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LEGISLATIVE COUNCIL OF MARYLAND

Item No. 6-13

By: Commission on Criminal Law
Report Submitted: November 25, 1974
Assigned to: House Judiciary Committee and Senate Judicial Proceedings Committee

A BILL ENTITLED

AN ACT concerning

Proposed Criminal Code

FOR the purpose of adding a new Article to the Annotated Code of Maryland, to be designated and known as the "Criminal Law" Article; abolishing all criminal offenses and defenses under the common law; repealing certain statutory crimes and penalties specifying certain conduct, acts, and omissions which constitute criminal offenses; classifying and designating criminal offenses; providing for the prosecution of criminal offenses; providing for limitations and bars to prosecution of criminal offenses; specifying standards for criminal liability; creating certain defenses to criminal offenses; providing for sentencing, penalties, and punishment of persons committing criminal offenses; providing for appellate review of sentences; providing for modification of sentences, probation, conditional discharge, and parole of criminal offenders; transferring, revising, restating, and recodifying certain statutory provisions relating to crimes, punishments, criminal law and procedure; and generally revising the criminal law of the State of Maryland.

BY adding

Article - Criminal Law
Annotated Code of Maryland

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That a new Article of the Annotated Code of Maryland designated "Criminal Law" be and it is hereby enacted, to read as follows:

Article - CRIMINAL LAW

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.
Numerals at right identify computer lines of text.

TITLE 1 — PROVISIONS APPLICABLE TO ALL CRIMES

SUBTITLE A — GENERAL PROVISIONS

PART 1 — SHORT TITLE AND GENERAL PURPOSES

1.00. SHORT TITLE

THIS ARTICLE SHALL BE KNOWN AS THE "CRIMINAL CODE OF MARYLAND." IT MAY BE SUFFICIENTLY REFERRED TO IN OTHER PROVISIONS OF THIS ARTICLE AS SUCH, AS "THE CRIMINAL CODE" OR AS "THIS CODE."

COMMENT

"Penal Law" is used in the corresponding New York provision; "Criminal Code" seems more in accordance with Maryland usage.

Where the Commission followed the New York provisions, it generally used a special pamphlet edition of the Revised Penal Law (Effective September 1, 1967) published in 1965, between the time of enactment and the time the new law came into effect. Citations herein to the New York law refer to this edition unless otherwise noted. These provisions are substantially identical to what became New York Penal Law (McKinney 1967), and occasionally reference is made to the 1967 edition or supplements thereto.

1.05. GENERAL PURPOSES

THE GENERAL PURPOSES OF THE PROVISIONS OF THIS ARTICLE ARE:

1. TO PROSCRIBE CONDUCT WHICH UNJUSTIFIABLY AND INEXCUSABLY CAUSES OR THREATENS SUBSTANTIAL HARM TO INDIVIDUAL OR PUBLIC INTERESTS;

2. TO GIVE FAIR WARNING OF THE NATURE OF THE CONDUCT PROSCRIBED AND OF THE SENTENCES AUTHORIZED UPON CONVICTION;

3. TO DEFINE THE ACT OR OMISSION AND THE ACCOMPANYING MENTAL STATE WHICH CONSTITUTE EACH OFFENSE;

4. TO DIFFERENTIATE ON REASONABLE GROUNDS BETWEEN SERIOUS AND MINOR OFFENSES AND TO PRESCRIBE PROPORTIONATE PENALTIES THEREFOR; AND

5. TO INSURE THE PUBLIC SAFETY BY PREVENTING THE COMMISSION OF OFFENSES THROUGH THE DETERRENT INFLUENCE OF

THE SENTENCES AUTHORIZED, THE REHABILITATION OF THOSE CONVICTED, AND THEIR CONFINEMENT WHEN REQUIRED IN THE INTERESTS OF PUBLIC PROTECTION.

COMMENT

This is taken without substantial change from the corresponding New York section 1.05. It seems to be a good general statement of the objectives of a criminal code.

1.10. ABOLITION OF COMMON LAW OFFENSES AND DEFENSES

ALL COMMON LAW OFFENSES AND COMMON LAW DEFENSES (INCLUDING PARTIAL DEFENSES SUCH AS MITIGATING FACTORS WHICH WOULD REDUCE THE GRADE OF AN OFFENSE) ARE HEREBY ABOLISHED. NO CONDUCT OR OMISSION CONSTITUTES AN OFFENSE UNLESS IT IS A CRIME OR VIOLATION UNDER THIS CODE OR UNDER ANOTHER STATUTE OR APPLICABLE MUNICIPAL ORDINANCE, AND UNLESS THE CODE, STATUTE, OR ORDINANCE FAIRLY WARNS THE DEFENDANT THAT HIS CONDUCT IS PROHIBITED.

COMMENT

New York has no exactly corresponding provision because prior New York law had already abolished common law crimes and defenses. Abolition is necessary in any attempt at complete codification of the criminal law. Cf. section 10.05, providing for the continued life of common law terms, other than those denoting offenses, defenses, or principles of mitigation, where these have received a judicial construction. For example, the Commission defines "burglary" because all offenses must be defined by the code, but it does not define the "entry" which is an important component of burglary, because it is satisfied with the common law interpretation of that word. It does define "night" because the common law term was thought to require some clarification. See section 140.00, infra.

Note that the effective date of this provision is determined by section 5.05, infra.

PART 5 — GENERAL RULES — APPLICABILITY; TIME LIMITATIONS ON PROSECUTIONS; MULTIPLE PROSECUTIONS; INCORPORATED OFFENSES; IMMUNITY

5.05. APPLICATION OF CODE TO OFFENSES COMMITTED BEFORE AND AFTER ENACTMENT

1. THE PROVISIONS OF THIS CODE SHALL GOVERN THE

CONSTRUCTION OF AND PUNISHMENT FOR ANY OFFENSE DEFINED IN THIS CODE AND COMMITTED AFTER THE EFFECTIVE DATE HEREOF, AS WELL AS THE CONSTRUCTION AND APPLICATION OF ANY DEFENSE TO A PROSECUTION FOR SUCH AN OFFENSE.

2. UNLESS OTHERWISE EXPRESSLY PROVIDED, OR UNLESS THE CONTEXT OTHERWISE REQUIRES, THE PROVISIONS OF THIS CODE SHALL GOVERN THE CONSTRUCTION OF AND PUNISHMENT FOR ANY OFFENSE DEFINED OUTSIDE OF THIS CODE AND COMMITTED AFTER THE EFFECTIVE DATE THEREOF, AS WELL AS THE CONSTRUCTION AND APPLICATION OF ANY DEFENSE TO A PROSECUTION FOR SUCH AN OFFENSE.

3. THE PROVISIONS OF THIS CODE DO NOT APPLY TO OR GOVERN THE CONSTRUCTION OF AND PUNISHMENT FOR ANY OFFENSE COMMITTED PRIOR TO THE EFFECTIVE DATE OF THIS CODE, OR THE CONSTRUCTION AND APPLICATION OF ANY DEFENSE TO A PROSECUTION FOR SUCH AN OFFENSE. SUCH AN OFFENSE MUST BE CONSTRUED AND PUNISHED ACCORDING TO THE PROVISIONS OF LAW EXISTING AT THE TIME OF THE COMMISSION THEREOF IN THE SAME MANNER AS IF THIS CODE HAD NOT BEEN ENACTED.

COMMENT

This section makes it clear that the code has no retroactive effect, but that it presumptively applies to penal provisions found outside the code, as well as those proscribed by the code, after the effective date of the code.

5.10. OTHER LIMITATIONS ON APPLICABILITY OF THIS CODE

1. EXCEPT AS HEREIN OTHERWISE PROVIDED, THE PROCEDURE GOVERNING THE ACCUSATION, PROSECUTION, CONVICTION AND PUNISHMENT OF OFFENDERS AND OFFENSES IS NOT REGULATED BY THIS CODE.

2. THIS CODE DOES NOT AFFECT ANY POWER CONFERRED BY LAW UPON ANY COURT-MARTIAL OR OTHER MILITARY AUTHORITY OR OFFICER TO PROSECUTE AND PUNISH CONDUCT AND OFFENDERS VIOLATING MILITARY CODES OR LAWS.

3. THIS CODE DOES NOT BAR, SUSPEND, OR OTHERWISE AFFECT ANY RIGHT OR LIABILITY TO DAMAGES, PENALTY, FORFEITURE OR OTHER REMEDY AUTHORIZED BY LAW TO BE RECOVERED OR ENFORCED IN A CIVIL ACTION, REGARDLESS OF WHETHER THE CONDUCT INVOLVED IN SUCH CIVIL ACTION CONSTITUTES AN OFFENSE DEFINED IN THIS CODE.

COMMENT

These are technical provisions, designed to avoid implied changes in civil, military, and procedural areas.

TERRITORIAL APPLICABILITY

EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, A PERSON MAY BE CONVICTED UNDER THE LAW OF THIS STATE OF AN OFFENSE COMMITTED BY HIS OWN CONDUCT OR THE CONDUCT OF ANOTHER FOR WHICH HE IS LEGALLY ACCOUNTABLE IF:

(A) EITHER THE CONDUCT THAT IS AN ELEMENT OF THE OFFENSE OR THE RESULT THAT IS AN ELEMENT OCCURS WITHIN THIS STATE; OR

(B) CONDUCT OCCURRING OUTSIDE THIS STATE IS SUFFICIENT UNDER THE LAW OF THIS STATE TO CONSTITUTE AN ATTEMPT TO COMMIT AN OFFENSE AND IS INTENDED TO TAKE EFFECT IN MARYLAND; OR

(C) CONDUCT OCCURRING OUTSIDE THE STATE IS SUFFICIENT UNDER THE LAW OF THIS STATE TO CONSTITUTE A CONSPIRACY TO COMMIT AN OFFENSE WITHIN THE STATE AND AN OVERT ACT IN FURTHERANCE OF THE CONSPIRACY OCCURS WITHIN THE STATE; OR

(D) CONDUCT OCCURRING WITHIN THE STATE ESTABLISHES COMPLICITY IN THE COMMISSION OF, OR AN ATTEMPT, SOLICITATION OR CONSPIRACY TO COMMIT, AN OFFENSE IN ANOTHER JURISDICTION WHICH ALSO IS AN OFFENSE UNDER THE LAW OF THIS STATE; OR

(E) THE OFFENSE CONSISTS OF THE OMISSION TO PERFORM A LEGAL DUTY IMPOSED BY THE LAW OF THIS STATE WITH RESPECT TO DOMICILE, RESIDENCE OR A RELATIONSHIP TO A PERSON, THING OR TRANSACTION IN THE STATE; OR

(F) THE OFFENSE IS A VIOLATION OF A STATUTE OF THIS STATE THAT EXPRESSLY PROHIBITS CONDUCT OUTSIDE THIS STATE, THE CONDUCT AFFECTS A LEGISLATIVELY PROTECTED INTEREST OF OR WITHIN THE STATE, AND THE ACTOR KNOWS THAT HIS CONDUCT IS LIKELY TO AFFECT THAT INTEREST.

2. SUBSECTION (1)(A) DOES NOT APPLY IF EITHER CAUSING A SPECIFIED RESULT OR AN INTENT TO CAUSE OR DANGER OF CAUSING THAT RESULT IS AN ELEMENT OF AN OFFENSE AND THE RESULT OCCURS OR IS DESIGNED OR LIKELY TO OCCUR ONLY IN ANOTHER JURISDICTION WHERE THE CONDUCT CHARGED WOULD NOT CONSTITUTE AN OFFENSE, UNLESS A LEGISLATIVE PURPOSE PLAINLY APPEARS TO DECLARE THE CONDUCT CRIMINAL REGARDLESS OF THE PLACE OF THE RESULT.

3. SUBSECTION (1)(A) DOES NOT APPLY IF CAUSING A PARTICULAR RESULT IS AN ELEMENT OF AN OFFENSE AND THE RESULT IS CAUSED BY CONDUCT OCCURRING OUTSIDE THE STATE THAT WOULD NOT CONSTITUTE AN OFFENSE IF THE RESULT HAD OCCURRED THERE, UNLESS THE ACTOR INTENTIONALLY OR KNOWINGLY CAUSED THE RESULT WITHIN THE STATE.

4. WHEN THE OFFENSE IS HOMICIDE, EITHER THE DEATH OF THE VICTIM OR THE BODILY IMPACT CAUSING DEATH CONSTITUTES A "RESULT" WITHIN THE MEANING OF SUBSECTION (1)(A). IF THE BODY OF A HOMICIDE VICTIM IS ORIGINALLY DISCOVERED WITHIN THE STATE, IT SHALL BE PRIMA FACIE EVIDENCE THAT THE RESULT OCCURRED WITHIN THE STATE.

5. "STATE" INCLUDES THE LAND AND WATER, AND THE AIR SPACE ABOVE THAT LAND AND WATER, WITH RESPECT TO WHICH THE STATE HAS LEGISLATIVE JURISDICTION.

6. WHERE CONDUCT CONSTITUTING A CRIME CONSISTS OF SEVERAL ELEMENTS OR PARTS, ANY SUCH ELEMENT OR PART SHALL CONSTITUTE "CONDUCT" AS THAT WORD IS USED IN THIS SECTION.

COMMENT

The New York Penal Law contains no corresponding provision because the matter is dealt with in a separate code of criminal procedure. The Commission preferred as a drafting model the American Law Institute's Model Penal Code §1.03 (Proposed Official Draft, 1962). Only slight changes were made. In general, the section makes it possible to reach any conduct which occurs wholly or partly in the State, or which causes a harmful result within the State. For further information, see the Status Note to the section in the Proposed Official Draft and the Comment to the section in Tentative Draft Number 5 (1956) of the Model Penal Code.

5.20. TIME LIMITATIONS ON PROSECUTIONS

THE FOLLOWING PROVISIONS SHALL GOVERN THE TIMES WITHIN WHICH PROSECUTIONS SHALL BE COMMENCED:

1. A PROSECUTION FOR A CLASS A FELONY MAY BE COMMENCED AT ANY TIME.

2. EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, PROSECUTIONS FOR OTHER OFFENSES SHALL BE COMMENCED WITHIN THE RESPECTIVE PERIODS AFTER THE COMMISSION THEREOF WHICH ARE SPECIFIED BELOW:

(A) FOR A CLASS B FELONY, WITHIN SIX YEARS;

(B) FOR ANY OTHER FELONY, WITHIN THREE YEARS;

(C) FOR A MISDEMEANOR, WITHIN ONE YEAR; AND

(D) FOR A VIOLATION, WITHIN SIX MONTHS.

3. IF ANY STATUTE CREATING OR DEFINING AN OFFENSE WHICH IS NOT CONTAINED IN THIS CODE FIXES A LESSER PERIOD OF LIMITATIONS FOR COMMENCING A PROSECUTION THEREFOR, SUCH LESSER PERIOD SHALL APPLY.

4. IF THE PERIOD PRESCRIBED BY SUBSECTION 2 HAS EXPIRED, A PROSECUTION MAY NEVERTHELESS BE COMMENCED AS SET FORTH BELOW:

(A) A PROSECUTION FOR LARCENY COMMITTED BY A PERSON IN VIOLATION OF A FIDUCIARY DUTY MAY BE COMMENCED WITHIN ONE YEAR AFTER THE FACTS CONSTITUTING SUCH OFFENSE ARE DISCOVERED OR, IN THE EXERCISE OF REASONABLE DILIGENCE, SHOULD HAVE BEEN DISCOVERED BY THE AGGRIEVED PARTY OR BY A PERSON UNDER A LEGAL DUTY TO REPRESENT HIM WHO IS NOT HIMSELF IMPLICATED IN THE COMMISSION OF THE OFFENSE.

(B) A PROSECUTION FOR ANY OFFENSE INVOLVING MISCONDUCT IN PUBLIC OFFICE BY A PUBLIC SERVANT MAY BE COMMENCED AT ANY TIME DURING THE DEFENDANT'S SERVICE IN SUCH OFFICE OR WITHIN FIVE YEARS AFTER THE TERMINATION OF SUCH SERVICE; PROVIDED HOWEVER, THAT IN NO EVENT SHALL THE PERIOD OF LIMITATION BE EXTENDED BY MORE THAN FIVE YEARS BEYOND THE PERIOD OTHERWISE APPLICABLE UNDER SUBDIVISION TWO.

5. IN CALCULATING THE TIME LIMITATION APPLICABLE TO COMMENCEMENT OF A CRIMINAL ACTION, THE FOLLOWING PERIODS SHALL NOT BE INCLUDED:

(A) ANY PERIOD FOLLOWING THE COMMISSION OF THE OFFENSE DURING WHICH (I) THE DEFENDANT WAS CONTINUOUSLY OUTSIDE THIS STATE OR (II) THE WHEREABOUTS OF THE DEFENDANT WERE CONTINUOUSLY UNKNOWN AND CONTINUOUSLY UNASCERTAINABLE BY THE EXERCISE OF REASONABLE DILIGENCE. HOWEVER, IN NO EVENT SHALL THE PERIOD OF LIMITATION BE EXTENDED BY MORE THAN FIVE YEARS BEYOND THE PERIOD OTHERWISE APPLICABLE UNDER SUBDIVISION TWO.

(B) WHEN A PROSECUTION FOR AN OFFENSE IS LAWFULLY COMMENCED WITHIN THE PRESCRIBED PERIOD OF LIMITATION THEREFOR, AND WHEN AN INDICTMENT, INFORMATION OR WARRANT UPON WHICH SUCH PROSECUTION IS BASED IS SUBSEQUENTLY DISMISSED BY AN AUTHORIZED COURT UNDER DIRECTIONS OR CIRCUMSTANCES PERMITTING THE LODGING OF ANOTHER CHARGE FOR THE SAME OFFENSE OR AN OFFENSE BASED ON THE SAME CONDUCT, THE PERIOD EXTENDING FROM THE COMMENCEMENT OF THE THUS DEFEATED PROSECUTION TO THE DISMISSAL OF THE INDICTMENT, INFORMATION OR WARRANT DOES NOT CONSTITUTE A PART OF THE PERIOD OF LIMITATION APPLICABLE TO COMMENCEMENT OF PROSECUTION BY A NEW CHARGE.

COMMENT

Provisions regarding limitations are based on §30.10 of the New York Criminal Procedure Law and §1.06 of the Model Penal Code. Under present Maryland law, there is no time limit on prosecutions for murder or other felonies or those curious hybrids commonly known as penitentiary misdemeanors. For other misdemeanors there is a general one-year limitation on prosecutions.

This draft does not follow either the New York law or the Model Penal Code exactly as to periods of limitation. (It may also be noted that the three are not identical in the classification of offenses.) None of the three imposes any time limit for prosecutions for murder (which is a class A felony in New York). No time limit is imposed by this draft or by New York upon prosecutions for class A felonies; the Model Penal Code fixes a six-year limit for prosecutions for its corresponding classification called felonies of the first degree. This draft places a six-year limit for class B felonies (conspiracy to commit a class A felony, manslaughter, and burglary, arson or robbery, each in the first degree). New York lumps all felonies below class A together with a five-year period of limitations. The Model Penal Code makes a similar grouping, with a three-year period, and this draft fixes a three-year limitation for the three lower grades of felony (C, D, and E).

There are also variations in limitations as to misdemeanors and lesser offenses. For misdemeanors, New York and the Model Penal Code fix two years; this draft fixes one year. For lesser offenses, New York makes the period one year; this draft and the Model Penal Code make it six months. This draft contains one provision (subsection 3) not found in the others – and possibly not necessary – that if an offense proscribed by another statute and not contained in this Code fixes a shorter period of limitations, that shorter limitation applies.

Subsections 4 and 5 follow the corresponding New York provisions almost verbatim and are very similar to the corresponding Model Penal Code provisions. The provisions of subsection 4 extend the period of limitation in two situations in which it is likely that the defendant's own position and conduct will prevent the early discovery of his crime: theft by a fiduciary and misconduct by a public servant. In the first case prosecution may be brought within one year after the facts are discovered, or should, in the exercise of reasonable

diligence, have been discovered. In the second case prosecution may be commenced at any time while the accused continues to serve in office or within five years after he ceases to serve, but this provision may not extend the normal statute of limitations period for the offense by a total of more than five years.

Subsection 5 suspends the period of limitations while the accused is outside the state under certain conditions, but not for more than five years beyond the normal period. It also provides that in the case of an abortive prosecution, which ultimately reguires the filing of a new charge, the period during which the abortive prosecution was being carried forward does not count as a part of the limitation period.

INTRODUCTION TO DOUBLE JEOPARDY PROVISIONS

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The great majority of state constitutions contain similar provisions. The Maryland Constitution is a notable exception and makes no mention of double jeopardy. The Maryland courts, however have long held that the protection against double jeopardy was part of the common law of this state. State v. Barger, 242 Md. 616, 220 A. 2d 304 (1966); Hoffman v. State, 20 Md. 425 (1863). That protection has been defined rather narrowly in the past. The Maryland decisions have frequently quoted and applied the Hoffman court's interpretation of double jeopardy:

> "At common law it meant nothing more than that where there had been a final verdict either of acquittal or conviction on an adequate indictment, the defendant could not be a second time placed in jeopardy for the particular offense." 20 Md. 425, 434 (1863).

Two recent developments have had a major impact on the Maryland law of double jeopardy. First, the Maryland courts have developed a modern doctrine of merger. Veney v. State, 227 Md. 608, 177 A. 2d 883 (1962); Tender v. State, 2 Md. App. 692, 237 A. 2d 65 (1968). Merger of offenses occurs if one offense "necessarily involves another, viz., when the facts necessary to prove the lesser offense are essential ingredients in establishing the greater offense, the lesser offense is merged with the greater offense." Stewart v. State, 4 Md. App. 565, 569, 244 A. 2d 452 (1968). Thus, the assault

with intent to rape that precedes a rape and the rape itself merge and become one offense. The defendant cannot be convicted of both offenses unless the State proves a separate and distinct assault with intent to rape that is not incidental to the actual rape. See Jenkins v. State, 3 Md. App. 243, 248–249, 238 A. 2d 922 (1968). The protection accorded the defendant by this modern doctrine of merger is similar to the protection afforded by the common law of double jeopardy, and many decisions have recognized that the doctrine of merger is part of or closely connected with the law of double jeopardy. Veney v. State, supra at 611–612. As recently stated by Judge Orth: "We recognize that a person should not be twice punished for the same acts whether the offenses charged by reason of such acts be deemed to be inconsistent, duplicitous or to have merged." Tender v. State, supra at 700. Futhermore, if the lesser offense is a necessary element of the greater one, an acquittal or conviction of one offense should bar a subsequent prosecution for the other because the defendant has already been placed in jeopardy for the merged offense. Gilpin v. State, 142 Md. 464, 121 A. 354 (1925); Veney v. State, supra; cf. Bennett v. State, 229 Md. 208, 182 A. 2d 815 (1962) (discussed below).

The second recent development affecting the Maryland law of double jeopardy is the Supreme Court's decision in Benton v. Maryland, 395 U.S. 784 (1969), holding the Double Jeopardy Clause in the Fifth Amendment to the United States Constitution enforceable against the states through the Due Process Clause of the Fourteenth Amendment. The effect of this decision is that federal constitutional standards on what constitutes double jeopardy are now available to defendants in the Maryland courts. Boblits v. State, 7 Md. App. 391, 256 A. 2d 187 (1969). As a result, much of the prior Maryland law on double jeopardy has been superseded by the new federal requirements. State v. Campbell and Reeves, 7 Md. App. 538, 256 A. 2d 537 (1969) (legislature may no longer constitutionally authorize state to appeal an acquittal).

Against this background §§5.25 to 5.50 state in legislative form the law of double jeopardy. Their purpose is to prevent undue harassment of the defendant without jeopardizing the ability of the State to maintain one successful prosecution. The following sections employ §§150–154 of the Proposed Michigan Criminal Code (Final Draft – Sept. 1967) as a working model.

5.25. PROSECUTION FOR MULTIPLE OFFENSES; INCLUDED OFFENSES

1. IF THE SAME CONDUCT OF THE DEFENDANT MAY ESTABLISH THE COMMISSION OF MORE THAN ONE OFFENSE, HE MAY BE PROSECUTED FOR EACH SUCH OFFENSE AND MAY BE CONVICTED AND SENTENCED THEREFOR SUBJECT, HOWEVER, TO ANY APPLICABLE LIMITATION OR LIMITATIONS EXPRESSED IN SUBSECTION 3 HEREOF OR IN SECTIONS 5.30, 5.35, 5.40 OR 5.45.

2. AN INDICTMENT, INFORMATION OR WARRANT MAY CHARGE A DEFENDANT WITH AN OFFENSE (REFERRED TO IN THIS PART AS AN "INCLUSIVE OFFENSE") AND WITH ONE OR MORE OTHER OFFENSES INCLUDED THEREIN. AS USED IN THIS PART, AN OFFENSE IS AN "INCLUDED OFFENSE" IF:

(A) IT IS ESTABLISHED BY THE PROOF OF THE SAME OR OF SOME BUT LESS THAN ALL OF THE FACTS REQUIRED TO ESTABLISH THE COMMISSION OF THE INCLUSIVE OFFENSE CHARGED; OR

(B) IT CONSISTS OF A SOLICITATION TO COMMIT THE INCLUSIVE OFFENSE CHARGED OR TO COMMIT AN OFFENSE OTHERWISE INCLUDED WITHIN IT; OR

(C) IT IS AN INCORPORATED OFFENSE WITHIN THE MEANING OF SECTION 5.55.

3. EXCEPT AS PROVIDED IN §5.55 AS TO INCORPORATED OFFENSES, A DEFENDANT MAY NOT BE CONVICTED OF ANY INCLUDED OFFENSE WHICH IS NOT SEPARATELY CHARGED. A CONVICTION OF AN INCLUSIVE OFFENSE WITHOUT A SPECIFIC FINDING OF GUILT ON AN INCLUDED OFFENSE SHALL NOT OPERATE AS AN ACQUITTAL OF THE INCLUDED OFFENSE.

4. THE TRIAL COURT SHALL NOT BE OBLIGATED TO INCLUDE IN ITS CHARGE TO THE JURY ANY INSTRUCTION WITH REGARD TO A POSSIBLE VERDICT FINDING THE DEFENDANT NOT GUILTY OF AN INCLUSIVE OFFENSE BUT GUILTY OF AN INCLUDED OFFENSE WHERE THE EVIDENCE AFFORDS NO RATIONAL BASIS FOR SUCH A VERDICT.

COMMENT

§5.25(1) recognizes that a defendant's course of conduct may involve more than one offense. A defendant may rob a bank and kill two of the tellers. The opening sentence of §5.25(1) permits the State, subject to the limitations in subsection 3 and in §§5.30–5.45, to prosecute, convict and sentence the defendant for each offense he has committed. Subsection 3(§5.25(3)) limits the situations where the State may convict the defendant for an included offense under an indictment,

information or warrant for an inclusive offense that does not separately charge the included offense. The State must separately charge the included offense except where the included offense is also an incorporated offense under §5.55. The sections which follow impose restrictions on multiple punishment (§5.30) and on successive prosecutions (§§5.35–5.45).

§5.25(2) defines a broadened concept of lesser included offenses. If one offense is included within another under this subsection, multiple punishments are barred by §5.30(1)(a) and successive prosecutions restricted by §5.35(1)(b) and (c). Multiple convictions for inclusive and included offenses are not barred by §5.25 or the sections which follow. §5.30(2) provides, however, that the defendant shall only be sentenced for the most serious inclusive offense of which he is convicted.

Lesser included offenses are found in three situations under §5.25(2). Paragraph (a) basically coincides with the present Maryland law on merger. Two offenses now merge when the facts necessary to prove one offense necessarily establish the commission of the other. Stewart v. State, 4 Md. App. 565, 569, 244 A. 2d 452 (1968). Normally, courts have looked at the definitions of the various offenses to determine if the proof of one offense always involves the proof of another. Thus, every robbery was held to include an assault with intent to rob and a common law assault. Tender v. State, 2 Md. App. 692, 237 A. 2d 65 (1968); Massey v. State, 7 Md. App. 615, 256 A. 2d 614 (1969). Paragraph (a) reformulates the test to require the court to consider the actual evidence in each case to determine whether the proof that the defendant committed one offense also establishes that he committed another included offense. This reformulation is necessary because this Code defines offenses more precisely than they have been defined in the past. A number of lesser offenses contain additional material elements which the State must prove but which are not necessary elements of more serious offenses. For instance, it is possible to imagine a robbery (§160.00) that does not contain all the material elements of any one of the four degrees of assault (§§120.05–120.20). Almost every robbery, however, will still include an assault; and the jury should be able in these cases where the defendant is charged with both robbery and assault to convict him of the appropriate degree of assault whether or not it convicts him of robbery. On the other hand, where there are multiple convictions, §5.30 permits only one punishment. That section,

however, allows an appellate court to uphold convictions for lesser included offenses while reversing convictions for more serious inclusive offenses on grounds of insufficient evidence. See §5.30(2)(a).

Paragraph (b) provides that a sclicitation to commit an offense is included in the completed offense. This provision of course can apply only where the intended offense is completed and the defendant is convicted thereof. If solicitation fails to achieve its intended result, the solicitation may itself constitute a separate offense; it cannot be an element of a non-existent completed offense. A similar result with respect to attempts is achieved through paragraph (c). Present Maryland law does not treat this problem as one of merger but achieves the same result by holding that convictions for both the attempt and the completed offense are inconsistent and connot stand if the defendant suffers prejudice thereby. Jones v. State, 3 Md. App. 608, 613, 247 A. 2d 347 (1968); Price v. State, 3 Md. App. 155, 238 A. 2d 275 (1968).

Paragraph (c) deals with incorporated offenses, as defined in §5.55. These include most offenses which are divided into degrees. The lesser degree is not necessarily included in the greater degree under paragraph (a) because it is often established by proof of facts that are not necessary for the proof of the greater offense. For instance, the State may establish criminal trespass in the third degree under §140.05(3) by proving that the defendant, under conditions, drove a snowmobile over the property of another. Proof of the use of a snowmobile is not necessary to establish the State's case for criminal trespass in the second degree under §140.10. Paragraph (c) operates in this type of situation to prevent multiple punishments and restrict successive prosecutions for what are in effect degrees of the same offense. It accomplishes this goal by treating a lesser degree of an offense that is divided into degrees as an included offense.

Incorporated offenses also involve a number of situations where the lesser offense is not specifically denominated by statute a different degree of the greater offense but requires only a less serious injury or risk of injury or a lesser kind of culpability. For example, many lesser offenses require the same proof as do greater offenses except that they require only recklessness or negligence while the greater offense requires some form of intent or knowledge. Conceptually, it

cannot be said that upon proof of the intentional or knowing conduct that all of the elements of the reckless or negligent conduct have been established. It is more accurate to say that one offense is of lesser culpability than another. Manslaughter (§125.20) and criminally negligent homicide (§125.25) are thus offenses of lesser culpability which are included in murder. Paragraph (c) is in accord with present Maryland law which treats as duplicitous multiple convictions for homicide offenses where only one death is involved.

§5.25(3) provides that in many cases a defendant may not be convicted of an included offense under an indictment, information, or warrant charging an inclusive offense unless the included offense is separately charged. Thus, an indictment or information charging rape should also charge the included offense of assault if the State is interested in securing a conviction for this offense. The State need not, however, charge each degree of these offenses because a charge of the highest degree of rape, or assault that the State expects to prove at trial will support a conviction for a lesser degree of those offenses even though the lesser degree is not separately charged. The reason for this distinction is that a charge of rape standing alone does not adequately notify the defense that the defendant may be convicted of assault, coercion or some other unexpected included offense. These offenses may be "established by the proof of the same or of some but less than all of the facts required to establish the commission of the inclusive offense" and thus may be included offenses under §5.25(2)(a). If the prosecutor wishes to secure convictions for these offenses he should separately charge them. This requirement is in accord with present practice whereby the State charges in a multicount indictment rape, assault with intent to rape, and simple assault. Section 5.55 (and §155.05 with respect to larceny offenses) deals with cases where fairness does not require a related charge to be stated explicitly in the indictment or information.

The final sentence in §5.25(3) provides that a conviction of an inclusive offense without a specific finding of guilt on an included offense does not operate as an implied acquittal so as to bar a retrial if the conviction for the inclusive offense is set aside, reversed or vacated.

§5.25(4) leaves it to the discretion of the trial judge whether to mention lesser included offenses in his charge to the jury if there is

nothing in the evidence logically to warrant such a charge. The trial judge's failure to instruct in this situation is not reversible error.

The trier of the facts must determine on the basis of the actual evidence in a case whether one offense is included within another or is a separate and distinct offense. A defendant may assault his victim and after he has completed the assault may decide to rob him. The interval between the first assault and the subsequent robbery (which necessarily includes an additional assault) may be sufficient on the facts of a particular case to justify a finding that the first assault was a separate and distinct offense that did not merge into the robbery. Present law permits such a finding. See Tender v. State, 2 Md. App. 692, 698, 237 A. 2d 65 (1967); Jenkins v. State, 3 Md. App. 243, 238 A. 2d 922 (1968). It is also permitted under §5.25(2)(a) where the prior assault is separate and distinct and thus not "established" by proof of the robbery.

5.30. LIMITATIONS ON MULTIPLE PUNISHMENTS

1. EXCEPT AS PROVIDED IN §5.35(3) AND IN SUBSECTION 2 OF THIS SECTION, A DEFENDANT WHO IS CONVICTED IN A SINGLE PROSECUTION OR AT A SINGLE TRIAL OF MORE THAN ONE OFFENSE MAY BE SENTENCED ONLY FOR ONE OFFENSE AND A CONVICTION OF ANY OTHER OFFENSE SHALL NOT BE CONSIDERED PART OF THE DEFENDANT'S CRIMINAL RECORD, IF:

(A) ONE OFFENSE IS INCLUDED IN ANOTHER, AS PROVIDED IN §5.25(2); OR

(B) ONE OFFENSE CONSISTS ONLY OF A CONSPIRACY OR OTHER FORM OF PREPARATION TO COMMIT ANOTHER OFFENSE OF WHICH THE DEFENDANT IS CONVICTED; OR

(C) ONE OFFENSE IS MERELY INCIDENTAL TO THE COMMISSION OF ANOTHER, DOMINANT OFFENSE IN THAT BOTH OFFENSES WERE SUBSTANTIALLY CONTEMPORANEOUS AND PART OF A SINGLE COURSE OF CRIMINAL CONDUCT DIRECTED AT THE SAME VICTIM, AND ONE OFFENSE (THE INCIDENTAL OFFENSE) DID NOT CAUSE PHYSICAL OR MENTAL INJURY OR SUFFERING OR PROPERTY DAMAGE SUBSTANTIALLY IN EXCESS OF THAT CAUSED BY THE DOMINANT OFFENSE; PROVIDED, THAT IN SUCH CASES ANY SENTENCE IMPOSED SHALL NOT EXCEED THE MAXIMUM SENTENCE AUTHORIZED FOR THE DOMINANT OFFENSE; OR

(D) INCONSISTENT FINDINGS OF FACT ARE REQUIRED TO ESTABLISH THE COMMISSION OF THE OFFENSES; OR

(E) 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 THAT CONDUCT; OR

(F) THE OFFENSE IS DEFINED AS A CONTINUING COURSE OF CONDUCT AND THE DEFENDANT'S COURSE OF CONDUCT WAS UNINTERRUPTED, UNLESS THE LAW PROVIDES THAT SPECIFIC PERIODS OF THAT CONDUCT CONSTITUTE SEPARATE OFFENSES.

2. IF A DEFENDANT HAS BEEN CONVICTED OF AN INCLUSIVE OFFENSE AND OF ONE OR MORE OFFENSES INCLUDED THEREIN WHICH HAVE BEEN ESTABLISHED BY PROOF OF THE SAME OR OF SOME BUT LESS THAN ALL OF THE FACTS REQUIRED TO ESTABLISH THE COMMISSION OF THE INCLUSIVE OFFENSE, THE TRIAL COURT SHALL SENTENCE THE DEFENDANT FOR THE MOST SERIOUS INCLUSIVE OFFENSE FOR WHICH HE STANDS PROPERLY CONVICTED. NO SEPARATE OR ADDITIONAL SENTENCE SHALL BE IMPOSED FOR AN INCLUDED OFFENSE NOR SHALL ANY CONVICTION THEREFOR BE CONSIDERED A PART OF THE DEFENDANT'S CRIMINAL RECORD, EXCEPT THAT IF AN APPELLATE COURT SUBSEQUENTLY DETERMINES THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR AN INCLUSIVE OFFENSE BUT SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION FOR AN INCLUDED OFFENSE, THAT COURT SHALL VACATE THE CONVICTION FOR THE INCLUSIVE OFFENSE AND THE ACCOMPANYING SENTENCE AND IF IT DETERMINES THAT THE INTEREST OF JUSTICE WILL THEREBY BE SERVED, MAY:

(A) REMAND THE CASE TO THE TRIAL COURT FOR THE IMPOSITION OF A NEW SENTENCE FOR ANY INCLUDED OFFENSE OF WHICH THE DEFENDANT WAS PROPERLY CONVICTED; AND IN SUCH EVENT, THE DEFENDANT'S CONVICTION AND SENTENCE FOR THAT INCLUDED OFFENSE SHALL BE CONSIDERED A PART OF HIS CRIMINAL RECORD; OR

B) REMAND THE CASE TO THE TRIAL COURT FOR A NEW TRIAL OF ANY INCLUDED OFFENSE OF WHICH THE DEFENDANT WAS CONVICTED; AND IN SUCH EVENT, THE TRIAL COURT SHALL IMPOSE SENTENCE IN ACCORDANCE WITH SUBSECTION (1) IF THE DEFENDANT IS CONVICTED OF ANY SUCH INCLUDED OFFENSE AT THE NEW TRIAL.

3. THE DEFENDANT SHALL RECEIVE CREDIT FOR ANY PORTION OF A SENTENCE IMPOSED WHICH HE ACTUALLY SERVES OR PAYS IF THE SENTENCE OR UNDERLYING CONVICTION IS FOR ANY REASON DECLARED INVALID AND THE DEFENDANT IS SUBSEQUENTLY CONVICTED AND SENTENCED FOR THE SAME OFFENSE OR FOR ANY OFFENSE INCLUDED THEREIN.

4. IF A DEFENDANT HAS BEEN CONVICTED OF AN INCLUDED OFFENSE OR OF AN INCIDENTAL OFFENSE (AS DEFINED IN §5.30(1)(C)) AND IS SUBSEQUENTLY PROSECUTED, CONVICTED AND SENTENCED FOR A MORE SERIOUS INCLUSIVE OFFENSE OR FOR A DOMINANT OFFENSE, THE SENTENCES IMPOSED FOR BOTH OFFENSES SHALL NOT EXCEED IN THE FORMER SITUATION THE

MAXIMUM SENTENCE AUTHORIZED FOR THE INCLUSIVE OFFENSE AND IN THE LATTER SITUATION THE MAXIMUM SENTENCE AUTHORIZED FOR THE DOMINANT OFFENSE. SUCH SUBSEQUENT PROSECUTION SHALL BE BROUGHT ONLY WHEN PERMITTED BY §5.35(1)(C) OR BY §5.40(1) AND (2).

COMMENT

§5.30(1) places six limitations on multiple punishments for separate offenses. In each of these situations the State may prosecute and the court convict the defendant for each offense committed by him, but the judge may only sentence the defendant for one offense. Normally, the sentence should be imposed for the most serious offense. The other convictions shall not be considered part of the defendant's criminal record in collateral contexts such as parole hearings or habitual offender proceedings (e.g., under §70.10 of the Code). Judges presently have authority to impose a general sentence following verdicts of guilty on a multi-count indictment or information although the better practice is to sentence a defendant separately on all counts. Vandegrift v. State, 226 Md. 38, 171 A. 2d 713 (1961). §5.30 requires the sentencing judge to follow the "better practice" when dealing with multiple convictions for which only one punishment may be imposed.

The first limitation (§5.30(1)(a)) builds on the basic Maryland law of merger. Under present law the merger of offenses takes place upon conviction, and the sentence imposed may not exceed that permitted for the most serious offense. §5.30(1)(a) reaches the same result by providing that when one offense is included within another the defendant convicted of both such offenses may only be sentenced for one of them. §5.30(2) specifies that the sentence shall be for the most serious inclusive offense.

The second limitation (§5.30(1)(b)) prevents multiple punishment when the defendant is charged with a substantive offense and with a conspiracy whose sole criminal objective is the substantive offense charged. This accords at least in part, with present Maryland law. See Code, Article 27, §38, which limits punishment for conspiracy to commit an offense to the maximum authorized for the substantive offense. See also §105.05 of this Code. Such a statute may bar separate punishments for a completed offense and for a conspiracy to commit it, but its language standing alone may not make it entirely clear that there could not be two separate punishments, each of them egual to the maximum for

the complete offense. Prior Maryland decisions recognized that a conspiracy to commit a substantive offense and the substantive offense were separate and distinct crimes, which did not merge. Gilpin v. State, 142 Md. 464, 121 A. 354 (1925); Rouse v. State, 202 Md. 481, 97 A. 2d 285 (1953). It was held in the Rouse case that a defendant could be sentenced under §38 as it then stood for a conspiracy to commit an offense for which he had already been convicted (on a plea of guilty) and sentenced. §5.30(1)(b) would not permit this result. Of course, conspiracy may pose an additional danger to the community if it has other criminal objectives than the substantive offense for which the defendant is convicted. In this situation §5.30(1)(b) permits separate sentences for the conspiracy and the separate substantive offense. See also §105.00 which, in defining conspiracy, requires an element of that offense that the unlawful agreement shall have the commission of a crime as its objective.

The third limitation on multiple punishments deals with incidental offenses. An incidental offense is an offense that accompanies another dominant offense but which does not cause physical or mental injury or suffering or property damage substantially in excess of that caused by the dominant offense. The classic example of such an incidental offense has been the technical kidnapping or false imprisonment that frequently accompanies a robbery or rape. The robber or rapist often must forcibly abduct or carry away his victim under circumstances where the abduction or carrying do not substantially aggravate the crime of robbery or rape. See Parker, Aspects of Merger in the Law of Kidnapping, 55 Corn L. Rev. 527 (1970). Likewise, under this Code a defendant who commits a robbery or a rape may also commit an incidental offense of unlawful detention or kidnapping (Part 135). §5.30(1)(c) provides that he shall not be punished for both the incidental and the dominant offense and that the single punishment imposed shall not exceed the maximum sentence authorized for the dominant offense. The definition of incidental offense in §5.30(1)(c) is a fairly narrow one which should not preclude multiple punishments where the unlawful detention accompanying a rape or robbery is protracted or aggravated.

The fourth limitation on multiple punishments retains the existing Maryland rule that verdicts of guilty on inconsistent counts in an indictment cannot stand and that the defendant cannot be punished under both counts. Tucker v. State, 237

Md. 422, 206 A. 2d 691 (1965); Bell v. State, 220 Md. 75, 150 A. 2d 908 (1960). §5.30(1)(c) extends that rule to inconsistent verdicts of guilty under different indictments and at different trials and to inconsistent findings by a trial judge sitting as the trier of the fact. Present Maryland law seems to be in substantial accord with this position. See Johnson v. State, 238 Md. 528, 540-546, 209 A. 2d 765 (1965). In Johnson, the court held that a verdict of not guilty on one count did not necessarily vitiate a sentence imposed on an inconsistent verdict of guilty on another count. Nothing in §5.30 on multiple punishments affects the court's holding in Johnson.

The fifth limitation on multiple punishments (§5.30(1)(e)) has its principal application where one charge is brought under a general provision of this Criminal Code and another charge is brought under a statute outside the Criminal Code which covers the same matter in more detail, or where both charges are brought under statutes which lie outside the Code. For instance, a bank officer, director or employee may not be punished on the basis of the same conduct both for the specific offense of making false statements or false entries in the books of any bank (§75 of Article 11 of the Maryland Code) and for the general offense of falsifying business records (§§175.05 and 175.10 of this Code).

The sixth and final limitation on multiple punishments deals with continuing offenses such as non-support, desertion and failure to report a particular occurrence. The defendant's continuing course of conduct must be treated for sentencing purposes as only one offense unless the Legislature specifies otherwise.

§5.30(2) establishes a more detailed procedure for handling multiple convictions of included offenses. The prevailing practice in this State has been for the prosecution to secure a multi-count indictment charging many lesser included offenses. For instance, an indictment may charge armed robbery, robbery, assault with intent to rob, larceny, and assault. The trier of the facts may find the defendant guilty on some or all of the counts or may return a general finding or verdict of guilty which is the equivalent of a determination of guilty on all counts. The court then sentences the defendant for the most serious inclusive offence or enters a general sentence which in effect passes judgment on the most serious offense of which the defendant stands convicted. Where the court does not impose a general sentence but sentences the

defendant for the most serious inclusive offense, it may also impose concurrent sentences for what are in effect lesser included offenses. Sometimes the question of merger is not raised until the appeal. Then the appellate court may find that the offenses charged in the different counts of the indictment merge and that the defendant may only be convicted on one offense. Normally this does not affect the defendant's actual sentence because the court upholds the sentence for the most serious offense for which the defendant was properly convicted or a general sentence that is no longer than that permitted for such offense. Berger v. State, 179 Md. 410, 415, 20 A. 2d 146 (1941); Price v. State, 3 Md. App. 155, 160, 238 A. 2d 275 (1968). §5.30(2) now requires that the sentencing court impose a single sentence for the most serious inclusive offense. It is possible that the appellate court will find the evidence insufficient to support the conviction for the most serious inclusive offense but sufficient to support a conviction for a lesser included offense. In this situation §5.30(2) authorizes the appellate court to vacate the conviction and sentence for the inclusive offense and remand the case to the trial court for the imposition of a new sentence for the included offense or for a new trial on the included offense. The resentencing or retrial does not involve multiple punishment but simply insures that the defendant receives the proper punishment for his offense. Thus, if a defendant is convicted of first degree robbery (§160.15) and of third degree larceny (§155.20), and the robbery conviction must be reversed for insufficient evidence, the appellate court need not remand the case for retrial but may, if it determines that the interest of justice will thereby be served, remand the case for resentencing on the larceny conviction. This procedure for avoiding retrials is obviously inappropriate and may not be followed where the defendant has not been separately convicted of the lesser included offenses. This procedure for avoiding retrials may also not be followed where the conviction for the lesser offense is duplicitous or inconsistent with the conviction for the greater offense. A defendant cannot be convicted of both murder and manslaughter with respect to the same homicide or of both an attempt and the completed offense. In such a situation both convictions cannot stand. Tucker v. State, 237 Md. 422, 206 A. 2d 691 (1965). However, a defendant who secures on appeal the reversal of a conviction on account of the insufficiency of the evidence may always be retried for a lesser included offense in accordance with §5.35(3). The operation of that subsection does not depend on the

defendant's having been convicted of the lesser included offense at his first trial.

§5.30(3) imposes a further limitation on multiple punishments by requiring that the defendant receive credit for any time served or fine paid under an invalid conviction when the defendant is subsequently convicted and sentenced for the same or an included offense. The constitutional guarantee against double jeopardy in the Fifth Amendment of the United States Constitution already requires that the defendant receive this credit. North Carolina v. Pearce, 395 U.S. 711, 719 at n. 13 (1969).

§5.30(4) deals with the rare situation where a subsequent prosecution may be brought for a more serious inclusive offense or for a dominant offense that was not known to the prosecution at the time of the defendant's initial prosecution for a lesser included offense or for an incidental offense. Often the initial sentence imposed on the defendant will be too lenient in light of the evidence subsequently discovered by the prosecutor. §5.30(4) provides that in this situation the defendant may be sentenced again but limits the total sentence which may be imposed for both offenses to the maximum sentence authorized for the inclusive or dominant offense.

5.35. SUBSEQUENT PROSECUTION BARRED BY FORMER PROSECUTION FOR SAME OFFENSE

1. A SUBSEQUENT PROSECUTION IS FOR THE SAME OFFENSE AS A FORMER PROSECUTION WHEN:

(A) IT IS BROUGHT UNDER THE SAME PROVISION OF LAW AND IS BASED UPON THE SAME FACTS AS THE FORMER PROSECUTION; OR

(B) IT IS FOR AN OFFENSE WHICH WAS INCLUDED WITHIN AN OFFENSE CHARGED IN THE FORMER PROSECUTION; OR

(C) IT IS FOR AN OFFENSE WHICH INCLUDES AN OFFENSE WHICH WAS CHARGED IN THE FORMER PROSECUTION UNLESS THE FORMER PROSECUTION RESULTED IN A JUDGMENT OF CONVICTION AND

(I) THE MORE SERIOUS INCLUSIVE OFFENSE WAS NOT CONSUMMATED AT THE TIME OF THE TRIAL FOR THE INCLUDED OFFENSE; OR

(II) THE PROSECUTOR AT THE TIME OF THE TRIAL FOR THE INCLUDED OFFENSE DID NOT IN THE EXERCISE OF DUE DILIGENCE HAVE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION OF THE DEFENDANT FOR THE INCLUSIVE OFFENSE; OR

(D) IT IS FOR AN OFFENSE WHICH IS MERELY INCIDENTAL TO THE COMMISSION OF ANOTHER, DOMINANT OFFENSE UNDER §5.30(1)(C).

SECTION 5.25(2) DEFINES WHEN ONE OFFENSE IS INCLUDED IN ANOTHER OFFENSE.

2. A SUBSEQUENT PROSECUTION FOR THE SAME OFFENSE AS A FORMER PROSECUTION IS BARRED BY THE FORMER PROSECUTION UNDER ANY OF THE FOLLOWING CIRCUMSTANCES:

(A) THE FORMER PROSECUTION RESULTED IN AN ACQUITTAL. THERE IS AN ACQUITTAL IF THE PROSECUTION RESULTED IN A FINDING OF NOT GUILTY BY THE TRIER OF FACT OR IN THE GRANTING BY THE COURT OF A MOTION FOR A JUDGMENT OF ACQUITTAL. A FINDING OF GUILTY OF A LESSER INCLUDED OFFENSE IS AN ACQUITTAL OF THE GREATER INCLUSIVE OFFENSE WHETHER OR NOT THE CONVICTION OF SUCH INCLUDED OFFENSE IS SUBSEQUENTLY SET ASIDE; OR

(B) THE FORMER PROSECUTION WAS TERMINATED AFTER THE INFORMATION HAD BEEN FILED OR THE INDICTMENT FOUND, BY A FINAL ORDER OR JUDGMENT FOR THE DEFENDANT THAT HAS NOT BEEN SET ASIDE, REVERSED OR VACATED, AND THAT NECESSARILY REQUIRED A DETERMINATION INCONSISTENT WITH A FACT OR A LEGAL PROPOSITION THAT MUST BE ESTABLISHED FOR CONVICTION IN THE SUBSEQUENT PROSECUTION; OR

(C) THE FORMER PROSECUTION RESULTED IN A CONVICTION THAT HAS NOT BEEN SET ASIDE, REVERSED OR VACATED; OR

(D) THE FORMER PROSECUTION WAS PREMATURELY TERMINATED. EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION, THESE IS A PREMATURE TERMINATION OF A PROSECUTION IF THE TERMINATION IS FOR REASONS NOT AMOUNTING TO AN ACQUITTAL, AND IT TAKES PLACE AFTER THE JURY IS SWORN IF THE CASE IS TRIED OR TO BE TRIED BY A JURY OR AFTER THE FIRST PROSECUTION WITNESS IS SWORN IF TRIAL IS BEFORE THE COURT WITHOUT A JURY. THERE IS NO PREMATURE TERMINATION, HOWEVER, WHERE A TRIAL IS TERMINATED UNDER ANY OF THE FOLLOWING CIRCUMSTANCES:

(I) THE DEFENDANT CONSENTS TO THE TERMINATION OR WAIVES, BY MOTION FOR A MISTRIAL OR OTHERWISE, HIS RIGHT TO OBJECT TO THE TERMINATION; OR

(II) TERMINATION IS NECESSARY BECAUSE IT IS IMPOSSIBLE TO PROCEED WITH THE TRIAL IN CONFORMITY WITH THE LAW; OR

(III) THE TRIAL COURT DETERMINES THAT JUSTICE REQUIRES THE TERMINATION OF THE TRIAL

BECAUSE THE ACTIONS IN OR OUTSIDE THE COURTROOM OF ANY OF THE PARTIES TO THE TRIAL OR THEIR COUNSEL OR OTHER OCCURRENCES INSIDE OR OUTSIDE OF THE COURTROOM SUBSTANTIALLY PREJUDICE THE PROSECUTION OR THE DEFENSE; OR

(IV) THE UNRULY OR DISRUPTIVE BEHAVIOR OF THE DEFENDANT AT THE TRIAL PREVENTS THE TRIAL FROM PROCEEDING IN AN ORDERLY AND DIGNIFIED FASHION; OR

(V) THE JURY IS UNABLE TO AGREE UPON A VERDICT, OR IN THE CASE OF A COURT TRIAL BEFORE TWO OR MORE JUDGES, A MAJORITY OF THE JUDGES IS UNABLE TO AGREE UPON A FINDING; OR

(VI) FALSE STATEMENTS OF A JUROR ON VOIR DIRE OR CONCEALMENT BY A JUROR OF HIS BIAS OR INTEREST PREVENT A FAIR TRIAL.

3. IF A CONVICTION FOR AN INCLUSIVE OFFENSE IS SET ASIDE, REVERSED OR VACATED ON APPEAL BECAUSE THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION, THE STATE MAY NOT RETRY THE DEFENDANT FOR THAT OFFENSE BUT MAY RETRY HIM FOR AN OFFENSE INCLUDED WITHIN IT, WHERE EITHER THE DEFENDANT WAS CONVICTED OF THE INCLUDED OFFENSE AT THE FIRST TRAIL OR WHERE NO SPECIFIC FINDING OF GUILT OR INNOCENCE WAS MADE ON THE INCLUDED OFFENSE AT THE FIRST TRIAL, IF THE APPELLATE COURT DETERMINES THAT IT IS IN THE INTEREST OF JUSTICE TO REMAND THE CASE TO THE TRIAL COURT FOR A NEW TRAIL ON THE INCLUDED OFFENSE AND SO DIRECTS.

COMMENT

§5.35 restricts multiple prosecutions for the same offense. The bar against double jeopardy prevents the State from wearing down the defendant with successive prosecutions. This protection is fundamental, and the courts of this State have always recognized the validity of the pleas autrefois acquit and autrefois convict in a subsequent prosecution for the same offense. Hoffmann v. State, 20 Md. 425 (1863). Concepts of merger and the identity of offenses have also been employed to prevent multiple prosecutions when one offense is included within another. A defendant who has been tried and convicted or acquitted first on the greater offense of which the lesser is an essential element may not later be tried on the lesser offense. The first prosecution put him in jeopardy for that offense. Bennington v. Warden, 190 Md. 752, 59 A. 2d 779 (1948). Conversely, a conviction or acquittal of the lesser offense normally bars a prosecution for the greater offense. The two offenses are "identical" and merge under the

Blockburger rule (see Blockberger v. United States, 284 U.S. 299, 304) because no additional facts are needed to prove the lesser offense than are needed to prove the greater. Bennett v. State, 229 Md. 208, 214, 182 A. 2d 815 (1962). The second prosecution therefore places the defendant twice in jeopardy for the "same"" offense. Gilpin v. Maryland, 142 Md. 464, 469, 121 A. 334 (1925) (quoting Corpus Juris). §5.35 retains this protection and expands it to conform with the requirements of federal constitutional law following Benton v. Maryland, 395 U.S. 784 (1969). Of course, a defendant who secures a reversal of his conviction may normally be retried without placing him twice in jeopardy. United States v. Ball, 163 U.S. 662. §5.35(2)(c) also permits a retrial after the defendant obtains a reversal of his conviction except in the one limited situation where the reversal of the conviction was based on the insufficiency of the evidence. See §5.35(3).

§5.35(1) specifies four tests for determining whether a subsequent prosecution is for the same offense as a former prosecution. First, §5.35(1)(a) provides that the subsequent prosecution is for the same offense if it is based upon the same facts and is for a violation of the same provision of law as the former prosecution. This "identity of the law and the facts" test conforms with present Maryland law and only prevents a subsequent prosecution which is brought under the same criminal statute and based on the same facts. Rouse v. State, 202 Md. 481, 97 A. 2d 205 (1953). §5.35(1)(b) and (c) utilize the concept of included offenses defined in §5.25(2) to treat subsequent prosecutions for lesser included and more serious inclusive offenses as prosecutions for the same offense. These two provisions operate to bar subsequent prosecutions that are generally barred at present by notions of double jeopardy, merger, identity of offenses, and duplicity or inconsistency of the charges. They thus clarify an uncertain area of the law. Finally, §5.35(1)(d) provides that a subsequent prosecution for an incidental offense (as defined in §5.30(1)(c) shall always be considered to be a subsequent prosecution for the same offense.

§5.35(1)(c)(i) and (ii) provides two exceptions to the ban on subsequent prosecutions for more serious inclusive offenses. Under these exceptions a subsequent prosecution may be brought where the more serious inclusive offense was not consummated at the time of the trial of the lesser included offense or where the prosecutor at that time did not in the exercise of due diligence have

sufficient evidence to prosecute the defendant for the more serious inclusive offense at the time of the trial for the lesser included offense. (The word "prosecutor", when used in subdivision (ii) and subsequently in section 5.40, is broad enough to include a police officer prosecuting for a minor offense, as well as a lawyer-prosecutor.) The classic case covered by the first exception is the assault conviction where the victim subsequently dies. In such a case justice requires a subsequent prosecution for homicide. §5.30(4) protects the defendant from multiple punishments in this situation by limiting the total punishment that may be imposed to the maximum sentence authorized for the homicide offense. The second exception is intended to cover a case like Bennet v. State, 209 Md. 208, 182 A. 2d 815 (1962), where the record indicated that at the time the defendant was convicted of a petty morals offense the prosecutor did not yet have sufficient evidence to sustain a charge of statutory rape. A subsequent prosecution for the more serious inclusive offense should be permitted when the prosecutor's failure to obtain the evidence by the time of the first trial is understandable. These two exceptions to the ban on subsequent prosecutions for the same offense do not raise any constitutional problems. Ashe v. Swenson, 397 U.S. 436, 453n. 7 (1970) (concurring opinion of Justice Brennan).

One major change made in Maryland law by §5.35(1) is the modification of the result reached in Bennett v. State, 229 Md. 212, 182 A. 2d 815 (1962). In Bennett, the court held that the defendant's conviction upon a plea of guilty in a magistrate's court for contributing to the delinquency of a minor in violation of a local county law did not bar a subsequent prosectuion for statutory rape in the circuit court. The court correctly held that the offenses were identical under the Blockburger rule because proof of statutory rape necessarily proved contributing to the delinquency of a minor. Nevertheless, the subsequent prosecution was held to be proper because the magistrate did not have jurisdiction over the offense of statutory rape and the defendant was therefore not put in jeopardy for that offense. This result is not in accord with the Model Penal Code (§1.08 of Proposed Official Draft of 1962) and the proposed Michigan Code (§151) and has been recently rejected by the courts in California. Kellett v. Superior Court, 63 Cal. 2d 822, 409 P. 2d 206 (1966). No doubt the Bennett result was intended to prevent a petty prosecution in a court of limited jurisdiction from aborting a prosecution

at the circuit court level for a more serious offense. The proper solution for this problem is for the county prosecutor or other official to take responsibility for the charging decision in cases in courts of limited jurisdiction. The exercise of that responsibility would prevent a defendant from getting off lightly when he is undercharged in such a court without subjecting him to two trials. Furthermore, on the facts in Bennett itself, a subsequent prosecution for statutory rape would be possible under §5.35(1)(c)(ii) of this Code. See also Brown v. Hendrick, (3rd Cir.), 431 F. 2d 436 (1970).

§5.50(b) supports the above resolution of the problem by permitting a subsequent prosecution for a more serious offense where the former prosecution was procured by the defendant without the knowledge of the prosecutor and with the intent to avoid the punishment that might be imposed in a prosecution for a more serious offense. In one respect §5.50(b) is broader than the result reached in Bennett because it applies when the prosecution in the magistrate's court resulted in an aquittal. In Bennett, the court recognized that the subsequent prosecution in the circuit court would have been barred if the defendant had been acquitted in the magistrate's court. Bennett v. State, 229 Md. 208, 219 (1962). However, the defendant does not deserve even this protection where he fraudulently procured the prosecution for the lesser charge.

§5.35(2) specifies the four situations in which the former prosecution constitutes jeopardy and thus acts as a bar to a subsequent prosecution for the same offense. The first situation is where the former prosecution resulted in an acquittal on the merits. An acquittal is defined to include a finding of not guilty by the trier of the fact or the granting by the court of a motion for a judgment of acquittal. The final sentence in §5.35(2)(a) also provides that conviction of a lesser included offense is an acquittal of the greater inclusive offense even though the conviction is reversed on the defendant's appeal. The State may only retry the defendant for the lesser included offense. This result accords with present Maryland law. In State v. Barger, 242 Md. 616, 220 A. 2d 304 (1966), the jury convicted the defendant of second degree murder and acquitted him of first degree murder; the court held that retrial on the first degree murder charge was barred by double jeopardy. The same result should be reached if the judge or jury did not explicitly acquit on the greater charge but simply returned no verdict because silence in this

situation is equivalent to a finding of not guilty. Jenkins v. State, 3 Md. App. 243, 245, 238 A. 2d 922 (1968).

The second situation in which a subsequent prosecution is barred is where the former prosecution was terminated by a final order in favor of the defendant and res judicata or collateral estoppel apply to prevent the relitigation of a matter of fact or law. The Supreme Court has held the Fifth Amendment's prohibition on double jeopardy requires the states to apply collateral estoppel in criminal cases to give finality to findings of fact in favor of the defendant. Ashe v. Swenson, 397 U.S. 436 (1970) (discussed in commentary to §5.40). Both the Supreme Court and the Maryland courts have also indicated that res judicata applies in appropriate cases in the criminal law to bar a second prosecution even though in the strict constitutional sense the defendant may not have been placed twice in jeopardy because the first prosecution was terminated before trial. United States v. Oppenheimer, 242 U.S. 85 (1916); Coblentz v. State, 169 Md. 159, 166 A. 45 (1935). §5.35(2)(b) would thus cover situations where the first indictment or information was dismissed on the basis of the statute of limitations or the unconstitutionality of the statute under which the prosecution was brought. The State may not relitigate such issues in a subsequent prosecution for the same offense. The order terminating the prosecution in favor of the defendant must be a final one that has not been set aside, reversed or vacated. Normally under §14 of Article 5 of the Maryland Code the State can appeal a final pre-trial order dismissing the prosecution and thus can seek to correct any error without relitigating the issue in a subsequent prosecution. Such appeals by the State are constitutional under Benton v. Maryland, 395 U.S. 784 (1969), because the defendant has not yet been placed in jeopardy. State v. Campbell & Reeves, 7 Md. App. 538, 542 n. 3, 256 A. 2d 537 (1969).

The third situation covered by §5.35(2) is where the former prosecution resulted in a conviction that has not been set aside, reversed or vacated. The State may not prosecute the defendant again in order to increase his punishment. This section recognizes the traditional rule that if the defendant secures a reversal of his conviction on appeal, he may be prosecuted again for the same offense, United States v. Ball, 163 U.S. 662. §5.50(c) makes clear that the defendant may also normally be prosecuted again for the same offense

when the initial conviction was held invalid on an application for a writ of habeas corpus in a state or federal court or on a petition under the State Post Conviction Procedure Act.

The fourth and final situation covered by §5.35 (2) is where the first trial is prematurely terminated after the jury is sworn if the case is tried by jury or after the first prosecution witness is called if the trial is by the court. This provision adopts the federal rule in Downum v. United States, 372 U.S.734 (1965), on the question of when jeopardy attaches. The Maryland courts have traditionally held that jeopardy attaches only when there is a verdict of guilty or not guilty and until that point is reached the defendant can be subjected to a subsequent prosecution for the same offense. Boone v. State, 3 Md. App. 11,23–27, 237 A. 2d 787 (1968); Hoffman v. State, 20 Md. 425, 434 (1863). §5.35(2)(d) adopts the federal rule because it is sound and because it is very likely constitutionally binding upon the states following the Supreme Court's holding that the federal Double Jeopardy Clause is enforceable against the states. Benton v. Maryland, 395 U.S. 784 (1969). However, the federal rule recognizes that where the defendant consents to the termination of the first trial or the termination is required by "manifest necessity" or the ends of public justice, the State may subsequently reprosecute the defendant for the same offense. United States v. Perez, 9 Wheat. 579 (1824); Wade v. Hunter, 336 U.S. 684 (1949); and see United States v. Jorn, 400 U.S. 470 (1971). §5.35(2)(d)(i) covers the former situation where the defendant consents to the termination, while §5.35(2)(d)(ii)–(vi) covers the latter situation by specifying various instances of "manifest necessity" which justify the termination of the trial. §5.30(2)(d)(iv) is drafted specifically in light of Illinois v. Allen, 397 U.S. 337 (1970). If the measures which the court must take to handle a disruptive defendant require the termination of the trial, a subsequent prosecution for the same offense should be permitted.

§5.35(3) deals with the problem of the appropriate disposition of an appeal where the defendant's conviction has been reversed on account of the insufficiency of the evidence. The question arises whether the State may retry the defendant or whether the charges must be dismissed. In Gray v. State, 254 Md. 385, 255 A. 2d 5 (1969), the Court of Appeals recognized that where an appellate court reverses a conviction for insufficient evidence it should normally remand for the entry of a judgment

of acquittal. However, Gray permits a retrial if the record indicates that the State can produce additional probative evidence of guilt at another trial. The Appellate Court of Illinois (First District) recently reached a contrary result. People v. Brown, 99 Ill. App. 2d 281, 241 N.E. 2d 633 (1968). The Illinois court argued that the appellate court's determination that the evidence was insufficient is in effect a ruling that the trial court should have entered a judgment of acquittal. The latter happening would have prevented a new trial, and the defendant is entitled to the benefit of an acquittal regardless of which court determines that the evidence is insufficient. Federal contitutional law on this point is both skimpy and uncertain. §5.35(3) takes a middle course and permits a new trial on lesser included offenses while barring a retrial for any offense for which a conviction has been reversed for insufficient evidence.

5.40 SUBSEQUENT PROSECUTION BARRED BY FORMER PROSECUTION FOR DIFFERENT OFFENSE

1. EXCEPT AS PROVIDED IN SUBSECTION (2), A DEFENDANT SHALL NOT BE SUBJECT TO SEPARATE TRIALS FOR MULTIPLE OFFENSES BASED ON THE SAME CONDUCT OR ARISING FROM THE SAME CRIMINAL TRANSACTION, IF THE OFFENSES ARE KNOWN OR SHOULD HAVE BEEN KNOWN IN THE EXERCISE OF DUE DILIGENCE TO THE PROSECUTOR AT THE TIME OF THE COMMENCEMENT OF THE FIRST TRIAL AND ARE WITHIN THE JURISDICTION OF A SINGLE COURT.

2. IF A DEFENDANT IS CHARGED WITH TWO OR MORE OFFENSES BASED ON THE SAME CONDUCT OR ARISING FROM THE SAME CRIMINAL TRANSACTION, THE COURT ON MOTION OF THE PROSECUTOR OR DEFENSE COUNSEL OR ON ITS OWN MOTION MAY ORDER ANY OF THE CHARGES TO BE TRIED SEPARATELY IF IT IS SATISFIED THAT THIS IS IN THE INTEREST OF JUSTICE.

3. ALTHOUGH A PROSECUTION IS FOR A VIOLATION OF A DIFFERENT PROVISION OF LAW THAN A FORMER PROSECUTION OR IS BASED ON DIFFERENT FACTS, IT IS BARRED BY THE FORMER PROSECUTION UNDER THE FOLLOWING CIRCUMSTANCES:

(A) THE FORMER PROSECUTION (I) RESULTED IN AN ACQUITTAL, A CONVICTION, OR A PREMATURE TERMINATION AS DEFINED IN SECTION 5.35(2) AND (II) THE SUBSEQUENT PROSECUTION IS FOR ANY OFFENSE FOR WHICH A SEPARATE TRIAL IS OR WOULD BE BARRED UNDER SUBSECTION (1) UNLESS ORDERED UNDER SUBSECTION (2) AND A SEPARATE TRIAL THEREFOR HAS NOT BEEN SO ORDERED.

(B) THE FORMER PROSECUTION WAS TERMINATED AFTER THE INFORMATION WAS FILED OR THE

INDICTMENT FOUND BY AN ACQUITTAL OR BY A FINAL ORDER OR JUDGMENT FOR THE DEFENDANT THAT HAS NOT BEEN SET ASIDE, REVERSED OR VACATED AND THAT NECESSARILY REQUIRED A DETERMINATION INCONSISTENT WITH A FACT THAT MUST BE ESTABLISHED FOR CONVICTION OF THE SECOND OFFENSE.

COMMENT

§5.40 restricts successive prosecutions for different offenses which are "based on the same conduct or arising from the same criminal transaction." The device for accomplishing these restrictions is the compulsory joinder provision in §5.40(1). Under this provision the State must join in a single trial all such offenses that are known to the prosecutor at the commencement of the trial and are within the jurisdiction of a single court. For example, the defendant who robs a bank and during the bank robbery also robs and kills one of the bank's customers has committed at least three offenses (two robberies and one homicide) and may be convicted and punished under §5.25(I) for each offense. However, §5.40(1) requires the prosecutor to join all three offenses at one trial unless the court orders separate trials under §5.40(2) in the interest of justice. The court may order separate trials on the motion of the defendant, the prosecution, or on its own motion.

Compulsory joinder of related offenses at a single trial is not presently required in Maryland. However, successive prosecutions run counter to the purposes behind the double jeopardy clause. They permit the State to wear down and harass a defendant who was initially acquitted and thus create a real danger of convicting the innocent. Furthermore, if the State is dissatisfied with the punishment following a conviction at the first trial, it can simply try again to secure a harsher punishment. These considerations led three Justices of the Supreme Court to hold that the Federal Double Jeopardy clause required the states to join in one prosecution all offenses growing out of the same criminal transaction. Ashe vs. Swenson, 397 U.S. 436, 448 (concurring opinion of Justice Brennan). Ashe involved a poker game where three or four men robbed all six participants. Ashe was prosecuted and acquitted of the robbery of one participant and subsequently prosecuted and convicted of the robbery of another participant. The majority of the Court held that collateral estoppel was part of the law of double jeopardy and that the jury's determination on the record of the first trial that the defendant was not one of the robbers could not be relitigated by the State at the second trial. This holding places

substantial limitations on successive prosecutions for offenses growing out of the same criminal transaction where the defendant was acquitted at the first trial.

§5.40(1) therefore requires compulsory joinder of related offenses. It follows §150(2) of the proposed Michigan Code in defining fairly narrowly the different offenses that are sufficiently related to require their joinder at one trial. The offenses must be based on the same conduct or arise from the same criminal transaction and must be within the jurisdiction of a single court. §1.09 of the Model Penal Code requires joinder in the additional situation where the offenses arise from the same criminal "episode." The Model Penal Code test would require joinder where a bank official embezzled bank funds and then made a false entry to conceal his embezzlement. Both offenses are part of the same "criminal episode." However, they would not form part of the same "criminal transaction" if there was an interval of time or other break in the defendant's course of conduct between the two offenses.

This new requirement of compulsory joinder should not handicap unfairly the prosecutor. Normally the prosecutor should seek to conserve the state's limited resources by joining related offenses at a single trial. Any valid reason for separate trials may be presented to the trial judge in a motion for separate trials under §5.40(2). Furthermore, the joinder requirement only applies to offenses which are known to the prosecutor, or which should have been known to him in the exercise of due diligence.

§5.40(3)(b) defines the scope of res judicata and collateral estoppel as they apply when the subsequent prosecution is for a different offense. See §5.35(2)(b) for the applicability of these doctrines to subsequent prosecutions for the same offense. The present provision applies whenever a previous determination of fact is inconsistent with a fact that must be established to convict of the second offense. Its applicability may be demonstrated by Sealfon v. United States, 332 U.S. 575 (1948), where the defendant had previously been tried and acquitted of a conspiracy to defraud the United States by presenting false invoices to a rationing board. When the defendant was subsequently convicted for aiding and abetting the uttering of the same false invoices, the Supreme Court reversed, saying:

". . . the substantive offense and a conspiracy to commit it are separate and distinct offenses. . . Thus . . . one may be prosecuted for both crimes. But res judicata may be a defense in a second prosecution." (at p.578).

The Maryland courts have adopted a similar approach to res judicata in prosecutions for different offenses. Coblentz v. State, 169 Md. 109, 166 A. 45 (1935). §5.40(2)(b) thus chiefly codifies this existing law. It should be noted that, unlike §5.35(2)(b), it covers only inconsistencies in the determination of facts and not on propositions of law. See further discussions in Model Penal Code, Tentative Draft #5, p. 58.

5.45. SUBSEQUENT PROSECUTION BARRED BY FORMER PROSECUTION IN ANOTHER JURISDICTION

IF CONDUCT CONSTITUTES AN OFFENSE WITHIN THE CONCURRENT JURISDICTION OF THIS STATE AND OF THE UNITED STATE, ANOTHER STATE OR ANOTHER COUNTRY, A PROSECUTION IN ANY OTHER OF THESE JURISDICTIONS IS A BAR TO A SUBSEQUENT PROSECUTION IN THIS STATE UNDER EITHER OF THE FOLLOWING CIRCUMSTANCES:

(A) THE FORMER PROSECUTION RESULTED IN A CONVICTION OR AN ACQUITTAL AS DEFINED IN SECTION 5.35(2) AND THE SUBSEQUENT PROSECUTION IS BASED ON THE SAME CONDUCT, UNLESS (I) THE OFFENSE OF WHICH THE DEFENDANT WAS FORMERLY CONVICTED OR ACQUITTED AND THE OFFENSE FOR WHICH HE IS SUBSEQUENTLY PROSECUTED EACH REQUIRES PROOF OF A FACT NOT REQUIRED BY THE OTHER AND THE LAW DEFINING EACH OF THE OFFENSES IS INTENDED TO PREVENT A SUBSTANTIALLY DIFFERENT HARM OR EVIL, OR (II) THE OFFENSE UPON WHICH THE SUBSEQUENT PROSECUTION IS BASED WAS NOT CONSUMMATED WHEN THE FORMER TRIAL BEGAN.

(B) THE FORMER PROSECUTION WAS TERMINATED AFTER THE INFORMATION WAS FILED OR THE INDICTMENT FOUND BY AN ACQUITTAL OR BY A FINAL ORDER OR JUDGMENT FOR THE DEFENDANT THAT HAS NOT BEEN SET ASIDE, REVERSED OR VACATED AND THAT NECESSARILY REQUIRED A DETERMINATION INCONSISTENT WITH A FACT THAT MUST BE ESTABLISHED FOR CONVICTION OF THE OFFENSE FOR WHICH THE DEFENDANT IS SUBSEQUENTLY PROSECUTED.

COMMENT

§5.45 deals with the problem of when a former prosecution in another jurisdiction constitutes jeopardy and thus bars a subsequent prosecution in Maryland. Such a provision is particularly important today because much crime is interstate in

nature and because state and federal criminal statutes frequently overlap. The problem of multiple prosecutions in different jurisdictions is greatly aggravated by provisions such as §5.15 of this Code which expand the territorial applicability of a state's criminal law. Provisions of this type may subject a defendant to the jurisdiction of the courts of several states for what is in effect a single offense.

The traditional approach adopted by state and federal courts in this country is the separate sovereignties rule. Under this rule a defendant may be separately prosecuted by two or more sovereigns if he commits an act which is an offense against both of them. Bartkus v. Illinois, 359 U.S. 121 (1959). The Maryland courts have seemingly adopted this approach. State v. James, 203 Md. 113, 100 A. 2d 12 (1953); Bloomer v. State, 48 Md. 521 (1878).

The separate sovereignties approach, however, is contrary to the English common law and accepted principles of international law. English common law accepted the judgments of foreign courts in criminal matters. The leading case of Rex v. Hutchinson, 84 Eng. Rep. 1011 (K.B. 1677), held that an acquittal on a murder charge in Portugal barred a prosecution for that crime in England. The English courts have always treated Hutchinson as establishing the principle that the judgments of another sovereign are recognized for double jeopardy purposes even though the acquittal or conviction took place in a foreign country. Kenny, Outlines of Criminal Law (18th ed. 1962). This principle was followed in Rex v. Aughet, 13 Cr. App. R. 101 (1919). An English court recognized the acquittal of a Belgian officer by a Belgian court martial for shooting a Belgian private on a London street. Likewise in the area of international law, when the question arises whether a court should recognize for double jeopardy purposes a judgment of the court of a foreign state, the problem is considered one of probity—

> "the only question being the extent to which our courts can safely entrust such determinations to foreign courts properly seized of jurisdiction. Nowhere in international jurisprudence is it suggested that the retrial of an already determined issue is an obligation of severeignty." Franck, An International Lawyer Looks at the Barkus Rule, 34 N.Y.U.L. Rev. 1096, 1097.

Thus Maryland does not sacrifice any of its sovereignty when it recognizes a prosecution in

another jurisdiction.

§5.45 provides that a former prosecution in another jurisdiction bars a subsequent prosecution in this state only where the former prosecution resulted in an acquittal or conviction, or was terminated in the defendant's favor so as to make res judicata or collateral estoppel applicable to an essential determinatcn of fact. A premature termination in the courts of the cther jurisdiction does not bar a subsequent prosecution here. Furthermore, the subsequent prosecution in Maryland is proper if under the Blockburger rule (Blockburger v. United States, 284 U.S. 299, 304) it is not for the identical offense as the former prosecution and if the law defining each of the offenses is intended to prevent a substantially different harm or evil. The test for determining whether the first prosecution bars the second is similar to the tests in §5.35(1) for determining meetings of the board of directors[,] any [or all] of the9as a former prosecution when both prosecutions took place in this state. The more general test in §5.45(a)(i) is more suitable for dealing with offenses in other jurisdictions which may be phrased in terms unfamiliar to Maryland law. The application of the more specific tests in §5.35(1) might therefore prove difficult. §5.45(a)(i) also seeks to insure that Maryland is protecting some additional interest by bringing the second prosecution. Thus, the law defining each of the offenses must be intended to prevent a substantially different harm or evil.

Finally, §5.45(a)(ii) permits a subsequent prosecution in Maryland for an offense not consummated when the former trial began in the other jurisdiction.

5.50. FORMER PROSECUTION NOT A BAR

A PROSECUTION IS NOT A BAR WITHIN THE MEANING OF THE FOUR PRECEDING SECTIONS UNDER ANY OF THE FOLLOWING CIRCUMSTANCES:

(A) THE FORMER PROSECUTION WAS BEFORE A COURT THAT LACKED JURISDICTION OVER THE DEFENDANT OR THE OFFENSE; OR

(B) THE FORMER PROSECUTION WAS PROCURED BY THE DEFENDANT WITHOUT THE KNOWLEDGE OF THE APPROPRIATE PROSECUTING OFFICIAL AND WITH THE INTENT TO AVOID THE PUNISHMENT THAT MIGHT BE IMPOSED IN A PROSECUTION FOR A MORE SERIOUS OFFENSE; OR

(C) THE FORMER PROSECUTION RESULTED IN A

JUDGMENT OF CONVICTION THAT WAS HELD INVALID ON AN APPLICATION FOR A WRIT OF HABEAS CORPUS IN A STATE OR FEDERAL COURT OR ON A PETITION UNDER THE UNIFORM POST CONVICTION PROCEDURE ACT (AS AMENDED AND IN EFFECT IN THIS STATE), UNLESS THE JUDGMENT OR ORDER OF THE COURT GRANTING RELIEF UPON HABEAS CORPUS OR UNDER THE POST CONVICTION PROCEDURE ACT SHALL EXPRESSLY BAR FURTHER PROSECUTION BY THE STATE.

COMMENT

§5.50 defines three situations where a prior prosecution is not held to bar a subsequent prosecution for the same offense or for a different offense. In these three situations the restrictions on multiple prosecutions in §§5.35 and 5.40 do not apply. These three exceptions are generally in accord with present law and have been discussed in part in the Commentary to the prior sections on double jeopardy.

5.55. INDICTMENT, INFORMATION, AND WARRANT; INCORPORATED OFFENSES

1. "INCORPORATED OFFENSE" AS USED IN THIS SECTION MEANS AN OFFENSE WHICH NEED NOT BE SEPARATELY CHARGED OR MENTIONED IN ANY INDICTMENT, INFORMATION, OR WARRANT FOR ANOTHER OFFENSE SPECIFICALLY CHARGED IN THE SAME INDICTMENT, INFORMATION, OR WARRANT, IN ORDER THAT THE INDICTMENT, INFORMATION, OR WARRANT SERVE AS A LEGALLY ADEQUATE CHARGE OF THE INCORPORATED OFFENSE, SUFFICIENT TO SUPPORT A JUDGMENT OF CONVICTION OR ACQUITTAL OF THE INCORPORATED OFFENSE.

2. IN THE CASE OF ANY OFFENSE SPECIFIED IN SUBTITLE H, OTHER THAN PART 120, OR IN SUBTITLE I, J, K, L, M, N, OR O, AN ATTEMPT TO COMMIT SUCH OFFENSE IS AN INCORPORATED OFFENSE.

3. IN THE CASE OF ANY OFFENSE, OTHER THAN AN OFFENSE SPECIFIED IN SUBTITLE G, WHICH ENTAILS DIFFERENT PUNISHMENT CLASSIFICATIONS ACCORDING TO THE EXISTENCE OF AGGRAVATING OR MITIGATING CIRCUMSTANCES SPECIFIED IN THE SECTION DEFINING THE OFFENSE, AN INDICTMENT, INFORMATION, OR WARRANT CHARGING THE OFFENSE AND SPECIFYING A HIGHER PUNISHMENT CLASSIFICATION, IS SUFFICIENT TO SUPPORT A JUDGMENT OF CONVICTION THE OFFENSE SPECIFYING ANY LOWER PUNISHMENT CLASSIFICATION MENTIONED IN THE SECTION, OR A JUDGMENT OF ACQUITTAL.

