Chapter 17. Offenses Against Property

ARSON AND OTHER PROPERTY DESTRUCTION

§ 1701. Arson.
(1) Offense. A person is guilty of arson, a Class B felony, if he starts or maintains a fire or causes an explosion with intent to destroy an entire or any substantial part of a building or inhabited structure of another or a vital public facility.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (c), (e), (f), (k), or (l) of section 201 and, in addition, when the offense is committed by means of an explosive or destructive device, under paragraph (g) of section 201 or if the building, inhabited structure or vital public facility is in whole or in part owed, possessed, or used by or leased to, any institution or organization receiving federal financial assistance.

Comment
In defining the offense of arson and grading it as a Class B felony, this section recognizes the same threat to public safety from direct destruction of the kind of property found in § 1703 by fire or explosion as from extraordinary destruction on the part of the perpetrator. While human endangerment is the principal concern, note that the section makes no explicit distinction based upon the fact that humans are present or absent at the time of the act, and that, so long as property is included, e.g., communications and nuclear installations and power substations, in which humans may reside or be present. The policy thus expressed is that the difference between arson accompanied and not accompanied by the awareness, or consequence, of actual human occupation of the property is insufficient to warrant requiring proof as to the awareness or consequence in order to distinguish between the availability of Class B and Class C felony penalties. That policy is based on the view that the means employed usually pose danger of conflagration, total destruction or irreparable damages, human endangerment due to firefighting efforts, or significant pecuniary loss, human inconveniences or suffering.

Under the jurisdictional provisions the felony of interstate or foreign commerce, including airships, ships, and trains (case covered by 16 U.S.C. §§ 42, 43, 1992, 2015) will continue to be federally proscripted. An issue is whether the federal jurisdiction over property destruction when goods moving in interstate commerce are involved, established in recent legislation, 16 U.S.C. § 1385, should be continued. Section 1701 continues such federal jurisdiction, which is similar to that long provided under federal law when the crime is theft. The jurisdiction provided for arson is somewhat broader than

§ 1703. Endangering by Fire or Explosion.
(1) Offense. A person is guilty of an offense if he intentionally starts or maintains a fire or causes an explosion and thereby recklessly:
(a) places another person in danger of death or bodily injury;
(b) places an entire or any substantial part of a building or inhabited structure of another or a vital public facility in danger of destruction;
(c) causes damage to property of another constituting pecuniary loss in excess of $2,000.

(2) Grading. The offense is a Class B felony if the actor places another person in danger of death under circumstances manifesting an extreme indifference to the value of human life. Otherwise it is a Class C felony.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (c), (f), or (l) of section 201.

Comment
This section deals with reckless use of fire and explosives, conduct which does not fall neatly within the traditional arson offense, of which intentional destruction is an element. This provision augments the general criminal endangerment offense § 1705 in the bombing, aircraft, and transportation of explosives, and buys protection against potential danger posed by use of fire or explosion, see Working Papers, pp. 651, 644, 479-481.

§ 1705. Failure to Control or Report a Dangerous Fire.
(1) Offense. A person who knows that a fire which was started or maintained, albeit lawfully, by him or with his consent, is endangering life or a substantial amount of property of another
guilty of a Class A misdemeanor if he willfully fails either to take reasonable measures to put out or control the fire when he can do so without substantial risk to himself, or to give a prompt fire alarm.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (d) of section 201.

Comment
This section extends existing law, which protects federal land from destruction by persons setting fires (18 U.S.C. § 356), to apply to destruction of federal property. Consideration was given to extending liability under this provision to persons responsible for the destruction of the property as well as to persons setting dangerous fires. This was rejected in the light of the general applicability of the provisions of the criminal code, and the need for uniformity and fairness as to persons of like circumstances.

§ 1704. Release of Destructive Forces

(1) Causing Catastrophe. A person is guilty of a Class B felony if he intentionally causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison, radioactive material, bacteria, virus, or other dangerous and difficult-to-control force or substance, and is guilty of a Class C felony if he does so willfully.

(2) Risking Catastrophe. A person is guilty of a Class A misdemeanor if he willfully creates a risk of catastrophe by fire, explosive or other means listed in subsection (1), although no fire, explosion or other destruction results.

(3) Failing to Prevent Catastrophe. A person who knowingly does an act which causes or which he knows is likely to cause an explosion, fire, flood, avalanche, collapse of building, or release of poison, radioactive material, bacteria, virus or other dangerous and difficult-to-control force or substance, or omission in the doing of such act, is guilty of a Class A misdemeanor if he willfully fails to take reasonable measures to prevent catastrophe.

(4) Catastrophe Defined. Catastrophe means serious bodily injury to ten or more people or substantial damage to ten or more separate habitations or structures, or property loss in excess of $500,000.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (b), (c), (d), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), or (A) of section 201, and, in addition, over the offense defined in subsection (i)(1)(b) of this section when it is committed by means of an explosive or destructive device, under paragraph (g) of section 201 or if the tangible property is in whole or in part, owned, possessed, or used by or leased to, any institution or organization receiving federal financial assistance.

Comment
This section is intended to provide a national grading structure for the numerous property-damage and property-destroying provisions in existing law which are consolidated in 18 U.S.C. §§ 1581-184, 18 U.S.C. § 1291. In some circumstances criminal negligence could result in higher penalties than are provided in this section; for example, if there is an intention to kill or recklessness, the numerator and

(i) or (j) of section 201, or when commission of the offense causes or threatens damage to an area in two or more states.

Comment
This new offense, which carries substantial penalties, is proposed to deal with widespread destruction or injury caused not only by fire or explosion but also by other dangerous and difficult-to-control forces and substances. 18 U.S.C. § 356. The provision deals with reckless conduct with respect to storage or handling of highly dangerous materials. See Working Papers, pp. 823, 841, 844, 852-86, 866-87.
§ 1706. Tampering With or Damaging a Public Service.

(1) Offense. A person is guilty of an offense if he causes a substantial interruption or impairment of a public communication, transportation, supply of water, gas, power or other public service by: (a) tampering with or damaging the tangible property of another; (b) incapacitating an operator of such service; or (c) negligently damaging the tangible property of another by fire, explosion or other dangerous means listed in section 158(h).

(2) Grading. The offense is a Class C felony if the actor engages in the conduct intentionally, and a Class A misdemeanor if the actor engages in the conduct knowingly or recklessly. Otherwise it is a Class B misdemeanor.

§ 1707. Consent to a Defense to Sections 1708 to 1709.

Whenever in sections 1708 to 1709 it is an element of the offense that the property is of another, it is a defense to a prosecution under those sections that the other has consented to the actor's conduct with respect to the property.

§ 1710. Definitions for Sections 1710 to 1719.

(a) "inhabited structure" means a structure or vehicle: (1) where any person lives or carries on business or other calling; (b) where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or (c) which is used for overnight accommodation of persons.

§ 1711. Burglary.

(b) property that is of another if anyone other than the actor has a possessory or proprietary interest therein;

(c) "vital public facility" includes a facility maintained for use as a bridge (whether over land or water), dam, tunnel, wharf, communications or radar installation, power station, or space launching facility.

§ 1712. Burglary, etc.

(1) Definitions: A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time
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the premises are not open to the public and the actor is not li-
censed, invited or otherwise privileged to enter or remain, as
the case may be, with intent to commit a crime therein.

(2) Grading. Burglary is a Class B felony if:

(a) the offense is committed at night and is knowingly per-

petrated in the dwelling of another; or

(b) in effecting entry or while in the premises or in im-

mediate flight therefore, the actor inflicts or attempts to in-

flict bodily injury or physical restraint on another, or manac-

es another with imminent serious bodily injury, or is armed with

a firearm, destructive device or other weapon the possession of

which under the circumstances indicates an intent or readiness

to inflict serious bodily injury.

Otherwise burglary is a Class C felony.

(3) Jurisdiction. There is federal jurisdiction over an offense
defined in this section under paragraphs (a), (b), (d), (e), or (f)
of section 301.

Comment

Present federal law defines several offenses, even for federal
offenses, which reflect the common law burglary concept of "breaking
and entering into a dwelling at night." Thus, an offense, the offense
must be consummated from state law, a result which is understandable in
view of the wide variations in state laws and the extreme penalties
provided in some of them.

Existing federal burglary-type provisions are chiefly oriented, apply-
ing, for example, to unlawful entry into premises used for storage, or
vehicles used for transport of property in interstate commerce, 18
U.S.C. §17. There would have been little need for each "burglary"
section, unless the appropriateness of classifying it as burglary was
justified because entry was for a short period or the entry was for
short of the intended theft as nearly entering premises for the
purpose of check. Under this Code, attempt law would clarify apply-
ing, the unlawful entry would constitute a "substantial step." See
§ 846. Accordingly, burglary under § 1711 has been confined to entries
into buildings and structures, where the danger of violent encounters
with occupants aggravate the offense. Although entry into storage
structures for goods moving in interstate commerce would not consti-
tute the felony of burglary, such conduct would be a criminal trespass
(§ 1722), as well as an attempted theft of an interstate shipment of
goods (§ 1719), or the offense of breaking into or entering in countable
in a vehicle (§ 1713).

As in the common law the crime intended to be committed is not
specified. This avoids the necessity of proving the precise crime in-
tended—break, ransack, robbery, kidnapping—by a person who actually
enters premises when people are likely to be encountered. In addition
unlawful entry of a structure in dwelling engenders fear. Of course, the crime
begins to invite other severe entry or presence crimes, such as criminal trespass or stealing away.


§ 1712. Criminal Trespass.

(1) Dwelling: Highly Secured Premises. A person is guilty of a
Class A misdemeanor if, knowing that he is not licensed or privi-
lized to do so, he enters or remains in a dwelling or in highly
secured premises.

(2) Building: Structures: Enclosed Premises. A person is
 guilty of a Class B misdemeanor if, knowing that he is not licensed or
privimized to do so, he:

(a) enters or remains in any building, occupied structure or
storage structure, or separately secured or occupied portion
thereof; or

(b) enters or remains in any place as enclosed as manifi-
ently to exclude intruders.

(3) Any Premises. A person is guilty of an infraction if, know-
ing that he is not licensed or privileged to do so, he enters or re-
 mains in any place as to which notice against trespass is given by
actual communication to the actor by the person in charge of the
premises or other authorized person or by posting in a manner rea-
sonably likely to come to the attention of intruders.

(4) Defense. It is a defense to a prosecution under this section
that:

(a) the premises were abandoned; or

(b) the premises were at the time open to members of the
public and the actor complied with all lawful conditions im-
posed on access to or remaining in the premises.

(5) Jurisdiction. There is federal jurisdiction over an offense
defined in this section under paragraphs (a), (b), (c), (d), (e),
or (f) of section 301.

Comment

This federal interest in protecting various sites from trespass varies
from protection of ABC installations (42 U.S.C. § 5375(a)) to national
forests (16 U.S.C. § 1602). This section reflects the variety of interests
in the breaking into or entering in a dwelling or highly secured areas (de-
defined in § 1719 as gilded government buildings in which inmate identi-
fication is required) as a Class A misdemeanor and trespass into other
buildings and structures (including storage structures for interstate
goods), and enclosed areas, as a Class B misdemeanor. Trespass upon
other premises would be an infraction. Perhaps the principal issues
with respect to a person as whether the offense is more severe warrant
punishment more severe than 30 days (b) or a Class B mis-
classification—and whatever more aggravating element, such as refusal
to leave, should be a condition precedent to the imposition of any jail
penalty. Note that entering a restricted area for espionage purposes is
dealt with under § 112. See Working Papers, pp. 450–460.
§ 1773. Breaking Into or Concealment Within a Vehicle.

(1) Offense. A person is guilty of an offense if, knowing that he is not licensed or privileged to do so, he breaks into a vehicle, vessel or aircraft, or, with intent to commit a crime, conceals himself therein.

(2) Grading. The offense is a Class C felony if the actor is armed with a firearm, destructive device or other weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury. Otherwise it is a Class A misdemeanor.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b) or (f) of section 281.

Comment
In this section a new offense, in addition to the statutory offense in § 1774, is proposed to deal with unlawful intrusions into vehicles, similar to burglary, that present sufficient grounds for warrant special treatment. For example, since "unlawful" in an automobile is generally to be a misdemeanor (§ 1776), it would be inconsistent if unlawful entry into an automobile with intent to commit such crime constituted the felony of burglary. There should be a penalty, however, of charging an offense against a person who conceals himself in another's car to obtain a crime, without the need for proving which crime he intended to commit—robbery, rape, kidnapping, etc. Moreover, the fact that various crimes may be intended by a person who breaks into a vehicle seems to warrant statutes criminalizing as an offense separate from the attempt, as is done with burglary. Note that for this offense the notion of facially entry, dropped from burglary, has been retained. Men unconsenting entry into an unlocked vehicle would not be an offense under this section. See Working Paper, pp. 986-97, 988-91.

§ 1774. Staying Away.

(1) Offense. A person is guilty of a Class A misdemeanor if, knowing that he is not licensed or privileged to do so, he surreptitiously remains aboard a vessel or aircraft with intent to obtain transportation.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (d) or (f) of section 281.

Comment
In carrying forward the existing provision regarding stowaways (30 U.S.C. § 139), this section makes it clear that the penalty is against those whose presence aboard the vessel or aircraft is concealed from the authorities. Upon refusal to pay fines is left.

§ 1775. Definitions for Sections 1771 to 1779.

In sections 1771 to 1779:
(a) "occupied structure" means a structure or vehicle:
(i) where any person lives or carries on business or other calling; or
(ii) which is used for overnight accommodation of persons.

Any such structure or vehicle is deemed to be "occupied" regardless of whether a person is actually present.

(b) "dwelling" structure means any structure, truck, railway car, vessel or aircraft which is used primarily for the storage or transportation of property.

(c) "highly secured premises" means any place, maintained, in fact, by the United States which is continuously guarded and where display of visible identification is required of persons while they are on the premises;

(d) "dwellings" has the meaning prescribed in section 619;

(e) "night" means the period between 30 minutes past sunset and 30 minutes before sunrise.

Comment
Differences in the definition of "inhabited structure" for the crimes of property destruction and of "occupied structure" for unlawful entry are likewise in the comment to § 1779, supra. See Working Paper, pp. 985-94, 992-95.

BIBLIOGRAPHY

§ 1778. Robbery.

(1) Offense. A person is guilty of robbery if, in the course of committing a theft, he inflicts or attempts to inflict bodily injury upon another, or threatens or menacing another with imminent bodily injury.

(2) Grading. Robbery in a Class A felony if the actor uses a firearm or explosives or harasses or threatens others or otherwise forces use of a firearm, destructive device or other dangerous weapon to obtain property or threatens to use such weapon against another. Robbery in a Class B felony if the robber possesses or pretends to possess a firearm, destructive device or other dangerous weapon, or threatens another with serious bodily injury, or inflicts bodily in-


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jury upon another, or is aided by an accomplice actually present. Otherwise robbery is a Class C felony.

(2) Definitions. In this section:

(a) an act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, whether or not the theft is successfully completed, or in immediate flight from the commission of, or an unsuccessful effort to commit, the theft;

(b) "dangerous weapon" means a weapon the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), (c), (d), (e), or (f) of section 210. No prosecution may be instituted under paragraph (g), however, unless expressly authorized by the Attorney General.

**Comment**

The plot of this offense is the combination of aggression against the person with aggression against property. Though in use since the 18th century, the concept of "aggravated assault" is relatively recent. The act of "beating" or "aggravating" a person with a weapon, such as a baseball bat or a gun, is often considered to be a form of "armed robbery." An actual or threatened use of a dangerous weapon, whether or not injury results, partly for the offense in the highest category. Class A felony. Class B felony offenses are treated similarly. In other words, the use of a dangerous weapon does not guarantee an increased sentence. If the weapon is not used, regardless of whether the theft is successful.

Grading reflects primary concern with the danger to the person. Actual use of a dangerous weapon, whether or not injury results, partly for the offense in the highest category. Class A felony. Class B felony offenses are treated similarly. In other words, the use of a dangerous weapon does not guarantee an increased sentence. If the weapon is not used, regardless of whether the theft is successful.

The single robbery provision proposed consolidates without radical substantive change the several existing felony provisions dealing with (a) robbery—theft of money (18 U.S.C. § 2113), the mails and other federal property (18 U.S.C. § 2114), robbery "affecting commerce" (18 U.S.C. § 219), robbery in federal prisons (18 U.S.C. § 2114). However, federal discretionary guidelines (18 U.S.C. § 2157) discourage unnecessary federal entry into local robbery cases. The term "affecting commerce" jurisdiction for robbery, potentially capable of reaching almost any case of robbery in the section (although in practice rarely extended), is limited in subsection (e) by the explicit requirement that the Attorney General approve prosecutions brought on this

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basis. Approval could be further limited to cases relating to organized crime or the drug business and to cases otherwise effective to combat organized crime. See Working Papers, pp. 605-61, 1969-70.

**THEFT AND RELATED OFFENSES**

**Introduction**

The major reforms which would be accomplished by the following provisions on theft would be the consolidation and simplification of the current statutory provisions dealing with the taking of property by imposition of punishment provided for in the federal criminal statutes (18 U.S.C. § 2111) and theft from interstate shipments (18 U.S.C. § 655); and theft from banks (18 U.S.C. § 652). The term "theft" is defined to include theft of money, money, and other kinds of money. E.g., "theft" (18 U.S.C. § 2139(b)(2)) and misappropriation (18 U.S.C. § 652). In the proposed draft provisions, property, theft, or attempted theft, regardless of whether the theft is successful.

The various existing definitions of the crime of theft have been consolidated into a few provisions; and, in addition, the principle is articulated that the theory underlying the prescription is irrelevant so long as the defendant has been adequately informed as to the proof with which he must contend (17 U.S.C. § 2157). These sections in this group define the misappropriation. The key sections in the section defining theft (18 U.S.C. § 655), since it is the crime of "theft," is defined as well as "theft" (18 U.S.C. § 652) and "theft" (18 U.S.C. § 652). Each section defines the theft of a federal law offense which, with some exceptions included: unauthorized use of travel in the United States, unauthorized use of a motor vehicle property which involves risk of theft or destruction (18 U.S.C. § 2157). A new section defining an offense deals with misappropriation of property (18 U.S.C. § 2156).

In this group of laws, the crime of "theft" is defined as well as the crime of "theft" (18 U.S.C. § 652). Each section defines the theft of a federal law offense which, with some exceptions included: unauthorized use of travel in the United States, unauthorized use of a motor vehicle property which involves risk of theft or destruction (18 U.S.C. § 2157). A new section defining an offense deals with misappropriation of property (18 U.S.C. § 2156).
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§ 1731. Consolidation of Theft Offenses.

(1) Construction. Conduct denominated theft in sections 1732 to 1734 constitutes a single offense designed to include the separate offenses heretofore known as larceny, stealing, purloining, embezzlement, obtaining money or property by false pretenses, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like.

(2) Charging Theft. An indictment or information charging theft under sections 1732 to 1734 which fairly apprises the defendant of the nature of the charges against him shall not be deemed insufficient because it fails to specify a particular category of theft. The defendant may be found guilty of theft under such an indictment or information if his conduct falls under any of sections 1732 to 1734, so long as the conduct proved is sufficiently related to the conduct charged that the accused is not unfairly surprised by the case he must meet.

Comment

This section states the legal effect of consolidation. Subsection (2) permits a charge of "theft" with a description of the conduct, and should satisfy the constitutional requirements that the defendant must be apprised of the precise charge against him, tried on the charge stated in the indictment and provided with a basis for a claim of double jeopardy should he be charged anew. Moreover, treating theft as one offense precludes conviction of two offenses for the same conduct on the ground that the conduct falls within two theories of theft, e.g., both taking and retaining the same property. See Working Papers, pp. 944-47, 963.

§ 1732. Theft of Property.

A person is guilty of theft if he:

(a) knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;
(b) knowingly obtains the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat; or
(c) knowingly receives, retains or disposes of property of another which has been stolen, with intent to deprive the owner thereof.

Comment

This is the major section on theft in the proposed Code. The overlap among the three paragraphs of subsection (1) is intended to insure that

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everything which is now theft by any name will be covered. The paragraphs do not differ otherwise in the elements which must be proved; the culpability requirement in each is "knowingly . . . with intent to deprive". Section 1731 makes clear that theft need not be charged under any particular paragraph. Some important defenses to prosecution under this section appear in § 1738. See Working Papers, pp. 888, 914-37.