4. IN THE CASE OF AN INDICTMENT, INFORMATION, OR WARRANT FOR AN OFFENSE SPECIFIED AS ONE OF DEGREE,

A. EXCEPT AS PROVIDED IN SUBDIVISION (B) OF THIS SUBSECTION, A CRIME WHICH IS SPECIFIED AS ONE OF

DEGREE IS AN INCORPORATED OFFENSE WHEN A CRIME HAVING THE SAME NAME, EXCEPT FOR A DIFFERENT DEGREE DESIGNATION, AND A HIGHER PUNISHMENT CLASSIFICATION IS CHARGED.

B. IN THE FOLLOWING CASES A CHARGE OF A CRIME OF LOWER DEGREE DESIGNATION IS NOT AN INCORPORATED OFFENSE WHEN A CHARGE OF THE CRIME OF HIGHER DEGREE DESIGNATION IS MADE:

I. A CHARGE OF A CRIME OF DEGREE DEFINED IN PART 170 IS NOT INCORPORATED IN A CHARGE OF ANY OTHER CRIME OF DEGREE DEFINED IN THAT PART;

II. A CHARGE OF BAIL JUMPING IN THE SECOND DEGREE (SECTION 205.45) IS NOT AN INCORPORATED OFFENSE IN A CHARGE OF BAIL JUMPING IN THE FIRST DEGREE (SECTION 205.50);

III. A CHARGE OF PERJURY IN THE SECOND DEGREE (SECTION 210.10) IS NOT AN INCORPORATED OFFENSE IN A CHARGE OF PERJURY IN THE FIRST DEGREE (SECTION 210.15);

IV. A CHARGE OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE THIRD DEGREE (SECTION 220.10) IS NOT AN INCORPORATED OFFENSE IN A CHARGE OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE SECOND DEGREE (SECTION 220.15) OR IN A CHARGE OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE FIRST DEGREE (SECTION 220.20);

V. A CHARGE OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE SECOND DEGREE (SECTION 220.15) IS NOT AN INCORPORATED OFFENSE IN A CHARGE OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE FIRST DEGREE (SECTION 220.20); AND

VI. A CHARGE OF MISCONDUCT WITH RESPECT TO A PROHIBITED WEAPON IN THE SECOND DEGREE (SECTION 255.05) IS NOT AN INCORPORATED OFFENSE IN A CHARGE OF MISCONDUCT WITH RESPECT TO A PROHIBITED WEAPON IN THE FIRST DEGREE (SECTION 255.10).

5. AN OFFENSE IS AN INCORPORATED OFFENSE IN THE FOLLOWING CASES:

A. ASSAULT IN THE FOURTH DEGREE (SECTION 120.05), ASSAULT IN THE THIRD DEGREE (SECTION 120.10), AND ASSAULT IN THE SECOND DEGREE (SECTION 120.15) ARE INCORPORATED OFFENSES IN A CHARGE OF ROBBERY IN THE THIRD DEGREE (SECTION 160.05), ROBBERY IN THE SECOND DEGREE (SECTION 160.10), OR ROBBERY IN THE FIRST DEGREE (SECTION 160.15);

B. ASSAULT IN THE FIRST DEGREE (SECTION 120.25) IS AN INCORPORATED OFFENSE IN A CHARGE OF ROBBERY

IN THE SECOND DEGREE (SECTION 160.10) OR ROBBERY IN THE FIRST DEGREE (SECTION 160.15);

C. MANSLAUGHTER (SECTION 125.20) AND CRIMINALLY NEGLIGENT HOMICIDE SECTION 125.25) ARE INCORPORATED OFFENSES IN A CHARGE OF MURDER (SECTION 125.05);

D. CRIMINALLY NEGLIGENT HOMICIDE (SECTION 125.25) IS AN INCORPORATED OFFENSE IN A CHARGE OF MANSLAUGHTER (SECTION 125.20).

E. SEXUAL MISCONDUCT (SECTION 130.10) IS AN INCORPORATED OFFENSE IN A CHARGE OF RAPE IN THE SECOND DEGREE (SECTION 130.15), RAPE IN THE FIRST DEGREE (SECTION 130.30), SODOMY IN THE SECOND DEGREE (SECTION 130.25), SODOMY IN THE FIRST DEGREE (SECTION 130.30), OR INCEST IN THE FIRST DEGREE (SECTION 130.45);

F. UNLAWFUL DETENTION IN THE SECOND DEGREE (SECTION 135.05) IS AN INCORPORATED OFFENSE IN A CHARGE OF KIDNAPPING (SECTION 135.20) OR SUBSTITUTION OF CHILDREN (SECTION 135.25);

G. UNLAWFUL DETENTION IN THE FIRST DEGREE (SECTION 135.15) IS AN INCORPORATED OFFENSE IN A CHARGE OF KIDNAPPING (SECTION 135.20);

H. CRIMINAL TRESPASS IN THE THIRD DEGREE (SECTION 140.05), CRIMINAL TRESPASS IN THE SECOND DEGREE (SECTION 140.10), CRIMINAL TRESPASS IN THE FIRST DEGREE (SECTION 140.15), AND POSSESSION OF BURGLAR'S TOOLS (SECTION 140.45) ARE INCORPORATED OFFENSES IN A CHARGE OF BURGLARY IN THE THIRD DEGREE (SECTION 140.20), BURGLARY IN THE SECOND DEGREE (SECTION 140.25), OR BURGLARY IN THE FIRST DEGREE (SECTION 140.30);

I. FAILURE TO REPORT A DANGEROUS FIRE (SECTION 150.20) IS AN INCORPORATED OFFENSE IN ANY CHARGE OF ARSON IN THE THIRD DEGREE (SECTION 150.05), ARSON IN THE SECOND DEGREE (SECTION 150.10), OR ARSON IN THE FIRST DEGREE (SECTION 150.15);

J. LARCENY IN THE THIRD DEGREE (SECTION 155.10) AND LARCENY IN THE SECOND DEGREE (SECTION 155.15) ARE INCORPORATED OFFENSES IN A CHARGE OF ROBBERY IN THE THIRD DEGREE (SECTION 160.05), ROBBERY IN THE SECOND DEGREE (SECTION 160.10), OR ROBBERY IN THE FIRST DEGREE (SECTION 160.15);

K. LARCENY IN THE FIRST DEGREE (SECTION 155.20) IS AN INCORPORATED OFFENSE IN A CHARGE OF ROBBERY IN THE SECOND DEGREE (SECTION 160.10) OR ROBBERY IN THE FIRST DEGREE (SECTION 150.16);

L. CRIMINAL POSSESSION OF A FORGED WRITING IN THE SECOND DEGREE (SECTION 170.15) IS AN INCORPORATED OFFENSE IN ANY CHARGE OF FORGERY IN THE SECOND DEGREE (SECTION 170.05);

M. CRIMINAL POSSESSION OF A FORGED WRITING IN THE FIRST DEGREE (SECTION 170.20) IS AN INCORPORATED OFFENSE IN ANY CHARGE OF FORGERY IN THE FIRST DEGREE (SECTION 170.10);

N. UNLAWFUL POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE (SECTION 220.25) AND UNLAWFUL POSSESSION OF MARIHUANA (SECTION 220.30) ARE INCORPORATED OFFENSES IN ANY CHARGE OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE THIRD DEGREE (SECTION 220.10), TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE SECOND DEGREE (SECTION 220.15), OR TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE FIRST DEGREE (SECTION 220.20);

O. POSSESSION OF GAMBLING RECORDS (SECTION 225.10) AND POSSESSION OF A GAMBLING DEVICE (SECTION 225.20) ARE INCORPORATED OFFENSES IN ANY CHARGE OF PROMOTING GAMBLING (SECTION 225.05);

P. PROSTITUTION (SECTION 230.05), PATRONIZING A HOUSE OF PROSTITUTION (SECTION 230.10), PERMITTING PROSTITUTION (SECTION 230.35), AND EXPLOITING USE OF PREMISES FOR LEWDNESS (SECTION 230.40) ARE INCORPORATED OFFENSES IN ANY CHARGE OF PROMOTING PROSTITUTION IN THE THIRD DEGREE (SECTION 230.20), PROMOTING PROSTITUTION IN THE SECOND DEGREE (SECTION 230.25), OR PROMOTING PROSTITUTION IN THE FIRST DEGREE (SECTION 230.30);

Q. UNLAWFULLY PROCURING A MARRIAGE LICENSE (SECTION 240.10) IS AN INCORPORATED OFFENSE IN ANY CHARGE OF BIGAMY (SECTION 240.15); AND

R. UNLAWFUL ASSEMBLY (SECTION 245.10) AND INCITING TO RIOT (SECTION 245.15) ARE INCORPORATED OFFENSES IN ANY CHARGE OF RIOT (SECTION 245.05).

6. WHEN, UNDER THE TERMS OF THIS SECTION, AN OFFENSE INCORPORATES ANOTHER OFFENSE, IT ALSO INCORPORATES ANY OTHER OFFENSE WHICH IS AN INCORPORATED OFFENSE WHEN SUCH OTHER OFFENSE IS SPECIFICALLY CHARGED.

COMMENT

This section attempts to make what general provisions are possible for the drafting of indictments. It is included here rather than left for procedural revision because of the close connection of the provision with the specific

details of the substantive code. The draft does not attempt to provide indictment forms for specific offenses, but it does seek to simplify the task of drafting indictments and similar instruments by providing that in certain cases, charges of specified offenses automatically carry with them charges of other lesser or auxilliary offenses commonly related to them. Necesary notice to the accused of just which offenses are charged is provided through this section.

Selection of the offenses to be charged whenever specified other charges are made took place on an ad hoc basis. Each part of the draft was examined with the question in mind of what should be automatically included in a charge.

Subsection 1 defines "incorporated offense," which is the term used to designate an offense which need not be specifically charged when another offense is charged.

Subsection 2 provides that for all offenses other than anticipatory offenses (attempt, conspiracy, and solicitation), a charge of the offense incorporates a charge of attempt to commit the offense. Since the proof sometimes falls short of showing that the accused actually completed the offense, but shows that he did make an attempt to commit the offense, it should be unnecessary to change attempt separately. An exception is made in the case of assault offenses, where attempt is not an incorporated offense because the assault provisions have been specially drafted so as not to require anxilliary attempt provisions, even assuming that an attempted assault would otherwise be possible. Conspiracy and solicitation are not incorporated offenses and must be specifically charged. They involve the interaction between the accused and one or more other persons, and the accused should be given specific warning in the indictment that others are alleged to be involved.

Subsection 3 deals with a few instances in which alternative punishments are provided in the same section, according to the presence or absence of special factors. See, for example, section 255.15, which punishes misconduct with respect to a handgun, more or less severely according to whether or not the defendant is a prior offender.

Subsection 4 deals with the common case in which the code specifies crimes of degree, and it allows conviction of crimes of lesser degree when a charge of a crime of higher degree is made. In a

few specified cases, such a conviction would not be appropriate, because the crimes of degree depend for their differences, not on aggravating features of criminal conduct, but upon differences as to the kind of conduct prohibited. For example, in forgery, the difference in degree depends on the kind of writing forged. (See Part 170).

Subsection 5 deals with cases in which the incorporated offense is not capable of general description, as an attempt or crime of lesser degree, but is closely related to the offense as to which it is incorporated that it is convenient to charge it automatically. For example, sexual misconduct (section 130.10) is a very broad offense, carrying relatively light penalties, which may be proved when proof of rape, sodomy, or incest in the first degree fails; it is made an incorporated offense as to these crimes.

Subsection 6 provides that when an incorporated offense itself incorporates other offenses, these other offenses are also incorporated when a charge of the main offense is made.

It should be noted that the issue addressed by this section is: When are two crimes so similar that an explicit charge of one should carry an automatic warning to the accused that he may be required to defend himself also or in the alternative against the other related but unstated charge? This differs from the issue involved in earlier §§5.25ff. which relate to prohibitions of multiple prosecutions or multiple punishments. For example, the present section does not provide an automatic charge of solicitation to commit arson when arson is charged, because the accused should be explicitly warned when he is required to meet evidence of solicitation. His witnesses and line of defense might be very different as to the two charges. But under the earlier sections, the State would usually be barred from a second prosecution for solicitation to commit arson, following an arson prosecution arising from the same state of facts, because the State should normally consolidate all related charges and not subject the defendant to unnecessary multiple prosecutions.

5.60. IMMUNITY

1. EACH OF THE FOLLOWING LETTERED SUBDIVISIONS CONTAINS A PAIR OF "COUNTERPART OFFENSES", AS THE TERM IS USED IN THIS SECTION:

A. CRIMINAL BREACH OF TRUST (§180.00) AND

INDUCING CRIMINAL BREACH OF TRUST (§180.05);

B. SPORTS BRIBING (§180.20) AND SPORTS BRIBE RECEIVING (§180.25);

C. BRIBERY (§200.05) AND BRIBE RECEIVING (§200.10);

D. BRIBING A WITNESS (§215.05) AND BRIBE RECEIVING BY A WITNESS (§215.10); AND

E. BRIBING A JUROR (§215.25) AND BRIBE RECEIVING BY A JUROR (§215.30).

2. ANY PERSON WHO COMMITS OR ATTEMPTS TO COMMIT CONSPIRACY TO COMMIT A CRIME (§105.00) OR ONE OF A PAIR OF COUNTERPART OFFENSES SHALL BE A COMPETENT WITNESS AND COMPELLABLE TO TESTIFY AGAINST ANY OTHER PERSON WHO MAY HAVE COMMITTED OR ATTEMPTED TO COMMIT, AS A PART OF THE SAME COURSE OF CONDUCT, EITHER, AS THE CASE MAY BE, CONSPIRACY TO COMMIT THE CRIME OR ONE OF THE PAIR OF COUNTERPART OFFENSES, CONCERNING HIS PARTICIPATION OR GUILT THEREIN; PROVIDED THAT ANY PERSON SO COMPELLED TO TESTIFY SHALL BE EXEMPT FROM PROSECUTION, TRIAL, AND PUNISHMENT FOR CONDUCT ABOUT WHICH HE IS COMPELLED TO TESTIFY, INCLUDING ANY CONDUCT INVOLVING OR PERTAINING TO ANY SUCH OFFENSE OF WHICH HE MAY HAVE BEEN GUILTY OR IN WHICH HE MAY HAVE PARTICIPATED.

COMMENT

Section 50 of Article III of the Maryland Constitution (quoted in the Comment to §200.10) requires the legislature to provide for a grant of immunity to compel testimony about bribery and attempted bribery involving public officials. Article 27, section 23, contains such a grant. This draft follows quite closely the wording of the present section and gives the full transactional immunity contemplated by the Constitution.

Additional language, not appearing in section 23, is intended to make clear the extent to which testimony may be compelled and immunity is conferred. A person may be required to testify concerning "his participation or guilt" and receives immunity" for conduct about which he is compelled to testify." Thus, if a public servant testifies that he accepted or demanded a bribe in such a manner that he is guilty not only of bribe receiving but also of extortion, he reveives immunity for both offenses. The draft would also cover immunity for conspiracy to commit bribery, which is not required by the Constitution, but is covered by the present section 39 of Article 27.

The draft goes further than the present law in providing immunity for conspiracy generally and for certain other paired (or counterpart) offenses (listed in subsection (1)), where the rationale for immunity also seems strong. The offenses are by most regarded as serious and matters for severe moral condemnation, and they are such that the prosecution is likely to be difficult unless one of the parties involved in the criminal conduct can be compelled to testify.

Article 27 currently provides immunity for gambling offenses in section 262. This immunity is not continued in the present draft on two grounds: (1) Under the draft, mere players are no longer guilty of a crime (see §225.05 and §225.00(3), (4) and (5)), and they can therefore be compelled to testify against others involved without any grant of immunity. (2) The public probably does not regard even professional gambling as a matter serious enough to support the granting of immunity to one gambler in order to reach another.

PART 10 — DEFINITIONS

10.00. DEFINITIONS OF TERMS OF GENERAL USE IN THIS CODE

EXCEPT WHERE DIFFERENT MEANINGS ARE EXPRESSLY SPECIFIED IN SUBSEQUENT PROVISIONS OF THIS CODE, THE FOLLOWING TERMS HAVE THE FOLLOWING MEANINGS:

1. "OFFENSE" MEANS CONDUCT FOR WHICH A SENTENCE TO A TERM OF IMPRISONMENT OR TO A FINE IS PROVIDED BY ANY LAW OF THIS STATE OR BY ANY LAW, LOCAL LAW OR ORDINANCE OF A POLITICAL SUBDIVISION OF THIS STATE.

2. "VIOLATION" MEANS AN OFFENSE FOR WHICH A SENTENCE TO A TERM OF IMPRISONMENT NOT IN EXCESS OF FIFTEEN DAYS IS AUTHORIZED BY THIS CODE, OR FOR WHICH NO SENTENCE OF IMPRISONMENT CAN BE IMPOSED.

3. "MISDEMEANOR" MEANS AN OFFENSE FOR WHICH A SENTENCE TO A TERM OF IMPRISONMENT IN EXCESS OF FIFTEEN DAYS BUT NOT IN EXCESS OF SIX MONTHS IS AUTHORIZED BY THIS CODE.

4. "FELONY" MEANS AN OFFENSE FOR WHICH A SENTENCE TO A TERM OF IMPRISONMENT IN EXCESS OF ONE YEAR IS AUTHORIZED BY THIS CODE.

5. "CRIME" MEANS A MISDEMEANOR OR A FELONY.

6. "PERSON" MEANS A HUMAN BEING, AND WHERE APPROPRIATE, A PUBLIC OR PRIVATE CORPORATION, AN UNINCORPORATED ASSOCIATION, A PARTNERSHIP, A GOVERNMENT

OR A GOVERNMENTAL INSTRUMENTALITY.

7. "POSSESS" MEANS TO HAVE PHYSICAL POSSESSION OR OTHERWISE TO EXERCISE DOMINION OR CONTROL OVER TANGIBLE PROPERTY.

8. "PHYSICAL INJURY" MEANS IMPAIRMENT OF PHYSICAL CONDITION OR SUBSTANTIAL PAIN.

9. "SERIOUS PHYSICAL INJURY" MEANS PHYSICAL INJURY WHICH CREATES A SUBSTANTIAL RISK OF DEATH, OR WHICH CAUSES SERIOUS AND PROTRACTED DISFIGUREMENT, PROTRACTED IMPAIRMENT OF HEALTH OR PROTRACTED LOSS OR IMPAIRMENT OF THE FUNCTION OF ANY BODILY ORGAN.

10. "DEADLY PHYSICAL FORCE" MEANS PHYSICAL FORCE WHICH, UNDER THE CIRCUMSTANCES IN WHICH IT IS USED, IS READILY CAPABLE OF CAUSING DEATH OR SERIOUS PHYSICAL INJURY.

11. "DEADLY WEAPON" MEANS ANY LOADED WEAPON FROM WHICH A SHOT MAY BE DISCHARGED BY GUNPOWDER, GAS, OR COMPRESSED AIR, OR A SWITCHBLADE KNIFE, GRAVITY KNIFE, BILLY, BLACKJACK, BLUDGEON, METAL KNUCKLES, OR SLUNGSHOT.

12. "DANGEROUS INSTRUMENT" MEANS ANY LOADED OR UNLOADED WEAPON, INSTRUMENT, ARTICLE OR SUBSTANCE WHICH, UNDER THE CIRCUMSTANCES IN WHICH IT IS USED, ATTEMPTED TO BE USED OR THREATENED TO BE USED, IS OR APPEARS TO BE READILY CAPABLE OF CAUSING DEATH OR SERIOUS PHYSICAL INJURY, AND INCLUDES A "SELF-PROPELLED VEHICLE" AS THAT TERM IS DEFINED IN THIS SECTION.

13. "SELF-PROPELLED VEHICLE" MEANS A "MOTOR VEHICLE" AS DEFINED IN ARTICLE 66 1/2, SECTION 1-149 OF THE ANNOTATED CODE OF MARYLAND, OR ANY AIRCRAFT, ANY TRAIN OR COMPONENT PART THEREOF, OR ANY VESSEL EQUIPPED FOR PROPULSION ON OR UNDER WATER BY MECHANICAL MEANS OR SAIL.

14. "VEHICLE" MEANS A SELF-PROPELLED VEHICLE OR ANY DEVICE DESIGNED OR COMMONLY USED TO TRANSPORT PERSONS OR PROPERTY ON A HIGHWAY, RAILWAY, WATERWAY, OR AIRWAY.

15. "PUBLIC SERVANT" MEANS (A) ANY PUBLIC OFFICER OR EMPLOYEE OF THE STATE OR OF ANY POLITICAL SUBDIVISION THEREOF OR OF ANY GOVERNMENTAL INSTUMENTALITY WITHIN THE STATE, OR (B) ANY PERSON EXERCISING THE FUNCTION OF ANY SUCH PUBLIC OFFICER OR EMPLOYEE. THE TERM PUBLIC SERVANT INCLUDES A PERSON WHO HAS BEEN ELECTED OR DESIGNATED TO BECOME A PUBLIC SERVANT.

16. "JUROR" MEANS ANY PERSON WHO IS A MEMBER OF ANY JURY, INCLUDING A GRAND JURY, IMPANELED BY ANY COURT IN THIS STATE IN ANY ACTION OR PROCEEDING OR BY ANY

PUBLIC SERVANT AUTHORIZED BY LAW TO IMPANEL A JURY IN ANY ACTION OR PROCEEDING. THE TERM JUROR ALSO INCLUDES A PERSON WHO HAS BEEN DRAWN OR SUMMONED TO ATTEND AS A PROSPECTIVE JUROR.

17. "BENEFIT" MEANS ANY GAIN OR ADVANTAGE TO THE BENEFICIARY AND INCLUDES ANY GAIN OR ADVANTAGE TO A THIRD PERSON PURSUANT TO THE DESIRE OR CONSENT OF THE BENEFICIARY.

18. "CONSENT" MEANS ASSENT, EXCEPT WHEN (A) IT IS GIVEN BY A PERSON WHO IS LEGALLY INCOMPETENT TO AUTHORIZE THE CONDUCT CHARGED TO CONSTITUTE THE OFFENSE; OR (B) IT IS GIVEN BY A PERSON WHO BY REASON OF YOUTH, MENTAL DISORDER, OR INTOXICATION IS MANIFESTLY UNABLE OR KNOWN BY THE DEFENDANT TO BE UNABLE TO MAKE A REASONABLE JUDGMENT AS TO THE NATURE OR HARMFULNESS OF THE CONDUCT TO CONSTITUTE THE OFFENSE; OR (C) IT IS GIVEN BY A PERSON WHOSE IMPROVIDENT CONSENT IS SOUGHT TO BE PREVENTED BY THE LAW DEFINING THE OFFENSE; OR (D) IT IS INDUCED BY FORCE, DURESS, OR DECEPTION OF A KIND SOUGHT TO BE PREVENTED BY THE LAW DEFINING THE OFFENSE.

19. "DEFENDANT" MEANS A PERSON CHARGED WITH AN OFFENSE; AND WHEN THE CONTEXT SO INDICATES OR REQUIRES, THE TERM INCLUDES A PERSON WHOSE CONDUCT MAY SUBJECT HIM TO BEING SO CHARGED, WHETHER OR NOT A PROSECUTION HAS BEEN INITIATED AGAINST HIM.

20. "PROPERTY" INCLUDES REAL AND PERSONAL PROPERTY AND PROPERTY BELONGING TO A GOVERNMENT OR TO ANY GOVERNMENTAL INSTRUMENTALITY.

21. "POLICE OFFICER" MEANS ANY PERSON WHO, IN HIS OFFICIAL CAPACITY, IS AUTHORIZED BY LAW TO MAKE ARRESTS AND WHO IS:

(1) A MEMBER OF THE MARYLAND STATE POLICE; OR

(2) A MEMBER OF THE BALTIMORE CITY POLICE DEPARTMENT; OR

(3) A MEMBER OF THE POLICE DEPARTMENT, BUREAU, OR FORCE OF ANY COUNTY; OR

(4) A MEMBER OF THE POLICE DEPARTMENT, BUREAU OR FORCE OF ANY INCORPORATED CITY OR TOWN, EXCEPT BALTIMORE CITY, WHICH IS A "QUALIFYING MUNICIPALITY" AS DEFINED IN §37(A)(7) AND §39 OF ARTICLE 15A OF THE ANNOTATED CODE OF MARYLAND (SUPP. TO 1968 REP. VOLUME); OR

(5) WHO IS APPOINTED, OR GIVEN THE POWERS OF, A SPECIAL POLICEMAN EMPLOYED AND COMPENSATED BY THE

STATE FOR THE ENFORCEMENT OF LAW AND THE MAINTENANCE OF ORDER ON PROPERTY OF THE STATE OR OF ANY OF ITS AGENCIES, OR FOR THE PROTECTION OF SUCH PROPERTY; OR

(6) WHO IS THE SHERIFF OF ANY COUNTY OR OF BALTIMORE CITY AND WHOSE USUAL DUTIES INCLUDE THE MAKING OF ARRESTS; OR

(7) WHO IS A REGULARLY EMPLOYED DEPUTY SHERIFF OF ANY COUNTY AND WHO IS COMPENSATED BY THE COUNTY AND WHOSE USUAL DUTIES INCLUDE THE MAKING OF ARRESTS.

COMMENT

Many terms which are used in the same sense in more than one Part of the Code are defined here. It should be noted, however, that definitions contained in other Parts of Title I (Provisions Applicable to All Crimes) apply to the specific provisions in the rest of the Draft Code. Many, such as the definitions of culpable mental states (§15.05), defenses and affirmative defenses (§25.00), and various matters of justification (Part 35) are in frequent use in the later Parts of the draft. In a few cases, where the terms are used in only two or three separated Parts of the Code, cross-references have been used. See, for example, the reference in section 35.30(7) to "detention facility" as defined in section 205.00. In subtitle J, a number of definitions appropriate only to various theft offenses are cross-referenced within the various Parts of the subtitle. Frequently definitions are appropriate only for a single Part or section; in those cases the definitions will be found in the appropriate Part or section.

10.05. MEANING OF CERTAIN WORDS HAVING JUDICIALLY; DETERMINED MEANING

UNDEFINED WORDS OR PHRASES IN THIS CODE, WHICH ARE USED AT COMMON LAW OR IN STATUTES WHICH ARE OR HAVE BEEN IN FORCE IN THIS STATE AND WHICH HAVE A JUDICIALLY DETERMINED MEANING IN THE CONTEXT IN WHICH THEY ARE USED IN THIS CODE, SHALL BE CONSTRUED IN THE LIGHT OF SUCH JUDICIALLY DETERMINED MEANING.

COMMENT

Although the draft code defines many terms, no statute can or should attempt to define every word it uses. Some reliance is placed upon usage, and where a technical meaning has been developed in the relevant context, it may be invoked. So, where a common law term, otherwise undefined, is used in a

context similar to the one in which it appeared at common law, a court may properly be guided by the judicially developed common law meaning. See the Comment to section 1.10, supra.

SUBTITLE B — PRINCIPLES OF CRIMINAL LIABILITY

PART 15: CULPABILITY

15.00. CULPABILITY; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS ARTICLE:

1. "ACT" MEANS A BODILY MOVEMENT.

2. "VOLUNTARY ACT" MEANS A BODILY MOVEMENT PERFORMED CONCIOUSLY AS A RESULT OF EFFORT OR DETERMINATION, AND INCLUDES THE POSSESSION OF PROPERTY IF THE ACTOR WAS AWARE OF HIS PHYSICAL POSSESSION OR CONTROL THEREOF FOR A SUFFICIENT PERIOD TO HAVE BEEN ABLE TO TERMINATE IT.

3. "OMISSION" MEANS A FAILURE TO PERFORM AN ACT AS TO WHICH A DUTY OF PERFORMANCE IS IMPOSED BY LAW.

4. "CONDUCT" MEANS AN ACT OR OMISSION AND ITS ACCOMPANYING MENTAL STATE.

5. "TO ACT" MEANS EITHER TO PERFORM AN ACT OR TO OMIT TO PERFORM AN ACT.

6. "CULPABLE MENTAL STATE" MEANS "INTENTIONALLY" OR "KNOWINGLY" OR "RECKLESSLY" OR WITH "CRIMINAL NEGLIGENCE," AS THESE TERMS ARE DEFINED IN SECTION 15.05.

COMMENT

These definitions are taken directly from the New York Code. They will be discussed, as necessary, in the course of dealing with the sections which follow.

15.05. CULPABILITY; DEFINITIONS OF CULPABLE MENTAL STATES

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS ARTICLE:

1. "INTENTIONALLY." A PERSON ACTS INTENTIONALLY WITH RESPECT TO A RESULT OR TO CONDUCT DESCRIBED BY A STATUTE DEFINING AN OFFENSE WHEN HIS CONSCIOUS PURPOSE OR OBJECTIVE IS TO CAUSE SUCH RESULT OR TO ENGAGE IN SUCH CONDUCT.

2. "KNOWINGLY." A PERSON ACTS KNOWINGLY (A) WITH RESPECT TO CONDUCT OR TO A CIRCUMSTANCE DESCRIBED BY A STATUTE DEFINING AN OFFENSE, WHEN HE IS AWARE THAT HIS CONDUCT IS OF SUCH A NATURE OR THAT SUCH CIRCUMSTANCES EXIST, OR (B) WITH RESPECT TO A RESULT DESCRIBED BY A STATUTE DEFINING AN OFFENSE, WHEN HE IS AWARE THAT IT IS PRACTICALLY CERTAIN THAT HIS CONDUCT WILL CAUSE SUCH A RESULT.

3. "RECKLESSLY." A PERSON ACTS RECKLESSLY WITH RESPECT TO A RESULT OR TO A CIRCUMSTANCE DESCRIBED BY A STATUTE DEFINING AN OFFENSE WHEN HE IS AWARE OF AND CONSCIOUSLY DISREGARDS A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT SUCH RESULT WILL OCCUR OR THAT SUCH CIRCUMSTANCE EXISTS. THE RISK MUST BE OF SUCH NATURE AND DEGREE THAT DISREGARD THEREOF CONSTITUTES A SERIOUS AND EXTREME DEVIATION FROM THE STANDARD OF CONDUCT THAT A REASONABLE PERSON WOULD OBSERVE IN THE SITUATION. A PERSON WHO CREATES SUCH A RISK BUT IS UNAWARE THEREOF SOLELY BY REASON OF VOLUNTARY INTOXICATION ALSO ACTS RECKLESSLY WITH RESPECT THERETO.

4. "CRIMINAL NEGLIGENCE." A PERSON ACTS WITH CRIMINAL NEGLIGENCE WITH RESPECT TO A RESULT OR TO A CIRCUMSTANCE DESCRIBED BY A STATUTE DEFINING AN OFFENSE WHEN HE FAILS TO PERCEIVE A SUBSTANTIAL AND UNJUSTIFIABLE RISK THAT SUCH RESULT WILL OCCUR OR THAT SUCH CIRCUMSTANCE EXISTS. THE RISK MUST BE OF SUCH NATURE AND DEGREE THAT THE FAILURE TO PERCEIVE IT CONSTITUTES A SERIOUS AND EXTREME DEVIATION FROM THE STANDARD OF CARE THAT A REASONABLE PERSON WOULD OBSERVE IN THE SITUATION.

COMMENT

Introduction: One of the most important accomplishments of the Model Penal Code is to reduce to only four the number of mental states significant for most forms of criminal liability. The common law deals with such concepts as malice, purpose, knowledge, willfulness, wantonness, intent (general and specific), recklessness, and criminal, gross, or ordinary negligence. All of these terms suffer from either vagueness or shifting of meaning. The Model Penal Code deals only with purpose, knowledge, recklessness, and negligence, and New York follows the Model Penal Code closely. (New York uses the word "intentionally" in place of the Model Penal Code's "purposely.") The Commission has made only a few minor changes, for the sake of clarity, in the New York provisions.

"Intentionally," "Knowingly," "Recklessly," and "Criminal Negligence": "Intentionally" denotes purposive action. "Knowingly" indicates awareness of the relevant factor's existence, without

requiring that it is desired. One who aims a gun at another, wishing to kill him, and pulls the trigger, intends death; one who is merely testing the mechanism of the gun, and realizes, but does not care that his testing will almost certainly kill, does not act intentionally, but does act knowingly. Although the distinction is a narrow one, there are some areas in which it is of significance. Either intention or knowledge would be sufficient for murder if the victim is killed in the above example (§ 125.05), but intent is required for attempt (§110.00); if the accused acted with knowledge only and the shot narrowly missed, the proposed Code punishes for assault (§§120.10,ff.).

The difference between "recklessly" and with "criminal negligence" turns on the accused's awareness of the risk, which in each case must be a substantial and unjustifiable one, and must involve a serious and extreme deviation from the standard of a reasonable man in the accused's conduct in consciously disregarding the risk (in the case of the reckless conduct) or failing to perceive it (in the case of criminally negligent conduct). The phrase "serious and extreme deviation" has been used, to suggest both quantitative and qualitative requirements in the departure from the ordinary standard of care. The words "substantial," "unjustifiable," and "serious and extreme deviation from the standard of a reasonable man" are somewhat imprecise, but the nature of the topic does not allow absolute precision, and the words reflect the reliance on the judgment of the jury (in a multitude of possible fact situations) which is necessary in this area. The qualification in the last sentence of subsection three, relating to recklessness where voluntary intoxication exists, is discussed in connection with section 15.25, infra.

Propriety of liability for negligence, as opposed to recklessness: Since failure to perceive a risk ordinarily involves stupidity rather than fault, it is usually inappropriate to punish for mere criminal negligence. There may, however, be cases in which this should be done. One who is aware of the possibility of punishment for negligence in a particular kind of activity may take steps to discover and avoid possible risks, because of the threat of punishment. One who knows that the violation of certain standards may be regarded as negligence if harm is caused may follow the standards even if his personal view is that violation of them is not negligent.

15.10. REQUIREMENTS FOR CRIMINAL LIABILITY IN GENERAL

AND FOR OFFENSES OF STRICT LIABILITY AND MENTAL CULPABILITY

THE MINIMAL REQUIREMENT FOR CRIMINAL LIABILITY IS THE PERFORMANCE BY A PERSON OF CONDUCT WHICH INCLUDES A VOLUNTARY ACT OR THE OMISSION TO PERFORM AN ACT WHICH HE IS PHYSICALLY CAPABLE OF PERFORMING. IF SUCH CONDUCT IS ALL THAT IS REQUIRED FOR COMMISSION OF A PARTICULAR OFFENSE, OR IF AN OFFENSE OR SOME MATERIAL ELEMENT THEREOF DOES NOT REQUIRE A CULPABLE MENTAL STATE ON THE PART OF THE ACTOR, SUCH OFFENSE IS ONE OF "STRICT LIABILITY." IF A CULPABLE MENTAL STATE ON THE PART OF THE ACTOR IS REQUIRED WITH RESPECT TO EVERY MATERIAL ELEMENT OF AN OFFENSE, SUCH OFFENSE IS ONE OF "MENTAL CULPABILITY."

COMMENT

Voluntariness: While it may make sense to provide compulsory institutional treatment in some cases of harm caused by involuntary acts, it is obvious that punishment is inappropriate. Cases exist in which the voluntariness of the accused's conduct was an important issue, e.g. Reg. v. Charlson, 39 Crim. App. R. 37 (Chester Assizes, 1955), involving an assault, explainable only as a product of a cerebral tumor, and Fain v. Commonwealth, 78 Ky. 183 (1879), involving homicide and a defense of somnambulism. It would be possible to list specific involuntary acts, as does Model Penal Code section 2.01: reflexes, convulsions, bodily movements during unconsciousness or sleep, conduct during hypnosis or resulting from hypnotic suggestion, or bodily movements that are otherwise not a product of the effort or determination of the actor, either conscious or habitual. The New York formulation, followed here, is more general (see section 15.00(2)); it seems better because it more plainly leaves open, for example, the question of whether a particular person while subject to hypnotic suggestion committed a voluntary act. The reason for the phrasing, "conduct which includes a voluntary act," is to make clear that one who, knowing that he is subject to blackouts, drives a car and runs over a pedestrian during a momentary blackout, may be found guilty of a crime, although he was not committing a voluntary act at the moment of impact. The voluntary act of driving the car is sufficient to meet this particular requirement. (Of course, a culpable mental state, e.g. recklessness, must also be shown.) The provision relating to possession is derived from Model Penal Code section 2.01(4). Special treatment is required because possession is neither a bodily movement nor an omission.

Conduct: act or omission: The section requires for criminality the performance of conduct, which, according to section 15.00, includes either an act, defined as a bodily movement, or an omission, defined as a failure to perform an act as to which a duty of performance is imposed by law. As to the act requirement, the section does no more than reflect the common law principle that criminality cannot be based on a state of mind alone; the defendant must have "done" something. The omission requirement takes care of the relatively small number of cases where the defendant performs no physical movement, but rather fails to perform some act required by law. Examples of criminal liability based on omission include some cases of failure of a parent to provide food for a child, failure of a nursing home to take reasonable steps to prevent injury to a helpless patient, and failure to obey some statutory duty to act. From time to time it has been suggested that this common law duty to act in narrow situations be expanded, so that the criminal law would generally require action to prevent the actus reus of crime, unless some justification for non-action, such as danger to the defendant, could be shown. The difficulties of policy decision, classification of justifying circumstances, and draftsmanship have generally left the common law rule undisturbed. The Commission has followed New York and the Model Penal Code (cf. section 2.01(3)) in not attempting to draft a broad omissions provision.

Causation: New York has no general formulation of a causal principle; causal requirements are incorporated as necessary in specific offenses, usually by a simple use of the word "cause," e.g. "a person is guilty of murder when . . . he causes the death . . . " The Model Penal Code does provide a drafting model for a general provision on cause in section 2.03, but does not attempt a precise formulation of the problem of supervening cause, resting content with "not too remote or accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense." If no causal formulation is attempted, the courts will presumably continue to apply common law conceptions of causation. This is a field in which there are many uncertainties. It seemed to the Commission best to follow New York and not to attempt to draft a section on causation which might create more problems than it would solve.

Strict liability: If negligence is to be used cautiously as a basis for criminal liability, still less often, if at all, should the criminal law

concern itself with conduct which does not even involve negligence on the part of the defendant. Most of the cases in which a justification of absolute criminal liability has been attempted concern minor regulatory offenses, such as liquor sales to minors, in which it might be difficult for the prosecution to prove negligence in assessing age. The large volume of cases and the usually trivial nature of the fine involved tempt us to save time by making the state of mind of the actor irrelevant. It is probably well to anticipate the possiblity of such crimes for the present and include a mention of them, as does New York. While allowing for the strict liability offense, which requires no culpable mental state, the section (as appears more clearly in the following section) states the more usual requirements for criminal liability: culpable mental state as defined in section 15.05, plus conduct as required by sections 15.10 and 15.00.

15.15. CONSTRUCTION OF STATUTES WITH RESPECT TO CULPABILITY REQUIREMENTS

1. WHEN THE COMMISSION OF AN OFFENSE DEFINED IN THIS ARTICLE, OR SOME ELEMENT OF AN OFFENSE, REQUIRES A PARTICULAR CULPABLE MENTAL STATE, SUCH MENTAL STATE IS ORDINARILY DESIGNATED IN THE STATUTE DEFINING THE OFFENSE BY USE OF THE TERMS "INTENTIONALLY," "KNOWINGLY," "RECKLESSLY" OR "CRIMINAL NEGLIGENCE," OR THE LIKE. WHEN ONE AND ONLY ONE OF SUCH TERMS APPEARS IN A STATUTE DEFINING AN OFFENSE, IT IS PRESUMED TO APPLY TO EVERY ELEMENT OF THE OFFENSE UNLESS AN INTENT TO LIMIT ITS APPLICATION CLEARLY APPEARS. REFERENCES IN THE CRIMINAL CODE TO "NEGLIGENCE" MEAN "CRIMINAL NEGLIGENCE" UNLESS THE CONTEXT OTHERWISE REQUIRES.

2. ALTHOUGH NO CULPABLE MENTAL STATE IS EXPRESSLY DESIGNATED IN A STATUTE DEFINING AN OFFENSE, A CULPABLE MENTAL STATE MAY NEVERTHELESS BE REQUIRED FOR THE COMMISSION OF SUCH OFFENSE, OR WITH RESPECT TO SOME OR ALL OF THE MATERIAL ELEMENTS THEREOF, IF THE PRESCRIBED CONDUCT NECESSARILY INVOLVES SUCH CULPABLE MENTAL STATE. A STATUTE DEFINING A CRIME, UNLESS CLEARLY INDICATING A LEGISLATIVE INTENT TO IMPOSE STRICT LIABILITY, SHOULD BE CONSTRUED AS DEFINING A CRIME OF MENTAL CULPABILITY. THIS SUBDIVISION APPLIES TO OFFENSES DEFINED BOTH IN AND OUTSIDE THIS ARTICLE.

3. WHENEVER A PARTICULAR CULPABLE MENTAL STATE IS SUFFICIENT TO CONSTITUTE AN ELEMENT OF A PARTICULAR OFFENSE, ANY MORE CULPABLE MENTAL STATE IS ALSO SUFFICIENT. THE CULPABLE MENTAL STATES DEFINED IN SECTION 15.05 ARE LISTED IN ORDER OF DECREASING CULPABILITY.

COMMENT

The presumption in subparagraph 1 is designed to provide for the common situation in which mental elements with respect to several factors exist in a single offense. E.g., although to sustain a charge of manslaughter where excessive use of force in meeting an attack is involved, intention or knowledge is required as to causing death or injury, negligence is the appropriate factor to consider in evaluating the use of excessive force. See Sec. 125.20(1)(b) infra. The construction suggestion in paragraph 2 may not be very helpful, but it is probably desirable insurance against inadvertent omissions of references to mental state by draftsmen.

15.20. EFFECT OF IGNORANCE OR MISTAKE UPON LIABILITY

1. IGNORANCE OR MISTAKE AS TO A MATTER OF FACT IS A DEFENSE IF THE IGNORANCE OR MISTAKE NEGATIVES THE INTENTION, KNOWLEDGE, BELIEF, RECKLESSNESS OR CRIMINAL NEGLIGENCE REQUIRED TO ESTABLISH A MATERIAL ELEMENT OF THE OFFENSE, OR IF THE IGNORANCE OR MISTAKE IS OF A KIND THAT SUPPORTS A DEFENSE OF JUSTIFICATION AS DEFINED IN SECTIONS 35.00 TO 35.30, INCLUSIVE.

2. IGNORANCE OR MISTAKE AS TO A MATTER OF FACT OR LAW IS A DEFENSE IF THE LAW PROVIDES THAT THE STATE OF MIND ESTABLISHED BY SUCH IGNORANCE OR MISTAKE CONSTITUTES A DEFENSE OR OTHERWISE PREVENTS CRIMINAL LIABILITY.

3. ALTHOUGH IGNORANCE OR MISTAKE WOULD OTHERWISE AFFORD A DEFENSE TO THE OFFENSE CHARGED, THE DEFENSE IS NOT AVAILABLE IF THE DEFENDANT WOULD BE GUILTY OF ANOTHER OFFENSE HAD THE SITUATION BEEN AS HE SUPPOSED. IN SUCH CASE, HOWEVER, IF SUCH OTHER OFFENSE IS OF A LOWER GRADE THAN THE OFFENSE CHARGED, THE IGNORANCE OR MISTAKE OF THE DEFENDANT SHALL REDUCE THE GRADE OF THE OFFENSE OF WHICH HE MAY BE CONVICTED TO THAT OF THE OFFENSE OF WHICH HE WOULD BE GUILTY HAD THE SITUATION BEEN AS HE SUPPOSED.

4. A BELIEF THAT CONDUCT DOES NOT LEGALLY CONSTITUTE AN OFFENSE IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION FOR THAT OFFENSE BASED UPON SUCH CONDUCT WHEN THE STATUTE OR OTHER ENACTMENT DEFINING THE OFFENSE IS NOT KNOWN TO THE DEFENDANT AND HAS NOT BEEN PUBLISHED OR OTHERWISE REASONABLY MADE AVAILABLE PRIOR TO THE CONDUCT ALLEGED.

COMMENT

Introduction: The answer to the problem of mistake in criminal law is implied in the definition of a criminal state of mind. Obviously, if the mens

rea of an offense requires a particular belief, an accused person may not have this belief if he is mistaken about a crucial fact relevant to the event. For example, whatever else a defendant may be guilty of when he points a gun at the victim and pulls the trigger, he is not guilty of intentional murder if he believes that the gun is unloaded. He could not have a purpose to kill under those circumstances. It is therefore arguable, at least with respect to mistakes of fact, that no provision in the Code is necessary because the problem of mistake is taken care of in the definitions of the mental states which are already provided. It is, however, important with respect to mistake of fact to indicate clearly that the mistake must be relevant to the requirements for the crime in order to have any effect, so that the primary purpose of the draft section with respect to mistake of fact should probably be to limit the effect of mistake of fact to those cases in which it does have a bearing on the state of mind.

Ignorance or mistake of fact: Subsections (1) and (2) set forth the generally accepted rule as to mistake of fact. Insofar as the mistake prevents the existence of the state of mind required for the crime, or insofar as the statute specifically provides that its nonexistence is a defense, it prevents criminal liability. As to some of the specific offenses to be considered later, the Code may impose an additional requirement for the excuse of mistake of fact, that the mistake be reasonable. Whenever this is done, the defendant can be punished for mere negligence.

Where mistake affects the guilty mind, and is not specially required to be reasonable, actual mistake is enough to change the result. With respect to mistakes of fact relevant to the defense of justification, the justification sections require reasonable mistake as to most of the central matters (though in cases of criminal homicide, honest but unreasonable mistake may reduce murder to manslaughter). Where nothing is specified, this section provides that honest mistake is enough. E.g., a private citizen claiming a defense under section 35.30(4) for committing what would otherwise be an assault on an arrestee, on the ground that he believed that a policeman had demanded his help and that the force was necessary to effect the arrest, would have to be reasonable as to his belief in the necessity of force (because §35.30 so provides) but not as to his belief that the person requesting his aid was a policeman (because §35.30 is silent and the current section governs).

Ignorance or mistake of law: The Commission found the New York provisions generally satisfactory as to mistake of fact, but not as to mistake of law. The usual view is that mistake of law, aside from the special situations covered in subsections (3) and (4), is irrevelevant unless a specific attitude towards the law is a part of the definition of the offense, as, for example, in common law larceny, where the defendant's claim of right, based on a mistake of property law prevents his guilt. This view is followed by the Model Penal Code section 2.04 and by the Commission and is in accord with current Maryland law. Hopkins v. State, 193 Md. 489.

It would of course be dangerous to provide generally that ignorance or mistake of law prevents conviction, since most citizens are unaware of many technical requirements of the law which may impose criminal liability. To permit such a defense would encourage lack of care and lack of forethought when one embarks on a course of conduct. And, in most cases, the potential defendant will at least recognize a danger that his doubtful conduct may be criminal and will have an opportunity to investigate before acting. Both New York and the Model Penal Code (in section 2.04(3)) provide that the rule should be otherwise where the defendant makes a bona fide effort to discover the law from an official source and reasonably relies on an official interpretation from the proper source. Punishing such a defendant seems unjust, and it adds nothing to the policy of encouraging citizens to find out what the law is before acting. The Commission's drafting subcommittee, however, thought New York and Model Penal Code provisions to be too loosely drawn. It attempted to tighten the provisions, e.g., by requiring that the defendant rely on a written statement, but the Commission believes that it is probably impossible to draft a provision sufficiently narrow so that it will not cause more difficulty in the adjudicating of spurious defenses than it is worth, and it has therefore decided to omit any such defense, except in the limited situation in which the law has not been properly published prior to the defendant's act. The defense under this subsection is made an affirmative one. The showing of a bona fide effort to discover the law and obey it would of course be relevant on a question either of sentencing or of pardon.

Ignorance or mistake where defendant would be guilty of another offense if the situation were as he supposed: One special problem of mistake arises when the accused is genuinely mistaken about facts relevant to his offense, but even on his erroneous

assumption he would be guilty of some offense, although not the offense involved. For example, the defendant might intend to steal an article which he believed to be worth $15,000, but was in fact, worth only $150. He has a defense to a charge of larceny in the first degree in this situation because he did not in fact commit the actus reus of the crime. He might also claim to have a defense to a charge of larceny in the second degree because he did not have an "intention" or "conscious objective" embracing the lesser charge. The Commission in subsection (3) has added to the New York provisions on mistake Model Penal Code section 2.04(2) to solve this problem. The section also handles the case where the accused, charged with larceny in the third degree, attempts to defend on the ground that his aspirations rose higher, and that he would not have bothered with the cheaper goods, had he known their value. This defense is simply made "not available."

This special provision would be almost entirely limited to mistakes of fact, as in the above illustrations. However, it is possible to imagine an offense which would require a specific attitude towards the law, e.g., suppose that harboring a felon is punished more severely than harboring a misdemeanant; the accessory's mistake of law as to whether the act committed was felony or misdemeanor would require the use of this section if belief about the nature of the crime is part of the offense.

15.25. EFFECT OF INTOXICATION UPON LIABILITY

1. THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS SECTION:

(A) "INTOXICATION" MEANS A DISTURBANCE OF MENTAL OR PHYSICAL CAPACITIES RESULTING FROM THE INTRODUCTION OF SUBSTANCES INTO THE BODY.

(B) "INVOLUNTARY INTOXICATION" MEANS INTOXICATION CAUSED WITHOUT THE NEGLIGENCE OR FAULT OF THE DEFENDANT BY:

(I) SUBSTANCES INTRODUCED WITHOUT THE KNOWLEDGE OF THE DEFENDANT, OR SUBSTANCES, THE TENDENCY OF WHICH TO CAUSE THE INTOXICATION THE DEFENDANT DOES NOT KNOW; OR

(II) SUBSTANCES INTRODUCED IN QUANTITIES WHICH PRODUCE INTOXICATION GROSSLY EXCESSIVE IN DEGREE, CONSIDERING THE AMOUNT OF THE INTOXICANT, TO WHICH THE DEFENDANT DOES NOT KNOW THAT HE IS UNUSUALLY SUSCEPTIBLE; OR

(III) SUBSTANCES INTRODUCED UNDER CIRCUMSTANCES WHICH WOULD AFFORD A DEFENSE OF DURESS OR JUSTIFICATION TO A CHARGE OF CRIME; OR

(IV) SUBSTANCES INTRODUCED PURSUANT TO MEDICAL ADVICE.

(C) "VOLUNTARY INTOXICATION" MEANS INTOXICATION WHICH IS NOT INVOLUNTARY INTOXICATION.

2. EXCEPT AS PROVIDED IN §15.05(3), VOLUNTARY OR INVOLUNTARY INTOXICATION IS A DEFENSE TO A CRIMINAL CHARGE IF AND TO THE EXTENT THAT IT NEGATIVES AN ELEMENT OF AN OFFENSE WITH WHICH THE DEFENDANT IS CHARGED.

3. INVOLUNTARY INTOXICATION IS ALSO A DEFENSE TO A CRIMINAL CHARGE IF BY REASON OF SUCH INTOXICATION THE DEFENDANT AT THE TIME OF HIS CONDUCT LACKS SUBSTANTIAL CAPACITY EITHER TO APPRECIATE ITS CRIMINALITY OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW. THE DEFENDANT HAS THE BURDEN OF ESTABLISHING THE INVOLUNTARY NATURE OF THE INTOXICATION BY A PREPONDERANCE OF THE EVIDENCE UNDER THIS SUBSECTION THREE.

4. INTOXICATION DOES NOT, IN ITSELF, CONSTITUTE MENTAL DISORDER WITHIN THE MEANING OF §30.05.

COMMENT

Introduction: The problem of intoxication as an excusing factor in crime is one of great practical importance since it appears that a substantial proportion of crimes involves the use of intoxicating liquor to some degree or other. The New York section is quite short. It deals only with voluntary intoxication, and the Commission considered it inadequate. The Model Penal Code section 2.08 provided a better model, but the section has been substantially redrafted to avoid use of the new concepts of "self-induced intoxication" and "pathological intoxication" in favor of the traditional "involuntary intoxication." It is believed that the proposed section is substantially in accord with Maryland law.

Involuntary intoxication: The usual statement of the American law distinguishes ordinary intoxication from some rather special and unusual situations. The latter include such unintended and fault free intoxication as exists where the accused has been forcibly required to imbibe alcohol or where it has been administered to him without his knowledge that he is drinking anything intoxicating. Some recent authority has also put in this class what is called pathological intoxication. This is

intoxication which results from an unusual and unknown susceptibility to intoxicating liquor because of some physiological condition. In these special situations the usual treatment has been to regard the accused as if he were insane under the local insane-at-the-time-of-act rule of the jurisdiction, so that the question is whether the blameless intoxication has rendered the defendant lacking in substantial capacity either to appreciate the criminality of his act or to conform his conduct to the requirements of law. See Dubs v. State, 2 Md. App. 524, 541. While intoxication itself is a matter on which the prosecution has the burden of proof (assuming the defense to be in issue because of the existence of evidence to support it in the case) as part of its duty to show a criminal state of mind, the draft makes the involuntary nature of the intoxication a matter for the accused to prove by a preponderance of the evidence. Note also that intoxication can not qualify as involuntary unless it is caused without the negligence of fault of the defendant.

Also, the law has recognized that prolonged drinking may lead to certain pathological states in which the accused is in reality suffering from a mental disease. Generally, for example, delirium tremens is placed in this category. Cases in which such a mental disease exists are properly dealt with as insanity under Section 30.05, infra.

This section does not deal with the defense of "alcoholism," which appears to be available, at most, only with respect to crimes like public drunkenness, where the conduct ordinarily condemned as criminal is or almost is a sympton of the "disease." See Dubs v. State, supra, and Prather v. Warden, 1 Md. App. 478. The Supreme Court has recently held by a divided court that it is not necessarily cruel and unusual punishment to punish a chronic alcoholic for public drunkenness. Powell v. Texas, 392 U.S. 514, 88 S. Ct. 2145 (1968). It may be that the courts will classify alcoholism as a mental disease for this limited purpose, bringing the problem within the insanity section of the code. For our purposes, it would seem adequate to deal with the problem specially in liquor and drug offenses.

Voluntary intoxication: The common case of drunkenness is one of voluntary intoxication. Such intoxication is not ordinarily treated as relevant except insofar as it prevents the existence of a particular state of mind which is required for the existence of the offense. Accord, Avey v. State,

249 Md. 385. So, for example, most American jurisdictions have held that where premeditation and deliberation are necessary elements of first degree murder, the existence of voluntary intoxication is relevant on the issue of whether a defendant is capable of premeditation or deliberation, and, if his senses were so dulled by alcohol that he could not premeditate, he is entitled to a judgment of not guilty of first degree murder. However, the accused in the situation supposed could be found guilty of second degree murder. The cases have not admitted that a more general criminal state of mind can be negatived by intoxication. The New York Code provides in section 15.05(3) that recklessness is not affected by the fact that the accused, because of intoxication, was unable in fact to assess the risk to the same degree as if he had been sober. The provision seems sound as in accord with the usual view. While it may be said that in some circumstances liability without fault or without serious fault may result in this area, it would appear that public policy requires that the actor exercise care in assessing his alcoholic capacity, and in order to enforce this it may be necessary to have some form of absolute provision.

PART 20: LIABILITY OF ACCOMPLICES, CORPORATIONS, AND CORPORATE AGENTS

20.00. CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER

WHEN ONE PERSON ENGAGES IN CONDUCT WHICH CONSTITUTES AN OFFENSE, ANOTHER PERSON IS CRIMINALLY LIABLE FOR SUCH CONDUCT WHEN, ACTING WITH THE MENTAL CULPABILITY REQUIRED FOR THE COMMISSION THEREOF, HE URGES, REQUESTS, COMMANDS, OFFERS TO HIRE OR OTHERWISE ENDEAVORS TO INDUCE OR INTENTIONALLY AIDS SUCH PERSON TO ENGAGE IN A SPECIFIC TYPE OR TYPES OF CONDUCT CONSTITUTING SUCH OFFENSE.

COMMENT

Conduct amounting to complicity: traditionally the accomplice aids or abets; that is, he assists or encourages another in the commission of a crime. At common law, he was in the case of a felony, for which the accomplice system was most fully developed, an accessory before the fact if the aid or encouragement was given in advance and he was not himself present at the commission of the offense, or a principal in the second degree if he gave it while present at the commission of the crime. Commonly principals of either degree and accessories before the fact are subject to the same punishment today, and it is unnecessary to preserve the old distinctions and terminology. (Accessories after

the fact are not dealt with in this Part; they are treated in §§205.65ff.)

The language of the draft: "urges, requests, commands, offers to hire or otherwise endeavors to induce or intentionally aids," express a little more fully the old ideas of aiding and abetting, and are derived from the New York language, with minor changes in the interest of clarity.

The mental element: The section requires that the accomplice share the culpable mental state required for the commission of the crime by its definition. E.g., if the receiver of stolen goods must have knowledge that the goods are stolen, nobody can be the accomplice of a receiver without having such knowledge. It also requires that he must intend to aid or abet the commission of the crime. This required intention is specifically provided for in the phrase "intentionally aids," and is implied in the other verbs quoted at the beginning of the next preceding paragraph; to "urge" another to commit a crime is to intend to abet its commission. In this we follow New York and the Model Penal Code.

The American Law Institute gave serious consideration to making knowledge that one is aiding or abetting (without purpose to aid or abet) sufficient, but finally decided that this would cast the net too wide. The difference between requiring intention or purpose on the one hand, or knowledge on the other is illustrated by the case of the landlord who rents a room to a prostitute, at an uninflated rental, knowing that she uses the room for purposes of prostitution. He would not be guilty as a party to the crime of prostitution under the proposed draft. If he can be held guilty on the basis of knowledge alone, one might also indict the druggist who sells the prostitute cosmetics, or the grocer who sells her bread, if he knows that the purchase will aid her in prostitution. Limiting accessoryship to those who actively desire to have the crime committed avoids this problem, though it may prevent conviction of some people on the fringes of the criminal enterprise whom we might, in particular cases, wish to convict.

New York has tried to solve this problem by creating the minor crime of "Facilitation," (applicable only to felonies) which is roughly aiding or abetting with knowledge. The Commission does not favor creating even such minor general criminal liability in such cases. At any rate, doubt is cast on punishment on the basis of

knowledge alone, as a matter of due process, by the decision of the Supreme Court in Scales v. United States, 367 U.S. at 222, 225–6 n. 17 (but cf. Direct Sales Co. v. United States, 319 U.S. 703, 713). It is not clear whether the limiting construction of the Smith Act there adopted rested on due process or first amendment grounds; in the former event, doubt would be cast on the general validity of the facilitation statute.

Aiding or abetting specific conduct: One change in the phraseology of §20.00 of the New York Code has been made in the present draft statute, in the interests of protecting legitimate agitation. It substitutes the words "specific type or types of conduct constituting such crime" for "such crime," in accord with the Model Penal Code (see Tent. Dr. #10, at 88–9) which also uses the word "specific" and explains:

> It is of course unnecessary for the actor to go into great detail as to the manner in which the crime solicited is to be committed. But it is necessary under this formulation that, in the context of the knowledge and position of the intended recipient, the solicitation carry meaning in terms of some course of conduct that it is the actor's object to incite.

It is also believed that the limitation will meet any constitutional limitations imposed by Yates v. United States, 354 U.S. at 321–22, 327. It is believed desirable to deal with these problems in the general complicity and solicitation statutes, rather than in a criminal anarchy statute addressed specifically to political speech such as that contained in §240.15 of the New York Code, an approach in accord with the view of Professor Chafee (Freedom of Speech in the United States (1941), 145 n.3). Comnare 64 Columbia L. Rev. at 1513–14, which takes the view that the "specific" limitation is unnecessary if the "criminal anarchy" provision is retained to deal with political speech.

20.05. CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER; NO DEFENSE

IN ANY PROSECUTION FOR AN OFFENSE IN WHICH THE CRIMINAL LIABILITY OF THE DEFENDANT IS BASED PURSUANT TO SECTION 20.00 UPON THE CONDUCT OF ANOTHER PERSON, IT IS NO DEFENSE THAT:

1. SUCH OTHER PERSON IS NOT GUILTY OF THE OFFENSE IN QUESTION OWING TO CRIMINAL IRRESPONSIBILTY OR OTHER

LEGAL INCAPACITY OR EXEMPTION, OR TO UNAWARENESS OF THE CRIMINAL NATURE OF THE CONDUCT IN QUESTION OR OF THE DEFENDANT'S CRIMINAL PURPOSE OR TO OTHER FACTORS PRECLUDING THE MENTAL STATE REQUIRED.

2. SUCH OTHER PERSON IS NOT AMENABLE TO JUSTICE OR HAS NOT BEEN PROSECUTED FOR OR CONVICTED OF ANY OFFENSE BASED UPON THE CONDUCT IN QUESTION, OR HAS PREVIOUSLY BEEN ACQUITTED THEREOF, OR HAS LEGAL IMMUNITY FROM PROSECUTION THEREFOR; OR HAS BEEN CONVICTED OF A DIFFERENT OFFENSE BASED ON THE CONDUCT IN QUESTION OR A DIFFERENT DEGREE OF THE OFFENSE CHARGED.

3. THE OFFENSE IN QUESTION, AS DEFINED, CAN BE COMMITTED ONLY BY A PARTICULAR CLASS OR CLASSES OF PERSONS, AND THE DEFENDANT, NOT BELONGING TO SUCH CLASS OR CLASSES, IS FOR THAT REASON LEGALLY INCAPABLE OF COMMITTING THE OFFENSE IN AN INDIVIDUAL CAPACITY.

COMMENT

The basic purpose of this provision, which is in accord with most modern codes, is to permit the conviction of an accomplice regardless of the disposition of the charges against the supposed perpetrator. As pointed out by the drafters of the Model Penal Code, when the perpetrator has been wrongfully acquitted, conviction of the accomplice is preferable to a grant of immunity based upon a miscarriage of justice.

Minor changes in the New York draft provision have been made. Further, §20.05.(2) adds the words "is not amenable to justice" and the words "or has been convicted of a different offense based on the conduct in question or a different degree of the offense charged," in order to further negate the various "inconsistency" defenses. The added language is drawn from §8–3(b) of the Illinois Code and from a proposal at 64 COLUM. L. REV. at 1489 n. 143.

20.10. CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER; EXEMPTION

UNLESS OTHERWISE PROVIDED BY THE CODE OR BY THE LAW DEFINING THE OFFENSE, A PERSON IS NOT CRIMINALLY LIABLE UNDER SECTION 20.00 FOR AN OFFENSE COMMITTED BY ANOTHER PERSON IF THE OFFENSE IS SO DEFINED THAT HIS CONDUCT IS INEVITABLY INCIDENT TO ITS COMMISSION.

COMMENT

The basic thought of this provision, which is similar in effect but not in language to the

corresponding section of the New York Code, has been described as fcllows:

> "Section 50.10(1) recognized as a defense to a charge of accessorial liability that the conduct causing or aiding the commission of the offense was "necessarily incidental thereto" . . . Where the public entertains an ambivalent attitude toward the two participants in the crime — for example, in cases involving prostitution, gambling, or narcotics — imposition of liability for both of the actors may undermine public support of prosecution and enforcement. If the incidental conduct, on the other hand, is clearly reprehensible, public indignation will inevitably call for a specific provision for liability, thus compelling separate legislative consideration of the appropriate definition of the offense." Comment, The Proposed Penal Law of New York, 64 COLUM. L. REV. 1469, at 1489.

The particular language used here is drawn from §2.06(6)(b) of the Model Penal Code, which appears more clearly phrased than the New York provisions.

20.15. CONVICTIONS FOR DIFFERENT DEGREES OF OFFENSE

EXCEPT AS EXPRESSLY PROVIDED IN THIS CHAPTER, WHEN TWO OR MORE PERSONS ARE CRIMINALLY LIABLE FOR AN OFFENSE WHICH IS DIVIDED INTO DEGREES, EACH PERSON IS GUILTY OF SUCH DEGREE AS IS COMPATIBLE WITH HIS OWN CULPABLE MENTAL STATE AND WITH HIS OWN ACCOUNTABILITY FOR AN AGGRAVATING FACT OR CIRCUMSTANCE.

COMMENT

The language used is substantially that of the corresponding section of the New York Code. The proposed section corresponds to §2.06(7) of the Model Penal Code and §5-3 of the Illinois Code, and would permit, for example, conviction of an accomplice for murder, when the perpetrator, because he is entitled to mitigation on grounds of provocation, is only guilty of manslaughter.

20.20. RENUNCIATION; AFFIRMATIVE DEFENSE

IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE BASED ON A DEFENDANT'S CRIMINAL LIABILITY FOR THE CONDUCT OF ANOTHER PERSON UNDER SECTION 20.00 THAT, UNDER CIRCUMSTANCES MANIFESTING A VOLUNTARY, COMPLETE AND PERMANENT RENUNCIATION OF HIS CRIMINAL PURPOSE, NOT MOTIVATED BY

INCREASED FEAR OF FAILURE, DETECTION, OR ARREST, THE DEFENDANT WITHDREW FROM PARTICIPATION IN SUCH OFFENSE PRIOR TO THE COMMISSION THEREOF AND EITHER WHOLLY DEPRIVED HIS PRIOR EFFORTS OF EFFECTIVENESS OR GAVE TIMELY WARNING TO LAW ENFORCEMENT AUTHORITIES OR OTHERWISE MADE PROPER EFFORT TO PREVENT THE COMMISSION OF THE OFFENSE.

COMMENT

This is a restricted version similar to §35.45(1) and (5) of the New York Code. It was deemed desirable to codify the defense with the definitional provision rather than separately. The rationale of the New York provision has been thus stated:

> "Under Section 50.10(2) it is a defense to complicity that the defendant, under circumstances manifesting a 'voluntary and complete renunciation' of his criminal purpose, 'attempted to prevent' the commission of the offense by persuading the principal actor to refrain from the criminal conduct, or 'in any other manner made a substantial effort' to prevent such conduct. The requisite renunciation is not satisfied if the attempted prevention resulted from either a belief that the circumstances were less favorable for the commission of the crime or a decision merely to postpone the crime until another time." (See 64 COL. L. REV. at 1489–90 from which the above paragraph is quoted and from which the two following paragraphs are largely derived and in part quoted.)

The defense of attempted prevention is permitted even where the attempt is made after consummation of the crime. There are two reasons for this. First, an effort in good faith to prevent the commission of an offense clearly indicates that the defendant presents less of a danger to society than one who makes no such attempt. Second, the exoneration of the defendant from guilt in the actual commission of the offense does not exempt him from all criminal liability in connection with it, since his previous conduct will almost certainly constitute the less serious crimes of solicitation or conspiracy.

Under the statutory requirement of complete renunciation, the defense of attempted prevention is not available if the actor's effort resulted from a belief that the crime would be detected or that he would be apprehended. The provision thus penalizes

those who act cold bloodedly (though probably rationally) by withdrawing and attempting to prevent the crime solely for reasons of their own self-preservation but who are presumably likely to try again at a time when the probabilities of success are considered greater. It seems clear that occasions of the requisite "complete and voluntary" renunciation will be rare, but an extraordinary defense that allows a reprieve for already committed criminal conduct is properly limited to special situations.

An effort has been made to condense the language contained in §35-45(5) of the New York Code. In addition, the words "and make a substantial effort to prevent the commission thereof" are deleted from the last clause of §35.45(1) and replaced by more specific limiting language drawn from §5-2(c)(3) of the Illinois draft code.

20.25. CRIMINAL LIABILITY OF CORPORATIONS

1. AS USED IN THIS SECTION:

(A) "AGENT" MEANS ANY DIRECTOR, OFFICER, SERVANT, EMPLOYEE OR OTHER PERSON WHO IS AUTHORIZED TO ACT IN BEHALF FOR THE CORPORATION.

(B) "HIGH MANAGERIAL AGENT" MEANS AN OFFICER OF A CORPORATION OR ANY OTHER AGENT IN A POSITION OF COMPARABLE AUTHORITY WITH RESPECT TO THE FORMULATION OF CORPORATE POLICY OR THE SUPERVISION IN A MANAGERIAL CAPACITY OF SUBORDINATE EMPLOYEES.

2. A CORPORATION IS GUILTY OF AN OFFENSE WHEN:

(A) THE CONDUCT CONSTITUTING THE OFFENSE CONSISTS OF AN OMISSION TO DISCHARGE A SPECIFIC DUTY OF AFFIRMATIVE PERFORMANCE, IMPOSED ON CORPORATIONS BY LAW; OR

(B) THE CONDUCT CONSTITUTING THE OFFENSE IS ENGAGED IN, AUTHORIZED, SOLICITED, REQUESTED, COMMANDED, OR RECKLESSLY TOLERATED BY THE BOARD OF DIRECTORS OR BY A HIGH MANAGERIAL AGENT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AND IN BEHALF OF THE CORPORATION; OR

(C) THE CONDUCT CONSTITUTING THE OFFENSE IS ENGAGED IN BY AN AGENT OF THE CORPORATION WHILE ACTING WITHIN THE SCOPE OF HIS OFFICE OR EMPLOYMENT AND IN BEHALF OF THE CORPORATION AND (1) THE OFFENSE IS A MISDEMEANOR OR A VIOLATION, OR (2) THE OFFENSE IS ONE DEFINED BY A STATUTE WHICH CLEARLY INDICATES A LEGISLATIVE INTENT TO IMPOSE SUCH CRIMINAL LIABILITY ON A

CORPORATION.

3. IT IS AN AFFIRMATIVE DEFENSE IN ANY PROSECUTION OF A CORPORATION FOR AN OFFENSE UNDER SECTION 20.25(2)(C), OTHER THAN AN OFFENSE FOR WHICH ABSOLUTE LIABILITY HAS BEEN IMPOSED, THAT THE HIGH MANAGERIAL AGENT HAVING SUPERVISORY RESPONSIBILITY OVER THE SUBJECT MATTER OF THE OFFENSE EMPLOYED DUE DILIGENCE TO PREVENT ITS COMMISSION. THIS SUBSECTION SHALL NOT APPLY IF IT IS PLAINLY INCONSISTENT WITH THE LEGISLATIVE PURPOSE IN DEFINING THE PARTICULAR OFFENSE.

COMMENT

A general statutory provision for corporate criminal liability appears to be something new in Maryland law, but seems to accord with a modern trend. In McKim v. Odom, 3 Bland 407, 421–22 (1827), the common law rule was stated: "in its corporate capacity a corporation cannot commit a crime." This view was clearly repudiated by a dictum in Lewis v. Accelerated Express, Inc., 219 Md. 252, 255(1959) and fines on corporations for violations of Federal laws (notably the Anti-Trust Laws) are quite familiar. Corporate criminal liability is at least impliedly recognized by a procedural statute, Art. 27, §§24–25 (derived from Ch. 403 of the Acts of 1906), regulating process and executions against corporations in criminal cases. See Brune, Maryland Corporation Law §235 (1953 & 1965 supp.). The language of subsection 2 of the draft statute is that of the New York Code, save for the addition of "office or" before "employment" in Section 2(c), following Section 5–4 (a)(1) of the Illinois Code.

§20.25(3) below modifies the New York provision by adding an affirmative defense. The Model Penal Code provides for corporate liability for the acts of ordinary agents only with respect to violations (§2.07(1)(a)); the New York Code, in common with the Illinois Code, extends this rule to misdemeanors on the theory that such liability "provides an inducement for high managerial officers in the corporation to supervise the behavior of minor employees in such a way as to avoid criminal conduct on the part of corporate employees."

Section 2(b), which is the New York provision, limits corporate liability for felonies to those committed or authorized by the Board of Directors or high managerial agents (as defined in Section 50.20 (1)(a) of the New York law). This limitation is on the theory that "before the stigma of serious criminality attaches to a corporate body, the

conduct should involve someone close to the center of corporate power. Moreover, in these cases the argument for the necessity of corporate fines to stimulate diligent supervision of minor employees is considerably less persuasive. This is true because most of the serious felonies also involve the possibility of corporate tort liability and this possibility provides ordinarily sufficient inducements for the exercise of proper supervision by managerial officials." Tentative Draft Illinois Criminal Code of 1961, p. 166, citing People v. Canadian Fur Trappers, 248 N.Y. 159, 161 NE 455 (1928), Welsh, The Criminal Liability of Corporations, 62 L.Q. Rev. 345 (1946).

Subsection 3 does not appear in the New York Code, but appears in the Model Penal Code, §2.07(5) and in the Illinois Code §5-4(b). Its omission from the New York Code is criticized in Comment, 64 COLUM L. REV. 1469, 1491 (1964): "the provision imposing absolute liability for misdemeanors is without precedent. Presumably, its primary purpose is to encourage effective supervision of corporate employees by managerial personnel. If this assumption is correct, the corporation should be permitted to defend prosecutions under the subsection by proving that the criminal conduct constituting the offense ocurred despite the exercise of reasonable diligence on the part of supervisory personnel. In contrast to absolute civil liability for injuries caused by employees, the corporation should not be criminally liable in the absence of blameworthiness. If this defense is recognized, the corporation should have the burden of proof both because the facts relating to diligence are peculiarly within its possession, and because the requirement affirmatively to show that the supervisory personnel failed to exercise due diligence would place an unreasonable burden upon the prosecution."

Subsection 1(a) is the Illinois Code language (§5-5(c)(1)), which was deemed preferable to the New York language on two counts: 1) the Illinois language includes "servants"; the New York language does not 2) the phrase "who is authorized to act in behalf of the corporation" modifies "director, officers, servant, employee" as well as "any other person"; this is desirable since it makes provision for the fact that directors, officers, etc. may commit offenses outside the scope of their authority. Subsection 1(b) is the New York language, which is similar to the Illinois language, and less vague than the Model Penal Code language ("having duties of such responsibility that his

conduct may fairly be assumed to represent the policy of the corporation").

20.30. CRIMINAL LIABILITY OF AN INDIVIDUAL FOR CORPORATE CONDUCT

1. A PERSON IS CRIMINALLY LIABLE FOR CONDUCT CONSTITUTING AN OFFENSE WHICH HE PERFORMS OF CAUSES TO BE PERFORMED IN THE NAME OR ON BEHALF OF A CORPORATION TO THE SAME EXTENT AS IF SUCH CONDUCT WERE PERFORMED IN HIS OWN NAME OR BEHALF.

2. AN INDIVIDUAL WHO HAS BEEN CONVICTED OF AN OFFENSE BY REASON OF HIS LEGAL ACCOUNTABILITY FOR THE CONDUCT OF A CORPORATION IS SUBJECT TO THE PUNISHMENT AUTHORIZED BY LAW FOR AN INDIVIDUAL UPON CONVICTION OF SUCH OFFENSE, ALTHOUGH ONLY A LESSER OR DIFFERENT PUNISHMENT IS AUTHORIZED FOR THE CORPORATION.

COMMENT

Section (1) is the New York Code provision, which has been said to codify settled law, (Comment, 64 COLUM. L. REV. at 1492 n. 163.) Section (2) does not appear in the New York Code but appears as §5–5(b1) of the Illinois Code. A similar provision appears as §2.07(6)(c) of the Model Penal Code. It deals with principal–accessory problems not fully encompassed by Section 1. See the commentary to the Illinois Code, Tentative Draft, pp. 166–67.

SUBTITLE C – DEFENSES

PART 25: DEFENSES IN GENERAL

25.00. DEFENSES; BURDEN OF PROOF

1. IN ANY PROSECUTION THE BURDEN SHALL BE UPON THE STATE TO PROVE EACH ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT; AND WHENEVER EVIDENCE IS OFFERED TO SUPPORT A DEFENSE, OTHER THAN A DEFENSE SPECIFIED IN SUBSECTION (2) OF THIS SECTION, THIS BURDEN UPON THE STATE SHALL EXTEND TO NEGATIVING SUCH DEFENSE BEYOND A REASONABLE DOUBT. IN THE ABSENCE OF THE PROOF SPECIFIED IN THIS SUBSECTION, THE INNOCENCE OF THE DEFENDANT IS ASSUMED.

2. THE DEFENDANT HAS THE BURDEN OF ESTABLISHING BY A PREPONDERANCE OF THE EVIDENCE ANY DEFENSE WHICH IS DESIGNATED BY STATUTE AN AFFIRMATIVE DEFENSE OR WHICH IS SPECIFIED BY STATUTE TO BE A DEFENSE AS TO WHICH THE DEFENDANT HAS THE BURDEN OF PROOF.

COMMENT

Burden of proof; in general: The Commission decided to follow the Model Penal Code rather than New York in making explicit the burden of the prosecution to prove its case beyond a reasonable doubt.

Ordinary and affirmative defenses: Although the prosecution must prove its case beyond a reasonable doubt, it is obvious that, as a practical matter, the defendant should have at least the burden of going forward with the evidence as to some defenses. All that the burden of going forward requires is that there must be sufficient evidence offered so that a reasonable jury could find the existence of the defense. If such evidence is in the case, the issue goes to the jury, and the prosecution is still required to satisfy the reasonable doubt test on the case as a whole, including the defense issue. This is the Maryland situation as to the insanity defense. Bradford v. State, 234 Md. 505, 200 A. 2d 150 (1964). Unless the defendant (or the prosecution) introduces some credible evidence from which a jury might find insanity, the issue is out of the case. If such evidence is offered, the state must negative insanity beyond a reasonable doubt. If the defendant did not have the burden of going forward, the prosecution would have to offer proof of sanity in every criminal case — a great waste of time and effort. It would seem that as to all or nearly all defenses which can be separated from the routine issues of proof of the definitional elements of a crime, the defendant should have at least the burden of going forward with the evidence. This view is reflected in subparagraph one.

Subparagraph two provides for affirmative defenses, in which the burden of persuasion shifts to the defendant to convince the jury by a preponderance of the evidence. In this sense, self-defense is presently an affirmative defense in Maryland. The Model Penal Code takes the position that such affirmative defenses should be rare: "It may be said in general, however, that we do not favor such a shifting of the burden in the absence of the most exceptional considerations. Certainly any thought of taking this course with respect to all excuses or justifications involves too serious an inroad on the principle that guilt shall be established beyond reasonable doubt to be seriously entertained . . . There is a different situation, of course, as to defenses which merely interpose a bar to prosecution, without touching upon guilt or innocence, such, for example, as irregularity in the selection of the grand jury, pardon, immunity or

double jeopardy. Here . . . there should be no hesitancy in imposing a persuasive burden on defendants." (Tent. Draft #4, pp. 112–113.)

The Commission disagrees with the cautious approach suggested above and takes the view that current Maryland position on burden of proof in self-defense is sound and should be extended to most or all matters of justification or excuse, as is noted below in connection with §35.00. If the prosecution retains the burden, there is a risk that, when the defendant is the sole survivor of an unwitnessed fight, he may easily succeed with a false defense. The Reporter believes that this risk must be accepted, and fears that a constitutional doctrine may develop which will prohibit shifting the burden of persuasion in all matters of justification.

In Leland v. Oregon, 343 U.S. 790(1952), a majority of the Supreme Court upheld an Oregon statute requiring that the defense of insanity be proved by the defendant beyond a reasonable doubt, as offending no fundamental principle of justice. The Court today might be more ready to overturn such a statute; the Model Penal Co*ode takes the view that conservative shiftsare unlikely to run afoul of due process requirements. (Tent. Draft #4, pp. 113–114.)

PART 30: DEFENSES INVOLVING LACK OF CRIMINAL RESPONSIBILITY

30.00. INFANCY

1. A PERSON BELOW THE AGE OF SEVEN YEARS IS INCAPABLE OF COMMITTING A CRIME. A PERSON BETWEEN THE AGES OF SEVEN AND FOURTEEN YEARS IS PRESUMED TO BE INCAPABLE OF COMMITING A CRIME, BUT SUCH PRESUMPTION MAY BE REBUTTED.

2. NOTHING HEREIN CONTAINED SHALL AFFECT THE JURISDICTION OF THE JUVENILE COURT OVER ANY PERSON FOR ANY ACT ALLEGEDLY COMMITTED BY HIM, OR ITS POWER TO WAIVE SUCH JURISDICTION.

COMMENT

At common law and in Maryland (Prevatte v. Director, Patuxent Institution, 5 Md. App. 406(1968)) a child under the age of seven cannot be convicted of a crime, and a child fourteen or over is treated as an adult for purposes of determining criminal responsibility. Between these ages there is a gradually weakening rebuttable presumption of

incapacity. The New York Code adopts a flat age of sixteen. The Model Penal Code §4.10, provides for no criminal liability under the age of sixteen, and for none under the age of eighteen unless the Juvenile Court has no jurisdiction or waives jurisdiction. The Commission decided to retain the common law rule here. This decision does not purport to govern any changes that may be made in the Juvenile Court provisions.

30.05. MENTAL DISORDER

1. CRIMINAL RESPONSIBILITY IN CASES OF MENTAL DISORDER SHALL BE DETERMINED ACCORDING TO THE PROVISIONS OF ARTICLE 59, SECTION 25(A) OF THE ANNOTATED CODE OF MARYLAND.

2. IN ANY PROSECUTION FOR AN OFFENSE, LACK OF CRIMINAL RESPONSIBILITY BY REASON OF MENTAL DISORDER, AS SUCH LACK OF CRIMINAL RESPONSIBILITY IS DEFINED IN ARTICLE 59, SECTION 25(A) OF THE ANNOTATED CODE OF MARYLAND, IS A DEFENSE.

COMMENT

Article 59, section 25(a), which was based on an earlier recommendation of this Commission, provides: "A defendant is not responsible for criminal conduct and shall be found insane at the time of the commission of the alleged crime if, at the time of such conduct as a result of mental disorder, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. As used in this section, the terms 'mental disorder' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." The term "mental disorder" was substituted for the earlier "mental disease or defect" in 1970 and is defined in Article 59, section 2.

PART 35: DEFENSES INVOLVING LACK OF CULPABILITY

35.00. JUSTIFICATION; AN AFFIRMATIVE DEFENSE

IN ANY PROSECUTION FOR AN OFFENSE, JUSTIFICATION, AS DEFINED IN SECTIONS 35.05 THROUGH 35.30, IS AN AFFIRMATIVE DEFENSE.

COMMENT

As indicated in the note to §25.00, the Model Penal Code and New York do not place the burden of proof on the defendant as to most of the matters in this article. (They do, however, make entrapment

an affirmative defense, according to our definition, and New York also makes duress and renunciation affirmative defenses.) The Reporter believes that New York strikes about the right balance here, but the Commission believes that it is fair to place the burden of persuasion on the defendant in all of this area, as Maryland now does, at least in self-defense. Gunther v. State, 228 Md. 404, 179 A. 2d 880 (1960). The Maryland rule is criticized in 24 Md. L. Rev. 78 (1964).

The Reporter concedes that if self-defense is to be an affirmative defense, so should the other matters of justification.

35.05. JUSTIFICATION; GENERALLY

UNLESS INCONSISTENT WITH THE ENSUING PROVISIONS OF THIS PART DEFINING JUSTIFIABLE USE OF PHYSICAL FORCE, OR WITH SOME OTHER PROVISION OF LAW, CONDUCT WHICH WOULD OTHERWISE CONSTITUTE AN OFFENSE IS JUSITIFIABLE AND NOT CRIMINAL WHEN:

1. SUCH CONDUCT IS REQUIRED OR AUTHORIZED BY A PROVISION OF LAW, OR BY A JUDICIAL JUDGMENT, DECREE, OR ORDER, OR IS PERFORMED BY A POLICE OFFICER OR OTHER PUBLIC SERVANT IN THE REASONABLE EXERCISE OF HIS OFFICIAL POWERS, DUTIES, OR FUNCTIONS, AND, WHERE SUCH CONDUCT INVOLVES THE USE OF DEADLY PHYSICAL FORCE, IS EXPRESSLY AUTHORIZED BY LAW OR OCCURS IN THE LAWFUL CONDUCT OF WAR. AMONG THE KINDS OF SUCH PROVISIONS, JUDGMENTS, DECREES, AND ORDERS ARE (A) LAWS DEFINING DUTIES AND FUNCTIONS OF PUBLIC SERVANTS, (B) LAWS DEFINING DUTIES OF PRIVATE CITIZENS TO ASSIST PUBLIC SERVANTS IN THE PERFORMANCE OF CERTAIN OF THEIR FUNCTIONS, (C) LAWS GOVERNING THE EXECUTION OF LEGAL PROCESS, (D) LAWS GOVERNING THE MILITARY SERVICES AND THE CONDUCT OF WAR, AND (E) JUDGMENTS, DECREES, AND ORDERS OF COMPETENT COURTS; OR

2. SUCH CONDUCT IS NECESSARY AS AN EMERGENCY MEASURE TO AVOID AN IMMINENT PUBLIC OR PRIVATE INJURY WHICH IS ABOUT TO OCCUR BY REASON OF A SITUATION WHICH IS OF SUCH GRAVITY THAT, ACCORDING TO ORDINARY STANDARDS OF INTELLIGENCE AND MORALITY, THE DESIRABILITY AND URGENCY OF AVOIDING SUCH INJURY CLEARLY OUTWEIGH THE DESIRABILITY OF AVOIDING THE INJURY SOUGHT TO BE PREVENTED BY THE STATUTE DEFINING THE OFFENSE IN ISSUE. THE NECESSITY AND JUSTIFIABILITY OF SUCH CONDUCT MAY NOT REST UPON CONSIDERATIONS PERTAINING TO THE MORALITY AND ADVISABILITY OF THE STATUTE, EITHER IN ITS GENERAL APPLICATION OR WITH RESPECT TO ITS APPLICATION TO A PARTICULAR CLASS OF CASES ARISING THEREUNDER. WHEN THE DEFENDANT WAS RECKLESS OR NEGLIGENT IN BRINGING ABOUT THE SITUATION REQUIRING A CHOICE OF HARMS OR EVILS OR IN APPRAISING THE NECESSITY FOR HIS CONDUCT, THE

JUSTIFICATION AFFORDED BY THIS SUBSECTION IS UNAVAILABLE IN A PROSECUTION FOR ANY OFFENSE FOR WHICH RECKLESSNESS OR NEGLIGENCE, AS THE CASE MAY BE, SUFFICES TO ESTABLISH CULPABILITY.

WHENEVER EVIDENCE RELATING TO THE DEFENSE OF JUSTIFICATION UNDER THIS SUBSECTION IS OFFERED BY THE DEFENDANT, THE COURT SHALL RULE AS A MATTER OF LAW ON ITS ADMISSIBILITY, ACCORDING TO WHETHER THE CLAIMED FACTS AND CIRCUMSTANCES WOULD, IF ESTABLISHED, CONSTITUTE A DEFENSE.

COMMENT

Authorization by law or decree: Section 35.05 (1) deals with a broad defense applicable to all charges of crime: authorization of the conduct by provision of law or by judicial decree. The sheriff who seizes goods under a valid writ is not guilty of larceny; the executioner is not guilty of murder in the performance of his job; the physician who acts under a court order permitting a blood transfusion for a child is not guilty of assault. Even though there may be no express law or order permitting it, the police officer who possesses narcotics or numbers slips in the course of his duties is also protected from criminal liability. At the end of the first sentence of the subsection the phrase "and, where such conduct involves the use of deadly physical force, is expressly authorized by law or occurs in the lawful conduct of war" has been added to the New York provisions, which are otherwise rather closely followed. The change was made to reflect the view of the Model Penal Code, Section 3.03, and of the Commission that authorization for the use of deadly force should be clear, to avoid the unlikely, but possible construction, for example, that deadly force was justifiable to levy execution on a judgment.

Necessity: Section 35.05(2) deals with the defense of necessity. The priniciple of necessity comes into most serious question in homicide prosecutions. The principle that when the actor, through no fault of his own, is put in a position in which he can save a relatively more important interest only at the expense of a less important one, he commits no crime by doing so (whatever the tort liability may be), unless the law specifically provides otherwise, would probably receive general acceptance where no homicide is committed. So, as the comment to Model Penal Code §3.02 (T.D. #8, p.9) points out, there should be no criminal liability when property is destroyed to prevent the spread of a fire, when a speed limit is violated in pursuing a

suspected criminal, when a man marooned in a storm breaks into a house to preserve himself, or when a druggist dispenses a drug without a prescription in an appropriate emergency. Provisions providing such a defense must necessarily be general in nature because of the multitude of situations which must be faced. But the problem is not different in kind from the question of definition of negligence or fraud, where the nature of the situation prevents a formula of words which will provide easy automatic answers. A code with no necessity provision, or only an inadequate one, is seriously defective in failing to preserve important common law flexibility which permitted the finding of a defense of this nature in a situation new to the courts.

In homicide cases there is a split in what little authority exists. The argument for denying the defense where the defendant has taken an unoffending life is that it is wrong, and ought to be punished by the criminal law, no matter how lofty the motive. This position simply seems untenable. As the Model Penal Code comment says:

> "Suppose, for example, that the actor has made a breach in a dike, knowing that this will inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. The life of every individual must be assumed in such case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely establishes an ethical and legal justification for the act." (p.8)

The Model Penal Code section (§3.02, P.O.D., p.45) presents the choice of evils defense in very general terms.

Both there and under the New York provision a net gain must be found; it is not enough that the value sacrificed is equal to or no greater than the value preserved. So, the defendant would not be justified under this section in preserving his own life at the expense of another life, though he would be justified in preserving his own and another life at the expense of a third life in some circumstances. In this respect, the defense tends to be inconsistent with the duress defense which can exist when, under duress, the defendant takes the life of another person to preserve his own. The

broadness of the necessity principle, however, makes it dangerous to permit a free substitution of equivalents.

The New York provision seems to contain in substance the Model Penal Code limitations, plus more of its own. For one thing, it adds the requirement that the act be an "emergency measure to avoid an imminent" injury. This is probably sound caution; true necessity situations involve emergencies. Also, the New York provision allows no defense unless the defendant is without fault. So, under it, if, for example, through his own negligence, the defendant becomes lost in the woods, he has no defense to a larceny or burglary charge if he breaks into a cabin to obtain food to prevent starvation. The Model Penal Code provision, which would permit conviction on the basis of negligence or recklessness only where the crime charged could be committed by negligence or recklessness, is believed more sound, and the Model Penal Code language has been adapted to the New York section. The New York provision states that the defense may not rest on considerations pertaining "only" to the morality and advisability of the statute; this suggests that such considerations may properly be considered as a partial contribution to the defense. The Commission believes that they should not be relevant at all, and has therefore deleted the word "only." The language of the last sentence of the subsection has been changed to avoid any problem with the jury-as-judge-of-the-law provision of the constitution, by making it clear that the judge is ruling only on a question of admissibility of evidence.

35.10. JUSTIFICATION; USE OF PHYSICAL FORCE GENERALLY

1. THE USE OF PHYSICAL FORCE UPON ANOTHER PERSON WHICH WOULD OTHERWISE CONSTITUTE AN OFFENSE IS JUSTIFIABLE AND NOT CRIMINAL UNDER ANY OF THE FOLLOWING CIRCUMSTANCES:

(A) A PARENT, GUARDIAN OR OTHER PERSON ENTRUSTED WITH THE CARE AND SUPERVISION OF A MINOR OR A DISABLED PERSON, OR A TEACHER OR OTHER PERSON ENTRUSTED WITH THE CARE AND SUPERVISION OF A MINOR, MAY USE PHYSICAL FORCE, BUT NOT DEADLY PHYSICAL FORCE, UPON SUCH MINOR OR DISABLED PERSON WHEN AND TO THE EXTENT THAT HE REASONABLY BELIEVES IT NECESSARY TO MAINTAIN DISCIPLINE OR TO PROMOTE THE WELFARE OF SUCH MINOR OR DISABLED PERSON.

(B) A WARDEN OR OTHER AUTHORIZED OFFICIAL OF A JAIL, PRISON OR CORRECTIONAL INSTITUTION MAY, IN ORDER

TO MAINTAIN ORDER AND DISCIPLINE, USE SUCH PHYSICAL FORCE AS IS AUTHORIZED BY THE RULES AND REGULATIONS GOVERNING THE INSTITUTION, TO THE EXTENT THAT SUCH FORCE IS REASONABLY NECESSARY.

(C) A PERSON RESPONSIBLE FOR THE MAINTENANCE OF ORDER IN A COMMON CARRIER OF PASSENGERS, OR A PERSON ACTING UNDER HIS DIRECTION, MAY USE PHYSICAL FORCE WHEN AND TO THE EXTENT THAT HE REASONABLY BELIEVES IT NECESSARY TO MAINTAIN ORDER, BUT HE MAY USE DEADLY PHYSICAL FORCE ONLY WHEN HE REASONABLY BELIEVES IT NECESSARY TO PREVENT DEATH OR SERIOUS PHYSICAL INJURY.

(D) A PERSON ACTING UNDER A REASONABLE BELIEF THAT ANOTHER PERSON IS ABOUT TO COMMIT SUICIDE OR TO INFLICT SERIOUS PHYSICAL INJURY UPON HIMSELF MAY USE PHYSICAL FORCE UPON SUCH PERSON TO THE EXTENT THAT HE REASONABLY BELIEVES IT NECESSARY TO THWART SUCH RESULT.

(E) A DULY LICENSED PHYSICIAN, OR A PERSON ACTING UNDER HIS DIRECTION, MAY USE PHYSICAL FORCE FOR THE PURPOSE OF ADMINISTERING A RECOGNIZED FORM OF TREATMENT WHICH HE REASONABLY BELIEVES TO BE ADAPTED TO PROMOTING THE PHYSICAL OR MENTAL HEALTH OF THE PATIENT IF (A) THE TREATMENT IS ADMINISTERED WITH THE CONSENT OF THE PATIENT OR, IF THE PATIENT IS A MINOR OR A DISABLED PERSON, WITH THE CONSENT OF HIS PARENT, GUARDIAN OR OTHER PERSON ENTRUSTED WITH HIS CARE AND SUPERVISION, OR (B) THE TREATMENT IS ADMINISTERED IN AN EMERGENCY WHEN THE PHYSICIAN REASONABLY BELIEVES THAT NO ONE COMPETENT TO CONSENT CAN BE CONSULTED AND THAT A REASONABLE PERSON, WISHING TO SAFEGUARD THE WELFARE OF THE PATIENT, WOULD CONSENT.

(F) A PERSON MAY USE PHYSICAL FORCE UPON ANOTHER PERSON IN DEFENDING HIMSELF OR A THIRD PERSON, OR IN DEFENDING PROPERTY, OR IN RESISTING AN UNLAWFUL ARREST, OR IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE, AS HEREAFTER PRESCRIBED IN THIS PART.

2. WHENEVER PHYSICAL FORCE IS JUSTIFIED BY THIS PART, THE JUSTIFICATION EXTENDS TO THE USE OF CONFINEMENT AS PROTECTIVE FORCE IF THE DEFENDANT TAKES ALL REASONABLE MEASURES TO TERMINATE THE CONFINEMENT AS SOON AS HE KNOWS THAT HE SAFELY CAN, BUT THE OBLIGATION TO TERMINATE CONFINEMENT SHALL NOT APPLY IF THE PERSON CONFINED HAS BEEN ARRESTED ON A CHARGE OF CRIME, OR IF THE DEFENDANT IS AUTHORIZED BY LAW TO CARE FOR OR SUPERVISE THE PERSON CONFINED AS A MINOR OR DISABLED PERSON AND REASONABLY BELIEVES SUCH CONFINEMENT IS NECESSARY TO MAINTAIN DISCIPLINE OR TO PROMOTE THE WELFARE OF SUCH MINOR OR DISABLED PERSON, OR IF THE CUSTODY OF SUCH CONFINED PERSON HAS BEEN TRANSFERRED TO ONE AUTHORIZED BY LAW TO CARE FOR OR SUPERVISE A MINOR OR INCOMPETENT PERSON.

COMMENT

Section 35.10(1) follows New York and resembles Model Penal Code §3.08, dealing with use of force by persons with special responsibility for the care, discipline, or safety of others. The New York provision is shorter and simpler than that of the Model Penal Code but seems adequate. Parents, teachers, and others entrusted with the care and supervision of minors or incompetents commit no crime (whatever the tort consequences) in using non-deadly force to the extent reasonably believed necessary to maintain discipline or promote the welfare of the minor or incompetent. A treating physician, or one acting under his direction, may commit what would otherwise be an assault or battery with proper consent, or in an emergency, where no one competent to consent can be consulted and a reasonable person would consent, if he reasonably believes the treatment is adapted to promoting the patient's health. Those responsible for maintaing order in a common carrier may use physical force to maintain order, but deadly force only upon reasonable belief it is necessary to prevent death or serious physical injury. Prison officials, to maintain law and order may use such physical force as is authorized by the correction law.

The section, following New York, also contains a provision, similar to that in Model Penal Code §3.07(5), permitting force upon reasonable belief that a person will otherwise commit suicide or inflict serious physical injury on himself.

Minor changes have been made in the New York provision in the interest of clarity. In subsection (1)(f) the phrase "in resisting an unlawful arrest" has been added to reflect a change in the subsections which follow, to which this subsection is an introduction.

The Commission decided, in subsection 35.10(2) to follow the Model Penal Code's policy of providing, in section 3.01(3) and 3.06(4), that in certain instances confinement may be justified when physical force is justified.

35.15. JUSTIFICATION; USE OF PHYSICAL FORCE IN DEFENSE OF A PERSON

1. EXCEPT AS PROVIDED IN SECTION 35.26, A DEFENDANT IS JUSTIFIED IN USING PHYSICAL FORCE OTHER THAN DEADLY PHYSICAL FORCE UPON ANOTHER PERSON, REFERRED TO IN THIS SUBSECTION AS THE VICTIM, WHEN AND TO THE EXTENT

THAT THE DEFENDANT REASONABLY BELIEVES IT TO BE NECESSARY TO DEFEND HIMSELF OR A THIRD PERSON FROM WHAT HE REASONABLY BELIEVES TO BE THE USE OR IMMINENT USE OF UNLAWFUL PHYSICAL FORCE BY THE VICTIM, UNLESS:

A. THE DEFENDANT PROVOKED THE VICTIM'S CONDUCT, INTENDING TO USE IT AS A PRETEXT FOR THE USE OF THE PHYSICAL FORCE CONSTITUTING THE CONDUCT FOR WHICH THE DEFENDANT IS BEING PROSECUTED; OR

B. THE DEFENDANT WAS THE INITIAL AGGRESSOR, EXCEPT THAT THE DEFENDANT'S NON-DEADLY PHYSICAL FORCE IS NEVERTHELESS JUSTIFIED TO THE EXTENT THAT IT OCCURS (I) AFTER THE DEFENDANT HAS WITHDRAWN OR ATTEMPTED TO WITHDRAW FROM THE ENCOUNTER ARISING OUT OF HIS INITIAL AGGRESSIVE CONDUCT, (II) AFTER THE DEFENDANT HAS EFFECTIVELY COMMUNICATED OR TAKEN REASONABLE STEPS TO COMMUNICATE EFFECTIVELY HIS WITHDRAWAL OR ATTEMPT TO WITHDRAW TO THE VICTIM AND (III) IN REASONABLE RESPONSE TO THE VICTIM'S SUBSEQUENT PERSISTENCE IN THE USE OR THREATENED IMMINENT USE OF UNLAWFUL PHYSICAL FORCE; OR

C. THE PHYSICAL FORCE INVOLVED WAS THE PRODUCT OF A COMBAT BY AGREEMENT NOT SPECIFICALLY AUTHORIZED BY LAW.

2. EXCEPT AS PROVIDED IN SECTION 35.26, A DEFENDANT WHO WAS NOT AN AGGRESSOR, OR WHO WAS INITIALLY AN AGGRESSOR NOT USING OR THREATENING THE USE OF DEADLY PHYSICAL FORCE, IS JUSTIFIED IN USING DEADLY PHYSICAL FORCE UPON ANOTHER PERSON, REFERRED TO IN THIS SUBSECTION AS THE VICTIM, WHEN THE VICTIM HAS USED OR THREATENED THE IMMINENT USE OF UNLAWFUL DEADLY PHYSICAL FORCE, AND THE DEFENDANT REASONABLY BELIEVES DEADLY PHYSICAL FORCE TO BE NECESSARY TO DEFEND HIMSELF OR A THIRD PERSON FROM THE VICTIM, AND, EITHER

A. THE DEFENDANT HAS RETREATED AS FAR AS HE BELIEVES THAT COMPLETE SAFETY FOR HIMSELF AND ANY THIRD PERSON PERMITS, AND, WHERE PRACTICABLE, HAS ENCOURAGED ANY THIRD PERSON ENDANGERED BY THE VICTIM'S UNLAWFUL CONDUCT TO MAKE A SIMILAR RETREAT; OR

B. THE DEFENDANT WAS UNDER NO OBLIGATION TO RETREAT. THE DEFENDANT IS UNDER NO OBLIGATION TO RETREAT IF:

I. HE DOES NOT KNOW THAT HE CAN RETREAT WITH COMPLETE SAFETY TO HIMSELF AND ANY THIRD PERSON ENDANGERED BY THE VICTIM'S UNLAWFUL CONDUCT; OR

II. HE IS IN HIS DWELLING AND WAS NOT AN INITIAL AGGRESSOR, UNLESS THE VICTIM WAS A LAWFUL RESIDENT IN THE SAME DWELLING; OR

III. HE IS A POLICE OFFICER OR A PRIVATE PERSON ASSISTING SUCH AN OFFICER AT THE OFFICER'S DIRECTION, AND THE DEFENDANT WAS ACTING PURSUANT TO SECTION 35.30.

3. EXCEPT AS PROVIDED IN SECTION 35.26, A DEFENDANT WHO WAS INITIALLY AN AGGRESSOR USING OR THREATENING THE IMMINENT USE OF DEADLY PHYSICAL FORCE, IS JUSTIFIED IN A SUBSEQUENT USE OF DEADLY PHYSICAL FORCE UPON ANOTHER PERSON, REFERRED TO IN THIS SUBSECTION AS THE VICTIM, WHEN THE DEFENDANT HAS PREVIOUSLY WITHDRAWN FROM AN ENCOUNTER ARISING OUT OF HIS INITIAL AGGRESSIVE CONDUCT AND HAS EFFECTIVELY COMMUNICATED HIS WITHDRAWAL TO THE VICTIM, BUT THE VICTIM HAS NEVERTHELESS AFTER SUCH COMMUNICATION USED OR THREATENED THE IMMINENT USE OF UNLAWFUL DEADLY PHYSICAL FORCE, AND THE DEFENDANT REASONABLY BELIEVES FURTHER SAFE RETREAT TO BE IMPRACTICABLE AND DEADLY PHYSICAL FORCE TO BE NECESSARY TO DEFEND HIMSELF OR A THIRD PERSON FROM THE VICTIM.

4. IT IS NOT NECESSARY FOR THE DEFENDANT TO DEFEND HIMSELF OR A THIRD PERSON FROM THE VICTIM WITHIN THE MEANING OF SUBSECTIONS (2) AND (3) OF THIS SECTION IF THE DEFENDANT KNOWS THAT HE CAN AVOID THE NECESSITY OF USING FORCE WITH COMPLETE SAFETY TO HIMSELF AND OTHERS BY SURRENDERING POSSESSION OF PROPERTY TO A PERSON ASSERTING A GOOD FAITH CLAIM OF RIGHT THERETO.

5. WHEN THERE IS EVIDENCE THAT THE DEFENDANT WAS ACTING IN ORDER TO DEFEND HIMSELF OR THE VICTIM FROM WHAT HE REASONABLY BELIEVED TO BE THE USE OR IMMINENT USE OF UNLAWFUL PHYSICAL FORCE BY A THIRD PERSON, ONLY TO THE EXTENT THAT HE REASONABLY BELIEVED NECESSARY, THE DEFENDANT IS NOT REQUIRED TO NEGATIVE THE EXISTENCE OF CIRCUMSTANCES SET OUT IN SUBSECTIONS (1), (2), (3), OR (4) OF THIS SECTION, LIMITING THE DEFENSE OF JUSTIFICATION, UNLESS THERE IS EVIDENCE IN THE CASE THAT SUCH CIRCUMSTANCES EXIST, IN WHICH CASE THE DEFENDANT HAS THE BURDEN OF PROVING THE ABSENCE OF SUCH CIRCUMSTANCES BY A PREPONDERANCE OF THE EVIDENCE.

6. A DEFENDANT IS JUSTIFIED IN USING PHYSICAL FORCE, INCLUDING DEADLY PHYSICAL FORCE, UPON ANOTHER PERSON, REFERRED TO IN THIS SUBSECTION AS THE VICTIM, TO THE EXTENT THAT THE DEFENDANT REASONABLY BELIEVES IT NECESSARY TO DEFEND HIMSELF OR A THIRD PERSON FROM WHAT HE REASONABLY BELIEVES TO BE THE USE OR IMMINENT USE OF UNLAWFUL PHYSICAL FORCE BY THE VICTIM, WHEN THE DEFENDANT REASONABLY BELIEVES THAT THE VICTIM IS COMMITTING OR ABOUT TO COMMIT AN OFFENSE UNDER SECTION 135.20 (KIDNAPPING), PART 160 (ROBBERY), SECTIONS 130.15(1) OR 130.20(1) (FORCIBLE RAPE), OR SECTIONS 130.25(1) OR 130.30(2) (FORCIBLE SODOMY).

COMMENT

Introduction: This section deals with the general rule justifying the use of deadly and nondeadly force to meet a threat to the person of the defendant or another. (Burglary and arson threats, which involve also threats to real property, are treated in the next section more conveniently.) Threats in the nature of murderous attacks, assaults, forcible sexual attempts, kidnappings, and robberies are treated here. Since the rules permitting use of deadly physical force are narrower than those permitting ordinary force, the two kinds of force will be discussed separately. ("Deadly physical force" is defined by the Code as "physical force which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury." (§10.00(10)) "Serious physical injury" is defined as "physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." (§10.00 (9)) "physical injury" means impairment of physical condition or substantial pain." (§10.00(8)).

Use of nondeadly physical force based on defendant's reasonable belief: Subsection (1) states the general rule (subject to modification in the case of resisting unlawful arrest) that one is justified in using less than deadly force to meet an attack on the person when he has a reasonable belief (1) that the person against whom the force is directed is committing or about to commit an unlawful attack, and (2) that the degree of force used is necessary to stop him from imminent action. This reflects the usual common law and Maryland (Guerriero v. State, 213 Md. 545 (1957)) view, protecting the defendant where he is mistaken, as long as he acts reasonably. (In the case of the defendant who comes to the aid of another, there is a difference of opinion in the cases. Some follow the rule of reasonable mistake; others protect the defendant only if the person he assists would in fact be justified in doing in his own defense what the defendant did. According to the latter view, if the defendant comes to the aid of one who appears to be under attack, but who is in fact resisting a lawful arrest, the defendant is not justified. The language of Maryland Code, Art. 27, §12A, provides no express justification unless the person aided would himself be justified in resisting the attack. For a case taking this view, see People v. Young, 229 N.Y.S. 2d 1 (N.Y., 1962), reversing 210 N.Y.S. 2d 358 (N.Y. App. Div., 1st Dept., 1961). Such a

rule discourages intervention by bystanders in a doubtful situation; they are protected only if they are right, no matter how strongly appearances may favor them. The rule of reasonable mistake appears to be better and fairer. Society is probably in more danger from those who refuse to intervene to protect one apparently under attack than it is from those who reasonably but mistakenly intervene. The New York and Model Penal Codes take this position.)

Limitations on the use of nondeadly physical force: In general one may, if reasonable, use non-deadly force to protect himself or another person from attack. Some of the old cases permitted intervention on behalf of others only if there was some close relationship or special duty to protect. The modern authorities tend to support the position of the New York Code. Subsection (1) lists special situations in which one is not justified in using even non-deadly force he reasonably believes necessary to protect himself: (1) where the defendant is responding to a situation he has intentionally created by provoking an attack by the victim so that the defendant would have a pretext for harming him; or (2) whenever the defendant was the initial aggressor, except as to later physical force used by the defendant in response to unlawful conduct of the victim after the defendant has withdrawn and communicated this to the victim; or (3) where there is an unlawful combat by agreement.

Use of deadly physical force based on defendant's reasonable belief: Subsections (2), (3), and (6) deal with justification for using deadly physical force on another. Apart from justification for resisting unlawful arrest, dealt with specially in section 35.26, the defendant may use deadly force to protect himself or another only to the extent that he reasonably believes it necessary in defense against the victim's deadly force (subsections (2) and (3)) or against the commission of specified crimes against the person (subsection (6)). (Justification for the use of deadly force in arson and burglary situations is dealt with in section 35.26.)

The defendant's privilege to use deadly physical force to meet the victim's deadly physical force is further limited in accordance with the history of the altercation. If the defendant was not an aggressor at all, or if he had not, even though an aggressor, used or threatened deadly force except in response to the victim's use or imminent use of deadly force, he is merely subject to a retreat rule (discussed below), before he can claim

justification for the use of deadly force. But if the defendant was the initiator of an attack using or threatening the use of deadly force, he cannot ordinarily claim self-defense at all, even if it later became necessary to use deadly force in defense of himself or another; only when he has withdrawn from the fight and communicated his withdrawal to the victim, does his right of self-defense revive against the subsequent use of unlawful deadly force by the victim. This represents the usual view of the cases, which distinguish the complete withdrawal required here from the ordinary retreat. See Perkins on Criminal Law (3d ed., 1969), pp. 1006-1007.

Subsection (6) of the draft allows deadly physical force based on the defendant's reasonable belief as to necessity, to prevent kidnapping, robbery, forcible rape, or forcible sodomy. This follows New York, and is close to the usual view. At common law deadly force which appeared reasonably necessary to prevent the commission of a felony was justified, but the modern authorities tend to limit the justification to those felonies which carry some danger to life, and to defense of self or another from what appears to be a deadly attack. Maryland seems to be in accord with this approach. See Crawford v. State, 231 Md. 354 (1963).

Use of deadly physical force based on defendant's unreasonable belief: Perhaps it should be noted that New York, following the usual view, permits a conviction for criminal homicide on the basis of mere negligence in assessing a justification situation. If the defendant honestly but unreasonably believes (a) that he is being attacked with deadly force, or (b) that his danger is imminent, or (c) (in some cases) that retreat is impracticable, or (d) that fatal force is necessary to repel the attack, he has no defense, either under the usual common law view or in New York. However, the Model Penal Code does not require that the belief be reasonable when it is offered as a defense to a crime requiring intention or knowledge. If recklessness or negligence is sufficient for the crime, then recklessness or negligence as to justification circumstances is no defense. See Model Penal Code, P.O.D., Article 3, especially §3.09(2), p. 63, and the comment to §3.04 in T.D. #8, pp. 14-18.

The Commission takes the view that the problem is best solved by leaving the reasonableness requirements in the justification sections, but, following a number of statutes and judicial

decisions, it provides in the homicide sections, that an honest but unreasonable belief in justifying circumstances reduces what would otherwise be murder to manslaughter. This is a little less logical than the Model Penal Code solution, but it is thought that there is some value in punishing (though less severely), negligence in evaluating justification circumstances. No doubt triers of fact will be inclined to give full benefit of the doubt to the actor in borderline cases of negligence, particularly when the defendant has had to make a quick decision.

Limitations on the use of deadly force; the retreat rule: The retreat rule, covered in subsection (2), is a limitation on the principle which allows the use of deadly force in self-defense or defense of others. It takes different forms in different jurisdictions. The scope of the Maryland retreat rule is not clear. A man attacked in his dwelling need not retreat (Crawford v. State, 231 Md. 354 (1963)); otherwise, it is sometimes suggested that there is a duty to retreat in specified circumstances (Bruce v. State, 218 Md. 87 (1958)), and at other times suggested that the only duty is to act reasonably (Guerriero v. State, 213 Md. 545 (1957)). The New York Code requires retreat before inflicting fatal force if the defendant knows he can retreat with complete safety, except where the defendant is in his dwelling and was not the initial aggressor (or where the defendant is a peace officer or one assisting him in making an arrest pursuant to §35.30).

There is an important policy question here. In self-defense and defense of others situations should a person be required to retreat before inflicting fatal force, in accord with the New York and Model Penal Code views, allowing the defendant to stand his ground only in limited situations, or should any non-aggressor be permitted to stand his ground? Since occasions in which the defendant knows he can retreat with full safety are relatively rare in this day of firearms, the question may be of less practical importance than might at first be supposed. While there is an argument that bullies would be deterred by a rule which would permit their victims to kill them before retreating, the balance of interest appears to be in preventing the use of fatal force at all. Let the police and the courts settle these matters. In general the Commission has followed New York, as to the retreat rule, but it has made two changes in detail: (a) it is made clear that the actor has no obligation to retreat unless this would be safe for third persons as well

as himself; and (b) following the Model Penal Code, the defendant, where practicable, must try to get a person he is assisting to retreat before using deadly force. The Commission also considered following the Model Penal Code §3.04(2)(b) in providing that the place of work of the defendant in some circumstances, as well as the home, is a place from which retreat is not required, but ultimately decided not to extend the retreat rule to this situation.

Limitations on the use of deadly force; failure to submit to demands: New York (by §35.15(2), as originally enacted) provides:

"Notwithstanding the provisions of subdivision one of this section, a person is not justified in using deadly physical force upon another person if he knows that he can avoid the necessity of using such force with complete safety, (a) . . ., or (b) by surrendering possession of property to a person asserting a claim of right thereto, or (c) by complying with a demand that he abstain from performing an act which he is not obligated to perform.

In general the provisions seem sound. The first one (b) is probably aimed at the situation in which a defendant claims justification in shooting the man from the finance company who is mistakenly taking the defendant's car away under an open claim of right, and the second (c) seems aimed at the situation in which the defendant shoots the drunk who threatens to kill him unless he leaves the barroom. In both of these cases it seems preferable to remove the dispute from the street or the barroom to the courts, but the Commission felt that those provisions were too broad and uncertain as they stood. For example, under (b) they might apply to the case of a robber who asserted an obviously insincere claim to the defendant's wallet, and under (c) they might apply to a malefactor who cut the defendant's telephone wires and threatened to shoot him if he left his house. The Commission believes that the defendant's use of deadly force is not necessarily inappropriate in such circumstances. As to (b), the New York language has been retained in draft subsection (4), except that the victim's claim of right must be known by the defendant to have been made in good faith. Subparagraph (c) was deleted, because the Commission was unable to limit its scope sufficiently, and it was thought to be of only minor importance.

Burden of proof: Subsection (5) is necessary

because, unlike New York, the present draft puts the burden of proof on the defendant on the issue of self-defense. The Commission feels that this burden should not extend, for example, to requiring the defendant to prove that he did not unreasonably fail to retreat or submit to demands of his victim, unless there is some evidence in the case that he did so fail. If the rule were otherwise, he would be obliged to negative a number of possibilities which might not even be seriously suggested by the prosecution.

35.20. JUSTIFICATION; USE OF PHYSICAL FORCE IN DEFENSE OF PREMISES

A PERSON IS JUSTIFIED IN USING PHYSICAL FORCE WHEN AND TO THE EXTENT THAT HE REASONABLY BELIEVES IT NECESSARY TO PREVENT OR TERMINATE WHAT HE REASONABLY BELIEVES TO BE AN ATTEMPT TO COMMIT OR THE COMMISSION OF ARSON IN ANY DEGREE OR BURGLARY IN ANY DEGREE, EXCEPT THAT, WHEN THE DEFENDANT IS NOT ON THE PREMISES (AS THAT TERM IS DEFINED IN SECTION 140.00) BEING DEFENDED, HE IS NOT JUSTIFIED IN USING DEADLY PHYSICAL FORCE, UNLESS HE REASONABLY BELIEVES THAT THERE IS A SUBSTANTIAL POSSIBILITY THAT (A) A HUMAN BEING, OTHER THAN THE PERSON AGAINST WHOM SUCH DEADLY PHYSICAL FORCE IS BEING DIRECTED OR HIS ACCOMPLICE, IS THEN ON THE PREMISES, AND (B) SUCH HUMAN BEING IS OR WILL, IN THE COURSE OF THE COMMISSION OF SUCH ARSON OR BURGLARY, BE PLACED IN DANGER OF PHYSICAL INJURY BY THE CONDUCT OF THE PERSON AGAINST WHOM SUCH DEADLY PHYSICAL FORCE IS DIRECTED. A PERSON IN POSSESSION OR CONTROL OF PREMISES, AS THAT TERM IS DEFINED IN SECTION 140.00, OR A PERSON WHO IS LICENSED OR PRIVILEGED TO BE THEREON, IS JUSTIFIED IN USING PHYSICAL FORCE, OTHER THAN DEADLY PHYSICAL FORCE, UPON ANOTHER PERSON WHEN AND TO THE EXTENT THAT HE REASONABLY BELIEVES IT NECESSARY TO PREVENT OR TERMINATE WHAT HE REASONABLY BELIEVES TO BE THE COMMISSION OR ATTEMPTED COMMISSION OF A CRIMINAL TRESPASS IN ANY DEGREE BY SUCH OTHER PERSON IN OR UPON SUCH PREMISES.

COMMENT

Introduction: This section deals with justifiable force in defense of premises against arson, burglary, or criminal trespass. For the definition of deadly physical force, see the introduction to the comment on section 35.15. For purposes of clarification, the following definitions are supplied from §140.00: "'Premises' includes the term 'building' as defined herein, and any real property. 'Building' in addition to its ordinary meaning, includes (among other things) any structure, vehicle or watercraft used for lodging of persons, or used by persons for carrying on business

therein . . . ." ("A person is guilty of criminal trespass . . . when he knowingly enters or remains unlawfully in or upon premises. . .") (§140.05)

Use of nondeadly force to prevent or terminate criminal trespass: The Commission followed in substance the New York provisons on the prevention of criminal trespass, and these in turn are close to the common law. Ordinary force is, but deadly force is not, permissible to eject a mere criminal trespasser. Of course if the trespasser resists by attacking, the principles of self-defense, covered in the preceding section, come into play.

Use of deadly force to prevent or terminate arson or burglary: This section justifies the use of force, including deadly force, to prevent the commission or attempt to commit arson or burglary, if the defendant is on the premises under attack. The defendant must reasonably believe that such an offense is taking place and he must reasonably believe that the force he uses is necessary. If the defendant is not on the premises under attack, he is justified in using deadly force only upon reasonable belief in a substantial possibility of injury to some person on the premises, other than the burglar, the arsonist, or his accomplice, from the conduct of the person against whom the deadly force is used.

The central notion is that essentially only potential danger to an occupant of the premises justifies deadly force. The Commission feels that the mere fact of reasonable belief in arsonous or burglarious intrusion, and the lack of alternative methods of preventing it, should in a criminal prosecution justify an occupant of the premises in using fatal force. Serious concern for one's own safety is nearly always present on such an occasion. The situation is considerably less compelling when the defendant is not on the premises when he becomes aware of the attack, unless he supposes someone else to be in danger.

The justification provided here is broader than that granted under the New York or Model Penal Codes. In the case of burglary, section 35.15(1) in New York allows deadly force (subject to the limitations in (2) and (3)) only upon reasonable belief that the person against whom it is used is "using or about to use physical force against an occupant of a dwelling." Probably such a belief would not be reasonable in all cases just from the fact of burglarious intrusion alone. In the case of arson, New York allows deadly force only when justifiable as in defense of a person, or when the

defendant is one in possession or control of premises, or is licensed or privileged to be thereon and believes it reasonably necessary to prevent the arson. The Model Penal Code provisions for burglary and arson in section 3.06(3)(d)(ii) require belief that the person against whom the force is used "has employed or threatened deadly force against or in the presence of the actor; or . . . the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm." (The Model Penal Code provision is broader than the Commission draft in one respect: the defendant's belief need not be reasonable.)

As in the case of defense of a person, the Commission recommends that honest but unreasonable mistake have the effect of mitigating what would otherwise be murder to manslaughter, this to be accomplished by a provision in the homicide sections.

35.25. JUSTIFICATION; USE OF PHYSICAL FORCE IN DEFENSE OF PROPERTY

A PERSON IS JUSTIFIED IN USING PHYSICAL FORCE UPON ANOTHER PERSON WHEN AND TO THE EXTENT THAT HE REASONABLY BELIEVES IT NECESSARY TO PREVENT WHAT HE REASONABLY BELIEVES TO BE AN ATTEMPT BY SUCH OTHER PERSON TO COMMIT AN OFFENSE UNDER PART 145 OR PART 155 OF THIS ARTICLE; BUT HE MAY USE DEADLY PHYSICAL FORCE UNDER SUCH CIRCUMSTANCES ONLY IN DEFENSE OF A PERSON AS PRESCRIBED IN SECTION 35.15.

COMMENT

This section is taken without change from the New York provision. It is similar to the Maryland position, following the Restatement of Torts §77, expressed in Maddran v. Mullendore, 206 Md. 291 (1955) and Vancherie v. Siperly, 243 Md. 366 (1966).

The material portion of the Commission's §145.00, dealing with criminal damage to property, provides: "A person is guilty of criminal mischief . . . when, having no right to do so nor any reasonable ground to believe that he has such right, he . . . intentionally damages property of another person."

35.26. JUSTIFICATION; USE OF PHYSICAL FORCE IN RESISTING UNLAWFUL ARREST

THE JUSTIFICATION PROVIDED IN SECTION 35.15 DOES NOT

EXTEND TO THE USE OF PHYSICAL FORCE TO RESIST WHAT IS OR IS BELIEVED BY THE DEFENDANT TO BE AN UNLAWFUL ARREST, EXCEPT THAT WHEN THE ARREST IS IN FACT UNLAWFUL, SUCH JUSTIFICATION DOES EXTEND TO A DEFENDANT WHO (A) KNOWS THAT THE ARREST IS UNLAWFUL AND NOT MADE IN GOOD FAITH, OR (B) REASONABLY BELIEVES THAT THE ARREST IS UNLAWFUL AND THAT IT IS MADE BY ONE WHO IS NEITHER A POLICE OFFICER NOR A PRIVATE PERSON WHO HAS BEEN DIRECTED OR AUTHORIZED TO ASSIST A POLICE OFFICER BY SUCH OFFICER.

COMMENT

The New York provisions as enacted do not deal explicitly with resisting unlawful arrest, and so, presumably, an unlawful arrest is to be treated as that kind of unjustified aggression against the defendant which brings into operation the privilege of self-defense, and therefore permits resistance, and may lead to a situation which permits resistance with deadly force. This is a typical common law view and appears to be in accord with current Maryland law. Sugarman v. State, 173 Md. 52 (1937) appears to allow the use of whatever force is necessary to avoid the unlawful arrest. Such an approach is questionable when the law is rather generous in justifying the actions of a police officer in making an arrest of borderline legality; the criminal law should not encourage both parties to use force in this kind of situation. Both the Model Penal Code (Section 3.04(2)(a)(i) and the draft New York Code (Section 65.25) do not justify resistance to unlawful arrest generally, but do justify it in clear or extreme situations. The Model Penal Code does not justify resistance to any arrest which the defendant knows is being made by a peace officer; the draft New York section justifies resistance only when the defendant believes the arrest is unlawful and it in fact is unlawful.

Almost always, it is better that the arrestee submit even to an arrest he believes to be illegal, and fight the matter out in court rather than on the street. But the Commission agreed that resistance is sometimes proper, although it did not entirely agree with the draftsmen of the other codes as to what circumstances should be regarded as justifying. Suppose a police officer, after demanding and being refused a bribe, attempts to arrest the defendant on an obviously trumped up charge. Prudence might or might not suggest submission; but it seems unreasonable to make resistance a crime, particularly if the defendant thinks the officer is looking for a chance to rough him up. The draft also allows justification in the situation which is and reasonably appears to the defendant to be an

attempt to kidnap him by persons who are not police officers, under the pretense of making an arrest.

The Commission believes that the justification provided is appropriately narrow; for one thing it does not extend to any situation in which the arrest is in fact lawful. It is intended only to cover those situations in which the arrestee knows that the arrest is unlawful and that the person making the arrest does not believe the arrest to be lawful, and cases in which the arrestee reasonably believes that the unlawful arrest is being made by one not connected with the police.

35.30. JUSTIFICATION; USE OF PHYSICAL FORCE IN MAKING AN ARREST OR IN PREVENTING AN ESCAPE

1. A POLICE OFFICER IS JUSTIFIED IN USING PHYSICAL FORCE OTHER THAN DEADLY PHYSICAL FORCE UPON ANOTHER PERSON WHEN AND TO THE EXTENT THAT HE REASONABLY BELIEVES IT NECESSARY:

(A) EXCEPT WHEN PROHIBITED BY SUBSECTION (3) OF THIS SECTION, TO EFFECT AN ARREST OR TO PREVENT THE ESCAPE FROM CUSTODY OF A PERSON WHOM HE REASONABLY BELIEVES TO HAVE COMMITTED AN OFFENSE; OR

(B) TO DEFEND HIMSELF OR A THIRD PERSON FROM WHAT HE REASONABLY BELIEVES TO BE THE USE OR IMMINENT USE OF PHYSICAL FORCE WHILE EFFECTING OR ATTEMPTING TO EFFECT SUCH AN ARREST OR WHILE PREVENTING OR ATTEMPTING TO PREVENT SUCH AN ESCAPE.

2. A POLICE OFFICER IS JUSTIFIED IN USING DEADLY PHYSICAL FORCE UPON ANOTHER PERSON FOR A PURPOSE SPECIFIED IN SUBSECTION ONE OF THIS SECTION ONLY WHEN HE REASONABLY BELIEVES THAT SUCH IS NECESSARY:

(A) TO DEFEND HIMSELF OR A THIRD PERSON FROM WHAT HE REASONABLY BELIEVES TO BE THE USE OR IMMINENT USE OF DEADLY PHYSICAL FORCE; OR

(B) TO EFFECT AN ARREST OR TO PREVENT THE ESCAPE FROM CUSTODY OF A PERSON WHOM HE REASONABLY BELIEVES (I) HAS COMMITTED OR ATTEMPTED TO COMMIT ROBBERY IN ANY DEGREE, RAPE IN ANY DEGREE, SODOMY IN ANY DEGREE, KIDNAPPING, ARSON IN ANY DEGREE, OR BURGLARY IN ANY DEGREE, UNLESS THE OFFICER KNOWS, OR SHOULD KNOW, FROM THE INFORMATION HE HAS AT THE TIME HE ACTS, THAT THE PERSON AGAINST WHOM THE OFFICER USES THE DEADLY PHYSICAL FORCE DID NOT USE OR THREATEN THE USE OF DEADLY PHYSICAL FORCE IN THE COMMISSION OF OR ATTEMPT TO COMMIT THE CRIME; OR (II) HAS COMMITTED OR ATTEMPTED TO COMMIT A FELONY INVOLVING THE USE OR THREATENED USE OF DEADLY PHYSICAL FORCE; OR (III) IS RESISTING ARREST OR

ATTEMPTING TO ESCAPE BY USING OR THREATENING THE IMMINENT USE OF DEADLY FORCE, OR (IV) OTHERWISE INDICATES THAT HE IS LIKELY TO ENDANGER HUMAN LIFE OR TO INFLICT SERIOUS PHYSICAL INJURY UNLESS APPREHENDED WITHOUT DELAY; PROVIDED, THAT NOTHING CONTAINED IN THIS PARAGRAPH SHALL BE DEEMED TO CONSTITUTE JUSTIFICATION FOR RECKLESS OR CRIMINALLY NEGLIGENT CONDUCT BY SUCH POLICE OFFICER AMOUNTING TO AN OFFENSE AGAINST OR WITH RESPECT TO INNOCENT PERSONS WHOM HE IS NOT SEEKING TO ARREST OR RETAIN IN CUSTODY.

3. FOR PURPOSES OF THIS SECTION, A REASONABLE BELIEF THAT A PERSON HAS COMMITTED AN OFFENSE MEANS A REASONABLE BELIEF IN FACTS OR CIRCUMSTANCES WHICH IF TRUE WOULD IN LAW CONSTITUTE AN OFFENSE. IF THE BELIEVED FACTS OR CIRCUMSTANCES WOULD NOT IN LAW CONSTITUTE AND OFFENSE, OR IF THE POLICE OFFICER, NOT ACTING PURSUANT TO A WARRANT, IS NOT AUTHORIZED BY LAW TO MAKE ANY ARREST WITHOUT A WARRANT OR DETAIN THE PERSON ARRESTED OR HELD AT THE TIME OR PLACE WHERE THE ARREST IS MADE OR FOR THE OFFENSE HE BELIEVES WAS COMMITTED, AN ERRONEOUS THOUGH NOT UNREASONABLE BELIEF THAT THE LAW IS OTHERWISE DOES NOT RENDER JUSTIFIABLE THE USE OF PHYSICAL FORCE TO MAKE AN ARREST OR TO PREVENT AN ESCAPE FROM CUSTODY. A POLICE OFFICER WHO IS EFFECTING AN ARREST PURSUANT TO A WARRANT IS JUSTIFIED IN USING THE PHYSICAL FORCE PRESCRIBED IN SUBSECTIONS 1 AND 2 OF THIS SECTION UNLESS THE WARRANT IS INVALID AND IS KNOWN BY SUCH OFFICER TO BE INVALID.

4. A PERSON WHO HAS BEEN DIRECTED BY A POLICE OFFICER TO ASSIST SUCH POLICE OFFICER TO EFFECT AN ARREST OR TO PREVENT AN ESCAPE FROM CUSTODY IS JUSTIFIED IN USING PHYSICAL FORCE OTHER THAN DEADLY FORCE WHEN AND TO THE EXTENT THAT HE REASONABLY BELIEVES SUCH TO BE NECESSARY TO CARRY OUT SUCH POLICE OFFICER'S DIRECTION, UNLESS HE KNOWS OR BELIEVES THAT THE OFFICER'S CONDUCT AS TO THE ARREST IS NOT OR WAS NOT LAWFUL.

5. A PERSON WHO HAS BEEN DIRECTED TO ASSIST A POLICE OFFICER UNDER CIRCUMSTANCES SPECIFIED IN SUBSECTION 4 OF THIS SECTION MAY USE DEADLY PHYSICAL FORCE TO EFFECT AN ARREST OR TO PREVENT AN ESCAPE FROM CUSTODY ONLY WHEN:

(A) HE REASONABLY BELIEVES SUCH TO BE NECESSARY TO DEFEND HIMSELF OR A THIRD PERSON FROM WHAT HE REASONABLY BELIEVES TO BE THE USE OR IMMINENT USE OF DEADLY PHYSICAL FORCE; OR

(B) HE IS DIRECTED OR AUTHORIZED BY SUCH POLICE OFFICER TO USE DEADLY PHYSICAL FORCE AND DOES NOT KNOW THAT, IF SUCH HAPPENS TO BE THE CASE, THE POLICE OFFICER HIMSELF IS NOT AUTHORIZED TO USE DEADLY PHYSICAL FORCE UNDER THE CIRCUMSTANCES.

6. A PRIVATE PERSON ACTING ON HIS OWN ACCOUNT MAY USE PHYSICAL FORCE OTHER THAN DEADLY FORCE UPON ANOTHER PERSON WHEN AND TO THE EXTENT THAT HE REASONABLY BELIEVES IT NECESSARY TO EFFECT A LAWFUL ARREST OR TO PREVENT THE ESCAPE FROM CUSTODY OF A PERSON HE REASONABLY BELIEVES TO HAVE COMMITTED A FELONY OR A MISDEMEANOR; BUT HE MAY USE DEADLY PHYSICAL FORCE FOR SUCH PURPOSE ONLY WHEN HE REASONABLY BELIEVES SUCH TO BE NECESSARY:

(A) SUBJECT TO THE REQUIREMENT OF RETREAT SPECIFIED IN SECTION 35.15(2), TO DEFEND HIMSELF OR A THIRD PERSON FROM WHAT HE REASONABLY BELIEVES TO BE THE USE OR IMMINENT USE OF DEADLY PHYSICAL FORCE; OR

(B) TO EFFECT THE ARREST OF A PERSON WHOM HE REASONABLY BELIEVES TO HAVE COMMITTED AN OFFENSE UNDER SECTION 125.05 (MURDER), SECTION 125.20(1) (MANSLAUGHTER), SECTION 135.20 (KIDNAPPING), PART 160 (ROBBERY), SECTIONS 130.15(1) OR 130.20(1) (FORCIBLE RAPE), OR SECTIONS 130.25(1) OR 130.30(2) (FORCIBLE SODOMY), AND WHO IS IN IMMEDIATE FLIGHT THEREFROM.

7. A POLICE OFFICER, GUARD, CUSTODIAL OFFICER, OR ANY PERSON CHARGED WITH MAINTAINING CUSTODY OF PRISONERS OR INMATES IN ANY DETENTION FACILITY, AS DEFINED IN SECTION 205.00, OR IN ANY PLACE OF CONFINEMENT FOR PERSONS UNDER LAWFUL ARREST OR OTHERWISE LAWFULLY DETAINED IN CONNECTION WITH CRIMINAL PROCEEDINGS BEFORE ANY COURT HAVING CRIMINAL JURISDICTION, WHETHER BEFORE, DURING, OR AS A CONSEQUENCE OF SUCH PROCEEDINGS, IS JUSTIFIED IN USING PHYSICAL FORCE, NOT FORBIDDEN BY THE RULES OR REGULATIONS OF ANY INSTITUTION WHERE THE PERSON IN CUSTODY MAY BE CONFINED OR BY THE DEFENDANT'S SUPERIOR OFFICER, WHEN AND TO THE EXTENT THAT HE REASONABLY BELIEVES IT NECESSARY TO USE SUCH FORCE, INCLUDING DEADLY PHYSICAL FORCE, TO PREVENT THE ESCAPE OF A PRISONER OR INMATE FROM CUSTODY.

COMMENT

The term "police officer" is defined in §10.00; the definition conforms to that in the present Art. 27, §594B, dealing with arrest powers of police officers. There is a reference in subsection (7) to "detention facility" as defined in section 205.00. "Deadly physical force" and related terms are discussed in the introductory comment to section 35.15, supra.

In Maryland, a police officer may make a valid arrest under a warrant, or in the circumstances set out in Article 27, Section 594B: roughly, (1) where a crime is committed in the officer's presence or view, or where he has probable cause to believe that this is so, or (2) where the officer has probable

cause to believe that the arrestee has committed, outside the officer's presence or view, a felony or misdemeanor specified in the statute. The officer may use any force he reasonably believes necessary to effect such a lawful arrest, except that he may not use fatal force unless he reasonably believes that a felony (or, under some modern cases, a dangerous felony) has been committed. See, generally, Kauffman, The Law of Arrest in Maryland, 5 Md. L. Rev. 125, 154 ff. (1941).

Use of nondeadly force by a police officer; applied against a person reasonably believed to have committed an offense: Subsection (1)(a) states the rule that ordinary force may be used upon another to the extent that the officer reasonably believes it necessary to effect the arrest or prevent the escape from custody of a person whom he reasonably believes to have committed an offense. Subsection (3) specifies that "a reasonable belief that one has committed an offense" does not refer to a situation in which the believed facts and circumstances do not in law constitute an offense, or a situation in which the officer may not lawfully arrest at the place or for the offense involved, except that a police officer's action pursuant to a warrant is justified unless the officer knows the warrant to be invalid. The language follows the New York provisions in the main, with one change, designed to make it clear that the officer's mistake about the nature of his own authority to arrest for a particular offense or at a particular place does not provide justification. In this respect the draft adopts the viewpoint of the Model Penal Code (Section 3.09(1)(a)). As to matters of fact, a reasonable belief is sufficient for justification; as to matters of the officer's authority or of the provisions of the penal law, it is not. The important change which this provision makes in the common law is to permit the officer to use force to arrest on the basis of reasonable belief (which is equivalent to probable cause) that any offense, not only a felony, has been committed. At the same time he is encouraged to act with a warrant by the final sentence of subsection (3).

Use of nondeadly force by a police officer; self-defense or defense of another while making an arrest: Subsection (1)(b) makes it clear that the officer, when making an arrest justifying the use of force under subsection (1)(a), retains a privilege to defend himself or another, without being subject to such limitations as the retreat rule, if he is attacked by the arrestee.

Use of deadly force by police officer or guard: It is probably clear that force, deadly if it reasonably appears necessary, should be justifiable for a prison guard trying to prevent an escape, as provided in subsection (7), and for a police officer who is protecting himself or another against the use of deadly force, as provided in subsection (2)(a). In New York the guard's justification under subsection (7) is limited to escapes from "detention facilities," as defined in section 205.00, and thus does not extend to places where persons are confined without court orders, e.g., station house lock-ups holding persons arrested without warrants. The Commission has broadened subsection (7) to change this and permit deadly force, subject to any rules of the place of confinement.

The proper limits of the justification provided in subsection (2)(b) for the use of deadly force, where there is neither a problem of self-defense of the officer or defense of another, nor of escape from a place of confinement, are debatable. In the main, the Commission has followed the New York model, but some changes have been made. Like New York, the Commission limits the justification for deadly force to those situations in which nondeadly force is justified, and in addition there is some indication of a danger to life in the victim's actual or anticipated conduct. The Commission however has to some extent broadened the officer's justification for the use of deadly force.

Subsection (2)(b)(i) is new. An officer who is properly seeking to make an arrest or prevent an escape in a case of suspected actual or attempted robbery, rape, kidnapping, arson, or burglary, and reasonably finds that deadly force is necessary to accomplish his purpose may use it unless he "knows, or should know, from the information he has at the time he acts, that the person against whom the officer uses the deadly physical force did not use or threaten the use of deadly physical force in the commission of or attempt to commit the crime." In other words, in these situations, the officer may act on an assumption of deadly threat having been used by the suspect in the commission of the crime, unless he should know from the circumstances of the particular case that there was no such threat. We believe that the nature of the suspected crimes makes such an assumption reasonable and that the officer should not be limited to nondeadly force unless he knows facts which make the assumption unreasonable.

Subsection (2)(b)(ii) follows New York in allowing necessary deadly force where the suspect is reasonably believed to have committed a felony involving the use or threatened use of deadly physical force. This would cover the obvious cases of actual criminal homicide or serious assault. (Most of the other major felonies which commonly involve violence are already covered by the preceding subparagraph.) It would also cover other felonies where the threat of violence was actually present.

Subsection (2)(b)(iii) is derived, with slight modification from New York. The use or threatened imminent use of deadly force is largely covered by (2)(a), which deals with the officer's defense of himself or others and may be unnecessary here, but it may give a slightly broader justification than (2)(a), since if the victim has threatened to use imminent deadly force on anyone, the officer may be entitled to use deadly force even if we cannot later show that he reasonably believed that the threat would be carried out, as long as he reasonably believed that he could prevent the escape or effect the arrest only by the use of deadly force.

Subsection (2)(b)(iv) follows New York in allowing deadly force upon a reasonable belief that the victim "otherwise indicates that he is likely to endanger human life or to inflict serious physical injury unless apprehended without delay." This would cover such situations as arrests for minor crimes where the arrestee in trying to escape makes credible threats of immediate death against a supposed informer, or drives an automobile so recklessly that the officer is justified in trying to minimize probable loss of life by firing at the driver or escaping car.

The Commission recommends, in accordance with its earlier position, that honest but unreasonable mistake should reduce what would otherwise be murder to manslaughter, that such a mistake here on the officer's part should be so treated in the homicide provisions.

Use of force by one assisting a police officer: As the Model Penal Code states (§3.07, comment, T.D. #8, pp. 64–65), the private person, being under obligation to respond to a lawful summons, is entitled to protection when he responds in good faith to a summons which is unlawful. New York and the Commission therefore provide that he may use ordinary force that he reasonably believes necessary to carry out the police officer's

direction, unless he knows or believes that the arrest or prospective arrest is not or was not authorized. And he may use deadly force, aside from defense of himself or another (without retreat), if the police officer directs or authorizes him to do so, unless he knows that the officer himself is not authorized to use deadly force in the circumstances. Again, honest but unreasonable mistake should, by provision in the homicide sections, reduce murder to manslaughter.

Use of force by private citizen not assisting a police officer: Finally, we have the case of the use of force by a private citizen to make an arrest or prevent an escape, when he is acting alone, not in concert with a police officer. Here there is no duty to act, and there is some danger inherent in nonprofessional action. Maryland permits the private citizen to make an arrest for felony or breach of the peace actually committed in his presence. B. & O. R.R. v. Cain, 81 Md. 87 (1895). The draft broadens the justification to some extent. It allows the private citizen to act on the basis of reasonable belief as to the existence of a crime and the identity of an offender. In self defense or defense of another, or in the case of arresting for certain serious offenses when the arrestee is in immediate flight, reasonably necessary deadly force is permitted. The justification is however narrowed in one respect; no self-help by way of arresting or preventing escape at all is allowed in the case of a violation, if any physical force is necessary.

35.35. DURESS

1. IN ANY PROSECUTION FOR AN OFFENSE, IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT ENGAGED IN THE PROSCRIBED CONDUCT BECAUSE HE WAS COERCED TO DO SO BY THE USE OR THREATENED IMMINENT USE OF UNLAWFUL PHYSICAL FORCE UPON HIM OR A THIRD PERSON, WHICH FORCE OR THREATENED FORCE A PERSON OF REASONABLE FIRMNESS IN HIS SITUATION WOULD HAVE BEEN UNABLE TO RESIST.

2. THE DEFENSE OF DURESS AS DEFINED IN SUBDIVISION 1 OF THIS SECTION IS NOT AVAILABLE IN A CASE OF MURDER OR WHEN A PERSON INTENTIONALLY OR RECKLESSLY PLACES HIMSELF IN A SITUATION IN WHICH IT IS PROBABLE THAT HE WILL BE SUBJECT TO SUCH DURESS.

COMMENT

The kind of physical compulsion involved when one's arm is physically moved by somebody else has already been taken care of by the requirement of a voluntary act in §15.00. We deal here with cases in

which a degree of physical resistance is possible, but the defendant yields through fear and commits an act which would be a crime, except for the defense of duress. Many cases of duress, where the accused sacrifices what is clearly a lesser value to preserve a greater from a convincing threat (e.g. where he parts with money entrusted to him in response to a threat, which he believes will be carried out, to kill a third person), are covered by the general choice of evils provisions of section 35.05(2). The more difficult cases, where an equal or greater value is sacrificed because of threats, are treated in this section. Suppose that the accused has participated in a kidnapping or burglary to avoid a beating, or in a killing to avoid being killed himself. The Model Penal Code and New York take the position that it is best to rely on the reasonable man standard in this situation. To allow a defense whenever the accused is actually frightened would tend to encourage cowardice; to deny a defense when the average man would be unable to resist the threat serves no sound policy of deterrence, rehabilitation or restraint, according to the draftsmen of these codes. The Commission accepts the argument in general, but not where the accused has committed a murder. It believes that cases in which the accused is really reasonably coerced into killing are rare or nonexistent in real life, and that a greater danger in this area is that a jury will accept a false defense. It therefore has rejected the defense in murder cases, but believes that in such cases duress as defined here should reduce what would otherwise be murder to manslaughter. (Cf. N.Y. §35.35 and M.P.C. §2.09 (P.O.D.))

35.40. ENTRAPMENT

1. IN ANY PROSECUTION FOR AN OFFENSE OTHER THAN ASSAULT IN ANY DEGREE (§§120.05, 120.10, 120.15, 120.25), HOMICIDE OFFENSES (PART 125), SEXUAL MISCONDUCT (§130.10), RAPE IN EITHER DEGREE (§§130.15, 130.20), SODOMY IN EITHER DEGREE (§§130.25, 130.30), UNLAWFUL DETENTION IN THE FIRST DEGREE (§135.15), KIDNAPPING (§135.20), OR ROBBERY OFFENSES (PART 160), IT IS AN AFFIRMATIVE DEFENSE THAT A PUBLIC LAW ENFORCEMENT OFFICIAL OR A PERSON ACTING IN COOPERATION WITH SUCH AN OFFICIAL ENTRAPPED THE DEFENDANT BY ENCOURAGING OR OTHERWISE INDUCING THE DEFENDANT, FOR THE PURPOSE OF OBTAINING EVIDENCE OF THE COMMISSION OF AN OFFENSE, TO ENGAGE IN CONDUCT CONSTITUTING SUCH OFFENSE WHEN HE WAS NOT THEN OTHERWISE DISPOSED TO DO SO. INDUCEMENT OR ENCOURAGEMENT TO COMMIT AN OFFENSE MEANS ACTIVE INDUCEMENT OR ENCOURAGEMENT. CONDUCT MERELY AFFORDING A PERSON AN OPPORTUNITY TO COMMIT AN OFFENSE DOES NOT

CONSTITUTE ENTRAPMENT.

2. AT ANY TIME BEFORE TRIAL, OR, WHEN THE DEFENDANT ESTABLISHES TO THE SATISFACTION OF THE COURT THAT HE DID NOT HAVE AND IN THE EXERCISE OF REASONABLE DILIGENCE COULD NOT HAVE HAD SUFFICIENT INFORMATION TO FORM A BASIS FOR MOVING FOR A HEARING BEFORE TRIAL, AT ANY TIME DURING TRIAL, THE DEFENDANT MAY HAVE, UPON MOTION, A HEARING BEFORE THE COURT, OUT OF THE PRESENCE OF THE JURY IF A JURY HAS BEEN SELECTED, ON THE ISSUE OF ENTRAPMENT. IF, AT SUCH A HEARING, THE DEFENDANT ESTABLISHES THE EXISTENCE OF THE DEFENSE BY A PREPONDERANCE OF THE EVIDENCE, THE COURT SHALL ENTER JUDGMENT OF ACQUITTAL ON THE CHARGE OR CHARGES AS TO WHICH THE DEFENSE IS APPLICABLE; OTHERWISE, THE COURT SHALL DENY RELIEF, AND IN SUCH CASE, OR WHEN NO HEARING UNDER THIS SUBSECTION HAS BEEN HELD, THE DEFENDANT MAY SUBMIT THE DEFENSE TO THE TRIER OF FACT AT THE TRIAL. A DEFENDANT SHALL NOT, BY TESTIFYING AT SUCH A HEARING, WAIVE HIS PRIVILEGE NOT TO TESTIFY AT THE TRIAL, AND NO TESTIMONY GIVEN BY HIM AT THE HEARING SHALL BE ADMISSIBLE AGAINST HIM AT THE TRIAL, EXCEPT TO IMPEACH HIS TESTIMONY AT THE TRIAL.

COMMENT

Nature of the defense: The American Law Institute (Model Penal Code, T.D. #9, p. 15) states that entrapment in some situations is almost universally recognized in the United States, listing only New York (since changed) and Tennessee as denying that they recognize it. The reason for admitting the defense is not that the accused is significantly less blameworthy than others who are convicted (those persuaded by private citizens to commit crimes they would not otherwise have committed are convicted), but rather to deter wrongful governmental conduct. In addition to the inducement of previously innocent persons to turn to crime, just mentioned, such conduct has the harmful results of lowering public respect for the law and law officers, removing police resources from proper concerns, and providing opportunities for police blackmail and oppression. In many cases of entrapment, the defendant will command more public sympathy than the police, despite his moral guilt. The only effective remedy appears to be acquittal of the defendant.

The most serious problem in the entrapment area is whether to focus on the misconduct of the police or the readiness of the defendant to act. This issue has divided most of those who have considered the problem, including the Supreme Court of the United States and the American Law Institute.

Supreme Court majorities and most of the states have thought the crucial question to be whether the defendant was ready to commit the crime; the defendant's past history and conduct at the time of the offense thus becomes of prime importance, and the tactics of the police are important primarily for the light they throw on this question of the attitude of the defendant. On the other hand, the final position of the American Law Institute asks whether police action induces conduct by "employing methods of encouragement or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." The following Institute hypoethical illustrates the difference. Suppose the defendant, unknown to the police, is willing to sell narcotics to anyone. A police informer, pretending to be the defendant's friend, encourages the defendant to sell to him by making "overreaching appeals to compassion and friendship." The defendant makes the sale. The orthodox, Supreme Court view would convict if it could be shown that he was ready to sell anyway. The Model Penal Code would not, because the police tactics were reprehensible, whatever the defendant's predisposition. Maryland has not decided between these two views, Ferraro v. State, 200 Md. 274 (1952), but shows some tendency to favor the orthodox view. See Stewart v. State, 232 Md. 318 (1963).

If we wish to discourage police overreaching, the orthodox rule is less effective. The police may not care much about acquittals of those not predisposed to act, when they can establish this predisposition if they are allowed to use these tactics against professional criminals. Furthermore, the focus on the predisposition of the defendant suggests the relevance of such things as the prior criminal record of the defendant as to related offenses, and this may open up prejudicial inquiries at the trial. The Commission nevertheless decided that we should adopt the majority rule. The New York formulation ("The defendant engaged in the proscribed conduct because he was induced or encouraged to do so . . . when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it") does not seem to put the matter so clearly as the Model Penal Code's recommended language for a jurisdiction which chooses to adopt the majority view, and the Commission therefore decided to follow the latter.

It is clear under any test that merely

affording an opportunity for a willing violator to commit a crime does not amount to entrapment. In crimes like gambling and narcotics sales, where there is seldom a complaining victim, the police could not investigate or control crime without a certain amount of deception, including asking others to engage in criminal activity. Entrapment requires more; conduct likely to induce criminal activity in one not already willing to act.

Crimes to which the defense is applicable: The entrapment defense entails police conduct of such a nature that it is likely to induce the commission of an offense by one who is not otherwise ready to commit it. Generally then, the offense would never be committed by the defendant without police encouragement, and it may be argued that the defendant, if left alone, is not a significant danger to society. Why then should entrapment not be a defense to even the most serious crimes? A partial answer is that if the defendant can be induced to commit a serious crime by the police, he can probably be induced to commit it by a private person, and therefore remains a significant potential danger, aside from the situation in which he claims entrapment. More importantly, public opinion in a case of violent crime probably would support the punishment of the defendant, even if induced to act by the police. It would also be likely to provide effective alternative deterrents to acquittal of the defendant for police misconduct, by supporting civil, criminal, or administrative penalties against the police.

New York did not follow the Model Penal Code suggestion that entrapment should not be an available defense "when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment." The Commission approved the Model Penal Code limitation. As a matter of draftsmanship, we might have copied the Model Penal Code language, changing "bodily injury" to "physical injury" to conform to the terminology of the New York Code. We instead decided to specify particular crimes, because we feared that the determination of whether a threat of bodily injury is involved in a particular kind of crime or a particular incident might be an unnecessarily complicating factor in dealing with the entrapment defense.

Procedure: Subsection (2) was drafted to reflect a decision that the defendant should have

the option of submitting the defense of entrapment to the court rather than to the jury, particularly in view of the fact that the defendant's past conduct is often relevant on the issue of his readiness to commit the crime, and may be highly prejudicial. The Commission also felt that if the judge does not accept the defense, the defendant should have a chance to submit it to the jury, if he wishes to do so. A hearing before rather than during the trial is encouraged in the interest of efficiency and advance disclosure of the defense. The defendant is free to testify in such a hearing, without fear that he may waive his defendant's privilege against self-incrimination at the trial, and without fear that his testimony at the hearing will be used against him on the merits. It does not seem unreasonable, however, to permit impeachment by way of prior inconsistent statement, if the defendant chooses to testify at the trial and contradicts his hearing testimony. Testimony at the hearing will often bring him close to an admission that he is guilty if the entrapment defense fails; he should be free to make the defense without relieving the prosecution of the burden of making its own case on the merits independently, but there is no reason why he should be permitted to give contradictory testimony at trial without being subject to impeachment.

TITLE II — SENTENCES

SUBTITLE E — SENTENCES

Introduction

The General Objectives and Philosophy of the proposed draft:

The objectives of the proposed draft are to replace the present system of sentencing, which stresses "punishment of the crime," with a more flexible system, which emphasizes "punishing the criminal" — i.e., handling him according to society's and his needs rather than by formulae of retribution. However valid it may be theoretically, the retributive system is too often ineffective in practice. In some cases it results in sentences that are too short to protect the community. In others it produces sentences that are too long to permit rehabilitation of the offender or which discourage him from attempting to reform himself. An example of ineffective retribution is the dangerous assaultive individual who, in the course of a lifetime is convicted of four or five assaults with deadly weapons, yet never draws sentences of

more than a few years before he finally commits a homicide because, luckily, the earlier victims are not seriously injured by the attacks. The retributive system is also ineffective with respect to habitual perpetrators of relatively more minor offenses. An example is the confirmed check writer who may be convicted 10 or 15 times without drawing a sentence of more than one year because, evaluating his case in terms of the retribution his crime deserves, judges repeatedly decide that the $35 he steals each time just isn't worth more than a year. Untempered retribution also results in the incarceration of more tractable offenders for prison terms which do not appear, from the high recidivism statistics available, to protect the community and may even endanger it by placing inexperienced offenders into prolonged association with hardened criminals. For these young men the prison experience may be nothing more than a semester or two in a "graduate school for crime."

The proposed draft seeks to strengthen the hand of the law enforcement system both to be able to isolate the hard core criminal for longer periods for the protection of the community and to facilitate the application to other offenders of more promising correctional methods than the two present and generally available alternatives of minimally supervised probation and total incarceration. A special extended sentence is provided for persons who repeat crimes of violence and might not, under present law, be appropriate subjects for treatment in the Patuxent Institution as "Defective Delinquents." A lesser extension of sentence is provided for repeaters of less serious crimes. A life sentence with a minimum term of parole eligibility is provided for perpetrators of a new substantive offense entitled "Leading Organized Crime." Indeterminate sentences are used. The indeterminate sentence should give correctional and parole officials the option of holding professional and habitual offenders for longer periods than often is possible under today's system of retributive definite sentences. Yet, at the same time, the indeterminate sentence will usually make it possible to release tractable offenders sooner than is likely to happen at this time. At present, although the law does not forbid early parole except in the most serious cases, convicts are by longstanding custom not considered eligible for parole (or for minimum security and work release classifications within the correctional system) until they have served a fourth or third of their determinate sentences. Understandably, correctional officials often find convicts with long sentences difficult to motivate

constructively until an expectation that their efforts may earn them parole becomes realistic. On the other hand, many convicts with relatively short sentences are hard to motivate also. Apparently there is not enough time "hanging over" such convicts to induce them to take seriously such rehabilitative programs as exist in the penal system, especially when the more or less automatic industrial and good behavior credits may reduce the time remaining after the customary parole ineligibility period has elapsed to a period that seems easily endurable. The indeterminate sentence should make it easier to motivate both types, since by its nature it rejects the notion that Board of Parole officials should feel obligated to withhold parole until a retributive fourth or third of the determinate sentence has been served. Thus it offers hope that early efforts will be rewarded; yet it also provides an ample maximum to motivate recalcitrants.

The overall effect of the indeterminate sentence should be to encourage greater use of parole and of correctional alternatives between probation and total incarceration, such as work release and "half-way house" programs. Ideally, it should permit correctional and Board of Parole officials to collaborate to create a system whereby the convict can earn his progress from maximum security to parole at a rate set by his own efforts by demonstrating that he can handle progressively larger amounts of freedom and responsibility. In practice, particularly at first, the Maryland system probably will fall short of that ideal because of other limitations in the correctional system. Nevertheless, to the extent that it facilitates development of community-based programs which will move tractable offenders more rapidly out of maximum security it will be an improvement, both in terms of removing such offenders from the negative influences of the prison society and in terms of the large amounts of custodial costs to be saved.

In its theoretical approach, the proposed draft does not reject any of the traditional objectives of penal sentences, though it shifts the emphasis between them. Such objectives are generally said to be four: (a) Vengeance — i.e., retaliation against the offender to satisfy the community's emotion of anger at his crimes and obviate private retribution; (b) deterrence — i.e., an unpleasant experience imposed as a warning to others who might be contemplating similar crimes; (c) isolation — i.e., physically preventing the offender from committing more crimes by locking him

up and (d) correction — i.e., changing the offender so that he will not commit additional crimes, either by deterring him with the unpleasant experience of punishment or by helping him to adjust to a constructive role in society or both. However, the traditional objectives frequently are at cross purposes with one another. For example, measures that are thought to be ultimate deterrents, capital punishment and life imprisonment, are at odds with the objective of correction. The principal task facing the creators of a new sentencing code is to arrange the sentencing system so that the various objectives of punishment are given proper emphasis, vis a vis one another, in the proper situations. Thus, the proposed draft differs from the present Maryland sentencing system in that it places relatively little emphasis upon vengeance in the belief that the satisfaction of the emotion of anger serves only a transitory, relatively less important community interest. Deterrence and isolation are relatively more important objectives with respect to the most serious offenses and the most dangerous offenders than with respect to the largest proportion of offenses committed, i.e., those which today would draw relatively short sentences. As to the non-hard core offender, who usually would get the shorter sentence today, more emphasis is placed upon facilitating his change to constructive citizenship in the belief that the community's greatest and most durable interest in the disposition of his case is to see that he does not offend again.

The choice of emphasis in the proposed draft represents acceptance of two premises: First, except perhaps for a small number of crimes where the lure of committing the crime may be great enough to make someone willing to endure a prison sentence to achieve the objectives of the crime (e.g., murder of a spouse or larceny of a very large amount of money), the sureness and swiftness, far more than the severity of punishment will determine its effectiveness as a deterent, both to correct the convict and to scare others away from committing similar acts. Second, the terms of imprisonment now being served by over 90% of those committed to prison and most or all of those committed to jail, though longer than terms imposed for similar offenses in most other countries of the world, are too short to afford the community long run protection merely from isolating the criminal. Thus, over 50% of persons committed to the Division of Correctional Services in Maryland are released before 1 year has elapsed; 90% before 3 years and 95% before 5 years have elapsed. Recidivism

statistics indicate that whatever deterrent and isolative effect these sentences have is probably enough offset by the increased criminalization of the offender which occurs in prison so that the net result for the community is that he commits more and bigger crimes in his lifetime than might have been the case had he been handled alternatively, not to mention the tremendous expense (over $3,000 per man per year plus welfare costs to dependents and loss of his productivity and tax revenues) of keeping him out of circulation.

The philosophy of the draft has been greatly influenced by several thorough studies of the correctional problem in the United States which have been undertaken in the last ten years, namely (a) The American Law Institute's Model Penal Code (Proposed Official Draft, 1962); (b) The National Council on Crime and Delinquency's Model Sentencing Act (1963); (c) The Report of the President's Commission on Law Enforcement and the Administration of Justice (1967); (d) the American Bar Association's Standards Relating to Sentencing Alternatives and procedures (1968) and (e) the National Commission on Reform of Federal Laws' Study Draft of a New Federal Code (1970). In addition, working drafts have been circulated to the following Maryland officials to obtain their views concerning the practical problems of sentencing in Maryland: Joseph Cannon, then Commissioner of Corrections; Leighton Dudley, then Superintendent of Parole and Probation, now Assistant Secretary of Public Safety; David Mason, Chairman of the Board of Parole; Harold Boslow, Superintendent of the Patuxent Institution and Franklin Goldstein, Chairman of the Board of Patuxent Institution. Together, this group not only includes representatives from the spectrum of correctional agencies in Maryland but also three lawyers, one psychiatrist and one social worker. Therefore, while many other sources of information might have been consulted had time permitted, a considerable bank of expert knowledge and opinion has been drawn upon in order to arrive at the philosophy of sentencing which runs through this particular draft.

It is not possible to say generally whether the proposed new system of sentencing for Maryland is "tougher" or "softer" than the present system. A major objective of the draft is flexibility so that the authorities who must make decisions about punishment — particularly the sentencing judge and the Parole Board — can isolate the most dangerous and intractable offenders as long as they remain dangerous and intractable while not impeding, with

rigid or excessively harsh punishment formulae, the progress of those offenders who are willing and able to progress toward good citizenship. Along these lines, a special effort has been made to facilitate communications between the sentencing judge and receiving correctional authorities — particularly the presentation to the judge by the correctional officials of a correctional plan under which, if he cooperates, the offender can be expected to progress toward rehabilitation. Another major objective is to reduce disparity of sentences from judge to judge and from location to location by employing the indeterminate form of sentence and by fixing penalties according to various graded categories of sentences. Still another general objective of the draft is to ensure that sentencing decisions are based upon the greatest amount of relevant information about the offender which can practicably be gained without wasting the money of the State on unproductive diagnosis.

Specific objectives of particular portions of the draft will be taken up in the comments which follow each section.

PART 55: CLASSIFICATION AND DESIGNATION OF OFFENSES

Part 55 designates different incarceration punishment classifications used throughout the Criminal Code. This establishes a legislative scheme for grading offenses according to the maximum incarceration punishment allowable for the offense absent proof of special factors justifying an extended sentence. Offenses are divided by the Part into five classes of felonies, two classes of misdemeanors and a single class of petty offenses designated a "violation." The classification into which a particular offense is put is listed elsewhere in the Code at the end of the section defining the offense. For example, rape in the first degree, defined in Section 130.25 of the new Code, has been classified as a class A felony and rape in the second degree, is defined in Section 130.20 as a class D felony.

55.00. APPLICABILITY OF PART

THE PROVISIONS OF THIS PART GOVERN THE CLASSIFICATION AND DESIGNATION OF EVERY OFFENSE, WHETHER DEFINED WITHIN OR OUTSIDE OF THE CRIMINAL CODE.

COMMENT

This Section indicates that the proposed new Sentencing Code generally, and this Part

specifically, are applicable to all offenses, including those created by the Legislature outside the Proposed Code or by local ordinance.

55.05. PURPOSES AND CONSTRUCTION

THE PURPOSES OF THIS PART AND PARTS 60, 65, 70, 75 AND 80 ARE THAT PERSONS CONVICTED OF CRIME SHALL BE DEALT WITH IN ACCORDANCE WITH THEIR INDIVIDUAL CHARACTERISTICS, CIRCUMSTANCES, NEEDS, AND POTENTIALITIES AS WELL AS THE NATURE AND CIRCUMSTANCES OF THE CRIME; THAT DANGEROUS OFFENDERS SHALL BE HELD IN CUSTODY FOR AS LONG TERMS AS NEEDED; AND THAT OTHER OFFENDERS SHALL BE DEALT WITH BY PROBATION, SUSPENDED SENTENCE, OR FINE WHENEVER SUCH DISPOSITION APPEARS PRACTICABLE AND NOT DETRIMENTAL TO THE NEEDS OF PUBLIC SAFETY AND THE CORRECTION OF THE OFFENDER, OR SHALL BE COMMITTED FOR A LIMITED PERIOD. SAID PARTS SHALL BE CONSTRUED LIBERALLY TO EFFECTUATE SUCH PURPOSES.

COMMENT

This Section is adapted from §1 of the Model Sentencing Act. It is designed to function as a preamble to the Sentencing Code. It emphasizes the philosophy underlying this Code that the sentencing judge should attempt to sentence the individual, not the crime, and should choose alternatives to commitment wherever the needs of public safety and the offender permit, reserving long terms in custody for dangerous offenders.

55.10. CLASSIFICATION OF FELONIES AND MISDEMEANORS

1. FELONIES. FELONIES ARE CLASSIFIED, FOR THE PURPOSE OF SENTENCE, INTO FIVE CATEGORIES AS FOLLOWS:

(A) CLASS A FELONIES;

(B) CLASS B FELONIES;

(C) CLASS C FELONIES;

(D) CLASS D FELONIES; AND

(E) CLASS E FELONIES.

2. MISDEMEANORS. MISDEMEANORS ARE CLASSIFIED, FOR THE PURPOSE OF SENTENCE, INTO THREE CATEGORIES AS FOLLOWS:

(A) CLASS A MISDEMEANORS;

(B) CLASS B MISDEMEANORS; AND

(C) UNCLASSIFIED MISDEMEANORS.

COMMENT

This Section puts all felonies into one of five sentencing classifications and all misdemeanors into two classes. A group of unclassified misdemeanors is also designated to cover minor offenses created by statute outside of the proposed new Criminal Code for which the penalty is expressly stated in the provisions defining the offense.