§ 1733. Theft of Services.

A person is guilty of theft if:

(a) he intentionally obtains services, known by him to be available only for compensation, by deception, threat, false token or other means to avoid payment for the services; or
(b) having control over the disposition of services of another to which he is not entitled, he knowingly diverts those services to his own benefit or to the benefit of another not entitled thereto.

Where compensation for services is ordinarily paid immediately upon their rendition, as in the case of hotels, restaurants, and comparable establishments, abscending without payment or making provision to pay is prima facie evidence that the services were obtained by deception.

Comment

Theft of services is not presently covered by federal statute except in a few specific situations, e.g., use of the mails without paying postage (18 U.S.C. §§ 1720 and 1721). There appears to be no good reason to distinguish takings on the basis of tangibility. This section covers not only theft of services which are ordinarily supplied for compensation, e.g., transportation by taxicab, but also diversion of the services of an employee, e.g., using a public servant as a driver for a private enterprise, a situation which is of particular significance to the federal government. Note that not all services obtained by deception are covered. Where the service is not normally viewed as a thing of value, the question of criminality depends on whether criminal means—proscribed in other provisions—were used to obtain the service, e.g., force, menacing, criminal coercion. Thus merely deceiving a neighbor for the purpose of obtaining his "services" in driving one into town would not be an offense.

The last sentence of the provision defines a situation which is prima facie evidence of deception, although normally mere failure to perform on a promise is not a basis for an inference of fraud. See § 1744 (a) (1). A person who refuses to pay because he honestly considers the service to be poor can still present evidence which would warrant withholding the case from the jury.

See Working Papers, pp. 937-38.
§ 1734. Theft of Property Lost, Mislaid or Delivered by Mistake.
A person is guilty of theft if he:
(a) retains or disposes of property of another when he knows it has been lost or mislaid, or
(b) retains or disposes of property of another when he knows it has been delivered under a mistake as to the identity of the recipient or as to the nature or amount of the property, and with intent to deprive the owner of it, fails to take readily available and reasonable measures to restore the property to a person entitled to have it.

Comment
Existing federal law does not explicitly prescribe theft of property which was lost, mislaid, or delivered by mistake; but modern federal code revisions do. Such thefts may be distinguished from other forms of theft in which the actor himself initiates the loss to the owner of the property. A sanction to encourage the return of property not warranted, at least where large amounts are involved. Issues are raised as to the elements of the crime. How society is going to respond to this offense, and whether it should be graded as an equivalent to theft. Note that retention or disposal of the property must occur at a time when the actor has knowledge of the character of the property. The actor must have "intent to deprive" and must fail to take readily available and reasonable measures to return the property. Variables such as knowledge of who is the owner and the value of the property preclude setting forth a satisfactory definition of "reasonable measures."

See Working Papers, pp. 308-30.

§ 1735. Grading of Theft Offenses Under Sections 1732 to 1734.
(1) Class B Felony. Theft under sections 1732 to 1734 is a Class B felony if the property or services stolen exceed $100,000 in value or are acquired or retained by a threat to commit a Class A or Class B felony or to inflict serious bodily injury on the person threatened or on any other person.
(2) Class C Felony. Theft under sections 1732 to 1734 is a Class C felony if:
(a) the property or services stolen exceed $500 in value;
(b) the property or services stolen are acquired or retained by threat and (i) are acquired or retained by a public servant by a threat to take or withhold official action, or (ii) exceed $50 in value;
(c) the property or services stolen exceed $50 in value and are acquired or retained by a public servant in the course of his official duties;
(d) the property stolen is a firearm, ammunition, explosive or destructive device or an automobile, aircraft or other motor-propelled vehicle;
(e) the property consists of any government file, record, document or other government paper stolen from any government office or from any public servant;
(f) the defendant is in the business of buying or selling stolen property and he receives, retains or disposes of the property in the course of that business;
(g) the property stolen consists of any implement, paper, or other thing uniquely associated with the preparation of any money, stamp, bond, or other document, instrument or obligation of the United States;
(h) the property stolen consists of a key or other implement uniquely suited to provide access to property the theft of which would be a felony and it was stolen to gain such access;
(i) the property is stolen from the United States mail and is first class mail or air mail.
(2) Class A Misdemeanor. All other theft under sections 1732 to 1734 is a Class A misdemeanor, unless the requirements of subsection (2) of (5) are met.
(4) Class B Misdemeanor. Theft under sections 1732 to 1734 of property or services of a value not exceeding $50 shall be a Class B misdemeanor if:
(a) the theft was not committed by threat;
(b) the theft was not committed by deception by one who stood in a confidential or fiduciary relationship to the victim of the theft; and
(c) the defendant was not a public servant or an officer or employee of a financial institution who committed the theft in the course of his official duties.
The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.

(5) Infraction. Theft under section 1739 of services of a value not exceeding $50 shall be an infraction if the defendant was not a public servant who committed the theft in the course of his official duties. The special classification provided in this subsection shall apply if the offense is classified under this subsection in the charge or if, at sentencing, the required factors are established by a preponderance of the evidence.
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(4) Attempt. Notwithstanding the provisions of section 1001 (3), an attempt to commit a theft under sections 1722 to 1724 is punishable equally with the completed offense when the actor has completed all of the conduct which he believes necessary on his part to complete the theft except receipt of the property.

(5) Valuation. For purposes of grading, the amount involved in a theft under sections 1722 to 1724 shall be the highest value by any reasonable standard, regardless of the actor’s knowledge of such value, of the property or services which were stolen by the actor, or of the actor’s belief that he was stealing, or which the actor could reasonably have anticipated to have been the property or services involved. Theft committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be charged as one offense and the amount proved to have been stolen may be aggregated in determining the grade of the offense.

Comment

Grading of the offense defined in §§ 1722-1724 follows several principles: the nature of the conduct (theft), the value or character of the property, and the status of the third (public servant, employer).

Theft by Threat.—Under existing federal law, a 20-year maximum penalty applies to all extortion, see, e.g., 18 U.S.C. § 1951. In this section (theft by threat) thefts are graded according to the seriousness of the threat. Thefts committed by the most serious threats constitute Class B felonies, regardless of the amount of money involved, and are graded at a level comparable to robbery (§ 1721). Any theft which results in the acquisition or retention of property worth more than $50 makes the extortion a Class C felony. Thefts committed by public servants by threats to take or withhold official action are also Class C felonies, and thus parallel bribery in seriousness (§ 1341). The last sentence in the definition of "threat" in § 1731(1)(B) is intended to preclude avoidance of liability for extortion by a public servant who claims that he was merely bribing.

Value of Property.—The second major grading principle for theft is the value of the property involved. This is traditional in federal law (see, e.g., 18 U.S.C. § 610). Capability as to value need not be proved. Under existing law the value distinction in grading is $100. In this section three values are most widely employed: $500,000 for the line between Class B and C felonies; $500 for the felony-misdemeanor line (reflecting the realities of inflation), and $50 for the Class B-misdemeanor conditions set forth in subsection (8). Note that under subsection (7) the value of separate properties can be aggregated for grading purposes. This aggregation provision and the persistent misdemeanor sentencing provision (§ 3001) serve to focus felony sanctions more precisely on dangerous defendants. Theft of services worth less than $50 is an infraction. This is consistent with 319

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existing provisions which make thefts of mail service feasible offenses only (18 U.S.C. §§ 1719, 1720, 1722, 1723).

Other Penalty Grading.—There are a number of other felony categories based on the value or status of the defendant. A theft of more than $50 by a public servant in the course of his office is graded as a misdemeanor because of the violation of public trust. Fire arms, explosives, destructive devices, cars, counterfeiting equipment are graded by the amount stolen to be used in further crimes; their value is not the significant feature of the theft. Theft of government documents disrupts the normal functioning of the government. The professional focus is always a felony because he is vital to making theft harassment.

Thefts from the mails present special grading problems. Although in theory it would appear that value grading would be appropriate, experimentation with value grading following the 1968 revision of Title 18 resulted in the return to all-felony grading embodied in 18 U.S.C. § 1701. That approach is substantially retained in this section because of the need for special protection of the integrity of the mails, the fact that thefts from the mails are not usually objective-oriented, and the need for greater deterrence when there is greater vulnerability (because of the postal inmosts being carried by employees who are themselves exposed to temptation in some manner is recognized).

Yet, notwithstanding the statutory distinction in some statutes is recognized by such existing statutes as 18 U.S.C. § 1709, under which theft of a letter by a postal service employee is a misdemeanor. In order to maintain both policies, any theft of first class mail or air mail is graded as a Class C felony. All other thefts from the mail are graded according to general standards.

Subsection (4), dealing with attempts, is intended to preclude the issue of the vulnerability or guiltiness of the intended victim of a fraud or extortion does not arise in grading the attempt; where the actor has done all that he considers necessary, his conduct is deemed as coming "dangerously close" to completion of the offense, the element that distinguishes equally graded from lesser graded attempts in § 1701 (B). The principle stated here may warrant application to any attempt.


§ 1736. Unauthorized Use of a Vehicle.

(1) Offense. A person is guilty of an offense if, knowing that he does not have the consent of the owner, he takes, operates, or exercises control over an automobile, aircraft, motorcycle, motorboat, or other motor-propelled vehicle of another.

(2) Defense. In a defense to a prosecution under this section that the actor reasonably believed that the owner would have consented had he known of the conduct on which the prosecution was based.

(3) Grading. The offense is a Class C felony if the vehicle is
§ 1737. Misapplication of Entrusted Property.

A person is guilty of a Class A misdemeanor if he disposes of, uses or transfers any interest in, property which has been entrusted to him as a fiduciary, or in his capacity as a public servant or an officer, director, agent, employee of, or a person controlling a financial institution, in a manner that he knows is not authorized and that he knows to involve a risk of loss or detriment to the owner of the property or to the government or other person for whose benefit the property was entrusted.

Comment

This offense is part of the three-step approach to the problems posed by the misapplication of property by a fiduciary in a fiduciary relationship. Under existing federal law, e.g., 18 U.S.C. § 644, any intentional misapplication of property by a fiduciary is treated in the same manner as in a fiduciary theft, regardless of whether there was a great risk of loss of the property resulting from the misapplication. The approach taken in the proposed Code is to define a "fiduciary" as a key element in theft, to include only those misapplications of property in which the property is taken or threatened with unlawful use or disposition. Title 18 (if it is to be subject to criminal sanctions at all) is only intended to cover the case (1) where the fiduciary uses the property to defraud the owner or another person with whom the fiduciary had a relationship of trust and confidence.

Comment

This section sets forth a definition to keep family disputes and arguments between friends out of the federal courts. The difficulty of proving defendant's alleged reckless belief may warrant enacting this defense as an "affirmative defense," which would put the burden of proof on the prosecution. See § 1722(1).

§ 1728. Refunding Secured Creditors.

(1) Offense. A person is guilty of an offense if he destroys, removes, controls, exchanges, transfers or otherwise deals with property subject to a security interest with intent to prevent collection of the debt represented by the security interest.

(2) Grading. The offense is a Class A misdemeanor if the property has a value exceeding $50 and a Class II misdemeanor if the property has a value exceeding $50. Otherwise it is an infraction. Value is to be determined as provided in section 1725(7).

Comment

Security interests are not included in the definition of "property" applicable to the theft provisions generally (§ 1731(g)). That separate provision is therefore necessary if it is determined that interference with a security interest should be covered by the criminal law. (See 12 U.S.C. § 458 for a scheme of criminal treatment of disposition of property mortgaged or pledged to the Farm Credit Administration.) This offense is graded as a Class A misdemeanor or less on the judgment that interference with security interests differs essentially from theft—that existing the collection of a debt is not to be classed as the same level with appropriation of property interests of another. The definition of "security interests" is left to judicial interpretation, but would ordinarily include mortgage and commercial lines. It should be noted that the A.L.I. Model Penal Code provision on this subject (P.D.S. § 234.10) states a culpability requirement in formulating the offense to hinder enforcement of the security interest. The section is intended to be applied where the owner is thought to be probable owner of the debt to which the security interest relates and where the offense is toward a trust-like conduct that is more toward theft-like conduct than is the case where steps taken to postpone the payment of a debt. See Working Papers, pp. 913-15, 960.
§ 1739. Defense and Proof as to Theft and Related Offenses.

(1) Defense. It is a defense to a prosecution under sections 1732 to 1735 that:
   (a) the actor honestly believed that he had a claim to the property or services involved which he was entitled to assert in the manner which forms the basis for the charge against him; or
   (b) the victim is the actor's spouse, but only when the property involved constitutes household or personal effects or other property normally accessible to both spouses and the parties involved are living together. The term "spouse," as used in this section, includes persons living together as man and wife.

(2) Proof. (a) It shall be a prima facie case of theft under sections 1732 to 1735 if it is shown that a public servant or an officer, director, agent or employee of, or a person connected in any capacity with, a financial institution has failed to pay or account upon lawful demand for money or property entrusted to him as part of his official duties or if an audit reveals a shortage or misappropriation of his accounts. (b) It shall be prima facie evidence that the actor knows that property has been stolen if it is shown that, being a debtor, he accepted it for a consideration which he knew to be below the reasonable value. "Debtor" means a person, whether licensed or not, who has repeatedly engaged in transactions in the type of property involved. (c) In any prosecution under sections 1732 to 1735 or 1737 where it is alleged that there is federal jurisdiction over the offense under paragraph (1) of section 381, the place from which and to which the shipment was made in presumed to have been designated in the waybill or other shipping document of such shipment and the interstate character of the shipment of any property by pipeline systems is presumed from the interstate extension of the pipeline system.

Comment

Subsection (1) of the section, which has no counterpart in existing federal statutes, delineates the outer limits of the theft offenses, dealing with matters handled today by the exercise of prosecutorial discretion. Subsection (2) of the section requires the prosecution to prove that the defendant knew that property was stolen. Absent this defense, however, a defendant who knows that the specific property he appropriated is guilty of theft. For example, one who believes to possess criminal charges unless someone vente a claim would otherwise be guilty of theft. Furthermore, because he knows the money he is obtaining is not his, subsection (1)(b) is intended to keep certain family arguments out of the federal courts.

§ 1740. Jurisdiction over Theft and Related Offenses.

(1) Common Basis for Sections 1732 to 1737. There is federal jurisdiction over an offense defined in sections 1732 to 1737 under paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k) or (l) of section 381.

(2) Section 738. There is federal jurisdiction over an offense defined in section 1738 under paragraphs (a) or (b) of section 381 or when the United States holds a security interest in the property which is the subject of the offense.

(3) Additional Common Basis for Sections 1732 to 1737. There is federal jurisdiction over an offense defined in sections 1732 to 1737 under paragraph (g) of section 381 when the theft is one in which property or services are acquired or retained by threat, but no prosecution may be instituted under this subsection unless expressly authorized by the Attorney General.

(4) Special Basis for Sections 1732 to 1737. Federal jurisdiction over an offense defined in sections 1732 to 1737 and section 1737 also exists under any of the following circumstances:

(a) Federal Public Servants—when the offense is committed by a federal public servant acting under color of office.

(b) Misrepresentation of Federal Interest—when the offense is committed by a misrepresentation of United States ownership, authority, guarantee, insurance or other interest of the United States in property involved in a transaction.

(c) Impersonation of Creditors—when the offense is com-
committed by impersonation of a creditor of the United States;
(A) Indian Property—when the subject of the offense is property
owned by or in the custody of a tribe, band, or com-
munity of Indians which is subject to federal statutes relating
to Indian affairs or of any corporation, association or group
which is organized under any of such statutes;
(c) Employee Benefit Plans—when the subject of the
offense is property owned by or in the custody of any employee
welfare benefit plan or employee pension benefit plan subject
to 29 U.S.C. Ch. 10;
(d) Public Work Kiochicken—when any part of the compo-
nation of a person employed in the construction, prosecution,
completion or repair of any federal public building, federal
public work, or building or work financed in whole or in part
by loans or grants from the United States is obtained or
retained by a threat or deception in relation to that person's
employment;
(a) Funds Insured by Department of Housing and Urban
Development—when the offense is committed in a transac-
tion for a loan, advance of credit or mortgage insured by the
United States Department of Housing and Urban Develop-
ment;
(b) Small Business Investment Company—when the
offense is committed by an officer, director, agent, receiver
or employee of, or person connected in any capacity with, a
small business investment company, as defined in 15 U.S.C. § 692, and
the subject of the offense is property owned by or in the cus-
tody of such small business investment company;
(i) Registered Investment Companies—when the sub-
ject of the offense is property owned by or in the custody of a regis-
tered investment company, as defined in 15 U.S.C. § 80a;
(ii) Futures Commission Merchant—when the offense is
committed by a futures commission merchant, as defined in 7
U.S.C. § 2, or any employee or agent thereof, and the subject
of the offense is property of a customer received by such
commission merchant;
(k) Common Carriers—when the offense is committed by
an officer, director, manager or employee of a firm, association
or corporation engaged in commerce as a common carrier, and
the subject of the offense is property owned by or in the
custody of such common carrier;
(l) Federal Economic Opportunity Program—when the
offense is committed by an officer, director, agent or employee
of, or person connected in any capacity with, any agency re-
ceiving financial assistance under 42 U.S.C., Ch. 34, and the
subject of the offense is property which is the subject of a
grant or contract of assistance pursuant to such Chapter;
(m) Employment in Federal Economic Opportunity Pro-
gram—when property of a person is obtained or retained by
a threat in relation to that person's employment under a grant
or contract of assistance pursuant to 42 U.S.C., Ch. 34;
(n) Labor Organizations—when the offense is committed
by an officer, agent or employee of a labor organization, as
defined in 29 U.S.C. § 152, and the subject of the offense
is property owned by or in the custody of such labor
organization;
(o) Commodity Credit Corporation—when the subject of
the offense is property mortgaged or pledged to the Commodity
Credit Corporation or is property mortgaged or pledged as
security for any guarantee note or other evidence of indebted-
ness which the Corporation has guaranteed or is obligated to
purchase upon tender.

Comment
When existing federal theft statutes are consolidated, the vast
federal jurisdiction as to theft becomes apparent. In addition to
jurisdiction over acts of theft arising in federal enclaves or in the
course of commission of other federal offenses which are defined
in this Code, or when federal property is stolen, there exists a
general jurisdiction over theft offenses when the mails, radio, or tele-
vision are used to commit fraud (18 U.S.C. §§ 1341, 1343); when a
person is induced to travel interstate as part of a fraudulent scheme
(18 U.S.C. § 1951), when property is stolen from an interstate ship-
ment (18 U.S.C. § 2313), or when property is stolen from a bank (18
U.S.C. § 2113). These general jurisdictional bases are reflected in
subsection (1) of the proposed section. There has, on occasion, been
some effort to restrict this jurisdiction arbitrarily. The National
Stolen Property Act (18 U.S.C. § 991), for example, confers federal
jurisdiction only when stolen property of $1,000 or more is trans-
ported interstate. The approach of § 1741 to such lines is that the
issue of value, appropriately1 obviously determines whether
promotion has been brought in the proper court, and that unnecessary exercise of federal
jurisdiction is better curbed by a provision such as § 907 of the pro-
posed Code, setting authority and standards for restraining federal
intervention. If limits such as the $1,000 value on stolen property
moving across state lines are regarded as appropriate, they should be
retained in guidelines only, not as absolute (and bipartite) jurisdic-
tional conditions.
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dictional basis. Again, the federal interest could be limited, by discretion in guiding, to major crimes involving interstate organized criminal activity.

Subsection (2) establishes relatively narrow jurisdiction over the defrauding of national credit. If the jurisdiction were as broad as that for theft, there would be federal jurisdiction over all mortgage frauds (property owned by a national credit institution—§ 205 (4)).

The detailed listing of various jurisdictional bases in subsection (4) represents an effort to incorporate in the proposal the existing jurisdictional provisions (other than the general statute of limitations provision—§ 212 (1)) to the extent that they may have been upheld by the common bases specified in subsections (2) and (3). No substantial change in federal jurisdiction is contemplated, thus, the list is largely an adaptation of the detailed jurisdictional specifications of existing such sections. Note that some of these specific bases refer to only one form of theft. Subsections (4), (b) and (c) deal with jurisdiction over certain instances of theft by deception; subsection (4) (f) deals with theft by threat, and subsection (4) (m) with theft by threat.