55.15. DESIGNATION OF OFFENSES

1. FELONIES. THE PARTICULAR CLASSIFICATION OF EACH FELONY DEFINED IN THIS CODE IS EXPRESSLY DESIGNATED IN THE SECTION OR PART DEFINING IT. ANY OFFENSE DEFINED OUTSIDE THIS CODE WHICH IS DECLARED BY LAW TO BE A FELONY WITHOUT SPECIFICATION OF THE CLASSIFICATION THEREOF, OR FOR WHICH A LAW OUTSIDE THIS CODE PROVIDES A SENTENCE TO A TERM OF IMPRISONMENT IN EXCESS OF ONE YEAR, SHALL BE DEEMED A CLASS E FELONY.

2. MISDEMEANORS.

(A) EACH MISDEMEANOR DEFINED IN THIS CODE IS EITHER A CLASS A MISDEMEANOR OR A CLASS B MISDEMEANOR, AS EXPRESSLY DESIGNATED IN THE SECTION OR PART DEFINING IT.

(B) ANY OFFENSE DEFINED OUTSIDE THIS CODE WHICH IS DECLARED BY LAW TO BE A MISDEMEANOR WITHOUT SPECIFICATION OF THE CLASSIFICATION THEREOF OR OF THE SENTENCE THEREFORE SHALL BE DEEMED A CLASS A MISDEMEANOR.

(C) WHERE AN OFFENSE IS DEFINED OUTSIDE THIS CODE AND A SENTENCE TO A TERM OF IMPRISONMENT IN EXCESS OF FIFTEEN DAYS IS PROVIDED IN THE LAW OR ORDINANCE DEFINING IT, SUCH OFFENSE SHALL BE DEEMED AN UNCLASSIFIED MISDEMEANOR.

3. VIOLATIONS. EVERY VIOLATION DEFINED IN THIS CODE IS EXPRESSLY DESIGNATED AS SUCH. ANY OFFENSE DEFINED OUTSIDE THIS CODE WHICH IS NOT EXPRESSLY DESIGNATED A VIOLATION SHALL BE DEEMED A VIOLATION IF, NOTWITHSTANDING ANY OTHER DESIGNATION SPECIFIED IN THE LAW OR ORDINANCE DEFINING IT, A SENTENCE TO A TERM OF IMPRISONMENT WHICH IS NOT IN EXCESS OF FIFTEEN DAYS IS PROVIDED THEREIN, OR A SENTENCE TO A FINE BUT NO SENTENCE TO IMPRISONMENT IS PROVIDED THEREIN.

COMMENT

This Section, adapted from the New York Code, states that any felony defined by statute outside of the proposed new Criminal Code shall be deemed a

class E felony, which would limit the sentence to the maximum permissible for that class of felony. Similarly, misdemeanors defined outside the proposed new Criminal Code for which no penalty is expressly stated in the provisions defining the offense are to be deemed class A misdemeanors. These provisions take into account the fact that legislatures frequently create misdemeanors and occasionally create felonies without tying them specifically to the criminal or penal code of the state and that such practice may occur in Maryland after the adoption of the new Criminal Code. The object of the provisions is to tie such unclassified crimes into the new Criminal Code in a way that is harmonious with the correctional scheme and sentencing objectives of the Code.

The Section also creates a category of very minor offenses called the "violation." A person convicted of a violation presumably would not acquire the stigma of having been adjudicated a "criminal."

PART 60: AUTHORIZED DISPOSITIONS OF OFFENDERS

INTRODUCTION

With the classification scheme having been outlined in Part 55, Part 60 proceeds to deal generally with the authority of the sentencing judge to dispose of criminal convictions. Parts 65, 70 and 75 then spell out the specific details of the punishment alternatives that are available to the judge – i.e., Part 65 deals with the probation situation; Part 70 deals with the imprisonment situation, and Part 75 with fines.

60.00. APPLICABILITY OF PART

THE SENTENCES PRESCRIBED BY THIS PART SHALL APPLY IN THE CASE OF EVERY OFFENSE, WHETHER DEFINED WITHIN OR OUTSIDE OF THIS CODE.

COMMENT

This Section indicates that the proposed new sentencing code is to be applicable to all offenses, including those created by the Legislature outside of the new Criminal Code or by local ordinance.

60.05. AUTHORIZED DISPOSITIONS; CLASS A FELONIES

1. EVERY PERSON CONVICTED OF A CLASS A FELONY SHALL BE SENTENCED TO A TERM OF IMPRISONMENT PURSUANT TO

SECTION 70.00.

2. A PERSON CONVICTED OF A CLASS A FELONY MAY BE SENTENCED TO PAY A FINE AUTHORIZED BY PART 75 IN ADDITION TO THE SENTENCE OF IMPRISONMENT.

COMMENT

The original draft of this section and of Part 120 contemplated offering the General Assembly alternative drafts, according to whether or not it was desired to retain capital punishment. However, the case of Furman v. Georgia, 408 U.S. 238 (1972), has led the Commission to modify this section and to withdraw the main sections 120.05, 125.10, and 125.15, in favor of the alternate draft section 125.05, beginning on page 170 of the draft. The Commission expresses no opinion on the merits of capital punishment, but it believes that no capital punishment scheme which is (a) constitutional in the view of a majority of the Supreme Court, (b) workable, and (c) acceptable to the people of the State, can be drafted at the present time, or until the Supreme Court sheds further light on the question. The best prospects for constitutional plans appear to be (1) some mandatory scheme of punishment for a relatively few kinds of murder, or (2) a variation of the proposal of the Model Penal Code, which lists a series of aggravating and mitigating factors for consideration of the jury and which (under a possibly constitutional version) would require the jury to decide in a kind of special verdict for or against capital punishment according to its findings as to these factors. But agreement on the limited area or the relevant factors is extremely difficult, and there is a strong likelihood that such schemes would not pass muster with the present Supreme Court, even if carefully drafted and conscientiously applied. A number of bills adopting approaches of the two types suggested above were introduced in the 1974 session of the General Assembly and failed to pass.

This section and section 70.00 provide for mandatory minimum sentences for all class A felonies, which include such serious offenses as murder, first degree rape, and kidnapping. The sentence may be either ten years to life or five to fifteen years. The maximum life sentence, like all other maximum sentences, is to be indeterminate, for reasons more fully explained in the Comment to Part 70. A mandatory minimum which would prevent the defendant from being eligible for parole for five or ten years is made a part of the sentence to assure that the defendant will not be seen back in the

community for a substantial period of time following the commission of the crime. Such a minimum sacrifices correctional objectives in some cases for the deterrent objective; many persons convicted of murder or similar serious crimes are relatively good rehabilitative prospects, and prolonged detention may actually cause the individual to regress. A provision of section 60.65 permits modification of the ten year minimum by the court after five years upon motion of the Board of Parole. The requirement that both the court and Board of Parole approve is designed to prevent persons contemplating commission of class A felonies from assuming that they can readily or easily get out of prison in less than ten years, though it permits early release in cases where the value of rehabilitation appears to outweigh the need for further deterrence and/or isolation.

60.10. AUTHORIZED DISPOSITIONS; GENERALLY

1. REVOCABLE DISPOSITIONS; PROBATION AND CONDITIONAL DISCHARGE. WHEN A PERSON IS CONVICTED OF AN OFFENSE, THE COURT, WHERE AUTHORIZED BY PART SIXTY-FIVE, MAY SENTENCE SUCH PERSON TO A PERIOD OF PROBATION OR TO A PERIOD OF CONDITIONAL DISCHARGE AS PROVIDED IN THAT PART. SUCH SENTENCE SHALL BE DEEMED A TENTATIVE ONE TO THE EXTENT THAT IT MAY BE ALTERED OR REVOKED IN ACCORDANCE WITH PART SIXTY-FIVE, BUT (EXCEPT AS OTHERWISE PROVIDED BY SECTION 65.25) FOR ALL OTHER PURPOSES SHALL BE DEEMED TO BE A FINAL JUDGMENT OF CONVICTION.

ALSO, UNLESS THE SECTION OF PART SIXTY-FIVE UNDER WHICH THE COURT ACTS IN IMPOSING A SENTENCE OF PROBATION OTHERWISE PROVIDES, THE COURT MAY IMPOSE A FINE AUTHORIZED BY PART SEVENTY-FIVE.

2. OTHER DISPOSITIONS. WHEN A PERSON IS CONVICTED OF AN OFFENSE, OTHER THAN A CLASS A FELONY, AND NOT SENTENCED TO A PERIOD OF PROBATION OR TO A PERIOD OF CONDITIONAL DISCHARGE, OR WHEN A SENTENCE OF PROBATION OR OF CONDITIONAL DISCHARGE IS REVOKED, THE SENTENCE OF THE COURT SHALL BE AS FOLLOWS:

(A) A TERM OF IMPRISONMENT AUTHORIZED BY PART SEVENTY; OR

(B) A FINE AUTHORIZED BY PART SEVENTY-FIVE, PROVIDED, HOWEVER, THAT WHEN THE CONVICTION IS OF A CLASS B FELONY OR OF ANY FELONY DEFINED IN PART TWO HUNDRED TWENTY, (COVERING VARIOUS DRUG OFFENSES) THE SENTENCE SHALL NOT CONSIST SOLELY OF A FINE; OR

(C) BOTH IMPRISONMENT AND A FINE; OR

(D) WHERE AUTHORIZED BY SECTION 65.20, UNCONDITIONAL DISCHARGE AS PROVIDED IN THAT SECTION.

IN ANY CASE WHERE A PERSON HAS BEEN SENTENCED TO A PERIOD OF PROBATION, IF THE PART OF THE SENTENCE THAT PROVIDES FOR PROBATION IS REVOKED, THE COURT SHALL COMMIT SUCH PERSON TO THE CUSTODY OF THE COMMISSIONER OF CORRECTION FOR EVALUATION IN A DIAGNOSTIC FACILITY IN ACCORDANCE WITH THE PROVISIONS OF SECTION 60.45 AND A REDETERMINATION OF HIS SENTENCE, PROVIDED THAT SUCH REDETERMINED SENTENCE SHALL NOT EXCEED IN SEVERITY THE MAXIMUM SENTENCE WHICH COULD HAVE BEEN IMPOSED HAD THE DEFENDANT NOT BEEN SENTENCED INITIALLY TO A PERIOD OF PROBATION.

COMMENT

This Section lists the various alternatives available to the sentencing judge in the case of offenses other than class A felonies. It authorizes, subject to limitations set forth elsewhere in the proposed draft, the following dispositions of a criminal case:

1. Unconditional discharge;

2. Probation or conditional discharge (the latter in effect a probation without supervision);

3. A definite jail term of up to six months for class A misdemeanors and lesser terms for lesser offenses;

4. An indeterminate sentence for felons and multiple misdemeanants to the Division of Correction, which may totally incarcerate the man or handle him by some method intermediate between total freedom and total incarceration, such as work release or a halfway house;

5. An extended sentence of 10 to 30 years for perpetrators of repeated crimes of violence, or an extended sentence under the special circumstances described in sections 70.16, 70.17, and 70.18;

6. Institution of civil proceedings to commit the offender to the Patuxent Institution as a defective delinquent under the present Article 31B of the Maryland Code or to commit him to a narcotic rehabilitation center under Article 43B of the present Code.

The probation and conditional discharge alternatives, which are more fully spelled out in Part 65, are not new except that the practice of

imposing a discretionary sentence and suspending it is eliminated. Instead, the maximum indeterminate sentence for the offense for which the man stands convicted is deemed mandatorily imposed but is suspended and the judge is required to delay exercising his discretion to impose a lesser indeterminate sentence until the conditions of probation or conditional discharge are violated and a revocation occurs. Thus, if revocation occurs, the judge will be exercising all of the discretion he might have exercised initially, but will have the additional facts of the defendant's behavior during the probationary period available to assist him. The suspension of the maximum sentence thus avoids a situation where the judge may preclude himself from imposing a long sentence upon revocation by imposing an initial suspended sentence that is too short.

60.15. AUTHORIZED DISPOSITIONS; NARCOTIC ADDICT

WHEN A PERSON IS CONVICTED OF AN OFFENSE, OTHER THAN ONE SUBJECT TO A SENTENCE OF DEATH OR A CLASS A OR B FELONY, AND IT APPEARS THAT HE MAY BE A DRUG ADDICT, CIVIL PROCEEDINGS MAY BE INSTITUTED PURSUANT TO § 12 OF ARTICLE 43B OF THE MARYLAND CODE.

COMMENT

This Section cross references the sentencing code to existing provisions in Article 43B of the present Maryland Code. It adds no powers that the judge does not presently have. However, it prevents him from employing the civil alternative to criminal punishment where the defendant stands convicted of a class A or B felony.

60.20. AUTHORIZED DISPOSITIONS; CORPORATION

WHEN A CORPORATION IS CONVICTED OF AN OFFENSE, THE SENTENCE OF THE COURT SHALL BE AS FOLLOWS:

(A) A FINE AUTHORZIED BY SECTION 75.10; OR

(B) WHERE AUTHORIZED BY SECTION 65.05, A PERIOD OF CONDITIONAL DISCHARGE AS PROVIDED IN THAT SECTION; OR

(C) WHERE AUTHORIZED BY SECTION 65.20, UNCONDITIONAL DISCHARGE AS PROVIDED IN THAT SECTION.

IN ANY CASE WHERE A CORPORATION HAS BEEN SENTENCED TO A PERIOD OF CONDITIONAL DISCHARGE AND SUCH SENTENCE IS REVOKED, THE COURT SHALL SENTENCE THE CORPORATION TO PAY A FINE.

COMMENT

The proposed Criminal Code will not count revocation of governmental licenses among its sanctions for criminal behavior. Where a corporation is convicted of an offense, the only penal sanction that can be used is a fine. However, there is no reason why a sentencing judge should not be permitted the same discretion with respect to withholding of penal sanctions as to a corporation that he may exercise as to individual defendants. Section 60.20, therefore, provides three alternative dispositions for sentencing a corporation; a fine, conditional discharge, and unconditional discharge.

60.25. CIVIL PENALTIES

THIS PART DOES NOT DEPRIVE THE COURT OF ANY AUTHORITY CONFERRED BY LAW TO DECREE A FORFEITURE OF PROPERTY, SUSPEND OR CANCEL A LICENSE, REMOVE A PERSON FROM OFFICE, OR IMPOSE ANY OTHER CIVIL PENALTY, AND ANY APPROPRIATE ORDER EXERCISING SUCH AUTHORITY MAY BE INCLUDED AS PART OF THE JUDGMENT OF CONVICTION.

COMMENT

This Section makes it clear that the court may impose any applicable civil penalty, unless such procedure would be inconsistent with some other prescribed procedure for its enforcement. It is primarily a matter of convenience and does not create any new civil disabilities.

60.30. DESIGNATION OF SENTENCE TO JURISDICTION OF DIVISION OF CORRECTION

1. COURTS TO WHICH SECTION APPLICABLE. THE PROVISIONS OF THIS SECTION ARE APPLICABLE TO THE CIRCUIT COURT FOR ANY COUNTY, THE CRIMINAL COURT OF BALTIMORE, THE DISTRICT COURT FOR ANY DISTRICT AND ANY APPELLATE COURT ON AN APPEAL FROM SENTENCE.

2. ALL CONVICTED PERSONS SENTENCED TO A TERM OF IMPRISONMENT WHICH, BY ITS TERMS, DOES OR MAY EXCEED SIX MONTHS SHALL BE COMMITTED TO THE CUSTODY OF THE COMMISSIONER OF CORRECTION AND DELIVERED TO HIM. THEREAFTER ALL SUCH PERSONS SHALL BE HELD, CONFINED IN, ASSIGNED TO OR TRANSFERRED TO SUCH OF THE INSTITUTIONS AND FACILITIES UNDER THE JURISDICTION OF THE DIVISION OF CORRECTION AS SUCH DIVISION FROM TIME TO TIME MAY ORDER, OR STATE POLICE BARRACKS WHERE SUCH USE IS CONVENIENT AND PRACTICAL.

3. NO SENTENCE BY ANY JUDGE TO THE JURISDICTION OF THE DIVISION OF CORRECTION SHALL BE FOR A PERIOD OF

IMPRISONMENT WHICH, BY ITS TERMS, DOES NOT OR MAY NOT EXCEED SIX MONTHS, ANY PROVISION OF THIS PART OR ANY OTHER LAW TO THE CONTRARY NOTWITHSTANDING. NOTHING IN THIS SECTION SHALL PREVENT ANY JUDGE FROM COMMITTING ANY MINOR TO ANY FACILITY TO WHICH MINORS MAY BE COMMITTED UNDER THE LAW.

4. WHENEVER IN THIS PART OR ANY OTHER LAW REFERENCE IS MADE TO THE SENTENCING OR CONFINEMENT OF PRISONERS TO ANY OF THE INSTITUTIONS ENUMERATED IN ARTICLE 27, SECTION 689, OF THE ANNOTATED CODE OF MARYLAND, SUCH REFERENCE SHALL AFTER JUNE 1, 1967, BE CONSTRUED TO MEAN SENTENCING OR CONFINEMENT TO THE JURISDICTION OF THE DIVISION OF CORRECTION RATHER THAN TO ANY PARTICULAR INSTITUTION OR FACILITY OF THE DIVISION.

5. THE COMMISSIONER OF CORRECTIONAL SERVICES MAY TRANSFER MINIMUM SECURITY INMATES TO COUNTY OR BALTIMORE CITY DETENTION FACILITIES FOR PARTICIPATION IN COMMUNITY-ORIENTED CORRECTIONAL PROGRAMS, BY MUTUAL AGREEMENT WITH BALTIMORE CITY OR THE COUNTIES INVOLVED.

6. THE COMMISSIONER OF CORRECTIONAL SERVICES MAY ACCEPT TRANSFER OF INMATES OR PRETRIAL DEFENDANTS FROM A COUNTY OR BALTIMORE CITY DETENTION FACILITY IF SUCH PERSON TO BE TRANSFERRED REQUIRES MAXIMUM SECURITY DETENTION, AND THE COUNTY OR BALTIMORE CITY FACILITY IS NOT EQUIPPED TO PROPERLY PROVIDE THE NECESSARY TREATMENT OR DETENTION.

COMMENT

This Section continues the present practice, under Article 27, §690 of the Maryland Code, of requiring judges to send convicts to the Division of Correction instead of to specific institutions, so that the Division may classify them for appropriate disposition within its system. The present procedure is for the Division of Correction to assign all persons committed to its custody to the Reception and Diagnostic Center in the Maryland Penitentiary for a period of from six to twelve weeks prior to being classified for other institutions. Pursuant to Section 60.40, after July 1, 1977, the sentencing judge would have the benefit of the information gained from such diagnostic process at the time of sentence. Hopefully, the Reception and Diagnostic facilities will be developed so that the benefits of such classification procedure can be made available to the judge in some cases prior to 1977. In addition, it is expected that some facilities will be developed as time goes on so that offenders may be put into correctional programs intermediate between probation and total incarceration earlier in their

institutional careers than at present. Presently, the main intermediate program, work release, serves only as a pre-release measure to get inmates over the damaging effects of prison. Society and the offender would both be better served if inmates were to start progressing toward rehabilitation before institutionalization commenced.

Subsections two and three of Section 60.30 together with Section 60.35 follow a practice employed in many other states of fixing a line of demarcation based upon length of incarceration to determine which offenders serve their time in jail and which are sent to the State correctional system. After consultation with Maryland's Commissioner of Corrections, the line of demarcation was fixed at six months. According to the Commissioner, the present system, whereby individuals occasionally are sentenced to his jurisdiction for as little as 90 days, imposes a burden upon the Division and does not achieve any benefit that justifies using the State correctional system, rather than a jail, to hold the offender for such a relatively short period. The offender often spends the greater part of his incarceration being classified in the Reception and Diagnostic Center and then is released almost immediately.

The six-month cut-off scheme also recognizes that jails are essentially punitive institutions for minor offenders as well as holding institutions for persons awaiting trial, and that because of the short-term nature of most confinement in such institutions, jails rarely have any programs which might be called corrective. Prisons, on the other hand, presently provide state-use industrial employment and some educational and vocational training for their inmates. Hopefully they will be adding more treatment programs in the future.

Therefore, the decision to eliminate jail terms over six months and prison terms under six months represents the following judgments:

1. A man who is going to be out of circulation for more than six months should be in a place where more is going on than mere "warehousing";

2. A man with more than six months to serve presumably has misbehaved in a way that justifies putting him in with more serious offenders. Contrary likewise, a man sentenced to less than six months should be in with other minor offenders.

3. The man with more than six months to serve poses a different security problem from the man with less time to serve. Ideally, jails will segregate sentenced minor offenders from accused felons awaiting trial and impose less rigid and less expensive security upon them. (If a man will be coming out into the community again in only a few months, there is no reason to go to the expense of treating him as a menace.) The man with more time to serve may or may not need tighter security measures. The Division of Correction is set up to handle him according to the risk of escape he presents.

The sentencing scheme of the Criminal Code, set forth in detail in Part 70, does not provide for any determinate sentence of over six months or any indeterminate sentence of less than 0-3 years for offenses included within the Code. However, a few unclassified crimes carrying penalties of between six months and one year will persist in the Motor Vehicle Code and elsewhere in the Maryland Code after the new Criminal Code is adopted. Section 70.05(3) provides that these individuals will serve their time in jail if the judge imposes a determinate sentence of six months or less but will have an indeterminate sentence not to exceed the maximum permitted by law for the offense to the custody of the Division of Correction if the judge imposes more than six months.

60.35. SENTENCE TO SHORT TERMS OF INCARCERATION

ALL PERSONS SENTENCED TO A TERM OF IMPRISONMENT WHICH, BY ITS TERMS, DOES NOT OR MAY NOT EXCEED SIX MONTHS, SHALL BE COMMITTED TO THE CUSTODY OF THE WARDEN OF THE COUNTY JAIL OR REGIONAL DETENTION CENTER OF THE JURISDICTION IN WHICH THE DEFENDANT WAS INDICTED OR PROSECUTED BY INFORMATION, OR IN CASES SPECIFIED IN ARTICLE 27, SECTION 689(D) OF THE ANNOTATED CODE OF MARYLAND, TO THE MARYLAND CORRECTIONAL INSTITUTION - HAGERSTOWN, EXCEPT THAT THE SENTENCING JUDGE MAY ORDER THE SENTENCE TO BE SERVED IN THE JAIL OR REGIONAL DETENTION CENTER NEAREST THE COMMUNITY IN WHICH THE DEFENDANT RESIDES, IS EMPLOYED OR IS OTHERWISE OCCUPIED AS A FULL-TIME STUDENT OR IS UNDERGOING A MEDICAL OR PSYCHIATRIC TREATMENT.

COMMENT

This Section, together with §60.30 divides persons sentenced to imprisonment into relatively long and relatively short-term offenders and decrees that the short termers will be committed to a jail or regional detention center. Mindful of the fact

that incarceration in a locality near the offender's residence, school or place of medical or psychiatric treatment could facilitate his correction, the Section gives the sentencing judge discretion to change the venue of incarceration. This provision probably will be little used at first since most Maryland jails lack the necessary facilities and programs. Hopefully, however, Maryland jails will expand their use of work release and other community-based correctional programs, and the provision will be more valuable as time goes on.

In the usual case confinement will be in the jail of the county or city in which the criminal proceedings started. Thus, a jurisdiction to which a case is removed will not have to bear the expenses of incarceration. See Art. 27, Sec. 638, which is superseded by this section.

60.36. SPECIAL PROVISIONS RELATING TO SHORT TERMS OF INCARCERATION

1. WHERE A DEFINITE SENTENCE OF THIRTY DAYS OR LESS IS IMPOSED, THE COURT MAY CAUSE THE CONVICT TO SERVE SUCH SENTENCE BY ATTENDANCE AT THE COUNTY JAIL OR REGIONAL DETENTION CENTER WHERE THE SENTENCE IS TO BE PERFORMED BETWEEN THE HOURS OF 6:00 P.M. FRIDAY AND 6:00 P.M. SUNDAY, EACH SUCH PERIOD TO CONSTITUTE TWO DAYS OF THE SENTENCE IMPOSED.

2. AS TO ANY DEFINITE SENTENCE OF SIX MONTHS OR LESS, THE COURT MAY ORDER THAT THE WARDEN OF THE JAIL OR REGIONAL DETENTION CENTER WHERE THE SENTENCE IS TO BE PERFORMED SHALL HAVE THE DISCRETION TO PERMIT THE CONVICT TO LEAVE THE INSTITUTION FOR EMPLOYMENT OR TO CARRY ON A COURSE OF STUDIES IN AN EDUCATIONAL INSTITUTION ACCREDITED BY THE STATE OF MARYLAND OR TO UNDERGO MEDICAL OR PSYCHIATRIC TREATMENT DURING HOURS SPECIFIED IN THE ORDER OF THE COURT.

COMMENT

This section, suggested by Article 27, section 639 and parts of sections 645K, ff., authorizes weekend confinement, designed to punish the offender without interfering with his regular employment. It also permits the judge to render an order allowing work release or a program of therapy to be conducted while the defendant is serving his definite sentence. The words "in the discretion of the warden" permit the warden to restrict or cancel the privileges granted by the judge whenever, in his opinion, they are being, or are about to be abused.

60.40 PRESENTENCE INVESTIGATIONS AND REPORTS; AGENCIES;

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1. A COURT IN WHICH A DEFENDANT IS TO BE SENTENCED UPON A CONVICTION OR A PLEA OF GUILTY OR OF NOLO CONTENDERE MAY CALL FOR ONE OR MORE OF THE FOLLOWING REPORTS, AS MAY BE APPROPRIATE AND AVAILABLE: A PRESENTENCE INVESTIGATION AND REPORT CONCERNING THE DEFENDANT'S RELEVANT PERSONAL, FAMILY, AND JOB SITUATION AND HISTORY, AND SIMILAR FACTORS, FROM THE DIVISION OF PAROLE AND PROBATION, THE PROBATION DEPARTMENT OF THE SENTENCING COURT OR OF ANY OTHER COURT OF THIS STATE, OR THE DIVISION OF CORRECTIONAL SERVICES; OR A DIAGNOSTIC EVALUATION AND REPORT, BASED ON OBSERVATION OR TESTING OF RELEVANT PSYCHOLOGICAL, PSYCHIATRIC, AND SOCIAL BEHAVIORAL FACTORS, FROM A DIAGNOSTIC FACILITY OF THE DIVISION OF CORRECTIONAL SERVICES AND PUBLIC SAFETY OR OTHER DIAGNOSTIC FACILITY APPROVED BY THE DEPARTMENT TO MAKE SUCH INVESTIGATIONS. THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES MAY BE GIVEN OVERALL RESPONSIBILITY FOR THE COLLECTION OF INFORMATION AND ASSIGNMENT OR PREPARATION OF REPORTS. A REPORT SHALL CONTAIN ANY KNOWN PRIOR CRIMINAL RECORD OF THE DEFENDANT AND SUCH INFORMATION ABOUT HIS CHARACTERISTICS, HIS FINANCIAL CONDITION AND THE CIRCUMSTANCES AFFECTING HIS BEHAVIOR AS MAY BE HELPFUL IN IMPOSING SENTENCE OR IN GRANTING PROBATION OR IN THE CORRECTIONAL TREATMENT OF THE DEFENDANT, AND SUCH OTHER INFORMATION AS MAY BE REQUIRED BY THE COURT. ALL LOCAL AND STATE MENTAL, EDUCATIONAL AND CORRECTIONAL INSTITUTIONS, COURTS AND POLICE AND WELFARE AGENCIES SHALL FURNISH TO PERSONS OR AGENCIES FURNISHING REPORTS UNDER THIS SUBSECTION ON REQUEST THE DEFENDANT'S CRIMINAL RECORD AND OTHER RELEVANT INFORMATION.

2. THE COURT MAY REMAND OR COMMIT THE DEFENDANT TO CUSTODY FOR A REASONABLE TIME PENDING THE RECEIPT OF SUCH A REPORT PRIOR TO THE IMPOSITION OF SENTENCE OR THE COURT MAY, IN ITS DISCRETION, ADMIT HIM TO BAIL, CONTINUE OR REWRITE EXISTING BAIL, OR RELEASE HIM UPON HIS OWN RECOGNIZANCE UPON THE TERMS AND CONDITIONS SET FORTH IN SECTION 60.45, SUBSECTION 2, INSOFAR AS APPLICABLE. ALL COMMITMENTS FOR INVESTIGATION AND REPORT BY A DIAGNOSTIC FACILITY SHALL BE GOVERNED BY SECTION 60.45.

3. NO REQUIREMENT FOR A PRESENTENCE INVESTIGATION REPORT OR FOR A DIAGNOSTIC REPORT BEFORE IMPOSING SENTENCE NOR ANY RECOMMENDATION CONTAINED IN ANY SUCH REPORT SHALL RESTRICT THE POWER OF A COURT IN ANY CASE TO IMPOSE ANY SENTENCE AUTHORIZED BY LAW, OTHERWISE THAN TO THE EXTENT THAT THE TIME OF IMPOSING SENTENCE MAY BE THEREBY AFFECTED.

4. PRIOR TO JULY 1, 1979, THERE SHALL BE NO REQUIREMENT IN ANY CASE THAT A COURT ORDER AND CONSIDER A PRESENTENCE INVESTIGATION REPORT OR A DIAGNOSTIC REPORT

PRIOR TO THE IMPOSITION OF SENTENCE UPON A DEFENDANT, BUT A COURT MAY, IN ITS DISCRETION, CALL FOR SUCH A REPORT OR REPORTS AS PROVIDED IN SUBSECTION 1 HEREOF.

5. ON AND AFTER JULY 1, 1979, IF A SENTENCE TO BE IMPOSED UPON A DEFENDANT IS NOT THE ONLY SENTENCE PERMITTED BY LAW FOR THE OFFENSE INVOLVED, A COURT MAY NOT IMPOSE A SENTENCE OF IMPRISONMENT OF SUCH LENGTH AS TO REQUIRE THAT THE SENTENCE BE TO THE CUSTODY OF THE DIVISION OF CORRECTION UNTIL THE COURT SHALL HAVE RECEIVED AND CONSIDERED A PRESENTENCE INVESTIGATION REPORT AND A DIAGNOSTIC REPORT MADE BY A DIAGNOSTIC FACILITY DESCRIBED IN SUBSECTION 1 HEREOF.

6. THE SECRETARY OF PUBLIC SAFETY AND CORRECTIONAL SERVICES SHALL CERTIFY A LIST OF APPROVED DIAGNOSTIC FACILITIES ON OR BEFORE JANUARY 30TH OF EACH YEAR TO THE CHIEF JUDGES OF THE COURT OF APPEALS, THE COURT OF SPECIAL APPEALS, EACH OF THE CIRCUIT COURTS, THE CRIMINAL COURT OF BALTIMORE, AND THE DISTRICT COURT.

COMMENT

The Model Sentencing Act, Model Penal Code, American Bar Association Standards and the Study Draft of a new Federal Criminal Code all recommend that presentence and diagnostic reports be used by the sentencing judge in every felony case. Subsection 5 of this Section adopts that recommendation effective July 1, 1979. Until July 1, 1979, courts are authorized to call for such reports in their discretion. See subsection 4. At present, presentence reports are probably used in only a fraction of cases in Maryland, with the practice varying greatly from jurisdiction to jurisdiction. Under present circumstances a report is most important to a judge when he is seriously considering probation as an alternative to incarceration. It is relatively less valuable when the offender has been convicted of a very serious crime or has a long record. Judges often feel that the seriousness of the offense or the man's record require that he be given a long sentence of incarceration whatever the report states about him. Moreover, at present, judges are in a relatively poor position to make much use of the information provided about an offender because the correctional authorities do not make it a practice to inform judges concerning their intentions to provide correctional treatment with respect to particular individuals committed to them.

This Section and §§60.45 and 60.50 contemplate that in the future diagnostic facilities of the Division of Corrections will be used to gather

information. The objective of such provisions is to facilitate communications before sentence between correctional authorities and judges similar to those which presently exist between judges and probation authorities before sentence, so that judges may then have a clear picture of what the Division of Corrections would do with a defendant if he were sent to prison. Together with §§60.45 and 60.50, this Section calls upon the Diagnostic Center of the Division of Corrections to outline for the judge before he imposes sentence its plan for attempting to correct the defendant. This should make information about the defendant's character and social history, which usually is included in presentence reports, more meaningful and helpful to the court in determining sentence, particularly in cases in which the seriousness of the offense and/or the man's criminal record suggest that probation would be inappropriate and that some term of imprisonment should be imposed.

The proposed Section assumes that the Divisions of Parole and Probation and Corrections will collaborate in conducting presentence investigations and diagnostic investigations in diagnostic facilities under the auspices of the new Department of Public Safety and Correctional Services. Commissioner Cannon and Assistant Secretary Dudley (then Superintendent of Probation and Parole) have advised the Commission that the combined resources of both Divisions would have to be increased to handle the larger evaluation load involved in performing investigations of every felony case, but otherwise collaboration between the two Divisions would be entirely feasible. The delay in requiring reports in every felony case is designed to permit the Division to add personnel and develop facilities before being required to handle the entire load of mandatory presentence reports. Commissioner Cannon and Assistant Secretary Dudley have informed the Commission that their respective Divisions are already working vigorously toward the development of additional diagnostic capacity independently of the objectives of the new Code. The July 1, 1979, date will therefore represent a target date for plans already underway.

The concept of a combined presentence and diagnostic investigation performed in a diagnostic facility has several advantages aside from helping the judge relate what he has been told about the man to a proposed correctional program. First, it eliminates a duplication of effort which now occurs whenever the Division of Parole and Probation or other probation agency prepares a presentence report

for a judge and the Reception and Diagnostic Center of the Division of Correction then re-evaluates him after sentence for the purpose of classifying him for assignment within the prison system. A single evaluation would perform both functions. Second, the concept would provide the judge with the benefit of whatever investigation into the man's background and nature is now being performed by the Reception and Diagnostic Center. At present, such evaluation is severly limited, but it still might be useful to sentencing judges. Moreover, such evaluation probably will be improved as time goes on. Finally, there may be some advantage to the imprisonment of offenders for a limited period within the correctional system prior to sentence. This should give the offender some time to think about his offense and his future in custody while the disposition of his case is still unknown to him. After thus getting a taste of the prison environment, he may be more receptive to cooperating with a correctional program of probation or community-based partial custody if the judge is relatively lenient in his sentence. If he winds up totally incarcerated in prison, he should be no worse off than he is now.

60.45. INVESTIGATION BY A DIAGNOSTIC FACILITY; COMMITMENT; CONDITIONAL RELEASE

1. COMMITMENT FOR INVESTIGATION. WHENEVER A DIAGNOSTIC FACILITY IS ORDERED TO UNDERTAKE A PRESENTENCE INVESTIGATION AND REPORT OR A DIAGNOSTIC EVALUATION AND REPORT, THE DEFENDANT (UNLESS CONDITIONAL RELEASE IS GRANTED UNDER SUBSECTION 2) SHALL BE COMMITTED TO THE CUSTODY OF THE COMMISSIONER OF CORRECTION AND DELIVERED TO HIM FOR DETENTION IN AN APPROVED DIAGNOSTIC FACILITY FOR A PERIOD NOT TO EXCEED 8 WEEKS, UNLESS THE COURT, FOR GOOD CAUSE SHOWN, SHALL EXTEND THE PERIOD. THE DIAGNOSTIC FACILITY SHALL PROMPTLY PROCEED TO DETAIN AND (WHERE APPROPRIATE) TO TREAT, AND TO EVALUATE THE DEFENDANT, AND TO PREPARE FOR THE COURT A REPORT ON THE DEFENDANT.

2. CONDITIONAL RELEASE OF DEFENDANT PENDING INVESTIGATION. AT ANY TIME PRIOR TO OR DURING A PRESENTENCE INVESTIGATION BY A DIAGNOSTIC FACILITY, THE COURT, UPON MOTION OF THE DEFENDANT OR HIS COUNSEL OR THE COMMISSIONER OF CORRECTION OR *SUA SPONTE* IN ITS DISCRETION, MAY ADMIT THE DEFENDANT TO BAIL OR CONTINUE HIM ON BAIL OR RELEASE HIM UPON HIS OWN RECOGNIZANCE UPON SUCH TERMS AND CONDITIONS AS MAY REASONABLY SERVE TO INSURE THE PRESENCE OF THE DEFENDANT IN COURT FOR SENTENCING, HIS COOPERATION WITH THE PRESENTENCE INVESTIGATION AND HIS ABSTINENCE FROM FURTHER CRIMINAL ACTIVITY. THE CONDITIONS OF THE DEFENDANT'S RELEASE OR

CONTINUANCE ON BAIL OR RELEASE ON HIS OWN RECOGNIZANCE MAY INCLUDE, BUT SHALL NOT BE LIMITED TO, ANY OF THE FOLLOWING REQUIREMENTS: (A) THAT HE REPORT TO A SPECIFIED APPROVED DIAGNOSTIC FACILITY AS DIRECTED; (B) THAT HE SPEND HIS NIGHTS AND/OR WEEKENDS IN CUSTODY; (C) THAT HE FOLLOW A PROGRAM OF SCHOOLING, EMPLOYMENT AND/OR THERAPY.

3. NOTWITHSTANDING THE PROVISIONS OF SUBSECTION (2), THE PROVISIONS OF ARTICLE 27, SECTION 616 1/2, OF THE ANNOTATED CODE OF MARYLAND SHALL BE APPLICABLE WHENEVER, PRIOR TO OR DURING A PRESENTENCE INVESTIGATION IN CONNECTION WITH ANY OF THE FOLLOWING OFFENSES, THE DEFENDANT IS CHARGED WITH ONE OF THE FOLLOWING OFFENSES:

A. SECTION 120.15 (ASSAULT IN THE SECOND DEGREE) OR 120.25 (ASSAULT IN THE FIRST DEGREE); OR

B. SECTION 125.05 (MURDER) OR 125.20 (MANSLAUGHTER); OR

C. SECTION 130.15 (RAPE IN THE SECOND DEGREE), 130.20 (RAPE IN THE FIRST DEGREE), 130.25 (SODOMY IN THE SECOND DEGREE), OR 130.30 (SODOMY IN THE FIRST DEGREE); OR

D. SECTION 135.20 (KIDNAPPING); OR

E. SECTION 140.20 (BURGLARY IN THE THIRD DEGREE), 140.25 (BURGLARY IN THE SECOND DEGREE), OR 140.30 (BURGLARY IN THE FIRST DEGREE); OR

F. SECTION 150.10 (ARSON IN THE SECOND DEGREE) OR 150.15 (ARSON IN THE FIRST DEGREE); OR

G. SECTION 160.05 (ROBBERY IN THE THIRD DEGREE), 160.10 (ROBBERY IN THE SECOND DEGREE), OR 160.15 (ROBBERY IN THE FIRST DEGREE); OR

H. SECTION 220.10 (TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE THIRD DEGREE), 220.15 (TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE SECOND DEGREE), OR 220.20 (TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE FIRST DEGREE); OR

I. AN ATTEMPT TO COMMIT ANY OF THE FOREGOING OFFENSES.

COMMENT

This Section implements the in-custody diagnostic scheme by providing that whenever an investigation in a diagnostic facility is ordered, the defendant shall be committed to the custody of the Commissioner of Correction. The present period of incarceration in the Reception and Diagnostic

Center lasts between six and twelve weeks. A maximum of eight weeks is provided in this Section. It is submitted that sentencing should not be delayed any longer.

Many cases will exist where the judge may believe even before he sees a report that he will impose a sentence of probation, conditional release or even unconditional release. In such cases, this Section permits the court, in its discretion, to release the defendant on bail or on his own recognizance during the investigation period in such cases to save the State the expense of incarcerating him or to permit the defendant to continue his schooling, employment or medical or psychiatric treatment pending the investigation. To facilitate the investigation, the order releasing the defendant before sentence may direct that he report to a diagnostic facility at the convenience of the correctional and probation authorities who will be evaluating him there.

Subsection (3) is suggested by Article 27, section 616 1/2, and the offenses here listed correspond roughly to those listed in section 616 1/2.

This Section also provides that other state institutions should cooperate with diagnostic facilities in compiling information about the defendant. Obviously, it is in the interest of the State to cut down duplication of effort as much as possible.

60.50. CONTENTS OF REPORT BY DIAGNOSTIC FACILITY

A REPORT OF AN EVALUATION MADE AND SUBMITTED BY AN APPROVED DIAGNOSTIC FACILITY PURSUANT TO THE PROVISIONS OF §60.45 SHALL INCLUDE (IN ADDITION TO WHAT IS CALLED FOR BY §60.40, SUBSECTION 1) A RECOMMENDATION OF SUCH DIAGNOSTIC FACILITY CONCERNING A CORRECTIONAL PROGRAM WHICH IS APPROPRIATE FOR THE DEFENDANT, TOGETHER WITH A STATEMENT OF THE FACTORS UPON WHICH THE RECOMMENDATION IS BASED. THE RECOMMENDATION SHALL STATE SPECIFICALLY WHETHER OR NOT THE NEEDS OF THE DEFENDANT AND OF SOCIETY INDICATE THAT THE DEFENDANT SHOULD BE

(A) SENTENCED TO PROBATION, CONDITIONAL DISCHARGE OR UNCONDITIONAL DISCHARGE,

(B) IMPRISONED FOR A PERIOD OF TIME UNDER CLOSE CUSTODY, OR

(C) COMMITTED TO A PROGRAM OF CORRECTION INTERMEDIATE BETWEEN RELEASE AND CLOSE CUSTODY OR A

COMBINATION OF CLOSE CUSTODY AND OTHER CORRECTIONAL HANDLING.

THE RECOMMENDATIONS OF THE DIAGNOSTIC REPORT SHALL NOT BE BINDING UPON A SENTENCING JUDGE, NOR SHALL THE IMPOSITION OF A SENTENCE IN ACCORDANCE WITH THE RECOMMENDATIONS OF THE DIAGNOSTIC REPORT BIND THE DEPARTMENT OF CORRECTIONAL SERVICES AND PUBLIC SAFETY OR ANY DIVISION THEREOF TO FOLLOW ANY CORRECTIONAL PROGRAM IN SUCH REPORT.

COMMENT

This Section provides that the diagnostic report should contain a recommended correctional program for the defendant and the reasons for the recommendation. In addition to the reasons for this practice explained in the commentary to §60.40, this provision should facilitate a general improvement of communications between the judge and those assigned to implement his disposition of the case. Nevertheless, the Section makes it clear that the judge's discretion to determine the sentence is not being delegated to the authors of the report by expressly providing that such recommendations shall not be binding on the judge. Similarly, the Section makes it clear that the autonomy of the Division of Corrections and the Board of Parole are preserved by stating that neither shall be bound to follow the correctional program recommended although the judge appears to approve such program by imposing the exact sentence such a report recommends. Presumably, the correctional authorities and Board of Parole will want to see the correctional program implemented and will usually abide by it. However, many unforeseen developments can occur to require modification of a correctional program, not the least of which may be the fact that the offender will refuse to cooperate or will misbehave while in custody. The correctional authorities should be in a flexible position to tailor their programs to the efforts of the individual offender and to the changing capabilities of their resources.

60.55. MEMORANDUM OF BASIS FOR SENTENCE

THE COURT OF APPEALS OR THE COURT OF SPECIAL APPEALS, WHEN REVIEWING A SENTENCE ON APPEAL, OR THE DEFENDANT OR HIS COUNSEL OR STATE'S ATTORNEY AT ANY TIME PRIOR TO THE EXPIRATION OF THE TIME WITHIN WHICH AN APPEAL FROM A SENTENCE MAY BE TAKEN, MAY REQUIRE A SENTENCING JUDGE TO PROVIDE THE PARTIES WITH A MEMORANDUM OF THE BASIS FOR HIS SENTENCE. THE COURT OF APPEALS MAY, BY RULE OF COURT, PROVIDE THAT SUCH MEMORANDUM SHALL TAKE THE FORM OF A "CHECK LIST" OF FACTORS WHICH THE JUDGE

CONSIDERED IN IMPOSING SENTENCE OR ANY OTHER SUITABLE AND CONVENIENT FORM. THE MEMORANDUM SHALL BE PART OF THE RECORD ON APPEAL IN THE CASE.

COMMENT

Another feature of the proposed new sentencing code, more fully developed in Part 80, is review of sentences by the Court of Special Appeals. The Court of Special Appeals was not in existence when the present system of review by three-judge panels of nisi prius judges, including the original sentencing judge, was instituted. The present system of sentence review has been little used and has resulted in few changes of sentences. The present Section, read in conjunction with Part 80, seeks to substitute a system whereby a single sentence review body can attempt to impose some standards of uniformity on sentencing throughout the State. In order to aid a reviewing court, the Court of Appeals may, by rule, require the trial court to state the reasons for his sentence. Hopefully, some statewide recognition of what are and what are not valid reasons for imposing particular sentences in particular situations will result from requiring judges to specify reasons for sentences and from appellate decisions in those cases which are appealed.

It should not be necessary for the busy trial judge to prepare an elaborate memorandum of the reasons for his sentence. The Section makes express for this situation a power which already exists in the Court of Appeals to provide by rule of court a simple form for the judge's memorandum to take.

60.60. REPORTS; USE, DISCLOSURE, NONDISCLOSURE

1. DEFINITION. AS USED IN THIS SECTION, THE TERM "REPORT" INCLUDES ANY REPORT OF A PRESENTENCE INVESTIGATION, OR ANY REPORT OF A DIAGNOSTIC EVALUATION CONTAINING ANY SUCH INFORMATION AS IS CALLED FOR IN REPORTS UNDER §60.40 OR §60.50, MADE TO A COURT FOR CONSIDERATION BY THE COURT IN ITS DETERMINATION OF THE SENTENCE TO BE IMPOSED UPON A DEFENDANT.

2. SUBJECT IN ALL RESPECTS TO THE PROVISIONS OF SUBSECTION (5) HEREOF, THE SENTENCING COURT SHALL MAKE A REPORT AVAILABLE TO THE STATE'S ATTORNEY AND TO COUNSEL FOR THE DEFENDANT. IF A PROTECTIVE ORDER RESTRICTING THE DEFENDANT'S ACCESS TO A REPORT IS APPROPRIATE IN ACCORDANCE WITH SUBSECTION (5), THE COURT MAY ORDER THAT INFORMATION IN THE REPORT NOT BE DISCLOSED TO THE DEFENDANT.

3. IF A DEFENDANT APPEALS FROM A SENTENCE IMPOSED UPON HIM, ANY REPORT AND ANY OTHER DOCUMENTARY INFORMATION EMPLOYED BY THE TRIAL COURT IN DETERMINING THE SENTENCE TO BE IMPOSED SHALL BE MADE A PART OF THE RECORD ON APPEAL. ANY REPORT SO INCLUDED SHALL BE SEALED AND SHALL NOT BE SUBJECT TO INSPECTION BY ANYONE OTHER THAN THE APPELLATE COURT IN WHICH SUCH APPEAL MAY BE FILED WITHOUT AN ORDER OF THE SENTENCING COURT OR OF SAID APPELLATE COURT PERMITTING OR DIRECTING SUCH DISCLOSURE; AND DISCLOSURE OF SUCH REPORT AND OF ANY PART OR PARTS THEREOF MAY BE LIMITED OR WITHHELD AS PROVIDED IN SUBSECTION 5 HEREOF.

4. AN AGENCY OR FACILITY PREPARING A REPORT MAY RETAIN COPIES OF IT AND/OR SUMMARIES OF ITS CONTENTS AMONG ITS OWN CONFIDENTIAL RECORDS. WHENEVER A DEFENDANT IS COMMITTED OR TRANSFERRED TO A STATE INSTITUTION OR AGENCY WHILE UNDER SENTENCE OF CONFINEMENT, THE COURT COMMITTING HIM OR THE INSTITUTION OR AGENCY TRANSFERRING HIM SHALL FURNISH THE RECEIVING INSTITUTION OR AGENCY WITH A COPY OF SUCH REPORT. SUCH AN INSTITUTION OR AGENCY MAY RETAIN COPIES OF IT AND/OR SUMMARIES OF ITS CONTENTS AMONG ITS OWN CONFIDENTIAL RECORDS. EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, NO INSTITUTION OR AGENCY HOLDING A REPORT SHALL DISCLOSE IT OR ITS CONTENTS TO ANYONE WITHOUT AN ORDER OF COURT PURSUANT TO SUBSECTION 5 HEREOF.

5. EXCEPT AS AUTHORIZED BY SUBSECTIONS 2 OR 4 HEREOF, NO REPORT SHALL BE OPEN TO OR MADE AVAILABLE FOR INSPECTION BY ANYONE, NOR SHALL ITS CONTENTS BE DISCLOSED TO ANYONE, WITHOUT AN ORDER OF THE SENTENCING COURT OR OF THE APPELLATE COURT HAVING JURISDICTION OVER AN APPEAL FROM SENTENCE. EITHER OF SAID COURTS MAY, IN ANY CASE, WITHHOLD FROM DISCLOSURE ALL OR ANY PART OR PARTS OR ANY REPORT AS THE COURT MAY DEEM NECESSARY OR ADVISABLE FOR THE PROTECTION OF THE DEFENDANT, OF HIS FAMILY, OF A WITNESS OR A VICTIM OF HIS CRIME, OR OF ANY OTHER PERSON FURNISHING INFORMATION CONTAINED IN SUCH REPORT, OR FOR THE PROTECTION OF THE PUBLIC INTEREST. IF A COURT MAKES THE WHOLE OR ANY PART OR PARTS OF SUCH A REPORT AVAILABLE FOR INSPECTION BY ANYONE, IT MAY ISSUE A PROTECTIVE ORDER RESTRAINING ANY PERSON TO WHOM DISCLOSURE IS MADE FROM REVEALING CONFIDENTIAL INFORMATION CONTAINED IN THE REPORT UPON SUCH CONDITIONS AS THE COURT MAY DEEM NECESSARY FOR THE PROTECTION OF THE DEFENDANT, OF HIS FAMILY, OR OF A WITNESS OR A VICTIM OF HIS CRIME, OR OF ANY OTHER PERSON FURNISHING INFORMATION, OR FOR THE PROTECTION OF THE PUBLIC INTEREST.

COMMENT

Reports which may delve into the defendant's social history and psychological makeup may be based upon confidential information and should not be

generally available to the public. At the same time, judges should have to account to some extent to litigants and to the public for their decisions, including sentencing decisions, to facilitate appellate review and the orderly judicial administration of the law. This Section seeks to make available to the parties to an appeal parts of the record which may be important to the appeal while permitting the court to protect confidential information to the extent the court deems necessary.

Subject to the provisions of subsection 5 (see comment thereon below), subsection 2 calls upon the court to make the report available to the prosecution and the defendant and/or his attorney. The reason for this alternative position is that in some cases the court may wish to allow only defense counsel to see the report with instructions that all or part of the information not be disclosed to the defendant.

Subsection 3 makes information used by the judge in sentencing part of the record on appeal in any case when an appeal from a sentence is taken.

Subsection 4 requires that other state institutions – for example, a mental hospital receiving the defendant – have the benefit of the report. Subsection 4 makes it clear that agencies preparing the report or acquiring it when the defendant is committed to their custody may keep and use it without a specific court order, provided they do so confidentially.

Subsection 5 requires an order of either the trial or appellate court for the disclosure of a report, except in cases covered by subsections 2 or 4. It also provides generally that either court may withhold from disclosure to anyone all or such part or parts of a report as it may deem necessary or advisable for the protection of the defendant, his family, a witness or victim of the crime or of any one else furnishing information in the report, or to protect the interest of the public. It further authorizes a court which issues an order permitting any person to have access to the contents of all or any parts of a report, to restrain the use of confidential parts thereof and to impose whatever conditions upon such use as are deemed necessary for any of the protective purposes above stated.

Normally the court will in all likelihood not disclose the report other than to the parties. It is envisioned that protective orders will not only be needed to preserve the confidentiality of

information which obviously might embarrass the defendant but also to induce witnesses, professionals in the behavioral science area and others furnishing information to reveal information which they would withhold unless assured it would be treated confidentially.

60.65. MODIFICATION OF SENTENCE BY COURT

1. UPON MOTION OF THE DEFENDANT FILED WITHIN NINETY (90) DAYS AFTER THE IMPOSITION OF SENTENCE, OR WITHIN NINETY (90) DAYS AFTER RECEIPT BY THE COURT OF A MANDATE ISSUED BY THE COURT OF APPEALS OR THE COURT OF SPECIAL APPEALS UPON AFFIRMANCE OF THE JUDGMENT OR DISMISSAL OF APPEAL, OR ON ITS OWN MOTION SUA SPONTE WITHIN SUCH PERIOD, AND AFTER HEARING IN OPEN COURT AND WITH NOTICE TO THE STATE'S ATTORNEY, THE COURT MAY, PURSUANT TO THIS SECTION, MODIFY OR REDUCE, BUT SHALL NOT INCREASE THE LENGTH OF A SENTENCE. AFTER THE EXPIRATION OF SUCH NINETY DAY PERIOD, THE COURT SHALL HAVE POWER TO MODIFY OR REDUCE A SENTENCE ONLY IN CASE OF FRAUD, MISTAKE, OR IRREGULARITY OR PURSUANT TO THE PROVISIONS OF SUBDIVISION 2 OR SUBDIVISION 3 OF THIS SECTION.

2. AFTER THE EXPIRATION OF THE COURT'S REVISORY POWER PURSUANT TO SUBDIVISION 1 OF THIS SECTION, A SENTENCING COURT UPON MOTION AND RECOMMENDATION OF THE BOARD OF PAROLE, AND UPON NOTICE TO THE STATE'S ATTORNEY, MAY REDUCE THE MINIMUM TERM OF AN INDETERMINATE SENTENCE OF IMPRISONMENT AS FOLLOWS:

(A) IF THE SENTENCE IS NOT AN EXTENDED TERM PURSUANT TO §70.10, BUT IS A SENTENCE WITH A MINIMUM TERM OR AGGREGATE OF CONSECUTIVE MINIMUM TERMS OF TEN YEARS OR MORE, AND THE DEFENDANT WAS MORE THAN 20 AND LESS THAN 65 YEARS OF AGE WHEN THE CRIME OR SOME OF THE CRIMES FOR WHICH HE STANDS SENTENCED WERE COMMITTED, AND SUCH DEFENDANT HAS SERVED AT LEAST FIVE YEARS IN CUSTODY WHICH ARE CREDITABLE AGAINST SUCH SENTENCE, THE COURT MAY REDUCE THE MINIMUM TERM OR AGGREGATE OF MINIMUM TERMS TO ANY TERM WHICH IS FIVE YEARS OR MORE BUT LESS THAN THE MINIMUM TERM OR AGGREGATE OF MINIMUM TERMS PREVIOUSLY IMPOSED;

(B) IF THE SENTENCE IS NOT AN EXTENDED TERM PURSUANT TO §70.10, BUT IS A SENTENCE WITH A MINIMUM TERM OR AGGREGATE OF CONSECUTIVE MINIMUM TERMS OF TEN YEARS OR MORE, AND THE DEFENDANT WAS NOT WITHIN THE AGE RANGE SPECIFIED IN SUBDIVISION (A) OF THIS SECTION WHEN THE CRIME OR CRIMES FOR WHICH HE STANDS SENTENCED WERE COMMITTED, THE COURT MAY REDUCE THE MINIMUM TERM OR AGGREGATE OF MINIMUM TERMS TO ANY LESSER MINIMUM TERM;

(C) IF THE SENTENCE IS TO AN EXTENDED TERM PURSUANT TO §70.10 OF PART 70, THE COURT MAY MODIFY SUCH

SENTENCE PURSUANT TO THE PROVISIONS OF §60.70 OF THIS PART;

(D) IF THE SENTENCE IS TO ANY OTHER INDETERMINATE SENTENCE HAVING A MINIMUM TERM, THE SENTENCING COURT MAY REDUCE THE MINIMUM TO ANY TERM WHICH IS LESS THAN THE MINIMUM TERM ORIGINALLY IMPOSED.

3. UPON SUCCESSFUL COMPLETION OF TWO OR MORE YEARS OF PAROLE BY A DEFENDANT, A SENTENCING COURT, UPON MOTION OF THE BOARD OF PAROLE AND UPON NOTICE TO THE STATE'S ATTORNEY, MAY VACATE THE REMAINING PORTION OF THE PRISON TERM SUCH COURT IMPOSED.

4. IF THE JUDGE WHO SENTENCES THE DEFENDANT IS UNAVAILABLE WHEN THE BOARD OF PAROLE VOTES FOR A REDUCTION OF A MINIMUM TERM OR TO VACATE PART OF A SENTENCE PURSUANT TO SUBDIVISION 2 OR SUBDIVISION 3, THE ADMINISTRATIVE JUDGE OF THE COURT IN WHICH SUCH DEFENDANT WAS SENTENCED SHALL ASSIGN A SUBSTITUTE JUDGE TO CONSIDER THE MOTION.

COMMENT

This Section continues the present practice of permitting a judge to modify a sentence at any time up to 90 days following its imposition. It does not permit increase of the sentence, since in most cases such increase would probably be unconstitutional. The Section would extend the period within which certain inferior courts of limited jurisdiction would be able to modify their sentences from 30 days to 90 days. A hearing in open court and notice to the State's Attorney seems desirable to prevent possible abuse of this power and what is practically a far greater danger in most cases, the appearance of its possible misuse.

In the ordinary case, the judge will not exercise his power to reduce or modify a sentence without a motion from the defendant requesting such modification. However, the judge is given the power to effectuate such reduction on his own motion, since in some cases the judge may see rehabilitative value in attempting to shock the defendant by imposing a stiff sentence, which the judge really intends to modify after the defendant has spent some time thinking about it in jail.

The Section also provides that a sentencing judge, or in his absence a judge assigned by the administrative judge of his court, may reduce the minimum term of an indeterminate sentence at any time upon motion of the Board of Parole with notice to the State's Attorney. Sections 60.05, 70.00 and

70.10 either require or permit minimum terms of parole eligibility for certain very serious cases or very dangerous offenders. Generally, minimum sentences are a poor idea from a correctional standpoint because they limit the options of correctional authorities and tend to discourage offenders from making efforts to reform until parole eligibility is near. These provisions are designed to assure sentencing judges and the community that adoption of the indeterminate sentence concept will not permit the early release of the offenders who cause the community the most anxiety without the assent of a judge, who can take the local community's needs into account along with the State's and the offender's needs. The provision permitting modification of the minimum on motion of the Board of Parole is designed to offer offenders sentenced to minimum terms encouragement to reform and to make possible the early release of those offenders who have demonstrated that they are good prospects for successful reintegration into society. For deterrence purposes, the sentence with a ten-year minimum can only be modified after the defendant has served five years in custody unless the defendant's youth or old age at the time of the crime justifies making a special exception.

It should be expected that the Board of Parole will ask for a modification of minimum terms in some cases even where the Board does not consider the man ready for parole at the time of the motion. The object of such modification will probably be to facilitate classification of the offender for minimum security incarceration or for work release by the correctional authorities. A long sentence, and particularly a rigid minimum sentence, seriously increases the risk that a prisoner will escape from minimum security custody or walk away from work release. However, a man is more likely to refrain from attempting escape when he has some hope that he can gain his freedom legitimately within a reasonable time. Presumably, the Board of Parole will explain its reasons for requesting modification of a sentence when it applies for modification under this Section and ask the judge to reduce the minimum so that when the offender's progress justifies parole the Board can grant it.

60.70. MODIFICATION OF EXTENDED SENTENCE IMPOSED UNDER SECTION 70.10

1. WHO MAY APPLY FOR MODIFICATION; EVALUATION OF DANGEROUSNESS BY THE PATUXENT INSTITUTION; HEARING AND A DETERMINATION.

(A) AFTER ANY PERSON SHALL HAVE BEEN SENTENCED TO AN EXTENDED SENTENCE PURSUANT TO THE PROVISIONS OF SECTION 70.10 AND SHALL HAVE BEEN CONFINED FOR FIVE YEARS AFTER SUCH COMMITMENT WITH DUE ALLOWANCES BEING GIVEN FOR TIME SERVED IN CUSTODY WHILE AWAITING THE TRIAL AND SENTENCE FOR THE OFFENSE, SUCH PERSON OR ANYONE IN HIS BEHALF, INCLUDING THE COMMISSIONER OR DEPUTY COMMISSIONER OF CORRECTION OR WARDEN OR ASSISTANT WARDEN OF THE INSTITUTION IN WHICH HE IS CONFINED, MAY FILE A PETITION IN THE COURT WHERE SUCH PERSON WAS ORIGINALLY SENTENCED REQUESTING THAT SUCH COURT CONSIDER WHETHER TO MODIFY HIS SENTENCE. THE COURT SHALL FORTHWITH PROCEED TO REMAND SUCH PERSON TO THE PATUXENT INSTITUTION FOR A STUDY AND REPORT, TO BE COMPLETED WITHIN SIX MONTHS FROM THE DATE THE PETITION FOR MODIFICATION OF SENTENCE IS FILED, AS TO SUCH PERSON'S PROPENSITY, IF ANY, FOR FURTHER CRIMINAL ACTIVITY WHICH IS DANGEROUS TO HUMAN LIFE OR SAFETY.

(B) IF THE REPORT STATES THAT THE DEFENDANT IS A DEFECTIVE DELINQUENT, THE COURT SHALL ENTER AN ORDER DIRECTING THAT THE CASE BE TREATED AS A DEFECTIVE DELINQUENCY PROCEEDING, AND SHALL THEREUPON PROCEED AS IF SUCH A PROCEEDING HAD BEEN INSTITUTED PURSUANT TO SECTION 8 OF ARTICLE 31B OF THE ANNOTATED CODE OF MARYLAND ON THE DATE OF SUCH ORDER; AND THE COURT SHALL REMAND THE PETITIONER TO THE CUSTODY OF THE PATUXENT INSTITUTION PENDING THE DETERMINATION OF SUCH PROCEEDING.

(C) IF THE REPORT SHALL NOT CONTAIN A FINDING THAT THE DEFENDANT IS A DEFECTIVE DELINQUENT IT SHALL CONTAIN (I) THE FINDINGS OR OPINION OF THE PATUXENT INSTITUTION AS TO WHETHER THE PETITIONER THEN HAS AN APPARENT PROPENSITY FOR FURTHER CRIMINAL ACTIVITY WHICH IS DANGEROUS TO HUMAN LIFE OR SAFETY, AND, IF SIGNIFICANT, WHETHER THERE HAS THEN BEEN AN APPARENT IMPROVEMENT IN HIS ATTITUDE AND CONDITION, AND (II) SUCH RECOMMENDATION AS IT MAY DEEM APPROPRIATE AS TO WHETHER THE 30-YEAR INDETERMINATE SENTENCE SHOULD BE CONTINUED OR MODIFIED. AFTER CONSIDERING THE REPORT AND RECOMMENDATIONS OF THE PATUXENT INSTITUTION FOR A PERIOD NOT TO EXCEED 30 DAYS, AND UPON REASONABLE NOTICE TO THE DEFENDANT AND HIS COUNSEL AND TO THE STATE'S ATTORNEY AND OPPORTUNITY FOR A HEARING, THE COURT, IN ITS DISCRETION MAY EITHER:

(I) REMAND THE PETITIONER TO THE CUSTODY OF THE DIVISION OF CORRECTION TO CONTINUE HIS 10 TO 30-YEAR SENTENCE; OR

(II) SUBSTITUTE FOR THE 10 TO 30-YEAR TERM OF IMPRISONMENT AN INDETERMINATE TERM OF IMPRISONMENT HAVING A MAXIMUM OF 15 YEARS AND NO MINIMUM. SUCH TERM SHALL BE DETERMINED TO HAVE RUN AS THOUGH IT HAD BEEN IMPOSED ON THE DATE THE ORIGINAL 10 TO 30-YEAR

INDETERMINATE SENTENCE WAS IMPOSED WITH DUE ALLOWANCES FOR TIME SERVED FOR THE SUBSTITUTE SENTENCE, GOOD BEHAVIOR AND INDUSTRIAL CREDITS BEING GIVEN.

2. APPLICATION FOR FURTHER REVIEW NOT TO BE MADE WITHIN FIVE YEARS. AFTER THE RIGHT TO PETITION FOR REVIEW OF A 10 TO 30 YEAR SENTENCE UNDER THE PROVISIONS OF THIS SECTION HAVE BEEN EXERCISED ONCE, IT SHALL NOT AGAIN BE SOUGHT UNDER THE PROVISIONS OF THIS SECTION WITHIN LESS THAN FIVE YEARS FOLLOWING THE PRIOR SEEKING OF A PETITION FOR REVIEW FROM CONFINEMENT UNDER THE SAME COMMITMENT EXCEPT UPON LEAVE OF THE COURT GRANTED UPON MOTION OF THE BOARD OF PAROLE AND NOTICE TO THE STATE'S ATTORNEY.

3. RIGHT TO PETITION FOR HABEAS CORPUS. THE RIGHT TO REVIEW SPECIFIED IN THIS SECTION SHALL NOT BE CONSTRUED TO DEPRIVE THE DEFENDANT OF HIS RIGHT TO PETITION FOR HABEAS CORPUS AS IT MIGHT OTHERWISE EXIST.

4. RIGHT TO APPEAL FROM A DENIAL OF A PETITION FOR MODIFICATION OF SENTENCE. WHENEVER A RIGHT TO PETITION FOR MODIFICATION OF A 10 TO 30 YEAR SENTENCE IS EXERCISED UNDER THIS SECTION, THE PETITIONER MAY APPEAL TO THE COURT OF SPECIAL APPEALS FROM AN ADVERSE DETERMINATION THEREOF PURSUANT TO THE PROVISIONS OF PART 80.

5. THE PROVISIONS OF §60.55 OF THIS PART SHALL APPLY TO AN APPEAL PURSUANT TO THIS SECTION. THE REPORT OF THE PATUXENT INSTITUTION SHALL BE A PART OF THE RECORD ON APPEAL SUBJECT TO THE PROVISIONS OF §60.60.

COMMENT

Section 70.10 provides that persons convicted of a felony involving violence who has been convicted and punished twice before for felonies, one of which must be a crime of violence, may be committed for an extended ten to thirty-year sentence. Conviction of two violent crimes creates enough of a presumption of a propensity to commit dangerous offenses and conviction of a third offense after two correctional failures is enough basis for assuming intractability to justify allowing the judge to impose an extended sentence with a substantial minimum term of ineligibility for parole. However, not all multiple offenders are either predictably dangerous or intractable. A relatively youthful offender could be convicted of two armed robberies and one other crime under circumstances which did not indicate a need for incarcerating him for a long period of time without chance to earn his freedom – e.g., where he participated as the result of the social pressure of

a gang or acted only as a look-out and received probation for the first offense and a short sentence for the second. Therefore, the imposition of the very severe extended sentence is made discretionary. Nevertheless, once a judge has determined extended confinement to be appropriate, this Section represents the view that the defendant should not be returned to the community for a substantial period of time except with the concurrence of the sentencing court having the benefit of the advice of Patuxent Institution's experts in evaluating propensities to dangerous behavior. Therefore, the Section provides that the ten-year minimum can only be modified after the defendant has been evaluated at Patuxent Institution and an appropriate report has been made to the judge.

The extended sentence for persons who repeatedly commit crimes of violence and the provision of this Section permitting evaluation by Patuxent Institution also seeks to give Patuxent Institution a chance to determine whether or not such individual is a relatively good prospect for treatment in that institution. Of course, if the sentencing judge had thought at the time of sentencing that he should be treated there, he would have committed him for evaluation as a possible defective delinquent pursuant to Article 31B of the Maryland Code. (The same alternative is, of course, available to the judge with respect to some offenders who have not been convicted three times). However, the offender who faces a thirty-year maximum and a ten-year minimum presumably will be highly motivated to seek the opportunity for a completely indeterminate sentence and treatment at the Patuxent Institution. The Section provides that he may seek such opportunity as of right every five years or that it may be sought for him. The Board of Parole is permitted to invoke the evaluation process at any time with the concurrence of the court. This provides a vehicle for acquainting the judge with any change in the defendant's status or attitude which would justify a reduced sentence that might facilitate minimum security, work release or parole classification for him or which indicates that he may be a good prospect for treatment in Patuxent Institution as a defective delinquent.

The extended sentence provisions of the proposed Code, plus the modification scheme of this Section, represent a recognition that a class of offenders exists who need to be confined for the protection of the community but as to whom the treatment resources of Patuxent would be relatively ill spent. It also recognizes that individuals can

change as can the technology of scientists for dealing with antisocial personalities. It permits society to protect itself adequately, while not denying all hope to the offender and thereby precluding society from motivating him to change. After evaluation by Patuxent Institution, this Section allows the court all of the alternatives which he might originally have exercised at the time of sentence. He can continue the extended sentence, institute defective delinquent proceedings or substitute a shorter indeterminate sentence.

The Section provides a right to appeal where a court declines to modify a sentence. The appeal provision is designed for the relatively rare situation where a judge might, perhaps vindictively or arbitrarily, refuse to act upon strong evidence gained from the evaluation of Patuxent Institution and the man's behavior in the correctional system either that (a) extended incarceration is not necessary for the protection of the community or (b) the man should be treated as a defective delinquent in Patuxent Institution. In the case where the court's disposition of the application and the Patuxent evaluation are in accord, appeal presumably will appear fruitless and will not be taken or can be disposed of summarily. In the close case, presumably the trial court, whom the statute authorizes to make the decision, will be upheld on appeal.

PART 65: SENTENCES OF PROBATION, CONDITIONAL DISCHARGE AND UNCONDITIONAL DISCHARGE

INTRODUCTION

This part governs sentences of probation, conditional discharge and unconditional discharge – i.e., cases where the defendant is given his freedom immediately at the time of sentence.

65.00. SENTENCE OF PROBATION

1. CRITERIA. THE COURT MAY SENTENCE A PERSON TO A PERIOD OF PROBATION UPON CONVICTION OF ANY CRIME OTHER THAN A CLASS A FELONY IF THE COURT, HAVING REGARD TO THE NATURE AND CIRCUMSTANCES OF THE CRIME AND TO THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, IS OF THE OPINION THAT:

(A) INSTITUTIONAL CONFINEMENT OF THE DEFENDANT IS NOT NECESSARY FOR THE PROTECTION OF THE PUBLIC;

(B) THE DEFENDANT IS IN NEED OF GUIDANCE,

TRAINING OR OTHER ASSISTANCE WHICH, IN HIS CASE, CAN BE EFFECTIVELY ADMINISTERED THROUGH PROBATION SUPERVISION; AND

(C) SUCH DISPOSITION IS NOT INCONSISTENT WITH THE ENDS OF JUSTICE.

PROVIDED, HOWEVER, THAT THE COURT SHALL NOT IMPOSE A SENTENCE OF PROBATION IN ANY CASE WHERE IT SENTENCES A DEFENDANT FOR MORE THAN ONE CRIME AND IMPOSES AN INDETERMINATE SENTENCE OF IMPRISONMENT FOR ANY ONE OF THE CRIMES, OR WHERE THE DEFENDANT IS SUBJECT TO A NONDISCHARGED INDETERMINATE SENTENCE OF IMPRISONMENT WHICH WAS IMPOSED AT A PREVIOUS TIME BY A COURT OF THIS STATE AND HAS MORE THAN ONE YEAR TO RUN.

2. SENTENCE. WHEN A PERSON IS SENTENCED TO A PERIOD OF PROBATION THE COURT SHALL IMPOSE THE PERIOD AUTHORIZED BY SUBDIVISION THREE OF THIS SECTION AND SHALL SPECIFY, IN ACCORDANCE WITH SECTION 65.10, THE CONDITIONS TO BE COMPLIED WITH. UPON NOTICE AND AFTER HEARING, IF REQUESTED, THE COURT MAY MODIFY OR ENLARGE THE CONDITIONS OR, IF THE DEFENDANT COMMITS AN ADDITIONAL OFFENSE OR VIOLATES A CONDITION, MAY REVOKE THE SENTENCE AT ANY TIME PRIOR TO THE EXPIRATION OR TERMINATION OF THE PERIOD OF PROBATION.

3. PERIODS OF PROBATION. UNLESS TERMINATED SOONER BY THE COURT UPON APPLICATION OF THE SUPERVISING PROBATION AGENCY, THE PERIOD OF PROBATION SHALL BE AS FOLLOWS:

(A) FOR A FELONY, FIVE YEARS;

(B) FOR A CLASS A MISDEMEANOR, THREE YEARS;

(C) FOR A CLASS B MISDEMEANOR, ONE YEAR; AND

(D) FOR AN UNCLASSIFIED MISDEMEANOR, THREE YEARS IF THE AUTHORIZED SENTENCE OF IMPRISONMENT IS IN EXCESS OF THREE MONTHS, OTHERWISE, ONE YEAR.

4. SENTENCE; SUSPENSION; COMPLETION OR REVOCATION OF PROBATION; EFFECT. A SENTENCE OF PROBATION PURSUANT TO THE PROVISIONS OF THIS SECTION OR OF CONDITIONAL DISCHARGE PURSUANT TO THE PROVISIONS OF SECTION 65.05 OF THIS PART SHALL BE DEEMED TO OPERATE AS THOUGH THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED BY LAW FOR THE OFFENSE FOR WHICH THE DEFENDANT IS SENTENCED HAD BEEN IMPOSED AND SUSPENDED PENDING SATISFACTORY PERFORMANCE OF THE CONDITIONS OF PROBATION OR CONDITIONAL DISCHARGE. UPON REVOCATION OF PROBATION OR CONDITIONAL DISCHARGE, THE COURT MAY LET STAND THE SENTENCE PREVIOUSLY IMPOSED OR DEEMED TO HAVE BEEN IMPOSED BUT SHALL NOT BE REQUIRED TO DO SO AND MAY IMPOSE ANY LESSER SENTENCE WHICH MIGHT

INITIALLY HAVE BEEN IMPOSED. UPON COMPLETION, WITHOUT REVOCATION, OF A TERM OF PROBATION OR CONDITIONAL DISCHARGE, INCLUDING ANY EXTENSION THEREOF, ANY SENTENCE OF IMPRISONMENT OR TO PAY A FINE WHICH HAS BEEN IMPOSED OR IS DEEMED TO HAVE BEEN IMPOSED, SHALL BE DISCHARGED.

5. RESTITUTION — EXTENSION OR TERMINATION OF PROBATION. WHERE THE COURT HAS REQUIRED, AS A CONDITION OF THE SENTENCE, THAT THE DEFENDANT MAKE RESTITUTION OF THE FRUITS OF HIS OFFENSE OR MAKE REPARATION FOR THE LOSS OR DAMAGE CAUSED THEREBY AND SUCH CONDITION HAS NOT BEEN SATISFIED, THE COURT, AT ANY TIME PRIOR TO THE EXPIRATION OR TERMINATION OF THE PERIOD OF PROBATION, MAY IMPOSE AN ADDITIONAL PERIOD. THE LENGTH OF THE ADDITIONAL PERIOD SHALL BE FIXED BY THE COURT AT THE TIME SUCH ADDITIONAL PERIOD IS IMPOSED AND SHALL NOT BE MORE THAN TWO YEARS. ALL OF THE INCIDENTS OF THE ORIGINAL SENTENCE, INCLUDING THE AUTHORITY OF THE COURT TO MODIFY OR ENLARGE THE CONDITIONS, SHALL CONTINUE TO APPLY DURING SUCH ADDITIONAL PERIOD, PROVIDED THAT IF THE DEFENDANT SATISFIES IN FULL AT ANY TIME THE CONDITION THAT HE MAKE RESTITUTION OR REPARATION, HE SHALL BE ENTITLED TO HAVE THE ADDITIONAL PERIOD OF PROBATION TERMINATED PROMPTLY UPON MAKING APPLICATION TO THE COURT AND FURNISHING SATISFACTORY PROOF THAT THE CONDITION OF RESTITUTION OR REPARATION HAS IN FACT BEEN SATISFIED.

COMMENT

The sentence of probation is a method of offering a criminal offender an opportunity to remain in the community under the supervision of a probation officer, rather than be imprisoned, while the court retains continuing power to impose a more stringent sentence in the event the opportunity is abused.

Subsection one sets forth the guidelines for use of the sentence. It authorizes the court to impose a sentence of probation for any crime other than a class A felony and defines the basic factors to be considered by the court in deciding whether to do so. These factors are merely for the purpose of focusing the court's attention upon the proper use of the sentence. The court is not bound by them, and it is not intended that a sentence of probation should be reversed on appeal because one or more factors arguably are absent, nor is it intended that a sentence to confinement should be reversible because someone might maintain that all of the probation factors existed in the particular case.

Subsection one prevents the judge from sentencing to probation where the defendant is to be incarcerated because the basic purpose of probation

is to provide a method of supervising the offender without removing him from the community. Probation is prohibited where the defendant is subject to an undischarged indeterminate sentence having more than a year to run because he would then be subject to the jurisdiction of the Board of Parole and probation supervision would result in confusion and duplication of services. In the case where the defendant is subject to an undischarged, indeterminate sentence for a year or less to run, the need for permitting use of probation outweighs the disadvantages of possible duplication of services.

The sentence of probation cannot be used for murder or any other class A felony or for a non-criminal offense — i.e., a violation. In the violation situation, the crime is deemed too minor to justify burdening already overloaded probation facilities with the task of supervising the defendant.

Subsection two requires the court to specify as a part of the sentence the period of probation supervision and the conditions to be complied with. It also provides the court with authority to alter the conditions or revoke the probation if the defendant commits an additional offense or violates a condition. The power to alter conditions includes the power to add new conditions. This represents the view that probation is a privilege granted in lieu of imposing the maximum sentence of incarceration for the offense and that the court should be able to tailor its community-based correctional program of probation to the changing needs or situation of the defendant just as the Division of Correction could increase or decrease the defendant's privileges within the limits of a sentence to incarceration.

Subsection three provides uniform periods of probation and requires the court to impose the maximum period at the time of sentence. The object of this provision is to provide an adequate period of probation in every case and to encourage the determination of such period when, in the opinion of the supervising probation agency, the offender is ready to be relieved of further supervision.

Subsection four eliminates the formality of imposing and suspending a particular sentence for the offense and substitutes a suspension of the maximum sentence which the judge might have imposed for that particular offense. In legal effect, the maximum sentence has been suspended, but in

practical effect, the entire process of deciding upon a sentence of commitment is delayed until the probation is revoked. If probation is revoked, the judge may let the maximum prison sentence stand or impose any lessor sentence he might originally have imposed. Thus, the judge is provided with maximum flexibility in re-sentencing at the time of revocation.

Subsection four also provides for automatic discharge of the suspended sentence tc confinement upon successful completion of probation.

Subsection five permits an extension of the period of probation in cases where the defendant fails to complete payments of restitution or reparation within the original probationary period and it is desirable to keep the conditions of probation and probationary supervision in force for an additional period of time until the payments can be completed. An extension up to a maximum of two years is allowed. However, once the original period of probation has elapsed, the defendant has a right to have the extended period terminated upon a showing that he has in fact made the payments. Such extension is not provided for the fine situation because the judge should not impose a fine which the defendant cannot reasonably acquire the means to pay well within the initial period of probation.

65.05. SENTENCE OF CONDITIONAL DISCHARGE

1. CRITERIA. THE COURT MAY IMPOSE A SENTENCE OF CONDITIONAL DISCHARGE FOR AN OFFENSE IF THE COURT, HAVING REGARD TO THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND TO THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, IS OF THE OPINION THAT NEITHER THE PUBLIC INTEREST NOR THE ENDS OF JUSTICE WOULD BE SERVED BY A SENTENCE OF IMPRISONMENT OR A FINE AND THAT PROBATION SUPERVISION IS NOT APPROPRIATE; PROVIDED, HOWEVER, THAT THE COURT SHALL NOT IMPOSE A SENTENCE OF CONDITIONAL DISCHARGE FOR A CLASS A OR CLASS B FELONY OR FOR ANY FELONY DEFINED IN PART TWO HUNDRED TWENTY.

WHEN A SENTENCE OF CONDITIONAL DISCHARGE IS IMPOSED FOR A FELONY, THE COURT SHALL SET FORTH IN THE RECORD THE REASONS FOR ITS ACTION.

THE PROVISIONS OF §65.C0, SUBSECTION 4, ARE APPLICABLE, AS THEREIN STATED, TO THE INITIAL IMPOSITION AND SUSPENSION OF SENTENCE, TO THE REINSTATEMENT OR ALTERATION THEREOF IN THE EVENT OF REVOCATION OF CONDITIONAL DISCHARGE, AND TO THE DISCHARGE OF SENTENCE UPON COMPLETION OF THE PERIOD OF CONDITIONAL DISCHARGE WITHOUT SUCH DISCHARGE HAVING BEEN REVOKED.

2. SENTENCE. WHEN THE COURT IMPOSES A SENTENCE OF CONDITIONAL DISCHARGE THE DEFENDANT SHALL BE RELEASED WITH RESPECT TO THE CONVICTION FOR WHICH THE SENTENCE IS IMPOSED WITHOUT IMPRISONMENT, FINE OR PROBATION SUPERVISION BUT SUBJECT, DURING THE PERIOD OF CONDITIONAL DISCHARGE, TO SUCH CONDITIONS AS THE COURT MAY DETERMINE. THE COURT SHALL IMPOSE THE PERIOD OF CONDITIONAL DISCHARGE AUTHORIZED BY SUBDIVISION THREE OF THIS SECTION AND SHALL SPECIFY, IN ACCORDANCE WITH SECTION 65.10, THE CONDITIONS TO BE COMPLIED WITH. UPON NOTICE AND AFTER HEARING, IF REQUESTED, THE COURT MAY MODIFY OR ENLARGE THE CONDITIONS OR, IF THE DEFENDANT COMMITS AN ADDITIONAL OFFENSE OR VIOLATES A CONDITION, MAY REVOKE THE SENTENCE AT ANY TIME PRIOR TO THE EXPIRATION OR TERMINATION OF THE PERIOD OF CONDITIONAL DISCHARGE.

3. PERIODS OF CONDITIONAL DISCHARGE. UNLESS TERMINATED SOONER, THE PERIOD OF CONDITIONAL DISCHARGE SHALL BE AS FOLLOWS:

(A) THREE YEARS IN THE CASE OF A FELONY; AND

(B) ONE YEAR IN THE CASE OF A MISDEMEANOR OR A VIOLATION.