§ 1741. Definitions for Theft and Related Offenses

In sections 1711 to 1714:

(a) "deception" means: (i) creating or reinforcing a false impression, including false impressions as to fact, law, status, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not substantially perform the promise unless it is part of a continuing scheme to defraud; or (ii) preventing another from acquiring information which would affect his judgment of a transaction; or (iii) failing to correct a false impression which the actor previously created or reinforced, or which he knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or (iv) failing to correct an impression which the actor previously created or reinforced and which the actor knows to have become false due to subsequent events; or (v) failing to disclose a lien, adverse claim or other impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained or in order to continue to deceive another of his property, whether such impediment to or is not valid, or is or is not a matter of official record; or (vi) using a credit card, charge plate, or any other instrument which purports to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer (A) where such instrument

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has been stolen, forged, revoked or cancelled, or where for any other reason its use by the actor is unauthorized, and (B) where the actor does not have the intention and ability to meet all obligations to the issuer arising out of his use of the instrument; or (vii) any other scheme to defraud. The term "deception" does not, however, include falsifications as to matters having no pecuniary significance, or puffing by statements unlikely to involve ordinary persons in the group addressed.

"Puffing" means an exaggerated commendation of wares in communications addressed to the public or to a class or group:

(b) "deceptive" means: (i) to withhold property or to cause it to be withheld either permanently or under such circumstances that a major portion of its economic value, or its use and benefit, has, in fact, been appropriated; or (ii) to withhold property or to cause it to be withheld with the intent to recover it only upon the payment of a reward or other compensation; or (iii) to dispose of property or to use it or transfer any interest in it under circumstances that make its restoration, in fact, unlikely.

(c) "fiduciary" means a trustee, guardian, executor, administrator, receiver, or any other person acting in a fiduciary capacity, or any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary;

(d) "financial institution" means a bank, insurance company, credit union, savings and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment;

(e) "obtain" means: (i) in relation to property, to bring about a transfer or purported transfer of an interest in the property, whether to the actor or another; or (ii) in relation to services, to secure performance thereof;

(f) "property" means any money, tangible or intangible personal property, property (whether real or personal) in the location of which can be changed (including things growing on, affixed to, or found in land and documents although the rights represented thereby have no physical location), contract right, choses-in-action, interest in or claim to wealth, credit, or any other article or thing of value of any kind. "Property" also means real property the location of which cannot be moved if the offense involves transfer or attempted transfer of an interest in the property;

(g) "property of another" means property in which a person other than the actor or to which a government has an interest
which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. "Owner" means any person or a government with an interest in property such that it is "property of another" as far as the actor is concerned;

(b) "receiving" means acquiring possession, control or title, or leading on the security of the property;

(i) "services" means labor, professional service, transportation, telephone, mail or other public service, gas, electricity and other public utility services, accommodations in hotels, restaurants or elsewhere, admission to exhibitions, and use of vehicles or other property;

(i) "stolen" means property which has been the subject of theft or robbery or a vehicle which is received from a person who is then in violation of section 1736;

(ii) "threat" means an expressed purpose, however communicated, to (i) cause bodily injury in the future to the person threatened or to any other person; or (ii) cause damage to property; or (iii) subject the person threatened or any other person to physical confinement or restraint; or (iv) engage in other conduct constituting a crime; or (v) expose anyone of a crime; or (vi) expose a secret or publicize an asserted fact, whether true or false, leading to subject a person living or deceased, to hatred, contempt, or ridicule or to impair another's credit or business repute; or (vii) reveal any information sought to be concealed by the person threatened; or (viii) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (ix) take or withhold official action as a public servant, or cause a public servant to take or withhold official action; or (x) being about or continuous a strike, boycott, or other similar collective action to obtain property or deprive another of his property which is not demanded or re- ceived for the benefit of the group which the actor purports to represent; or (xi) cause anyone to be dismissed from his employment, unless the property is demanded or obtained for law-
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Federal forgeries, drawn by or upon an authorized officer of the United States, having been previously deposited with the United States, is included in the definition of 'forgery.' False statements to or by a government officer or employee are also included in the definition of 'false statements.' False statements are defined in subsection (c) of section 1001 of Title 18, United States Code, as follows:

(a) knowingly or recklessly makes or causes to be made false statements to or by a government officer or employee;

(b) knowingly and willfully makes false statements to or by a government officer or employee for the purpose of influencing or obstructing the course of justice;

(c) falsely or fraudulently misrepresents a fact to or by a government officer or employee for the purpose of influencing or obstructing the course of justice;

(d) knowingly and willfully makes false statements to or by a government officer or employee for the purpose of influencing or obstructing the course of justice; or

(e) knowingly and willfully makes false statements to or by a government officer or employee for the purpose of influencing or obstructing the course of justice; or

(f) knowingly and willfully makes false statements to or by a government officer or employee for the purpose of influencing or obstructing the course of justice.

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(2) Counterfeiting Impressions. A person is guilty of an offense if, except as authorized by statute or by regulation, he:

(a) knowingly or otherwise makes a copy of:

(i) money or other obligation of the United States; or

(ii) a foreign government, or any part thereof; or

(iii) any plate, coin, bill, bank, or other implement or thing uniquely associated with or fitting for the preparation of any writing described in subsection (1); or

(iv) knowingly sells, buys, imports, possesses or otherwise has within his control any photograph or copy the making of which is prohibited by subsection (2)(a).

(3) Authorization as Defense. In a prosecution under this section authorization by statute or by regulation is a defense.

(4) Grading. An offense defined in this section is a Class B felony if the implement or the impression relates to the forging or counterfeiting of money or other obligation or security of the United States. Otherwise it is a Class C felony.

(5) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a), (b) or (i) of section 281 or when the offense involves a writing made by the United States or any foreign government.

Comment

This provision consolidates, without substantial change, a number of existing counterfeiting provisions. In subsection (1) the words "counterfeit" and "counterfeit" are included in the definition of section 1754(2), and in effect the term is taken as synonymous. Federal jurisdiction is substantially carried forward in subsection (2), and expanded to cover forgery of any writing in federal enclave. See Working Papers, pp. 463, 464, 739, 464, 469, 469.

Section 1752. Facilitation of Counterfeiting

(1) Counterfeiting Implements. A person is guilty of an offense if, except as authorized by statute or by regulation, he knowingly or otherwise makes, buys, sells, imports, possesses or otherwise has within his control any implement or thing uniquely associated with or fitting for the preparation of any forgery or counterfeiting of money or other obligation or tax stamp or any writing which purports to be made by the United States or any foreign government.
21, concerning money and fines. Making the reproduction within the permissible exception would not be an offense, since the proposed statute explicitly exempts conduct "authorized by statute or by regulation." Under subsection (2) the government need not negate the fact of authorization until the issue has been raised.

See Working Papers, pp. 344, 967-98, 992.

§ 1753. Deceptive Writings.

(1) Offense. A person is guilty of an offense if, with intent to deceive or harm the government or another person, or with knowledge that he is facilitating such a deception or harm by another person, knowingly issues a writing without authority to issue it or knowingly alters or possesses a deceptive writing.

(2) Grading. The offense is a Class B felony if it is committed pursuant to a scheme to defraud another of money or property of a value in excess of $100,000. The offense is a Class C felony if (a) the actor in a public servant or an officer or employee of a financial institution and the offense is committed under color of office or is made possible by his office; or (b) the offense is committed pursuant to a scheme to defraud another of money or property of a value in excess of $50,000. Otherwise it is a Class A misdemeanor.

(3) Jurisdiction. Federal jurisdiction over an offense defined in this section is the same as that prescribed for forgery or counterfeiting in section 1752.

Comment

This section, together with the definitions in § 1754, contain two new ideas. The first is that the act of issuing an instrument without authority is comparable to uttering forged or counterfeit documents. Thus, an agent who possesses a validly issued instrument, with instructions as to when it is to be used, is really no different from the agent who issues a falsely issued document, if with the appropriate instructions he issues the genuine instrument in breach of that authority. The fact that the instrument happened to be issued on its face, in other words, is not a material factor in distinguishing his case from that of one who issues a falsely issued document. In both cases, the actor fraudulently takes advantage of his principal's trust in him as an agent.

Section 1753 is broader than section 1752. Under the latter section, the actor must have his principal's authority to issue the instrument, and he is not liable if his principal does not have the authority to issue the instrument. Under the former section, the actor need not have the authority to issue the instrument if the instrument was not issued for his principal's use. The latter section is narrower than the former because the latter section requires the actor to have the authority to issue the instrument.

The second new idea is related. It covers the phrase "deceptive writing," which is defined in the general definition section to include two types of instruments: (1) a document issued in breach of authority; and (2) a document which has been procured by fraud. Each

§ 1754. Definitions for Sections 1752 to 1754.

In sections 1751 to 1754:

(a) the definitions prescribed in section 1751 apply;

(b) "writing" means (i) any paper, document or other instrument containing written or printed matter or its equivalent, including money, a money order, bond, public record, affidavit, certificate, passport, visa, contract, security, or obligation, and (ii) any coin or any gold or silver bullion or ingot or any stamp or seal of the United States or any agency, certificate, credit card, token, stamp, seal, badge, decoration, medal, trademark or other symbol or evidence of value, rights, privileges, or identification which is capable of being used to the advantage or disadvantage of the government or any person;

(c) "without authority" includes conduct that, on the specific occasion called into question, is beyond any general authority given by statute, regulation or agreement;

(d) "falsely makes" means to make a writing which purports to be made by the government or another person, or to pay or alter, but which is not because the apparent maker is fictitious or because the writing was made without authority;

(e) "falsely completes" means to make an addition to or an insertion in a writing, without authority, such that the writing appears to have been made by, or fully authorized by, its apparent maker;

(f) "falsely alters" means to make a change in a writing,
without authority, such that the writing appears to have been made by, or fully authorized by, its apparent maker;

(a) to "forge" or to "counterfeit" a writing means to falsely make, complete, or alter the writing, and a "forged" or "counterfeited" writing is a writing which has been falsely made, completed or altered. The terms "forgery" and "counterfeiting" and their variants are intended to be synonymous in legal effect;

(b) "utter" means to issue, authenticate, transfer, publish, sell, transmit, present, use or otherwise give currency to;

(i) "possess" means to receive, conceal or otherwise exercise control over;

(j) the term "obligation or other security of the United States" means a bond, certificate of indebtedness, national bank currency, Federal Reserve note, Federal Reserve bank note, coupon, United States note, Treasury note, gold certificate, silver certificate, fractional note, certificate of deposit, a stamp, a postage stamp or other representative of value of whatever denomination, issued pursuant to a federal statute, and a canceled United States stamp;

(k) "security" other than as provided in paragraph (j) includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, prepayment certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in tangible or intangible property, instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise, un canceled stamp issued by a foreign government (whether or not demonstrated); or, in general, any instrument commonly known as a "security," or any certificate of interest or participation in, temporary or junior certificate for, receipt for, warrant or right to subscribe to or purchase any of the foregoing;

(l) "tax stamp" includes any tax stamp, tax taken, tax meter imprints, or any other form of evidence of an obligation running to a state, or evidence of the discharge thereof;

(m) a "deceptive writing" is a writing which (i) has been procured by deception, or (ii) has been issued without authority.
The definition of "alter" (paragraph (b)) expands upon the offense of using forged or counterfeited instruments in a fraudulent scheme. Since the conduct is original only when accompanied by an intent to deceive or harm, "altering" need not include a notion of altering only for unlawful purposes. Other uses of the term also require a more rea which will exclude innocent conduct. Similarly, possession (paragraph (c)) will be an offense only if accompanied by an intent to deceive or harm another.

The definitions in paragraph (d), (e), and (f) are taken from existing law.

See Working Papers, pp. 918-919.

§ 1706. Making or Uttering Slugs

(1) Offense. A person is guilty of an offense if he makes or utters a slug with intent to defraud a supplier of property or services sold or offered by means of a coin machine or with knowledge that he is facilitating such a deprivation by another person.

(2) Gradings. The offense is a Class A misdemeanor if it involves slugs which exceed $50 in value. Otherwise it is a Class B misdemeanor.

(3) Definitions. In this section:

(a) "slug" means a metal, paper, or other object which by virtue of its size, shape or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine, or improper but effective substitute for a genuine coin, bill or token;

(b) "coin machine" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed:

(i) to receive a coin or bill of a certain denomination or a token made for the purpose; and

(ii) in return for the insertion or deposit thereof, automatically to offer, provide, assist in providing or permit the acquisition of property or a public or private service;

(c) "value" of the slugs means the value of the coins, bills or tokens for which they are capable of being substituted.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201 or when

§ 1708. Bankruptcy Fraud

(1) Offense. A person is guilty of a Class C felony if, with intent to deceive a court or its officers or to harm creditors of a bankrupt, he knowingly:

(a) transfers or conceals any property belonging to the estate of a bankrupt;

(b) receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding;

(c) transfers or conceals, in contemplation of a bankruptcy proceeding, any property belonging to the property of another;

(d) conceals, destroys, mutilates, alters or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt, or withholds any such document from the receiver, trustee or other officer of the court entitled to its possession; or

§ 1709. Federal Criminal Code

the offense involves a coin machine designed to receive currency of the United States.

Comment

The offense is presently dealt with in a lengthy and complex fashion in 18 U.S.C. § 401. This section represents a substantial departure in format, but not much change in substance. The gravamen of the offense as proposed, and as it exists, is the making or using of slugs with the intent to deprive another of goods or services obtained by putting a coin in a vending machine, passing through a turnstile, etc. (Use of slugs is actually a form of theft, but it is included in this group of offenses because the principal jurisdictional base involves machines designed to receive United States currency. Further, the concept of "altering," in this provision, includes, as does existing law, trafficking in slugs, as well as using them.) While existing law appears to be a more accurate reflection in the manufacture of objects that can be used as slugs, the section should be revised to reflect the change in emphasis since the idea is facilitating such a deprivation by another person. The existing provisions that a car thief, with a manufacturer of goods that has peculiar in being used as slugs may provoke such knowledge is a questionable one, and is not included in the section: It gives to a true enforcement officer the power to remove a wide range of objects from legitimate manufacturer on the ground that they may be used as slugs. Some safeguards for the rights of the manufacturer seem to be needed, but are inapplicable in a criminal code. If necessary, a regulatory provision outside Title 38 establishing appropriate agency supervision could provide such safeguards.

Grading depends from existing law to the extent that Class A misdemeanor penalties attach only when the $50 limit is met, in order to be consistent with grading of theft.

See Working Papers, pp. 971-972, 1092.

§ 1704. Making or Uttering Slugs

(1) Offense. A person is guilty of a Class C felony if, with intent to deceive a court or its officers or to harm creditors of a bankrupt, he knowingly:

(a) transfers or conceals any property belonging to the estate of a bankrupt;

(b) receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding:

(c) transfers or conceals, in contemplation of a bankruptcy proceeding, any property belonging to the property of another;

(d) conceals, destroys, mutilates, alters or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt, or withholds any such document from the receiver, trustee or other officer of the court entitled to its possession; or

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(1) Offense. A person is guilty of a Class C felony if, with in

intent to deceive a court or its officers or to harm creditors of a bankrupt, he knowingly:

(a) transfers or conceals any property belonging to the estate of a bankrupt;

(b) receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding:

(c) transfers or conceals, in contemplation of a bankruptcy proceeding, any property belonging to the property of another;

(d) conceals, destroys, mutilates, alters or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt, or withholds any such document from the receiver, trustee or other officer of the court entitled to its possession; or

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the offense involves a coin machine designed to receive currency of the United States.

Comment

Slugs are presently dealt with in a lengthy and complex fashion in 18 U.S.C. § 401. This section represents a substantial departure in format, but not much change in substance. The gravamen of the offense as proposed, and as it exists, is the making or using of slugs with the intent to deprive another of goods or services obtained by putting a coin in a vending machine, passing through a turnstile, etc. (Use of slugs is actually a form of theft, but it is included in this group of offenses because the principal jurisdictional base involves machines designed to receive United States currency. Further, the concept of "altering," in this provision, includes, as does existing law, trafficking in slugs, as well as using them.) While existing law appears to be a more accurate reflection in the manufacture of objects that can be used as slugs, the section should be revised to reflect the change in emphasis since the idea is facilitating such a deprivation by another person. The existing provisions that a car thief, with a manufacturer of goods that has peculiar in being used as slugs may provoke such knowledge is a questionable one, and is not included in the section: It gives to a true enforcement officer the power to remove a wide range of objects from legitimate manufacturer on the ground that they may be used as slugs. Some safeguards for the rights of the manufacturer seem to be needed, but are inapplicable in a criminal code. If necessary, a regulatory provision outside Title 38 establishing appropriate agency supervision could provide such safeguards.

Grading depends from existing law to the extent that Class A misdemeanor penalties attach only when the $50 limit is met, in order to be consistent with grading of theft.

See Working Papers, pp. 971-972, 1092.
§ 1757. Rigging a Sporting Contest.

(1) Interference With a Sporting Contest. A person is guilty of a Class C felony if, with intent to prevent a publicly-exhibited sporting contest from being conducted in accordance with the rules and usage purporting to govern it, he:

(a) confers or offers or agrees to confer any benefit upon, or threatens any harm to, a participant, official or other person associated with the contest; or
(b) tampers with any person, animal or thing.

(2) Soliciting or Accepting Benefits. A person is guilty of a Class C felony if he knowingly solicits, accepts or agrees to accept any benefit the giving of which is prohibited under subsection (1).

(3) Definition. A "publicly-exhibited sporting contest" is any contest in any sport, between individual contestants or teams of contestants, the occurrence of which is publicly announced in advance of the event.

§ 1758. Commercial Bribery.

(1) Giving Bribe. A person is guilty of a Class A misdemeanor if he:

(a) confers or offers or agrees to confer any benefit upon an employee or agent without the consent of the latter’s employer or principal, with intent to influence his conduct in relation to his employer’s or principal’s affairs; or

(b) confers or offers or agrees to confer any benefit upon any fiduciary without the consent of the beneficiary, with intent to influence the fiduciary to act or conduct himself contrary to his fiduciary obligation.

(2) Receiving Bribe. A person is guilty of a Class A misdemeanor if he knowingly solicits, accepts or agrees to accept any benefit the giving of which is prohibited under subsection (1).

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (b) of section 281;
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(b) National Credit Institutions—when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of a national credit institution (as defined in section 2331 of a small business investment company (as defined in 15 U.S.C. § 642), and the offense is committed in connection with his duties;

(c) Employee Welfare or Pension Plan—when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of an employee welfare benefit plan or employee pension benefit plan subject to 29 U.S.C. Ch. 50; or an employer any of whose employees are covered by such plan; or an agent, fiduciary or employee of an employer any of whose employees are covered by such plan; or an agent, fiduciary or employee of an organization which, provides benefit plan services to such plan; and the offense is committed in connection with his duties;

(d) Interstate Facilities—when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of any interstate facility and the offense is committed in the course of his duties;

(e) Military Service Clubs—when the person committing the offense or the person who is the subject of the offense is an agent, fiduciary or employee of a military service club for personnel on active duty, or of a military postal exchange, and the offense is committed in connection with his duties.

Comment

Existing law proscribes commercial bribery committed in specific areas of federal regulation, such as with respect to banks, employee benefit plans and railroads. See 18 U.S.C. § 1341 (banking or debit card fraud); 18 U.S.C. § 1342 (false statements, in application for banking treatment); and 18 U.S.C. § 1343 (false statements in application for banking treatment). The offense of commercial bribery in the federal mail is covered by 18 U.S.C. § 1341. A minor definitional distinction in 18 U.S.C. § 1341 is to make the offense of commercial bribery subject to a minimum definition of fraudulent inducement of the recipient which results in a benefit to the briber. The offense of commercial bribery in the federal mail is a misdemeanor.

§ 1770. Unlawful Traffic in Food Stamp Coupons

(1) Offense. A person is guilty of an offense if he knowingly traffics in food stamp coupons in violation of the regulatory law.

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(2) Definitions. In this section:

(a) “trafficking” means:

(i) transfers or otherwise disposes of the coupons to another;

(ii) possesses the coupons with intent to transfer or otherwise dispose of them to another; or

(iii) obtains or receives the coupons;

(b) “regulatory law” means Chapter 51 of Title 7, United States Code, and regulations issued pursuant thereto.