THE DEFENDANT MAY, HOWEVER, AT ANY TIME PRIOR TO THE EXPIRATION OF SUCH PERIOD, FILE AN APPLICATION WITH THE COURT REQUESTING THAT IT BE TERMINATED SOONER AND STATING THE GROUNDS FOR SUCH APPLICATION. A COPY THEREOF SHALL BE SERVED ON THE STATE'S ATTORNEY. THE COURT SHALL GRANT A HEARING THEREON IF REQUESTED TO DO SO BY EITHER DEFENDANT OR THE STATE, OR IT MAY DO SO OF ITS OWN MOTION; AND ANY SUCH HEARING SHALL BE UPON REASONABLE NOTICE TO THE PARTIES. THE COURT, AS IT MAY DEEM PROPER, SHALL GRANT OR DENY SUCH APPLICATION, OR MAY GRANT IT WITH MODIFICATIONS. IF ANY SUCH APPLICATION IS DENIED, NO NEW APPLICATION MAY BE FILED THEREAFTER WITHOUT LEAVE OF THE COURT.

4. WHERE THE COURT HAS REQUIRED, AS A CONDITION OF THE SENTENCE, THAT THE DEFENDANT MAKE RESTITUTION OF THE FRUITS OF HIS OFFENSE OR MAKE REPARATION FOR THE LOSS OR DAMAGE CAUSED THEREBY AND SUCH CONDITION HAS NOT BEEN SATISFIED, THE COURT, AT ANY TIME PRIOR TO THE EXPIRATION OR TERMINATION OF THE PERIOD OF CONDITIONAL DISCHARGE MAY IMPOSE AN ADDITIONAL PERIOD. THE LENGTH OF THE ADDITIONAL PERIOD SHALL BE FIXED BY THE COURT AT THE TIME SUCH ADDITIONAL PERIOD IS IMPOSED AND SHALL NOT BE MORE THAN TWO YEARS. ALL OF THE INCIDENTS OF THE ORIGINAL SENTENCE, INCLUDING THE AUTHORITY OF THE COURT TO MODIFY OR ENLARGE THE CONDITIONS, SHALL CONTINUE TO APPLY DURING SUCH ADDITIONAL PERIOD, PROVIDED THAT, IF THE DEFENDANT SATISFIES IN FULL AT ANY TIME THE CONDITION THAT HE MAKE RESTITUTION OR REPARATION, HE SHALL BE ENTITLED TO HAVE THE ADDITIONAL PERIOD OF CONDITIONAL DISCHARGE TERMINATED

PROMPTLY UPON MAKING APPLICATION TO THE COURT AND SATISFACTORY PROOF THAT SUCH CONDITION HAS IN FACT BEEN SATISFIED.

COMMENT

The sentence of conditional discharge provides the court with an appropriate disposition in cases where it wishes to impose specific obligations upon the offender but where probation supervision is unnecessary or inappropriate. The criteria in subsection one spell out these objectives and indicate that the court is not permitted to use the sentence for the most serious crimes or for certain drug offenses defined in Part 220. The court is required to set forth its reasons for employing conditional discharge when the sentence is for a felony, and it is contemplated that the sentence of conditional discharge will be used only in the most worthy cases. Nevertheless, the statute does not require proof of any particular fact as a prerequisite to use of the sentence nor, of course, is there a requirement that the defendant receive the sentence if the statutory criteria are present. It is expected that the most usual use of the sentence will be in conjunction with a sentence of fine where the defendant does not need the supervision which goes with probation or incarceration but some punishment is necessary to preserve standards of justice or to serve as a deterrent to others.

Subsection two requires the court to specify the conditions and the period during which the defendant shall be subject to the conditions. As in the case of probation, the court is permitted to alter the conditions or revoke the sentence upon a violation.

Subsection three sets forth the periods during which the discharge remains conditional. A defendant may apply to the court to terminate the conditional discharge or for modification of the conditions.

Subsection four provides for the situation where the court requires restitution or reparation as a condition of the sentence and the condition is not satisfied prior to expiration of the period of conditional discharge. As in the case of probation (see §65.00(5)), the court may extend the period for up to two years but the defendant is entitled to have the extended portion terminated when he completes the payments. The extension provision is designed for the situation where the defendant's

means are inadequate because of the relatively short periods of conditional discharge to complete the restitution or reparation within the prescribed statutory period. Such extension is not provided for the fine situation because the judge should not impose a fine, which the defendant cannot reasonably acquire the means to pay well within the initial period of conditional discharge.

65.10. CONDITIONS OF PROBATION AND OF CONDITIONAL DISCHARGE

THE CONDITIONS OF PROBATION AND OF CONDITIONAL DISCHARGE 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 AND MAY INCLUDE PROVISIONS FOR RESTITUTION OR REPARATION IN ACCORDANCE WITH SECTION 65.00, SUBSECTION 5. THE COURT FROM TIME TO TIME MAY CHANGE THE CONDITIONS OF PROBATION OR CONDITIONAL DISCHARGE.

COMMENT

Subsection one of this section gives the sentencing court wide discretion in establishing conditions of probation and conditional discharge. The court may later enlarge or diminish the conditions in the exercise of such discretion, (see also comment to §65.00).

65.15. CALCULATION OF PERIODS OF PROBATION AND OF CONDITIONAL DISCHARGE

1. A PERIOD OF PROBATION OR OF CONDITIONAL DISCHARGE COMMENCES ON THE DAY IT IS IMPOSED, AND AN EXTENDED PERIOD OF PROBATION OR CONDITIONAL DISCHARGE COMMENCES ON THE DAY THE ORIGINAL PERIOD LAPSES. MULTIPLE PERIODS, WHETHER IMPOSED AT THE SAME OR AT DIFFERENT TIMES, SHALL RUN CONCURRENTLY.

2. WHEN A PERSON IS FOUND BY THE COURT TO HAVE VIOLATED ONE OR MORE CONDITIONS OF HIS PROBATION OR CONDITIONAL DISCHARGE AND THE COURT REVOKES HIS PROBATION OR CONDITIONAL DISCHARGE ON ACCOUNT OF SUCH AN ACT OR ACTS OF VIOLATION, THE PERIOD OF THE SENTENCE OF PROBATION OR CONDITIONAL DISCHARGE SHALL BE DEEMED TO HAVE BEEN INTERRUPTED AS OF THE DATE OF THE FIRST VIOLATION AND SUCH INTERRUPTION SHALL CONTINUE UNTIL THE STATUS OF SUCH PERSON'S SENTENCE SHALL HAVE BEEN REDETERMINED BY THE COURT.

3. IN ANY CASE WHERE A PERSON WHO IS UNDER A SENTENCE OF PROBATION OR OF CONDITIONAL DISCHARGE IS ALSO UNDER AN INDETERMINATE SENTENCE OF IMPRISONMENT IMPOSED FOR SOME OTHER OFFENSE BY A COURT OF THIS STATE, THE

SERVICE OF THE SENTENCE OF IMPRISONMENT SHALL SATISFY THE SENTENCE OF PROBATION OR OF CONDITIONAL DISCHARGE UNLESS THE SENTENCE OF PROBATION OR OF CONDITIONAL DISCHARGE IS REVOKED BEFORE ANY OF THE FOLLOWING EVENTS SHALL HAVE OCCURRED: SUCH PERSON HAS BEEN RELEASED ON PAROLE OR CONDITIONAL RELEASE UNDER SUCH SENTENCE OF IMPRISONMENT AND SUCH RELEASE SHALL NOT HAVE BEEN REVOKED, OR SUCH PERSON IS RELEASED UPON SATISFACTION OF SUCH SENTENCE OF IMPRISONMENT. THE FOREGOING PROVISIONS OF THIS SUBSECTION ARE SUBJECT TO THE FOLLOWING PROVISOS: (I) THE SERVICE OF AN INDETERMINATE SENTENCE OF IMPRISONMENT SHALL NOT SATISFY A SENTENCE OF PROBATION IF THE SENTENCE OF PROBATION WAS IMPOSED AT A TIME WHEN THE SENTENCE OF IMPRISONMENT HAD ONE YEAR OR LESS TO RUN; AND (II) WHEN A PERSON'S SENTENCE OF PROBATION OR CONDITIONAL DISCHARGE IS INTERRUPTED SOLELY BECAUSE OF THE FAILURE OF SUCH PERSON TO MAKE RESTITUTION OR REPARATION TO A PERSON WHO HAS SUFFERED LOSS OR DAMAGE BY HIS CONDUCT, IF SUCH PERSON SHALL MAKE RESTITUTION OR REPARATION IN FULL AT ANY TIME AFTER SUCH INTERRUPTION, THEN SUCH INTERRUPTION SHALL CEASE AND THE INTERRUPTED SENTENCE MAY BE RESTORED FOR ANY UNEXPIRED PORTION THEREOF, LESS SUCH PERIOD AS SUCH PERSON MAY HAVE BEEN IMPRISONED DURING THE INTERRUPTION THEREOF.

COMMENT

Subsection one of this Section makes periods of conditional release commence when they are pronounced. Thus, the probationer or conditional dischargee will leave the courtroom after sentence is pronounced and serve the full period of probation or conditional discharge thereafter. Were the defendant's time served in jail while awaiting trial or sentence to be deducted from the probationary period, such period would, in some cases, be inadequate to fulfill the sentence's purposes of assisting the defendant to lead a law-abiding life. Extensions of the probationary period where restitution is uncompleted ordered pursuant to §65.00(5) or §65.05(4) are lengthenings of the original period of probation rather than separate additional periods. Therefore, such extended periods will commence on the date the original period lapses rather than on the date the court orders that such original period be lengthened. Multiple periods run concurrently, since the purpose of the probationary period is corrective rather than retributive.

Subsection two provides that a period of conditional release is interrupted as of the date of the first violation of the conditions of release which is subsequently proved in court at a revocation hearing to have occurred. This provision

prevents a violator from getting credit for successfully performing the conditions of his conditional release at a time when he was actually violating them.

The purpose of subsection three is to prevent duplication of supervision and to allow a person who has served a prison sentence to wipe his slate clean of conditional sentences that would otherwise be hanging over his head. Five situations are covered: (1) where a person who is on probation or under conditional discharge is sentenced to imprisonment for an additional crime; (2) where a person is convicted of more than one offense and receives both a sentence of imprisonment and a sentence of conditional discharge; (3) where a person who is incarcerated under a sentence of imprisonment receives a sentence of conditional discharge for some other offense; (4) where a person who is under parole supervision receives a sentence of conditional discharge for some other offense; and (5) where a person who is either incarcerated or on parole under a sentence that has one year or less to run receives a sentence of probation. If the court wishes to revoke the sentence of probation or conditional discharge in any of the first three situations, it must act before the defendant is released by parole, conditional release or final discharge, whichever occurs first. This eliminates duplication of supervision and permits the defendant to make a clean start without unduly restricting the court that imposed the sentence of probation or conditional discharge. If grounds for revocation exist and the court wishes to revoke, there is ample time to do so. In these three cases no just objective can be served by allowing the sentence of probation or of conditional discharge to stand while the defendant is on parole or after he has completed service of sentence of imprisonment. In the fourth situation, where a sentence of conditional discharge is imposed while the defendant is on parole, the situation is somewhat different. In this case, the court and the Board of Parole would retain concurrent jurisdiction (but without duplication of supervision) so that the court would have an opportunity to ascertain whether its confidence in the defendant had been misplaced. If the conditional sentence is not revoked prior to the time the defendant is discharged from parole, it will be deemed satisfied. The fifth situation, which is spelled out in the first proviso in subsection 3, is an exception to the rule. The purpose of this exception is to permit the use of a sentence of probation where the previous sentence has only a short time to run.

It should be noted that subsection 3 does not apply where the sentence of imprisonment is a definite sentence (see §70.05).

65.20. SENTENCE OF UNCONDITIONAL DISCHARGE

1. CRITERIA. THE COURT MAY IMPOSE A SENTENCE OF UNCONDITIONAL DISCHARGE IN ANY CASE WHERE IT IS AUTHORIZED TO IMPOSE A SENTENCE OF CONDITIONAL DISCHARGE UNDER SECTION 65.05 IF THE COURT IS OF THE OPINION THAT NO PROPER PURPOSE WOULD BE SERVED BY IMPOSING ANY CONDITION UPON THE DEFENDANT'S RELEASE.

WHEN A SENTENCE OF UNCONDITIONAL DISCHARGE IS IMPOSED FOR A FELONY, THE COURT SHALL SET FORTH IN THE RECORD THE REASONS FOR ITS ACTION.

2. SENTENCE. WHEN THE COURT IMPOSES A SENTENCE OF UNCONDITIONAL DISCHARGE, THE DEFENDANT SHALL BE RELEASED WITH RESPECT TO THE CONVICTION FOR WHICH THE SENTENCE IS IMPOSED WITHOUT IMPRISONMENT, FINE OR PROBATION SUPERVISION. A SENTENCE OF UNCONDITIONAL DISCHARGE IS FOR ALL PURPOSES A FINAL JUDGMENT OF CONVICTION.

COMMENT

The sentence of unconditional discharge provides the court with an appropriate disposition where it does not have any reason to impose a condition. The sentence can be used in any case where conditional discharge can be used. It is intended for limited use in those cases where a defendant, perhaps because he has already served some time in jail while awaiting trial or has made full restitution, has already been adequately punished for his crime, is repentant and needs no further corrective measures.

65.25. PROBATION WITHOUT RECORD

1. WHEN AUTHORIZED. WHERE AN OFFENSE CONSTITUTES A CLASS D OR A CLASS E FELONY OR A MISDEMEANOR OR A VIOLATION, AND THE COURT FINDS SUFFICIENT EVIDENCE OF GUILT BY WAY OF FORMAL PROOF OR BY AGREED STATEMENT OF FACTS TO WARRANT A FINDING OF GUILT, AND THERE IS A VERDICT, FINDING, OR PLEA OF GUILTY OR A PLEA OF NOLO CONTENDERE, THE COURT MAY GRANT OR ORDER PROBATION WITHOUT RECORD IF, HAVING REGARD TO THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND TO THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, THE COURT IS OF THE OPINION THAT NEITHER THE PUBLIC INTEREST NOR THE ENDS OF JUSTICE WOULD BE SERVED BY THE IMMEDIATE ENTRY OF A FINAL ADJUDICATION OF GUILT AND THE IMPOSITION OF A SENTENCE OF IMPRISONMENT OR A FINE, AND THAT PROBATION

SUPERVISION IS NOT PRESENTLY APPROPRIATE. THE COURT SHALL DICTATE OR FILE A BRIEF MEMORANDUM OF THE GROUNDS FOR SUCH OPINION IN SUCH FORM AS MAY BE REQUIRED OR PERMITTED BY RULE ADOPTED BY THE COURT OF APPEALS.

2. CONDITIONS AND PERIOD. THE CONDITIONS OF PROBATION WITHOUT RECORD MAY INCLUDE ANY OR ALL OF THE CONDITIONS WHICH THE COURT MIGHT IMPOSE OR REQUIRE UNDER SECTION 65.10, AND THE COURT MAY ORDER ANY PROBATION SUPERVISION WHICH IT MIGHT ORDER IN SENTENCING A PERSON TO PROBATION AFTER CONVICTION.

THE TERM OF PROBATION WITHOUT RECORD SHALL NOT (EXCEPT AS PROVIDED IN THE NEXT SENTENCE) EXCEED THAT PRESCRIBED BY SECTION 65.00 FOR AN OFFENSE OF THE GRADE IN RESPECT OF WHICH PROBATION WITHOUT RECORD IS GRANTED OR ORDERED. THE COURT, MAY IN ITS DISCRETION, AT THE REQUEST OR WITH THE WRITTEN CONSENT OF THE DEFENDANT, AT ANY TIME AND FROM TIME TO TIME, EXTEND THE PERIOD OF SUCH PROBATION, IN ORDER TO ENABLE THE DEFENDANT TO COMPLY FULLY WITH THE CONDITIONS IMPOSED, OR FOR OTHER GOOD CAUSE, EVEN THOUGH, AS EXTENDED, SUCH TERM MAY EXCEED THAT AUTHORIZED UNDER THE PROVISIONS OF SECTION 65.00 ABOVE LISTED.

3. EFFECT.

(A) WHEN PROBATION WITHOUT RECORD IS GRANTED OR ORDERED AND SO LONG AS SUCH GRANT OR ORDER REMAINS IN EFFECT, NO FINAL JUDGMENT SHALL BE ENTERED UPON THE VERDICT, FINDING, OR PLEA OF GUILTY OR PLEA OF NOLO CONTENDERE. SUCH VERDICT, FINDING OR PLEA SHALL BE SUFFICIENT TO SUSTAIN AND IMPLEMENT THE GRANT OR ORDER OF PROBATION WITHOUT RECORD, INCLUDING PROCEEDINGS FOR THE REVOCATION THEREOF FOR VIOLATION OF ANY OF THE CONDITIONS OF SUCH PROBATION, AND FOR APPELLATE OR POST CONVICTION REVIEW; BUT OTHERWISE NO CONVICTION SHALL BE DEEMED TO HAVE RESULTED FROM THE PROCEFDINGS, NOR SO FAR AS THE LAW OF THIS STATE MAY BE CONTROLLING, SHALL SUCH PROCEEDINGS OPERATE TO DISQUALIFY A PERSON TO GAIN EMPLOYMENT, TO ATTEND AN EDUCATIONAL INSTITUTION, TO OBTAIN A GOVERNMENTAL LICENSE, TO HOLD PUBLIC OFFICE, WHETHER ELECTIVE OR APPOINTIVE, TO BECOME A MEMBER OF THE BAR OR OF ANY OTHER PROFESSION OR CALLING FOR WHICH A LICENSE MAY BE REQUIRED, OR TO ENJOY OTHER RIGHTS OR PRIVILEGES ACCORDED TO PERSONS OF GOOD REPUTE HAVING NO RECORD OF CONVICTION.

(B) UPON THE EXPIRATION OF THE PERIOD OF PROBATION WITHOUT RECORD IF SUCH PROBATION HAS NOT BEEN REVOKED AND IF NO PROCEEDING FOR ITS REVOCATION IS THEN PENDING WHICH IS SUBSEQUENTLY DETERMINED ADVERSELY TO THE DEFENDANT, NO CONVICTION SHALL THEREAFTER BE DEEMED TO HAVE OCCURRED IN THE PROCEEDINGS IN WHICH SUCH PROBATION WAS GRANTED OR ORDERED AND THE PROVISIONS OF PARAGRAPH

(A) BARRING DISQUALIFICATION BY REASON OF SUCH PROCEEDINGS SHALL APPLY. NOTHING IN THIS PARAGRAPH CONTAINED SHALL OPERATE TO RESCIND, CANCEL OR INVALIDATE ANY OF THE TERMS OF THE GRANT OR ORDER OF PROBATION WITHOUT RECORD OR ANY ACT DONE OR PAYMENT MADE PURSUANT TO OR REQUIRED BY SUCH TERMS.

(C) WHEN AND AS LONG AS A PERSON IS ENTITLED TO THE PROTECTIONS AGAINST DISQUALIFICATION AFFORDED BY PARAGRAPH (A) OR (B) OF THIS SUBSECTION, AND INSOFAR AS THE LAWS OF THIS STATE MAY BE CONTROLLING WITH REGARD THERETO, HE MAY PROPERLY OMIT ANY REFERENCE TO THE PROCEEDINGS BASED ON AN OFFENSE IN RESPECT OF WHICH PROBATION WITHOUT RECORD WAS GRANTED TO OR ORDERED FOR HIM, AND MAY PROPERLY DENY THAT HE HAS BEEN CONVICTED OF SUCH OFFENSE, IN ANY APPLICATION, WRITTEN OR ORAL (INCLUDING ANSWERS TO ANY QUESTIONNAIRE SUBMITTED IN CONNECTION WITH SUCH APPLICATION), OR IN ANY CERTIFICATE OR OTHER DOCUMENT PERTAINING TO ANY EMPLOYMENT, ADMISSION, LICENSE, OR OTHER MATTER AS TO WHICH SUCH PROTECTION IS AFFORDED. NO OMISSION OR DENIAL MADE PURSUANT TO THIS PARAGRAPH SHALL BE DEEMED A MISREPRESENTATION OR UNTRUE STATEMENT CONSTITUTING AN OFFENSE UNDER THIS CODE.

4. EFFECT OF VIOLATION AND REVOCATION; SENTENCE. UPON THE REVOCATION OF PROBATION WITHOUT RECORD, A FINAL DISPOSITION OF THE CASE SHALL BE MADE AND RECORDED IN ACCORDANCE WITH THE VERDICT, FINDING OR PLEA OF GUILTY OR PLEA OF NOLO CONTENDERE AND ANY SENTENCE OF IMPRISONMENT OR FINE, OR BOTH, WHICH MIGHT HAVE BEEN IMPOSED AT THE TIME WHEN PROBATION WITHOUT RECORD WAS GRANTED OR ORDERED MAY THEN BE IMPOSED. THEREUPON THE PROTECTIONS AGAINST DISQUALIFICATION AFFORDED BY PARAGRAPHS (A) OR (B) OF SUBSECTION 2 OF THIS SECTION SHALL BE TERMINATED AND SHALL BE OF NO FURTHER EFFECT, AND JUDGMENT AND SENTENCE PURSUANT TO THIS PARAGRAPH SHALL CONSTITUTE A FINAL JUDGMENT.

COMMENT

This Section both supplements §§65.00, 65.05 and 65.20 of this Part and revises existing Maryland law relating to what is generally known as probation without verdict.

§§65.00, 65.05 and 65.20 each permits the release of a defendant after conviction, but without confinement. In all cases under these sections, the conviction stands as a matter of record. §65.00 applies to any case where the offense is not a class A felony; §65.05 applies where the offense is neither a class A nor a class B felony nor a felony of any grade under the narcotics or dangerous drugs or substances laws. Under each of these sections a

sentence of imprisonment is deemed to have been imposed but suspended during probation or conditional release and is discharged upon satisfactory completion thereof (as more fully set forth in those sections). Release pursuant to §65.00 is upon conditions and under probation supervision; under §65.05 it is upon conditions similar to those of probation, but not under supervision. §65.20, authorizing unconditional discharge, applies in any case where §65.05 would permit conditional discharge, if the further requirement is met that the court be of the opinion that no proper purpose would be served by imposing a sentence of imprisonment or a fine.

§65.25 likewise permits release without the imposition of a sentence; but it goes beyond any of the other sections just referred to in that it provides a means by which the court may relieve the defendant of the stigma of a criminal record. That is the reason for the existence of the present Maryland procedure of "probation without verdict," which avoids any finding of guilt. Skinker v. State, 239 Md. 234 at 239, 210 A. 2d 716, at 719; Commissioner of Motor Vehicles v. Lee, 254 Md. 279, 255 A. 2d 44. See also State v. Jacob, 234 Md. 452 at 455, 199 A. 2d 803, at 804.

The Commission believes that some procedure to effect this result is desirable, but thinks that there are some difficulties with the existing procedure, which it seeks to avoid. Present provisions seem overly broad in permitting probation without verdict in all cases, regardless of their seriousness and the Commission therefore would limit the availability of "probation without record" to cases involving offenses below the grade of a class C felony -- that is to class D or E felonies, misdemeanors and violations. There is a complete absence of stated criteria for the grant of probation without verdict under present law. The Commission believes that both the broad permissible scope of present law and the absence of criteria have probably contributed to a somewhat too liberal use of this method of disposition of cases.

Furthermore, the incompatibility of the objective of avoiding any finding of guilt and the imposition of any penal sanctions based upon the proceedings resulting in probation without verdict is quite apparent from the Skinker and Lee cases, which are explicit on this point. The Skinker case indicates, however, that restitution may be validly required as a condition of probation without verdict. Whether or not the written consent of the

accused could supply the lack of an adjudication of guilt, a plea of guilty or a plea of nolo contendere, it seems obvious that, under present law, in the absence of either written consent, conviction or plea, if the accused should violate the terms of his probation, the only effective way of imposing any penalty on him for the original offense would be through a new trial. That would, in most instances, amount to a second trial, and it would involve the risk of the unavailability of witnesses at the second hearing who had been present at the first. It also seems that a problem of double jeopardy might well be involved — questions which do not appear to have been raised in the Skinker case or to have been involved in the Lee case, but which might now be serious under Benton v. Maryland, 395 U.S. 784 (1969); North Carolina v. Pearce, 395 U.S. 711 (1969), and Downum v. United States, 372 U.S. 734 (1963). Both Benton and Pearce, applying the double jeopardy clause of the Fifth Amendment to the States, were decided several years after Skinker (and as it happened, two days before the opinion in Lee was filed). Downum deals with when jeopardy attaches.

§65.25 is narrower in scope than the present §461 of Article 27 and §146 of Article 26. The former applies to the Circuit Courts of the counties and the Criminal Court of Baltimore City, the latter to the new District Court; and §65.25 would replace both of them as to this matter. §70-24(c) of Article 26 is presently tied to §461 of Article 27. (With the District Court fully operative, §146 of Article 26 supersedes §114 of that Article and §§19 and 20 of Article 52.) The history of statutes dealing with probation without verdict and with the differing probation without commitment is outlined in the Skinker and Jacob cases above cited. §292 of the present Article 27 deals with conditional discharge of first offenders under the Controlled Dangerous Substances Act (narcotics, etc.). It is thought unnecessary to continue that special provision in Part 220 of this Code.

§65.25 makes a finding of guilt or a plea of guilty or of nolo contendere a prerequisite to probation without record and thereby seeks to void the problem of a new trial. It also offers the defendant protection against a record of conviction both during the period of probation and after its successful completion. This protection is made explicit as to civil rights, and, it is believed, relieves a worthy defendant who has been involved in an offense of less than major gravity of the possibly disproportionate burdens which a conviction

for such an offense might impose upon him in such matters as seeking employment or admission to a profession.

It is the hope of the Commission that §65.25 will preserve the principal benefits of probation without verdict and will meet problems and difficulties now associated with it.

PART 70: SENTENCES OF IMPRISONMENT

INTRODUCTION

Part 70 governs sentences to confinement in the Maryland correctional system, in one of the local jails and/or in a regional detention facility.

70.00. DEFINITE AND INDETERMINATE SENTENCES OF IMPRISONMENT FOR CERTAIN CRIMES

1. INDETERMINATE SENTENCE. A MAXIMUM SENTENCE OF SIX MONTHS SHALL BE A DEFINITE SENTENCE; OTHERWISE A SENTENCE OF IMPRISONMENT FOR A FELONY SHALL BE AN INDETERMINATE SENTENCE. EXCEPT AS PROVIDED IN THIS SUBSECTION, WHEN A SENTENCE TO A TERM OF IMPRISONMENT IS IMPOSED, THE COURT SHALL SPECIFY THE MAXIMUM TERM OF IMPRISONMENT IN ACCORDANCE WITH THE PROVISIONS OF SUBSECTION (2) OF THIS SECTION, SECTION 70.05(3), SECTION 70.10(2), SECTION 70.15, SECTION 70.16, SECTION 70.17, SECTION 70.18, OR SECTION 70.20, AS THE CASE MAY BE. A SENTENCE SHALL NOT HAVE A MINIMUM TERM OF INELIGIBILITY FOR PAROLE UNLESS ONE IS SPECIFIED BY THE COURT. IF THE SENTENCE IS FOR A CLASS A FELONY OR FOR AN EXTENDED TERM PURSUANT TO SECTION 70.10, THE COURT SHALL SPECIFY THE MINIMUM TERM REQUIRED BY LAW. THE COURT SHALL NOT BE REQUIRED TO IMPOSE A MINIMUM TERM WITH ANY OTHER SENTENCE, BUT IF THE SENTENCE IS IMPOSED UNDER SECTION 70.17 OR 70.18, A MINIMUM SENTENCE MAY BE IMPOSED IN ACCORDANCE WITH ITS TERMS, OR IF THE SENTENCE IS FOR A CLASS B FELONY, IT MAY IMPOSE A MINIMUM TERM NOT EXCEEDING FIVE YEARS, OR IF THE SENTENCE IS FOR A CLASS C FELONY, IT MAY IMPOSE A MINIMUM TERM NOT EXCEEDING TWO YEARS. THE COURT SHALL NOT IMPOSE A MINIMUM TERM FOR A CLASS D OR CLASS E FELONY, OR FOR ONE OR MORE MISDEMEANORS.

2. TERMS OF SENTENCING. THE TERMS OF A SENTENCE OF IMPRISONMENT SHALL BE AS FOLLOWS:

(A) FOR A CLASS A FELONY, A MAXIMUM OF LIFE IMPRISONMENT AND A MINIMUM OF TEN YEARS OR A MAXIMUM OF FIFTEEN YEARS AND A MINIMUM OF FIVE YEARS;

(B) FOR A CLASS B FELONY, A MAXIMUM OF FIFTEEN YEARS OR OF TEN YEARS;

(C) FOR A CLASS C FELONY, A MAXIMUM OF TEN YEARS, OR OF SEVEN YEARS, OR OF FIVE YEARS;

(D) FOR A CLASS D FELONY, A MAXIMUM OF SEVEN YEARS, OR OF FIVE YEARS, OR OF THREE YEARS OR OF SIX MONTHS;

(E) FOR A CLASS E FELONY, A MAXIMUM OF FIVE YEARS, OR OF THREE YEARS OR OF SIX MONTHS.

COMMENT

This Section lays out the basic structure for sentencing for felonies defined in the new Criminal Code. Except in rare cases for class D and E felonies, the sentences will be indeterminate and will be served, pursuant to Section 60.30, in the custody of the Division of Correction. Judges are given the power in the case of class D and E felonies to impose a short determinate sentence, which, pursuant to Section 60.35, must be served in a local jail or regional detention center.

Most sentences will, of course, be 'indeterminate' up to a specified maximum term of years. This means that instead of a fixed term of years which the offender is required to serve in prison unless such time is reduced by good behavior time, industrial time and/or the action of the Board of Parole, persons committed under the Proposed Code will have maximum sentences substantially in excess of the amount they would ordinarily be expected to serve for the offenses they had committed, and the Board of Parole will be encouraged to employ greater discretion in deciding when and why a man should be released. In theoretical legal effect, the proposed system of indeterminate sentences will not be much different from the present system, except that the maximum will usually be longer than a determinate sentence would be today for a defendant with an equivalent crime and criminal record. Thus, Section 110 of Article 41 of the Maryland Code places no minimum limitation upon the power of the Board of Parole to release convicts in the ordinary case. Sentences of one, two, five or ten years under the present system could be considered indeterminate sentences having as a maximum the definite term imposed by the judge and no minimum of parole eligibility. However, in practical effect, the Board of Parole has operated by a rule of thumb to the effect that, except in very rare instances, individuals are not eligible for parole until one quarter of their sentence has been served. Moreover, the present system operates psychologically to put the Board of Parole in the

position of ignoring or contradicting the judge if it does not require some sizable fraction of the judge's sentence to be served before the man is considered eligible for parole. For example, assume that the judge has decided that the man should serve five years and two years consecutively for, let us say, storehouse breaking and larceny. The Board of Parole would be hard put to justify releasing him after a year. Under the indeterminate system, the man might receive a 0 to 7 or 0, 1 or 2 to 10 year sentence for the same misconduct, depending upon whether or not the aggravating factors necessary to raise the storehouse breaking to the class C felony of second degree burglary were present. Unless the two-year minimum were specified in the class C felony situation, the Board of Parole would have no problem of seeming conflict with the court's decision if, hearing evidence of the defendant's successful adjustment to a community-based correctional program, it thought the offender should be granted a parole after a year or even less in a particularly promising case. Yet, the Board could hold the man as long or longer as it might under the present system if he did not cooperate or for some other reason was a poor risk.

The present system has important negative effects, particularly for any efforts to develop community-based correctional programs. Thus, a man with a long sentence cannot be placed in a minimum security institution or on work release until one quarter of his sentence has been served because, as he perceives it, he has no chance for parole until he serves more time. With no hope of earning his freedom, he has too much motivation for escape. Conversely, the man with too little time may escape or fail to take the correctional program seriously because he figures he is going to be getting out soon whatever happens. The indeterminate sentence should give every man a large enough maximum to motivate him to cooperate with the correctional program of the authorities. Yet it should also encourage the Board of Parole to adopt flexible enough policies for tying the release of men into their performance in the correctional system so that only the perpetrators of the most serious offenses and recidivists will lack hope that they can earn their way out of prison at a rate which is more or less commensurate with their efforts to cooperate with the authorities.

This Section represents something of a compromise between the present system of judicially imposed determinate sentences and the systems of some other states whereby the trial judge is

required to impose mandatory indeterminate sentences with long maxima and the real sentencing decision is placed in the hands of an independent sentencing board. The proposed Code gives the trial judge adequate flexibility in fixing sentences but not the near-random flexibility he has at present. He decides whether or not a man is probationed, conditionally discharged, unconditionally discharged, fined or imprisoned. He also has several alternative indeterminate sentences of imprisonment to choose from. However, the judge may only impose terms specified in this Section. For example, for a class C felony he may impose a maximum term of five years, seven years or ten years, and he may impose a minimum term of up to two years. However, he may not impose a maximum term of two years or of six years or of nine years, as he presently might with respect to a crime for which a sentence of up to ten years is authorized. Such a limitation upon the number of combinations of sentences which judges can impose should operate to reduce disparity in sentencing. It should also encourage the Board of Parole to be less influenced by the precise quantity of the judge's sentence, once the minimum, if any, has been served, than it is thought to be at present in deciding when a man is ready for release. Thus, the Board of Parole would be performing some of the functions of an independent sentencing board, while operating within the broader guidelines fixed by the judge.

In practical effect, the volume of people in the correctional system will probably force the Board of Parole to continue to have rules of thumb for considering individuals eligible for parole. No doubt, the Board will continue to be influenced somewhat by the judge's sentence. Thus, one would expect the Board of Parole to require a man with a 0-10 year sentence to serve more time than a man with a 0-5 year sentence in the normal case, if only because the Division's correctional plan for him would probably follow a longer timetable. However, the new system should produce more flexibility in parole policy, particularly as the Department of Public Safety and Correctional Services develops greater diagnostic capabilities and more effective correctional programs. The Borad of Parole is presently heavily dependent upon the Division of Correction for information about a man's progress in the correctional system relevant to his suitability for release. However, where there has been little opportunity for the man to progress within the correctional system, and there is little diagnostic information available, the Board of Parole operates in something of a vacuum. Presumably, in the

future, when the judge bases his sentence upon a correctional plan submitted with a presentence investigation report pursuant to Section 60.50 of Part 60, the Board of Parole will base its release decision upon the plan as revised from time to time by the correctional authorities and the extent to which the man has succeeded in cooperating with the plan.

Subsection one of this Section permits the judge to impose a minimum term of ineligibility for parole for class A, B and C felonies and for extended sentences pursuant to Sections 70.10.ff. This represents a value judgment that as to the most serious crimes the objectives of retribution and deterrence may be important. Some public retribution may be necessary with respect to these most serious criminal wrongs to prevent victims or their relatives from taking private retribution. As to these crimes, the judge must weigh the importance of the objectives of deterrence and retribution against the objective of correction based upon the information he has about the crime, the victims and the offender from the trial and presentence investigation report. The judge is not permitted to impose minimum terms for the two lowest grades felonies or for misdemeanors. Here, the danger of private retribution is relatively less serious and presumably even a small amount of loss of freedom will be an adequate deterrent (provided the law is effectively enforced) when compared to the rewards of such a crime. Therefore, the objective of correction is deemed most important to the State.

Subsection two sets forth the authorized maxima for the various classes of felonies in the Criminal Code. Subsection 2(a) of Section 70 provides that in the case of any class A felony, the court must impose either a sentence of ten years to life or of five years to fifteen years, unless the sentence is extended under §70.10 or §70.15. Class A felonies are so serious that the objective of deterrence requires that the perpetrators of such crimes not be seen back in the community for several years after the commission of the crime however tractable they may be. Thus, every person convicted of a class A felony will have to serve at least five years in prison, unless pardoned. He will have to serve at least ten years unless the court has given him a minimum sentence of only five years or concurs in the Board of Parole's decision that he be released sooner.

In general, the scheme of subsection two of Section 70.00 is set up to encourage the judge to

FELONIES, WHETHER UNDER THIS CODE, PRIOR LAW, OR THE LAWS OF THE UNITED STATES OR OF ANOTHER STATE, AT LEAST ONE OF WHICH CONSTITUTED A CRIME OF VIOLENCE; AND

(II) WITHIN FIVE YEARS AFTER THE DATE OF HIS CONVICTION FOR ONE OF SAID PRIOR FELONIES OR WITHIN FIVE YEARS AFTER THE DATE OF HIS RELEASE OR ESCAPE FROM IMPRISONMENT UNDER ANY SENTENCE FOR ANY PRIOR FELONY (WHICHEVER OF SAID EVENTS MAY BE LATER IN TIME).

PRIOR CONVICTIONS FOR TWO OR MORE FELONIES COMMITTED ON THE SAME OCCASION AND AS PART OF A SINGLE CONTINUING COURSE OF ACTION SHALL BE COUNTED AS ONLY ONE CONVICTION FOR PURPOSES OF THIS SUBSECTION. A SENTENCE OF IMPRISONMENT WHICH IS IMPOSED AND SUSPENDED DURING PROBATION OR CONDITIONAL DISCHARGE, OR IS DEEMED TO HAVE BEEN SO IMPOSED AND SUSPENDED, SHALL BE DEEMED A SENTENCE OF IMPRISONMENT WITHIN THE MEANING OF THIS SUBSECTION.

2. DISPOSITION PERMITTED IN THE CASE OF REPETITIVE VIOLENT FELONY OFFENDERS. WHENEVER A REPETITIVE VIOLENT FELONY OFFENDER IS BEING SENTENCED FOR A CRIME OF VIOLENCE, THE COURT AFTER REASONABLE NOTICE TO THE DEFENDANT AND HIS COUNSEL AND THE STATE'S ATTORNEY AND OPPORTUNITY FOR HEARING MAY IMPOSE AN INDETERMINATE SENTENCE OF TEN TO THIRTY YEARS IMPRISONMENT IN LIEU OF A SENTENCE SET FORTH IN SECTION 70.00 IF THE COURT IS OF THE OPINION, AFTER DUE CONSIDERATION OF A PRESENTENCE INVESTIGATION REPORT, THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY AND CHARACTER OF THE DEFENDANT AND ANY EVIDENCE SUBMITTED AT THE HEARING THAT EXTENDED CONFINEMENT IS NECESSARY TO PROTECT THE PUBLIC FROM FURTHER CRIMINAL ACTIVITY OF THE DEFENDANT WHICH IS DANGEROUS TO HUMAN LIFE OR SAFETY. SUCH SENTENCE SHALL BE SUBJECT TO MODIFICATION ONLY AS SET FORTH IN SECTION 60.65.

COMMENT

This Section provides an extended ten to thirty-year indeterminate sentence for certain third offenders who have demonstrated by their criminal conduct that they may have a propensity for committing crimes which are dangerous to the person. The provision assumes that a man's criminal record can be presumptive evidence of a need to protect the community from him by isolating him. Two factors should be present before the expense of long term isolation is undertaken by the State. There should be reason to believe that the man may be intractable — i.e., that it is not likely that he will be corrected if he is sent to prison for a relatively shorter term. This statute requires two previous correctional failures before intractability can be presumed. The second factor justifying long-term

isolation is dangerousness. This Section infers dangerousness from the commission of more than one crime of violence after one attempt at correction for a crime of violence. Thus, the youth who committed six robberies with his gang before being caught, would not necessarily be presumed to have a personality with a propensity to violent crimes, but someone who repeats violent criminal activity after being caught would have such a presumption.

The presumptions of dangerousness and intractability upon which the extended sentence is based are not conclusive presumptions. Hence, use of the extended term is made discretionary with the judge, who can and should in many cases impose an ordinary sentence when the information in the presentence report does not support an inference of a dangerous, intractable personality. Moreover, not every man who appears to be dangerous and intractable at the time of sentencing will be so permanently. Section 60.70 of Part 60 provides for a review of the individual's personality nature with the aid of experts from the Patuxent Institution after he has served five years, or sooner upon motion of the Board of Parole. This scheme should permit the treatment of some of these offenders at Patuxent under circumstances where they will be motivated to cooperate with such treatment and the reduction of sentences of others who, after five years, have demonstrated constructive behavior in the correctional system. Thus, not even the recipient of the extended sentence will lack motivation to cooperate with the correctional authorities, as is presently the case with many men whose life sentences or long terms or consecutive sentences eliminate virtually all hope that they can profit from good behavior. See the commentary to Section 60.70 for further discussion.

70.15. EXTENDED SENTENCE UPON CONVICTION OF A THIRD FELONY OFFENSE NOT MORE THAN FIVE YEARS AFTER THE LAST PREVIOUS FELONY

1. DEFINITIONS. "THIRD FELONY OFFENDER" MEANS A PERSON WHO STANDS CONVICTED OF A FELONY COMMITTED AFTER HE HAS PREVIOUSLY BEEN CONVICTED OF TWO OR MORE FELONIES AND THE FELONY FOR WHICH HE CURRENTLY STANDS CONVICTED WAS COMMITTED WITHIN FIVE YEARS OF EITHER THE DATE OF CONVICTION OF THE LAST OF SUCH PRIOR FELONIES OR THE DATE OF HIS RELEASE OR ESCAPE FROM IMPRISONMENT FOR ANY OF SUCH PRIOR FELONIES. PRIOR CONVICTIONS FOR TWO OR MORE FELONIES COMMITTED ON THE SAME OCCASION AND AS PART OF A SINGLE CONTINUING COURSE OF CONDUCT SHALL BE COUNTED AS ONLY ONE CONVICTION FOR PURPOSES OF THIS SECTION. CONVICTIONS WHICH STAND REVERSED ON APPEAL, WHICH HAVE

BEEN SET ASIDE IN HABEAS CORPUS OR POST CONVICTION PROCEEDINGS OR FOR OFFENSES FOR WHICH THE OFFENDER HAS BEEN PARDONED SHALL NOT BE TAKEN INTO ACCOUNT. FOR THE PURPOSE OF THIS SECTION, IN ADDITION TO A CONVICTION FOR A FELONY COMMITTED IN VIOLATION OF THE LAWS OF THIS STATE, WHETHER UNDER THIS CODE, OTHER PROVISIONS OF THE ANNOTATED CODE, OR PRIOR LAW, A CONVICTION FOR AN OFFENSE COMMITTED IN VIOLATION OF THE LAWS OF THE UNITED STATES OR OF ANOTHER STATE SHALL BE DEEMED A CONVICTION FOR A OR PRIOR FELONY IF THE OFFENSE CONSTITUTED A FELONY UNDER THE LAWS OF SUCH OTHER JURISDICTION OR WAS PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR AND WOULD HAVE CONSTITUTED A FELONY IF COMMITTED IN MARYLAND.

2. DISPOSITION PERMITTED IN THE CASE OF THIRD FELONY OFFENDERS. WHENEVER A THIRD FELONY OFFENDER IS BEING SENTENCED FOR A FELONY, THE COURT MAY INCREASE THE MAXIMUM TERM OF THE INDETERMINATE SENTENCE OF IMPRISONMENT IMPOSED FOR SUCH FELONY BY FIVE YEARS, PROVIDED THAT THIS SECTION SHALL NOT APPLY TO SENTENCES HAVING A MAXIMUM TERM OF LIFE IMPRISONMENT OR TO SENTENCES MADE PURSUANT TO §70.10 OF THIS PART.

COMMENT

This Section permits a judge to increase the maximum term of the indeterminate sentence of imprisonment imposed for a felony by 5 years if a defendant has been convicted twice previously of felonies and 5 years have not elapsed between his most recent previous felony conviction and the conviction of the felony for which he is being sentenced. Unlike §70.10, this Section does not require two previous correctional failures before the additional term can be imposed. The Section also differs from §70.10 in that it does not require that the previous felonies be crimes of violence. The primary purpose of the extended sentence provided for in §70.10 is to protect the community by isolating a dangerous and apparently intractable offender, though correctional objectives might suffer greatly in the process. This sentence seeks to give the State the option of holding a multiple offender for a relatively long time at less cost to its prospects for correcting him. The sentencing judge is not permitted to increase the minimum term of parole eligibility. However, the additional maximum term does represent an increase in punishment and should serve to strengthen the hand of the correctional authorities to motivate the offender to cooperate.

70.16. EXTENDED SENTENCE UPON CONVICTION OF A SECOND FELONY DRUG OFFENSE NOT MORE THAN FIVE YEARS AFTER THE LAST PREVIOUS FELONY DRUG OFFENSE

1. DEFINITIONS. "SECOND FELONY DRUG OFFENDER" MEANS A PERSON WHO STANDS CONVICTED OF A DRUG FELONY COMMITTED AFTER HE HAS PREVIOUSLY BEEN CONVICTED OF ONE OR MORE DRUG FELONIES AND THE DRUG FELONY FOR WHICH HE CURRENTLY STANDS CONVICTED WAS COMMITTED WITHIN FIVE YEARS OF EITHER THE DATE OF CONVICTION OF SUCH PRIOR DRUG FELONY (OR THE LAST OF THEM) OR THE DATE OF HIS RELEASE OR ESCAPE FROM IMPRISONMENT FOR ANY OF SUCH PRIOR FELONIES. "DRUG FELONY" MEANS A FELONY UNDER PART 220, OR, IN THE CASE OF PREVIOUS CONVICTIONS, IN THE ALTERNATIVE, AN OFFENSE UNDER ANY PRIOR LAW OF THIS STATE OR ANY LAW OF THE UNITED STATES OR OF ANY OTHER STATE RELATING TO CONTROLLED DANGEROUS SUBSTANCES, AS DEFINED FOR PURPOSES OF PART 220, WHICH CONSTITUTED A FELONY UNDER SUCH PRIOR LAW OR WAS PUNISHABLE BY IMPRISONMENT FOR MORE THAN ONE YEAR AND WOULD HAVE CONSTITUTED A FELONY IF COMMITTED IN MARYLAND. CONVICTIONS WHICH STAND REVERSED ON APPEAL, WHICH HAVE BEEN SET ASIDE IN HABEAS CORPUS OR POST CONVICTION PROCEEDINGS OR FOR OFFENSES FOR WHICH THE OFFENDER HAS BEEN PARDONED SHALL NOT BE TAKEN INTO ACCOUNT.

2. DISPOSITION PERMITTED IN THE CASE OF SECOND FELONY DRUG OFFENDERS. WHENEVER A SECOND FELONY DRUG OFFENDER IS BEING SENTENCED FOR A DRUG FELONY, THE COURT MAY INCREASE THE MAXIMUM TERM OF THE INDETERMINATE SENTENCE OF IMPRISONMENT IMPOSED FOR SUCH FELONY BY FIVE YEARS.

COMMENT

This Section is substantially similar to Section 70.15, except that it permits the five-year addition to the maximum sentence in the case of a second drug offense. In controlling drugs, this more severe treatment of repeaters seems desirable both from the point of view of deterrence and danger to the public. Current Maryland law provides for doubling of penalties where drug offenses are repeated. See Article 27, Section 293.

70.17. EXTENDED SENTENCE FOR ESCAPE OR FELONY COMMITTED WHILE AWAITING TRIAL OR SENTENCING

1. THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS SECTION:

A. "ESCAPE" MEANS ESCAPE IN THE FIRST DEGREE OR ESCAPE IN THE SECOND DEGREE, AS DEFINED IN PART 205.

B. "FELONY COMMITTED WHILE AWAITING TRIAL OR SENTENCING" MEANS A FELONY COMMITTED BY THE DEFENDANT WHILE CHARGES FOR ANOTHER FELONY, FOR WHICH HE IS ULTIMATELY CONVICTED, ARE PENDING

AGAINST HIM IN A COURT OF RECORD OF THIS STATE OR WHILE HE IS AWAITING SENTENCING AFTER HAVING BEEN CONVICTED OF A FELONY IN SUCH A COURT. CHARGES ARE "PENDING" ONCE THE DEFENDANT IS UNDER INDICTMENT WITHIN THE MEANING OF MARYLAND RULE 702(A), OR IS RELEASED ON BAIL OR ON HIS OWN RECOGNIZANCE, OR IS BOUND OVER TO A GRAND JURY BY A MAGISTRATE.

2. WHENEVER A PERSON IS SENTENCED FOR CRIMINAL CONTEMPT UNDER SECTION 215.55, ESCAPE OR FOR A FELONY COMMITTED WHILE AWAITING TRIAL OR SENTENCING, THE COURT MAY, IN LIEU OF IMPOSING A SENTENCE AUTHORIZED FOR THE CRIME BY ANOTHER SECTION OF THIS PART, IMPOSE AN INDETERMINATE SENTENCE OF IMPRISONMENT WITH NO MINIMUM TERM OR WITH A MINIMUM TERM OF TWO YEARS, TO BE SERVED CONSECUTIVELY TO ANY OTHER MINIMUM TERM WHICH HAS BEEN OR MAY BE IMPOSED, AND WITH A MAXIMUM TERM OF FIVE YEARS, TO BE SERVED CONSECUTIVELY TO ANY OTHER MAXIMUM TERM, EXCEPT A MAXIMUM TERM OF LIFE IMPRISONMENT, WHICH HAS BEEN OR MAY BE IMPOSED.

COMMENT

This Section permits a judge to impose an extended penalty upon an offender who commits an additional felony while awaiting trial or sentence or who escapes or commits criminal contempt while serving an indeterminate sentence. It is designed to close a loophole which would exist due to the concurrent sentencing provisions of Section 70.25 if a defendant could commit a new crime while on bail or recognizance or escape or commit contempt while serving an indeterminate sentence yet have more time to serve for the original crime than could be added for the subsequent crime or the crime of escape or contempt.

Generally, the Commission believes that consecutive sentencing is counter-rehabilitative. Except in cases where multiple offenses justify an extended sentence, the maximum term of the greatest crime of which the defendant stands convicted should be adequate to serve all the purposes of deterrence, isolation, retribution and correction. The provisions of this Section are an exception to the general principle, which the Commission believes justified to deter offenders from believing they have nothing to lose by escaping or committing an additional crime while awaiting trial or sentence or while under sentence for a previous offense.

In effect, the Section is similar to a multiple offender statute, permitting a greater sentence for the second crime because the first was committed.

This Section does not apply to an offender awaiting trial or sentence or previously sentenced for a misdemeanor. In such a case, the penalties ordinarily provided for a serious offense are sufficient; a new felony committed will carry heavier penalties than the old misdemeanor. When an escape is involved after the accused has been confined in a detention facility by order of a court, the escape itself will be a felony according to Part 205. The misdemeanaut who commits another misdemeanor while awaiting trial or sentence also is not covered. His second offense is asking the judge to impose the maximum for either offense, though single offenders usually get less. If he has committed a second class B misdemeanor, he may be sentenced consecutively for both crimes. If he has committed a class A misdemeanor, he is earning points toward an extended sentence pursuant to Section 70.20. Thus, there is no invitation to commit the second offense.

70.18. EXTENDED SENTENCE FOR MURDER WHEN MORE THAN ONE MURDER IS COMMITTED

WHENEVER A PERSON IS SENTENCED FOR MURDER AND IT APPEARS THAT HE HAS BEEN CONVICTED FOR MORE THAN ONE MURDER FOR WHICH HE HAS NOT ALREADY BEEN SENTENCED, THE COURT MAY, IN LIEU OF IMPOSING A SENTENCE AUTHORIZED FOR THE CRIME BY ANOTHER SECTION OF THIS PART, IMPOSE AN INDETERMINATE SENTENCE WITH A MAXIMUM TERM OF LIFE IMPRISONMENT AND A MINIMUM TERM OF ANY NUMBER OF YEARS IN EXCESS OF TEN YEARS AND NOT GREATER THAN THE SUM OF TEN YEARS FOR THE FIRST MURDER PLUS FIVE YEARS FOR EACH ADDITIONAL MURDER AFTER THE FIRST.

COMMENT

This Section is intended to provide an additional deterrent for multiple killings, of special importance when a defendant is tempted to kill a witness to the first killing to avoid a successful prosecution. The alternative sentence here authorized contains the same maximum as is available for a single murder (life imprisonment) but allows an increased minimum over the ten years otherwise authorized, so that, for example, if three murders are committed, the minimum sentence could be as great as twenty years. Such long mandatory minimum sentences are undesirable from a rehabilitative point of view and should not be automatic for multiple murderers, but there may be cases in which deterrence or danger to the public justifies them.

70.20. SENTENCE AS FOR A CLASS E FELONY UPON

CONVICTION OF THREE OR MORE CLASS A MISDEMEANORS WITHIN A FIVE YEAR PERIOD

IF A DEFENDANT IS CONVICTED OF THREE OR MORE CLASS A MISDEMEANORS OR TWO OR MORE CLASS A DRUG MISDEMEANORS, HE MAY BE SENTENCED AS FOR A CLASS E FELONY TO A TERM HAVING A MAXIMUM OF FIVE YEARS OR THREE YEARS AND NO MINIMUM IF THE COURT IS SATISFIED THAT THERE IS AN EXCEPTIONAL NEED FOR REHABILITATIVE OR INCAPACITATIVE MEASURES FOR THE PROTECTION OF THE PUBLIC. THIS SECTION SHALL APPLY NOT ONLY WHEN THE DEFENDANT IS SENTENCED AT ONE TIME FOR MULTIPLE OFFENSES BUT ALSO WHEN A DEFENDANT IS SENTENCED FOR ONE OR MORE CLASS A MISDEMEANORS HAVING PREVIOUSLY BEEN CONVICTED OF TWO OR MORE CLASS A MISDEMEANORS WITHIN A FIVE YEAR PERIOD NEXT PRECEDING THE DATE OF OFFENSE FOR WHICH HE IS CURRENTLY BEING SENTENCED. IN THE EVENT THAT THE DEFENDANT IS SERVING A DETERMINATE JAIL SENTENCE WHEN AN INDETERMINATE SENTENCE UNDER THIS SECTION IS IMPOSED, ANY UNEXPIRED PORTION OF SUCH DETERMINATE SENTENCE SHALL BE SERVED CONCURRENTLY WITH SUCH INDETERMINATE SENTENCE. IN THE EVENT THAT THE INDETERMINATE SENTENCE UNDER THIS SECTION IS SUBSEQUENTLY VACATED OR HELD TO BE ILLEGAL BY ANY COURT HAVING JURISDICTION OVER THE MATTER, THE DEFENDANT SHALL BE REMANDED TO JAIL TO COMPLETE ANY THEN UNEXPIRED PORTION OF SUCH DETERMINATE JAIL SENTENCE, DUE CREDIT BEING GIVEN FOR ANY TIME SERVED UNDER BOTH THE ORIGINAL DETERMINATE SENTENCE AND THE INDETERMINATE SENTENCE IMPOSED UNDER THIS SECTION AS WELL AS FOR APPLICABLE CLASS A DRUG MISDEMEANOR MEANS FOR PURPOSES OF THIS SECTION A CLASS A MISDEMEANOR PUNISHABLE UNDER PART 220, OR IN THE CASE OF PREVIOUS CONVICTIONS, IN THE ALTERNATIVE, AN OFFENSE UNDER ANY PRIOR LAW OF THIS STATE OR ANY LAW OF THE UNITED STATES OR OF ANY OTHER STATE RELATING TO CONTROLLED DANGEROUS SUBSTANCES, AS DEFINED FOR PURPOSES OF PART 220, WHICH CONSTITUTED A MISDEMEANOR UNDER SUCH PRIOR LAW OR LAWS.

PART 70 — SENTENCES OF IMPRISONMENT

COMMENT

Section 70.25 does not permit consecutive determinate sentences to a jail institution for misdemeanors which have the effect of requiring an individual to serve more than six months at any one time in such an institution. This represents a judgment that incarceration in a jail institution without a correctional program can only be a constructive experience if it is for a relatively short term. This Section provides an extended term for persons who commit three class A misdemeanors within a five year period upon the assumption that such persons have demonstrated by their repetitive misbehavior not only that they need more punishment than six months in jail but also that they should be held with more serious offenders and have special

correctional programs to assist them to adjust to society. Second drug offenders may be sentenced to an extended term; cf. §70.16 and comment.

The effect of this Section, read together with Section 70.25, is that the perpetrator within a six-month period of two class A misdemeanors cannot receive a greater penalty than could the perpetrator of a single class A misdemeanor. At first glance, this might appear to allow the perpetrator of one class A misdemeanor to commit a second crime without penalty. However, in practical effect this would hardly ever be the case. In the overwhelming majority of cases the maximum penalty is not given out for a single, isolated class A misdemeanor. Therefore the perpetrator of two such misdemeanors would normally draw a higher penalty from the judge than the perpetrator of one such crime even though the maximum authorized penalty for two offenses is not greater than six months. Second, the commission of a second crime would earn the perpetrator "points" toward the imposition of the extended 0-5 or 0-3 year indeterminate sentence.

By its terms, this Section is not drafted, as was Section 70.10 to define the third offender in terms of correctional failures. Instead, he may have committed all three misdemeanors before being caught for any one of them.

70.25 TERMS OF IMPRISONMENT TO BE CONCURRENT

1. AN INDETERMINATE SENTENCE SHALL RUN CONCURRENTLY WITH ALL OTHER TERMS IMPOSED AT THE SAME TIME AND WITH THE UNEXPIRED PORTIONS OF ANY TERMS PREVIOUSLY IMPOSED. NEITHER MAXIMUM NOR MINIMUM TERMS SHALL BE IMPOSED CONSECUTIVELY, EXCEPT AS EXPRESSLY AUTHORIZED BY THIS PART.

2. WHEN A PERSON IS SENTENCED TO A DEFINITE TERM OF IMPRISONMENT, THE JUDGE SHALL SPECIFY WHETHER SUCH TERM IS TO RUN CONCURRENTLY WITH OR CONSECUTIVE TO ANY OTHER DEFINITE TERM OF IMPRISONMENT, PROVIDED THAT THE AGGREGATE OF DEFINITE TERMS OF IMPRISONMENT TO BE SERVED SHALL NOT EXCEED 6 MONTHS. WHEN A PERSON SENTENCED TO A DEFINITE TERM OF IMPRISONMENT IS ALSO SENTENCED TO AN INDETERMINATE TERM OF IMPRISONMENT OR IS CURRENTLY SERVING AN UNEXPIRED PORTION OF AN INDETERMINATE SENTENCE OF IMPRISONMENT, HE SHALL BE COMMITTED TO THE CUSTODY OF THE COMMISSIONER OF CORRECTION TO COMPLETE THE INDETERMINATE SENTENCE OF IMPRISONMENT AND THE DEFINITE TERM SHALL RUN CONCURRENTLY WITH SUCH INDETERMINATE TERM. IN THE EVENT THAT THE INDETERMINATE TERM OF IMPRISONMENT EXPIRES BEFORE THE DEFINITE TERM, THE JUDGE MAY REQUIRE THE DEFENDANT TO COMPLETE THE DEFINITE TERM IN THE

CUSTODY OF THE COMMISSIONER OF CORRECTION.

3. WHEN A DEFINITE OR INDETERMINATE SENTENCE IS IMPOSED UPON A MAN WHO IS CURRENTLY UNDER SENTENCE TO SERVE AN UNEXPIRED TERM OF IMPRISONMENT IN ANOTHER JURISDICTION, THE SENTENCING JUDGE MAY REMAND SUCH DEFENDANT TO THE CUSTODY OF THE APPROPRIATE AUTHORITIES OF SUCH OTHER JURISDICTION IN ORDER THAT HIS MARYLAND SENTENCE BE SERVED CONCURRENTLY WITH SUCH OTHER SENTENCE, OR HE MAY SUBTRACT THE UNEXPIRED TERM DUE TO BE SERVED IN SUCH OTHER JURISDICTION FROM THE MAXIMUM TERM OF IMPRISONMENT AUTHORIZED FOR THE OFFENSE FOR WHICH THE DEFENDANT STANDS CONVICTED IN MARYLAND AND ORDER THE DEFENDANT TO SERVE ONLY THE REMAINING PORTION OF TIME IN MARYLAND BEFORE OF AFTER BEING REMANDED TO THE CUSTODY OF THE OTHER JURISDICTION. IN THE EVENT THAT AN INDETERMINATE SENTENCE IS IMPOSED, THE MARYLAND BOARD OF PAROLE MAY PAROLE THE DEFENDANT TO THE CUSTODY OF THE APPROPRIATE AUTHORITIES OF ANY OTHER JURISDICTION IN WHICH HE HAS BEEN SENTENCED TO A TERM OF IMPRISONMENT UPON THE COMPLETION OF ANY MINIMUM TERM OF IMPRISONMENT TO WHICH HE HAS BEEN SENTENCED IN MARYLAND.

COMMENT

This section eliminates most consecutive sentences except with respect to misdemeanors and violations, in which case consecutive sentences may be imposed up to an aggregate limit of six months. Consecutive sentences work against the flexibility which is normally desirable in determining how long an offender serves, and they are justified only in special narrow instances such as those provided for in section 70.17. As a substitute for the use of consecutive sentences, the Code authorizes the court to impose extended sentences upon certain multiple offenders and minimum terms of ineligibility for parole where the grade of felony is of Class A, B or C. The relatively long maximum term of the indeterminate sentence also, in most cases, permits multiple offenders to be held as long or longer than they would at present if they received several consecutive determinate sentences of relatively shorter duration. However, long aggregate sentences of forty, fifty and sometimes one hundred years or more will no longer be possible. The Board of Parole is encouraged to adopt a more flexible approach to the timing of release, thereby encouraging efforts by offenders at self-improvement, which consecutive sentences could make seem to be futile.

The overall effect of the various Code provisions should be to ensure that the court will have authority to impose an ample maximum sentence

on any type of multiple offender—i.e., five or seven years for a double and ten to twelve years for a triple Class E or D felon; ten years for a double and fifteen years for a triple Class C felon; fifteen years for a double and twenty years for a triple Class B felon; and thirty years for a repetitive violent felony offender. At the same time, the new system should focus the court's attention more directly on society's interest in correcting the offender and discourage purely retributive sentencing formulae based upon the number of convictions. Conviction on several counts of an indictment may or may not have much sentencing significance. Many offenders commit multiple offenses before they are caught, but whether or not they become multiply convicted is usually a matter almost of pure accident, depending upon factors unrelated to criteria for intelligent sentencing, such as the number of charges recorded by the arresting policeman, the convenience to the prosecutor of proving separate counts of the indictment and the bargaining skill of the defense attorney. Even where conviction on several counts is readily obtainable and the charges are relatively serious, whether or not a long sentence should be served may not be apparent at the time of sentence. Thus, the boy who has been caught for the first time after committing five burglaries with his gang and is convicted of each is simultaneously a candidate for early release and for lengthy confinement. He is a candidate for early release because he is young and a first offender, but for extended confinement because he has committed several serious offenses. The indeterminate sentence not only leaves the question of early release versus long confinement open until the offender's behavior in custody can be viewed, but also encourages rather than discourages his cooperation, and obviates the prolonged expensive maximum security custody required where a man lacks hope.

Perhaps the most difficult type of multiple offender which a sentencing code must deal with is the intractable perpetrator of relatively minor property offenses, such as the check writer who repeatedly cashes bogus checks for $25 or $50. The seriousness of the crimes these people commit does not seem to justify the expense and punishment of very long term incarceration. Under the present system, such criminals frequently receive probation upon condition that they make restitution to the particular victim who happens to have caught them or relatively short sentences of 90 days, 6 months, a year or perhaps 18 months. Sometimes an offender will be convicted ten or fifteen times under our

present system and never draw a long prison term. The proposed Code represents an improvement on the present system, because it would ultimately put such persons into the Division of Corrections for a substantial indeterminate term where they could be handled correctively rather than by a punishment term based upon the seriousness of the particular act for which they were convicted. Some of these people are uncorrectable by our present science, whichever sentencing system is used. However, in spite of the elimination of the consecutive sentence, the multiple property offender will probably wind up serving more time sooner when he receives the 0-5 and 0-7 year sentences authorized under the new Code than he does under the present system, where he is processed through the "revolving door" repeatedly with short determinate sentences.

Subsection 3 of this Section provides that persons under sentence in other jurisdictions may have their sentences here adjusted as though their criminal activity had been committed entirely within one state. From the standpoint of correction, the present system, whereby persons who commit crimes in more than one jurisdiction before they are caught usually receive a series of consecutive sentences is a nightmare. It becomes impossible to motivate these people to reform themselves in any jurisdiction except the last to confine them because they have no hope of being rewarded for their efforts. Instead, the purpose of imprisonment becomes completely retributive - i.e., each jurisdiction gets its "pound of flesh" before sending the man off to the next. This Section tries to minimize the senselessness of the present system.

70.30. CALCULATION OF TERMS OF IMPRISONMENT

1. INDETERMINATE SENTENCES. AN INDETERMINATE SENTENCE OF IMPRISONMENT COMMENCES WHEN THE PRISONER IS RECEIVED IN AN INSTITUTION UNDER THE JURISDICTION OF THE COMMISSIONER OF CORRECTION FOR CORRECTIONAL HANDLING. WHERE A PERSON IS UNDER MORE THAN ONE INDETERMINATE SENTENCE TO BE SERVED CONCURRENTLY, THE TIME SERVED UNDER IMPRISONMENT ON ANY OF THE SENTENCES SHALL BE CREDITED AGAINST THE MINIMUM PERIODS OF ALL THE CONCURRENT SENTENCES AND THE MAXIMUM TERMS MERGE IN AND ARE SATISFIED BY DISCHARGE OF THE TERM WHICH HAS THE LONGEST UNEXPIRED TIME TO RUN.

2. DEFINITE SENTENCES. A DEFINITE SENTENCE OF IMPRISONMENT COMMENCES WHEN THE PRISONER IS RECEIVED IN THE INSTITUTION NAMED IN THE COMMITMENT. WHERE A PERSON IS UNDER MORE THAN ONE DEFINITE SENTENCE, THE SENTENCES

SHALL BE CALCULATED AS FOLLOWS:

(A) IF THE SENTENCES RUN CONCURRENTLY AND ARE TO BE SERVED IN A SINGLE INSTITUTION, THE TERMS MERGE IN AND ARE SATISFIED BY DISCHARGE OF THE TERM WHICH HAS THE LONGEST UNEXPIRED TIME TO RUN;

(B) IF THE SENTENCES RUN CONSECUTIVELY, THE TERMS ARE ADDED TO ARRIVE AT AN AGGREGATE TERM AND ARE SATISFIED BY DISCHARGE OF SUCH AGGREGATE TERM.

3. JAIL TIME. THE TERM OF A DEFINITE SENTENCE OR THE MAXIMUM TERM OF AN INDETERMINATE SENTENCE, OTHER THAN A SENTENCE OF LIFE IMPRISONMENT, IMPOSED ON A PERSON SHALL BE CREDITED WITH AND DIMINISHED BY THE AMOUNT OF TIME THE PERSON SPENT IN CUSTODY PRIOR TO THE COMMENCEMENT OF SUCH SENTENCE AS A RESULT OF THE CHARGE THAT CULMINATED IN THE SENTENCE, INCLUDING THE AMOUNT OF TIME, IF ANY, SPENT IN TOTAL INCARCERATION IN A DIAGNOSTIC FACILITY WHILE UNDERGOING PRESENTENCE INVESTIGATION AND IN THE DISCRETION OF THE SENTENCING COURT FOR TIME SPENT IN CUSTODY FOR ANOTHER OFFENSE. IN THE CASE OF AN INDETERMINATE SENTENCE, IF THE MINIMUM PERIOD OF IMPRISONMENT HAS BEEN FIXED BY THE COURT, THE CREDIT SHALL ALSO BE APPLIED AGAINST SUCH PORTION OF THE MINIMUM PERIOD AS EXCEEDS ONE YEAR. THE CREDIT HEREIN PROVIDED SHALL BE CALCULATED FROM THE DATE OF CUSTODY UNDER THE CHARGE COMMENCED FOR THE DURATION OF SUCH CUSTODY TO THE DATE THE SENTENCE COMMENCES AND SHALL NOT INCLUDE ANY TIME THAT IS CREDITED AGAINST THE TERM OR MAXIMUM TERM OF ANY PREVIOUSLY IMPOSED SENTENCE TO WHICH THE PERSON IS SUBJECT.

IN ANY CASE WHERE A PERSON HAS BEEN IN CUSTODY DUE TO A CHARGE THAT CULMINATED IN A DISMISSAL OR ACQUITTAL, THE AMOUNT OF TIME THAT WOULD HAVE BEEN CREDITED AGAINST A SENTENCE FOR SUCH CHARGE HAD ONE BEEN IMPOSED, SHALL BE CREDITED AGAINST ANY SENTENCE THAT IS BASED ON A CHARGE FOR WHICH A WARRANT OR COMMITMENT WAS LODGED DURING THE PENDANCE OF SUCH CUSTODY.

4. GOOD BEHAVIOR AND INDUSTRIAL CREDITS. EXCEPT IN THE CASE OF A PRISONER SENTENCED TO AN INDETERMINATE SENTENCE WITH A MAXIMUM TERM OF LIFE IMPRISONMENT, TIME ALLOWANCES EARNED FOR GOOD BEHAVIOR AND/OR INDUSTRIAL CREDITS SHALL BE COMPUTED AND APPLIED AS FOLLOWS:

(A) EACH PRISONER IN A PRISON, JAIL, ROAD CAMP, REGIONAL DETENTION CENTER OR OTHER CORRECTIONAL INSTITUTION OF THIS STATE IS ENTITLED TO A DIMINUTION OF THE PERIOD OF HIS CONFINEMENT UNDER THE FOLLOWING RULES AND REGULATIONS:

(I) FOR EACH CALENDAR MONTH COMMENCING ON THE FIRST DAY OF THE MONTH NEXT AFTER HIS ARRIVAL AT

THE INSTITUTION, DURING WHICH HE IS NOT GUILTY OF A VIOLATION OF THE DISCIPLINE OR ANY OF THE RULES THEREOF AND LABORS WITH DILIGENCE AND FIDELITY, HE SHALL BE ALLOWED A DEDUCTION OF FIVE DAYS FROM EACH MONTH OF THE COMMITMENT OR SENTENCE AS DEFINED IN SUBDIVISION (B) OF THIS SUBSECTION.

(II) FOR EACH CALENDAR MONTH COMMENCING ON THE FIRST DAY OF THE MONTH NEXT AFTER HIS ARRIVAL AT THE INSTITUTION, DURING WHICH UNDER SUCH REGULATIONS AS SHALL BE ESTABLISHED BY THE COMMISSIONER OF CORRECTION, SHERIFF, WARDEN OR OTHER PERSON HAVING HIS CUSTODY, HE IS DEEMED TO HAVE MANIFESTED SATISFACTORY INDUSTRY, APPLICATION, AND SKILL IN THE PERFORMANCE OF INDUSTRIAL, AGRICULTURAL, OR ADMINISTRATIVE TASKS ASSIGNED TO HIM OR TO HAVE MANIFESTED SATISFACTORY INDUSTRY, APPLICATION AND PROGRESS IN VOCATIONAL AND/OR OTHER EDUCATIONAL AND TRAINING COURSES ASSIGNED TO HIM, HE MAY BE ALLOWED AN ADDITIONAL DEDUCTION OF FIVE MORE DAYS FROM EACH MONTH OF THE PERIOD OF HIS COMMITMENT OR SENTENCES AS DEFINED IN SUBDIVISION (B) OF THIS SUBSECTION.

(III) FOR EACH CALENDAR MONTH OR FRACTION THEREOF COMMENCING ON THE FIRST DAY OF ASSIGNMENT, DURING WHICH, UNDER SUCH RULES AND REGULATIONS AS SHALL BE ESTABLISHED BY THE COMMISSIONER OF CORRECTION, HE IS DEEMED TO HAVE MANIFESTED SATISFACTORY INDUSTRY, APPLICATION, AND PROGRESS IN SUCH SPECIAL SELECTED WORK PROJECTS, OR OTHER SPECIAL PROGRAMS, DESIGNATED BY THE COMMISSIONER OF CORRECTION AND APPROVED BY THE SECRETARY OF THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, ASSIGNED TO HIM, HE MAY BE ALLOWED AN ADDITIONAL DEDUCTION OF DAYS, NOT EXCEEDING FIVE (5) IN NUMBER, FOR EACH MONTH OF THE PERIOD OF HIS COMMITMENT OR SENTENCE.

(IV) FOR EACH AND EVERY VIOLATION OF THE RULES AND DISCIPLINE OF THE INSTITUTION, OR WANT OF FIDELITY OR CARE IN THE PERFORMANCE OF WORK OR LACK OF INDUSTRY, APPLICATION, OR PROGRESS IN VOCATIONAL OR EDUCATIONAL TRAINING, THE PERSON HEREIN CONFINED SHALL NOT ONLY FORFEIT ALL GAINED TIME IN THE MONTH IN WHICH SUCH DELINQUENCY OCCURS, BUT ACCORDING TO THE AGGRAVATED NATURE OR FREQUENCY OF HIS OFFENSE, THE COMMISSIONER OF CORRECTION, SHERIFF, WARDEN OR OTHER PERSON HAVING HIS CUSTODY MAY DEDUCT A PORTION OR ALL OF HIS GAINED TIME FOR GOOD CONDUCT UNDER SUBDIVISION (A)(I) OR SUBDIVISION (A)(III) OF THIS SUBSECTION, BUT THE DEDUCTION EARNED AND ALLOWED UNDER SUBDIVISION (A)(II) OF THIS SUBSECTION SHALL NOT BE AFFECTED THEREBY.

(V) AN INMATE ENTITLED TO A DIMINUTION OF THE PERIOD OF HIS OR HER CONFINEMENT UNDER THIS SECTION WHO IS TRANSFERRED TO A HOSPITAL OR MENTAL INSTITUTION MAY NOT BE DENIED CREDIT UNDER THIS SECTION.

(B) WHERE A SENTENCE IS DETERMINATE, GOOD CONDUCT AND INDUSTRIAL CREDITS SHALL BE DEDUCTED FROM THE DEFINITE TERM OF SUCH SENTENCE. WHERE A SENTENCE IS INDETERMINATE, THE MAXIMUM TERM OF SUCH SENTENCE SHALL BE DEEMED TO BE THE SENTENCE OR COMMITMENT FROM WHICH GOOD CONDUCT AND INDUSTRIAL CREDITS SHALL BE DEDUCTED.

5. TIME SERVED UNDER VACATED SENTENCE. WHEN A SENTENCE OF IMPRISONMENT THAT HAS BEEN IMPOSED ON A PERSON IS VACATED AND A NEW SENTENCE IS IMPOSED ON SUCH PERSON FOR THE SAME OFFENSE; OR FOR AN OFFENSE BASED UPON THE SAME ACT, THE NEW SENTENCE SHALL BE CALCULATED AS IF IT HAD COMMENCED AT THE TIME THE VACATED SENTENCE COMMENCED, AND ALL TIME CREDITED AGAINST THE VACATED SENTENCE SHALL BE CREDITED AGAINST THE NEW SENTENCE.

6. ESCAPE. WHEN A PERSON WHO IS SERVING A SENTENCE OF IMPRISONMENT ESCAPES FROM CUSTODY, THE ESCAPE SHALL INTERRUPT THE SENTENCE AND SUCH INTERRUPTION SHALL CONTINUE UNTIL THE RETURN OF THE PERSON TO THE INSTITUTION IN WHICH THE SENTENCE WAS BEING SERVED OR, IF THE SENTENCE WAS BEING SERVED IN AN INSTITUTION UNDER THE JURISDICTION OF THE STATE DIVISION OF CORRECTION, TO AN INSTITUTION UNDER THE JURISDICTION OF THAT DIVISION. ANY TIME SPENT BY SUCH PERSON IN CUSTODY FROM THE DATE OF ESCAPE TO THE DATE THE SENTENCE RESUMES SHALL BE CREDITED AGAINST THE TERM OR MAXIMUM TERM OF THE INTERRUPTED SENTENCE, PROVIDED:

(A) THAT SUCH CUSTODY WAS DUE TO AN ARREST OR SURRENDER BASED UPON THE ESCAPE; OR

(B) THAT SUCH CUSTODY AROSE FROM AN ARREST ON ANOTHER CHARGE WHICH CULMINATED IN A DISMISSAL OR AN ACQUITTAL, AND THE PERSON WAS DENIED ADMISSION TO BAIL PENDING DISPOSITION OF SUCH CHARGE DUE TO A WARRANT LODGED AGAINST HIM BECAUSE OF THE ESCAPE.

7. RELEASE DATE FALLING ON SUNDAY OR LEGAL HOLIDAY. WHEN THE DATE OF RELEASE FROM IMPRISONMENT IN AN INSTITUTION UNDER THE JURISDICTION OF THE COMMISSIONER OF CORRECTION FALLS ON A SUNDAY OR LEGAL HOLIDAY, THE PRISONER SHALL BE RELEASED ON THE NEXT PRECEDING DAY WHICH IS NOT A SUNDAY OR LEGAL HOLIDAY.

8. RECORDS. WHEN A PERSON WHO IS SERVING A SENTENCE OF IMPRISONMENT IS TRANSFERRED FROM ONE PLACE OF CUSTODY TO ANOTHER, HIS RECORDS OF ACCRUED CREDITS SHALL BE TRANSFERRED WITH HIM, AND THE DIMINUTION OF THE PERIOD OF CONFINEMENT TO WHICH HE IS ENTITLED SHALL NOT BE AFFECTED BY A TRANSFER.

COMMENT

This Section determines when sentences start to run, and how various credits, such as time served in jail before sentence, good behavior time and industrial time are to be subtracted from the sentence. Under the Section, subtractions of jail time are made from both the maximum and minimum terms and subtractions of good behavior time and industrial credits are made from the maximum terms. Existing formulae for calculating good behavior time and industrial time are continued unchanged. Subsection 6 of this Section provides that an escape shall interrupt the running of the sentence so that the defendant gets no credit for time spent as a fugitive. Subsections (7) and (8) are suggested by provisions of Article 27, sections 633A and 704A.

70.35. RELEASE ON PAROLE; CONDITIONAL RELEASE

1. INDETERMINATE SENTENCE.

(A) A PERSON WHO IS SERVING ONE OR MORE THAN ONE INDETERMINATE SENTENCE OF IMPRISONMENT MAY BE PAROLED FROM THE INSTITUTION IN WHICH HE IS CONFINED AT ANY TIME AFTER THE EXPIRATION OF THE MINIMUM PERIOD OR PERIODS OF IMPRISONMENT THAT HAVE BEEN FIXED. RELEASE ON PAROLE SHALL BE IN THE DISCRETION OF THE BOARD OF PAROLE, AND SUCH PERSON SHALL CONTINUE SERVICE OF HIS SENTENCE OR SENTENCES WHILE ON PAROLE.

(B) ANY PERSON SENTENCED AFTER JULY 1, 1970, TO THE JURISDICTION OF THE DIVISION OF CORRECTION AND HAVING SERVED HIS TERM OR TERMS, LESS THE DEDUCTIONS PROVIDED FOR IN PART 70, SECTION 70.30 OF THIS CODE, SHALL, UPON RELEASE, BE DEEMED AS IF RELEASED ON PAROLE UNTIL THE EXPIRATION OF THE MAXIMUM TERM OR TERMS FOR WHICH HE WAS SENTENCED. SAID RELEASED PRISONER SHALL BE SUBJECT TO ALL LAWS, RULES, REGULATIONS AND CONDITIONS APPLICABLE TO PAROLEES AND SHALL REMAIN UNDER THE SUPERVISION OF THE STATE DEPARTMENT OF PAROLE AND PROBATION UNTIL THE EXPIRATION OF THE MAXIMUM TERM OR TERMS FOR WHICH HE WAS SENTENCED.

THIS SECTION SHALL NOT PREVENT DELIVERY OF A PRISONER TO ANY STATE OR FEDERAL AUTHORITY OTHERWISE ENTITLED TO HIS CUSTODY.

PAROLE SHALL INTERRUPT SERVICE OF THE SENTENCE OR SENTENCES AND THE REMAINING PORTION OF THE MAXIMUM TERM SHALL BE HELD IN ABEYANCE. EVERY PERSON PAROLED MAY BE UNDER THE SUPERVISION OF THE BOARD OF PAROLE FOR A PERIOD EQUAL TO THE UNSERVED PORTION OF THE MAXIMUM OR AGGREGATE MAXIMUM TERM, OR FOR A PERIOD OF ONE YEAR, WHICHEVER IS LONGER, UNLESS THE BOARD OF PAROLE SHALL RELEASE SUCH PERSON FROM SUPERVISION. COMPLIANCE WITH THE CONDITIONS OF RELEASE DURING THE PERIOD OF SUPERVISION SHALL SATISFY

THE PORTION OF THE MAXIMUM TERM THAT HAS BEEN HELD IN ABEYANCE.

2. DEFINITE SENTENCE. AT ANY TIME AFTER A PERSON WHO IS SERVING ONE OR MORE THAN ONE DEFINITE SENTENCE OF IMPRISONMENT WITH A TERM OR AGGREGATE TERM IN EXCESS OF SIXTY DAYS HAS SERVED THIRTY DAYS OF SUCH TERM (EXCLUSIVE OF CREDITS ALLOWED UNDER SUBDIVISIONS THREE, FOUR AND SIX OF SECTION 70.30), HE MAY, UPON HIS REQUEST AND IN THE DISCRETION OF THE BOARD OF PAROLE, BE PAROLED FROM THE INSTITUTION IN WHICH HE IS CONFINED, UPON SUCH CONDITIONS AS MAY BE IMPOSED BY THAT BOARD.

CONDITIONAL RELEASE ON PAROLE SHALL INTERRUPT SERVICE OF THE SENTENCE OR SENTENCES AND THE REMAINING PORTION OF THE TERM OR AGGREGATE TERM SHALL BE HELD IN ABEYANCE. EVERY PERSON SO RELEASED SHALL BE UNDER THE SUPERVISION OF THE AUTHORIZED PAROLE AGENCY FOR A PERIOD WHICH SHALL BE AS FOLLOWS:

(A) ONE YEAR, IF AT THE TIME OF RELEASE THE UNSERVED PORTION OF THE TERM OR AGGREGATE TERM LESS ALL CREDITS ALLOWED UNDER SECTION 70.30 IS NOT IN EXCESS OF ONE HUNDRED AND TWENTY DAYS; AND

(B) TWO YEARS IN ANY OTHER CASE.