(3) Grading. The offense is a Class C felony if the value of the coupons exceeds $500 and the trafficking was engaged in with intent that the coupons be used by a person not authorized to use them or that the coupons be used to purchase a thing other than food, as defined in the regulatory law. Otherwise the offense is a Class C misdemeanor.

(4) Valuation. For purposes of grading, the value of the coupons shall be the face value. Trafficking committed pursuant to one scheme or course of conduct may be charged as one offense and the value of the coupons involved may be aggregated in determining the grade of the offense.

Comment

This section brings into the Code criminal provisions connected with the federal food stamp program, primarily to provide felony grading for certain violations, rather than to have all violations subject to reduction to a misdemeanor pursuant to Code § 8006. Instead of the $100 felony/misdemeanor line of 7 U.S.C. § 2013, grading follows the $500 felony/misdemeanor line found in Code provisions dealing with theft and forgery and, in addition, requires for the offense here resorted to purposes of the program in order to exclude from felony treatment technical violations which may involve coupons valued at more than $500 but do not involve the $500 value which may involve coupons valued at more than $500 but do not involve the $500 value. The offense is covered by 7 U.S.C. § 2013 which is not within this section, as covered by other Code provisions, e.g., presenting illegally obtained coupons to the government for redemption would be attempted theft.

§ 1772. Engaging in or Financing Criminal Lottery Business

(1) Offense. A person is guilty of a Class C felony if he knowingly engages in, or directly or indirectly provides financing for, the business of making extensions of credit at such a rate of interest that repayment or performance of any promise given in consideration thereof is unenforceable through civil judicial process (a) in the jurisdiction where the debtor, if a natural person,
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rested at the time credit was extended or (b) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time credit was extended.

(2) Presumptions. Knowledge of unenforceability shall be presumed, in the case of a person engaging in the business, if any of the following exist, and in the case of a person directly or indirectly providing financing, if he knew any of the following:

(a) it is an offense in the relevant jurisdiction described in subsection (1) to charge, take or receive interest at the rate involved;

(b) the rate of interest charged, taken or received is 50 or more percentum greater than the maximum enforceable rate of interest in the relevant jurisdiction described in subsection (1); or

(c) the rate of interest involved exceeds 45 percentum per annum or the equivalent rate for a longer or shorter period.

(3) Rate of Interest. Unless otherwise provided by the law of the relevant jurisdiction described in subsection (1), the rate of interest is to be calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(4) Demeos. It is a defense to a prosecution under this section that the defendant was licensed or otherwise authorized by the United States or a state government to engage in the business of making extensions of credit.

(5) Definitions. In this section:

(a) an "extension of credit" means any loan, or any agreement tacit or express whereby the repayment or satisfaction of any debt, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred;

(b) "debtor" means any person to whom an extension of credit is made, or who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same;

(c) the repayment of any extension of credit includes the return of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

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(6) Judicial Notice of State Law. For the purposes of this section, relevant state law, including conflicts of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This subsection does not impair any authority which any court would otherwise have to take judicial notice of any matter of state law.

(7) Jurisdiction. Federal jurisdiction over an offense defined in this section extends to any such offense committed anywhere within the United States, pursuant to the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy, and under the findings of Congress expressed in section 201 of the Consumer Credit Protection Act (Public Law 90-224), and to any such offense committed within the special maritime and territorial jurisdiction of the United States as defined in section 229.

Comment

This section is proposed for consideration as a substitute for the recently-enacted provisions of Chapter 42 of Title 13 (§§281-306), dealing with unauthorized credit transactions. Chapter 42 proscribes all extensions of credit made upon an understanding between the creditor and debtor that failure to make timely payments could result in violence or other criminal harm. Since proof of such an understanding is exceedingly difficult, the statute relies upon definitions of what constitutes a prima facie case: civil unenforceability plus 45 percent interest plus a reasonable belief by the debtor as to the creditor’s use or reputation for use of extraordinary means of collection. If direct evidence of the debtor’s belief is not available, evidence of the creditor’s reputation in the debtor’s community may be substituted.

In order to avoid possible constitutional questions in the existing law (fear of which appears to be limiting its utility), the approach of this section is to proscribe the act of extending the credit and the facts which are considered sufficient to establish it. This is accomplished by excluding the business of making uncollectible loans as one which rests on either implicit threat of violent collections or multiple fraudulent representations that loans, interest rates, etc., are in fact valid and enforceable. This section is close to the anti-bank-sharking offense recently enacted in New York, which simply makes it a felony to charge interest at a rate higher than 6 percent, unless authorized by law to do so. See N.Y. Penal Law § 190.05. In order to avoid establishing a national legal rate of interest, the notion of unenforceability in the jurisdiction where the defier resides is borrowed from the existing federal statute as the gist of the offense, and the presumption is that the rate either is legal under the existing 45 percent. Since the element of threat or fear is no longer required, §1771 becomes more sharply on banksharking by requiring that the illegal
that prison sentences of felony length are rarely imposed for violations of the securities laws in the absence of a showing of an underlying fraud of great magnitude. The regulatory schemes are focused principally on the activities of highly sophisticated professionals, who are alert to the existence of the requirements imposed upon them, and rely to a great extent upon self-regulation. It is virtually impossible to predict whether the standards of self-regulation, developed over the 30 years of the Act's existence, might be relaxed should the maximum prison penalties for violations be significantly reduced. Other factors tend to support the need for felony penalties as a deterrent particularly with respect to the national exchanges. Certain practices, not necessarily fraudulent, entail the risk of serious consequences for the securities market, perhaps the national economy; yet the temptations to violate prohibitions, because of the possibility of large and quick "windfalls," are great, while the penalties are easily avoidable. In addition to the false statements felony contained in the 1933 and 1934 Acts (15 U.S.C. §§ 77q, 77ff, 77xx, 77q(a)(1)-(5) or (Rule 10b-2), or (b) in a registration statement filed under subsection I of 15 U.S.C. Ch. 2A, or in an application, report or document filed under subsection III of 15 U.S.C. Ch. 2A or any rule, regulation, or order issued pursuant thereto, knowingly makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading.

Comment

In accordance with the policy of including in the proposed Code all crimes punishable as felonies, this section serves to incorporate by reference certain penalty provisions in Title 15 which are part of the complex and detailed scheme for regulating securities transactions. Encompassed are the Securities Act of 1933, Security Exchange Act of 1934, and Trust Indenture Act of 1939, virtually all violations of which are now punishable as felonies by up to five years' imprisonment under the general penalty provisions of the 1933 and 1934 Acts (15 U.S.C. §§ 77(q), 77ff) and up to two years' in the 1934 Act (15 U.S.C. § 78f). Some of the securities offenses there defined constitute offenses already defined in the proposed Code and are, therefore, not explicitly incorporated here and can be repealed, for example, 15 U.S.C. § 77f (falsely affixing signature to registration statement) is duplicative merely is forgery, but the other offenses either do not parallel the identical ones in the proposed Code or do not parallel the same or similar offenses in the proposed Code. In legislation, for example, prescriptions against selling unregistered stock and against publishing a stock without disclosing receipt of payment for the stock, or see false statement provisions which satisfy grading as a felony.

Even though, absent the requirement of intent to defraud, the offenses are largely minor violations of or prospectuses, § 1772 proposes retention of felony penalties for misconduct in the securities area, largely because of uncertainty as to the effort on the regulatory scheme of lesser deterrent than the felony penalties. It appears

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Section 1772. Securities Violations.

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

(a) knowingly does anything declared to be unlawful in 15 U.S.C. §§ 77q, 77ff, 77xx, 77q(a)(1)-(5) or (Rule 10b-2); or

(b) in a registration statement filed under subsection I of 15 U.S.C. Ch. 2A, or in an application, report or document filed under subsection III of 15 U.S.C. Ch. 2A or any rule, regulation, or order issued pursuant thereto, knowingly makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading.

Comment

In accordance with the policy of including in the proposed Code all crimes punishable as felonies, this section serves to incorporate by reference certain penalty provisions in Title 15 which are part of the complex and detailed scheme for regulating securities transactions. Encompassed are the Securities Act of 1933, Security Exchange Act of 1934, and Trust Indenture Act of 1939, virtually all violations of which are now punishable as felonies by up to five years' imprisonment under the general penalty provisions of the 1933 and 1934 Acts (15 U.S.C. §§ 77q, 77ff) and up to two years' in the 1934 Act (15 U.S.C. § 78f). Some of the securities offenses there defined constitute offenses already defined in the proposed Code and are, therefore, not explicitly incorporated here and can be repealed, for example, 15 U.S.C. § 77f (falsely affixing signature to registration statement) is duplicative merely is forgery, but the other offenses either do not parallel the identical ones in the proposed Code or do not parallel the same or similar offenses in the proposed Code. In legislation, for example, prescriptions against selling unregistered stock and against publishing a stock without disclosing receipt of payment for the stock, or see false statement provisions which satisfy grading as a felony.

Even though, absent the requirement of intent to defraud, the offenses are largely minor violations of or prospectuses, § 1772 proposes retention of felony penalties for misconduct in the securities area, largely because of uncertainty as to the effort on the regulatory scheme of lesser deterrent than the felony penalties. It appears
§ 1773. Banking Violations.

A person is guilty of a Class C felony if he engages in conduct prohibited or declared to be unlawful by 12 U.S.C. § 95 (relating to emergency restrictions on members of federal reserve system), with intent to conceal a transaction from a government agency authorized to administer the statute or with knowledge that his unlawful conduct substantially obstructs, impedes, or prejudices the administration of the statute or any government function.

Comment

This section incorporates in the Code an economic regulation felony outside Title 18. Because 12 U.S.C. § 95 prohibits a violation of rules and regulations promulgated by administrative authority, not Congress, sound policy would suggest that such a violation should, at least, be a misdemeanor. However, the class which can violate the rules and regulations is very narrow and highly regulated. Culpability requirements have been added to the felony similar to those for commission of fraud under international transactions, also incorporated into the Code. See Code § 1346. It is contemplated that any other regulatory felonies to be incorporated in the Code would be similarly treated.

Chapter 18. Offenses Against Public Order, Health, Safety and Sensibilities

§ 1801. Inciting Riot.

(1) Offense. A person is guilty of an offense if he:
   (a) incites or urges five or more persons to create or engage in a riot; or
   (b) gives commands, instructions or directions to five or more persons in furtherance of a riot.

"Riot" means a public disturbance involving an assembly of five (see) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function.

(2) Attempt, Solicitation and Conspiracy. A person shall be convicted under sections 1801, 1805 or 1806 of attempt, solicitation or conspiracy to commit an offense under this section only if he engages in the prohibited conduct under circumstances in which there is a substantial likelihood that his conduct will immediately produce a violation of this section.

(3) Grading. The offense is a Class C felony if it is under subsection (1)(b) and the riot involves 100 or more persons. Otherwise it is a Class A misdemeanor.

(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (c) or (b) of section 201; but no prosecution shall be instituted under paragraphs (a) or (b) unless the Attorney General certifies that a federal interest exists or reason of the fact the circumstances under which the offense occurred manifestly pertain to involvement of 100 or more persons or the riot involved 100 or more persons and its occurrence was or was being substantially furthered from outside the state where the riot occurred or would have occurred.

Comment

This section is based on recently-enacted federal legislation for the District of Columbia defining "rioting" for the District. The definition of riot in subsection (1) is derived from D.C. Code §32-1322 which reads: "rioting is the unlawful and unprovoked assembly of five or more persons, which by tumultuous and violent conduct or threats thereof creates grave danger or injury to property or persons"; its omission
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The provision of the District of Columbia that is equivalent to the provision of 18 U.S.C. §1503(a)(2) is 1 D.C. C. §1503(a)(2). The provision of the District of Columbia that is equivalent to the provision of 18 U.S.C. §1503(b) is 1 D.C. C. §1503(b). The provision of the District of Columbia that is equivalent to the provision of 18 U.S.C. §1503(c) is 1 D.C. C. §1503(c).

§1902

ARMS OF THE FEDERAL GOVERNMENT

(1) Offense. A person is guilty of a Class C felony if he:
(a) knowingly supplies a firearm or destructive device for use in a riot;
(b) teaches another to prepare or use a firearm or destructive device with intent that such any such device be used in a riot; or
(c) while engaging in a riot, knowingly aids any armed with a firearm or destructive device.

"Riot" has the meaning prescribed in section 1851.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (c) or (d) of section 231 and, with respect to offenses under subsection (c) or (d), also under paragraph (3).

Comment

This section on felonies arising for acts done from the 1989 federal legislation against "civil disorder" (18 U.S.C. §§851 et seq.). The mischief that this section seeks to address is the "civil disorder" in the context of §851, more, the "affecting commerce" basis for federal jurisdiction over the violation of section 851 has been dropped. Note that jurisdiction over this offense includes offenses of using interstate facilities and travel in interstate commerce. Attorney General certification, required by §851, is not required by this section, but the general provision of §851 remains a Congressional policy to limit jurisdiction to cases involving a significant federal interest. The section also abolishes "knowingly" for the same reasons described in §231(a), which eliminates such consequences in the supply of arms to a possible rioter. On general principles, negligence should not be enough to convict of a felony. See Working Papers, pp. 431, 469, 1029-37, 1050.

§1903

Engaging in a Riot.

(1) Offense. A person is guilty of a Class B misdemeanor if he engages in a riot, as defined in section 1851. (2) Attempt, Solicitation and Conspiracy; Presence. The pro-
§ 1804. Disobedience of Public Safety Orders Under Riot Conditions.

(1) Offense. A person is guilty of an infraction if during a riot, as defined in section 1801, or when one is immediately impending, he disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot. A public safety order is an order designed to prevent or control disorder, or to promote the safety of persons or property, issued by an official having supervisory authority over at least ten persons in the police, fire, military, or other forces concerned with the riot.

§ 1805. Motion on a Vessel.

(1) Offense. A person is guilty of an offense if by force, threat of force or deception, he endeavors to control the conduct of another person on a vessel. The offense or attempt to commit the offense is a Class B felony if the vessel is on the high seas, and otherwise is a Class C felony.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (d) of section 201.

Comment

Section 1808 (like § 1901) derives from D.C. Code § 20-1121, which grades engaging in a riot and leading or inciting a riot as a misdemeanor punishable by up to one year’s imprisonment and a fine up to $1,000. Engaging in § 1801 as a Class A misdemeanor; mere participation is graded in this section as a Class B misdemeanor; C. F. 18 U.S.C. § 225 (participation graded as a felony).

The proposed classification of mere participation as a Class B misdemeanor reflects four considerations: (1) the desirability of Congressional guidance to law enforcement, prosecuting, and judicial officials in discriminating among the mass of persons involved in a serious riot; (2) the availability of summary procedure for disposing of large numbers of petty offenses; (3) the considerable risk that a person may be convicted as a “participant” when he may have been a mere observer; and (4) the possibility of imposing the ultimate punishment of imprisonment on those who are not observers and who may be guilty of assisting those who are not. (See Comment to § 1801.

The Federal jurisdiction over the offense of engaging in a riot is limited to federal interests. C. F. 18 U.S.C. § 175. This discriminates between the federal interest in leaders and factantes and mere participants. It avoids the possibility of legislating federal courts with prosecutions of mere participants in cases where the federal interest is slight. Of course, a participant would be liable to prosecution for any federal offense involving harm to persons or property he committed in the course of a riot, such as an assault on a federal law enforcement official, whether the conduct took place within or outside an enclave.

See Working Papers, pp. 851, 899.

(2) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 201.
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**Comment**

This section carries forward the proscription of using command of a vessel contained in the existing statute of offense [18 U.S.C. § 221]. Other provisions in the existing statute, e.g., statutes defining the various crimes in the section, have been deleted as redundant or as unnecessary in a Code which deals generally with offenses committed on water. Although strictly speaking, a vessel is a seafaring vessel, as defined in § 1345, the statute also covers a vessel of commerce or a vessel of war. The section was designed to carry forward the existing law in this area, and to provide a basis for enforcing the statute, wherever it may be applicable.

**FIREARMS AND EXPLOSIVES**

**Introductory Note**

Two of the sections in this group, §§ 1811 and 1812, are intended to cover the analogous aspects of conduct prohibited under federal law:

1. The production and possession of and trafficking in firearms, with exceptions for military, police and similar official activities; and
2. The registration of firearms.


The arguments supporting the majority view are the following:

Criminal activity involving firearms is greatly reduced by suppression of handguns, which, on the one hand, are distinctively associated with crime and violence and, on the other hand, are not commonly used for sporting purposes.

The arguments supporting the opposing view are the following:

Suppression of handguns will not reduce the incidence of violent crime since criminals will probably still be able to obtain them while

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§ 1811. Supplying Firearms, Ammunition, Destructive Devices or Explosives for Criminal Activity.

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

(a) knowingly supplies a firearm, ammunition therefore, destructive device or explosive to a person who intends to commit a crime of violence or intimidation with the aid thereof or while armed therewith; or

(b) procures or receives the name with the like intent.

(2) Definition. In this section "crime of violence or intimidation" means a crime defined in sections 1951 to 1959, and such a crime defined in Chapters 16 and 17 of this Code when the offense is a felony.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a) or (b) of section 231.

Commission of an offense in this section shall not be a basis for application of section 231(b) to confer federal jurisdiction over commission of another offense except where the offense defined in this section involves a destructive device or explosive and the other offense is defined in sections 1951 to 1959, 1961 and 1962.

**Comment**

This section adapts to the Code two measures in present law: 18 U.S.C. § 2214(a) relating to firearms and new § 18 U.S.C. § 924(b), a part of Title VI of the Omnibus Crime Control and Safe Streets Act of 1968 [18 U.S.C. §§ 1801-1803] (Title VI) relating to explosives. Existing law is expanded somewhat by the Code, as well as by the section's coverage of firearms, and explosive devices and destructive devices. It is intended to cover firearms and explosive devices by analogy to the definition of "crime of violence or intimidation", defined in subsection (b), as substituted for 18 U.S.C. §§ 446-448 in the Code

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§ 1812. Illegal Firearms, Ammunition or Explosive Materials Business

(1) Offense. A person is guilty of an offense if he knowingly supplies a firearm, ammunition or explosive material to, or procures or receives a firearm, ammunition or explosive material for, a person prohibited by the regulatory law for receiving it.

(2) Definitions. In this section:
(a) "firearms" has the meaning prescribed in section — of the regulatory law;
(b) "explosive material" has the meaning prescribed in section — of the regulatory law;
(c) "ammunition" has the meaning prescribed in section — of the regulatory law; and

§ 1812. Illegal Firearms, Ammunition or Explosive Materials Business

(1) Offense. A person is guilty of an offense if he knowingly supplies a firearm, ammunition or explosive material to, or procures or receives a firearm, ammunition or explosive material for, a person prohibited by the regulatory law for receiving it.

(2) Definitions. In this section:
(a) "firearms" has the meaning prescribed in section — of the regulatory law;
(b) "explosive material" has the meaning prescribed in section — of the regulatory law;
(c) "ammunition" has the meaning prescribed in section — of the regulatory law; and
$1813. Trafficking In and Receiving Limited-Use Firearms.

(1) Offense. A person is guilty of a Class C felony if he:
(a) transfers in limited-use firearms in violation of the regulatory law;
(b) receives a limited-use firearm with knowledge that it is being transferred in him in violation of the regulatory law.

(2) Definitions. In this section:
(a) "traffics" means:
(i) transfers to another person;
(ii) possesses with intent to transfer to another person;
(iii) makes or manufactures;
(iv) imports or exports;
(b) "limited-use firearm" has the meaning prescribed for "firearm" in the regulatory law; and
(c) "regulatory law" means Chapter 55 of Title 26, United States Code, Chapter — of this Code and any rules and regulations issued pursuant thereto.

(3) Jurisdiction. Commission of an offense defined in this section shall not be a basis for application of section 281(b) to confer federal jurisdiction over the commission of another offense.

Comment
This section is intended for use with a regulatory scheme which generally suppresses trafficking in and possession of certain kinds of firearms. See Introductory Note preceding § 1511 supra. At present, such a scheme is relevant to machine guns, submachine guns,.45 caliber breech-loading rifles, shotguns, sawed-off long guns, etc.; but the section is hoped both to the legislative body and the administrative provisions (indicated by the blank reference to a Chapter in the Code) implementing the majority recommendations of a hash on handguns. Weave, as here, weapons are intended to be totally suppressed among the civilian population, fewer violations are trivial, and there is justification for enacting more severe than that identified in § 1512 under felony violations.

$1814. Possession of Explosives and Destructive Devices in Buildings.

A person is guilty of a Class A misdemeanor if he possesses an explosive or destructive device in a federal government building.

$1821. Unlawful Drug Importation.

Without the written consent of the government agency or person responsible for the management of such building, "Federal government building" means a building which is owned, possessed, or used by or leased to the United States.

Comment
This section carried forward 18 U.S.C. § 464(a), recently enacted as part of Title XI of the Organized Crime Control Act of 1965 (P.L. 89-347). It is probable that Congress did not intend to penalize renegades, technical violations of this provision. This intent could be made explicit by providing an affirmative defense that the explosive material was possessed for a lawful purpose, which would not undermine the enforcement scheme since, under the Code, the burden of proof would be on the defendant.

DANGEROUS, ABUSABLE, AND Destructed Drugs

Introductory Note
The following sections on drugs, §§ 1813 to 1829, were being developed by the Commission at the same time that the 61st Congress was working on new provisions dealing with the same subject. The work of the Congress resulted in enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513). The original provisions of the new Drug Act and the Code sections differ in many respects, but with respect to the penalty for possession of marihuana, the Commission expresses no preference for one mode of treatment or the other and is prepared to recommend that Code sections be amended to conform to the 1970 Act. The discussion below is not intended to reflect the Commission's reaction to the new Act, but simply to note the different in the existing Code and the new Act. The Code sections were also amended to reflect the situation of the Commission to both modes of treatment. Principal differences between the new Drug Act and the Code sections are noted in the comments to these sections.

The drug offenses included in the proposed Code depend, for complete definition, upon the existence of a comprehensive regulatory scheme set forth outside of Title 21; such a scheme is contained in the new Drug Act. Although some of the sections proposed here would require some modification of the regulatory provisions of the new Drug Act, an attempt has been made to integrate these sections with the regulatory scheme of that Act. These provisions involving regulatory matters, e.g., violation of record keeping requirements, would remain outside Title 21, either as Class A misdemeanors or perhaps subject to the regulatory offense provision (§ 1806).

$1823. Classification of Drugs.

For purposes of sections 1821 to 1829 and unless modified by the Attorney General in accordance with this section, "dangerous drug," "abusable drug," and "narcotic drug" have the meanings prescribed in section 1829. The Attorney General is authorized to classify and reclassify any "controlled substance" as defined in

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§ 1622

Trafficing in Dangerous and Abusable Drugs.

(1) Class B Felony Trafficing. A person is guilty of a Class B felony if, except as authorized by the regulatory law, he knowingly sells a dangerous drug for resale or traffic in a dangerous drug is a quantity in excess of that established by time in time by the Attorney General, in accordance with the procedure prescribed in section 201 of the regulatory law, an indicative of trafficking for resale.

(2) Class C Felony Trafficing. A person is guilty of an offense if, except as authorized by the regulatory law, he knowingly traffic in a dangerous or abusable drug. The offense is a Class C felony unless subsection (3) applies.

(3) Misdeemor Trafficing. Trafficing in a dangerous or abusable drug shall be a Class A misdemeanor if:

(a) the defendant did not act for profit or to further commercial distribution; and

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(b) the defendant did not transfer or otherwise dispose of a dangerous or abusable drug to a child under eighteen or facilitate such transfer or other disposition, or, if the defendant did engage in such conduct, he was less than five years older than the child.

The special classification provided in this subsection shall apply if the defendant is charged with trafficking under this subsection or if, at sentencing, the required factors are established by a preponderance of the evidence.

Comment

Subsection (1) penalizes wholesaling of dangerous drugs and gives the Attorney General the power to establish quantities of dangerous drugs which are indicative of wholesale dealing in them. Alternatively, Class A felony penalties could be made available to leaders of groups of ten or more who engaged in any drug felony on a continuing basis (Sen. Draft § 500; § 408 of the new Drug Act regarding penalties for continuing criminal drug enterprises).

The procedure for determining the quantities should be set forth in the regulatory law. Although the new Drug Act does not distinguish among crimes based on the basis of quantity, the procedure used for classifying crimes (which provides for HEW Secretary, etc.) could be used for this purpose.

There are a number of alternative approaches to Class B grading. Trafficing in dangerous quantities and other narcotics when taken place through organized crime channels, and therefore could be made subject to more severe penalties, as is done in the new Drug Act, regardless of whether it is shown to be for resale or of the quantity involved.

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Trafficing in Dangerous and Abusable Drugs.

(b) the defendant did not transfer or otherwise dispose of a dangerous or abusable drug to a child under eighteen or facilitate such transfer or other disposition, or, if the defendant did engage in such conduct, he was less than five years older than the child.

The special classification provided in this subsection shall apply if the defendant is charged with trafficking under this subsection or if, at sentencing, the required factors are established by a preponderance of the evidence.

Comment

Subsection (1) penalizes wholesaling of dangerous drugs and gives the Attorney General the power to establish quantities of dangerous drugs which are indicative of wholesale dealing in them. Alternatively, Class A felony penalties could be made available to leaders of groups of ten or more who engaged in any drug felony on a continuing basis (Sen. Draft § 500; § 408 of the new Drug Act regarding penalties for continuing criminal drug enterprises).

The procedure for determining the quantities should be set forth in the regulatory law. Although the new Drug Act does not distinguish among crimes based on the basis of quantity, the procedure used for classifying crimes (which provides for HEW Secretary, etc.) could be used for this purpose.

There are a number of alternative approaches to Class B grading. Trafficing in dangerous quantities and other narcotics when taken place through organized crime channels, and therefore could be made subject to more severe penalties, as is done in the new Drug Act, regardless of whether it is shown to be for resale or of the quantity involved.

§ 1623

Trafficing in Dangerous and Abusable Drugs.

(b) the defendant did not transfer or otherwise dispose of a dangerous or abusable drug to a child under eighteen or facilitate such transfer or other disposition, or, if the defendant did engage in such conduct, he was less than five years older than the child.

The special classification provided in this subsection shall apply if the defendant is charged with trafficking under this subsection or if, at sentencing, the required factors are established by a preponderance of the evidence.

Comment

Subsection (1) penalizes wholesaling of dangerous drugs and gives the Attorney General the power to establish quantities of dangerous drugs which are indicative of wholesale dealing in them. Alternatively, Class A felony penalties could be made available to leaders of groups of ten or more who engaged in any drug felony on a continuing basis (Sen. Draft § 500; § 408 of the new Drug Act regarding penalties for continuing criminal drug enterprises).

The procedure for determining the quantities should be set forth in the regulatory law. Although the new Drug Act does not distinguish among crimes based on the basis of quantity, the procedure used for classifying crimes (which provides for HEW Secretary, etc.) could be used for this purpose.

There are a number of alternative approaches to Class B grading. Trafficing in dangerous quantities and other narcotics when taken place through organized crime channels, and therefore could be made subject to more severe penalties, as is done in the new Drug Act, regardless of whether it is shown to be for resale or of the quantity involved.

§ 1623

Trafficing in Dangerous and Abusable Drugs.

(b) the defendant did not transfer or otherwise dispose of a dangerous or abusable drug to a child under eighteen or facilitate such transfer or other disposition, or, if the defendant did engage in such conduct, he was less than five years older than the child.

The special classification provided in this subsection shall apply if the defendant is charged with trafficking under this subsection or if, at sentencing, the required factors are established by a preponderance of the evidence.

Comment

Subsection (1) penalizes wholesaling of dangerous drugs and gives the Attorney General the power to establish quantities of dangerous drugs which are indicative of wholesale dealing in them. Alternatively, Class A felony penalties could be made available to leaders of groups of ten or more who engaged in any drug felony on a continuing basis (Sen. Draft § 500; § 408 of the new Drug Act regarding penalties for continuing criminal drug enterprises).

The procedure for determining the quantities should be set forth in the regulatory law. Although the new Drug Act does not distinguish among crimes based on the basis of quantity, the procedure used for classifying crimes (which provides for HEW Secretary, etc.) could be used for this purpose.

There are a number of alternative approaches to Class B grading. Trafficing in dangerous quantities and other narcotics when taken place through organized crime channels, and therefore could be made subject to more severe penalties, as is done in the new Drug Act, regardless of whether it is shown to be for resale or of the quantity involved.

§ 1623

Trafficing in Dangerous and Abusable Drugs.

(b) the defendant did not transfer or otherwise dispose of a dangerous or abusable drug to a child under eighteen or facilitate such transfer or other disposition, or, if the defendant did engage in such conduct, he was less than five years older than the child.

The special classification provided in this subsection shall apply if the defendant is charged with trafficking under this subsection or if, at sentencing, the required factors are established by a preponderance of the evidence.

Comment

Subsection (1) penalizes wholesaling of dangerous drugs and gives the Attorney General the power to establish quantities of dangerous drugs which are indicative of wholesale dealing in them. Alternatively, Class A felony penalties could be made available to leaders of groups of ten or more who engaged in any drug felony on a continuing basis (Sen. Draft § 500; § 408 of the new Drug Act regarding penalties for continuing criminal drug enterprises).

The procedure for determining the quantities should be set forth in the regulatory law. Although the new Drug Act does not distinguish among crimes based on the basis of quantity, the procedure used for classifying crimes (which provides for HEW Secretary, etc.) could be used for this purpose.

There are a number of alternative approaches to Class B grading. Trafficing in dangerous quantities and other narcotics when taken place through organized crime channels, and therefore could be made subject to more severe penalties, as is done in the new Drug Act, regardless of whether it is shown to be for resale or of the quantity involved.
sentencing proceeding unless the prosecutor has charged the lesser crime in the information. See Working Papers, pp. 1080-81, 1082-84, 1180-21, 1184-86.

§ 1823. Trafficking in Restricted Drugs.

(1) Class A Misdemeanor Trafficking. A person is guilty of an offense if, except as authorized by the regulatory law, knowingly traffics in a restricted drug. The offense is a Class A misdemeanor unless subsection (2) applies.

(2) Class B Misdemeanor Trafficking. Trafficking in a restricted drug shall be a Class B misdemeanor if the defendant did not act for profit or to further commercial distribution. The special classification provided in this subsection shall apply if the defendant is charged with trafficking under this subsection or if, at sentencing, the required factors are established by a preponderance of the evidence.

(3) Trafficking For Own Use. It is an affirmative defense to a prosecution under this section that the defendant did not transfer or intend to transfer or otherwise dispose of the drug to another person.

Comment

This section distinguishes between commercial and noncommercial trafficking in restricted drugs as § 1820. Class with respect to trafficking in dangerous and abused drugs. Nonpossession of restricted drugs would not be unlawful under the Code and, therefore, trafficking which amounts only to possession, for one's own use is excluded. But cf. § 401(b) of the new Drug Act, which provides a one-year penalty for all trafficking in restricted drugs whether or not it is commercial. See Working Papers, pp. 1064, 1100, 1130-38, 1140-46.

§ 1824. Possession Offenses.

A person is guilty of an offense if, except as authorized by the regulatory law, he knowingly possesses a usable quantity of a dangerous or abused drug. If the drug is a dangerous drug, the offense is a Class A misdemeanor. If the drug is an abused drug other than marihuana, the offense is an infraction upon a first offense, a Class B misdemeanor if it is the second conviction of the defendant for trafficking in or possessing a dangerous or abused drug, and a Class A misdemeanor if it is the third or subsequent conviction of the defendant for such trafficking or possessing. If the drug is marihuana, the offense is an infraction.

In a prosecution under sections 1822 to 1824 authorization, in fact, by the regulatory law in a defense.

Comment

In providing that authorization in a defense, this section is explicit that the government need not, in the first instance, require the existence of an exception, e.g., the defendant was a practitioner. However, the plain language of section 1823(4)(a)(ii) requires that the prosecution has the burden of proving beyond a reasonable doubt the existence of an exception. Thus, the regulatory law did not authorize defendant's conduct. See § 1803(7), § 535 of the new Drug Act, under which the burden of going forward with evidence of an exception is placed on the person claiming the exception. See Working Papers, p. 1094.

§ 1826. Federal Jurisdiction Over Drug Offenses.

Federal jurisdiction over an offense defined in sections 1822 to 1824 extends to any such offense committed anywhere within the United States or the special maritime or territorial jurisdiction, as defined in section 216, pursuant to the powers of Congress to regulate commerce and under the findings of Congress expressed in section 101 of the regulatory law.

Comment

This section establishes plenary federal jurisdiction over drug offenses, as does the new Drug Act (§ 101). An alternative to plenary jurisdiction for all offenses would be plenary jurisdiction for the trafficking offenses but only exclusive jurisdiction for the possession offenses. Since this would produce difficulties in deciding who could be prosecuted in certain situations, e.g., in a raid on a place where drugs were being distributed, plenary jurisdiction is proposed over possession offenses, subject to discretionary constraint in the exercise of such jurisdiction under § 207, and guidelines established by the Attorney General. Note that the grant of plenary jurisdiction avoids the need for presumed bases for federal involvement, e.g., that a drug was illegally imported, which were a feature of federal drug laws prior to the new Drug Act. See Working Papers, p. 1059.

§ 1827. Suspended Entry of Judgment.

(1) Authority of the Court. Except as provided in subsection (C), whenever a court is authorized to enter a conviction for an offense under sections 1822 to 1824 which is not a felony, it may, without entering a judgment of guilty and with the consent of the defendant, defer further proceedings and place the defendant on probation in accordance with Chapter 33. Upon violation of a

§ 1829. condition of probation, the court shall discharge the defendant and proceed as provided in section 2104(1). Upon satisfactory completion of the term of probation, the court shall discharge the defendant and dismiss the proceedings against him.

(2) Consequences of Discharge. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction of an offense for any purpose.

(3) Exclusions. This section does not apply to any person who has previously been convicted of a drug crime or who has previously had a judgment against him suspended under this section.

Comment

This section would permit the court to deal with a first offender without stigmaizing him with a criminal record, thus a provision is particularly appropriate in the area of drug legislation, but as it may also be a desirable way of dealing with other first offenders, e.g., simp- lifies, it could, alternatively, be made a general sentencing provision. The section is similar to § 404(b) of the new Drug Act. Because the reduction in misdemeanor to § 1827 occurs at sentencing it would be inappropriate to deny the benefit of this section to a person whom a jury has found guilty of a felony. Therefore, this section authorizes a court to use it whenever a conviction for less than a felony is authorized. Prior conviction of a drug crime serves to deny the ben-efit of this section. (A crime is any felony or misdemeanor as defined by the proposed Code without regard to whether or not there is federal jurisdiction. Thus state crimes are counted as prior convictions to the extent that the conduct would have been illegal and fall under federal jurisdiction. See definition of "convict" in § 106.)

Section 404(b) of the new Drug Act provides for expunging records of arrest, trial and conviction in certain cases and permits the offender to deny that such events occurred. Chapter 50 of the proposed Code deals with collateral consequences of conviction; but its provisions apply to all offenders, reflect the view that attempt to suppress the facts is not an effective or appropriate way to deal with the problem posed by such consequences. See Working Papers, pp. 1101-03.

§ 1828. Definitions for Sections 1821 to 1829.

In sections 1821 to 1829:

(a) "traffic" means:

(I) transfers, or otherwise disposes of a drug to another person;

(II) prescribes a drug not in the course of professional practice; or

(III) possesses a drug with intent to transfer or other- wise dispose of it to another person;

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(i) manufactures a drug; or
(ii) imports a noxious quantity of a drug into the United States, or exports a noxious quantity of a drug from the United States. "Import" includes landing in the United States or receiving at the place where it was landed in the United States or from a person who brought it from the place where it was landed in the United States a noxious quantity of a drug imported into the United States and landed in the United States;

(b) means modified by the Attorney General in accordance with section 582, "dangerous drug" means:

(i) any substance classified as a Schedule I or Schedule II controlled substance under section 302 of the regulatory law except a material, compound, or preparation which contains any quantity of marihuana or peyote and does not contain a dangerous drug;

(ii) any material, compound, or preparation in a form not primarily adapted for oral use which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(A) amphetamines, its salts, optical isomers, and salts of its optical isomers;

(B) phencyclidine and its salts;

(C) any substance which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers;

(D) methylenedide

(iii) any cannabis preparation;

(c) means modified by the Attorney General in accordance with section 582, "alcohol drug" means:

(i) any substance classified as a Schedule III or Schedule IV controlled substance under section 302 of the regulatory law except as provided in paragraph (b)(ii) of this section;

(ii) marihuana;

(iii) peyote;

(d) unless modified by the Attorney General in accordance with section 582, "restricted drug" means any substance classified as a Schedule V controlled substance under section 302 of the regulatory law;

(e) "controlled substance" means the separated resin, whether crude or purified, obtained from marihuana or from

the mature stalks of any plant of the genus cannabis; any preparation, compound, or derivative of the resin; or any tincture of marihuana; but it does not include fiber produced from the mature stalks of any plant of the genus cannabis, oil or cake made from the seeds of the plant, or any other preparation, compound, or derivative of the mature stalks (except the separated resin) or of the fiber, oil, or cake:

(f) "marihuana" means all parts, including the seeds, of any plant of the genus cannabis, whether growing or not; but does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any preparation, compound, or derivative of the stalks, fiber, oil, or cake, or the sterilized seed of the plant that is incapable of germination;

(g) "regulatory law" means the Comprehensive Drug Abuse Prevention and Control Act of 1970.

Gambling

"Gambling" is defined very broadly, and the conduct proscribed in the new Drug Act is generally as transferable to drug abuse. See also 18 U.S.C. 1701-1709. See Gambling, pp. 1705, 1707-1709, 1711-1715, 1720-21.

Gambling

Introductory Notes

The following sections on gambling, §§ 1881 and 1882, were being developed by the Commission at the same time that the 91st Congress was working on new provisions dealing with the same subject. The work of the Congress resulted in enactment of Title VIII of the Organized Crime Control Act of 1970 (PL 91-452). Title VIII and the Code sections, particularly Code § 1881, differ in some respects; but the Commission expressly approves of the treatment of the subject and in presenting the Code sections as they appear in the Study Draft only for the purpose of calling the attention of the Congress to both modes of treatment.

Among the differences are the following: Title VIII establishes primary federal jurisdiction over gambling activity which violates state laws, but imposes national regulations on gambling enterprises. The criterion, under new 18 U.S.C. § 1881, is whether the gambling enterprise "comprehends five or more persons who conduct, engage in, manage, supervise, direct or own all or part of the illegal gambling business or places or stages the substantially continuous operation for a period in excess of thirty days or has a gross revenue of $10,000 in any single day." All violations of the provision punishable by up to five years' imprisonment. Code § 1881 would continue reliance upon to five years' imprisonment. Code § 1881 would continue reliance upon

Conventional jurisdictional bases, e.g., use of interstate commerce; but distinctions in one of the enterprises (similar to those employed in Title VIII of federal statutes) affecting the ability to distinguish Class C offenses from Class A misdemeanors. Title VIII also makes violations of the state laws a part of the government's power to enact laws in every prosecution. Code § 2251 (criminal penalties) is a matter of definition, a result of which the prosecution has no burden of proof for the state laws until there is evidence in the case sufficient to raise a reasonable doubt that it is lawful. In addition, Title VIII explicitly authorizes gambling conducted for the benefit of a charitable organization, regardless of whether it is prohibited by local law. Title VIII, like Title VII, does not directly refer to the offenses existing under state law in Code § 1821. Neither of the Code sections contains forfeiture provisions such as those in new 18 U.S.C. § 1955, since it is contemplated that all forfeiture provisions would be placed in a different statute.

Title VIII contains a new offense (18 U.S.C. § 1511) which prescribes a conspiracy to obstruct the enforcement of the criminal laws of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business when at least one of the conspirators is an official or employee of the state or political subdivision and a co-conspirator con ducts, finances, manages, supervises, directs, or conspires of the illegal gambling business, and the latter makes or attempts to make illegal transfers or deposits of the property derived from the conduct of any federal offense, including, for example, drug offenses as well as illegal gambling.

§ 1831. Illegal Gambling Businesses.

1. Offense. A person is guilty of an offense if he engages in participation in the business of gambling, unless, as provided in subsection (2), it was legal in all places in which it was carried on. Without limitation, a person shall be deemed to be engaged in the business of gambling if he:
   (a) conducts a wagering pool or lottery;
   (b) receives wagers for or on behalf of another person;
   (c) alone or with others, owns, controls, manages, or finances a gambling business;
   (d) knowingly leases or otherwise permits a place to be regularly used to carry on a gambling business;
   (e) maintains for use on any place or premises occupied by him a co-operated gaming device, as defined in 20 U.S.C. § 1082; or
   (f) is a public servant who shares in the proceeds of a gambling business whether by way of a bribe or otherwise.