COMPLIANCE WITH THE CONDITIONS OF RELEASE DURING THE PERIOD OF SUPERVISION SHALL SATISFY THE PORTION OF THE TERM OR AGGREGATE TERM THAT HAS BEEN HELD IN ABEYANCE.

3. DELINQUENCY.

(A) WHEN A PERSON HAS VIOLATED THE TERMS OF HIS PAROLE AND THE BOARD OF PAROLE HAS DECLARED SUCH PERSON TO BE DELINQUENT, THE DECLARATION OF DELINQUENCY SHALL INTERRUPT THE PERSON'S SENTENCE AS OF THE DATE OF THE DELINQUENCY AND SUCH INTERRUPTION SHALL CONTINUE UNTIL THE RETURN OF THE PERSON TO AN INSTITUTION UNDER THE JURISDICTION OF THE DIVISION OF CORRECTION.

(B) WHEN A PERSON HAS VIOLATED THE TERMS OF HIS CONDITIONAL RELEASE AND HAS BEEN DECLARED DELINQUENT BY THE PAROLE AGENCY HAVING SUPERVISION OVER HIM, THE DECLARATION OF DELINQUENCY SHALL INTERRUPT THE PERIOD OF SUPERVISION AS OF THE DATE OF THE DELINQUENCY AND SUCH INTERRUPTION SHALL CONTINUE UNTIL THE RETURN OF THE PERSON TO THE INSTITUTION FROM WHICH HE WAS RELEASED OR, IF HE WAS RELEASED FROM AN INSTITUTION UNDER THE JURISDICTION OF THE DIVISION OF CORRECTION, TO THE CUSTODY OF THAT DIVISION. UPON SUCH RETURN, THE PERSON SHALL RESUME SERVICE OF HIS SENTENCE.

(C) ANY TIME SPENT BY A PERSON IN CUSTODY FROM THE TIME OF DELINQUENCY TO THE TIME SERVICE OF THE

SENTENCE RESUMES SHALL BE CREDITED AGAINST THE TERM OR MAXIMUM TERM OF THE INTERRUPTED SENTENCE, PROVIDED:

(I) THAT SUCH CUSTODY WAS DUE TO AN ARREST OR SURRENDER BASED UPON THE DELINQUNECY; OR

(II) THAT SUCH CUSTODY AROSE FROM AN ARREST ON ANOTHER CHARGE, WHICH CULMINATED IN A DISMISSAL OR AN ACQUITTAL, AND THE PERSON WAS DENIED ADMISSION TO BAIL PENDING DISPOSITION OF SUCH CHARGE DUE TO A WARRANT LODGED AGAINST HIM BECAUSE OF SUCH DELINQUENCY.

COMMENT

This Section provides that the Board of Parole shall have complete discretion after the expiration of a minimum sentence to release a man at any time. Subsection 1(b) provides that a man released before the expiration of his maximum term or terms due to reduction of such term by good behavior time or industrial credits shall be deemed as if released on parole until the expiration of such maximum term or terms. Such provision continues existing law but adapts it to the indeterminate sentence system. The Section speaks in terms of the possibility of more than one indeterminate term of imprisonment even though consecutive sentences are abolished, because it is possible that a person may receive concurrent sentences starting at different times. Subsection 2 of this Section permits the Board of Parole to conditionally release jail prisoners after they have served 30 days if their original sentences to jail aggregate more than 60 days. Here, as with the case of the felon, the prisoner's request for parole justifies a parole supervision period in excess of his original sentence.

Subsection 3 of the Section states that a declaration by the Board of Parole that a parole violator is delinquent shall interrupt his sentence until he is returned to the institution. This prevents a parole violator from receiving credit against his sentence for time spent outside the correctional system pending a determination by the Board of Parole of his parole violation. Parole violators are returned to resume service of their sentences, as at present. However, subsection 3 provides for a credit against the sentence of time spent in custody while awaiting determination of a parole violation unless such custody is applicable to the placement of another charge against the man.

PART 75: FINES

INTRODUCTION

This Part governs all sentences to pay fines under the new Code.

75.00. FINES GENERALLY

1. CRITERION FOR FINE. THE COURT MAY IMPOSE A FINE IN ADDITION TO A SENTENCE OF IMPRISONMENT OR OF PROBATION OR CONDITIONAL DISCHARGE. THE COURT SHALL NOT SENTENCE A DEFENDANT TO PAY A FINE UNLESS THE COURT IS SATISFIED THAT DEFENDANT IS OR WILL BE ABLE TO PAY THE FINE, AND THE FINE WILL NOT PREVENT THE DEFENDANT FROM MAKING RESTITUTION OR REPARATION TO THE VICTIM OR VICTIMS OF THE CRIME. IN DETERMINING THE AMOUNT AND METHOD OF PAYMENT OF A FINE THE COURT SHALL TAKE INTO ACCOUNT THE FINANCIAL RESOURCES OF THE DEFENDANT AND THE NATURE OF THE BURDEN THAT ITS PAYMENT WILL IMPOSE.

2. MODIFICATION OF FINES. A DEFENDANT WHO HAS BEEN SENTENCED TO PAY A FINE AND WHO IS NOT IN CONTUMACIOUS DEFAULT IN PAYMENT THEREOF MAY AT ANY TIME PETITION THE COURT THAT SENTENCED HIM FOR A REVOCATION OF THE FINE OR OF ANY UNPAID PORTION THEREOF. IF IT APPEARS TO THE SATISFACTION OF THE COURT THAT THE CIRCUMSTANCES WHICH WARRANTED THE IMPOSITION OF THE FINE HAVE CHANGED, OR THAT IT WOULD OTHERWISE BE UNJUST TO REQUIRE PAYMENT, THE COURT MAY REVOKE THE FINE OR THE UNPAID PORTION THEREOF IN WHOLE OR IN PART, OR MODIFY THE METHOD OF PAYMENT.

COMMENT

This Section authorizes a court to impose a fine in connection with sentences of imprisonment, probation or conditional discharge but not unconditional discharge. Payment of the fine will always be a condition of discharge, even though Article 38, Sections one and four of the Maryland Code do not require the judge to imprison all defendants who fail to pay their fines.

The purposes of fine punishments are to some extent implied in the provisions of this Section. They are: (1) to correct the defendant by "stinging him in his pocketbook" and thus deterring him from repeating the crime, (2) to deprive him of the profits of his criminal activites where restitution is an inadequate remedy, (3) to deter others from committing similar crimes and (4) to avert private retribution by public retribution. The language of Subsection 1 imposes a duty upon the judge to assure himself that the payment of the fine penalty to the state will not take precedence over or interfere with the return of ill gotten gains to the victim.

Obviously, in order to decide what fine is appropriate, the judge should take into account the ability of the defendant to pay. Judges intent on dispensing equal justice will not wish to punish relatively wealthy and relatively poor men with equal fines. Similiarly, a conscientious judge will not wish to impose so onerous a fine upon a relatively poor individual as to insure that he will not be able to pay the fine, deprive innocent members of his family of basic needs or impede or discourage the defendant's adjustment to constructive citizenship. Subsection 2 of the Section recognizes that the circumstances which the conscientious judge will take into account in imposing a fine may change after the fine has been imposed. The judge is permitted to revoke the fine, reduce it by revoking the unpaid portion of the fine in whole or in part or to modify the terms for payment of the fine.

75.05. FINE FOR A FELONY

1. AMOUNT OF FINE. A SENTENCE TO PAY A FINE FOR A FELONY SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT EXCEEDING THE FOLLOWING AMOUNTS:

(A) FOR A CLASS A, B OR C FELONY, $10,000.

(B) FOR A CLASS D OR E FELONY, $5,000.

2. EXTENDED FINE WHERE DEFENDANT'S GAIN FROM COMMISSION OF THE CRIME IS KNOWN. A SENTENCE TO PAY A FINE FOR A FELONY MAY BE FIXED BY THE COURT IN AN AMOUNT EXCEEDING THE AMOUNTS SET FORTH IN SUBSECTION ONE OF THIS SECTION, NOT EXCEEDING DOUBLE THE AMOUNT OF THE DEFENDANT'S GAIN FROM THE COMMISSION OF THE CRIME, WHERE SUCH GAIN HAS BEEN PROVED TO THE SATISFACTION OF THE COURT OR ADMITTED BY THE DEFENDANT. AS USED IN THIS SECTION, THE TERM, "GAIN" MEANS THE AMOUNT OF MONEY OR THE VALUE OF PROPERTY DERIVED FROM THE COMMISSION OF THE CRIME, LESS THE AMOUNT OF MONEY OR THE VALUE OF PROPERTY RETURNED TO THE VICTIM OF THE CRIME OR SEIZED BY OR SURRENDERED TO LAWFUL AUTHORITIES PRIOR TO THE TIME SENTENCE IS IMPOSED.

WHEN THE COURT IMPOSES A FINE, THE COURT MAY CONDUCT A HEARING UPON THE ISSUE OF THE AMOUNT OF THE DEFENDANT'S GAIN FROM THE CRIME IF THE RECORD DOES NOT CONTAIN SUFFICIENT EVIDENCE TO SUPPORT A FINDING UPON SUCH ISSUE.

3. EXCEPTION. THE PROVISIONS OF THIS SECTION SHALL NOT APPLY WHERE A PUNISHMENT OF FINE IS EXPRESSLY PROVIDED IN A STATUTORY PROVISON PENALIZING A FELONY OR A CORPORATION.

COMMENT

This Section sets forth the maximum amount which a judge can impose for a single felony count. The maximum amount is $10,000 for a class A, B or C felony and $5,000 for a class D or E felony.

Subsection 2 permits a larger-than-maximum fine, not exceeding double the defendant's gain from the crime, where such gain has been proved or admitted. The New York Code limits fines for felonies to crimes against property and provides this as the measure for the fine in every case. However, in the usual case it will probably be difficult to prove the exact amount of the defendant's gain from the commission of the crime, and unnecessary litigation to determine such gain should be avoided. This Section allows the judge to employ the double-the-gain measure where it is known or can readily be ascertained, but does not require him to expend a lot of time and effort seeking to determine the amount of the defendant's gain where such an inquiry would be unfeasible.

Subsection 3 excepts the provisions of the Section from two situations covered elsewhere - i.e., the use of fines for corporations set forth in Section 75.15 and any other statutory provision expressly providing for a fine punishment for a particular felony.

75.10. FINES FOR MISDEMEANORS AND VIOLATION

1. CLASS A MISDEMEANOR. A SENTENCE TO PAY A FINE FOR A CLASS A MISDEMEANOR SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT EXCEEDING ONE THOUSAND DOLLARS.

2. CLASS B MISDEMEANOR. A SENTENCE TO PAY A FINE FOR A CLASS B MISDEMEANOR SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT EXCEEDING FIVE HUNDRED DOLLARS.

3. UNCLASSIFIED MISDEMEANOR. A SENTENCE TO PAY A FINE FOR AN UNCLASSIFIED MISDEMEANOR SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, IN ACCORDANCE WITH THE PROVISIONS OF THE LAW OR ORDINANCE THAT DEFINES THE CRIME, OR IF NO AMOUNT IS PROVIDED BY SUCH LAW OR ORDINANCE, THEN AN AMOUNT NOT EXCEEDING ONE THOUSAND DOLLARS.

4. VIOLATION. A SENTENCE TO PAY A FINE FOR A VIOLATION SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT EXCEEDING TWO HUNDRED FIFTY DOLLARS.

IN THE CASE OF A VIOLATION DEFINED OUTSIDE THIS CODE, IF THE AMOUNT OF THE FINE IS EXPRESSLY SPECIFIED IN THE LAW OR ORDINANCE THAT DEFINES THE OFFENSE, THE AMOUNT OF THE FINE SHALL BE FIXED IN ACCORDANCE WITH THAT LAW OR ORDINANCE.

5. ALTERNATIVE SENTENCE. IF A PERSON HAS GAINED MONEY OR PROPERTY THROUGH THE COMMISSION OF ANY MISDEMEANOR OR VIOLATION, THEN UPON CONVICTION THEREOF, THE COURT, IN LIEU OF IMPOSING THE FINE AUTHORIZED FOR THE OFFENSE UNDER ONE OF THE ABOVE SUBDIVISIONS, MAY SENTENCE THE DEFENDANT TO PAY AN AMOUNT, FIXED BY THE COURT, NOT EXCEEDING DOUBLE THE AMOUNT OF THE DEFENDANT'S GAIN FROM THE COMMISSION OF THE OFFENSE. IN SUCH EVENT THE PROVISIONS OF SUBDIVISION TWO OF SECTION 75.05 SHALL DETERMINE THE MEANING AND METHOD OF DETERMINING THE DEFENDANT'S GAIN.

6. THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO A CORPORATION.

COMMENT

It is envisioned that the greatest use of fines will be with respect to minor crimes, where the alternatives of imprisonment and probation supervision will often be unnecessary and expensive to the State. The Section provides maximum fines as follows: $1,000 for a class A misdemeanor; $500 for a class B misdemeanor; and $250 for a violation. That these amounts are to some extent higher than present amounts provided by law for similar offenses reflects inflation. In the case of violations and unclassified misdemeanors defined outside this Code, the amount of the fine shall be as expressly specified in the law or ordinance defining the offense, whenever such specification occurs.

Subsection 5 permits double-the-gain fining in cases where the amount is known, incorporating the provisions of Section 75.05(2) for the purpose of permitting the judge to conduct a hearing to determine the amount of gain.

75.15 FINES FOR CORPORATIONS

1. IN GENERAL. A SENTENCE TO PAY A FINE, WHEN IMPOSED ON A CORPORATION FOR AN OFFENSE DEFINED IN THIS PART OR FOR AN OFFENSE DEFINED OUTSIDE THIS PART FOR WHICH NO SPECIAL CORPORATE FINE IS SPECIFIED, SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT EXCEEDING:

(A) THE AMOUNTS SET FORTH IN SUBSECTION 1 OF SECTION 75.05 FOR THE CLASS OF FELONY OF WHICH THE

CORPORATION STANDS CONVICTED IF THE CONVICTION IS OF A FELONY.

(B) FIVE THOUSAND DOLLARS, WHEN THE CONVICTION IS OF A CLASS A MISDEMEANOR OR OF AN UNCLASSIFIED MISDEMEANOR FOR WHICH A TERM OF IMPRISONMENT IN EXCESS OF THREE MONTHS IS AUTHORIZED;

(C) TWO THOUSAND DOLLARS, WHEN THE CONVICTION IS OF A CLASS B MISDEMEANOR OR OF AN UNCLASSIFIED MISDEMEANOR FOR WHICH THE AUTHORIZED TERM OF IMPRISONMENT IS NOT IN EXCESS OF THREE MONTHS;

(D) FIVE HUNDRED DOLLARS, WHEN THE CONVICTION IS OF A VIOLATION;

(E) ANY HIGHER AMOUNT NOT EXCEEDING DOUBLE THE AMOUNT OF THE CORPORATION'S GAIN FROM THE COMMISSION OF THE OFFENSE IF SUCH GAIN IS KNOWN. IN SUCH EVENT THE PROVISION OF SUBDIVISION TWO OF SECTION 75.05 SHALL DETERMINE THE MEANING AND METHOD OF DETERMINING THE DEFENDANT'S GAIN.

2. EXCEPTION. IN THE CASE OF AN OFFENSE DEFINED OUTSIDE THIS CODE IF A SPECIAL FINE FOR A CORPORATION IS EXPRESSLY SPECIFIED IN THE LAW OR ORDINANCE THAT DEFINES THE OFFENSE, THE FINE FIXED BY THE COURT SHALL BE AS FOLLOWS:

(A) AN AMOUNT WITHIN THE LIMITS SPECIFIED IN THE LAW OR ORDINANCE THAT DEFINES THE OFFENSE; OR

(B) ANY HIGHER AMOUNT NOT EXCEEDING DOUBLE THE AMOUNT OF THE CORPORATION'S GAIN FROM THE COMMISSION OF THE OFFENSE IF SUCH GAIN IS KNOWN.

3. DETERMINATION OF AMOUNT OR VALUE. WHEN THE COURT IMPOSES THE FINE AUTHORIZED BY PARAGRAPH (E) OF SUBDIVISION ONE OR PARAGRAPH (B) OF SUBDIVISION TWO FOR ANY OFFENSE THE PROVISIONS OF SUBSECTION TWO OF SECTION 75.05 SHALL GOVERN THE MEANING AND METHOD OF DETERMINING THE DEFENDANT'S GAIN.

4. CORPORATION DEFINED. A "CORPORATION" AS MEANT BY THIS SECTION, SHALL INCLUDE ANY ASSOCIATION WHICH IS TAXABLE AS A CORPORATION.

COMMENT

Corporations cannot be imprisoned. Therefore, the fine is the only effective criminal penalty which can be imposed when a corporation commits a crime. (Of course, license revocation may be and often is a more effective sanction, but it exists outside the Criminal Code.) This Section has the

effect of providing higher fine amounts for corporations convicted of misdemeanors and violations than could be imposed upon an individual. The amounts for a felony are the same as for individuals because it is assumed that the amounts for individuals are relatively high.

The double-the-gain measure of fines is applied to corporations for the reasons set forth in the commentary to Section 75.05.

Subsection 4 indicates that this Section would apply to a common law trust or other association which was, in effect, essentially the same as a corporation. A partnership would not be included because the partners would be individually liable as co-conspirators for the crimes of the partnership.

75.20. MULTIPLE OFFENSES

WHERE A PERSON IS CONVICTED OF TWO OR MORE OFFENSES COMMITTED THROUGH A SINGLE ACT OR OMISSION, OR THROUGH AN ACT OR OMISSION WHICH IN ITSELF CONSTITUTED ONE OF THE OFFENSES AND ALSO WAS A MATERIAL ELEMENT OF THE OTHER, AND THE COURT IMPOSES A SENTENCE OF IMPRISONMENT OR A FINE OR BOTH FOR ONE OF THE OFFENSES, A FINE SHALL NOT BE IMPOSED FOR THE OTHER.

COMMENT

This Section prevents double fine punishment for what is essentially a single criminal transaction.

PART 80: APPELLATE REVIEW OF SENTENCES

INTRODUCTION

General. This Part substitutes appellate review of sentences for the present §§132-138 of Article 26 of the Annotated Code, enacted by ch. 288 of the Acts of 1966, under which review of sentences is by a panel of trial judges of the judicial circuit in which the conviction occurred.

Recent developments have contributed substantially to the Commission's recommendation of this change. For one thing, as a practical matter, relatively little use has actually been made of the present provisions. For another, the establishment of the Court of Special Appeals under a constitutional amendment approved at the November 1966 election, has made appellate review of sentences practicable (as it previously was not, because of the heavy workload of the Court of

Appeals). A more important factor is that the newly established Court, even in its brief history thus far, has developed and demonstrated a high degree of competence and expertise in other fields of the criminal law. Sentencing itself is, of course, an important part of the criminal law, and no reason is apparent for supposing that the Court of Special Appeals will fail to display equal ability in this phase of criminal law, if given jurisdiction. Accordingly, in the view of the Commission, the balance of considerations in this State is now clearly in favor of appellate review of sentences because not only will there continue to be expertise in sentencing, but there will also be these advantages over the present system: (1) that review of conviction and sentence in a given case can be had in a single proceeding and before one tribunal instead of in two proceedings before separate reviewing bodies; and (2) that the vesting of jurisdiction over the vast majority of criminal appeals in one court of statewide jurisdiction will tend to promote uniformity of sentencing guides and standards throughout the State.

For essentially the reasons above stated, this particular change in the reviewing court has the approval of the Honorable Frank A. Kaufman, who was Chairman of the Commission which drafted our present law, even though he is still of the opinion that, under most circumstances, sentence review by trial judges is preferable to sentence review by appellate judges. It is also in accord with the recommendation of Standards Relating to Appellate Review of Sentences recently promulgated by the American Bar Association.

The proposed system allows only one appellate review of sentences; no review by the Court of Appeals, either by way of appeal of certiorari, of a decision on sentence by the Court of Special Appeals is authorized.

As in the present law, the right to seek review of sentences is not unlimited, though the limitations under this Code differ somewhat from those now existing. See §80.05 and comment thereon.

Under §80.20-2, a sentence may not be increased on or as a result of appeal. This is in accord with a number of statutes and the American Bar Association's recommendations. The Commission understands that such a limitation has not produced a flood of baseless appeals elsewhere.

80.00 APPELLATE JURISDICTION TO REVIEW SENTENCES

IN ACCORDANCE WITH AND SUBJECT TO THE PROVISIONS, LIMITATIONS AND CONDITIONS SET FORTH IN THIS PART, THE COURT OF APPEALS AND THE COURT OF SPECIAL APPEALS, RESPECTIVELY, SHALL HAVE JURISDICTION IN ANY CASE IN WHICH APPELLATE REVIEW OF A CONVICTION BY A TRIAL COURT MAY BE HAD INITIALLY IN SUCH COURT (WHICHEVER MAY HAVE SUCH JURISDICTION IN ANY PARTICULAR CASE BEING REFERRED TO IN THIS PART AS THE "APPELLATE COURT"), TO REVIEW SENTENCES ALLEGED TO BE:

(A) UNLAWFUL UNDER THE CONSTITUTION OR LAWS OF THIS STATE OR OF THE UNITED STATES, OR

(B) UNDULY HARSH OR SEVERE IN ANY CASE DESCRIBED IN SECTION 80.05.

COMMENT

§80.00 states the general jurisdiction of the Court of Appeals and of the Court of Special Appeals, respectively, whichever of them may have initial jurisdiction over an appeal from conviction (the term "appellate court" as used in this Part meaning either of them, as may be appropriate in a given case), subject to the provisions, limitations and conditions elsewhere set forth in this Part, to review sentences alleged to be (a) unlawful under the Constitution or laws of Maryland or of the United States or (b) unduly harsh or severe in any case described in §80.05.

80.05. REVIEW OF SENTENCES ALLEGED TO BE UNDULY HARSH OR SEVERE

THE APPELLATE COURT SHALL HAVE JURISDICTION TO REVIEW A SENTENCE, AND A DEFENDANT MAY SEEK APPELLATE REVIEW OF A SENTENCE, ALLEGED TO BE UNDULY HARSH OR SEVERE UNDER THE CIRCUMSTANCES OF THE CASE AND IN LIGHT OF THE EVIDENCE AT THE TRIAL AND OF ANY FURTHER EVIDENCE OR REPORTS CONSIDERED BY THE TRIAL COURT IN CONNECTION WITH THE IMPOSITION OF SENTENCE IN ANY CASE IN WHICH THE SENTENCE IMPOSED

(A) IS A SENTENCE OF IMPRISONMENT FOR LIFE; OR

(B) IS FOR A MINIMUM TERM OF IMPRISONMENT FOR NOT LESS THAN TWO YEARS; OR

(C) IS FOR A MAXIMUM TERM OF IMPRISONMENT OF NOT LESS THAN THREE YEARS (WHETHER OR NOT ANY MINIMUM TERM OF IMPRISONMENT IS IMPOSED).

COMMENT

§80.05 lists the cases in which an appeal from sentence is a matter of right. These differ somewhat from those in which review may be had under existing law largely to conform to the proposed new schedule of authorized sentences. Under paragraph (b) a minimum of at least two years' imprisonment is substituted for a sentence in excess of two years as under present law.

80.10. SENTENCES NOT APPEALABLE UNDER §80.05

NO APPEAL SHALL BE ALLOWABLE ON GROUNDS OF UNDUE HARSHNESS OR SEVERITY AS STATED IN SECTION 80.05 FROM A SENTENCE OF IMPRISONMENT WHICH IS EITHER THE ONLY SENTENCE OF IMPRISONMENT OR THE MINIMUM SENTENCE OF IMPRISONMENT WHICH THE TRIAL COURT WAS AUTHORIZED TO IMPOSE.

COMMENT

§80.10 bars an appeal from a sentence of imprisonment which is either the only sentence of imprisonment or the minimum sentence of imprisonment which could be imposed.

80.15. APPEAL FROM SENTENCE; TIME AND MANNER; GROUNDS TO BE SPECIFIED IN BRIEF; DISMISSAL FOR INSUFFICIENCY

1. A DEFENDANT MAY APPEAL FROM A SENTENCE IMPOSED UPON HIM EITHER BY A SEPARATE APPEAL OR IN CONJUNCTION WITH AN APPEAL FROM A JUDGMENT OF CONVICTION. IN EITHER EVENT, (I) THE ORDER FOR APPEAL SHALL SHOW THAT APPELLATE REVIEW OF THE SENTENCE IS SOUGHT, AND (II) THE APPEAL FROM SENTENCE SHALL BE TAKEN WITHIN THE TIME ALLOWED FOR APPEAL FROM A JUDGMENT OF CONVICTION.

2. WHEN A DEFENDANT APPEALS FROM A SENTENCE, WHETHER SEPARATELY OR IN CONJUNCTION WITH AN APPEAL FROM CONVICTION, THE GROUND OR GROUNDS OF HIS APPEAL FROM SENTENCE, INCLUDING HIS CONTENTIONS IN SUPPORT THEROF, SHALL BE DISTINCTLY STATED IN HIS BRIEF ON APPEAL, AND SUCH APPEAL SHALL BE SUBJECT TO DISMISSAL UNDER RULES PROMULGATED BY THE COURT OF APPEALS IF THE GROUNDS ALLEGED ARE PLAINLY INSUFFICIENT TO WARRANT REVERSAL OR MODIFICATION OF THE SENTENCE APPEALED FROM.

COMMENT

§80.15 states the time and manner of taking an appeal from sentence, and provides that such an appeal may be taken either in conjunction with or without an appeal from conviction. It further requires the grounds of an appeal from sentence to be distinctly stated in the appellant's brief on appeal and provides that if such grounds are plainly

insufficient to warrant reversal or modification of the sentence, such appeal shall be subject to dismissal under rules promulgated by the Court of Appeals.

80.20. POWER OF THE APPELLATE COURT TO AFFIRM OR ALTER SENTENCE

1. SUBJECT TO THE PROVISIONS OF SUBSECTION 2, THE APPELLATE COURT SHALL HAVE POWER TO TAKE ANY OF THE FOLLOWING ACTIONS WHICH IT MAY DEEM PROPER WITH REGARD TO A SENTENCE APPEALED FROM:

(A) TO AFFIRM, REVERSE OR STRIKE OUT THE SENTENCE; OR

(B) TO STRIKE OUT OR ALTER THE SENTENCE AND TO IMPOSE SUCH AUTHORIZED SENTENCE AS IT MAY DEEM JUST; OR

(C) TO STRIKE OUT THE SENTENCE AND REMAND THE CASE TO THE TRIAL COURT WITH INSTRUCTIONS TO IMPOSE SUCH AUTHORIZED SENTENCE AS THE APPELLATE COURT MAY DIRECT; OR

(D) TO REMAND THE CASE TO THE TRIAL COURT WITHOUT AFFIRMANCE OR ALTERATION OF THE SENTENCE WITH INSTRUCTIONS TO RECONSIDER THE SENTENCE IN THE LIGHT OF THE OPINION OF THE APPELLATE COURT AND OF FURTHER EVIDENCE OR REPORTS PERTAINING TO SENTENCE, OR OF ANY OF THEM, AND TO IMPOSE SUCH AUTHORIZED SENTENCE AS IT MAY THEN DEEM JUST.

2. NEITHER THE APPELLATE COURT NOT THE TRIAL COURT ON REMAND SHALL HAVE POWER TO INCREASE A SENTENCE APPEALED FROM.

3. A SENTENCE AS MODIFIED OR IMPOSED UNDER THIS SECTION (AS WELL AS A SENTENCE AFFIRMED) SHALL TAKE EFFECT FROM THE SAME DATE AS THE SENTENCE APPEALED FROM.

COMMENT

§80.20 states the actions which may be taken on or after an appeal from sentence. Unlike the present law, a sentence may not be increased by the reviewing court. Also, the trial court may not increase a sentence in the event of a remand for further consideration of the sentence. This section further specifies the effective date of a sentence appealed from.

80.25. FINAL JUDGMENT ON APPEALS FROM SENTENCE UNDER §80.05

IN ANY APPEAL FROM SENTENCE BASED UPON SECTION 80.05, THE JUDGMENT OF THE APPELLATE COURT SHALL BE FINAL AS TO MATTERS THEREBY DETERMINED; AND IF THE APPELLATE COURT IN SUCH A CASE IS THE COURT OF SPECIAL APPEALS, THERE SHALL BE NO REVIEW OF ITS JUDGMENT BY THE COURT OF APPEALS EITHER BY APPEAL OR UPON WRIT OF CERTIORARI.

COMMENT

§80.25 provides for the finality of the judgment of the appellate court on sentence as to matters thereby determined; and if the appellate court is the Court of Special Appeals, it bars further review thereof by the Court of Appeals.

80.30. EFFECT UPON POST CONVICTION PROCEDURE RELIEF OF REVIEW OR REVIEWABILITY OF SENTENCE

1. THE DECISION OF THE APPELLATE COURT UPON ANY ERROR IN SENTENCE ALLEGED UPON APPEAL SHALL CONSTITUTE FINAL LITIGATION AND DETERMINATION OF ANY SUCH ALLEGED ERROR AND SHALL CONSTITUTE A BAR TO RELIEF ON THAT GROUND UNDER THE POST CONVICTION PROCEDURE ACT.

2. THE ALLEGED HARSHNESS OR SEVERITY OF A SENTENCE WHICH WOULD BE SUBJECT TO APPELLATE REVIEW ONLY BY VIRTUE OF SECTION 80.00, GROUND (B), AND SECTION 80.05 SHALL NOT CONSTITUTE A GROUND FOR RELIEF UNDER THE POST CONVICTION PROCEDURE ACT, EVEN THOUGH APPELLATE REVIEW OF THE SENTENCE HAS NOT BEEN SOUGHT, OF IF SOUGHT, HAS BEEN ABANDONED.

3. ANY ALLEGED ERROR IN A SENTENCE SUBJECT TO APPELLATE REVIEW OF SECTION 80.00 ON THE GROUND OF ASSERTED ILLEGALITY (GROUND (A)), WHICH IS APPARENT UPON THE RECORD OF THE TRIAL, MAY BE RAISED BY APPEAL FROM SENTENCE; BUT IT SHALL NOT CONSTITUTE A GROUND FOR RELIEF UNDER THE POST CONVICTION PROCEDURE ACT UNLESS FAILURE TO APPEAL FROM THE SENTENCE UPON SUCH GROUND SHALL BE EXCUSED OR EXCUSABLE BECAUSE OF SPECIAL CIRCUMSTANCES, AS PROVIDED BY THE POST CONVICTION PROCEDURE ACT (PRESENTLY §645A OF ARTICLE 27 OF THE ANNOTATED CODE).

COMMENT

§80.30 deals with the effect of the review or reviewability of sentences upon proceedings under the Post Conviction Procedure Act.

It is intended to permit such issues with regard to sentences as are properly and readily determinable on appeal to be so presented and considered, and not to permit them to be deferred for use in a subsequent collateral attack or to be

used as a basis for relitigation. It is believed to promote the prompt and efficient administration of justice to insist, so far as may be fair and practicable, that questions of sentence be resolved at the first available opportunity. This general observation seems especially appropriate with regard to cases where the chief reason for attacking the conviction is really the actual or supposed severity of the sentence.

It is also thought to be desirable to spell out the provisions of this section, although, at least to a large extent, the same results might readily be reached under the terms of the present Post Conviction Procedure Act. Those provisions appear to have been drafted in the light of Fay v. Noia, 372 U.S. 391, on the question of waiver where the (apparently intentional) non-exercise of a known right of appeal was held not to be a bar to Federal habeas corpus relief to a State prisoner complaining of the admission in evidence of a confession which the State conceded to have been coerced and so obtained in violation of the defendant's Federal constitutional rights.

This section does not contain any reference to State habeas corpus proceedings. Presumably judgments on sentences would receive the same consideration there as would be accorded to judgments on other questions previously fully litigated. It does not refer to and is not intended to have any effect upon Rule 764a, under which a trial court has power to correct an illegal sentence at any time.

TITLE III - SPECIFIC OFFENSES

SUBTITLE G - ANTICIPATORY OFFENSES

PART 100: SOLICITATION

100.00 SOLICITATION TO COMMIT A CRIME

A PERSON IS GUILTY OF SOLICITATION TO COMMIT A CRIME WHEN, WITH INTENT THAT ANOTHER PERSON ENGAGE IN CONDUCT CONSTITUTING SUCH CRIME, HE URGES, REQUESTS, COMMANDS, OFFERS TO HIRE, OR OTHERWISE ENDEAVORS TO INDUCE SUCH OTHER PERSON TO ENGAGE IN SPECIFIC CONDUCT CONSTITUTING SUCH CRIME.

COMMENT

The general case for and against punishment for solicitation is set out in the comments to the

Model Penal Code:

"It has been argued on the one hand that the conduct of the solicitor is not dangerous since between it and the commission of the crime that is its object is the resisting will of an independent moral agent. By the same token, it is urged that the solicitor, manifesting his reluctance to commit the crime himself, is not a menace of significance. Against this is the view that a solicitation is, if anything, more dangerous than a direct attempt, since it may give rise to that cooperation among criminals that is a special hazard . . . Moreover, the solicitor, working his will through one or more agents, manifests an approach to crime more masterful and intelligent from the efforts of his hireling. Indeed, examples drawn from the controversial fields of political agitation and labor unrest suggest as a non-controversial lesson that the imposition of liability for criminal solicitation may be an important means by which the leadership of a movement deemed criminal may be suppressed" (MPC. Tent. Dr. #10, p. 82).

A critic of punishment for solicitation has stated the case against it in the following terms:

"The individual who, without success, exhorts another to commit a crime is socially dangerous only if he has the intent to continue his solicitation until a willing subject is found. Since there would seem to be no feasible way of distinguishing such individuals from those who would cease their efforts upon being met with one refusal, it is suggested that the crime of solicitation is incompatible with the end of apprehending these individuals who are socially dangerous. The present Illinois statute concerning accessories before the fact adequately deals with the situation where a crime is actually committed or attempted in response to a solicitation. Other provisions in the code dealing with disturbances to the public peace, riots, and unlawful assemblies serve further to make superfluous the common law crime of solicitation." Comment Proposed Revisions in the Illinois Criminal Code. 48 NW. U.L. Rev. 198, 211 (1953).

There is no Maryland Court of Appeals decision holding solicitation to be an offense in Maryland, though it is assumed to be a common-law crime in Maryland by Hochheimer, Criminal Law §266, and Maryland Self-Survey Commission, Report (1960), p. 244. In Lamb v. State, 67 Md. 524, 534, the court said "The law has declared that an attempt to commit a felony, or a persuasion of another person of

another person to commit a felony, is a misdemeanor * * * Acts of this description are well defined and their character well understood."

In Bittle v. State, 78 Md. 526, 528, the court stated that "it is settled law here that the bare act of solicitation to commit a misdemeanor is not in itself an indictable offense."

If the need is recognized as to serious felonies, a case can be made for an all-inclusive statute. "Unless legislative disapproval of specified behavior — strengthened by the imposition of criminal sanctions — can be considered 'trivial', there seems to be no justification for exempting any substantive offenses from the coverage of a general solicitation provision." MPC. Tent. Dr. #10, p. 84.

The views of the critics of a solicitation offense remain instructive, however, in pointing up the need for careful definition of its scope. It has been rightly observed of inchoate offenses generally that:

"Since in these offenses, it is the actor's intent, or more broadly, his state of mind, which is of primary concern, it is at once apparent that problems of individual liberty are involved here as perhaps nowhere else in the law of crimes. Freedom of action, and certainly in the case of conspiracy, freedom of speech and association may well be violated unless these forms of liability are properly delimited." Comment, 48 NW. U.L. Rev. at 199 (1953).

In considering solicitation, it should also be borne in mind that recent Supreme Court decisions relating to the First Amendment freedoms of speech, of the press and of assembly and the void-for-vagueness doctrine under the due process clause, severely limit the extent to which statutes drawn in general terms regulating speech can be sustained, at least in reference to political speech. Thus, great care must be taken in framing statutes impinging upon activities within this field to avoid overbreadth, which would render such statutes themselves invalid and would consequently invalidate the application of a general solicitation statute to solicitations to commit the acts sought to be proscribed by such other statutes.

Provisions undertaking to regulate excesses in the time, place and manner of speech or in the use of "direct action" techniques are codified in this

draft as or with provisions dealing with disorderly conduct or offenses against public order.

There seems to be little question as to the validity of solicitation statutes aimed at such common offenses as murder, robbery and assault.

For a fuller discussion of some of the problems just referred to, see the late Dr. Alexander Meiklejohn's article, "The First Amendment is an Absolute," Sup. Ct. Rev. 245, especially at p. 261 (1961) and Mr. Justice Brennan's article, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment." 79 Harv. L. Rev. 1, especially at pages 10, 13, 19 (1965).

Intent: The New York Code as enacted requires "intent that another person engage in conduct constituting a crime," "in order to assure that the crime does not encompass an insincere or facetious exhortation to crime, such as 'kill the umpire.'"

The Model Penal Code comments do not discuss the need for an intent requirement in the context of solicitation, but do discuss it in the context of conspiracy, where similar questions arise:

"The requirement of purpose would also play a crucial role in the case where a charge of conspiracy is based on membership in an organization having both lawful and criminal objectives * * * the defendant's membership may encourage and assist the organization in pursuing all its objects, legal and illegal. He would not be guilty of conspiracy, however, unless he had the purpose of promoting or facilitating the attainment of a criminal objective. Of course, knowledge of that objective and conscious assistance may justify an inference of such purpose, but they would not be independently sufficient to establish liability. . . ."

"This view accords with the opinion of the Supreme Court in the Dennis case, in recognizing that a purpose to effect the proscribed result is essential for conspiracy. * * * Judge Parker was explicitly of the opinion, that knowledge, as distinguished from purpose, sufficed for culpability both in conspiracy and in complicity, a point on which he differed from Judge Hand. (See Tent. Dr. #1, pp. 28–30). The Institute adopted Judge Hand's view as to complicity at the 1953 meeting. See Tent. Dr. #4, p. 21. The case for this position seems to us an even stronger one with respect to the inchoate crime." (Tent. Dr. #10, pp. 108–09).

The observations in respect to conspiracy would seem to apply equally to solicitation. The subsequent Supreme Court decision in Scales v. United States, 367 U.S. 203, where the court in a 5-4 decision sustained the membership clause of the Smith Act suggests that a requirement of purpose may be a constitutional requirement at least in political cases:

"We decline to attribute to Congress a purpose to punish nominal membership, even though accompanied by 'knowledge,' and 'intent,' not merely because of the close constitutional questions that such a purpose would raise, but also for * * * other reasons. (367 U.S. at 222).

"Whatever difficulties are thought to inhere in ascribing a course of criminal conduct to an abstract entity are certainly cured, so far as any particular defendant is concerned, by the requirement of proof that he knew that the organization engages in criminal advocacy and that it was his purpose to further that criminal advocacy." (367 U.S. at 226 n. 18).

It is thus concluded that a mens rea requirement should be included in the solicitation statute. The New York formulation which referes to "intent that another person engage in conduct constituting a crime" seems preferable to the Illinois formulation "with intent that an offense be committed" since it more plainly reaches solicitations of infants, insane persons, and others under disability.

Definition of 'solicit': The New York Code uses the formula "solicits, requests, commands, importunes, or otherwise attempts to cause." It omits "encourages," a word which may make the statute over-broad and applicable to uses where the criminal course of conduct has already been embarked upon by the solicitee; the effect of such a provision may really be to expand the facilitation statute. The New York statute is valuable in that it clearly covers non-verbal acts. The phrase "endeavors to induce," found in the Hawaiian Code, seems more precise than New York's "attempt to cause." The Hawaiian Code usefully spells out the applicability of the statute to the common "offering to hire" situation. The phrase 'importunes' in the New York statute adds little to 'requests.' Accordingly, the present draft uses a New York-Hawaiian hybrid, as follows:

"Solicits, requests, commands, offers to hire,

or otherwise endeavors to induce."

Requirement of specificity: The Model Penal Code states, with reference to its requirement of solicitation to engage in "specific" conduct:

"While solicitation of another to commit a crime apparently is not protected by the first amendment (Dennis v. U.S., 341 U.S. 494. Compare Yates v. U.S., 354 U.S. 298), it remains a legislative question whether the punishment of solicitations should be curtailed in order to protect free speech. It cannot be seriously contended that one who uses words as a means to crime, who intends that his words should cause a criminal result, makes a contribution to criminal discussion which is worthy of protection. The problem is not in guarding him, the problem is in preventing legitimate agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime. It would not be difficult to convince a jury that inflammatory rhetoric on behalf of an unpopular cause is in reality an invitation to violate the law rather than an effort to seek its change through legitimate criticism. * * * The present section makes an effort to protect legitimate agitation by reguiring that the criminal conduct allegedly solicited by the speaker must be 'specific'. It is of course unnecessary for the actor to go into great detail as to the manner in which the crime solicited is to be committed. But it is necessary under this formulation that, in the context of the knowledge and position of the intended recipient, the solicitation carry meaning in terms of some concrete course of conduct that it is the actor's object to incite. The requirement that the speaker solicit specific conduct goes beyond the analysis of the Supreme Court in Yates v. United States * * * where in interpreting the Smith Act the court held that to make out a violation there must be advocacy of action to accomplish the overthrow of the government by force and violence rather than advocacy of the abstract doctrine of violent overthrow — although at one point the Court did specify 'concrete action'. Under the present section there must be a solicitation of action and that action must be specific." (MPC Tent. Dr. #10, at 88-9).

The Commission has followed this approach, and relied upon the solicitation provisions to deal with illegitimate incitements, not protected by the First Amendment, rather than the approach of the New York Code, which uses a more loosely drawn solicitation provision supplemented by special provisions on

Criminal Anarchy. For the reasons suggested and elaborated elsewhere, it would seem best to deal with problems of 'political speech' via the general solicitation statute and via statutes regulating time, place and manner rather than via statutes aimed specifically at it. The current constitutional problems add force to the view that "If the normal law of any state is incomplete, a definite provision as to criminal attempt or solicitation will meet the need far more widely than the enactment of a vague and sweeping act against anarchy." (Chafee, Freedom of Speech in the United States (1941), 145 n. 3.) It follows from this that any safeguards for legitimate agitation which it is desired to insert should be inserted in the general solicitation statute if there is to be no 'political solicitation' statute to serve as a referent. It may be thought desirable to do something other than insert the word 'specific.' One might use the phrase 'concrete course of conduct' which the Model Penal Code commentators use in their explanatory text. The difficulty with overly refined formulations of this type is that they may fail to reach conduct which perhaps should be reached, as, for example, a speaker who exhorts a mob to "kill the police" or simply to "kill, kill, kill."

The Commission has thought a "dangerous proximity" standard inappropriate in a solicitation statute largely because of the difficulty of appraising proximity where the acts of other persons are to be set in motion. The solicitation must be to engage in conduct — that is, action, — and is not concerned with abstract advocacy. Cf. Yates v. United States, 354 U.S. 298, at 321–22.

It is thought that the inclusion in §100.00 of the requirement that the conduct solicited be of a type or types constituting the crime which is the object of the solicitation, affords safeguards against vagueness and impairment of legitimate agitation.

100.05. SOLICITATION; PUNISHMENT

A SOLICITATION TO COMMIT A CRIME IS A:

1. CLASS B FELONY WHEN THE CRIME SOLICITED IS A CLASS A FELONY;

2. CLASS C FELONY WHEN THE CRIME SOLICITED IS A CLASS B FELONY;

3. CLASS D FELONY WHEN THE CRIME SOLICITED IS A CLASS C FELONY;

4. CLASS E FELONY WHEN THE CRIME SOLICITED IS A CLASS D FELONY;

5. CLASS A MISDEMEANOR WHEN THE CRIME SOLICITED IS A CLASS E FELONY;

6. CLASS B MISDEMEANOR WHEN THE CRIME SOLICITED IS A CLASS A MISDEMEANOR;

7. VIOLATION WHEN THE CRIME SOLICITED IS A CLASS B MISDEMEANOR.

COMMENT

The penalties provided by the Commission are one grade less than the consummated offense, and are the same as the penalties for attempt. This approach may be contrasted with that of the Model Penal Code which would punish all inchoate crimes, including solicitation as heavily as the consummated offense on the theory that the presence of an intent to commit an offense is a convincing indicium of the dangerousness of the defendant and with the New York Code, which imposes penalties that are (roughly) one grade lower than the penalties for attempt and two grades lower than the penalties for the consummated offense. The present draft is in a sense a compromise between the New York and Model Penal Code approaches. The Commission in addition believed that since some, if not all, solicitations may be deemed 'substantial steps' rendering the solicitor punishable for attempt, it would be incongruous to have different allowable penalties for solicitation and attempt.

100.10. SOLICITATION; RENUNCIATION

IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE OF SOLICITATION THAT, UNDER CIRCUMSTANCES MANIFESTING A VOLUNTARY, COMPLETE, AND PERMANENT RENUNCIATION OF HIS CRIMINAL PURPOSE, NOT MOTIVATED BY INCREASED FEAR OF FAILURE, DETECTION, OR ARREST, THE DEFENDANT PREVENTED THE COMMISSION OF THE CRIME SOLICITED.

COMMENT

The renunciation provisions are codified together with the statutes defining the crimes rather than in a separate section, as in the New York Code (§35.45).

The words 'and permanent' are inserted, and the words 'not motivated by increased fear of failure, detection or arrest' are inserted, to limit the renunciation defense. It is believed that these

12 additional words secure the same result as the 82 words contained in §35.45(5) of the New York Code, which are dispensed with.

100.15. SOLICITATION; NO DEFENSE

IT IS NO DEFENSE TO A PROSECUTION FOR SOLICITATION THAT THE PERSON SOLICITED COULD NOT BE GUILTY OF THE CRIME SOLICITED OWING TO CRIMINAL IRRESPONSIBILITY OR OTHER LEGAL INCAPACITY OR EXEMPTION, OR TO UNAWARENESS OF THE CRIMINAL NATURE OF THE CONDUCT SOLICITED, OR OF THE DEFENDANTS' CRIMINAL PURPOSE, OR TO OTHER FACTORS PRECLUDING THE MENTAL STATE REQUIRED FOR THE COMMISSION OF THE CRIME IN QUESTION. IT IS NO DEFENSE THAT THE DEFENDANT FAILED TO COMMUNICATE WITH THE PERSON SOLICITED IF HIS CONDUCT WAS DESIGNED TO EFFECT SUCH COMMUNICATION.

COMMENT

It has been observed of the New York version of this section that:

"Under proposed Section 100.15, it is 'immaterial' that the person solicited was 'unaware of the criminal nature of the conduct solicited or of the defendant's purposes.' This provision properly recognizes that the guilt of the solicitor is independent of the state of mind of the person importuned. On the other hand, in specifying unawareness of only the criminal nature of the conduct and the purpose of the solicitor, the revisers may have inadvertently suggested that ignorance of other unmentioned facts could be relevant — as were communication of the defendant's solicitation is not completed and the person solicited remains unaware that he has been invited to commit a crime." (64 COLUM. L. REV. at 1514).

A sentence is added to the present draft to establish that failure of communication is not a defense, in accordance with the suggestion in Comment, 64 COLUM. L. REV. at 1514. The language used is drawn from the Model Penal Code provision (§5.02(2)) on uncommunicated solicitations.

100.20. SOLICITATION; EXCEPTION

UNLESS OTHERWISE PROVIDED BY THE CODE OR BY THE LAW DEFINING THE OFFENSE, A PERSON IS NOT GUILTY OF SOLICITATION IF THE OFFENSE IS SO DEFINED THAT HIS CONDUCT IS INEVITABLY INCIDENT TO ITS COMMISSION.

COMMENT

This provision is similar to §20.10, supra,

and is explained in the notes to that section.

PART 105: CONSPIRACY

105.00. CONSPIRACY TO COMMIT A CRIME

A PERSON IS GUILTY OF CONSPIRACY TO COMMIT A CRIME WHEN, WITH INTENT THAT CONDUCT CONSTITUTING A CRIME BE PERFORMED, HE AGREES WITH ONE OR MORE PRESONS TO ENGAGE IN OR CAUSE THE PERFORMANCE OF SUCH CONDUCT AND THE DEFENDANT OR ONE OF SUCH OTHER PERSONS COMMITS AN OVERT ACT IN FURTHERANCE OF THE CONSPIRACY WITHIN THE PERIOD OF THE STATUTE OF LIMITATIONS.

COMMENT

Present law: There is presently no general Maryland statute punishing the crime of conspiracy, which is a common law offense. Conspiracy may consist of an agreement to commit a crime, or to accomplish an unlawful purpose, or to do a lawful act by a criminal or unlawful means. Art. 27, Sec. 37 exempts from the common-law definition of conspiracy certain acts, not punishable as an offense if committed by one person, "done in contemplation or furtherance of a trade dispute between employers and workmen."

Maryland law contains also a number of more specific conspiracy provisions, including Art. 27, Sec. 539, relating to sabotage, and a conspiracy provision in the Ober Law, Art. 85A Sec. 2(c).

The Maryland case law on conspiracy contains a number of firmly established propositions. There is no overt act requirement, a position sharply at variance with the federal statute, which expressly requires "any act to effect the object of the conspiracy." See Garland v. State, 112 Md. 83; Lanasa v. State, 109 Md. 602; Hurwutz v. State, 200 Md. 578; Rome v. State, 202 Md. 481, cert. denied 346 U.S. 865; Piracci v. State, 207 Md. 499; Greenwald v. State, 221 Md. 245, appeal dismissed 363 U.S. 721; Cohen v. State, 235 Md. 62, cert. denied 379 U.S. 844.

Maryland law recognizes Wharton's Rule, holding that when by definition the intended substantive offense requires a plurality of actors, a conspiracy prosecution cannot be maintained if only the minimum number of parties logically necessary for the commission of the substantive offense agree to commit it. See Robinson v. State, 229 Md. 503; Seidman v. State, 230 Md. 305.

Maryland law imposes few, if any, bars to successive prosecutions. Acquittal for a specific crime does not bar subsequent conviction for a conspiracy to commit the crime, see Scarlett v. State, 201 Md. 310, a result not forbidden to the states under the 14th Amendment, see Hoag v. New Jersey, 356 U.S. 464 (1958).

Overt Act: The Model Penal Code position requiring an overt act is justified in the following terms: "The draft requires an overt act in the view, similar to that of the Yates decision, that it provides at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists . . ." The Model Penal Code framers note that under the federal decisions, while an act that is part of the formation of the conspiracy does not count as an overt act, any subsequent act such as attendance at a meeting or a telephone call are so counted. It is not easy to envisage a case in which an agreement which would warrant social punishment is unaccompanied either by an overt act or by acts of solicitation on the part of the principal conspirator. Under these circumstances and given the group organization aspect of conspiracy, it seems best not to depart from the New York treatment requiring an overt act.

Intent: One of the principal criticisms of the common law definition of conspiracy is that it does not require that the object of the conspiracy be a crime, and thus makes it impossible to discern the limits of the offense. The Commission has followed New York in correcting this defect. The comments to the New York Code state that the original draft was altered to more explicitly require "intent by the actor that the object crime be committed." (p. 270). This makes it plain that there must be both agreement (and presumably an intent to agree), and intent that a crime be committed. This, as a commentator observes "properly limits liability for inchoate criminal conduct (and) prevents unwarranted escalation of the degree of the offense charged." Comment, 64 COLUM. L. REV. at 1518.

Limitations: The passage ending with the words 'within the period of the statute of limitations' is added to make clear that the statute runs from the last overt act, and not from termination of the agreement. This changes the present Maryland law (see Adams v. State, 202 Md. 455, 459-70; Scarlett v. State, 201 Md. 310, 315-17) and brings it into conformity with the law under the federal conspiracy statute, see Grunewald v. United

States, 353 U.S. 391, 396-97).

105.05. CONSPIRACY; PUNISHMENT

1. A PERSON GUILTY OF CONSPIRACY COMMITS A:

A. CLASS B FELONY WHEN THE CRIMINAL OBJECT INTENDED BY HIM TO BE PERFORMED AS A RESULT OF SUCH CONSPIRACY IS OR INCLUDES A CLASS A FELONY.

B. CLASS C FELONY WHEN THE CRIMINAL OBJECT INTENDED BY HIM TO BE PERFORMED AS A RESULT OF SUCH CONSPIRACY IS OR INCLUDES A CLASS B FELONY.

C. CLASS D FELONY WHEN THE CRIMINAL OBJECT INTENDED BY HIM TO BE PERFORMED AS A RESULT OF SUCH CONSPIRACY IS OR INCLUDES A CLASS C FELONY.

D. CLASS E FELONY WHEN THE CRIMINAL OBJECT INTENDED BY HIM TO BE PERFORMED AS A RESULT OF SUCH CONSPIRACY IS OR INCLUDES A CLASS D FELONY.

E. CLASS A MISDEMEANOR WHEN THE CRIMINAL OBJECT INTENDED BY HIM TO BE PERFORMED AS A RESULT OF SUCH CONSPIRACY IS OR INCLUDES A CLASS E FELONY.

F. CLASS B MISDEMEANOR WHEN THE CRIMINAL OBJECT INTENDED BY HIM TO BE PERFORMED AS A RESULT OF SUCH CONSPIRACY IS OR INCLUDES A CLASS A MISDEMEANOR.

G. VIOLATION WHEN THE CRIMINAL OBJECT INTENDED BY HIM TO BE PERFORMED AS A RESULT OF SUCH CONSPIRACY IS OR INCLUDES A CLASS B MISDEMEANOR.

2. ONE WHO, IN A SINGLE AGREEMENT, CONSPIRES TO COMMIT MORE THAN ONE CRIME IS GUILTY OF AND SHALL BE PUNISHED FOR ONLY ONE CONSPIRACY.

COMMENT

The present Maryland law, like the Model Penal Code, allows punishment for conspiracy as severe as for the crime which is the object of the conspiracy. New York, on the other hand, punishes conspiracy less severely than attempt, which is itself punished one grade less severely than the offense which is the object. The argument for relatively mild punishment for conspiracy is that punishment is possible at a very early stage of the criminal plan, which might never have been carried out. The argument for severe punishment arises from the increased danger to the public from combinations of criminals, particularly in the area of organized crime. §245.20 dealing with "leading organized crime" imposes a special severe punishment for the

most dangerous combinations, and the Commission believes that punishment for other combinations at a level one grade below the punishment for the criminal object is adequate. This is the same as the punishment provided in this Draft for attempt, which is also punishable at an early stage in the development of the criminal project. Cf. §§110.00, 110.05, infra.

The view here adopted that a single agreement to commit several crimes is but a single conspiracy reflects the usual rule. Since under §105.20 it is possible for one to be guilty of a conspiracy when the object the defendant intends would constitute a different crime from the one intended as an object by another conspirator, it is necessary to grade the crime according to the object crime he intends rather than to grade in terms of "the" crime which is the object of the conspiracy.

105.10. CONSPIRACY; RENUNCIATION

IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE OF CRIMINAL CONSPIRACY THAT, UNDER CIRCUMSTANCES MANIFESTING A VOLUNTARY, COMPLETE, AND PERMANENT RENUNCIATION OF HIS CRIMINAL PURPOSE, NOT MOTIVED BY INCREASED FEAR OF FAILURE, DETECTION, OR ARREST, THE DEFENDANT PREVENTED THE CRIME CONTEMPLATED BY THE CONSPIRACY.

COMMENT

See the notes to sections 20.20, 100.10, and 110.15.

105.15. CONSPIRACY; VENUE

A PERSON MAY BE PROSECUTED FOR CONSPIRACY IN THE COUNTY IN WHICH HE ENTERED INTO SUCH CONSPIRACY OR IN ANY COUNTY IN WHICH AN OVERT ACT IN FURTHERANCE THEREOF WAS COMMITTED. THAT THE CONDUCT WHICH IS THE OBJECTIVE OF THE CONSPIRACY WOULD NOT CONSTITUTE A CRIME UNDER THE LAWS OF THE OTHER JURISDICTION IF PERFORMED THEREIN.

COMMENT

Venue problems in conspiracy prosecutions have chiefly arisen in connection with federal prosecutions, where existing law is said to give the government an overly wide choice of venue. The problem is minimal on the intrastate level in Maryland particularly in view of the liberal constitutional and statutory provisions for removal in criminal cases.

105.20. CONSPIRACY; NO DEFENSE

IT IS NO DEFENSE TO A PROSECUTION FOR CONSPIRACY THAT, OWING TO CRIMINAL IRRESPONSIBILITY OR OTHER LEGAL INCAPACITY OR EXEMPTION, OR TO UNAWARENESS OF THE CRIMINAL NATURE OF (A) THE AGREEMENT (B) THE CONDUCT WHICH IS THE OBJECT OF THE AGREEMENT OR (C) THE DEFENDANT'S CRIMINAL PURPOSE OR TO OTHER FACTORS PRECLUDING THE MENTAL STATE REQUIRED FOR THE COMMISSION OF THE CONSPIRACY OR THE OBJECT CRIME, ONE OR MORE OF THE DEFENDANT'S CO-CONSPIRATORS COULD NOT BE GUILTY OF CONSPIRACY OR THE OBJECT CRIME. IT IS NO DEFENSE TO A PROSECUTION FOR CONSPIRACY THAT ONE OR MORE OF THE DEFENDANT'S CO-CONSPIRATORS IS NOT AMENABLE TO JUSTICE, OR HAS NOT BEEN PROSECUTED FOR OR CONVICTED OF ANY OFFENSE BASED UPON THE CONDUCT IN QUESTION, OR HAS PREVIOUSLY BEEN ACQUITTED THEREOF, OR HAS LEGAL IMMUNITY FROM PROSECUTION THEREFOR, OR HAS BEEN CONVICTED OF A DIFFERENT OFFENSE BASED UPON THE CONDUCT IN QUESTION OR A DIFFERENT DEGREE OF THE OFFENSE CHARGED.

COMMENT

The second sentence has been added to eliminate the various inconsistency defenses, and draws upon §8-3(b) of the Illinois Code and on the provisions of the New York Code relating to accessories. (§20.05(2)).

PART 110: ATTEMPT

110.00. ATTEMPT TO COMMIT A CRIME

A PERSON IS GUILTY OF AN ATTEMPT TO COMMIT A CRIME WHEN, WITH INTENT TO COMMIT A CRIME, HE ENGAGES IN CONDUCT WHICH CONSTITUTES A SUBSTANTIAL STEP TOWARD THE COMMISSION OF THAT CRIME WHETHER OR NOT HIS INTENTION BE ACCOMPLISHED.

CONDUCT SHALL NOT BE HELD TO CONSTITUTE A SUBSTANTIAL STEP UNDER THIS SECTION UNLESS IT IS STRONGLY CORROBORATIVE OF THE ACTOR'S CRIMINAL INTENTION. WITHOUT NEGATIVING THE SUFFICIENCY OF OTHER CONDUCT, THE FOLLOWING, IF STRONGLY CORROBORATIVE OF THE ACTOR'S CRIMINAL PURPOSE, SHALL NOT BE HELD INSUFFICIENT AS A MATTER OF LAW TO CONSTITUTE A SUBSTANTIAL STEP:

(A) LYING IN WAIT, SEARCHING FOR OR FOLLOWING THE CONTEMPLATED VICTIM OF THE CRIME;

(B) ENTICING OR SEEKING TO ENTICE THE CONTEMPLATED VICTIM OF THE CRIME TO GO TO THE PLACE CONTEMPLATED FOR ITS COMMISSION;

(C) RECONNOITERING THE PLACE CONTEMPLATED FOR THE COMMISSION OF THE CRIME, AT A TIME OR IN A MANNER NOT USUAL FOR LAW-ABIDING INDIVIDUALS, UNDER CIRCUMSTANCES

THAT WARRANT ALARM FOR THE SAFETY OF PERSONS OR PROPERTY IN THE VICINITY, SUCH AS TAKING FLIGHT UPON APPEARANCE OF A POLICE OFFICER, REFUSING TO IDENTIFY HIMSELF, OR MANIFESTLY ENDEAVORING TO CONCEAL HIMSELF OR ANY OBJECT;

(D) UNLAWFUL ENTRY OF A STRUCTURE, VEHICLE OR ENCLOSURE IN WHICH IT IS CONTEMPLATED THAT THE CRIME WILL BE COMMITTED;

(E) POSSESSION OF MATERIALS TO BE EMPLOYED IN THE COMMISSION OF THE CRIME, WHICH ARE SPECIALLY DESIGNED FOR SUCH UNLAWFUL USE OR WHICH CAN SERVE NO LAWFUL PURPOSE OF THE ACTOR UNDER THE CIRCUMSTANCES;

(F) POSSESSION, COLLECTION OR FABRICATION OF MATERIALS TO BE EMPLOYED IN THE COMMISSION OF THE CRIME, AT OR NEAR THE PLACE CONTEMPLATED FOR ITS COMMISSION, WHERE SUCH POSSESSION, COLLECTION OR FABRICATION SERVES NO LAWFUL PURPOSE OF THE ACTOR UNDER THE CIRCUMSTANCES; OR

(G) SOLICITING AN INNOCENT AGENT TO ENGAGE IN CONDUCT CONSTITUTING AN ELEMENT OF THE CRIME.

COMMENT

The line between preparation and attempt: Professor Wechsler, prior to the formulation of the Model Penal Code, urged that the definition of attempt be broadened so as to allow more acts now defined as preparation to be regarded as attempts in order "to meet the special danger that the individual presents and to frustrate, if possible, commission of the crime that he intends". He noted that "the formulation of offenses of this order presents a substantial difficulty, however, because of the pervasive danger that equivocal behavior may be misinterpreted as preparation to commit a crime." Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. at 1110–1111 (1952). This difficulty of danger was historically a factor in discouraging early development or recognition of attempt as an offense. See Perkins, Criminal Law, pp. 476, 506–7, 528.

For the act in attempt, the Model Penal Code requires only "an act or omission constituting a substantial step" so long as the act or omission is "strongly corroborative of the actor's criminal purpose", and lists several forms of equivocal conduct which may be taken as "strongly corroborative." The comments make clear that any requirement of dangerous proximity or physical proximity, or any requirement that the act by itself (apart from the intention, which must also be

proved) be unequivocal, is eliminated.

The New York Code requires that "conduct" "tend to effect the commission of the crime". This provision is drawn from prior New York law, and appears to embody the "dangerous proximity" approach taken in New York cases (see People v. Ditchik, 288 N.Y. 95, 41 N.E. 2d 905 (1942); People v. Werblow, 241 N.Y. 55, 148 N.E. 786 (1925)).

The Wisconsin Code utilizes a res ipsa loquitur standard by requiring that the "act" "demonstrate unequivocally, under all the circumstances, that a person having formed that intent and having gone that far would normally commit the crime." (Wisc. Stat. Ann. §939.32). The Wisconsin Code provision overly restricts the acts that can supply the basis of attempt by requiring that they be unequivocal and overly reduces the value of clear evidence of an actor's intent.

The draft basically accepts the Model Penal Code approach, with its rejection of the dangerous proximity standard and its acceptance of the proposition that criminal intention plus a 'substantial step' is sufficient to warrant punishment and that the definition should permit legal intervention at an early stage.

With respect to the dangerous proximity test, the first question which comes to mind is the meaning of the term "dangerous proximity", with respect to the question of what the adjective "dangerous" modifies. Are we speaking simply of temporal and/or spatial closeness to the event, or does dangerousness also depend on how serious or harmful the intended crime be? We demand, even in the case where the offense is serious, that the defendant take sufficient steps so that we are confident that he has embarked upon a criminal enterprise. If the test for attempted murder under the dangerous proximity rule does not impose guilt at too early a period, from the point of view of our being fairly convinced of what the defendant was about to do, why should we be unwilling to convict at a comparable point when the crime is trivial? True, the danger is less because the crime attempted is less serious, but the defendant's acts should be equally convincing as to what he had in mind.

Aside from this objection, the test is really an empty formula which has quite different meanings in different areas of attempt crimes.

There are cases finding guilt in which the

dangerous closeness of the act to the result is questionable. For example, suppose that a person puts a substance which he correctly believes will cause illness, but not death, in the drinking cup of his intended victim, reasonably believing that on the following day the victim will drink from it and become mildly ill. It seems probable that under current law the actor would be convicted of an attempt, though proximity seems doubtful. To take a more striking example from the other side of the picture, suppose that someone tries to murder his victim by slow, repeated doses of arsenic. It seems clear that he should be guilty of an attempt by the time the prospective victim first comes in contact with the original dose of arsenic, even though that dose is not sufficient to kill him, as the poisoner well knows. There is no dangerous proximity to death at that time, and it may be months away and entirely dependent upon the later administration of further poison by the perpetrator.

Perhaps more seriously, there are cases in which there does seem to be what in common thought would be a dangerous proximity to success, in which in fact the courts have found the accused not guilty. Striking in this respect was the view of attempt in common law arson, where some of the cases indicated that the accused could move flammable material on to the premises, arrange it in preparation for the fire, and take the match out of the box without being guilty of an attempt; some authority had it that he had to strike the match.

It might be justifiable to accept a certain number of doubtful or wrong decisions under the dangerous proximity test if no better test could be found. But it seems that the test given in the Model Penal Code is superior. If the defendant's purpose is clear, there is no reason why he should not be convicted when he has taken a substantial step toward the commission of the crime, even though its ultimate consummation may be quite distant. After all, we are interested here in whether the man is clearly a dangerous offender. While daydreams and stated intentions plainly ought not to be enough to convict a man of crime, when he shows the seriousness of this intention by taking a step which is plainly calculated to carry the intention out, he has gone far enough to show that he is not merely thinking evil thoughts but doing evil deeds. The sooner he is convicted in this case the better. If we wait in all cases for dangerous proximity, we run a risk of success in a particular case, and we also run the risk that the defendant's plans will be temporarily frustrated before he reaches the point

of dangerous proximity, and that he will then resume his activity later, when he cannot be stopped in time.

It may be objected that finding an attempt before the accused has done much increases the danger of an incorrect inference of intention from the acts of the defendant, but the danger of an incorrect inference is by no means confined to the area of attempt. Let us suppose a case in which it is known that the accused disliked the victim and fired a weapon which caused the victim's death. It may well be that on these facts the jury would be ready to find the defendant guilty of murder. But the firing of the gun may have been accidental, even in a situation which to a witness might appear to involve a deliberate attempt to commit the crime. This kind of risk must be accepted because of the inherent nature of the difficulty of proving intention in any kind of a crime. The remedy for this danger is in pointing out to the trier of fact the difficulties in this kind of proof, the possibilities of error, and warning of the prosecution's burden of persuasion beyond a reasonable doubt. In some cases it will be proper to take the case from the jury altogether. But it would not be practical to prevent conviction in cases in which the defendant had not confessed, and even a rule which would allow conviction only upon confession would have to take account of the dangers of false confession on account of involuntariness, mental derangement, desire to protect another, and so forth. As a practical matter, it may be doubted that the question here involves very many cases in which there is a real danger of injustice. In many cases it will be quite clear that the defendant's purpose is to achieve a certain end.

The draft makes certain modifications in the Model Penal Code formulation. E.g., the definition of 'reconnoitering' contained in §5.01(2)(c) was narrowed by addition of a formulation drawn in part from the Model Penal Code provisions on loitering (§250.6, MPC).

Failure: Eliminating failure as an element of the offense is urged by most commentators, who point out that the requirement was based on technicalities relating to merger of offenses at common law. See Comment. The New Illinois Criminal Code, 1963 Wash. U.L. Rev. at 520; Perkins, Criminal Law, at 477. It has also been pointed out that "making (failure) an element of the crime would require that the state would have to prove beyond a reasonable doubt that the crime was not in fact committed." Comments to

§609.17 of the Minnesota Code. Elimination of the requirement makes attempt available as a compromise verdict or compromise charge. In view of the fact that the new Code is generally to be based on the New York Code, which does not negate the failure requirement, it has been deemed best to negate the failure requirement in the body of the statute, in order to make clear that the New York Code is not being followed in this regard.

110.05. ATTEMPT TO COMMIT A CRIME; PUNISHMENT

1. AN ATTEMPT TO COMMIT A CRIME IS A:

A. CLASS B FELONY WHEN THE CRIME ATTEMPTED IS A CLASS A FELONY

B. CLASS C FELONY WHEN THE CRIME ATTEMPTED IS A CLASS B FELONY

C. CLASS D FELONY WHEN THE CRIME ATTEMPTED IS A CLASS C FELONY

D. CLASS E FELONY WHEN THE CRIME ATTEMPTED IS A CLASS D FELONY

E. CLASS A MISDEMEANOR WHEN THE CRIME ATTEMPTED IS A CLASS E FELONY

F. CLASS B MISDEMEANOR WHEN THE CRIME ATTEMPTED IS A CLASS A MISDEMEANOR

G. VIOLATION WHEN THE CRIME ATTEMPTED IS A CLASS B MISDEMEANOR.

2. THE PROVISIONS OF THIS SECTION ARE INAPPLICABLE TO OFFENSES UNDER PART 120 (ASSAULT AND RELATED OFFENSES).

COMMENT

The subcommittee draft adopts the New York Code provision grading penalties for attempt one level lower than those for the consummated offense.

In urging that, save for death and life imprisonment cases, penalties for attempt should be the same as those for the consummated offense, the framers of the Model Penal Code took the view that "To the extent that sentencing depends upon the antisocial disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or the failure of the plan." (p. 178, Tent. Dr.

#10). It may be doubted that equal punishment for attempts and consummated acts serves one of the purposes said to be basic by framers of the Model Penal Code: avoidance of inequality of treatment that would shock the common sense of justice." Tent. Draft #10 at 25. The Model Penal Code reflects a stress on social defense and rehabilitation as the paramount criteria for provisions of the substantive criminal law. Against this view may be set the view of other commentators, who stress the continuing relevance of blameworthiness and assert that punishment should continue to be, at least in some measure, proportioned to the gravity of the offense.

There thus would seem to be a good case for grading attempts at a somewhat lower level than consummated offenses. Since the general policy of the Commission is to follow the New York Code whenever possible, it has adapted the New York approach here, though believing that solicitations should be punished as heavily as attempts. It should be noted that the New York penalties are more severe than the penalties in most states which assess the penalty for attempt at only a fraction of that for the substantive offense. See MPC, Tent. Dr. #10 at 174–5.

110.10. ATTEMPT; IMPOSSIBILITY

IT IS NO DEFENSE TO A PROSECUTION FOR ATTEMPT THAT THE CRIME CHARGED TO HAVE BEEN COMMITTED WAS FACTUALLY IMPOSSIBLE OF COMMISSION. IT IS A DEFENSE TO A PROSECUTION FOR ATTEMPT THAT THE CRIME CHARGED WAS LEGALLY IMPOSSIBLE OF COMMISSION IF BUT ONLY IF THE DEFENDANT COULD NOT HAVE COMMITTED THE CRIME EVEN IF THE ATTENDANT CIRCUMSTANCES HAD BEEN AS THE DEFENDANT BELIEVED THEM TO BE. THE LIMITATION IN THE PRECEDING SENTENCE SHALL NOT APPLY IF THE DEFENDANT'S BELIEF WAS FOUNDED ON MENTAL ABNORMALITY AND THE CONDUCT CHARGED WAS, UNDER THE ATTENDANT CIRCUMSTANCES, INHERENTLY UNLIKELY TO RESULT OR CULMINATE IN THE COMMISSION OF A CRIME.

COMMENT

The New York provision is clarified to accomplish the Model Penal Code objective as to the impossibility defense. A sentence is added to deal with the situation in which both the defendant's mental abnormality and the harmlessness of the method chosen under the attendant circumstances combine to give assurance of non-dangerousness.

The Model Penal Code abolishes the defense of impossibility, except in those legal impossibility

cases in which the completed crime could not have been committed even if the circumstances were as the accused supposed, because the Legislature has not elected to punish the supposed conduct.

The Model Penal Code framers note that the impossibility defense has traditionally served three functions 1) verification of criminal purpose; if the means were absurd, criminal intent is doubtful, 2) avoidance of entrapment, traps and decoys making consummation legally impossible. 3) exonerating innocuous conduct, impossibility indicating nondangerousness of the act. The Code framers argue that entrapment is dealt with separately in the Code and that the impossibility defense is thus no longer needed as a hedge against entrapment. They urge that impossibility should be largely eliminated as a defense because "since it cannot be affirmed that those who make unreasonable mistakes are not potentially dangerous. * * *" We have followed this approach.

110.15. ATTEMPT; RENUNCIATION

IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE OF ATTEMPT THAT UNDER CIRCUMSTANCES MANIFESTING A VOLUNTARY, COMPLETE AND PERMANENT RENUNCIATION OF HIS CRIMINAL PURPOSE, NOT MOTIVATED BY INCREASED FEAR OF FAILURE, DETECTION, OR ARREST, THE DEFENDANT ABANDONED HIS CRIMINAL EFFORT, AND, IF MERE ABANDONMENT WAS INSUFFICIENT TO AVOID COMMISSION OF THE CRIME, TOOK FURTHER STEPS WHICH PREVENTED ITS COMMISSION.

COMMENT

The framers of the Model Penal Code, in urging that renunciation of criminal purpose be made a defense, stress that permanent and voluntary renunciation tends to "negative dangerousness of the actor" in some instances, and, more importantly, "encourage(s) actors to desist from pressing forward with their criminal designs." This provision is praised by most of the commentators. The Maryland court, in the recent case of Wiley v. State, 237 Md. 560, 564, rejected this view as to the prevailing law and stated the Maryland rule as follows:

". . . If one who has intended to attempt a crime freely and voluntarily abandons the idea before it has progressed beyond mere preparation, he has not committed the crime of attempt; but a voluntary abandonment of an attempt which has proceeded beyond mere preparation into a direct act or acts in furtherance of the commission of the attempt does not expiate the guilt of, or forbid

punishment for, the crime already committed."

The Model Penal Code framers concede that "instances of renunciation of criminal purpose are not frequent, and that the occurrence of such is therefore improbable," and accordingly recommend that availability of a renunciation defense may add to the incentives to availability of a renunciation defense may add to the incentives to take the first steps toward crime, but think this effect cancelled by the actor's knowledge that the defense would be unavailable if the actor were apprehended before having an opportunity to renounce. Their view as to the desirability of the defense heavily stresses the incentive which it affords actors to discontinue offenses, and on this ground they reject suggestions that renunciations should be relevant only to mitigate punishment. The arguments utilized by the Code framers seem somewhat divorced from reality. Availability or unavailability of the defense would seem to have little impact on conduct. The judgment should turn on whether the desirability of maintaining intellectual consistency by exonerating a relatively small number of persons where renunciation may be taken as evidence of reduced dangerousness of acts or persons is outweighed by the desirability of simplifying the Code provisions and the issues at trial.

SUBTITLE H — OFFENSES AGAINST THE PERSON INVOLVING PHYSICAL INJURY, SEXUAL CONDUCT, RESTRAINT AND INTIMIDATION

PART 120: ASSAULT AND RELATED OFFENSES

120.00. DEFINITION OF TERM

"ATTEMPT" HAS THE MEANING GIVEN TO IT IN SECTION 110.00.

COMMENT

This section merely incorporates the definition of attempt worked out for the general provisions on attempt, and is necessary because of the draft's treatment of attempted batteries in the same way as completed batteries in this Part. The reason for this treatment is explained in the note to section 120.25.

120.05. ASSAULT IN THE FOURTH DEGREE

A PERSON IS GUILTY OF ASSAULT IN THE FOURTH DEGREE WHEN:

1. WITH INTENT TO HARASS, ANNOY, OR ALARM ANOTHER PERSON, HE STRIKES, SHOVES, KICKS, OR OTHERWISE TOUCHES A PERSON OR SUBJECTS HIM TO PHYSICAL CONTACT; OR

2. BY PHYSICAL MENACE, HE INTENTIONALLY PLACES OR ATTEMPTS TO PLACE ANOTHER PERSON IN FEAR OF IMMINENT PHYSICAL INJURY.

ASSAULT IN THE FOURTH DEGREE IS A VIOLATION.

COMMENT

The Commission has transposed subsection (1) of this provision from the New York material dealing with loitering, disorderly conduct, and the like (N.Y. §240.25) in order to make it clear that assaults which are trivial from the point of view of prospective bodily harm are nevertheless punishable as offensive conduct. Subsection (2) deals with a minor kind of civil assault (as to which, see the comment to section 120.25) in which the defendant puts another in fear of imminent physical injury, even though his intent may be only to frighten. Such affronts may be preliminary to more serious incidents, and even if they are not, there is a public interest in dealing with them as minor offenses.

120.10. ASSAULT IN THE THIRD DEGREE

A PERSON IS GUILTY OF ASSAULT IN THE THIRD DEGREE WHEN:

1. WITH INTENT TO CAUSE PHYSICAL INJURY TO ANOTHER PERSON, HE CAUSES OR ATTEMPTS TO CAUSE SUCH INJURY TO SUCH PERSON OR TO A THIRD PERSON; OR

2. HE RECKLESSLY CAUSES PHYSICAL INJURY TO ANOTHER PERSON; OR

3. WITH CRIMINAL NEGLIGENCE, HE CAUSES PHYSICAL INJURY TO ANOTHER PERSON BY MEANS OF A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; OR

4. HE RECKLESSLY ENGAGES IN CONDUCT WHICH CREATES A SUBSTANTIAL RISK OF SERIOUS PHYSICAL INJURY TO ANOTHER PERSON; OR

5. BY PHYSICAL MENACE, HE INTENTIONALLY PLACES OR ATTEMPTS TO PLACE ANOTHER PERSON IN FEAR OF IMMINENT SERIOUS PHYSICAL INJURY.

ASSAULT IN THE THIRD DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

For commentary, see §120.25.

120.15. ASSAULT IN THE SECOND DEGREE

A PERSON IS GUILTY OF ASSAULT IN THE SECOND DEGREE WHEN:

1. WITH INTENT TO CAUSE SERIOUS PHYSICAL INJURY TO ANOTHER PERSON, HE CAUSES OR ATTEMPTS TO CAUSE SUCH INJURY TO SUCH PERSON OR TO A THIRD PERSON; OR

2. WITH INTENT TO CAUSE PHYSICAL INJURY TO ANOTHER PERSON, HE CAUSES OR ATTEMPTS TO CAUSE SUCH INJURY TO SUCH PERSON OR TO A THIRD PERSON BY MEANS OF A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; OR

3. WITH INTENT TO PREVENT A POLICE OFFICER FROM PERFORMING A LAWFUL DUTY, HE CAUSES OR ATTEMPTS TO CAUSE PHYSICAL INJURY TO SUCH POLICE OFFICER; OR

4. HE RECKLESSLY CAUSES SERIOUS PHYSICAL INJURY TO ANOTHER PERSON BY MEANS OF A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; OR

5. FOR AN UNLAWFUL PURPOSE, HE INTENTIONALLY CAUSES OR ATTEMPTS TO CAUSE STUPOR, UNCONSCIOUSNESS OR OTHER PHYSICAL IMPAIRMENT OR INJURY TO ANOTHER PERSON BY ADMINISTERING OR ATTEMPTING TO ADMINISTER TO HIM A DRUG, SUBSTANCE OR PREPARATION CAPABLE OR BELIEVED BY HIM TO BE CAPABLE OF PRODUCING THE SAME; OR

6. UNDER CIRCUMSTANCES EVINCING A DEPRAVED INDIFFERENCE TO HUMAN LIFE, HE RECKLESSLY ENGAGES IN CONDUCT WHICH CREATES A GRAVE RISK OF DEATH TO ANOTHER PERSON.

ASSAULT IN THE SECOND DEGREE IS A CLASS D FELONY.

COMMENT

For commentary, see §120.25.

120.20. ASSAULT IN THE SECOND, OR THIRD, OR FOURTH DEGREE; DEFENSE OF CONSENT

IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION FOR ASSAULT IN THE SECOND DEGREE, ASSAULT IN THE THIRD DEGREE, OR ASSAULT IN THE FOURTH DEGREE THAT THE VICTIM CONSENTED TO THE CONDUCT OF THE DEFENDANT IF:

(A) SUCH CONDUCT DID NOT CAUSE OR CREATE A SUBSTANTIAL RISK OF SERIOUS PHYSICAL INJURY; OR

(B) SUCH CONDUCT AND THE PHYSICAL INJURY OR RISK THEREOF WHICH OCCURRED WERE REASONABLY FORESEEABLE HAZARDS OF JOINT PARTICIPATION IN A LAWFUL ATHLETIC CONTEST OR COMPETITIVE SPORT.

COMMENT

The justification chapter is applicable to the crime of assault, but a special provision on consent must be added. Common law and statutory authority is against the power of effective consent to deliberate infliction of serious injury, just as it is against a consent defense to homicide. However, it ought to be possible to consent, in such a way as to bar criminal prosecution, to minor battery, as involved, for example, in a friendly scuffle. The New York provisions do require "physical injury," defined as "impairment of physical condition or substantial pain," or the threat of such injury, for assault, but this may not be quite narrow enough. More clearly, a provision is necessary to bar prosecution for injuries inflicted in the ordinary way in lawful athletic contests. The Commission has borrowed consent provisions from Model Penal Code §2.11. In our general definition section it recommends adding provisions dealing with voluntary consent, borrowed from the same Model Penal Code section. These should be applicable to consent wherever it appears as a defense.