2. Offenses. It is a defense to a prosecution under this section that the gambling business was legal in all places in which it was carried on. The place in which a gambling business is carried on

Includen any place from which a customer places a wager or otherwise patronizes the gambling business, as well as the place in which the wager is received.

3. Grading. The offense is a Class C felony if:
   (a) the defendant employed or utilized three or more persons to carry on the gambling business;
   (b) the defendant, or the gambling business or part thereof which he owned, controlled, managed or financed, accepted wagers in excess of $2,000 in a single day;
   (c) the defendant received lay-off wagers or otherwise provided reinsurance or whole-fun manifests in relation to persons engaged in a gambling business; or
   (d) a public servant was bribed in connection with the gambling enterprise.

Otherwise the offense is a Class A misdemeanor.

4. Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b), or (c) of section 281, or when any gambling device, as defined in section 2252, used in the commission of the offense, moves across a state boundary.

Comment

Section 1821 would be the basic federal statute relating to gambling. It provides any significant participation in the conduct of a gambling business, except to the extent that such business is legal where carried on. It declares that all such gambling businesses are illegal in federal courts.

Ordinary social gambling would not be a federal offense, since the section applies only to those who "engage or participate in the business of gambling". In this respect it follows existing law, 20 U.S.C. § 1084 (crimonalizing wagering information, by persons "engaged in the business of betting or wagering"); 18 U.S.C. § 1952 (interstate travel pursuant to "business enterprise involving gambling . . ."); 18 U.S.C. § 4651 (tax on persons "engaged in the business of accepting wagers"). Note that the phrase "without limitation" renders the list of conduct in subsection (1)(a)- (f) nonexhaustive as to the conduct that constitutes engaging in a gambling business.

The section follows 18 U.S.C. § 1952, as recently construed in Brooks v. United States, 418 F.2d 1228 (5th Cir. 1969), in that federal jurisdiction exists if customers cross state boundaries (paragraph (a) of § 1952). However, no criminal liability would be imposed if the business was legal where carried on. In any event, there would be no criminal liability imposed on customers since persons who merely patronize a gambling business are not engaging or participating in the business.

Among the issues raised are (1) whether jurisdiction should be broader, and (2) whether the grading provided in subsection (3) is optimal. As to jurisdiction, the alternative to add paragraph (g) of § 1952 (affecting consumers), or even to bring all gambling within
§ 1852 Protecting State Antigambling Policies.

(1) Offense. A person is guilty of a Class A misdemeanor if he knowingly carries or sends any gambling device into a state from any place outside such state.

(2) Defense. This section shall not apply to:

(a) A gambling device carried or sent into a state, or any part thereof, where such gambling was legal, or on route to such place;

(b) Any conveyance in the usual course of business by a common or public contract carrier;

(c) Any newspaper or similar publication;

(d) Any ticket or other embodiment of the claim of a player or bettor which was carried or sent by him.

Inapplicability under this subsection is a defense.

(3) Definition of "Gambling Device". In this section "gambling device" means:

(a) Any device covered by 15 U.S.C. § 1371 and not excluded by subsections (2) and (3) of 18 U.S.C. § 1373;

(b) Any record, paraphernalia, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, lotteries, numbers, policy, lotteria, or similar games.

Comment

In addition to the federal interest in suppressing organized illegal gambling, expressed in § 1431, there is a federal concern to protect the states against subversion of their antigambling laws. This federal concern is implemented in this section by prohibiting the importation of gambling devices into states in which gambling is not legal.

§ 1841 Promoting Prostitution.

(1) Offense. A person is guilty of any offense if :

(a) Operates a prostitution business or a house of prostitution;
§ 1842. Facilitating Prostitution.

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

(a) knowingly solicits a person to patronize a prostitute;
(b) knowingly procures a prostitute for a patron;
(c) knowingly leases or otherwise permits a place...
§ 1842. Prostitution.
(1) Offense. A person is guilty of prostitution, a Class B misdemeanor, if he or she:
(a) is an inmate of a house of prostitution or is otherwise engaged in sexual activity as a business; or
(b) solicits another person with the intention of being hired to engage in sexual activity.
(2) Jurisdiction. Federal jurisdiction over an offense defined in this section is as provided for section 1822.

Comment
This provision treats the prostitute as a minor offender. Federal jurisdiction over this offense is limited to federal enclaves and the areas around military bases. 47 U.S.C. § 1801, which deals with activities that solicit sexual activity, whether or not for hire. Unlike a number of revised state criminal codes this Code does not impose criminal liability for patronizing a prostitute. Cf. Study Dutch § 1844. See Working Papers, pp. 157, 1185-96, 1190, 1199-1200.

§ 1848. Testimony of Spouse in Prostitution Offenses.
Testimony of a person against his or her spouse shall be admissible to prove offenses under sections 1841 to 1843 involving that person’s prostitution.

Comment
Pursuant federal law under the Mann Act recognizes an exception to the general common law rule that a person may not testify against his spouse over the latter’s objection; and that exception is explicitly preserved by this section. The privilege will still apply to prostitution crimes not involving the spouse. See Working Papers, pp. 1197-99.

§ 1849. Definitions for Sections 1841 to 1840.
In sections 1841 to 1849:
(a) “sexual activity” means sexual intercourse, deviate sexual intercourse, or sexual contact as defined in section 1849;
(b) a “prostitution business” is any business which derives funds from prostitution regularly carried on by a person under the control, management, or supervision of another;
(c) a “house of prostitution” is any place where prostitution is regularly carried on by a person under the control, management or supervision of another;

§ 1853. Disseminating Obscene Material.
(1) Offense. A person is guilty of an offense if he disseminates obscene material, or if he produces, transports, or sends obscene material with intent that it be disseminated. “Disseminate” means sell, lease, advertise, broadcast, exhibit, or distribute.
(2) Defense. It is a defense to a prosecution under this section that dissemination was restricted to:
(a) Institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material; or
(b) noncommercial dissemination to personal associates of the actor; or
(c) dissemination carried on in such a manner as, in fact, to minimize risk of exposure to children under eighteen or to persons who had no effective opportunity to choose not to be so exposed;
(3) Grading. The offense is a Class C felony if dissemination is carried on in reckless disregard of risk of exposure to children under eighteen or to persons who had no effective opportunity to choose not to be so exposed. Otherwise the offense is a Class A misdemeanor. [The offense is a Class A misdemeanor.]
(4) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraphs (a), (b) or (f) of section 201.

Comment
Section 1853, apart from the bracketed defense in subsection (3) (c), reflects the view that obscene material is harmful to individuals and society; that the federal government should continue to play a role in suppressing commercial trafficking in obscenity, and that Stanley v. Georgia, 394 U.S. 557 (1969), entitling the right of an individual to possess obscene material in the privacy of his own home, does not
§ 1862. Disorderly Conduct.

(1) Offense. A person is guilty of an offense if, with intent to harass, annoy or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed or alarmed by his behavior, he:

(a) engages in fighting, or in violent, tumultuous or threatening behavior;

(b) makes unreasonable noise;

(c) in a public place, uses abusive or obscene language, or makes an obscene gesture;

(d) obstructs vehicular or pedestrian traffic, or the use of a public facility;

(e) persistently follows a person in or about a public place or places;

(f) while loitering in a public place for the purpose of soliciting sexual contact, he solicits such contact;

(g) creates a hazard, physically offensive, or seriously alarming condition by any act which serves no legitimate purpose.

(2) Grading. The offense is a Class B misdemeanor if the defendant’s conduct violates subsection (1)(f). Otherwise it is an infraction.

(3) Jurisdiction. There is federal jurisdiction over an offense defined in this section under paragraph (a) of section 221.

(1) Complaint by Member of the Public Required. Prosecution under paragraphs (c), (e) and (f) of subsection (1) shall be instituted only upon complaint to a law enforcement officer by someone other than a law enforcement officer.

Comment

This statute defines what constitutes disorderly conduct in federal court. It is largely derived from 18 U.S.C. §4080, but includes, as well, offensive sexual solicitation and persistent following of a person. The thrust of the statute is prevention of harassment or annoyance of others. Because the conduct described in paragraphs (c), (e)
Part C. The Sentencing System

§ 3001. Authorized Sentences.

(1) In General. Every person convicted of an offense against the United States shall be sentenced in accordance with the provisions of this Chapter. The term "court", as used in Part C of this Code, includes magistrates to the extent of their powers as provided elsewhere by law.

(2) Felonies and Misdemeanors. Every person convicted of a felony or a misdemeanor shall be sentenced to one of the following alternatives:

(a) probation, a split sentence or unconditional discharge as authorized by Chapter 31;
(b) a term of imprisonment as authorized by Chapter 32; or
(c) a fine as authorized by Chapter 33. A fine authorized by Chapter 33 may be imposed in addition to a sentence to probation or to a term of imprisonment.

(3) Infractions. Every person convicted of an infraction shall be sentenced to one of the following alternatives:

(a) probation or unconditional discharge as authorized by Chapter 31; or
(b) a fine as authorized by Chapter 33. A fine authorized by Chapter 33 may be imposed in addition to a sentence to probation.

(4) Organizations. Every organization convicted of an offense against the United States shall be sentenced to one of the following alternatives:

(a) probation or unconditional discharge as authorized by Chapter 31;
(b) a fine as authorized by Chapter 33; or
(c) the special sanction authorized by section 3007.

A fine authorized by Chapter 33 or the special sanction authorized by section 3007 or both may be imposed in addition to a sentence to probation.

(5) Civil Penalties. This Chapter shall not be construed to deprive the courts of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, require forfeiture of or disqualification from office or position, or impose any
other civil penalty. An appropriate order exercising such authority may be included as part of the judgment of conviction.

§ 3002. Reduction in Class. If the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes that it would be unduly harsh to enter a judgment of conviction for that class of offense, the court may enter a judgment of conviction for the next lower class of offense and impose sentence accordingly.

Comment
This section provides a single comprehensive list of the options available for sentencing offenders, apart from imprisonment for fines and disqualifications, dealt with in Chapter 3C, and property forfeitures, dealt with in the Code. It is useful as a starting point for a judge's thinking when he reaches the sentencing stage, and as a reference point for provisions such as §§ 400A and 2104(e).

Commented subsection (e) reflects the view of some members of the Commission that a judge should have the discretion to reduce the class of offenses after conviction just as the prosecutor may have the discretion to charge a lesser offense initially. The inclusion of such a provision was rejected on the ground that judicial discretion to reduce the classification of a offense would tend to undermine the careful grading of offenses provided by the statutes and regulations. See Working Papers, pp. 367, 1594-95.

§ 3002. Classification of Offenses.
(5) Felonies. Felonies are classified for the purposes of sentence into the following three categories:
(a) Class A felonies;
(b) Class B felonies; and
(c) Class C felonies.

(2) Misdemeanors. Misdemeanors are classified for the purpose of sentence into the following two categories:
(a) Class A misdemeanors; and
(b) Class B misdemeanors.

(3) Infractions. Infractions are not further classified.

Comment
The sentencing categories in present federal law are arbitrary and inconsistent. Very similar crimes have widely disparate sentences. There exist some 6 to 75 categories, without an apparent rational basis for that number of distinctions. This section establishes six categories for all offenses in federal penal law. Provision is made for significant differences in the gravity of different offenses; and the scheme which emerges is an orderly one. Similar classifications have been provided in other modern code revisions. See Working Papers, pp. 420-21, 1594, 1599, 1600.

§ 3003. Persistent Misdemeanants.
(1) Criterion. A defendant convicted of a Class A misdemeanor may be sentenced as though convicted of a Class C felony if the court is satisfied that there is an exceptional need for rehabilitative or incapacitative measures for the protection of the public, in view of the fact that this is the third conviction against the defendant within five years for Class A misdemeanors or more serious crimes.

(2) Determination of Prior Convictions. The second conviction to be counted must have been committed after defendant was sentenced for the first conviction to be counted and the misdemeanor for which defendant is being sentenced under this section must have been committed after defendant was sentenced for the second conviction to be counted.

(3) Repeal. The court shall set forth in detail the reasons for its action whenever the sentence authorized in subsection (1) is imposed.

Comment
This section recognizes that some individuals who continue to commit misdemeanors after prior conviction are not deterred by the misdemeanor penalty or aided by the previous correctional measures and require rehabilitation, imprisonment, or both. See Working Papers, pp. 420-21, 1594, 1599, 1600.
§ 3004. Presentence Commitment for Study.

In cases where a term of imprisonment of more than one year is authorized and the court is of the opinion that imprisonment presently appears to be warranted but desires more detailed information as a basis for determining the appropriate sentence than has been provided by the presentence report, the court may commit a convicted defendant to the custody of the Bureau of Corrections for a period not exceeding 30 days. The Bureau shall conduct a complete study of the defendant during that time, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the rehabilitative resources or programs which may be available to suit his needs. By the expiration of the period of commitment, or by the expiration of such additional time as the court shall grant, not exceeding a further period of 30 days, the defendant shall be returned to the court for final sentencing and the court shall be provided with a written report of the results of the study, including whatever recommendations the Bureau believes will be helpful to a proper resolution of the case. An order committing a defendant under this section shall be a provisional sentence to imprisonment for the maximum term authorized by Chapter 32. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives available under section 3001.

Comment

This section represents a compilation of three existing provisions: 18 U.S.C. §§ 4004(b), 4002 and 4001(c). The presentence report prerequisite to commitment under this section constitutes the major alteration in existing law. Availability to the defense of the results of a § 9004 study should be governed by rules similar to those applicable to disclosure of presentence reports, dealt with in Rule 32 of the Federal Rules of Criminal Procedure. See Working Papers, pp. 1371-73, 1384-93.

§ 3005. Resentencing.

(1) Increased Sentence. Where a conviction has been set aside on direct review or collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct, which is more severe than the prior sentence previously satisfied, unless the court concludes that a more severe sentence is warranted by conduct of the defendant occurring subsequent to the prior sentence.
§ 3907. Special Section for Organizations.

When an organization is convicted of an offense, the court may require the organization to give notice of its conviction to the person or class of persons adversely harmed by the offense, by mail or by advertising in designated areas or by designated media or otherwise.

§ 3907. Special Section for Organizations.

When an organization is convicted of an offense, the court may require the organization to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media or otherwise.

Comment

This section would establish a special sanction for an organization convicted of an offense. By authorizing a court to order an organization convicted of an offense to give notice to the parties victims to facilitate redress, this section brings organizational liability into line with the criminal liability rules and the cases of defect in motor vehicles. A broader sanction envisioning representations of wrongdoing or other disavowals or corrections would be improper as inappropriate with respect other to organizations or to individuals, despite its possible deterrent effect, since it comes too close to the adoption of a policy supporting social culpability as a sanction.

The bracketed alternative reflects the view of a substantial body of opinion in the Commission that the sanction should go further. Thus the alternative permits the court to require "publicity" to persons "injured in or affected by the conviction" so that such publicity could go, for example, to potential customers or to a class of persons who were the object of an attempted but frustrated scheme to defraud another.

Another special sanction would be to make possible restitution by the organization to persons affected by the offense, in a proceeding auxiliary to the criminal case. However, a provision authorizing the sentencing court to direct institution of such a proceeding (cf. Study Draft § 502(1)(b)) was not adopted in view of the disparate considerations which the due process the Congress was giving to class actions by consumers.


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Chapter 31. Probation and Unconditional Discharge

§ 3908. Criteria for Utilizing Chapter.

(1) Eligibility. A person who has been convicted of a federal offense may be sentenced to probation or unconditional discharge as provided in this Chapter.

(2) Criteria. The court shall not impose a sentence of imprisonment upon a person unless, having regard to the nature and circumstances of the offense and to the history and character of the defendant, it is satisfied that imprisonment is the more appropriate sentence for the protection of the public because:

(a) there is undue risk that during a period of probation the defendant will commit another crime;

(b) the defendant is in need of correctional treatment that can most effectively be provided by a sentence to imprisonment under Chapter 32; or

(c) a sentence to probation or unconditional discharge will unduly deprecate the seriousness of the defendant's crime, or undermine respect for law.

(3) Factors to be Considered. The following factors, or the converse thereof where appropriate, while not controlling the discretion of the court, shall be accorded weight in making determinations called for by subsection (2):

(a) the defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;

(b) the defendant did not plan or expect that his criminal conduct would create or threaten serious harm to another person or his property;

(c) the defendant acted under strong provocation;

(d) there were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct;

(e) the victim of the defendant's conduct induced or facilitated the commission;

(f) the defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;

(g) the defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense;
(b) the defendant's conduct was the result of circumstances unlikely to recur;
(i) the character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;
(j) the defendant is particularly likely to respond affirmatively to probationary treatment;
(k) the imprisonment of the defendant would entail undue hardship to himself or his dependents;
(l) the defendant is elderly or in poor health;
(m) the defendant did not abuse a public position of responsibility or trust;
(n) the defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise.

Nothing herein shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.

Comment
Probation is not regarded under present law as a "sentence," but rather as an event which occurs when the execution or imposition of a sentence is suspended. Subsection (1) determines that probation is a sentence, an affirmative criminal device. Unlike present federal law, probation is not barred to persons convicted of certain crimes or classes of crimes. If it should be deemed imperative that Congress express itself as to the unavailability of a sentence of probation for certain crimes or classes of crimes, an appropriate method which would permit avoidance of the problems created by mandatory sentence provisions would be a provision establishing, in effect, a presumption against probation—that the court must state its reasons for imposing probation upon conviction of the specified crime.

Summary of criteria for a sentence of probation, provided in subsection (2), is new in federal law. The provision is not intended to preclude the use of the factors provided in subsection (1), but merely to discourage automatic imposition of such sentences. Recent studies on the effectiveness of probation, as well as economic considerations, justify this position.

Subsection (3) lists factors which a judge should consider in determining whether the sentence should be probation or imprisonment. Clarifying the criteria should assist in reducing sentencing disparities.


§ 3102. Incidents of Probation.

(1) Periods. Unless terminated as provided in subsection (2), the periods during which a sentence to probation shall remain conditional and be subject to revocation are:
(a) for a felony, 5 years;
(b) for a misdemeanor, 2 years;
(c) for an infraction, 1 year.

(2) Early Termination. The court may terminate a period of probation and discharge the defendant at any time earlier than that provided in subsection (1) if warranted by the conduct of the defendant and the ends of justice.

(3) Final Judgment. Notwithstanding the fact that a sentence to probation can subsequently be modified or revoked, a judgment which includes such a sentence shall constitute a final judgment for all other purposes.

Comment
This section restates the substance of present law with some modifications. It would continue the present maximum term of five years (18 U.S.C. § 3601), but would limit it to felons. Subsection (2) would continue present law as to the power to terminate probation early, not only to benefit the probationer but also to conserve supervisory resources (18 U.S.C. § 3624); but the section changes present law in denying the court the power to fix initially a shorter period of probation. Until the offender has been on probation, the length of the period of probation needed is difficult to determine.

Subsection (3) makes it clear that a sentence to probation is like any other sentence for purposes of appeal and otherwise.

See Working Papers, pp. 1387-88.

§ 3103. Conditions of Probation; Revocation.

(1) In General. The conditions of probation shall be such as the court in its discretion deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so. The court shall provide as an explicit condition of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation.

(2) Appropriate Conditions. When imposing a sentence to probation, the court may, as a condition of the sentence, require the defendant:
(a) work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;
(b) undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose;
(c) attend or reside in a facility established for the instruction, recreation or residence of persons on probation;
(d) support his dependents and meet other family responsibilities;
(e) make restitution or reparation to the victim of his conduct for the damages or injury which was sustained.
restitution or reparation is a condition of the sentence, the court shall fix the amount thereof, which shall not exceed an amount the defendant can or will be able to pay, and shall fix the manner of performance;

(f) require the defendant to make payments to the court, to be paid under the supervision of the court, to the extent necessary for the defendant to pay restitution or reparation;

(g) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, for the benefit of victims of the defendant’s offense;

(h) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, to any amount the court determines to be necessary to compensate victims of the defendant’s offense;

(i) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, to any amount the court determines to be necessary to compensate victims of the defendant’s offense;

(j) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, to any amount the court determines to be necessary to compensate victims of the defendant’s offense;

(k) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, to any amount the court determines to be necessary to compensate victims of the defendant’s offense;

(l) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, to any amount the court determines to be necessary to compensate victims of the defendant’s offense;

(m) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, to any amount the court determines to be necessary to compensate victims of the defendant’s offense;

(n) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, to any amount the court determines to be necessary to compensate victims of the defendant’s offense;

(o) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, to any amount the court determines to be necessary to compensate victims of the defendant’s offense;

(p) require the defendant to make payments to the court, to be paid under the supervision of the court, to any amount the defendant can or will be able to pay, including amounts exceeding the amount of the sentence, to any amount the court determines to be necessary to compensate victims of the defendant’s offense.

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reasons a reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

Comment
This section does not have a counterpart in Title 18. The provision for the concurrent running of multiple periods of probation is based on the same premise as the limitation of the maximum period to five years—either probation will work within a relatively short period of time or it will not work at all. In providing that probation runs concurrently with a prison or parole term for some offenses, the section differs from existing law. The imposition of a term of imprisonment during a term of probation represents a fundamental alteration of the treatment plan. The new prison and parole terms will supersede the probation sentence unless the court undertakes a new treatment plan pursuant to probation revocation.

Subsection (d) allows time for dealing with a probationer who cannot be found for revocation proceedings before the expiration. See Working Papers, pp. 1511-12.

§ 3105. Unconditional Discharge

The court may sentence a person convicted of an offense other than a Class A or B felony to an unconditional discharge without imprisonment, fine, conditions or probationary supervision if it is of the opinion that imposition of conditions upon the defendant's release would not be useful. If a sentence of unconditional discharge is imposed for a crime, the court shall set forth in detail the reasons for its action.

Comment
Under existing federal law, the court affords an unconditional discharge by imposing a sentence of one day's probation. This section represents a more useful approach to such discharge, and is especially significant because §2110 provides for periods of probation fixed by statute, subject to early discharge. Hence unconditional discharges for other than an infraction should not be automatic or unconditional; a statement of reasons for granting such a discharge is required. See Working Papers, p. 1512.

§ 3106. Split Sentences

When imposing a sentence to probation for a felony or a Class A misdemeanor, the court, in addition to imposing conditions under section 3105, may as part of the sentence commit the defendant to the custody of the Bureau of Corrections at whatever times or for such intervals within the period of probation as the court shall determine. The period of commitment shall not exceed six months. Interval commitments shall not be required unless the Bureau of Corrections has certified that appropriate facilities are available. That the defendant submit to commitment imposed under this section shall be deemed a condition of probation for the purpose of section 3103(d).

Comment
The split sentence provision is derived from 18 U.S.C. § 3624. The purpose of this provision is to permit the shock of short-term imprisonment which is primarily court-supervised probation. Imprisonment would permit a man to keep his job and spend nights in a prison cell instead of a halfway house. This provision does not permit the extinguishment of the term of imprisonment or a "split sentence" to a shorter period, e.g., 30 days, on the ground that it would be sufficient for "shock effect." See Working Papers, pp. 1500, 1512-13.
Chapter 32. Imprisonment

§ 3201. Sentence of Imprisonment: Incidents.

(1) Authorized Terms. The authorized terms of imprisonment are:
   (a) for a Class A felony, no more than twenty years;
   (b) for a Class B felony, no more than fifteen years;
   (c) for a Class C felony, no more than ten years;
   (d) for a Class A misdemeanor, no more than two years;
   (e) for a Class B misdemeanor, no more than one year.

   Such terms shall be administered as provided in Part C of this Code.

(2) Components of Maximum Term for Indefinite Sentence.

   A sentence of imprisonment of more than six months shall be an indefinite sentence. The maximum term of every indefinite sentence imposed by the court shall include a prison component and a parole component. The parole component of such maximum term shall be (i) one-third of the time components of terms of nine years or less; (ii) three years for terms between nine and fifteen years; and (iii) five years for terms more than fifteen years; and the prison component shall be the remainder of such maximum term. If, however, the parole component so computed is less than three years, the court may increase it up to three years.

(3) Minimum Term. An indefinite sentence for a Class A or B felony shall have no minimum term unless by the affirmative action of the court a term is set at no more than one-third of the prison component actually imposed. No other indefinite sentence shall have a minimum term. The court shall not impose a minimum term unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required because of the exceptional features of the case, such as warrant imposition of a term in the upper range under section 3202. The court shall set forth its reasons in detail. Except in the most extraordinary cases, the court shall obtain both a presentence report and a report from the Bureau of Corrections under section 3004 before imposing a minimum term.

(4) Minimum Term: Alternative; Further Powers. In line of imposing a minimum term, the court may make a recommendation
sectional authority; and part of that time (the "parole component") he must be confined on parole. This contrasts with present law under which a prisoner may serve his sentence within the walls and emerge without parole supervision. The parole component also defines the maximum time that must be served on parole where the parole board releases the prisoner at some early point in his sentence. Although ordinarily the parole component is considered as one-third of the prison component, three-year and five-year maximums are set for parole under long sentences, and provision is made for judicial flexibility in allotting time. The maximum term imposed is relatively short. It imposes any mandatory sentence terms, and parole periods in order to assure an adequate period of postprison supervision. It is desirable to authorize the Board of Parole to make the same sort of decision (adding to the period of parole supervision—always within the limits of the judicially imposed sentence) at the time of release.

Under existing law, all prison sentences have a minimum term—a period which an offender must serve in prison before becoming eligible for parole—unless the court effectively acts (18 U.S.C. § 4205). It is difficult at best for a judge to predict at the time of sentencing that under no circumstances will a particular person be ready for parole until a certain period has expired. The result may be that a person is kept in prison after the optimum time for his release. For some offenders, however, community supervision may call for a minimum term. Subsection (3) determines that only for Class A and B felony sentences may a minimum term be set and that only if the judge so effectively acts. Note, however, that even when a minimum term is not or cannot be set, the Board of Parole is not required to consider parole prior to the expiration of the aggregate term of imprisonment (§ 4205(1)). Note also that all terms here are prison terms; parole is subject to § 4205(1), which provides that only if in extraordinary circumstances should a prisoner be paroled during his first year in prison. The longest minimum is one-third of the prison component imposed, as under 18 U.S.C. §§ 4205, 4206.

Subsection (4) permits the judge to impose the parole date with- out actually imposing a minimum term. A procedure for reducing a minimum term improperly set is also established.

A substantial body of opinion is in the Committee favoring at least a modified form of mandatory minimum prison terms to supplement the minimum term provisions in subsection (2). This view would be affected by a provision that mandated minimum terms for certain serious offenses, e.g., kidnapping in hard narcotics (§ 885(11)), unless the judge determines that such a sentence would be grossly disproportionate to the extraordinary factors in the case which he explains in detail. Such a provision would be permitted on the view that present law gives judges too deferential a role, and that it is an improper legislative responsibility to set sentencing guidelines here as elsewhere. Other considerations include such provisions impede the fixing of optimal sentences and disturb the plea-bargaining process. See § 1301, supra, for a similar suggestion regarding probation.
issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or not contended or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except disclos or order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

(4) Hearing. Upon any plea of guilty or not contended or verdict or finding of guilty of the defendant of such felony, a hearing shall be held, before sentence is imposed, by the court sitting without a jury. Except in the most extraordinary cases, the court shall hold both a presentence report and a report from the Bureau of Corrections under section 5041 before holding a hearing under this subsection. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing so as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefore. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the court shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term as specified in subsection (1). The court shall place in the record
§ 3203. Federal Criminal Code

Its findings including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

Comment

This section establishes the system under which long prison terms may be imposed. Subsection (1) recognizes that maximum limits are set by statute in order to permit dealing appropriately with the worst offenders. Such long term sentences mainly perform an incapacitative function and should therefore be imposed only on defendants who are exceptionally dangerous. In the ordinary case, a judge should consider sentences in a narrower range.

This principle is expressed in Title X of the Organized Crime Control Act of 1970 (P.L. 91-453) in 18 U.S.C. § 3571 through an exception of all maximums to a youth offender's requirement that the maximum sentence is set for the felony. See generally B. Esp. No. 35-457, 1st Dist., Superior Court, Bk. 440, pp. 43-500, 588-67 (1942). Section 3203 (c) of the Title X provisions to the sentencing structure of the Code. Instead of the variety of maximums for felons in existing law, the Code limits the number to three distinctive classes. Instead of being judicially determined, the proportionate maximums can thus be more precisely expressed by the Congress as the upper range of the maximum authorized by law.

As an alternative to providing for leaders of organized crime only within the upper ranges of the class of crimes committed in their enterprises, e.g., trafficking in narcotics, illegal gambling, would be to provide a narrowly defined offense for leading organized crimes, graded at the Class A or B felony level according to the number of persons involved. 18 U.S.C. § 1050 of the Study Draft. If the procedural restraints on employing upper range maximums should give rise to concerns to raise the general level of maximum sentences to or in excess of particular offenses into a higher class of felony merely to provide for exceptional cases, it would appear preferable to focus on such cases in a limited range of maximums subject to higher penalties. A substantial body of opinion in the Commission, however, considers that the present range of maximums inadequate to meet the incapacitative role of the Code and would support substantial increases in the felony maximum.


§ 3204. Final Report

(2) Youth Offenders. If an offender is under the age of 22 years at the time of conviction, the court as part of its sentence may recommend that he be confined and treated in facilities established under Chapter —- for the rehabilitation of youth offenders.

(3) Narcotics Addicts. If the court determines after a study by the Bureau of Corrections under section 3204 that an offender is a narcotics addict and that he can be treated, the court as part of its sentence may recommend that he be confined and treated in facilities established under Chapter —- for the rehabilitation of narcotics addicts.

Comment

Existing law provides for consultation to the custody of the Attorney General, which function has been delegated to the Bureau of Prisons. Subsection (1) refers directly to the Bureau (renamed the Bureau of Corrections).

The other two subsections deal with special cases—youths and addicts—of the offenses of which an entire section of Title 18 is presently devoted. The greater flexibility afforded by the Code in dealing with all offenders obviates the need for special sections on youthful offenders and narcotics addicts. Special facilities for the treatment of these two types of offenders are desirable, however, and subsections (2) and (3) permit the court to recommend incarceration in such facilities. If special facilities for any other group, such as alcoholics, are established, a similar provision could be added for them. See Working Papers, pp. 1181-43, 1181-21.

§ 3205. Concurrent and Consecutive Terms of Imprisonment.

(1) Authority of Court. When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, the sentences shall run concurrently or consecutively as determined by the court. Sentences shall run concurrently unless otherwise specified by the court.

(2) Multiple Sentences. A defendant may not be sentenced consecutively for more than one offense to the extent:
(a) one offense is an included offense of the other;
(b) one offense consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other; or
(c) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.
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(3) Maximum Limits Where Felony Involved. The aggregate maximum of consecutive sentences to which a defendant may be subject shall not exceed the maximum term authorized by section 3201(1) for the most serious felony involved, except that a defendant being sentenced for two or more Class C felonies may be subject to an aggregate maximum not exceeding that authorized by section 3201(1) for a Class B felony if such Class C felony was committed as part of a different course of conduct or each involved a substantially different criminal objective; and a defendant being sentenced for two or more Class B felonies may be subject to an aggregate maximum not exceeding that authorized by section 3201(1) for a Class A felony if such Class B felony was committed as part of a different course of conduct or each involved a substantially different criminal objective.

(4) Maximum Limits for Misdemeanors. When sentenced only for misdemeanors, a defendant may not be consecutively sentenced to more than one year, except that a defendant being sentenced for two or more Class A misdemeanors may be subject to an aggregate maximum not exceeding that authorized by section 3201(1) for a Class C felony if each Class A misdemeanor was committed as part of a different course of conduct or each involved a substantially different criminal objective.

(5) Criteria and Reasons. The court shall not impose a consecutive sentence unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required because of the exceptional features of the case, for reasons which the court shall set forth in detail.

(6) Application in Multiple Proceedings. The limitations provided in this section shall apply not only when a defendant is sentenced at one time for multiple offenses but also when a defendant is sentenced at different times for multiple offenses all of which were committed prior to the imposition of any sentence for any of them. Sentences imposed both by other federal courts and by any state or local courts shall be counted in applying these limitations.

(7) Effect of Consecutive Terms. In determining the effect of consecutive sentences and the manner in which they will be served, the Board of Parole shall treat the defendant as though he has been committed for a single term with an aggregate sentence not to exceed maximum terms validly imposed. Any such term longer than six months shall have the following incidents:

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(a) the parole component of each single term shall be:

(i) one-third for terms of nine years or less, except that, if one-third of such term is less than three years, the parole component shall be the aggregate of the parole components of the terms imposed, but no more than three years;

(ii) three years for terms between nine and fifteen years, and

(iii) five years for terms more than fifteen years;

(b) the minimum term, if any, shall constitute the aggregate of all validly imposed minimum terms.

(c) Effect of State Sentences. Subject to any permissible cumulation of sentences explicitly authorized by this section, the Bureau of Corrections shall automatically award credit against the maximum term and any minimum term of any federal sentence for all time served in a state or local institution since the commencement of the federal offense or offenses.

Comment

Subsection (1) continues the authority of a federal court to impose either concurrent or consecutive terms in the case of convictions for more than one offense. Subsection (2) prohibits consecutive sentences in those situations where the multiple crimes result from one criminal objective. An alternative and more general statement might be: "The court shall not impose consecutive minimums for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective." In the event that subsections (3) and (4) are not adopted, some such limitation on the open-ended imposition of consecutive terms would be appropriate.

Subsections (3) and (4) would substantially change federal law by setting, for consecutive sentences, a maximum other than the total authorized for the combined offenses. The principle underlying subsection (3) is that multiple offenders may have persistent offenders, evidence demonstrates, which justify a long sentence. It applies, therefore, not only to each of the offenses but to any other crime. Sentences for all crimes may be aggregated up to the upper range maximum for the most serious felony involved.

Class C felonies may be aggregated into the Class B felony range. The felonies must, however, be parts of different courses of conduct or involve substantially different criminal objectives. Thus, stealing a check, from the mails, forging and then stealing it would not permit consecutive sentences into the Class B felony range, but stealing the check, stealing the postal inspector who was investigating the case, and bringing a witness would permit such cumulative.

The bracketed addition reflects a substantial body of opinion in the Commission that an additional deterrent is necessary to prevent repetition of Class B offenses, such offenses being a misdemeanor, e.g., theft, armed robbery, and that such repeated misconduct may warrant incarceration for as long a period as conviction of a single Class A felony. The counter-consideration is that the authorized limits for a
§ 3205. Calculation of Terms of Imprisonment.

(1) Commencement of Sentence. The sentence of imprisonment of any person convicted of a federal offense shall commence to run from the date on which such person is received at the institution at which the sentence is to be served.

(2) Credit. The Bureau of Prisons shall give credit toward service of the maximum term and any minimum term of a sentence of imprisonment for all time spent in custody as a result of the offense or acts for which the sentence was imposed.

(3) Other Charges. If a defendant is arrested on one charge and later prosecuted on another charge growing out of conduct which occurred prior to his arrest, the Bureau of Prisons shall give credit toward service of the maximum term and any minimum term of any sentence to imprisonment resulting from such prosecution for all time spent in custody under the former charge which has not been credited against another sentence.

Consolidated

The first two subsections are new in present law. See 18 U.S.C. §§ 3561. Subsection (3), which is new, is intended to give similar credit for a defendant who is first arrested on one charge and later prosecuted for another offense which was later discovered or which was the undetected basis for the first arrest. See Working Papers, p. 1925.

Chapter 33. Fines

§ 3301. Authorized Fines.

(1) Dollar Limits. Except as otherwise provided for an offense defined outside this Code, a person who has been convicted of an offense may be sentenced to pay a fine which does not exceed:

(a) for a Class A or a Class B felony, $10,000;

(b) for a Class C felony, $5,000;

(c) for a Class A misdemeanor, $1,000;

(d) for a Class B misdemeanor or an infraction, $500.

(2) Alternative Measure. In lieu of a fine imposed under subsection (1), a person who has been convicted of an offense through which he derived pecuniary gain or by which he caused personal injury or property damage or loss may be sentenced to a fine which does not exceed twice the gain so derived or twice the loss caused to the victim.

Comment

Existing federal law contains inconsistencies with respect to fines as well as to imprisonment; there are 14 different fine levels in Title 18 with little correlation in amounts authorized for offenses which are similar in nature or seriousness.

The amounts stated in subsection (1) are intended as maximum limits. Under some circumstances a fine or a portion of a fine may exceed the maximum authorized for the offense if the fine is assessed for a violation of another federal statute under which the defendant has been convicted, if such fine is imposed for violation of a condition of probation, or for contempt of court.

Note that offenses outside Title 18 may have fines which exceed the limits imposed in this section. See § 3554 and comment thereto, supra.

See Working Papers, pp. 139-98, 1292-64, 1300, 1325-26.

§ 3302. Imposition of Fines.

(1) Criteria. In determining the amount and the method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of the defendant. The court shall not sentence a defendant to pay a fine in any amount which will prevent him from making restitution or reparation to the victim of
(5) Civil Process. Nothing in this section shall be deemed to alter or interfere with employment for collection of fines of any means authorized for the enforcement of money judgments rendered in favor of the United States.

Comment
This section replaces 18 U.S.C. §§ 3626 and 3628, which deal in arbitrary terms with nonpayment of fines. These sections permit a judgment in favor of the United States to become a lien against the property of a person's real estate. The proposed approach, on the other hand, is to require a separate proceeding to determine whether there was such culpability for the nonpayment as to warrant a prison sentence in the first place, and to grant such power to the court as to permit flexibility in treatment of the nonpayee, i.e., give him the "keys to the jail," hold out the possibility of his release to induce payment, or in "state jail" regardless of payment as a sanction for his continuance. Payment of the fine can also be made a condition of probation, under § 3623(c) (f). Additional facility to modify the fine or method of payment is provided in subsection (6). See Working Papers, pp. 1506, 1506-01, 1536-39.

§ 3601. Parole Eligibility: Consideration.

(2) Consideration for Parole. The Board of Parole shall consider the desirability of parole for each prisoner at least 60 days prior to the expiration of any minimum term or, if there is no minimum, at any time.

Comment
This section substantially restates federal law and practice. The Board is not required to consider parole until near the end of the offender's first year in prison; and, in § 3601(1), it is indicated that parole should not be granted during the first year of a substantial term, except in extraordinary circumstances. Provision is made for parole in sentences longer than six months, as in existing law. See Working Papers, pp. 1529-30.


(1) In General. Except in the most extraordinary circumstances, a prisoner sentenced to a term of imprisonment, the prison component of which is three years or more, shall not be released on parole during the first year of his imprisonment. Thereafter, whenever the Board of Parole considers the parole of a prisoner who is or soon will be eligible for parole, he shall be released on parole unless the Board is of the opinion that his release should be deferred because:

(a) there is undue risk that he will not conform to reasonable conditions of parole;

(b) his release at that time would unduly depreciate the seriousness of his crime or undermine respect for law;

(c) his release would have a substantially adverse effect on institutional discipline; or
(4) his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date.

(2) Long Sentences. Whenever the Board of Parole considers the release on parole of a prisoner who has actually served the longer of five years or two-thirds of the prison component of his sentence, he shall be released on parole, unless the Board is of the opinion that his release should be deferred because there is a high likelihood that he would engage in further criminal conduct.

(3) Mandatory Parole. A prisoner who has not been paroled prior to the expiration of the entire prison component of his sentence shall then be released on parole.

Comment

Subsection (1) states the policy that all prisoners sentenced to a rehabilitative term in prison should be considered for at least one year, but the Board of Parole is granted some flexibility should unusual circumstances exist, e.g., a nonviolent prisoner has an incurable fatal disease. After the first year, or any minimum term, the presumption shifts from favoring confinement to favoring parole unless one of the four stated reasons appear. Note that, under § 3460, as in existing law, there is no judicial review of Parole Board decisions.

Subsection (2) states the policy that after service of two-thirds of a long sentence in prison the only acceptable reason for continuing confinement is the substantial likelihood that the prisoner would commit another crime if released.