120.25. ASSAULT IN THE FIRST DEGREE

A PERSON IS GUILTY OF ASSAULT IN THE FIRST DEGREE WHEN:

1. WITH INTENT TO CAUSE SERIOUS PHYSICAL INJURY TO ANOTHER PERSON, HE CAUSES SUCH INJURY TO SUCH PERSON OR TO A THIRD PERSON BY MEANS OF A DEADLY WEAPON OR A DANGEROUS INSTRUMENT; OR

2. WITH INTENT TO DISFIGURE ANOTHER PERSON SERIOUSLY AND PERMANENTLY, OR TO DESTROY, AMPUTATE OR DISABLE PERMANENTLY A MEMBER OR ORGAN OF HIS BODY, HE CAUSES SUCH INJURY TO SUCH PERSON OR TO A THIRD PERSON; OR

3. UNDER CIRCUMSTANCES EVINCING A DEPRAVED INDIFFERENCE TO HUMAN LIFE, HE RECKLESSLY ENGAGES IN CONDUCT WHICH CREATES A GRAVE RISK OF DEATH TO ANOTHER PERSON, AND THEREBY CAUSES SERIOUS PHYSICAL INJURY TO ANOTHER PERSON; OR

4. IN THE COURSE OF AND IN FURTHERANCE OF THE COMMISSION OR ATTEMPTED COMMISSION OF A FELONY OR OF IMMEDIATE FLIGHT THEREFROM, HE INTENTIONALLY, RECKLESSLY,

OR WITH CRIMINAL NEGLEGENCE CAUSES SERIOUS PHYSICAL INJURY TO ANOTHER PERSON; OR

5. BEING A PARENT, ADOPTIVE PARENT, OR OTHER PERSON WHO HAS THE PERMANENT OR TEMPORARY CARE OR CUSTODY OR RESPONSIBILITY FOR THE SUPERVISION OF A CHILD UNDER THE AGE OF EIGHTEEN YEARS, HE INTENTIONALLY INFLICTS SERIOUS PHYSICAL INJURY UPON SUCH CHILD.

ASSAULT IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

Assault in the third degree; assault in the second degree; assault in the first degree; common law assault: Ordinary assault cases do not get much attention from the higher courts or from legal writers, despite the rather complicated nature of "simple" or common law assault, and this has led to confusion on such matters as whether it is necessary for the crime that the victim have apprehended danger or the defendant have intended to do more than frighten the victim. Analysis reveals that modern assault is three related but different crimes, all having the same name. The oldest form of assault is an attempted criminal battery; here the defendant has an intention to commit a battery which carries him to the stage of an attempt, and it makes no difference that the victim is never aware of the danger since the defendant is a dangerous offender anyway. A second form of assault appeared with the procedural doctrine that every criminal battery includes an attempted criminal battery, and that consequently proof of criminal battery permitted conviction on a charge of attempted criminal battery or assault. It was thereafter possible to treat any battery as assault, and the batteries brought within assault in this manner included not only cases in which the defendant intended to commit a battery, but also cases in which the battery was produced by his gross or criminal negligence, and perhaps cases in which a battery resulted accidentally while the defendant was doing an act malum in se. In relatively modern times a third form of assault has appeared, as the crime of assault has tended to absorb the tort of the same name; in this class of cases, it is sufficient that the defendant intends merely to frighten, as long as the victim is actually put in fear by the apparent immediate threat. Most modern common law cases permit conviction of assault in any of these three situations. There is language in some of the Maryland cases suggesting that the civil assault basis is acceptable here for a criminal conviction. See Hayes v. State, 211 Md. 111 (1956);

Kelium v. State, 223 Md. 80 (1960).

Departures from the New York Code: All three of the forms of common law assault (attempted criminal battery, criminal battery and "civil" assault) are dealt with in the New York Code. The minor batteries constituting assault in the fourth degree under §120.05 of this proposed Code are there commented on. The three sections designated in the New York Code as assault all deal with one form or another of criminal battery, and physical injury is a required element of the offense under that Code. Attempted criminal battery is not mentioned in the New York assault sections, being left to the operation of the general law of attempt, which, under that Code (as in this), generally results in a one-step reduction in grade from the completed offense. "Civil" assaults (that is, offenses which have been derived from the law of torts) are treated by the New York Code in the two sections dealing with menacing. That code therefore covers all of the major areas of the old law of assault, but it fragments them more than the Commission thinks is necessary. Accordingly, in this draft menacing and reckless endangering provisions have been consolidated with attempt by including them as subsections of the appropriate assault offense, and attempted batteries have also been consolidated with actual batteries. (There is a corresponding omission of attempts to commit assault dealt with by this Part 120 from the general classification of attempts under §110.05.)

Aggravated assaults: All assaults are misdemeanors at common law, but statutes in most jurisdictions have created aggravated assaults, some of which are felonies or carry much heavier penalties than are usual for ordinary assaults. (The common law felony of mayhem — intentional destruction or deprivation of use of organ or limb — can be conveniently assimilated into the crime of assault). The most common statutory aggravating factors are (1) an intention to commit some more serious crime, such as murder, rape, or robbery (See, e.g., present Md. Code; Art. 27, §12), (2) the use of a deadly weapon or dangerous instrumentality, (3) the infliction of severe injury, or (4) the nature of the victim, e.g., a child or a policeman (See, e.g., Art. 27, §§35A, 11B). (Note: the special problem of a touching for a sexual purpose is dealt with in the sex offenses material.)

Grading of assaults: The grading of the assault crimes is designed to fit in with the law of attempt in the draft provisions, as in the New York

Code. A substantial step taken in carrying out a purpose to kill is attempted murder. Lesser acts are treated as one of four grades of assault, as shown by the table accompanying this Part. (Descriptions in the table of crimes are only approximate and the penalties shown are tentative only; consult the draft subsections indicated for precise descriptions.)

The chart shows that all assaults which originally were merely civil assaults (no injury or intent to injure, but merely an attempt to frighten) are in the lowest two grades. Also treated as assaults in the third degree are intentionally causing or attempting to cause, or recklessly causing physical injury; recklessly creating a substantial risk of serious physical injury, or injuring with a deadly weapon or dangerous instrument with criminal negligence. When the defendant's mental attitude becomes more culpable, the injury or risk of injury becomes greater, as when the attack is directed at a policeman, or dangerous drugs are used, the offense becomes assault in the second degree. Maiming, certain forms of child abuse, purposeful serious injury with a dangerous instrument or deadly weapon, extreme recklessness, or causing serious physical injury by extreme negligence while committing a felony may be punished as assault in the first degree. Attempted murder is still more severly punished in the general attempt provisions. (Attempted rapes and attempted robberies are also severly punished, but are not discussed here.)

Reckless endangering: One of the important gaps in the common law, filled by the modern codes, is the failure to deal with reckless conduct, which, by luck, fails to injure anyone. Historically this has not become incorporated in the crime of assault, but there is no reason to continue to leave it out. The defendant who didn't know the gun was loaded is as much in need of criminal sanctions when the bullet fails to hit the victim as when it strikes. Both New York and the Model Penal Code have appropriate provisions.

GRADING OF ASSAULT CRIMES

Crime (Degree of)	Where defendant intends injury or affront	Where defendant is armed or engaged in felony	Where defendant acts recklessly	Where defendant threatens
Assault in the fourth degree (up to 15 days)	Defendant touches with intent to annoy or alarm (120.05(1))			By physical menace, defendant intentionally places or attempts to place another in fear of imminent physical injury (120.05(2))
Assault in the third degree (up to six months)	Defendant intentionally causes or attempts to cause physical injury (120.10(1))	With criminal negligence, defendant injures with deadly weapon or dangerous instrument (120.10(3))	Defendant recklessly causes physical injury (120.10(2)), or recklessly creates substantial risks of serious physical injury (120.10(4))	By physical menace, defendant intentionally places or attempts to place another in fear of imminent serious physical injury (120.10(5))
Assault in the second degree (up to seven years)	Defendant intentionally causes or attempts to cause serious physical injury (120.15(1)), or intentionally causes physical injury to a police officer to prevent performance of duty (120.15(3)), or intentionally administers or attempts to administer dangerous drug for improper purpose (120.15(5))	Defendant intentionally causes or attempts to cause physical injury with deadly weapon or dangerous instrument (120.15(2)), or recklessly causes serious physical injury by such means (120.15(4)) (also noted in column three)	Defendant recklessly creates grave risk of death under circumstances evincing depraved indifference to human life (120.15(6)), or recklessly causes serious physical injury with deadly weapon or dangerous instrument (120.15(4)) (also noted in column two)	
Assault in the first degree (up to ten years)	Defendant intentionally maims or disfigures seriously and permanently (120.25(2)) (the highest degrees of attempted rape and attempted robbery carry equivalent penalties), or intentionally engages in child abuse (120.25(5))	Defendant intentionally causes serious physical injury with deadly weapon or dangerous instrument (120.25(1)), or with criminal negligence causes serious physical injury while committing felony (120.25(4))	Defendant recklessly causes serious physical injury while creating grave risk of death under circumstances evincing depraved indifference to human life (120.25(3))	
(up to 15 years)	(Attempted murder)			

120.30. PROMOTING A SUICIDE ATTEMPT

A PERSON IS GUILTY OF PROMOTING A SUICIDE ATTEMPT WHEN HE INTENTIONALLY CAUSES OR AIDS ANOTHER PERSON TO ATTEMPT SUICIDE.

PROMOTING A SUICIDE ATTEMPT IS A CLASS E FELONY.

COMMENT

For commentary, see §120.35.

120.35. PROMOTING A SUICIDE ATTEMPT; WHEN PUNISHABLE AS ATTEMPT TO COMMIT MURDER

A PERSON WHO ENGAGES IN CONDUCT CONSTITUTING BOTH THE OFFENSE OF PROMOTING A SUICIDE ATTEMPT AND THE OFFENSE OF ATTEMPT TO COMMIT MURDER MAY NOT BE CONVICTED OF ATTEMPT TO COMMIT MURDER UNLESS HE CAUSES OR AIDS THE SUICIDE ATTEMPT BY THE USE OF DURESS OR DECEPTION. A PERSON WHO ENGAGES IN CONDUCT CONSTITUTING BOTH THE OFFENSE OF PROMOTING A SUICIDE ATTEMPT AND THE OFFENSE OF ATTEMPT TO COMMIT MANSLAUGHTER MAY NOT BE CONVICTED OF ATTEMPT TO COMMIT MANSLAUGHTER.

COMMENT

The New York Code punishes those who cause or aid suicide or suicide attempts as follows: (1) causing or aiding suicide through duress or deception is murder; (2) causing or aiding suicide without duress or deception is manslaughter; (3) causing or aiding a suicide attempt through duress or deception is punishable as an attempt to commit murder; and (4) causing or aiding a suicide attempt without duress or deception is a lesser crime dealt with in this article of the code. All of these crimes require intention. The Commission has adopted the New York scheme.

PART 125: HOMICIDE

INTRODUCTION

Abortion: In view of the recent action of the Maryland legislature in abolishing the crime of abortion as such and removing provisions relating thereto out of the criminal code and into Article 43, the subcommittee has not considered reintroducing abortion into the new draft code.

The present law of murder and manslaughter: The central homicide crimes in Maryland are murder and manslaughter, and their definitions are common law. Both crimes require causing the death of a

human being as their actus reus. Criminal homicide has three important subdivisions: (1) those in which death or bodily injury is an intended or known consequence of the act, (2) reckless or negligent killings, and (3) killings in the course of committing other crimes. In each of these subdivisions, the most serious killings are murder, and are said to require the mens rea of malice aforethought. These are, in each of the three subdivisions: (1) intentional killings – those performed with intent to kill or inflict serious bodily injury on a human being without adequate justifying, excusing, or mitigating circumstances; (2) so-called depraved heart killings – those performed with wantonness or very extreme recklessness, e.g., by firing a weapon into a room known to be occupied, not caring whether or not anyone is hit; and (3) felony-murders, or certain killings committed in the course of committing another felony. As to each of these subdivisions, a slightly less reprehensible state of mind, not characterized by "malice aforethought", will bring a conviction of manslaughter. In subdivision (1), it is manslaughter if the defendant intends some less than serious injury and death unexpectedly results, or if legally adequate provocation acts as mitigation, or perhaps if justifying or excusing circumstances would be present except for the negligence of the defendant, as, for example, where the defendant negligently misjudges the degree of force necessary in self-defense. Some intentional killings are of course non-criminal, as for example, killings which fully meet the self-defense requirements. In subdivision (2), killings which involve merely "criminal negligence" or "recklessness" are manslaughter, and mere tort negligence does not ordinarily involve criminal liability at all. In subdivision (3), certain killings in the course of committing misdemeanors have resulted in manslaughter convictions; in other misdemeanor deaths, there is no criminal liability.

By statute, Maryland, like most American jurisdictions, has divided murder into degrees, the major importance of the division being that the death penalty is not permitted for second degree murder. In category (1) murders, first degree murders include murders by "poison, or lying in wait, or by any kind of willful, deliberate and premeditated killing." Class (1) murders in general are second degree when the prosecution cannot show premeditation or deliberation, or where it cannot show intent to kill, as opposed to intent to injure. There are no class (2) first degree murders; all are second degree. In class (3), killings in the

perpetration of enumerated serious crimes are by statute first degree murders; whether there are any remaining crimes to which the common law felony-murder rule attaches to produce second degree murder is uncertain.

Although this analysis is somewhat oversimplified, it is hoped that it will prove useful for purposes of comparison with the draft provisions.

Sources and general nature of the draft provision: The draft is based upon the New York and Model Penal Codes. These make noticeable changes in the common law scheme, but the underlying structure and many of the fundamental concepts of the common law are retained in them and in the Commission drafts. The Commission has followed New York where there seemed to be no good reason to depart from it, but it has not hesitated to substitute Model Penal Code provisions and its own draftsmanship where improvement seemed possible. (Cf. N.Y. Art. 120 and M.P.C. Art. 210 (P.O.D.).)

One noticeable departure from the New York provisions is in the order of sections. New York followed its usual practice of defining first the least serious, and later the more aggravated offenses within each class. In the interests of clarity, the Commission dealt first with murder, and then with lesser offenses. Manslaughter, in large part, both at common law and under statute, is defined in terms of murder with mitigating circumstances, and it is therefore impossible to understand manslaughter until murder has been defined.

The question of degrees of murder and manslaughter, in which we have also departed to some extent from the New York scheme, is discussed in a subsequent note. A number of other changes have been made, and the most important of these will be referred to in discussing particular sections.

The accompanying chart shows a tabular view of the criminal homicide provisions of the draft, and it may be helpful in the discussion of specific provisions which follows:

125.00. DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "PERSON," WHEN REFERRING TO THE VICTIM OF A

HOMICIDE, MEANS A HUMAN BEING WHO HAS BEEN BORN AND IS ALIVE.

2. "ANOTHER PERSON," WHEN REFERRING TO THE VICTIM OF A SUICIDE INTENTIONALLY CAUSED OR AIDED, OR TO THE VICTIM OF A HOMICIDE COMMITTED BY INTENTIONALLY OR KNOWINGLY CAUSING DEATH OR SERIOUS PHYSICAL INJURY, INCLUDES NOT ONLY A PARTICULAR PERSON WHOSE DEATH OR SERIOUS PHYSICAL INJURY THE DEFENDANT BELIEVED WOULD OCCUR, BUT ALSO ANY OTHER PERSON WHOSE DEATH WAS CAUSED, OR IN THE CASE OF A SUICIDE, CAUSED OR AIDED BY THE DEFENDANT'S CONDUCT.

COMMENT

The appropriate definitions for the draft depend upon the context of the substantive prohibitions. Changes elsewhere in the draft, especially in the elimination of the New York abortion sections, render definitions of homicide or criminal homicide unnecessary. We have retained the New York definition of "person," and have added a definition of "another person" in an attempt to simplify what would otherwise be a difficult problem of wording in the sections defining murder and manslaughter. The problem relates to the defendant who kills the wrong person by mistake, and the definition is designed to make this mistake irrelevant for the purpose of determining whether the killing was intentionally or knowingly committed.

GRADING OF HOMICIDE CRIMES

	Where defendant intends or knows that death or serious physical injury will occur (except aiding suicide)	Aiding suicide	Where defendant acts carelessly	Where defendant is engaged in committing a felony
Murder (up to life imprisonment)	Defendant intends or knows that his conduct will cause death or serious physical injury and there are no justifying or mitigating circumstances (125.05(1))	Defendant intentionally causes or aids suicide and there are no justifying or mitigating circumstances (§125.05(2))	Manifesting extreme indifference to life, defendant recklessly creates grave risk of and causes death (§125.05(3))	Absent affirmative defense,* defendant or accomplice causes death in the course of actual or attempted enumerated crimes (§125.05(4) and (5))
Manslaughter (up to 15 years)	Defendant shows partial justification, duress, or provocation (§125.20(1)(b), (c), (d))	Defendant shows he used no duress or deception, or shows partial justification, duress, or provocation (§125.20(1) (a), (c), (d))	Defendant recklessly causes death (§125.20(3))	
Criminally negligent homicide (up to 7 years)			Defendant, with criminal negligence, causes death (§125.25)	

* The affirmative defense is set out in the section; roughly the defendant must show that he had no reason to anticipate death or serious physical injury.

125.05. MURDER 11206

A PERSON IS GUILTY OF MURDER WHEN: 11208

1. INTENDING OR KNOWING THAT HIS CONDUCT WILL 11210
CAUSE DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER PERSON, 11211
HE CAUSES THE DEATH OF ANOTHER PERSON; PROVIDED, HOWEVER, 11212
(A) THAT FULL JUSTIFICATION FOR HIS CONDUCT UNDER PART 35 11213
FOR THE USE OF DEADLY PHYSICAL FORCE SHALL BE AN 11214
AFFIRMATIVE AND COMPLETE DEFENSE; (B) THAT IF THE
DEFENDANT ESTABLISHES IN MITIGATION OF HIS CONDUCT ANY OF 11215
THE FACTS OR CIRCUMSTANCES SET FORTH IN SUBSECTION ONE 11216
(B), (C), OR (D) OF §125.20 THE OFFENSE SHALL BE REDUCED 11217
TO MANSLAUGHTER; AND (C) THAT THE PROVISIONS OF THIS 11218
SUBSECTION SHALL NOT APPLY TO CONDUCT WHICH CAUSES THE 11219
DEATH OF ANOTHER PERSON BY SUICIDE; OR

2. INTENDING THAT HIS CONDUCT WILL CAUSE OR AID 11221
ANOTHER PERSON TO COMMIT SUICIDE OR TO INFLICT SERIOUS 11222
PHYSICAL INJURY UPON HIMSELF, HE CAUSES OR AIDS ANOTHER 11223
PERSON TO COMMIT SUICIDE; PROVIDED, HOWEVER, THAT IF THE 11224
DEFENDANT ESTABLISHES THE FACTS SET FORTH IN SUBSECTION 11225
ONE (A), (C), OR (D) OF §125.20 THE OFFENSE SHALL BE 11226
REDUCED TO MANSLAUGHTER; OR

3. UNDER CIRCUMSTANCES MANIFESTING EXTREME 11228
INDIFFERENCE TO THE VALUE OF HUMAN LIFE, HE RECKLESSLY 11229
ENGAGES IN CONDUCT WHICH CREATES A GRAVE RISK OF DEATH TO 11230
ANOTHER PERSON, AND THEREBY CAUSES THE DEATH OF ANOTHER
PERSON.

4. ACTING EITHER ALONE OR WITH ONE OR MORE OTHER 11232
PERSONS, HE COMMITS OR ATTEMPTS TO COMMIT RAPE IN THE 11233
FIRST DEGREE (§130.20), SODOMY IN THE FIRST DEGREE 11234
(§130.30), KIDNAPPING (§135.20), COERCION (§135.30), 11235
BURGLARY IN ANY DEGREE (§§140.20, 140.25, 140.30), ARSON
IN THE FIRST OR SECOND DEGREE (§§150.15, 150.10) LARCENY 11236
BY EXTORTION (§155.35), ROBBERY IN ANY DEGREE (PART 160), 11237
OR ESCAPE IN THE FIRST OR SECOND DEGREE (§§205.20, 11238
205.10), AND, IN THE COURSE OF AN IN FURTHERANCE OF SUCH 11239
CRIME OR IMMEDIATE FLIGHT THEREFROM, HE, OR ANOTHER
PERSON WHO IS A PARTY TO SUCH OFFENSE WITHIN THE 11240
PROVISIONS OF PART 20, CAUSES THE DEATH OF ANOTHER PERSON 11241
THAN ONE OF THE PARTIES TO THE COMMISSION OF SUCH
OFFENSE, EXCEPT THAT IN ANY PROSECUTION UNDER THIS 11242
SUBSECTION IT IS AN AFFIRMATIVE DEFENSE THAT THE 11243
DEFENDANT:

(A) DID NOT INTENTIONALLY OR KNOWINGLY COMMIT THE 11245
HOMICIDAL ACT OR IN ANY WAY SOLICIT, REQUEST, COMMAND, 11246
IMPORTUNE, OR INTENTIONALLY OR KNOWINGLY CAUSE OR AID THE 11247
COMMISSION THEREOF; AND

(B) EITHER (I) WAS NOT ARMED WITH A DEADLY WEAPON, 11249
OR ANY INSTRUMENT, ARTICLE, OR SUBSTANCE READILY CAPABLE 11250

OF CAUSING DEATH OR SERIOUS PHYSICAL INJURY AND OF A KIND NOT ORDINARILY CARRIED IN PUBLIC PLACES BY LAW-ABIDING PERSONS, OR (II) IF HE WAS SO ARMED, DID NOT CONTRIBUTE CAUSALLY TO THE DEATH THROUGH USE OR THREATENED USE OF SUCH WEAPON, INSTRUMENT, ARTICLE, OR SUBSTANCE; AND

(C) EITHER (I) HAD NO REASONABLE GROUND TO BELIEVE THAT ANY OTHER PARTY TO THE OFFENSE WAS ARMED WITH SUCH A WEAPON, INSTRUMENT, ARTICLE, OR SUBSTANCE, OR (II) IF HE DID HAVE SUCH REASONABLE GROUND, THAT SUCH OTHER PARTY DID NOT CONTRIBUTE CAUSALLY TO THE DEATH THROUGH USE OR THREATENED USE OF SUCH WEAPON, INSTRUMENT, ARTICLE, OR SUBSTANCE; AND

(D) DID NOT INTEND TO ENGAGE IN CONDUCT LIKELY TO RESULT IN DEATH OR SERIOUS PHYSICAL INJURY; AND

(E) HAD NO REASONABLE GROUND TO BELIEVE THAT ANY OTHER PARTY TO THE OFFENSE INTENDED TO ENGAGE IN CONDUCT LIKELY TO RESULT IN DEATH OR SERIOUS PHYSICAL INJURY.

5. DEFINITIONS IN SECTION 135.00 ARE APPLICABLE TO THIS SUBSECTION. WHENEVER A PERSON IS CHARGED WITH MURDER FOR VIOLATION OF SUBSECTION (4) OF THIS SECTION ON ACCOUNT OF THE DEATH OF A PERSON DETAINED IN THE COURSE OF AND IN FURTHERANCE OF THE CRIME OF KIDNAPPING, OR IMMEDIATE FLIGHT THEREFROM, EVIDENCE WHICH TENDS TO SHOW THE FOLLOWING FACTS SHALL BE ADMISSIBLE FOR CONSIDERATION BY THE TRIER OF FACTS IN CONJUNCTION WITH OTHER ADMISSIBLE EVIDENCE IN DETERMINING WHETHER SUCH DEATH HAS OCCURRED:

(A) WHEN SUCH KIDNAPPED PERSON HAD A LAWFUL CUSTODIAN OR CUSTODIANS AND WAS LESS THAN SIXTEEN YEARS OLD OR A DISABLED PERSON AT THE TIME THE DETENTION BEGAN, THAT NO LAWFUL CUSTODIAN OF SUCH PERSON SAW OR HEARD FROM HIM FOLLOWING THE COMMENCEMENT OF THE DETENTION AND PRIOR TO TRIAL, OTHER THAN IN CIRCUMSTANCES SUGGESTING THAT HE WAS THEN UNDER DETENTION OR THAT HE HAD NOT YET BEEN ABLE TO RETURN TO SAFETY AND THAT NO LAWFUL CUSTODIAN RECEIVED RELIABLE INFORMATION DURING SUCH PERIOD PERSUASIVELY INDICATING THAT HE HAD RETURNED TO SAFETY; OR

(B) WHEN SUCH KIDNAPPED PERSON WAS AT LEAST SIXTEEN YEARS OLD AND NOT A DISABLED PERSON OR WHEN HE HAD NO LAWFUL CUSTODIAN AT THE TIME THE DETENTION BEGAN, THAT A PERSON WHOM THE PERSON DETAINED WOULD IN ALL REASONABLE PROBABILITY HAVE BEEN LIKELY TO VISIT OR COMMUNICATE WITH DURING THE PERIOD FOLLOWING THE COMMENCEMENT OF THE DETENTION AND PRIOR TO TRIAL, WERE THE PERSON DETAINED ALIVE AND FREE TO DO SO, DID NOT SEE OR HEAR FROM HIM DURING SUCH PERIOD AND RECEIVED NO RELIABLE INFORMATION DURING SUCH PERIOD PERSUASIVELY INDICATING THAT HE WAS ALIVE, OTHER THAN IN CIRCUMSTANCES SUGGESTING THAT HE WAS THEN UNDER DETENTION OR THAT HE HAD NOT YET BEEN ABLE TO

RETURN TO SAFETY. 11296

MURDER IS A CLASS A FELONY. 11298

COMMENT 11301

Killings where death or bodily harm is intended, sections 125.05(1) and 125.05(2). 11304 11305

(For the Commission's conclusions rejecting restoration of capital punishment, see the comment to section 60.05.) 11308 11309

Degrees of murder and manslaughter: Maryland is familiar with two degrees of murder and one of manslaughter; New York has retained only one degree of murder and two of manslaughter; the Model Penal Code recommends only one degree of each (with an additional crime of negligent homicide). While the problem cannot be explored completely without reference to depraved heart killings and felony-murders, the major problem of degrees is in the area of intentional killings, and it seems appropriate to try to dispose of the problem here. Commonly, only a single degree is utilized in the other areas. 11312 11313 11314 11315 11316 11317 11318 11319 11320 11321

Maryland has not had degrees of manslaughter, and we see no reason to introduce this complication. With flexible punishment provisions, it is unnecessary to make a division into degrees. 11324 11325 11326

The mental element in "intentional" murder: While a specific intent to kill is commonly required under first degree murder statutes, it is unnecessary at common law for murder generally, if specific intent is taken as the equivalent of the "intention" tentatively adopted by us — conscious purpose or objective. We should include knowledge, as well as intention, as an adequate basis for a murder conviction. This is in accord with both common law and sensible policy. If the defendant plants a bomb on an experimental airplane, desiring only to discredit the designer of the plane by a mid-air explosion, and is indifferent to the fate of the pilot, he should be guilty of murder if the pilot is killed, because, though he did not have a purpose to kill the pilot, he knew that his acts would, in the normal course of events, cause his death. The Model Penal Code recognizes this point, and the draft statute conforms with the Model Penal Code in this respect. 11329 11330 11331 11332 11333 11334 11335 11336 11337 11338 11339 11340 11341 11342

Like the models on which it is based, the Commission draft retains the essential common law division between murder and manslaughter. Assuming 11345 11346 11347

no mitigation, excuse, or justification, killings are murder if there is an intention to kill (or knowledge that death will occur) or to inflict serious physical injury. Davis v. State, 237 Md. 97 (1964). (The specific references to justification in subsection one and in the manslaughter section are unnecessary, in view of the provisions of Part 35, but, because of the need to refer specifically to mitigating circumstances, their omission might produce confusion in a reader not familiar with Part 35.) A conviction for murder when only injury, and not death, is intended, may be questioned. It may possibly be justified in some cases on a theory of mens rea based on extreme recklessness rather than intent; one who intentionally inflicts serious injury ordinarily takes an unjustified risk of killing and can be prosecuted on the basis of knowingly taking such a risk. But a more straightforward analysis seems acceptable; one who sets out to produce serious injury ought to be criminally responsible for murder if death occurs, whether he intends it or forsees it as likely or not, because the risk of death is an obvious one. The Commission has followed the common law in this approach, rejecting the Model Penal Code approach which would require proof of recklessness as to causing death in this case (See Model Penal Code, T.D. No. 9, pp. 32–33).

Degrees of murder result from an attempt to mitigate the harshness of applying the death penalty to all common law murders. If the death penalty is to be abolished, the chief historical and policy reason for having two degrees of murder disappears. The draft consequently contains only a single section for murder, retaining the common law distinction between murder and manslaughter.

(First degree murder varies from one jurisdiction to another and has no common law basis, but the most common formula in the area of intentional harm requires premeditation, deliberation, and a purpose or intention to kill. This formula is found in Maryland, and is given the usual construction. Faulcon v. State, 211 Md. 249 (1956). The theory is that where there is forethought, weighing of alternatives, and a purpose to kill, there should be a possibility of the death penalty and that this should not exist in truly impulsive killings, or in killings where the accused intended only physical harm short of death.)

(In one sense, such a distinction is easy to explain. If capital punishment is justified as a deterrent which is designed to operate, while the

accused is thinking about killing, in order to dissuade him, premeditation, deliberation and intent to kill must be present in order to give deterrence a chance to succeed. Judicial construction of the formula has weakened this explanation by so diluting the requirements as to make them, in some jurisdictions, almost meaningless. Some courts have said that if a purpose to kill is present, sufficient opportunity for premeditation and deliberation is necessarily present. Others, like Maryland, which require some appreciable time for premeditation in addition to a purpose to kill (Hyde v. State, 228 Md. 209(1962)) may nevertheless allow such time to be very short, and may allow the jury to find a purpose to kill fairly easily when death in fact results. It may be questioned whether such constructions really give the death penalty an opportunity to act as a significant deterrent at the moment of action.)

(Another weakness of the formula is that it does an imperfect job of classification. E.g., the typical mercy killing, which most would regard as meriting relatively light punishment, is first degree murder. Brutal and impulsive killings, on inadequate provocation are only second degree murder, despite the overwhelmingly depraved and dangerous character often exhibited by such a killer. Most of those who have given careful consideration to the problem have disliked the distinction, and usually, as in the Model Penal Code and New York, they have rejected it as unsound. There is an excellent discussion of the problem in Chapter 7 of the Report of the Royal Commission on Capital Punishment (1953) at pp. 167–189.)

Aiding suicide: (Section 125.15(2)); alternate section (125.05(2)) at common law suicide was a felony and aiders and abettors were punishable under the ordinary principles of accessoryship. Under many modern statutes, especially those defining felony in terms of punishment, suicide is no longer a crime, and absent special legislation there may be doubt as to the status of those who promote suicide. The Model Penal Code and the New York statute treat the problem in similar ways. One who promotes suicide by duress or deception may be guilty of murder; aiders are otherwise guilty of manslaughter. This seems to be a good solution of a difficult problem. The Commission has chosen to make the cases which are murder no more than second degree murder.

It will be recalled that the proposed draft, unlike New York, allows knowledge as a substitute

for intention in murder. In the case of aiding suicide, however, New York seems correct in requiring intention. The will of the suicide intervenes. Suppose that a wife threatens to kill herself if her husband deserts her. A jury might find that her husband had reason to know, and might conclude that he did know, that she would do so. But it seems that the husband should not be guilty of criminal homicide here, or in other suicide cases, if he has no purpose to cause death.

Extremely reckless killings; section 125.05(3).

The common law treatment of careless killings was never well worked out because of the inadequacy of the definitions used for the relevant mental states. Ordinary tort negligence was insufficient for criminal liability; recklessness or criminal negligence was required. Whether the factor which raised ordinary negligence to recklessness was the defendant's actual knowledge of the risk, an increased probability of harm, a greater danger to be avoided, the absence of any excusing circumstances for taking the risk, some combination of these factors, or something entirely different, or whether the standard shifted from case to case, is unclear. In very outrageous cases the crime might be murder instead of manslaughter, but there is no clear rule pointing to the dividing line.

One of the important advances of the Model Penal Code, followed by New York, is a clarification of dividing lines. Manslaughter requires recklessness, as opposed to mere negligence, that is, awareness of and conscious disregard of an unreasonable risk, as opposed to action while (unreasonably) failing to perceive the existence of the risk. Murder requires, in addition to recklessness, engaging in conduct which creates a grave risk of death, under circumstances evincing a depraved indifference to human life (New York), or acting under circumstances manifesting extreme indifference to the value of human life. (Model Penal Code). The Commission prefers the Model Penal Code language.

Felony-murders; section 125.05(4) and (5).

Policy arguments: At common law, even fault-free (apart from the fault involved in the commission of the underlying felony) killings in the course of such felonies as arson, burglary, rape and robbery, were murder; accord: Stansbury v. State, 218 Md. 255 (1958). Since the death penalty was

available for these underlying felonies, it was not such a big step to hold that the mens rea for the felony was an adequate substitute for the ordinary mens rea of murder. If, however, as in modern times, the penalties for the underlying felonies are usually much less than for murder, the rule becomes difficult to defend.

The argument against the rule is simple. If the penalty for burglary is fifteen years and the penalty for fault-free killing is nothing, why should the penalty for fault-free killing which by accident occurs during a burglary be life imprisonment? The felon who kills intentionally or recklessly is liable for criminal homicide on grounds apart from the felony-murder rule.

The usual arguments for the felony-murder rule bring out other considerations. The rule may induce care for life in felons by warning them that they take an absolute risk of causing death. From the prosecutor's point of view, the felony-murder rule greatly simplifies the problem of proof, particularly when the felon has not left any witnesses behind who can help resolve the question of whether the killing was accidental, careless, or intentional. But these arguments in fact do not justify the common law rule, although they may justify a less extreme rule proposed by the Model Penal Code. This in effect creates a rebuttable presumption of sufficient recklessness for a murder conviction when a killing occurs in the course of listed dangerous crimes. In effect, the Model Penal Code requires the defendant to come up with a convincing explanation to avoid a murder conviction if he kills in the course of committing a felony.

The resolution of the problem in the draft: New York was unwilling to make a basic change in the rule, although it did allow a limited escape. The rule applies if the defendant acted alone or if he was the one of several felons who committed the physical act causing death, even if he can show accident. If, however, the defendant did not by his own act physically cause the death, he has an affirmative defense if he can show he did not aid in the killing, was not armed with a deadly weapon, had no reason to suspect that his accomplices were so armed, and had no reasonable ground to think that any of his accomplices intended to engage in conduct likely to result in death or serious injury. The Commission likes the New York provisions relating to belief about accomplices and to weapons, and it prefers to deal with an affirmative defense rather than a presumption; but it would allow an

affirmative defense even in the case of the felon whose own act causes death, if he can show accident or negligence. The draft therefore follows the New York language, except on this point, where it has incorporated the Model Penal Code point of view. Allowing the defense for the felon who causes death has required some additional language restricting the defense.

Evidence of death: §125.05(5) was drafted in connection with the kidnapping materials. It was recognized that there may be special problems in proving the death of the victim in such cases, where all that is clear is that the victim was never seen alive again by his family or friends after he was kidnapped. The New York Code contains special provisions in the kidnapping article, dealing with presumptions of death in such cases, and the present subsection is adapted, with what the Commission believes are some clarifications and improvements, from this source. The New York presumption, stated in New York section 135.25(3), is probably unreasonable in some instances, as for example where a fifteen year old, just prior to the kidnapping, has announced that he is going to take the first opportunity to run away from home, and the New York presumption is thought likely to face serious constitutional attack for this reason. The Commission has deemed it safer to speak only in terms of admissibility of evidence. It may well be that subsection (3) is unnecessary when drafted in such terms, since it seems improbable that a court would hold such evidence inadmissible as lacking in relevance, but it seems to the Commission wise to avoid any such question rather than to assume the answer. The Reporter would prefer to state the section in terms of permitting but not requiring a jury inference from the stated circumstances, but the Commission feels that even this might be open to some constitutional attack.

Murder under the draft might bring a heavier discretionary sentence than kidnapping, and it may therefore be desirable to prosecute some kidnappers for murder.

125.20 MANSLAUGHTER

1. A PERSON IS GUILTY OF MANSLAUGHTER WHEN, INTENDING OR KNOWING THAT HIS CONDUCT WILL CAUSE DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER PERSON, HE CAUSES THE DEATH OF ANOTHER PERSON AND ONE OR MORE OF THE FOLLOWING MITIGATING CIRCUMSTANCES IS PRESENT:

(A) WITHOUT THE USE OF DURESS OR DECEPTION HE

CAUSED OR AIDED THE PERSON OF WHOSE MURDER HE IS ACCUSED TO COMMIT SUICIDE; OR

(B) HE ACTED UNDER CIRCUMSTANCES WHICH WOULD CONSTITUTE JUSTIFICATION, AS DEFINED IN THIS CODE, BUT FOR HIS FAILURE TO ESTABLISH THAT HE ACTED REASONABLY IN ASSESSING THE EXISTENCE OR EXTENT OF THE RISK OF THE HARM HE SOUGHT TO AVOID, THE NECESSITY FOR TAKING ACTION TO AVOID SUCH HARM, OR THE DEGREE OF FORCE NECESSARY TO AVOID SUCH HARM; PROVIDED, HOWEVER, THAT FULL JUSTIFICATION FOR HIS CONDUCT UNDER PART 35 FOR THE USE OF DEADLY PHYSICAL FORCE SHALL BE AN AFFIRMATIVE AND COMPLETE DEFENSE; OR

(C) HE ACTED BECAUSE HE WAS COERCED TO DO SO BY THE USE OR THREATENED IMMINENT USE OF UNLAWFUL PHYSICAL FORCE UPON HIM OR A THIRD PERSON, WHICH FORCE OR THREATENED FORCE A PERSON OF REASONABLE FIRMNESS IN HIS SITUTATION WOULD HAVE BEEN UNABLE TO RESIST; OR

(D) HE ACTED UNDER THE INFLUENCE OF EXTREME EMOTIONAL DISTURBANCE FOR WHICH THERE WAS A REASONABLE EXPLANATION OR EXCUSE.

2. WHENEVER A DEFENDANT IS ON TRIAL FOR BOTH MURDER AND MANSLAUGHTER WITH RESPECT TO THE DEATH OF THE SAME PERSON, AND THE EXISTENCE OF ANY OF THE MITIGATING CIRCUMSTANCES SPECIFIED IN SUBSECTION ONE OF THIS SECTION IS IN ISSUE, THE DEFENDANT SHALL HAVE THE BURDEN OF PROOF AS TO THE EXISTENCE OF SUCH CIRCUMSTANCES, IN THE SAME MANNER AS IN THE CASE OF AN AFFIRMATIVE DEFENSE OF JUSTIFICATION.

3. A PERSON IS GUILTY OF MANSLAUGHTER IF HE RECKLESSLY CAUSES THE DEATH OF ANOTHER PERSON.

MANSLAUGHTER IS A CLASS B FELONY.

COMMENT

Introduction: As has been previously noted, the Commission saw no need for adoption of the two degrees of manslaughter existing in New York. It has tentatively designated the single degree of manslaughter a class B felony (the grade of first degree manslaughter in New York), though it is quite possible that it should be a class C felony, carrying a maximum fifteen year penalty. It should be noted that manslaughter in intentional killings (section 125.20(1)), where the crime would be murder, but for duress, provocation, or other mitigating factors, places the burden of persuasion on the defendant to establish the mitigating factors (section 125.20(2)).

Killings where death or bodily harm is intended; section 125.20(1): Aiding suicide: This matter is discussed above in connection with section 125.15(2) – aiding suicide as murder.

Situations in which justification would be present, but for defendant's negligence or recklessness: In accordance with decisions of the Commission about defenses generally, a provision is included which reduces what would otherwise be murder to manslaughter when the defendant believes that he is confronted by facts which would justify his act, e.g., by a self-defense situation, but is reckless or negligent in forming his belief, or is reckless or negligent in responding to the situation. A number of common law cases have reached the result of manslaughter here, either on the basis of this negligence or recklessness, or on the ground that what would be justifying becomes merely mitigating under the circumstances.

Duress: In accordance with a Commission decision relating to §35.35, duress reduces what would otherwise be murder or manslaughter.

Provocation: New York and the Model Penal Code make relatively little change in the common law as to provocation, in requiring that the defendant act under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. The Model Penal Code adds mental disturbance as an alternative to emotional disturbance, but the alternative does not seem necessary. The codes do not set out specific requirements for "provocation." In People v. Caruso, 246 N.Y. 437, 159 N.E. 390 (1927), the jury might have believed that the accused, an uneducated immigrant, was informed erroneously that improper treatment by a doctor was the reason for the very recent death of his infant son, and that, when the defendant informed the doctor of the child's death, the doctor seemed to laugh or smile, whereupon the defendant killed him. It is unlikely that provocation could be found here at common law, but the codes are broad enough to permit it. The codes depart from the strict requirement that the provocation must be enough to deprive the ordinary man of his self-control, without going all the way to a subjective standard which gives the defendant the benefit of all of his character or personality defects. Strict requirements of cooling time are remitted to the general problem of reasonable explanation or excuse; sometimes slowly working provocation is as much of a mitigating factor as that which works more rapidly.

The Commission has followed the New York language, which speaks of acting "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," but has omitted a further qualifying phrase, "the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be," on the ground that it tended more to confuse than to clarify the issue.

Killings unexpectedly resulting from the infliction of less than serious physical injury: As noted in connection with the material on murder, the Commission has retained the common law rule, rejected by the codes, that the intentional infliction of serious bodily harm, followed by death, is murder. It, however, follows the codes in repudiating the common law rule that the intentional infliction of less than serious harm is manslaughter if death unexpectedly occurs, e.g., because of an unknown physical weakness of the victim. Such a situation is sufficiently abnormal, and such a defendant is far enough from committing the sort of actions likely to be dangerous to life, that it would be unfair to convict the defendant of criminal homicide, absent the recklessness or criminal negligence which would justify conviction on other grounds under §§ 125.20(3) or 125.25. He may, of course, be liable to a conviction for assault.

Reckless killings; section 125.20(3).

Discussion of this subsection is included in the discussion of the related provision as to extremely reckless killings as murder in section 125.05(2), supra.

Misdemeanor – manslaughter.

A number of common law cases have held that, apart from criminal negligence, death occurring in the course of a misdemeanor is sometimes manslaughter. One area in which these cases often arise is traffic deaths, where the jury does not find criminal negligence, but does find disobedience of a traffic regulation relevant to the creation of a risk of death. (The Court of Special Appeals, in State v. Gibson, 4 Md. App. 236 (1968), recently said that the doctrine does not apply to manslaughter by automobile cases in Maryland.) The rule is always qualified; it would not, for example, be applied to an offense not requiring mens rea. So, if in the course of a sale of adulterated food, a misdemeanor not requiring any criminal state of

mind, the seller accidentally and without fault caused the death of another, it would not be manslaughter. Limiting principles are difficult to state. Sometimes it is suggested that the underlying misdemeanor must be malum in se, or naturally dangerous to life, or made criminal to prevent the risk of the kind of death which in fact occurred, or that some special causal relationship is required. The same arguments apply here as against the felony-murder rule, in some ways with even more force, since the underlying crimes usually are not committed by those who are likely to go on creating danger to life, if we assume the absence of negligence. If criminal negligence (without advertence) is accepted as a basis for criminal homicide, there seems no need to continue the misdemeanor-manslaughter rule, and neither New York nor the Model Penal Code has done so, nor does the Commission draft do so.

New York, but not the Model Penal Code, has continued a special misdemeanor-manslaughter rule (in force before the new code) with respect to illegal abortions which cause the death of the mother. The provision seems to be unnecessary. Criminal abortions which carry an obvious and unjustified risk of the mother's death or which are incompetently performed are reached by the manslaughter or negligent homicide sections anyway, if the nother dies. In other cases in which death occurs in the absence of criminal negligence, there seems no better reason for punishing for the accidental death, in addition to the criminal abortion, than in other misdemeanor-manslaughter situations.

125.25. CRIMINALLY NEGLIGENT HOMICIDE

A PERSON IS GUILTY OF CRIMINALLY NEGLIGENT HOMICIDE WHEN, WITH CRIMINAL NEGLIGENCE, HE CAUSES THE DEATH OF ANOTHER PERSON.

CRIMINALLY NEGLIGENT HOMICIDE IS A CLASS E FELONY.

COMMENT

Whether the code crimes of negligent homicide (Model Penal Code) or criminal negligent homicide (New York Code) – which are essentially identical – expand the common law is not entirely clear. The common law may have punished for manslaughter in cases in which the defendant was not aware of the risk which he took, if the risk was substantial enough and would have been recognized by the reasonable man. In general, modern theory tries to

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avoid punishment for negligence, as opposed to recklessness, largely on the grounds that unawareness is more apt to be an indicator of stupidity than moral fault or criminal tendencies, and that negligence, unlike recklessness cannot be deterred. How can you avoid a risk you do not see? However, the considerable loss produced by negligence in homicide cases has produced pressure to permit a jury to find a relatively low degree of criminal guilt in these cases. And often, deterrence may operate in the area of negligence, in encouraging attention to what Glanville Williams calls subsidiary rules of prudence. That is, one who knows he may be criminally liable for negligent driving may be more careful about observing speed limits or stop signs, even though he would not concede to himself that he is driving negligently when he sometimes disregards them. On these grounds, the crime seems to have a place in the code. It should be noted that something more than tort negligence is involved even in this crime, because the risk must be substantial and unjustifiable, and the defendant's act must involve a gross deviation from ordinary standards of care.

PART 130: SEX OFFENSES

INTRODUCTION

As has been done with respect to other parts of this Code, the Commission used the New York Code as its starting point in drafting the proposed Sex Offender Code. Present Maryland law and the Model Penal Code were also consulted before any of the proposed sections was drafted. The result resembles the New York Code at first glance but contains a number of significant alterations. The most significant issues will be discussed in the course of a section by section commentary upon the draft's provisions, many of which simplify and alter our present law.

130.00. SEX OFFENSES; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. " SEXUAL INTERCOURSE" HAS ITS ORDINARY MEANING OF GENITAL COPULATION BETWEEN MEMBERS OF OPPOSITE SEXES AND OCCURS UPON ANY PENETRATION, HOWEVER SLIGHT; EMISSION IS NOT REQUIRED.

2. "DEVIATE SEXUAL INTERCOURSE" MEANS SEXUAL CONDUCT BETWEEN PERSONS NOT MARRIED TO EACH OTHER CONSISTING OF CONTACT BETWEEN THE PENIS AND THE ANUS, THE

MOUTH AND THE PENIS, OR THE MOUTH AND THE VULVA.

3. "SEXUAL CONTACT" MEANS ANY TOUCHING OF THE SEXUAL OR OTHER INTIMATE PARTS OF ANOTHER PERSON FOR THE PURPOSE OF GRATIFYING SEXUAL DESIRE OF EITHER PARTY; IT DOES NOT INCLUDE ACTS COMMONLY EXPRESSIVE OF FAMILIAL OR FRIENDLY AFFECTION.

4. "MENTALLY DEFECTIVE" MEANS THAT A PERSON SUFFERS FROM A MENTAL DISEASE OR DEFECT WHICH PERMANENTLY OR TEMPORARILY RENDERS HIM SUBSTANTIALLY INCAPABLE OF APPRAISING THE NATURE OF HIS CONDUCT, OF RESISTING AN ACT, OR OF COMMUNICATING UNWILLINGNESS TO SUBMIT TO AN ACT.

5. "MENTALLY INCAPACITATED" MEANS THAT A PERSON IS RENDERED SUBSTANTIALLY INCAPABLE OF APPRAISING THE NATURE OF HIS CONDUCT, OF RESISTING AN ACT OR OF COMMUNICATING UNWILLINGESS TO SUBMIT TO AN ACT OWING TO THE INFLUENCE OF A DRUG, NARCOTIC OR INTOXICATING SUBSTANCE ADMINISTERED TO HIM WITHOUT HIS CONSENT OR AWARENESS OR TO ANY OTHER ACT COMMITTED UPON HIM WITHOUT HIS CONSENT OR AWARENESS.

6. "PHYSICALLY HELPLESS" MEANS THAT A PERSON IS UNCONSCIOUS OR THAT A PERSON DOES NOT CONSENT TO AN ACT AND IS PHYSICALLY UNABLE TO RESIST SUCH ACT OR COMMUNICATE UNWILLINGNESS TO SUBMIT TO SUCH ACT.

7. "MARRIED" PERSONS ARE (A) PERSONS WHO HAVE BEEN MARRIED TO ONE ANOTHER AND WHOSE MARRIAGE HAS NOT BEEN ANNULLED OR TERMINATED BY A FINAL DECREE OF ABSOLUTE DIVORCE, OR (B) SPOUSES LIVING APART UNDER A DECREE OF DIVORCE A MENSA ET THORO OR OF JUDICIAL SEPARATION, OR (C) EXCEPT WHERE THE YOUTHFULNESS OR FAMILY RELATIONSHIP OF ONE OR BOTH OF THE PARTIES IS AN ELEMENT OF THE ALLEGED CRIME, PERSONS LIVING TOGETHER BY MUTUAL CONSENT AS THOUGH THEY WERE MARRIED, WHATEVER THE LEGAL STATUS OF THEIR RELATIONSHIP.

COMMENT

The section on definitions is merely a device for saving space by defining only once key terms which recur in several operative sections. Except for the following brief comments, the effect of the definitional sections will be considered in connection with the discussion of the the operative sections.

1. "Sexual intercourse." The usual rule applicable in rape prosecutions that intercourse occurs upon any penetration, however slight, is continued here.

2. "Deviate sexual intercourse." Non-coital connection between married persons is taken out of the coverage of the sodomy sections by this definition. The definition also excludes sexual conduct between a person and an animal. Such conduct may fall within certain of the provisions of Part 250. Otherwise, apart from clarification and simplification, the definition does not meaningfully change the present Maryland law.

3. "Sexual contact." This term to be used in connection with the offense of sexual misconduct pertains primarily to two types of criminal conduct: (1) child molestation not involving sexual intercourse or deviate sexual intercourse and (2) offensive sexual touching of an adult without the victim's consent, as where a strange man seeks to fondle a woman in a crowded bus or dark alley without attempting intercourse. To avoid making any sort of caress or embrace an invitation to prosecution, it is provided that the term does not include acts commonly expressive of familial or friendly affection.

4. "Mentally defective." This term is designed to identify, for purposes of rape and sodomy provisions, persons who are incapable of consenting to sexual intercourse or deviate sexual intercourse due to severe mental illness or intellectual deficiency. It would not cover a person whose low intelligence, maladjustment or emotional illness manifested itself in sexual permissiveness or promiscuity but who retained the power of consent.

5. "Mentally incapacitated." This term identifies persons deemed incapable of consenting to sexual intercourse or deviate sexual intercourse because they are extremely intoxicated or drugged. It would not cover the person whose inhibitions have been affected by drugs or drink but who is still capable of understanding what is going on and giving or withholding consent.

6. "Physically helpless." This definition, used in sections on rape and sodomy identifies another class of persons likely to be victimized sexually on occasion due to a special condition in which consent or capacity to consent is lacking. The classs includes persons who are unconscious or crippled or paralyzed to the point where resistance is impossible.

7. "Married." The term includes virtually any persons who might reasonably believe they had a

right to have sexual intercourse with one another by reason of a marriage relationship, including common law spouses. The crime of incest and offenses where the victim is deemed incapable of consenting are exempted so that an adult living with a minor or with a person related within prohibited degrees of consanguinity will not be immunized by color of marriage from the prohibitions of the law. However, under this section, persons who have been lawfully married or whose marriage is merely voidable and has not yet been annulled, are 'married' within the meanings of those sections of the Code (e.g., Section 130.10(2); Section 130.15; Section 130.20; Section 130.35 and Section 130.40) which prohibit sexual conduct only with respect to a person to whom the actor is not married. In such cases, the element of mens rea is likely to be missing even though a court might have held the marriage to be invalid had the question been presented to it.

Section 130.00(7)(c) also has the effect of making it impossible for a male to commit the crimes of forcible rape, sexual misconduct or indecent exposure against a female not under age and not related to him who has chosen to live with him as though the two of them were married even though both are fully aware they do not have a lawful marriage relationship. Maryland presently does not punish fornication, and the new Code does not add such a crime. A person legally cannot rape his wife, since sexual intercourse is a normal incident of marriage. Here, the Commission takes the position that a woman who chooses to live like a wife has no more right to complain of nonconsensual sexual intercourse, sexual fondling or exhibition than does a lawful wife. If she does not like it when her paramour gets rough or fondles her or exposes himself to her when she doesn't want him to, her remedy is to cease living with him. She can, however, prosecute him for forcing deviate sexual intercourse upon her, as can a wife under Sections 130.25 and 130.30.

130.05. SEX OFFENSES; DEFENSES

1. TO THE EXTENT THAT A PROSECUTION UNDER THIS PART IS BASED UPON THE VICTIM'S BEING MENTALLY DEFECTIVE, MENTALLY INCAPACITATED, OR PHYSICALLY HELPLESS, IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT, AT THE TIME HE ENGAGED IN THE CONDUCT CONSTITUTING THE OFFENSE, DID NOT KNOW AND DID NOT HAVE REASONABLE GROUNDS TO KNOW THAT THE VICTIM WAS MENTALLY DEFECTIVE, MENTALLY INCAPACITATED, OR PHYSICALLY HELPLESS.

2. TO THE EXTENT THAT A PROSECUTION UNDER THIS PART IS BASED UPON THE AGE OF THE VICTIM BEING LESS THAN

THIRTEEN, IT IS NO DEFENSE THAT THE DEFENDANT DID NOT KNOW THE AGE OF THE VICTIM OR REASONABLY BELIEVED THE VICTIM TO BE THIRTEEN OR OLDER. TO THE EXTENT THAT A PROSECUTION UNDER THIS PART IS BASED ON THE AGE OF THE VICTIM BEING LESS THAN A CRITICAL AGE OTHER THAN THIRTEEN, IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT REASONABLY BELIEVED THE VICTIM TO BE THE CRITICAL AGE OR OLDER.

COMMENT

1. In cases where the defendant has taken advantage of a victim's being mentally defective, mentally incapacitated, or physically helpless to subject such victim to sexual conduct, an affirmative defense is provided by this section if the defendant did not have reasonable grounds to know of the victim's inability to consent to such conduct. This defense is relevant to prosecutions for sexual misconduct, rape or sodomy in either degree.

In providing the instant affirmative defense, the Commission considered that the mens rea for a sex offense would be lacking unless the defendant had a basis for knowing that the victim was incapacitated from giving consent. Thus, a defendant who fornicated with an adult woman of low enough intellectual capacity to be classified "mentally defective" but, perhaps by reason of his own low intelligence, did not realize she was incapable of consenting, would be entitled to acquittal on a charge of rape in the second degree if he met his burden to show that he did not have grounds to appreciate the extent of her mental defect. To give another example, a defendant who fondled the intimate parts of a female incapable of consenting because she was psychotic, would be entitled to acquittal on a charge of sexual misconduct if he did not have reasonable grounds to know that psychosis was responsible for her apparent consent to his actions.

2. In cases of alleged sexual misconduct and sodomy in the second degree where the basis for charging that sexual intercourse or deviate sexual intercourse is nonconsensual is the victim's age, an affirmative defense is provided if the defendant meets his burden to prove that he reasonably believed the victim to be the critical age or older. Thus, in those cases where the defendant can show he has been reasonably deceived by the victim's appearance of maturity and sexual experience, he may be found to lack the mens rea necessary for commission of the felony.

In cases of alleged rape in the first degree and sodomy in the first degree based upon a victim's being less than 13, the Commission considered the possibility that the defendant could be deceived by appearances into believing that the victim were at least sixteen in the case of a girl victim or at at least eighteen in the case of a boy victim (i.e., to lack criminal intent altogether) to be so remote that it declined to recommend that such a mistake be a complete defense. Such a mistake conceivably could be made a "partial defense" – i.e., operate to reduce the grade of the offense to second degree rape or sodomy. However, the Commissicn did not so recommend.

130.10. SEXUAL MISCONDUCT

1. A PERSON IS GUILTY OF SEXUAL MISCONDUCT WHO ENGAGES IN ANY FORM OF SEXUAL CONTACT, SEXUAL INTERCOURSE, OR DEVIATE SEXUAL INTERCOURSE WITH ANOTHER PERSON NOT MARRIED TO THE DEFENDANT:

(A) WHEN THE DEFENDANT KNOWS THAT THE VICTIM SUBMITS BECAUSE THE VICTIM IS UNAWARE THAT A SEXUAL ACT IS BEING COMMITTED UPON HIM OR HER, OR BECAUSE SUCH VICTIM FALSELY SUPPOSES THAT THE DEFENDANT IS MARRIED TO HIM OR HER; OR

(B) WHEN THE VICTIM DOES NOT CONSENT TO THE DEFENDANT'S CONDUCT, AND THE CIRCUMSTANCES PUT THE DEFENDANT ON NOTICE THAT THE VICTIM DOES NOT CONSENT; OR

(C) WHEN THE VICTIM IS A CHILD LESS THAN 13 YEARS OF AGE.

2. A PERSON IS GUILTY OF SEXUAL MISCONDUCT WHEN HE OR SHE ENGAGES IN SEXUAL INTERCOURSE WITH A PERSON NOT MARRIED TO HIM OR HER WHO IS LESS THAN SIXTEEN YEARS OLD, PROVIDED THAT THE DEFENDANT IS FOUR YEARS OR MORE OLDER THAN THE OTHER PERSON.

SEXUAL MISCONDUCT IS A CLASS A MISDEMEANOR.

COMMENT

The newly described offense of sexual misconduct is designed to cover five types of criminal conduct: (1) an included misdemeanor to permit a prosecutor to bargain for a lesser plea in a rape case; (2) an included misdemeanor to permit the prosecutor to bargain for a plea to a lesser offense in a sodomy case; (3) a misdemeanor offense to make criminal nonconsensual sexual touchings of the crowded bus and dark alley variety; (4) sexual fondling short of sexual intercourse or deviate

sexual intercourse as to a child, who is deemed incapable of consenting due to age; and (5) sexual intercourse between a defendant and another person who is less than sixteen and four years or more younger than the defendant. It should be emphasized that with respect to purposes (1) and (2) the Commission is not advocating the plea bargaining approach to prosecution. However, it is submitted that the statutory formula for defining rape and sodomy offenses ought not to preclude plea bargaining should it be desirable in particular situations.

In the nonconsensual touching situation it might be difficult to separate an experimental, but restrained, attempt to pet on Lover's Lane, which the Commission did not wish to recommend for criminal sanction, from conduct sufficiently offensive to require punishment. If the alleged victim's subjective attitude were to be the test for distinguishing between criminal and noncriminal conduct, spurious prosecutions and blackmail might result. The draft requires that the defendant be put on notice of the victim's lack of consent. As a practical matter, this means as to the couple on Lovers' Lane, that the female must make her nonconsent very clear and her date's advances must be more than experimental. In the crowded-bus or dark-alley situation, however, the fact that the alleged victim is a stranger to the defendant ought in itself to be notice that the victim does not consent, absent some affirmative conduct on her part indicating that she does consent.

Many cases of "child molestation" would fall under this section. Since only a touching or fondling is involved, the age below which the victim is deemed incapable of consent is set at 13. Adolescents 13 years old or more are deemed capable of consenting or withholding consent to sexual fondling. The crime is given misdemeanor status because the dangers of pregnancy, loss of virtue and serious degradation attendant upon instances of sexual intercourse or deviate sexual intercourse between an adult and an adolescent are not present. However, pursuant to §70.20 of Part 70, the persistent offender — defined as one who commits 3 or more such offenses in two years — could receive a sentence equivalent to that provided for a minor felony.

The Commission considered that homosexual fondling without consent was likely to be as offensive or more so as heterosexual fondling, and so made any type of sexual contact without consent

the misdemeanor of Sexual Misconduct.

Under the present §464 of Article 27 of the Maryland Code, a male eighteen years of age or older having sexual intercourse with a female not his wife between the ages of fourteen and sixteen years is guilty of the misdemeanor of carnal knowledge. In cases of sexual misconduct under subsection 2 of §130.10 the Commission considered that the essence of the crime is the employment by the offender of his greater age and experience to take advantage of the presumed innocence of a minor. Under this rationale, a 17 year old boy who had consensual intercourse with a female acquaintance near his own age but still less than 16 would not thereby commit a crime. The extreme disparity in ages permitted under this section is 4 years. This is the same disparity as the maximum presently permitted under §464 of Article 27, which does not make it criminal for a male one day short of being 18 years old to have carnal knowledge of a female on the day when she becomes 14 years old.

130.15. RAPE IN THE SECOND DEGREE

A MALE IS GUILTY OF RAPE IN THE SECOND DEGREE WHEN HE ENGAGES IN SEXUAL INTERCOURSE WITH A FEMALE NOT MARRIED TO HIM;

1. BY PHYSICAL FORCE THAT OVERCOMES HER EARNEST RESISTANCE; OR BY A THREAT OF IMMEDIATE DEATH, SERIOUS PHYSICAL INJURY OR KIDNAPPING, TO BE INFLICTED ON ANY PERSON, WHICH COMPELS THE VICTIM TO SUBMIT TO THE SEXUAL INTERCOURSE THROUGH FEAR; OR

2. WHEN SUCH FEMALE IS MENTALLY DEFECTIVE, MENTALLY INCAPACITATED OR PHYSICALLY HELPLESS.

RAPE IN THE SECOND DEGREE IS A CLASS D FELONY.

COMMENT

The Commission considered that some rapes are more offensive to the victim and the community, and therefore deserving of greater punishment, than others. Therefore, the proposed Code creates two degrees of rape, the second degree encompassing all rapes and the first degree involving certain enumerated aggravating factors which create the basis for the greater punishment.

Since rape in the first degree is defined as rape in the second degree plus enumerated aggravating factors, rape in the second degree defines the basic crime of rape. To constitute the

crime, there must be either: (1) sexual intercourse accomplished by force or threat, or (2) intercourse with a female rendered incapable of consenting by mental deficiency or disease, extreme intoxication or drugging or physical helplessness. Since any sexual intercourse between a man and a woman involves some physical force by the male, the draft provides that the crime is not committed by physical force unless the female offers more than a sham resistance to the intercourse. However, in cases where threat of immediate death, serious physical injury or kidnapping occurs, the victim, whose fear may inhibit any sort of protest, is not required to resist. In such cases, the State must only prove that the threat compelled the victim to submit to the sexual intercourse through fear.

130.20. RAPE IN THE FIRST DEGREE

A MALE IS GUILTY OF RAPE IN THE FIRST DEGREE WHEN HE ENGAGES IN SEXUAL INTERCOURSE WITH A FEMALE NOT MARRIED TO HIM:

1. WHERE THE DEFENDANT'S CONDUCT AMOUNTS TO RAPE IN THE SECOND DEGREE UNDER §130.15(1) OR §130.15(2) AND (A) THE VICTIM IS NOT A VOLUNTARY SOCIAL COMPANION OF THE DEFENDANT UPON THE OCCASION OF THE CRIME, OR (B) THE DEFENDANT DISPALYS OR EMPLOYS A DEADLY WEAPON OR INFLICTS SUFFOCATION, STRANGULATION, SEVERE PAIN OR SERIOUS PHYSICAL INJURY UPON ANYONE IN COMMITTING THE CRIME, OR (C) THE DEFENDANT COMMITS THE CRIME IN CONJUNCTION WITH ONE OR MORE OTHER ACTORS WHO EITHER ASSIST IN COMPELLING THE VICTIM TO SUBMIT TO THE SEXUAL INTERCOURSE OR THEMSELVES PERPETRATE ACTS OF SEXUAL INTERCOURSE UPON THE VICTIM; OR

2. WHEN SUCH A FEMALE IS LESS THAN THIRTEEN YEARS OLD, PROVIDED THAT THE DEFENDANT IS FOUR OR MORE YEARS OLDER THAN SHE IS.

RAPE IN THE FIRST DEGREE IS A CLASS A FELONY.

COMMENT

The aggravating factor which escalate rape in the second degree to the first degree are as follows: (1) the victim and actor are not voluntary social companions, (2) the defendant displays or employs a deadly weapon or inflicts suffocation, strangulation, severe pain or physical injury in the course of the crime, or (3) the rape involves multiple actors. All of these situations were considered to be more offensive to the victim and society than other rapes, primarily because they are likely to terrorize or degrade the victim to a

greater extent.

In addition, "statutory rape" of a child under 13 was considered to be deserving of greater seriousness than intercourse with an adolescent 13 years or older. Of course, the 13th birthday is not a magic moment at which all individuals achieve sexual maturity. However, no age can be found to mark the moment of maturity for all individuals. The 13th birthday appeared to be the best dividing point available.

As in the case of rape in the second degree of the "statutory rape" variety, intercourse between males and females of approximately the same age was not considered to be felonious, and the four-year maximum age disparity employed in §464 of Article 27 was used to mark the boundary line between rape and mere fornication, the latter activity not being presently prohibited in Maryland nor prohibited in the proposed Sex Offender Code.

130.25. SODOMY IN THE SECOND DEGREE

A PERSON IS GUILTY OF SODOMY IN THE SECOND DEGREE WHEN HE OR SHE ENGAGES IN DEVIATE SEXUAL INTERCOURSE WITH ANOTHER PERSON:

1. BY PHYSICAL FORCE THAT OVERCOMES THE VICTIM'S EARNEST RESISTANCE; OR BY A THREAT OF IMMEDIATE DEATH, SERIOUS PHYSICAL INJURY OR KIDNAPPING, TO BE INFLICTED ON ANY PERSON, WHICH COMPELS THE VICTIM TO SUBMIT TO THE DEVIATE SEXUAL INTERCOURSE THROUGH FEAR; OR

2. WHEN SUCH OTHER PERSON IS LESS THAN EIGHTEEN YEARS OLD, PROVIDED THAT THE DEFENDANT IS FOUR OR MORE YEARS OLDER THAN THE VICTIM IS; OR

3. WHEN SUCH OTHER PERSON IS MENTALLY DEFECTIVE, MENTALLY INCAPACITATED OR PHYSICALLY HELPLESS.

SODOMY IN THE SECOND DEGREE IS A CLASS D FELONY.

COMMENT

For commentary, see §130.30.

130.30. SODOMY IN THE FIRST DEGREE

A PERSON IS GUILTY OF SODOMY IN THE FIRST DEGREE WHEN HE OR SHE ENGAGES IN DEVIATE SEXUAL INTERCOURSE WITH ANOTHER PERSON:

1. WHERE THE DEFENDANT'S CONDUCT AMOUNTS TO SODOMY IN THE SECOND DEGREE UNDER §130.25(1) OR

§130.25(3) AND THE DEFENDANT (A) IS NOT A VOLUNTARY SOCIAL COMPANION OF THE VICTIM UPON THE OCCASION OF THE CRIME, OR (B) EMPLOYS A DEADLY WEAPON OR INFLICTS SUFFOCATION, STRANGULATION, SEVERE PAIN OR SERIOUS PHYSICAL INJURY UPON ANYONE IN COMMITTING THE CRIME, OR (C) COMMITS THE CRIME IN CONJUNCTION WITH ONE OR MORE OTHER ACTORS WHO EITHER ASSIST IN COMPELLING THE VICTIM TO SUBMIT TO THE DEVIATE SEXUAL INTERCOURSE OR THEMSELVES PERPETRATE ACTS OF DEVIATE SEXUAL INTERCOURSE UPON THE VICTIM; OR

2. WHEN SUCH OTHER PERSON IS LESS THAN THIRTEEN YEARS OLD, PROVIDED THAT THE DEFENDANT IS FOUR OR MORE YEARS OLDER THAN THE VICTIM IS.

SODOMY IN THE FIRST DEGREE IS A CLASS A FELONY.

COMMENT

The Commission considered that homosexual buggery and fellatio, included within the definition of "deviate sexual intercourse" in §130.00, is as offensive to a victim and to society as rape where the victim does not consent to the conduct. Similarly, where such nonconsensual homosexual behavior is accompanied by aggravating factors, such as the victim's extreme youth or the fact that the actor is a stranger, or employs a deadly weapon or inflicts suffocating, strangulation, severe pain or serious physical injury, or commits the crime in a gang fashion, it is as deserving of more severe punishment as is similarly aggravated rape. Therefore, the definitions of the two degrees of sodomy essentially parallel the definitions of the two degrees of rape. Rape and sodomy differ in that the essence of sodomy is nonconsensual deviate sexual intercourse while it is nonconsensual sexual intercourse in rape. The upper age limit of "statutory sodomy" is the 18th birthday, whereas the 16th birthday marks the age boundary of the Sexual Misconduct victim (See §130.10(2)). The difference reflects the fact that males generally mature later than females.

The effect of the new draft is to make relatively more serious certain conduct which is now defined as sodomy under §553 of Article 27 or unnatural or perverted practice under §554. At the same time, the following conduct is removed from prohibition: (1) homosexual conduct between consenting adults conducted in private; (2) noncoital private sexual behavior between adults of the opposite sex whether married or not; and (3) sexual conduct with an animal.

The prohibition against consensual homosexual behavior between adults in private was excluded from the new draft on the following grounds:

1. It is no longer the business of government to "outlaw sin" where no citizen is harmed by the immoral behavior.

2. A general prohibition of homosexual behavior is almost impossible of enforcement and, when token enforcement attempts are made, leads to arbitrary and capricious punishment of a tiny proportion of those who regularly engage in such behavior;

3. Incarceration in the all-male environment of a prison, where homosexual behavior is notoriously common, is hardly an appropriate punishment for homosexual behavior;

4. Valuable police resources are wasted in making token efforts to suppress private homosexual activity;

5. Police resources which are devoted to the apprehension of adult homosexuals are diverted from the much more important problem of homosexual molestation of youths by adults. Adult homosexuals often persuade teen-aged boys to engage in homosexual conduct by offering them money. Some of these boys discover that homosexual behavior is a ready source of cash and become, in effect, homosexual prostitutes. If anyone is likely to suffer psychic damage or to be converted from heterosexuality to permanent homosexuality by homosexual experiences, it is this youthful homosexual prostitute. He may initially have engaged in such behavior for the money, but may begin to think of himself as a homosexual after a number of experiences. Adults caught in homosexual behavior have usually already been corrupted. The new sodomy statute, of course, punishes an adult who consorts homosexually with a minor 4 years his junior and under 18 whether or not money is the inducement to perform the act.

6. The present law creates situations of disgrace and blackmail which are disproportionate in their undesirable effects to the law's effectiveness in controlling the problem of homosexuality.

7. Enforcement of the law against strictly private offending conduct would constitute an unwarranted invasion of privacy.

For a more full discussion of the issue see R. Fisher, The Sex Offender Provisions of the Proposed New Maryland Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?, 30 Md. L. Rev. 91 (1970).

The Commission's reasoning in removing from prohibition heterosexual variation between consenting adults in private rests upon the same grounds as its decision with respect to homosexual behavior between consenting adults in private except that certain of the arguments are even stronger with respect to the heterosexual conduct. For example, the intrusion into private domain would be arguably more serious in the case of heterosexual variation between married persons than in cases of homosexual conduct between unmarried persons. Likewise, the argument that the prohibition is unenforceable is even stronger with respect to heterosexual variation. The sodomy law is enforced with respect to only a tiny fraction of homosexual acts, but it is practically never enforced with respect to heterosexual variation.

The omission of the prohibition of sexual conduct with animals from the Sex Offender portion of the proposed Code is based upon the assumption that such conduct will be prohibited elsewhere in the Proposed Code under statutes covering cruelty to animals, public lewdness, etc.

130.35. INDECENT EXPOSURE

A PERSON SIXTEEN YEARS OLD OR MORE IS GUILTY OF INDECENT EXPOSURE WHEN UNDER CIRCUMSTANCES IN WHICH HE OR SHE OUGHT TO KNOW THAT HIS OR HER CONDUCT IS LIKELY TO CAUSE AFFRONT OR ALARM, HE OR SHE INTENTIONALLY EXPOSES HIS OR HER GENITALS FOR THE PURPOSE OF MAKING AN EXHIBITION TO A PERSON (A) OF THE OPPOSITE SEX TO WHOM HE OR SHE IS NOT MARRIED, OR (B) WHO IS LESS THAN THIRTEEN YEARS OLD.

INDECENT EXPOSURE IS A CLASS A MISDEMEANOR.

COMMENT

Section 250.00 of the proposed code punishes as a class B misdemeanor intentional exposure of the genitals in a public place, but the present section is more narrowly directed and covers something other than the nude sunbather on a public beach who may know and not care that his conduct is offensive to others. It requires a purpose of making an exhibition to a person of the opposite sex or a child under thirteen, in circumstances in which the

defendant knows or should know that his conduct will cause affront or alarm. It is primarily a sexual offense rather than an offense against public sensibilities.

130.40. INCEST IN THE SECOND DEGREE

A PERSON IS GUILTY OF INCEST IN THE SECOND DEGREE WHO WHEN HE ENGAGES IN ANY FORM OF SEXUAL CONTACT, SEXUAL INTERCOURSE OR DEVIATE SEXUAL INTERCOURSE WITH A PERSON WHOM HE KNOWS TO BE RELATED TO HIM, EITHER LEGITIMATELY OR ILLEGITIMATELY, AS AN ANCESTOR, DESCENDANT, BROTHER, SISTER, UNCLE, AUNT, NEPHEW OR NIECE OF THE WHOLE OR HALF BLOOD, PROVIDED THAT THE TWO PARTIES ARE NOT MARRIED TO EACH OTHER.

INCEST IN THE SECOND DEGREE IS A CLASS B MISDEMEANOR.

COMMENT

For commentary, see §130.45.

130.45. INCEST IN THE FIRST DEGREE

A PERSON IS GUILTY OF INCEST IN THE FIRST DEGREE WHEN HE ENGAGES IN SEXUAL INTERCOURSE OR DEVIATE SEXUAL INTERCOURSE WITH A PERSON LESS THAN TWENTY-ONE YEARS OLD WHOM HE KNOWS TO BE RELATED TO HIM:

1. EITHER LEGITIMATELY OR ILLEGITIMATELY, AS A DESCENDANT; OR

2. AS AN ADOPTIVE OR STEP SON, DAUGHTER, GRANDSON OR GRANDDAUGHTER.

INCEST IN THE FIRST DEGREE IS A CLASS E FELONY.

COMMENT

The draft contains two degrees of incest. Incest in the second degree is designed to cover all cases of incest intended to be prohibited as a sex offense, and it includes sexual contact as well as sexual intercourse and deviate sexual intercourse. (The Sex Offender Code does not deal with the question as to just when it should be made criminal to celebrate a marriage within prohibited degrees of consanguinity.) Incest in the first degree refers to certain instances of incest which are deemed to be more serious than other cases of incest because the victim will be, in the usual case, a member of a family living within the same house and dependent upon the actor or particularly closely related to the actor.

The Commission decided that for eugenic reasons the cut-off point for prohibitions of sexual conduct between relatives should be at the uncle-niece or aunt-nephew of the half blood level. This would not prevent the Legislature from prohibiting the celebration of marriages at the cousin-cousin level in Maryland. On the other hand, the section does not penalize persons who have been lawfully married in another state for sexual conduct with one another even though they may be within Maryland's prohibited degrees of consanguinity under the section.

Incest in the first degree is designed primarily to deal with the incest situation which causes the greatest problem for society — the case where a father or stepfather takes advantage of a minor daughter's dependence upon him to use her sexually. Such cases and ancestor-descendant relationships are deemed to more serious than other prohibited incestuous relationships because they tend to destroy the harmony of the core family, may involve the victimization of a minor by an adult, and theoretically promise more serious eugenic consequences because the relationship is closer. Neither marriage nor color of marriage protects such relatively more serious relationships under this section.

It should be noted that notwithstanding this section, intercourse between father or stepfather and a daughter below the age of 16 would be at least sexual misconduct under §130.10. The comparatively rare situation where the incestuous behavior is homosexual is included within the definitions of incest because it was considered that such activities, when they do occur, are as offensive to the victims and society as heterosexual activities.

130.50. INCEST; LACK OF PRESUMPTION

IN ANY PROSECUTION FOR INCEST OF THE FIRST OR SECOND DEGREE, NEITHER SEXUAL INTERCOURSE NOR DEVIATE SEXUAL INTERCOURSE SHALL BE PRESUMED FROM THE FACT THAT PERSONS RELATED TO EACH OTHER BY BLOOD OR OTHERWISE ARE LIVING TOGETHER IN THE SAME DWELLING UNIT.

COMMENT

In some jurisdictions, though not in Maryland, incestuous sexual intercourse has been presumed from the fact that adult brothers and sisters or other close relatives have chosen to live together in the same dwelling unit long after they would normally have been expected to strike out in different

directions on their own. This section is included to make it quite clear that the State must produce evidence that relatives within the prohibited degrees of consanguinity are actually engaging in sexual intercourse or deviate sexual intercourse to get a conviction under this section. Nothing in the section would prevent a circumstantial inference from being drawn that an adult brother or sister who regularly slept in the same bed were having intercourse, although such inference would still have to be weighted with any other evidence by the trier of fact.

PART 135: KIDNAPPING, COERCION, AND RELATED OFFENSES

INTRODUCTION

History and major policy problem: The modern crime or group of related crimes thought of a kidnapping comes from four old misdemeanors: (1) Abduction, first made a crime by statute in 1487, and found in Article 27, Section 1, of the Maryland Code, forbids the taking enticing, or detaining of a female, usually for some unlawful purpose connected with the fact that she is a female, e.g., to compel marriage or sexual intercourse, or for the purposes of prostitution or concubinage, but sometimes merely to deprive the lawful custodian of custody. Usually there is some age limit for the girl. (2) Child stealing, another old statutory misdemeanor, is closely related to abduction; the offenses often overlap. There need be no sexual element, and the child may be of either sex. Usually the gist of the offense is depriving a parent or guardian of custody, and often the offender is a parent or relative. See Article 27, Section 2, of the Maryland Code, and note that the main kidnapping sections, Sections 337 and 338, except the case of taking by a parent of young children. (3) False imprisonment, the intentional, unprivileged confinement of another so that he knows that his liberty is restrained, is a common law misdemeanor. (4) Common law kidnapping is a somewhat specialized offense, the forcible stealing of a person from his own country and taking him to another, a sort of shanghaiing.

Common law kidnapping has tended to expand over the years by statutory amendment; in many states it has absorbed the other crimes mentioned. For the modern offense, fraud is usually an acceptable substitute for force, and the act may often be secret confinement, confinement, removal to another place, or even detention, and sometimes a taking with intent to confine secretly, etc. may suffice.

The Maryland statute, Article 27, Section 337, is badly garbled, but the Court of Appeals tells us that in Maryland "to constitute kidnapping there must be a carrying of the person from the place where he is seized to some other place either out of or within this State. The statute also specifies that there must be an intent to carry . . . or, in the alternative, an intent to conceal such person in or out of this State." Midgett v. State, 216 Md. 26, 39 (1958). The broadness of the modern statutes has been criticized. See A Rationale of the Law of Kidnapping, 53 Col. L. Rev. 540. Severe penalties are needed for kidnapping for ransom; most other forms of kidnapping can be punished rather lightly. A single heavy punishment for all forms of modern kidnapping leads to such a problem as that in People v. Kuntzsch, 64 N.Y. Supp. 2d 116 (County Court, 1946), where, in view of prior constructions of the broad New York statute, the court found it difficult to acquit an over-zealous labor official of kidnapping an employee he was trying to get to join the union, when he took her by the arm, loaded her in a taxi, and took her to the union hall. Like conspiracy, kidnapping has tended to become an over-broad, vague offense.

Both the Model Penal Code and the New York Code attempt careful gradations of the offense. The Commission has drawn heavily on both the New York and Model Penal Code provisions, but it has departed substantially from both drafting models because of a number of points of dissatisfaction with their provisions, as will appear in the notes which follow.

Custodial and non-custodial kidnappings: Some modern codes remove from the general crimes of kidnapping and unlawful detention the specual case of custodial interference, that is, the case in which the defendant is trying to change the custody of the child or incompetent and restrains or abducts him for this reason. This is a different kind of crime; the defendant does not think of his act as harmful to the child, is usually a relative, and does not arouse the same kind of alarm in the other relatives as in other kinds of unlawful detention. New York and the Model Penal Code treat custodial interferences and other detentions as separate groups of offenses.

The Model Penal Code (T.D. #11, p.23) gives two reasons for treating the offenses separately: First, "the interest protected is not freedom from physical danger or terrorization by abduction, . . . but rather the maintenance of parental custody against

all unlawful interruption, even when the child itself is a willing, undeceived participant in the attack on this interest of its parent." This difference would not seem to require two offenses if the punishment for the two is to be the same, or can be otherwise differentiated, and if there is enough similarity so that they can be treated together conveniently as a matter of draftsmanship. Secondly, the American Law Institute suggests also that penal sanctions may properly be milder for custodial interference. The Commission agrees, but believes that the gradation problem can be solved without creating an elaborate scheme of special offenses. It has therefore combined the two classes into one scheme of offenses. This combination has required some extensive revisions, particularly in the general definitional section.

135.00. UNLAWFUL DETENTION AND KIDNAPPING; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. TO "DETAIN" MEANS INTENTIONALLY, UNLAWFULLY, WITHOUT CONSENT, AND WITH KNOWLEDGE THAT THE DETENTION IS UNLAWFUL, EITHER (A) TO RESTRICT A PERSON'S MOEVEMENTS IN SUCH A MANNER AS TO INTERFERE SUBSTANTIALLY WITH HIS LIBERTY BY MOVING HIM FROM ONE PLACE TO ANOTHER, OR BY REQUIRING HIM TO REMAIN OR CONFINING HIM EITHER IN THE PLACE WHERE THE RESTRICTION COMMENCES OR IN A PLACE TO WHICH HE HAS BEEN MOVED, OR (B) TO ENGAGE IN CUSTODIAL INTERFERENCE. A PERSON IS DETAINED "WITHOUT CONSENT" WHEN THE DETENTION IS ACCOMPLISHED BY (A) PHYSICAL FORCE, INTIMIDATION, OR DECEPTION, OR (B) ANY MEANS WHATEVER, INCLUDING ACQUIESCENCE OF THE PERSON DETAINED, IF HE IS A CHILD LESS THAN SIXTEEN YEARS OLD OR A DISABLED PERSON AND A LAWFUL CUSTODIAN HAS NOT ACQUIESCED IN THE RESTRICTION OR CUSTODIAL INTERFERENCE.