Subsection (3), like 18 U.S.C. § 4141, states the circumstances under which release is mandatory. Under the proposed Code such release will be on parole. It should be noted that the extensions of time provisions is proposed under the Code, so that the date for early parole will then take the place of the statutory sentence for good behavior. Such is presently the case under the federal Youthful offender guidelines. A further discussion of other "good-time" provisions may be found in the Working Papers, p. 1358.

see Working Papers generally, pp. 1291, 1372-73, 1399-40, 1399, 1399-41.

§ 3462. Incidents of Parole.

(1) Period of Parole. The period during which a parole shall remain conditional and be subject to revocation is the parole component of the sentence which has been imposed.

(2) Early Discharge from Supervision or Release from Conditions. The Board of Parole may, at its discretion, discharge the parolee from supervision or release him from one or more of the conditions of parole prescribed in section 3103(2) at any time after the expiration of one year of successful parole if warranted by the conduct of the parolee and the ends of justice.

(3) Conditions; Modifications; Revocation. Conditions of parole shall be determined as provided in section 3104. The Board of Parole may modify or change the conditions of parole at any time prior to the expiration of the period for which the parole remains conditional. If the parolee violates a condition at any time prior to the expiration of the period, the Board may continue him on the existing parole, with or without modifying or changing the conditions, or, if such continuation, modification or enhancement is not appropriate, may revoke the parole and recommit the parolee for a term computed in the following manner:

(a) the recomputation shall be for that portion of the maximum term which had not been served at the time of parole, less the time elapsed between the parole of the prisoner and the commission of the violation for which parole was revoked; and

(b) the prisoner shall be given credit against the term of recommitment for all time spent in custody since he was paroled which has not been credited against another sentence.

(4) Re-parole. A prisoner who has been recommitted following parole may be re-paroled by the Board of Parole subject to the same provisions of the statute which governed his initial parole. The total time during which the prisoner can remain subject to the jurisdiction of the Bureau of Corrections and the Board of Parole can in no event exceed the maximum term imposed by the court.

Comment

The length of the period of parole under existing law is in inverse proportion to the amount of the imposed prison term which has been served. Thus, a good risk who is released early will be subject to a longer parole than a poor risk who is released later. The purpose of parole is to aid the rehabilitation of the prisoner prior to his release. If the parolee is of good character and after release serves without violation of the conditions of parole, he will be eligible for re-parole.

The Code provides that, regardless of the parole term, he can be released if he is of good character and after release serves without violation of the conditions of parole. The parolee is then required to re-parole him on parole. The Code does not per-
§ 3404 Conditions of Parole.

(1) In General. The conditions of parole shall be such as the Board of Parole in its discretion deems reasonably necessary to assure that the parolee will lead a law-abiding life or to meet him to do so. The Board shall provide as an explicit condition of every parole that the parolee not commit another crime during the period for which the parole remains subject to revocation.

(2) Appropriate Conditions. As conditions of parole, the Board may require that the parolee:

(a) work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;

(b) undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose;

(c) attend or reside in a facility established for the instruction, recreation or residence of persons on probation or parole;

(d) support his dependents and meet other family responsibilities;

(e) refrain from possessing a firearm, destructive device or other dangerous weapon unless granted written permission by the Board or the parole officer;

(f) refrain from excessive use of alcohol, or any use of narcotics or of another dangerous or addictive drug without a prescription;

(g) report to a parole officer at reasonable times as directed by the Board or the parole officer;

(h) permit the parole officer to visit him at reasonable times at his home or elsewhere;

(i) remain within the geographic limits fixed by the Board, unless granted written permission to leave by the Board or the parole officer;

(j) answer all reasonable inquiries by the parole officer and promptly notify the parole officer of any change in address or employment;

§ 3405 Duration of Parole.

(1) Commencement; Multiple Sentences. A period of parole commences on the day the prisoner is released from imprisonment. Periods of parole shall run concurrently with any federal, state or local jail, prison or parole term for another offense to which the defendant is or becomes subject during the period.

(2) Delayed Adjudication. The power of the Board of Parole to revoke parole for violation of a condition shall extend for the duration of the period provided in section 3405(1) and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the parolee and to conduct the hearing prior to the expiration of the period.

§ 3406 Finality of Parole Determinations.

The federal courts shall not have jurisdiction to review or set aside, except for the denial of constitutional or procedural rights conferred by statute, regulation or rule, the discretionary action of the Board of Parole regarding but not limited to the release or deferment of release of a prisoner whose maximum term has not expired, the imposition or modification of conditions.
§ 3406. Federal Criminal Code

of a first or subsequent parole, and the reimprisonment of a parolee for violation of parole conditions during the parole period.

Comment

This section states that discretionary action of the Board of Parole is an administrative decision not subject to judicial review on the merits. The phrase "but not limited to" is used to avoid a construction of the provision which would allow judicial review of matters not mentioned. See Working Papers, pp. 334-35.

Chapter 35. Disqualification from Office and Other Collateral Consequences of Conviction

§ 2061. Disqualification from and Forfeiture of Federal Office.

(1) Disqualification. A person convicted of a crime listed below may, as part of the sentence, be disqualified from any, or a specified, federal position or category thereof for such period as the court may determine, but no longer than five years following completion of any other sentence imposed:

(a) treason (section 1511) and the crimes affecting national security defined in sections 1602 to 1609, 1971 and 1111 to 1117;

(b) bribery and other crimes of unlawful influence upon public affairs and betrayal of public office defined in sections 1584, 1591 to 1597, 1771 and 1772;

(c) unlawful acts under color of law (section 1321);

(d) felonies theft under sections 1732 to 1735 or felonious fraud under sections 1733 to 1754, when the subject of the offense was deposited with, entrusted to or otherwise under the control of the defendant, in his capacity as a public servant or officer of a national credit institution;

(e) a crime expressly made subject to this section by statute.

(2) Forfeiture. A person convicted of a crime listed in subsection (1)(a) or of bribery (section 1341) shall forfeit any federal position he then holds, and a person convicted of any other crime listed in subsection (1) may, as part of the sentence, be required to forfeit such position.

(2) "Federal Position" Defined. In this section "federal position" does not include any position for which qualifications or provisions with respect to length of term or procedure for removal are prescribed by the Constitution.

Comment

This section provides uniform treatment for cases in which a criminal conviction should or may carry the sanction of forfeiture of or disqualification from federal office or employment. Existing provisions do not follow a single line. Convictions of bribery (18 U.S.C. 201) or any other crime involving disloyalty, dishonesty or incapacity were subject to the discretion of the sentencing court to impose disqualification. A public bank examiner's receipt of a sum or deposit, on the other hand, results in automatic disqualification (18 U.S.C. § 611).

With respect to disqualification, the section leaves the matter entirely to the court's discretion, partly because the question is one more of government needs than of the appropriate discretion and partly
because disqualification may create problems with respect to rehabilitation, particularly in areas where the government is the principal employer. It is difficult to estimate the total proposed line between officers subject to mandatory disbarment of office and those subject to disbarment in the court’s exercise of discretion. An alternative, consistent with the principle of flexibility in sentencing generally, would be to make all disbarments a matter of discretion, possibly with an extension of the power to all serious offenses.

Legislative proposals which are consistent with the proposed in §3504 that all disbarments be automatically terminated five years after completion of the sentence. The sentence does not curtail powers of removal or disqualification vested elsewhere in federal law. See 5 U.S.C. §7322, regarding security clearances.

While the sentences largely carry forward existing policies, it does make some alterations. For example, it broadens the category of disbarments subject to disbarment and disqualification, 5 U.S.C. §7322, imposing conditions governing employment, where the offense is a disbarment offense involving dishonesty or breach of trust.7

Issues raised by this section are:

(1) whether disbarment is a matter which ought to be dealt with by a sentencing judge or by others, particularly as to federal positions for which existing machinery is adequate, e.g., the military establishment and lower level Civil Service positions.

(2) whether the offender might more appropriately be treated in Title 18, where a greater variety of alternatives can be employed. See, for example, 5 U.S.C. §7322, which provides that a 30-day suspension may be imposed by the Civil Service Commission, in lieu of the removal from office required for unlawful political activity, if it is administratively determined that “removal is unwarranted.” See also 18 U.S.C. §174, under which the Board of Parole may determine the fitness of a person to hold labor union office after a criminal conviction; and

(3) whether the list of offenses is appropriate.


§3505. Disqualification From Exercising Organization Functions

An executive officer or other manager of an organization convicted of an offense committed in furtherance of the affairs of the organization may, as part of the sentence, be disqualified from exercising similar functions in the same or other organizations for a period not exceeding five years, if the court finds the need or seriousness of his illegal actions make it dangerous for such functions to be entrusted to him.

Comment

These provisions in existing provisions disqualify persons convicted of certain offenses holding positions in banks where deposits are insured by the Federal Deposit Insurance Corporation (18 U.S.C. §1029).

§3506. Termination of Disqualification After Five Years

Any disqualification or disability imposed by law as a consequence of conviction terminates at the end of the first five-year period, commencing after completion of sentence, during which the defendant has not been convicted of another crime committed subsequent to the disqualifying or disabling conviction.

Comment

See comments to §3505, infra.
§ 3565. Effect of Removal of Disqualification.
Removal of a disqualification or disability under sections 3503 and 3504:
(a) has only prospective operation and does not require the restoration of the defendant to any office, employment or position forfeited or lost as a consequence of his conviction;
(b) does not preclude proof of the conviction as evidence of the commission of the offense, whenever the fact of its commission is relevant to the determination of an issue involving the rights or liabilities of someone other than the defendant;
(c) does not preclude consideration of the conviction for purposes of sentences if the defendant subsequently is convicted of another offense;
(d) does not preclude proof of the conviction as evidence of the commission of the offense, whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or public servant authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege which such court, agency or public servant is empowered to deny, but in such case the court, agency or public servant shall also give due weight to the issuance of the order under section 3505 or the applicability of section 3504, as the case may be;
(e) does not preclude proof of the conviction as evidence of the commission of the offense, whenever the fact of its commission is relevant for the purpose of impeaching the defendant as a witness, but the issuance of the order under section 3505 or the applicability of section 3504, as the case may be, may be admitted for the purpose of her rehabilitation.
(f) does not apply to the federal disqualification, if any, to receive, possess or supply a firearm, destructive device or ammunition.

Comment
Sections 3503-06 would provide a method for accelerating the collateral consequences of a federal criminal conviction. Existing federal law deals in a similar manner only with youthful offenders (18 U.S.C. §5051); all others must resort to the presidential pardon procedure, which deals with the problem not only bankruptly but also unthinkingly to the poor and ignorant. A number of states, as well as most foreign countries, have established more available and orderly procedures for terminating disabilities. Some offer greater relief, e.g., annulment of the conviction, than that proposed here. Since most disqualifications and disabilities from conviction are state imposed, e.g., loss of voting rights and insufficiency for occupational
INTRODUCTORY COMMENT TO CHAPTER 30

This Chapter reflects a sharp division within the Commission on the subject of capital punishment. The principal text embodies the view of those favoring abolition of capital punishment. The branch Mfr. Provisional Chapter expresses the strongly held view that the penalty, although not absolute, should be retained for certain grave offenses.

It may be useful to summarize the arguments for and against capital punishment which are elaborated in the Working Paper at page 147-76. The arguments against capital punishment include its inhumanity, as well as its deterrent effect. Studies of the deterrent effect of capital punishment do not support the view that there is an extra margin of deterrence to be found by replacing death sentences with longer terms of imprisonment. Abolition states show no higher murder rate than comparable states retaining the death penalty.

From a moral point of view, the infliction of capital punishment is intolerable because it does not conform to the principle of retribution. The retribution principle advocates that the punishment should be inflicted only by the state, and that the state must be the final arbiter of what is a just punishment. The retribution principle also states that the punishment must be proportionate to the crime, and that it should be inflicted only by the state, and that the state must be the final arbiter of what is a just punishment.

The arguments in favor of retaining capital punishment include the following. Existing studies of the efficacy of capital punishment as a deterrent are inconclusive. Too many factors are present to warrant strong conclusions. The efficacy of capital punishment as a deterrent, moreover, has not yet been tested in recent experience due to failure to carry out the provisions which the law does make for its use. In any event, as a matter of individual experience and common sense, the death penalty is the most feared sanction, and it has served to deter at least some would be killers; treasurers, etc. Provision for capital punishment, even if not seriously carried out, may serve to express the special horror of the community against murder. It also satisfies the conscience of the community in so as to create a situation against murder which is different from any situation of indifference and semi-consciousness regarding the deserts of criminality. Some crimes, particularly the delinquent behavior, deserve the criminal punishment. The murderer has killed his victim; and the death to impose a Class A sentence as authorized under § 3003.
[Provisional Chapter 38: Sentence of Death or Life
Improvement]

§ 3801: Death or Life Imprisonment Authorized for Certain Offenses.

Notwithstanding the provisions of sections 3803, 3804 and 3802, if the defendant is convicted of intentional murder or treason, a sentence of death or of life imprisonment may be imposed in accordance with the provisions of this Chapter. If the sentence is life imprisonment, the court may set a minimum term up to 15 years. The period of parole under a life sentence, for the purpose of section 3802(1), shall be the balance of the parolee's life or any lesser period fixed by the court at sentencing.

Comment

This section reflects a substantial body of opinion in the Commission that the death sentence should be retained for intentional murder, treason and perhaps other offenses. Alternatives to the death penalty, in retaining capital punishment, are likely to be effective in the various categories of offenses, perhaps in all instances where it exists under present federal law. The death sentence is the only sentence considered for murder to: (1) intentional murder of the President, Vice President, President-elect or Vice President-elect of the United States; (2) intentional murder of a law enforcement officer, or a public servant having custody of the defendant on parole, to prevent the performance of his official duties; or (3) intentional murder by a convict, under sentence of imprisonment for murder or for sentence of life imprisonment or death, while in custody or immediate flight therefrom. Cf. Study Draft § 3802. The provisions of a minimum term up to 15 years in a life sentence is taken from existing law, 18 U.S.C. 4092, 4096.

§ 3802: Separate Proceeding to Determine Sentence.

(1) Court or Jury. Unless the court imposes sentence under section 3801, it shall conduct a separate proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted before a jury unless the defendant, with the approval of the court, waives it. If a jury determines the defendant's guilt and it is not discharged by the court for good cause, the proceeding shall be conducted with that jury. Otherwise it shall be conducted with a jury empaneled for that purpose.

(2) Evidence and Instructions. In the proceeding, evidence may be presented by either party as to any matter relevant to sentence, including the nature and circumstances of the crime, defendant's character, background, history, mental and physical

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condition, and any aggravating or mitigating circumstances. Any such evidence, not legally privileged, which the court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rule of evidence, provided that the defendant and the prosecution are accorded a fair opportunity to rebut such evidence.

(3) Verdict and Sentence. The determination whether a sentence of death shall be imposed shall be in the discretion of the court, except that when the proceeding is conducted before the court sitting with a jury, the court shall not impose a sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or life imprisonment and the jury returns a verdict that the sentence should be death.

If the jury is unable to reach a unanimous verdict, the court shall impose a sentence of life imprisonment.

Comment

The separate penalty trial procedure provided by this section is designed to exclude from the trial stage testimony relevant only to punishment and likely to prejudice the trial of guilt. Under subsection (1), the defendant is entitled to have the penalty issue put to a jury even though he has elected to have his guilt determined by the court alone or to plead guilty. The right to waive a jury, however, is subject to approval of the court, on the view that the court should be entitled to share responsibility with a jury in imposing the extreme penalty. Contrary to federal practice at the trial stage, the section denies to the prosecution any participation in the decision as to whether there should be a penalty jury.

The provisions of subsections (2) and (3) are derived from A.L.I. Model Penal Code § 21.02(2), 27 R.T. Pen. Law § 10.33.

This section contemplate that the judge may decide, without conducting a separate proceeding and without participation of a jury, that a defendant whose sentence is imposed life imprisonment rather than the death penalty. An alternative supported by a substantial body of opinion in the Commission would be to sentence a defendant to death in those cases in which the judge determines there is a high probability of conviction and in order to avoid the presentation as an opportunity to address evidence in favor of the death penalty and to permit the decision to impose the death penalty to be made by the jury subject to review by the court. See § 3502, supra.

Some Commissioners, however, object to jury sentencing in any case, whether or not capital punishment is involved.

§ 3804: Death Sentence Excluded.

The court shall impose a sentence of life imprisonment if it is satisfied that:

(a) the defendant was less than eighteen years old at the time of the commission of the crime;
(b) the defendant's physical or mental condition calls for leniency;
(c) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt; or
(d) there are other substantial mitigating circumstances which render sentence of death unwarranted.

Comment
This section mandates a choice in favor of life imprisonment. In addition to its duty to take the death issue away from the jury in those cases, the court would, under § 3604(d), always have discretion to take the issue from the jury or reverse the jury in favor of a life sentence. Thus concurrence of court and jury, if any, is required to impose the death sentence or alternative life sentence.

An alternative, supported by a substantial body of opinion in the United States, is to have the jury determine the issue of the life issue first. Thus, under this proposal, the court would be to require submission of the issue to a jury below the court makes an own determination. The defendant would be in the position of settling aside a jury verdict in favor of death, presumably only where he regarded the jury verdict as arbitrary. In addition, some commentators would favor lowering the age requirement in paragraph (a) to 16, while others questioned the effect of the requirement of paragraph (c), believing that it might serve to block the imposition of the death penalty in cases where it was appropriate.

(1) Consideration of Aggravating and Mitigating Circumstances. In deciding whether a sentence of death should be imposed, the court and the jury, if any, may consider the mitigating and aggravating circumstances set forth in the subsections below.

(2) Mitigating Circumstances. In the cases of both treason and murder the following shall be mitigating circumstances:
(a) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(b) the defendant acted under duress or other compelling circumstances;
(c) at the time of the offense, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
(d) the defendant was young at the time of the offense;
(e) the defendant was an accomplice in the offense committed by another person and his participation in the offense was relatively minor.

(3) Aggravating Circumstances. In the case of treason, the following shall be aggravating circumstances:
(a) the defendant knowingly created a great risk of death to another person or a great risk of substantial impairment of national security;
(b) the defendant violated a legal duty concerning protection of the national security;
(c) the defendant committed treason for pecuniary gain.

(4) Aggravating Circumstances (Murder). In the case of murder, the following shall be aggravating circumstances:
(a) the defendant was previously convicted of another murder or a felony involving the use or threat of violence to a person, or has a substantial history of serious assaultive or террорistic criminal activity;
(b) at the time the murder was committed the defendant also committed another murder;
(c) the defendant knowingly created a great risk of death to at least several persons;
(d) the murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, expropriation of an aircraft, espionage or sabotage;
(e) the murder was committed for pecuniary gain;
(f) the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity;
(g) the murder was of a law enforcement officer, or a public servant having custody of the defendant or another, to prevent or on account of the performance of his official duties;
(h) the murder was of the President, Vice President, President-elect or Vice President-elect of the United States.

Comment
This section is adapted from A.L.I. Model Penal Code provisions on the possible life of death penalty. When the aggravating circumstances are to make the distinction between a murder and the kind of murder for which the death penalty is available.
Appellate Review of Sentence

Title 28, United States Code

§ 1291. Final Decisions of District Courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court. Such review shall in criminal cases include the power to review the sentence and to modify or set it aside for further proceedings.

Comment

Under existing law, all aspects of a criminal case except sentence are subject to appellate review. Several states provide for review of sentences, and the American Bar Association has endorsed it as a standard for the proper administration of criminal justice. In 1987 the Senate passed a review-of-sentences measure (S. 744, 104th Cong., 1st Sess.). In the Organized Crime Control Act of 1970 (P.L. 91-452; 18 U.S.C. § 3572), appeal to permitted by both the government and the defendant from the district court's decision following a special findings-offender sentencing hearing. In addition to the reasons usually advanced, review is deemed essential to carry out the sentencing approach of the Code, under which standards are imposed on several points for the exercise of discretion by the sentencing court, e.g., which warrant imposition of upper-range penalty sentences (§ 3553). The Federal Courts Study Commission's (Revised Edition) analysis of the appellate review of criminal sentences (radiated portion) is intended to reflect only the Commission's view that there should be some kind of sentence review and not on Commission recommendation as to its features. Among the possibilities are: permitting appeals from sentences like any other appeal; permitting the appellate court to decrease, but not increase, the sentence; permitting appeal by the government as well as the defendant; restricting appeal to specified kinds of sentences, e.g., long prison terms, and permitting appeal only upon leave of the appellate court.

See Working Papers, pp. 1554-55, 1573.