2. "CUSTODIAL INTERFERENCE" MEANS (A) IN THE CASE OF CUSTODY OR CONTROL OF A CHILD LESS THAN THIRTEEN YEARS OLD OR A DISABLED PERSON, THE ASSUMPTION OF SUCH CUSTODY OR CONTROL BY ONE WHO IS NOT HIMSELF A LAWFUL CUSTODIAN OF SUCH CHILD OR DISABLED PERSON; OR (B) IN THE CASE OF CUSTODY OR CONTROL OF A CHILD AT LEAST THIRTEEN BUT LESS THAN SIXTEEN YEARS OLD, THE ASSUMPTION OF SUCH CUSTODY OR CONTROL BY ONE WHO IS NOT HIMSELF A LAWFUL CUSTODIAN OF SUCH CHILD, EITHER (I) BY TAKING OR ENTICING HIM FROM A LAWFUL CUSTODIAN OR FROM ONE WHO IS EXERCISING CONTROL OVER THE CHILD BY AUTHORITY OF A LAWFUL CUSTODIAN, OR (II) BY EXERCISING CUSTODY OR CONTROL OF THE CHILD IN SUCH A WAY AS TO IMPAIR SUBSTANTIALLY THE CHILD'S HEALTH OR SAFETY OR TO CAUSE REASONABLE ALARM FOR THE CHILD'S HEALTH OR SAFETY.

3. "LAWFUL CUSTODIAN" MEANS A PERSON AUTHORIZED, EITHER ALONE OR TOGETHER WITH ANOTHER PERSON OR PERSONS, TO HAVE AND EXERCISE CUSTODY AND CONTROL OVER THE PERSON OF A CHILD LESS THAN SIXTEEN YEARS OLD OR A DISABLED PERSON. UNLESS THE CONTEXT INDICATES OTHERWISE, THE TERM "LAWFUL CUSTODIAN" MEANS A PERSON AUTHORIZED TO HAVE AND EXERCISE SUCH CUSTODY AND CONTROL AT THE TIME AND PLACE OF AN ACT TO WHICH ANY PROVISION OF THIS SUBTITLE IS, OR MAY BE ALLEGED TO BE, APPLICABLE. THE TERM SHALL INCLUDE ANY PERSON SO AUTHORIZED (A) BY A STATUTE OR BY AN ORDER OF A COURT COMPETENT JURISDICTION OF THIS STATE, OR (B) BY A STATUTE OR BY AN ORDER OF A COURT OF COMPETENT JURISDICTION OF ANOTHER STATE OR JURISDICTION WHICH, UNDER THE LAWS OF THIS STATE, OR UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES ENACTED PURSUANT THERETO OR A TREATY ENTERED INTO BY AUTHORITY OF THE UNITED STATES, SHALL BE ENTITLED TO FULL FAITH AND CREDIT OR TO RECOGNITION IN THIS STATE.

IN ORDER TO PRESERVE THE PEACE AND GOOD ORDER OF THIS STATE AND TO ENCOURAGE THE USE OF ORDERLY LEGAL PROCEDURES, RATHER THAN FORCE OR STEALTH FOR THE RESOLUTION OF CONTROVERSIES OVER CUSTODY OF CHILDREN OR INCOMPETENT PERSONS WITHIN THIS STATE, IN CASES WHERE THERE MAY APPEAR TO BE A CONFLICT BETWEEN A SUBSISTING CUSTODY ORDER ISSUED BY A COURT OF ANOTHER STATE OR JURISDICTION, THE "LAWFUL CUSTODIAN" OF A CHILD OR DISABLED PERSON WITHIN THIS STATE SHALL BE DEEMED TO BE THE PERSON APPOINTED BY ORDER OF A COURT OF THIS STATE, UNLESS (A) THE ORDER OF ANOTHER STATE OR JURISDICTION IS LATER IN DATE THAN THE ORDER OF A COURT OF THIS STATE AND (B) SUCH ORDER OF A COURT OF ANOTHER STATE OR JURISDICTION WAS ISSUED IN PROCEEDINGS IN WHICH THE PERSON APPOINTED BY A CUSTODY ORDER OF A COURT OF THIS STATE EITHER (I) CONSENTED TO THE CUSTODY ORDER ENTERED BY THE COURT OF ANOTHER STATE OR JURISDICTION, OR (II) PARTICIPATED THEREIN PERSONALLY AS A PARTY OR WITNESS OR (III) WAS PERSONALLY SERVED WITH NOTICE OF SUCH PROCEEDINGS (WHETHER WITHIN OR WITHOUT SUCH OTHER STATE OR JURISDICTION). NOTWITHSTANDING ANYTHING TO THE CONTRARY ABOVE CONTAINED IN THIS PARAGRAPH, IN ANY PROSECUTION UNDER THIS PART, EITHER THE DEFENDANT OR THE STATE MAY SHOW WHO IS OR WAS LAWFULLY ENTITLED TO THE CUSTODY AND CONTROL OF A CHILD OR DISABLED PERSON.

4. A "RELATIVE" OF A DETAINED PERSON MEANS A PARENT, OTHER ANCESTOR, BROTHER, SISTER, UNCLE, OR AUNT OF SUCH PERSON, OR ONE WHO HAS AT SOME PRIOR TIME BEEN A LAWFUL CUSTODIAN OF SUCH PERSON; AND, IN THE CASE OF A DISABLED PERSON, THE TERM "RELATIVE" ALSO INCLUDES A CHILD OR OTHER DESCENDANT OF SUCH PERSON.

COMMENT

The definitions are discussed in connections

with the sections in which they are used.

135.05. UNLAWFUL DETENTION IN THE SECOND DEGREE

A PERSON IS GUILTY OF UNLAWFUL DETENTION IN THE SECOND DEGREE WHEN HE DETAINS ANOTHER PERSON.

UNLAWFUL DETENTION IN THE SECOND DEGREE IS A CLASS A MISDEMEANOR, EXCEPT AS OTHERWISE PROVIDED IN SECTION 135.10. WHENEVER THE DEFENDANT ESTABLISHES, BY PREPONDERANCE OF THE EVIDENCE, ALL OF THE MITIGATING CIRCUMSTANCES DESCRIBED IN SECTION 135.10(A), THE COURT SHALL CONSIDER SUCH MITIGATING CIRCUMSTANCES IN IMPOSING PUNISHMENT FOR A CLASS A MISDEMEANOR.

COMMENT

The basic nature of "detention"; the mental element: Unlawful detention in the second degree is the basic offense for both custodial and non-custodial kidnapping; unlawful detention in the first degree and kidnapping are aggravated forms of the crime defined in the present section, and they always include its elements. The basic crime is defined entirely by a reference to "detains" (defined in section 135.00(1)). To "detain" includes a restraining, confining, or assumption of custody, to be discussed subsequently in this note, with a mental element defined as "intentionally, unlawfully, without consent, and with knowledge that the detention is unlawful." "Intentionally" and "unlawfully" are taken from the corresponding definition of "restraint" in the New York Code; they require that there be a purpose to restrain, etc., and that the restraint not in fact be privileged, as, for example in the case of a lawful arrest, or the ordinary restraint of a child by a guardian. "With knowledge that the detention is unlawful" means that a mistake of law as to the existence of a privilege to restrain does not render such a person making an arrest or such a guardian guilty of unlawful detention or kidnapping, whatever other criminal or civil consequences may attach. In this area, persons who belive they are legally privileged to restrain are not a significant danger of a kind under consideration in this Part. "Without consent" will be discussed below.

This basic crime of unlawful detention in the second degree, similar to common law false imprisonment, covers (in general) unprivileged restraints or assumptions of control, where the requisite mental element is present, in the following situations: (1) where a person's liberty is substantially restrained, either by confining him

or moving him from one place to another; or (2) where there is unauthorized assumption of custody or control of a disabled person or a child under thirteen; or (3) where there is unauthorized assumption of custody or control of a child under sixteen by enticement or in such a way as to affect or appear to affect his health or safety.

The nature of detention in non-custodial unlawful detention: The nature of detention in the ordinary unlawful detention (and kidnapping) situation is described in section 135.00(1)(a): "to restrict a person's movements in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by requiring him to remain or confining him either in the place where the restriction commences or in a place to which he has been moved." This restriction must be "without consent." In the case of an adult person of sound mind this means that the detention must be accomplished by "physical force, intimidation, or deception." In the case of a child less than sixteen or a disabled person, detention may be accomplished "by any means whatever, including acquiescence of the person detained . . . [if] a lawful custodian has not acquiesced in the restriction." "Disabled person" has the meaning provided by Art. 93A, Sec. 101(a) of the Code: (a person whose property is under guardianship for some statutory reason other than his minority). It is believed that the foregoing adequately covers all cases in which the victim has sufficient mental capacity to realize he is being restrained or threatened. In the case of a small child or disabled person, it could usually not be sucessfully maintained that the victim suffered a restriction of movement so as to interfere substantially with his liberty, but such cases are sufficiently covered by the later definition of custodial interference, which is an alternative form of detention to that now being discussed. A question may arise in connection with the consent problem as to the proper age at which to treat a person as an adult, so that parental consent is unnecessary to prevent detention. The age of sixteen is used in New York and seemed reasonable to the Commission.

The nature of detention in custodial interference cases: In the case of a child less than thirteen years old or a disabled person, detention by way of custodial interference, as defined in section 135.00 (2), reguires "the assumption of custody or control by one who is not himself a lawful custodian." ("Lawful custodian" is defined and will be discussed subsequently.) The

same mental element as in ordinary detention is required — "intentionally, unlawfully, without consent, and with knowledge that the detention is unlawful." The required lack of consent is present if "a lawful custodian has not acquiesced in the ... custodial interference." The Commission believes that any unauthorized interference with the custody or control of a child under thirteen or disabled person is properly made at least a minor crime. If the child is at least thirteen (but under sixteen, at which age he is treated as adult for purposes of detention), the draft requires in addition to the foregoing, that the defendant's assumption of custody or control be accomplished "either (i) by taking or enticing him from a lawful custodian or from one who is exercising control over the child by authority of a lawful custodian, or (ii) by exercising custody or control ... in such a way as to impair substantially the child's health or safety or to cause reasonable alarm for the child's health or safety." The Commission believes that the realities of modern life bar making it criminal *per se* to permit a fifteen year old child who has run away from home to live in one's household, even if one has no special privilege to act and knows that the parents (who may well be indifferent) have not acquiesced. In such a case the additional element of an enticing, or of an improper manner of exercising custody or control is required.

Lawful Custodian: Section 135.00(3) defines "lawfnl custodian." The lawfnl custodian is authorized by statute or court order of this State or another State (entitled to full faith and credit) to exercise custody and control of the child at the time and place in question. It should be noted that there is a statutory basis for cnstody by parents, absent any court order, Md. Code, Art. 72A, Sec. 1. The second paragraph of subsection three sets out guidelines for the case in which there may be conflicting court orders in this and another state. It should be remembered that detention, and therefore custodial interference as well, requires that the defendant act with knowledge that the detention is unlawful. A mistake as to which of two court orders controlled would be a defense for the jury to consider, bnt a defendant who had knowledge of the provisions of subparagraph three, as he might well have if he investigated the applicable law, would presumably have a hard time establishing a mistake if the order was not lawful under the language of the section.

Mitigation of punishment in certain cases of custodial interference: The second paragraph of

section 135.05 provides that if certain factors, described in the following section, are present, the court shall consider them as mitigating in imposing sentence. These factors are discussed in the note to section 135.10 which follows.

135.10. UNLAWFUL DETENTION IN THE SECOND DEGREE; MITIGATING CIRCUMSTANCE

UNLAWFUL DETENTION IN THE SECOND DEGREE, AS DEFINED IN SECTION 135.05, WHEN IT CONSISTS OF CUSTODIAL INTERFERENCE, IS A CLASS B MISDEMEANOR WHEN THE DEFENDANT, BY A PREPONDERANCE OF THE EVIDENCE, ESTABLISHES IN MITIGATION (A) THAT THE PERSON DETAINED WAS A CHILD LESS THAN SIXTEEN YEARS OLD, OR A DISABLED PERSON, THAT THE DEFENDANT WAS A RELATIVE OF SUCH CHILD OR DISABLED PERSON OR WAS AUTHORIZED TO ACT BY A RELATIVE OF SUCH CHILD OR DISABLED PERSON, AND THAT THE DEFENDANT'S SOLE PURPOSE WAS TO ASSUME CUSTODY OR CONTROL OF SUCH CHILD OR DISABLED PERSON FOR WHAT THE DEFENDANT BELIEVED TO BE THE BEST INTEREST OF THE CHILD OR DISABLED PERSON, AND (B) THAT THE DEFENDANT TOOK PROMPT AND REASONABLE MEASURES TO MAKE KNOWN TO THE LAWFUL CUSTODIAN OF SUCH CHILD OR DISABLED PERSON THE FACT OF HIS DETENTION AND THE PLACE THEREOF AND THE IDENTITY OF THE PERSON DETAINING THE CHILD OR DISABLED PERSON AND (IF A DIFFERENT PERSON) OF THE RELATIVE RESPONSIBLE FOR DETENTION OF THE CHILD OR DISABLED PERSON.

COMMENT

A typical case of custodial interference is that of separated parents, one of whom has legal custody, where the other takes de facto custody against the wishes of the first. Usually in such a case the second parent will make himself believe, or perhaps even believe reasonably, that the child would be better off with him. While the Commission has sympathy for such parents in many cases, it believes that these situations must be handled by the courts and not by self help, and it therefore believes that the conduct described should be criminal. It believes, however, that where the defendant is a "relative" (defined in section 135.00(4) as a "parent, other ancestor, brother, sister, uncle or aunt..., or one who has at some prior time been a lawful custodian...; and, in the case of a disabled person... also... a child or other descendant"), or is authorized to act by a "relative," and the defendant acts solely for what he believes to be the best interests of the child, this should be taken into account in mitigating punishment, though not in reduction of grade of the offense. (This is accomplished by the final sentence of section 135.05.) Where additionally the

defendant takes prompt and reasonable measures to give notice of the facts to the lawful custodian, thereby relieving him of his worst anxiety in the usual situation, the Commission proposes to reduce the grade of the offense.

135.15 UNLAWFUL DETENTION IN THE FIRST DEGREE

A PERSON IS GUILTY OF UNLAWFUL DETENTION IN THE FIRST DEGREE WHEN:

1. HE DETAINS ANOTHER PERSON UNDER CIRCUMSTANCES WHICH EXPOSE THE LATTER TO A SUBSTANTIAL RISK OF SERIOUS PHYSICAL INJURY; OR

2. HE HOLDS ANOTHER IN A CONDITION OF INVOLUNTARY SERVITUDE.

UNLAWFUL DETENTION IN THE FIRST DEGREE IS A CLASS E FELONY.

COMMENT

The Commission has followed New York in adopting the exposing of the victim to a substantial risk of serious physical injury as a factor aggravating ordinary unlawful detention to unlawful detention in the first degree. Normally this would occur in a case of rough handling in non-custodial detention, but if the custodial kidnapper endangers the child or disabled person, he is also guilty of the aggravated offense. The Commission has adopted the Model Penal Code position that the holding of a person in a condition of involuntary servitude should also be treated as aggravated unlawful detention. Such cases are rare, but they should be treated with some severity when they occur.

135.20. KIDNAPPING

A PERSON IS GUILTY OF KIDNAPPING WHEN HE DETAINS ANOTHER PERSON WITH INTENT TO:

1. HOLD SUCH PERSON FOR RANSOM OR REWARD, OR TO USE HIM AS A SHIELD OR HOSTAGE; OR

2. INFLICT OR CAUSE EITHER SERIOUS PHYSICAL INJURY TO OR THE SEXUAL VIOLATION OR ABUSE OF SUCH PERSON; OR

3. PUT SUCH PERSON OR A THIRD PERSON IN FEAR OF DEATH OF, OR SERIOUS PHYSICAL INJURY TO, SUCH PERSON OR A THIRD PERSON; OR

4. INTERFERE WITH THE PERFORMANCE OF A

GOVERNMENTAL OR POLITICAL FUNCTION, OR WITH THE ADMINISTRATION OF JUSTICE. 13052

KIDNAPPING IS A CLASS A FELONY. 13054

COMMENT 13057

The difference between unlawful detention and kidnapping: A table showing the gradations of the detention offenses, together with the other offenses in this Part, accompanies this section. One who detains, whether by way of ordinary restraint or custodial interference, with one of certain purposes in mind, is guilty of kidnapping. The first of these purposes is to hold for ransom or reward, or to use as a shield or hostage. This includes the classic situation of kidnapping for ransom, and there seems little doubt that it merits very severe punishment. A second purpose is that of inflicting serious injury or sexual violation or abuse. A third purpose is that of putting the victim in fear of death or serious physical injury to himself or another, a Commission substitution for the New York intention to "terrorize," which the Commission thought unclear. Finally, a purpose to interfere with the performance of a governmental or political function or the administration of justice is included. These purposes correspond to those included in either New York or the Model Penal Code, with one exception. The Commission has not included detention with the intention of facilitating the commission of a felony, as such, as do the American Law Institute and, in a slightly different form, New York. The reasons for this are of two kinds. First, the Commission opposes punishing as a detention or kidnapping offense that restraint which is a normal incident of such crimes as rape and robbery. (Such punishment is probably not intended in either the New York or Model Penal Codes, but the language, apart from double jeopardy provisions which may be applicable, does not clearly exclude it. This problem is dealt with in the Commission's draft jeopardy provisions, §§5.30, 5.35.) As to those detentions connected with other crimes, but not normally incidental thereto, as, for example, where a companion of a rape victim is detained, or the rape victim is locked in a closet after the rape to give more time for a getaway, the Commission agrees that they should be separately punished, but believes that the ordinary provisions of the detention crimes or the other subdivisions of the kidnapping sections are adequate for this purpose.

GRADING OF KIDNAPPING, COERCION, ETC.

DETENTION OFFENSES*			OTHER OFFENSES
	Ordinary Detention	Custodial Interference	
Unlawful detention in the second degree (up to three months, class B misdemeanor)		Defendant engages in custodial interference for the believed best interests of the child, as a relative, with adequate notice to lawful custodian (§135.10)	
Unlawful detention in the second degree (up to six months, class A misdemeanor)	Defendant intentionally, unlawfully, without consent, and with knowledge of unlawfulness, restricts victim's movements in such manner as to interfere substantially with his liberty, by moving or confining him (§§135.05, 135.00)	Other than as above, defendant, with same mental element as in ordinary detention, assumes custody or control of disabled person or child less than thirteen – or child less than sixteen by taking or enticing, or when he endangers or seems to endanger child (§§135.05, 135.00)	
Unlawful detention in the first degree (up to five years, class E felony)	IN BOTH CASES: Unlawful detention in the second degree, plus exposure of the victim to a substantial risk of serious physical injury; or holding another in a condition of involuntary servitude (§135.15)		SUBSTITUTION OF CHILDREN (§135.25); COERCION — compelling or inducing conduct by specified threats of injury to person or property, commission of a felony, accusation of crime, or blackmail, absent specified justification (§§135.30, 135.35)
Kidnapping (up to life imprisonment, class A felony)	IN BOTH CASES: Unlawful detention in the second degree, plus intent to hold for ransom or reward, or use as shield or hostage; or inflict serious injury or violate or abuse sexually; or put in fear of death or serious physical injury to victim himself or another; or interfere with performance of governmental or political function or the administration of justice. (§135.20)		

*Certain detentions merely incidental to other crimes are excluded from separate punishment by §5.30.

135.25. SUBSTITUTION OF CHILDREN

A PERSON IS GUILTY OF SUBSTITUTION OF CHILDREN WHEN, HAVING BEEN TEMPORARILY ENTRUSTED WITH A CHILD LESS THAN ONE YEAR OLD AND INTENDING TO DECEIVE A PARENT, GUARDIAN OR OTHER LAWFUL CUSTODIAN OF SUCH CHILD, HE SUBSTITUTES, PRODUCES OR RETURNS TO SUCH PARENT, GUARDIAN OR CUSTODIAN A CHILD OTHER THAN THE ONE ENTRUSTED.

SUBSTITUTION OF CHILDREN IS A CLASS E FELONY.

COMMENT

This section punishes the substitution of one infant child for another by a temporary custodian with intent to deceive the lawful custodian of the child. While the crime is not of very common occurrence and could be punished as an ordinary detention or kidnapping, the Commission believes it is worth adopting the New York idea.

Note on Abduction

The first section of Article 27 of the current Maryland Code punishes abduction. (See the introductory note to Part 135, supra, for an explanation of the offense.) The material portion of section one of the Maryland provisions reads as follows:

> Any person who shall, for purposes of prostitution, fornication or concubinage, forcibly abduct from her home or usual place of abode or from the custody and control of her parent or parents or guardian any female under the age of eighteen years, or be accessory thereto, or who shall for said purpose persuade or entice from her usual place of abode, or from the custody and control of her parent or parents or guardian, any such female, or be accessory thereto, or shall knowingly secrete or harbor any such female so abducted, persuaded or enticed as aforesaid, against the consent of her parent or parents or guardian, or the person or persons who may have the temporary care, custody or control of such female, or be accessory thereto, shall, upon conviction be deemed guilty of a felony, and shall undergo imprisonment in the penitentiary, in the discretion of the court, not exceeding the term of eight years....

So much of this section as deals with girls under sixteen or with forcible taking is also adequately

covered in the draft provisions, and cases involving prostitution will be handled elsewhere in the code, but the draft does not punish enticing or persuading a girl sixteen or over to leave her home for purposes of concubinage or fornication. (Note that the Maryland provision on abduction does not punish the boyfriend who runs off with the girl for purposes of entering into a valid marriage.) The Commission believes that prosecutions for the type of abduction omitted from the draft have been rare, and that the only important reason for retention is to provide an easy way for concerned parents to invoke the aid of the police in investigating and breaking up relationships. Because the girl is reasonably mature, prosecution is exceedingly unlikely, and the situation is apt to be resolved better outside the area of criminal sanction; the Commission therefore decided that it would not recommend continuation of the abduction offense. If the General Assembly disagrees, and decides to retain the offense, the following draft provision is recommended, the adoption of which will entail minor amendments in some of the definitions in §135.00:

> A person is guilty of abduction when he engages in custodial interference affecting the custody of a female under the age of eighteen years, with the intention that she, whether willingly or not, shall either engage in prostitution, adultery, or fornication with such person or another, or unlawfully marry such person or another.
>
> Abduction is a class E felony.

135.30. COERCION

A PERSON IS GUILTY OF COERCION WHEN HE INTENTIONALLY COMPELS OR INDUCES A PERSON TO ENGAGE IN CONDUCT WHICH THE LATTER HAS A LEGAL RIGHT TO ABSTAIN FROM ENGAGING IN OR TO ABSTAIN FROM ENGAGING IN CONDUCT IN WHICH HE HAS A LEGAL RIGHT TO ENGAGE, BY MEANS OF INSTILLING IN HIM A FEAR THAT, IF THE DEMAND IS NOT COMPLIED WITH, THE DEFENDANT OR ANOTHER WILL:

(1) CAUSE PHYSICAL INJURY TO SUCH PERSON OR TO A THIRD PERSON; OR

(2) CAUSE PHYSICAL DAMAGE TO PROPERTY OF SUCH PERSON OR OF A THIRD PERSON; OR

(3) ENGAGE IN OTHER CONDUCT CONSTITUTING A FELONY; OR

(4) ACCUSE SOME PERSON OF A CRIME; OR

(5) PUBLICIZE AN ASSERTED FACT, WHICH IF BELIEVED, WOULD TEND TO SUBJECT SOME PERSON TO HATRED, CONTEMPT OR RIDICULE; OR

(6) EXPOSE A SECRET.

COERCION IS A CLASS E FELONY.

COMMENT

The relationship between coercion and extortion and other offenses: The New York coercion provisions punish compelling or inducing a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage by means of instilling in him a fear that, if the demand is not complied with, the defendant or another will engage in named kinds of improper conduct, as for example, causing him physical injury. The provisions are closely related to the theft provisions which deal with larceny by extortion, principally §155.05(2)(e). Larceny by extortion requires the obtaining of property by improper threats; this tends to be slightly more serious than compelling other kinds of conduct than giving up property, and therefore, in New York, coercion is graded about one degree lower than larceny by extortion by comparable threats. This difference should be maintained, and the definitions of the threats covered in the two offenses should be as nearly identical as possible.

Coercion and extortion have some relation to bribery offenses. The difference between parting with property or conferring some benefit willingly (usually bribery) and unwillingly (usually extortion or coercion) may be a very difficult one to detect, and the offenses overlap to some extent.

It is not clear whether coercion, as distinguished from extortion, is currently punished in Maryland. The relevant sections (Art. 27, §§561, 562) refer to extorting or gaining any "money, goods or chattels or any other valuable thing." To the extent that the conduct demanded constitutes "any other valuable thing," the Maryland sections cover certain threats to accuse of crime or of anything which would bring the victim into contempt or disrepute, or do any injury to person or property.

The nature of the prohibited intent and act in coercion: The model Penal Code requires purpose or intention unlawfully to restrict another's freedom of action for criminal coercion. New York does not

spell out the mental element, speaking only of "compels or induces." The word "intentionally" is needed, though it is probably meant to be implied; it is possible to compel or induce conduct without even suspecting that you are doing so, even when you make threats. For example, a teacher may threaten to tell a student's parents that the student has cheated on an examination, and thereby unknowingly induce the student to withdraw from school, in the hope that he will not be exposed.

New York and the Model Penal Code differ in their description of the actus reus of the offense. New York requires that the defendant actually compel or induce conduct by his threats; the Model Penal Code makes him guilty if he threatens, with intent to restrict another's freedom of action. The New York formulation seems adequate, because the law of attempt will step in to punish threats intended to compel or induce action, where they fail in their purpose. Such punishment would be for a lower grade of offense, but in the related crime of extortion, the Commission has approved provisions which result in punishing attempt to extort less severely than when property is actually obtained. There may be, however, a question as to whether the law of attempt will be adequate. The proposed formulation punishes a defendant for attempt when "with intent to commit a crime, he engages in conduct which constitutes a substantial step toward the commission of that crime." Making the conditional threat in coercion would clearly qualify as such a substantial step, and the defendant who threatened unsuccessfully would be guilty of attempted coercion.

Degrees of coercion: The New York statute provides for two degrees of coercion which are classified differently. The higher degree consists of the elements of the lower degree plus several special factors and the lower degree covers several elements which the Commission believes can be more appropriately dealt with otherwise. The kinds of threats involved in conduct which the Commission thinks should be subject to punishment as coercion are deemed to be sufficiently similar in culpability to be treated together in a single section defining and classifying the offense.

Prohibited threats: The prohibited threats are to cause physical injury or damage to property, to commit a felony, to accuse a person of crime, and to publicize an asserted fact, which if believed, would tend to subject some person to hatred, contempt or ridicule, or expose a secret. These threats are covered in the first five subsections of

both the New York coercion in the second degree provision and the Maryland draft larceny by extortion section. They are also covered in substance by subsections (a), (b), and (c) of the Model Penal Code criminal coercion section. There will probably not be much question that these are appropriate threats to forbid. Threats to cause physical injury or property damage to another or to commit a felony, unless the victim acts or fails to act, plainly should be prohibited. The Commission did not include threats to commit misdemeanors (as do New York and the American Law Institute) because of constitutional doubts raised by Landry v. Daley, 280 F. Supp. 938 (N.D. Ill., 1968) (reversed on other grounds, sub nom. Boyle v. Landry, 401 U.S. 77 (1971)), in which a three judge court held an Illinois statute unconstitutional: where the basis of the charge was a threat to engage in a criminal trespass in a civil rights situation. Threats to accuse of crime, publicize damaging facts, or expose secrets are typical of blackmail schemes and seem also proper, on the same theory that they serve as a basis for the crime of extortion if property is taken. Special circumstances of justification will be discussed in a later portion of this note.

Other threats considered by the Commission, but not included under coercion. Threats contained in paragraphs 6, 7 and 8 of §135.60 of the New York Penal Code are omitted from the Commission's draft of coercion, as above indicated.

Paragraph 6 generally covers threats to cause a strike, boycott or other collective labor group action injurious to someone's business, but exempts such threats "when the act or omission compelled is for the benefit of the group in whose interest the actor purports to act." This provision thus seems aimed at a person seeking to serve his own interests rather than those of the group he purports to act for. §180.25 of the New York law deals specifically with bribe receiving by a labor official, and §135.70 of that law recognizes that the two may overlap, but declares the offenses not to be mutually exclusive. The Commission draft contains no special provisions applicable to such matters, but undertakes to cover any such abuses under general provisions contained in §180.00 of this draft which penalize criminal breaches of trust by any employee, agent or fiduciary.

Paragraph 7 deals with threats to give or withhold testimony or information pertaining to another's legal claim or defense. It, too, seems to be covered by another section — §215.05 — in New

York and (N.Y.) §135.70 also recognizes this overlap. The Commission believes the matter is adequately covered in this draft by §215.10 (which corresponds to the New York §215.05), penalizing bribe receiving by a witness or prospective witness.

Paragraph 8 of New York §135.60 (which also has a counterpart in §212.5(1) of the Model Penal Code) deals with threats by a public servant to take or withhold official action by another or to cause a public servant to do so. This, too, seems to be also covered by another provision of the New York Code (§200.10) and is believed to be adequately covered by §200.10 of this draft penalizing bribe receiving, solicitation, etc. by a public servant.

Subsection (6) of the draft Maryland extortion provision (§155.35), which is only slightly different from §135.60(9) of the New York criminal coercion provision, covers threats to:

> perform or cause to be performed any other act which would not in itself materially benefit him but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

Threats which would materially benefit the defendant must be excluded to prevent criminal prosecution for permitted economic activity. Absent some anti-trust violation, it is permissible in our society to induce intentionally another to go out of business by a threat to reduce your own prices, conduct which would be prohibited by this subsection without this limitation. An example of the kind of conduct intended to be prohibited by this subsection is given in the Commission Staff Notes to the Proposed New York Penal Law, at page 346: "a property owner's threat to grow ragweed adjacent to his allergic neighbor's house" unless the neighbor performed some act desired by the defendant. There are undoubtedly some threats, covered only by such a subsection, that it might be desirable to punish, but perhaps on the whole, such threats are not very serious. The language of the subsection is quite broad, and when this broadness is combined with the breadth of the language describing what is compelled or induced: "to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage." It may make conduct of doubtful importance criminal, or turn out to be much too inclusive. The draftsmen of the Model Penal Code,

while urging the adoption of such a provision in extortion, chose to omit it in criminal coercion. See the comment to section 211.3 in Tentative Draft #11 (1960), p. 8, which explains the reason for the limitation:

> ... This is narrower than the range of threats specified in legislation dealing with intimidation of public officials or extortion of property. In those provisions the unlawful object itself aggravates the offense. Here, where the objective is broadly defined, i.e., to compel another to do "any act" which he is not legally obliged to do, it is essential to restrict the threats more rigorously.

The Commission has omitted this subsection from the proposed draft.

135.35. COERCION; DEFENSE

IN ANY PROSECUTION FOR COERCION COMMITTED BY INSTILLING IN THE VICTIM A FEAR THAT THE DEFENDANT OR ANOTHER WILL ENGAGE IN CONDUCT IN VIOLATION OF SUBDIVISIONS (4), (5) OR (6) OF SECTION 135.30, IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT REASONABLY BELIEVED THE ACCUSATION OR ASSERTED FACT TO BE TRUE OR THE EXPOSURE OF THE SECRET TO INVOLVE NO FALSE STATEMENT BY THE DEFENDANT, AND THAT THE DEFENDANT'S PURPOSE WAS LIMITED TO COMPELLING THE OTHER TO BEHAVE IN A WAY REASONABLY RELATED TO THE CIRCUMSTANCES WHICH WERE THE SUBJECT OF THE ACCUSATION, PUBLICIZING, OR EXPOSURE, AS BY DESISTING FROM FURTHER MISBEHAVIOR, PLEADING GUILTY TO AN OFFENSE WHICH THE VICTIM HAS COMMITTED, MAKING GOOD A WRONG DONE, OR REFRAINING FROM TAKING ANY ACTION OR CONTINUING IN ANY COURSE OF ACTION FOR WHICH THE DEFENDANT BELIEVES THE OTHER DISQUALIFIED OR UNFIT.

COMMENT

Suppose that a State's Attorney, having some evidence that the defendant is guilty of burglary and grand larceny, says to a criminal defendant before trial, "I will try to get the grand jury to indict you for burglary unless you plead guilty to grand larceny," and the defendant thereupon enters a plea of guilty to grand larceny. The State's Attorney has intentionally induced the defendant to do something the defendant had a legal right not to do (plead guilty to grand larceny) by what might be regarded as a threat to accuse him of the crime of burglary, and the State's Attorney may be guilty of coercion unless a defense is provided. Or, suppose an employer, finding a shortage, threatens to accuse his cashier of theft unless the cashier obtains

psychiatric advice to help control his gambling. Or, suppose a law teacher threatens to tell the Bar Association character committee that a student has been guilty of cheating unless the student withdraws from law school. Either of these cases could amount to attempted coercion, unless something is added to prevent it. To prevent such convictions is the function of this section.

The New York provision, section 135.75, is generally good, but a little too narrow. It applies only to threats to charge with crime (and would not therefore apply to the last example given). It requires that the defendant believe the threatened charge to be true, and that his sole purpose be "to compel or induce the victim to take reasonable action to make good the wrong which was the subject of such threatened charge," a purpose which seems inappropriate to cover either of the last two examples, and is somewhat doubtful even as to the first. The corresponding Model Penal Code provision is broader, and the Commission has adopted it, with slight modification.

This matter of justification is made an affirmative defense, in accord with the Commission's decision about affirmative defenses generally. Note, however, that the Commission has followed the common law in not making the related claim of right defense in extortion affirmative.

SUBTITLE I — OFFENSES INVOLVING DAMAGE TO AND INTRUSION UPON PROPERTY

PART 140: BURGLARY AND RELATED OFFENSES

140.00. CRIMINAL TRESPASS AND BURGLARY; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "PREMISES" INCLUDES THE TERM "BUILDING," AS DEFINED HEREIN, AND ANY REAL PROPERTY.

2. "BUILDING," IN ADDITION TO ITS ORDINARY MEANING, INCLUDES ANY STRUCTURE, VEHICLE, OR WATERCRAFT WHICH IS (A) USED BY PERSONS FOR CARRYING ON BUSINESS THEREIN, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, A RAILROAD FREIGHT CAR, TRUCK, OR OTHER MOVEABLE STRUCTURE, THE PRIMARY USE OF WHICH IS FOR THE TRANSPORTING OF PERSONAL PROPERTY, BUT NOT INCLUDING AN ORDINARY AUTOMOBILE AND NOT INCLUDING ANY MOVEABLE STRUCTURE, THE PRIMARY USE OF WHICH IS FOR THE TRANSPORTING OF THE OPERATOR THEREOF OR FOR THE

TRANSPORTING OF PASSENGERS; OR (B) USED FOR THE LODGING OF PERSONS. WHERE A BUILDING CONSISTS OF TWO OR MORE UNITS SEPARATELY SECURED OR OCCUPIED, EACH UNIT SHALL BE DEEMED A SEPARATE BUILDING.

3. "DWELLING" MEANS A BUILDING WHICH IS CURRENTLY OCCUPIED BY A PERSON OR PERSONS LODGING THEREIN, WHETHER OR NOT SUCH PERSON OR PERSONS ARE ACTUALLY PRESENT AT THE TIME OF THE ALLEGED BURGLARY OR CRIMINAL TRESPASS.

4. "NIGHT" MEANS THE PERIOD BETWEEN THIRTY MINUTES AFTER SUNSET AND THIRTY MINUTES BEFORE SUNRISE.

5. "ENTER OR REMAIN UNLAWFULLY." A PERSON "ENTERS OR REMAINS UNLAWFULLY" IN OR UPON PREMISES WHEN HE IS NOT LICENSED OR PRIVILEGED TO DO SO. A PERSON WHO, REGARDLESS OF HIS INTENT, ENTERS OR REMAINS IN OR UPON PREMISES WHICH ARE AT THE TIME OPEN TO THE PUBLIC DOES SO WITH LICENSE AND PRIVILEGE UNLESS HE DEFIES A LAWFUL ORDER NOT TO ENTER OR REMAIN, PERSONALLY COMMUNICATED TO HIM BY THE OWNER OF SUCH PREMISES OR OTHER AUTHORIZED PERSON. A LICENSE OR PRIVILEGE TO ENTER OR REMAIN IN A BUILDING WHICH IS ONLY PARTLY OPEN TO THE PUBLIC IS NOT A LICENSE OR PRIVILEGE TO ENTER OR REMAIN IN THAT PART OF THE BUILDING WHICH IS NOT OPEN TO THE PUBLIC. A PERSON WHO ENTERS OR REMAINS UPON UNIMPROVED AND APPARENTLY UNUSED LAND, WHICH IS NEITHER FENCED NOR OTHERWISE ENCLOSED IN A MANNER DESIGNED TO EXCLUDE INTRUDERS, DOES SO WITH LICENSE AND PRIVILEGE UNLESS NOTICE AGAINST TRESPASS IS PERSONALLY COMMUNICATED TO HIM BY THE OWNER OF SUCH LAND OR OTHER AUTHORIZED PERSON, OR UNLESS SUCH NOTICE IS GIVEN BY POSTING IN A CONSPICUOUS MANNER.

COMMENT

The definitions will be discussed at the appropriate points in the notes on the substantive provisions which follow.

140.05. CRIMINAL TRESPASS IN THE THIRD DEGREE

A PERSON IS GUILTY OF CRIMINAL TRESPASS IN THE THIRD DEGREE WHEN:

1. HE KNOWINGLY ENTERS OR REMAINS UNLAWFULLY IN OR UPON PREMISES; OR

2. HE HUNTS GAME UPON THE PREMISES OF ANOTHER, WHILE UNACCOMPANIED BY THE OWNER OR OCCUPIER OF THE PREMISES OR HIS AUTHORIZED AGENT, AND (A) WHILE ARMED WITH A FIREARM, AS DEFINED IN SECTION 255.00(6) OR A BOW AND ARROW, OR (B) WHILE ACCOMPANIED BY A DOG, AND FAILS, UPON THE REQUEST OF AN OWNER OR OCCUPIER OF SUCH PREMISES, AN AUTHORIZED AGENT THEREOF, OR ANY POLICE OFFICER, TO EXHIBIT A WRITTEN STATEMENT OF PERMISSION,

SIGNED BY AN AUTHORIZED PERSON, AUTHORIZING HIS CONDUCT; OR

3. HE OPERATES OR USES AN OFF-ROAD VEHICLE ON THE PRIVATE PROPERTY OF ANOTHER OTHER THAN ON A PRIVATE ROAD, UNACCOMPANIED BY THE OWNER OR OCCUPIER OF THE PROPERTY OR HIS AUTHORIZED AGENT, AND FAILS, UPON THE REQUEST OF AN OWNER OR OCCUPIER OF SUCH PROPERTY, AN AUTHORIZED AGENT THEREOF, OR ANY POLICE OFFICER, TO EXHIBIT A WRITTEN STATEMENT OF PERMISSION, SIGNED BY AN AUTHORIZED PERSON, AUTHORIZING HIS CONDUCT. "OFF-ROAD VEHICLE," AS USED IN THIS SUBSECTION, MEANS ANY MOTORIZED VEHICLE DESIGNED FOR OR CAPABLE OF CROSS-COUNTRY TRAVEL ON OR IMMEDIATELY OVER LAND, WATER, SNOW, ICE, MARSH, SWAMPLAND, OR OTHER NATURAL TERRAIN, INCLUDING, BUT NOT LIMITED TO, FOUR-WHEEL-DRIVE OR LOW-PRESSURE-TIRE VEHICLES, AUTOMOBILES, TRUCKS, MOTORCYCLES, AND RELATED TWO-WHEEL VEHICLES, AMPHIBIOUS MACHINES, GROUND-EFFECT OR AIR-CUSHION VEHICLES, AND SNOWMOBILES, BUT DOES NOT MEAN ANY BOAT, MILITARY, FIRE, OR LAW-ENFORCEMENT VEHICLE, FARM-TYPE TRACTOR OR OTHER AGRICULTURAL EQUIPMENT USED FOR AGRICULTURAL PURPOSES, OR EARTH MOVING OR CONSTRUCTION EQUIPMENT WHILE USED FOR SUCH PURPOSES, OR LAWNMOWER, SNOW-BLOWER, GARDEN OR LAWN TRACTOR, OR GOLF CART, WHILE BEING USED FOR ITS DESIGNED PURPOSE.

CRIMINAL TRESPASS IN THE THIRD DEGREE IS A VIOLATION.

COMMENT

The mental element: For this and all criminal trespass and burglary offenses, the proposed code requires knowledge. Whatever the tort rule, this is appropriate for the crime. One who is mistaken about a license or privilege to enter or remain on property does not commit an offense.

Entering or remaining unlawfully: This phrase is discussed more fully in connection with burglary in the third degree. Here it has its expected meaning, set out fully in section 140.00(5), which provides in part:

> ...A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner.

So one found walking on unposted, unimproved land

would not ordinarily be a criminal trespasser.

But subsection two is adapted from certain current Maryland trespass provisions (Article 27, sections 268 ff., and 576 ff.) relating to hunters and operators of off the road vehicles. Hunters with firearms, bow and arrows, or dogs, and drivers of off-the-road vehicles, not accompanied by owners or occupiers of the premises or their agents, violate the provisions of the subsection by failing to exhibit proper written authorization upon demand by specified persons.

Premises: 'Premises,' defined in section 140.00 (1), includes real property, buildings (in the ordinary meaning of the term), and any structure, vehicle, or watercraft used for lodging of persons or as business premises or primarily for transporting goods, but does not include a passenger automobile. It is broad enough to cover almost anything to which it would be reasonable to apply a criminal trespass prosecution.

A chart showing the grades of criminal trespass, burglary, arson, and related offenses, appears at the end of the notes on this Part.

Maryland law: In Krauss v. State, 216 Md. 369 (1958), the prosecution conceded that, in the absence of statute, trespass upon private property is a crime only if it is accompanied by or tends to create a breach of the peace. Statutes (Article 27, sections 576 ff.) punish trespass after notice not to enter, except under a claim of right, and certain trespasses on public property, including some cases of refusal to leave public property on request, after lawful entry. Intrusions by hunters are dealt with both in the trespass provisions and in sections 235 and 236, dealing with game preserves. The most important change which the proposed code would effect would be to make trespasses on private property generally criminal ("entering or remaining unlawfully"), even if there is no advance notice not to enter and no connection with a breach of the peace, as long as the trespasser knows he has no privilege or license to be there. Today in Maryland, one who breaks and enters the dwelling house of another to satisfy his curiosity as to the contents of the house may be guilty of no crime at all; he would be guilty of criminal trespass under the proposed code. No change in the current law as to the civil rights "trespass" is intended. Where the occupier's basis for exclusion of an accused is unconstitutional discrimination, whatever privilege of entry the accused now has would continue to

exist. Maryland section 580, a "Peeping Tom" provision, is unnecessary as such in the proposed code, since to the extent that the Peeping Tom enters or remains unlawfully on the property of another, he is punishable as a trespasser, without regard to his purpose.

140.10. CRIMINAL TRESPASS IN THE SECOND DEGREE

A PERSON IS GUILTY OF CRIMINAL TRESPASS IN THE SECOND DEGREE WHEN HE KNOWINGLY ENTERS OR REMAINS UNLAWFULLY IN A BUILDING OR UPON REAL PROPERTY WHICH IS FENCED OR OTHERWISE ENCLOSED IN A MANNER DESIGNED TO EXCLUDE INTRUDERS.

CRIMINAL TRESPASS IN THE SECOND DEGREE IS A CLASS B MISDEMEANOR.

COMMENT

Criminal trespass becomes more serious when a building, as defined in section 140.00(2) and discussed later in connection with burglary in the third degree, or enclosed real property is invaded.

140.15. CRIMINAL TRESPASS IN THE FIRST DEGREE

A PERSON IS GUILTY OF CRIMINAL TRESPASS IN THE FIRST DEGREE WHEN HE KNOWINGLY ENTERS OR REMAINS UNLAWFULLY IN A DWELLING.

CRIMINAL TRESPASS IN THE FIRST DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

The most serious form of criminal trespass is the invasion of a dwelling, as defined in section 140.00(3), and discussed in connection with burglary in the second degree.

140.20. BURGLARY IN THE THIRD DEGREE

A PERSON IS GUILTY OF BURGLARY IN THE THIRD DEGREE WHEN HE KNOWINGLY ENTERS OR REMAINS UNLAWFULLY IN A BUILDING WITH INTENT TO COMMIT A CRIME THEREIN.

BURGLARY IN THE THIRD DEGREE IS A CLASS D FELONY.

COMMENT

Introductory note on burglary: Common law burglary, the nocturnal breaking and entry of the dwelling house of another with intent to commit a felony therein, is an offense which obviously and

justifiably arouses terror and alarm in the populace. Because of the rather narrow scope of common law attempt, such intrusions often could not be punished as attempts; the defendant's conduct might not have gone far enough to amount to the dangerous proximity to success to the murder, theft, etc., that the intrusion was designed to further.

This weakness in the law of attempt contributed to the statutory expansion of the burglary concept to cover daytime intrusions, intrusions without "breakings," and intrusions into other things than dwellings, e.g., commercial buildings and vehicles. Some of the modern burglary statutes are so loosely drawn that they permit or seem to permit convictions of burglary for such actions as breaking into the glove compartment of a car to steal the contents (which may be punished more severely than stealing the car itself), or walking through the open front door of the courthouse, intending to commit perjury therein.

Furthermore, when the burglar completes his intended conduct, he can be convicted and punished for two crimes, the burglary and the crime which was the object of the burglary. When one who enters a henhouse to steal a chicken is a technical burglar, the potential injustice of punishing him for burglary and petty larceny, while his counterpart who takes the hen at the henhouse door is only guilty of petty larceny, is clear.

These difficulties have led some modern writers to question the soundness of punishing burglary as a separate offense at all. In non-common law countries, the intrusion accompanying another crime is usually at most a ground for aggravating the other offense or increasing a discretionary penalty. Particularly if an expanded view of attempt is taken, as in the Commission draft, permitting conviction of attempt on the basis of a substantial step taken towards the commission of the contemplated crime, the need for a separate offense of burglary is questionable.

The Model Penal Code, however, finally concludes that the offense of burglary should be retained. The central dwelling house intrusion may not be adequately punished by the law of attempt, and it may be easier to prosecute for burglary than for attempt to commit some other crime. The Model Penal Code does reject double conviction for burglary and the related crime, except where the related crime is a very serious one.

Knowledge: As noted in connection with criminal trespass, knowledge is the appropriate mental element for all burglary offenses.

Entering or remaining unlawfully: Where the common law requires breaking and entering of a dwelling house (under modern statutes other buildings), New York substitutes a requirement of entering or remaining unlawfully. The requirement of "breaking" has become so artificial that it serves no real purpose in distinguishing those who should be punished from those who should not; pushing aside almost any barrier will suffice for a breaking if it is done without consent or privilege. The only modern function that the requirement of "breaking" properly serves is to prevent the conviction of those whose entry is privileged even though they may intend to commit a crime when they enter; e.g., the shoplifter who knows he is going to steal when he enters the department store.

This function is met by New York's definition of "enter or remain unlawfully," (section 140.00(5)), which requires that the defendant be not licensed or privileged to enter (or remain) in order to commit burglary. (As at common law, consent to the entry prevents conviction.) It adds that when the premises are open to the public at the time of entry, there is no unlawful entry, regardless of the defendant's intent, unless the defendant defies an order not to enter personally communicated to him by one authorized to do so. This prevents the ordinary shoplifter, or the man entering the courthouse, planning to commit perjury, from being convicted of burglary. There may be an entry sufficient for burglary when the defendant goes on a portion of the premises upon which he is not licensed or privileged to be, even if he was properly on another part of the premises; so, for example, the shoplifter, who sneaks into the off limits stock room to steal, is a burglar.

Since "enters" is not defined, it retains its common law and dictionary meaning. This has become somewhat technical, but there is nothing better to substitute for it.

The Model Penal Code does not permit remaining unlawfully upon premises lawfully entered to suffice for burglary, as does New York. The American Law Institute does not object specifically to such a provision (its objections to the broader statutes are on grounds not applicable to the New York provision); it merely objects to punishing as burglary any act which does not carry the notion of

intrusion into protected premises, as for example the ordinary shoplifting situation does not. Where one remains unlawfully, as by secreting himself in the store during business hours so as to steal after the store is closed, it seems proper to punish for burglary, as New York does. Compare N.Y. Art. 140 with M.P.C. Art. 221 (P.O.D.).

Building: The least serious version of burglary, burglary in the third degree, requires that the defendant knowingly enter or remain unlawfully in a "building" with intent to commit a crime therein. Section 140.00(2) provides that "building" means any structure, vehicle or watercraft used for lodging of persons, and also includes structures, vehicles, or watercraft used for certain business purposes. It also means anything which would ordinarily be denoted by the word "building." Separately secured or occupied units within a building are themselves buildings. So one licensed to be in an office or apartment building could burglarize a particular office or apartment. This is not very different from the corresponding term, "occupied structure," used in the Model Penal Code.

Intention to commit a crime therein: The common law required an intention to commit a felony therein, though it is sufficient almost everywhere that the intention be to commit any grade of larceny, even if only a misdemeanor. One of the most undesirable of the developments of the crime of burglary has been the tendency to grade it according to the value of the goods intended to be stolen. As the Model Penal Code says (Tent. Draft #11, p.60). "The gist of the burglary offense here envisioned is unlawful intrusion in occupied structures by dangerous characters. Since we do not view the offense as a means of penalizing early-stage attempts to commit heinous offenses, we reject grading relating to the gravity of the ultimate offense." This approach carries with it the great advantage of avoiding the puzzling question of just what the burglar caught in the act intended to steal. It is not even necessary to decide precisely what crime he intended to commit in the building if it is clear that he intended to commit some crime. There seems no reason not to punish intent to commit any crime, felony or misdemeanor.

Maryland law: In Article 27, section 29, Maryland retains common law burglary. The immediately following sections, and section 342, contain a number of statutory extensions of the burglary concept, most with diminished penalties.

Section 30 makes it clear that the crime the burglar intends to commit in the dwelling house may be only petty larceny and extends burglary (with a lesser penalty) to daytime intrusions. Other sections punish breaking into variously defined classes of buildings, where the accused either has an intent to steal at the time of breaking, or actually does steal property worth varying amounts. There is little sense to the many distinctions created.

For the present Maryland requirements of breaking and (sometimes) entering, the proposed code would substitute the requirement of entering or remaining unlawfully, explained above. The classification of structures to which burglary offenses are applicable would be regularized, with the only terms significant for grading purposes in the proposed code being "building" and "dwelling", as defined. The "nighttime" factor in common law burglary would be retained as a requirement for the highest degree of the new burglary. For the common law requirement of an intention to commit a felony therein, the proposed code would substitute an intention to commit any crime therein. For the present section 34, punishing more severely burglary with explosives, the new code would provide in substitution that any of the following is an aggravating factor: (1) being armed with explosives or a deadly weapon (as defined), (2) causing injury to a non-participant in the crime, by criminal negligence or some more reprehensible mental attitude, or (3) using or threatening the immediate use of a dangerous instrument (as defined).

140.25. BURGLARY IN THE SECOND DEGREE

A PERSON IS GUILTY OF BURGLARY IN THE SECOND DEGREE WHEN HE KNOWINGLY ENTERS OR REMAINS UNLAWFULLY IN A BUILDING WITH INTENT TO COMMIT A CRIME THEREIN, AND WHEN:

1. THE BUILDING IS A DWELLING; OR

2. IN EFFECTING ENTRY OR WHILE IN THE BUILDING OR IN IMMEDIATE FLIGHT THEREFROM, HE OR ANOTHER PARTICIPANT IN THE CRIME:

(A) IS ARMED WITH EXPLOSIVES OR A DEADLY WEAPON; OR

(B) INTENTIONALLY, KNOWINGLY, RECKLESSLY OR WITH CRIMINAL NEGLIGENCE CAUSES PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT IN THE CRIME; OR

(C) USES OR THREATENS THE IMMEDIATE USE OF A DANGEROUS INSTRUMENT.

BURGLARY IN THE SECOND DEGREE IS A CLASS C FELONY.

COMMENT

Introduction: Burglary in the third degree becomes burglary in the second degree by the addition of either of two circumstances. The first is that the building is a dwelling. The New York provision would require that the building be a dwelling and that the intrusion be at night in this branch of the offense, but the Commission believes it unnecessary to require the nocturnal intrusion for this level of the crime. The alternative aggravating factor is that the defendant or an accomplice is armed with explosives or a deadly weapon; or, with at least criminal negligence, causes physical injury to one who is not a participant in the crime, or uses or threatens the immediate use of a dangerous instrument. Although New York does not require it, the Model Penal Code does require some fault in causing the injury. The Model Penal Code requires at least recklessness, but the Commission prefers to punish criminal negligence here as well. The definitions of deadly weapon and dangerous instrument appear in section 10.00(11) and (12) of the proposed Code.

Dwelling: The Commission did not find the definition of this term in New York section 140.00(3) entirely satisfactory. It has added the word "currently" to the description of the lodging, but made it clear that it is unnecessary that anyone be on the premises at the moment of intrusion.

140.30. BURGLARY IN THE FIRST DEGREE

A PERSON IS GUILTY OF BURGLARY IN THE FIRST DEGREE WHEN HE KNOWINGLY ENTERS OR REMAINS UNLAWFULLY IN A DWELLING AT NIGHT WITH INTENT TO COMMIT A CRIME THEREIN, AND WHEN, IN EFFECTING ENTRY OR WHILE IN THE DWELLING OR IN IMMEDIATE FLIGHT THEREFROM, HE OR ANOTHER PARTICIPANT IN THE CRIME:

1. IS ARMED WITH EXPLOSIVES OR A DEADLY WEAPON; OR

2. INTENTIONALLY, KNOWINGLY, RECKLESSLY OR WITH CRIMINAL NEGLIGENCE CAUSES PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT IN THE CRIME; OR

3. USES OR THREATENS THE IMMEDIATE USE OF A DANGEROUS INSTRUMENT.

BURGLARY IN THE FIRST DEGREE IS A CLASS B FELONY.

COMMENT

Introduction: The alternative aggravating factors, discussed in the note on burglary in the second degree (invasion of a dwelling, or actual or potential danger to the person in particular circumstances), when they occur together, make burglary in the first degree, when the invasion is at night.

At night: "Night" is defined in section 140.00(4) as "the period between thirty minutes after sunset and thirty minutes before sunrise." This is a close approximation of and a slight improvement on the common law definition, which required a period between sunset and sunrise, during which the countenance of a man could not be discerned by natural light.

140.35. PUNISHMENT FOR BOTH BURGLARY AND THE OFFENSE INTENDED TO BE COMMITTED AFTER THE ENTRY OR REMAINING

A PERSON MAY NOT BE PUNISHED BOTH FOR BURGLARY AND FOR THE OFFENSE WHICH IT WAS HIS INTENTION TO COMMIT AFTER THE BURGLARIOUS ENTRY OR REMAINING, OR FOR AN ATTEMPT TO COMMIT SUCH INTENDED OFFENSE, UNLESS ANY SUCH SENTENCES ARE MADE CONCURRENT.

COMMENT

New York did not copy the Model Penal Code provision preventing double conviction for burglary and the object of the burglary (unless the object was a very serious crime). For reasons mentioned in the introductory note to section 140.20 of this memorandum, the Commission believes that such a provision is desirable. One of the chief reasons for retaining the offense of burglary as a separate offense is to permit the simpler handling and serious punishment of those offenses in which the most important factor is the frightening or dangerous intrusion. There is no need to permit two punishments in such cases. The Commission has eliminated double punishment even for very serious crimes; it believes, for example, that a defendant is adequately punished when he is sentenced for murder even when he breaks into a house to commit it. The Commission forbids double punishment rather than double conviction for procedural reasons.

140.40. POSSESSION OF BURGLAR'S TOOLS

A PERSON IS GUILTY OF POSSESSION OF BURGLAR'S TOOLS WHEN HE POSSESSES ANY TOOL, INSTRUMENT OR OTHER ARTICLE

ADAPTED, DESIGNED OR COMMONLY USED FOR COMMITTING OR FACILITATING OFFENSES INVOLVING FORCIBLE ENTRY INTO PREMISES, OR OFFENSES INVOLVING LARCENY BY A PHYSICAL TAKING, OR OFFENSES INVOLVING THEFT OF SERVICES AS DEFINED IN SUBSECTION (3) OF SECTION 165.20, SUBSECTIONS (3) OR (4) OF SECTION 165.25, OR SUBSECTIONS (2) OR (4) OF SECTION 165.30, UNDER CIRCUMSTANCES EVINCING AN INTENT TO USE OR KNOWLEDGE THAT SOME PERSON INTENDS TO USE THE SAME IN COMMISSION OF AN OFFENSE OF SUCH CHARACTER.

POSSESSION OF BURGLAR'S TOOLS IS A CLASS A MISDEMEANOR.

COMMENT

It seems important and desirable to punish the possession of burglar's tools, and the New York provision seems well designed. It should be noted that under the attempt section, in its present draft form, possession of burglar's tools at or near the scene of the contemplated crime may amount to an attempt to commit burglary. Sections 165.20, 165.25 and 165.30, referred to in the section, deal with theft by such means as tampering with telephone or metered services. The Model Penal Code treats this as a more general problem of possessing instruments of crime or weapons (section 5.06). This provision is more general and more elaborate than seems desirable or necessary, and the Commission has followed New York.

140.45. RESTORATION AND RESTITUTION.

UPON CONVICTION OF A DEFENDANT FOR THE OFFENSE OF BURGLARY IN ANY DEGREE, IN WHICH THE CRIME INTENDED TO BE COMMITTED WITHIN A BUILDING WAS IN FACT COMMITTED AND WAS A CRIME PUNISHABLE UNDER PART 155, PART 160, OR PART 165 OF THE CRIMINAL CODE, THE COURT MAY:

1. ORDER RESTORATION OF ANY PROPERTY WHICH (A) HAS BEEN THE OBJECT OF AN OFFENSE UNDER SUCH PART, AND (B) HAS BEEN RECOVERED FROM THE DEFENDANT OR ANOTHER OR WHICH IS IN THE DEFENDANT'S POSSESSION OR CONTROL, TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN; AND

2. ORDER RESTITUTION OF THE VALUE OF ANY PROPERTY WHICH HAS BEEN THE OBJECT OF AN OFFENSE UNDER SUCH PART TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN, TO THE EXTENT THAT SUCH PROPERTY IS NOT RESTORED; AND

3. ORDER RESTITUTION OF THE VALUE OF ANY SERVICES OBTAINED IN THE COMMISSION OF THE OFFENSE TO ANY PERSON OR PERSONS ENTITLED TO RESTITUTION THEREFOR.

COMMENT 14138

This provision follows many current Maryland 14141
statutes allowing an order for restitution or 14142
restoration of stolen property. 14143

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GRADING OF BURGLARY, CRIMINAL DAMAGE TO PROPERTY, ARSON, AND SIMILAR OFFENSES

	Burglary and like offenses	Criminal damage to property and like offenses	Arson and like offenses
Up to 15 days	CRIMINAL TRESPASS IN THE THIRD DEGREE: Defendant knowlingly enters or remains unlawfully in or upon premises (§140.05)	UNLAWFULLY POSTING ADVERTISEMENTS: Without right or reasonable belief he has such right, defendant intentionally causes posting of advertisement or the like on another's property (§145.30)	
Up to 3 months	CRIMINAL TRESPASS IN THE SECOND DEGREE: Same as above, except that premises are building or enclosed property (§140.10)	CRIMINAL TAMPERING IN THE SECOND DEGREE: Without right or reasonable belief he has such right, defendant either tampers with another's property with intent to cause substantial inconvenience or intentionally tampers with property of public service company (§145.15)	
Up to 6 months	CRIMINAL TRESPASS IN THE FIRST DEGREE: Same as above, except that premises are a dwelling (§140.15); POSSESSION OF BURGLAR'S TOOLS: Defendant possesses burglar's tools under circumstances evincing intention to use or knowledge that tools will be so used (§140.35)	CRIMINAL DAMAGE TO PROPERTY IN THE THIRD DEGREE: Without right or reasonable belief he has such right, defendant intentionally damages another's property, or recklessly damages another's property in amount exceeding $100 (other than by motor vehicle) (§145.00)	FAILURE TO REPORT A DANGEROUS FIRE: Defendant, knowing (1) that fire endangers life or substantial amount of property of another, (2) that he has duty to combat fire, and (3) that he caused fire or property is in his custody or control, fails, without justification, to give prompt fire alarm (§150.20); ARSON IN THE THIRD DEGREE: Defendant recklessly damages building of another by intentionally starting fire or causing explosion (§150.05)

Up to 5 years		CRIMINAL DAMAGE TO PROPERTY IN THE SECOND DEGREE: Without right or reasonable belief he has such right, defendant intentionally damages property of another, causing damage exceeding $100 (§145.05)	
Up to 7 years	BURGLARY IN THE THIRD DEGREE: Defendant knowingly enters or remains unlawfully in building with intent to commit a crime therein (§140.20)		
Up to 10 years	BURGLARY IN THE SECOND DEGREE: Defendant commits burglary in the third degree, and either (1) building is a dwelling, or (2) he or accomplice is armed with explosives or deadly weapon, causes physical injury by at least criminal negligence, or uses or threatens immediate use of dangerous instrument (§140.25)	CRIMINAL DAMAGE TO PROPERTY IN THE FIRST DEGREE: Without right or reasonable belief he has such right, defendant intentionally damages another's property, either causing damage exceeding $1,000 or damaging by explosives (§145.10); CRIMINAL TAMPERING IN THE FIRST DLGREE: Without right or reasonable belief he has such right, defendant intentionally causes substantial interruption or impairment of public service by tampering (§145.20)	ARSON IN THE SECOND DEGREE: Defendant intentionally damages building of another by fire or explosion, without stated justification (§150.10)
Up to 15 years	BURGLARY IN THE FIRST DEGREE: Defendant, at night, commits burglary in the second degree when both factors (1) and (2) above of second degree burglary are present (§140.30)		ARSON IN THE FIRST DLGREE: Defendant intentionally damages building of another by fire or explosion, when a nonparticipant in the crime is within and defendant either knows this or knows circumstances making such presence a reasonable possibility (§150.15)

PART 145: CRIMINAL DAMAGE TO PROPERTY AND RELATED OFFENSES

INTRODUCTION

Part 145 covers offenses against Property where the defendant damages or tampers with the property of another. §111 of Article 27 presently covers "any person who shall wilfully and maliciously destroy, injure, deface or molest any real or personal property of another." §§145.00–145.10 on criminal damage to property, which replace that section and several minor sections in Article 27 which deal with the damaging of specific types of property, divide the offense into three degrees based generally on the value of the property damaged. The highest or first degree also includes the damaging of property by means of an explosive. See §145.10(2). This provision replaces §119 of Article 27, which punishes the dynamiting of property more severely than §111 punishes malicious damaging in general. The new sections also clarify the mental element required for the offense of criminal damage to property and extend the coverage of the offense to include cases of recklessness (other than by motor vehicle) where the defendant damages the property of another in excess of $100.

§§145.00–145.10 and 145.25 only apply where the defendant "damages" the property of another or creates a substantial risk of "damage" thereto. The term "damage" generally refers to a physical injury to real or personal property which impairs its utility or materially diminishes its value. §§145.15 and 145.20 on criminal tampering cover, on the other hand, intrusions on property interests which may not result in any "damage" but which cause substantial inconvenience or impair the supplying of a public service. §§145.15(2) and 145.20 are also intended to punish any unauthorized interference with the property of a public service company. The term "public service company" is defined in §2(o) of Article 78 to include both public utilities and common carriers. The sections on criminal damage to property (§§145.00–145.10) already cover any intentional "damaging" of public service property. In addition, §165.30 on "Theft of services; public utility services; communication services" covers a person who "damages, connects, disconnects, taps, interferes or tampers with the equipment of the supplier of such services" with the intent to avoid the payment of the lawful charge for such services. Since the infliction of actual damage or the intent

to avoid payment for the service may often be difficult to prove, it is desirable to have additional provisions which simply proscribe the unauthorized tampering with the property of a public service company. All of these sections operate together to supersede the verbose sections in Article 27 which define offenses against the property of railroad, water, gas, electric and telephone companies (§§113, 118, 192–193, 194 and 194A).

The final section in Part 145, §145.30 on unlawfully posting advertisements, continues and simplifies the current prohibitions found in §452 of Article 27 and §366 of Article 66C.

The sections in Part 145 frequently refer to the property of another "person." "Person" is broadly defined in §10.00(6) and includes any government or governmental instrumentality. These sections therefore protect public as well as private property from damage and other intrusions. "Property" is also defined in §10.00(20).

145.00. CRIMINAL DAMAGE TO PROPERTY IN THE THIRD DEGREE

A PERSON IS GUILTY OF CRIMINAL DAMAGE TO PROPERTY IN THE THIRD DEGREE WHEN, HAVING NO RIGHT TO DO SO NOR ANY REASONABLE GROUND TO BELIEVE THAT HE HAS SUCH RIGHT, HE:

1. INTENTIONALLY DAMAGES PROPERTY OF ANOTHER PERSON; OR

2. RECKLESSLY DAMAGES PROPERTY OF ANOTHER PERSON IN AN AMOUNT EXCEEDING ONE HUNDRED DOLLARS OTHERWISE THAN THROUGH THE RECKLESS OPERATION OF A MOTOR VEHICLE AS DEFINED IN ARTILCE 66 1/2, SECTION 11–901(A) OF THE ANNOTATED CODE OF MARYLAND.

CRIMINAL DAMAGE TO PROPERY IN THE THIRD DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

§§145.00–145.10 on criminal damage to property adopt the pattern of the New York Penal Law in dividing the offense into three degrees, but the amount here selected as dividing points between them differ from those of the New York Penal Law. The lowest or third degree, defined in §145.00, covers reckless as well as intentional damage to property, but §145.00(2) punishes instances of recklessness only where the amount of damage actually caused exceeds $100. This limitation should exclude many petty cases from the criminal courts. §145.00(2) also excludes from its coverage the reckless

damaging of the property of another through the operation of a motor vehicle. Such incidents can be adequately handled through a reckless driving or other motor vehicle charge, and the motorist involved should not also face a charge of criminal damage to property.

145.05. CRIMINAL DAMAGE TO PROPERTY IN THE SECOND DEGREE

A PERSON IS GUILTY OF CRIMINAL DAMAGE TO PROPERTY IN THE SECOND DEGREE WHEN, WITH INTENT TO DAMAGE PROPERTY OF ANOTHER PERSON, AND HAVING NO RIGHT TO SO NOR ANY REASONABLE GROUND TO BELIEVE THAT HE HAS SUCH RIGHT, HE DAMAGES PROPERTY OF ANOTHER PERSON IN AN AMOUNT EXCEEDING ONE HUNDRED DOLLARS.

CRIMINAL DAMAGE TO PROPERTY IN THE SECOND DEGREE IS A CLASS E FELONY.

COMMENT

§145.05 on criminal damage to property in the second degree differs from §145.00(1) by the pecuniary amount of property damage which the State must prove. Increased liability under §145.05 depends solely upon the amount of actual damage inflicted by the defendant. While the Section does require that the defendant intend to damage the property of another, the State need not establish that the defendant intended to damage property in excess of any particular amount.

145.10. CRIMINAL DAMAGE TO PROPERTY IN THE FIRST DEGREE

A PERSON IS GUILTY OF CRIMINAL DAMAGE TO PROPERTY IN THE FIRST DEGREE WHEN, WITH INTENT TO DAMAGE PROPERTY OF ANOTHER PERSON, AND HAVING NO RIGHT TO DO SO NOR ANY REASONABLE GROUND TO BELIEVE THAT HE HAS SUCH RIGHT, HE DAMAGES PROPERTY OF ANOTHER PERSON:

1. IN AN AMOUNT EXCEEDING ONE THOUSAND DOLLARS; OR

2. BY MEANS OF AN EXPLOSIVE.

CRIMINAL DAMAGE TO PROPERTY IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

§145.10 defines the most serious of the three degrees of criminal damage to property. §145.10(1) differs from §145.00(1) solely by the pecuniary amount of property damage which the State must prove. §145.10(2) covers instances of damaging

property by means of an explosive. There is some overlap between that subsection and §§150.05–150.15 on arson. The arson provisions, however, cover only buildings, while §145.10(2) proscribes the damaging by means of an explosive of all forms of property.

145.15. CRIMINAL TAMPERING IN THE SECOND DEGREE

A PERSON IS GUILTY OF CRIMINAL TAMPERING IN THE SECOND DEGREE WHEN, HAVING NO RIGHT TO DO SO NOR ANY REASONABLE GROUND TO BELEIVE THAT HE HAS SUCH RIGHT, HE:

1. TAMPERS, INTERFERES OR DEALS WITH PROPERTY OF ANOTHER PERSON WITH INTENT TO CAUSE SUBSTANTIAL INCONVENIENCE TO SUCH PERSON OR TO A THIRD PERSON; OR

2. INTENTIONALLY DAMAGES, CONNECTS, DISCONNECTS, TAPS, INTERFERES OR TAMPERS WITH THE PROPERTY OF A PUBLIC SERVICE COMPANY OR OF A MUNICIPALITY, COUNTY, OR AGENCY OF STATE OR LOCAL GOVERNMENT WHICH IS USED TO SUPPLY GAS, ELECTRICITY, STEAM, WATER, OR SIMILAR COMMODITIES TO PREMISES.

CRIMINAL TAMPERING IN THE SECOND DEGREE IS A CLASS B MISDEMEANOR.

COMMENT

§145.15 on criminal tampering in the second degree derives from §145.15 of the New York Penal Law, but has been extensively rewritten to define more precisely the proscribed conduct. §145.15(1) is intended to cover instances where a person deals with the property of another so as to cause serious inconvenience. In many such instances there will not be any actual "damage" to the property. Illustrative of this type of conduct would be maliciously strewing about or disarranging papers or files that will take hours to rearrange. §145.15(2), which is discussed in the Introduction to this Part, punishes the unauthorized interference with the property of a public service company or governmental agency performing similar functions.

145.20. CRIMINAL TAMPERING IN THE FIRST DEGREE

A PERSON IS GUILTY OF CRIMINAL TAMPERING IN THE FIRST DEGREE WHEN, WITH INTENT TO CAUSE A SUBSTANTIAL INTERRUPTION OR IMPAIRMENT OF A SERVICE RENDERED TO THE PUBLIC, AND HAVING NO RIGHT TO DO SO NOR ANY REASONABLE GROUND TO BELIEVE THAT HE HAS SUCH RIGHT, HE DAMAGES, CONNECTS, DISCONNECTS, TAPS, INTERFERES OR TAMPERS WITH THE PROPERTY OF A PUBLIC SERVICE COMPANY (AS DEFINED IN ARTICLE 78, SECTION 2(O) OF THE ANNOTATED CODE OF MARYLAND), AND THEREBY CAUSES A SUBSTANTIAL INTERRUPTION

OR IMPAIRMENT OF SUCH SERVICE.

CRIMINAL TAMPERING IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

§145.20 on criminal tampering in the first degree derives from §145.20 of the New York Penal Law but has been extensively rewritten to define more precisely the proscribed conduct. Both this Section and §145.15(2) cover only public service property. The aggravating factor which distinguishes criminal tampering in the first degree from §145.15(2) on criminal tampering in the second degree is the intentional causing of a substantial interruption or impairment of a public service. Persons who subject the public to such an inconvenience or danger should be liable to stiffer sanctions.

145.30. UNLAWFULLY POSTING ADVERTISEMENTS

A PERSON IS GUILTY OF UNLAWFULLY POSTING ADVERTISEMENTS WHEN, HAVING NO RIGHT TO DO SO NOR ANY REASONABLE GROUND TO BELIEVE THAT HE HAS SUCH RIGHT, HE INTENTIONALLY POSTS, PAINTS OR OTHERWISE AFFIXES, OR CAUSES TO BE SO POSTED, PAINTED OR OTHERWISE AFFIXED, TO THE PROPERTY OF ANOTHER PERSON ANY ADVERTISEMENT, POSTER, NOTICE OR OTHER MATTER.

UNLAWFULLY POSTING ADVERTISEMENTS IS A VIOLATION.

COMMENT

§145.30 on unlawfully posting advertisements supersedes §366 of Article 66C (Natural Resources Code) and §452 of Article 27.

PART 150: ARSON AND RELATED OFFENSES

150.00. ARSON; DEFINITION OF TERM

AS USED IN THIS PART, "BUILDING," IN ADDITION TO ITS ORDINARY MEANING, INCLUDES ANY STRUCTURE, VEHICLE, OR WATERCRAFT WHICH IS (A) USED BY PERSONS FOR CARRYING ON BUSINESS THEREIN, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, A RAILROAD FREIGHT CAR, TRUCK, OR OTHER MOVEABLE STRUCTURE, THE PRIMARY USE OF WHICH IS FOR THE TRANSPORTING OF PERSONAL PROPERTY, BUT NOT INCLUDING AN ORDINARY AUTOMOBILE AND NOT INCLUDING ANY MOVEABLE STRUCTURE, THE PRIMARY USE OF WHICH IS FOR THE TRANSPORTING OF THE OPERATOR THEREOF OR FOR THE TRANSPORTING OF PASSENGERS; OR (B) USED FOR THE LODGING OF PERSONS. WHERE A BUILDING CONSISTS OF TWO OR MORE

UNITS SEPARATELY SECURED OR OCCUPIED, EACH UNIT SHALL NOT BE DEEMED A SEPARATE BUILDING.

COMMENT

The definition is discussed in connection with the following Section.

150.05. ARSON IN THE THIRD DEGREE

1. A PERSON IS GUILTY OF ARSON IN THE THIRD DEGREE WHEN HE RECKLESSLY DAMAGES A BUILDING BY INTENTIONALLY STARTING A FIRE OR CAUSING AN EXPLOSION.

2. IN ANY PROSECUTION UNDER THIS SECTION, IT IS AN AFFIRMATIVE DEFENSE THAT NO PERSON OTHER THAN THE DEFENDANT HAD A POSSESSORY OR PROPRIETARY INTEREST IN THE BUILDING.

ARSON IN THE THIRD DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

Intentionally starting a fire or causing an explosion: All three grades of the New York and draft arson provisions require that the defendant intentionally start a fire or cause an explosion. This corresponds to the traditional view that mere recklessness as to starting a fire is insufficient for arson. The causing of an explosion was not originally an alternative to starting a fire, but it makes sense to treat fire and explosion the same way; they are forms of destroying buildings which are at once dangerous to persons and likely to cause widespread damage.

Building: All degrees of arson are limited to damaging a building by fire or explosion. Building has almost the same meaning as in burglary. There is one important difference; units within a larger building are treated as separate buildings for purpose of burglary, but not for purposes of arson. This has the desirable result of permitting burglary for breaking into an individual room or apartment, but preventing a defense to arson, to the effect that one is merely burning his own property when he sets fire to his own apartment in a building containing other apartments.

The burning of property of another other than buildings, sometimes punishable under present Article 27, §§7 and 8, as a form of arson, is not arson under the New York plan, adopted by the Commission. It is covered as criminal destruction of property (§§145.00 ff.) and not differentiated

from the destruction of property by means other than fire. Burning a painting or piece of furniture does not necessarily carry the risks of fire out of control or danger of life, usually present when a building is burned. Where it does carry this risk, and a building is burned, the burning of the building may be punished as arson in the third degree.

Reckless damage to the building of another: The lowest grade of arson, arson in the third degree, requires the intentional setting of a fire (explosion is an alternative to fire, throughout the arson area), plus recklessness as to starting the fire with respect to a building, plus damage to the building. So, one who burns leaves in his back yard, perceiving but disregarding an unreasonable risk to his neighbor's house, may be guilty of third degree arson. It is necessary not merely that a reasonable man would have perceived a plainly unreasonable and unjustifiable risk; the jury must believe that the defendant actually perceived it. It is an affirmative defense that no other person but the defendant has a possessory or proprietary interest in the building. Such recklessness would not qualify as the wilfullness and malice required for arson under the present Maryland Provisions (Art. 27, §§6, 7 and 8).

150:10. ARSON IN THE SECOND DEGREE

1. A PERSON IS GUILTY OF ARSON IN THE SECOND DEGREE WHEN HE INTENTIONALLY DAMAGES A BUILDING BY STARTING A FIRE OR CAUSING AN EXPLOSION.

2. IN ANY PROSECUTION UNDER THIS SECTION, IT IS AN AFFIRMATIVE DEFENSE THAT (A) NO PERSON OTHER THAN THE DEFENDANT HAD A POSSESSORY OR PROPRIETARY INTEREST IN THE BUILDING, OR IF OTHER PERSONS HAD SUCH INTERESTS, ALL OF THEM CONSENTED TO THE DEFENDANT'S CONDUCT, AND (B) THE DEFENDANT'S SOLE INTENT WAS TO DESTROY OR DAMAGE THE BUILDING FOR A LAWFUL AND PROPER PURPOSE, AND HE HAD NO INTENT THAT HE OR ANOTHER WOULD COLLECT INSURANCE FOR SUCH DAMAGE, AND (C) THE DEFENDANT HAD NO REASONABLE GROUND TO BELIEVE THAT HIS CONDUCT MIGHT DAMAGE ANOTHER BUILDING IN WHICH SOME PERSON OTHER THAN THE DEFENDANT, WHO HAD NOT CONSENTED TO THE DEFENDANT'S CONDUCT, HAD A POSSESSORY OR PROPRIETARY INTEREST, OR THAT HIS CONDUCT MIGHT ENDANGER THE LIFE OR SAFETY OF ANOTHER PERSON.

ARSON IN THE SECOND DEGREE IS A CLASS C FELONY.

COMMENT

Intentional damage to the building of another:

When the damage is intentional rather than reckless, third degree arson becomes second degree arson. The principal Maryland arson Sections (§§6 and 7) would cover the conduct punishable as Second degree arson here.

Justification for intentional damage to the building of another: New York makes it an affirmative defense that (1) either the defendant had the sole possessory or proprietary interest in the building, or all interested person consented to his conduct; (2) the defendant's sole intent was to destroy the building for a lawful and proper purpose; and (3) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building. The Commission approved the policy expressed, but restated the New York provision to make it clear that any motive to collect insurance must be disproved by the defendant, and that, as to factor (3), consent of all interested parties can justify the risk of damage to another building.

150.15. ARSON IN THE FIRST DEGREE

A PERSON IS GUILTY OF ARSON IN THE FIRST DEGREE WHEN HE INTENTIONALLY DAMAGES A BUILDING BY STARTING A FIRE OR CAUSING AN EXPLOSION, AND WHEN (A) A PERSON WHO IS NOT A PARTICIPANT IN THE CRIME IS PRESENT IN SUCH BUILDING AT THE TIME, AND (B) THE DEFENDANT KNOWS THAT FACT OR THE CIRCUMSTANCES ARE SUCH AS TO RENDER THE PRESENCE OF SUCH A PERSON THEREIN A REASONABLE POSSIBILITY.

ARSON IN THE FIRST DEGREE IS A CLASS B FELONY.

COMMENT

Arson in the first degree is reserved for the intentional fire damage to a building when another person is present in the building, and, either the defendant knows this, or the circumstances are such as to render the presence of a person a reasonable possibility at the time the fire is set. The Commission has amended the New York language so as to exclude accomplices of the defendant as such other persons whose presence makes for first degree arson. Generally there is much less risk as to injury of such persons. The present Maryland law does not make this an aggravating factor.

Note on reckless endangering by fire or explosion

Model Penal Code §220.1(2) punishes the intentional starting of a fire or causing of an

explosion if the defendant recklessly endangers another person or building thereby, even if no physical harm is done. New York does not have an arson section dealing directly with this problem, but it is substantially covered elsewhere in the code. The assault material, as adapted by the Commission, punishes as assault in third degree the defendant who "recklessly engages in conduct which creates a substantial risk of serious physical injury." (§120.10(4)).

Note on sections of the present Maryland law dropped in the present draft

The Commission does not recommend continuation of the provisions of the present Sections 9, 10A, and 11 of Article 27.

Burning personal property with intent to injure insurer: Section 9 of the Maryland Code, which deals with this matter, should be dropped because a broader insurance fraud section, Section 175.40 (Presenting a false insurance claim) makes it unnecessary to have a special provision for fire insurance.

Burning a cross or other religious symbol: Despite the reference to notice to the fire department in Article 27, Section 10A, this section seems primarily designed to prevent a form of disorderly conduct, intimidation, or coercion, rather than to guard against fire hazards. It is punished primarily by §245.30(2). To the extent that a cross-burning creates a fire hazard, it is also punishable as arson in the third degree under the proposed code if a building is recklessly damaged, and under Part 145 (Criminal Damage to Property and Related Offenses) if other property is intentionally damaged or if property worth more than $100 is recklessly damaged. In some circumstances, the conduct would be punishable as coercion (§135.35) or attempted coercion. In such a case, the prosecution would have to show at least an attempt to compel or induce conduct of the victim which the victim is not legally required to engage in (e.g., moving out of the neighborhood) by means of making the victim fear such evils of physical injury, injury to property, or the commission of a felony.

Accidentally causing a fire in the course of committing another crime: Article 27, Section 11, of the present Maryland Code provides:

> Any person, who, while perpetrating, or attempting to perpetrate, a crime, shall set

fire to or burn any of the buildings enumerated in this subtitle, shall, upon conviction thereof, be sentenced to the penitentiary for not more than three years.

Such a rule was rejected as a matter of common law in Reg. v. Faulknor, 13 Cox Crim. Cas. 550 (Ct. for Crown Cases Reserved, 1877) and does not appear in the Model Penal Code or in New York. In its favor is that it permits an arson conviction where in fact the defendant deliberately burned a building in an attempt to destroy the evidence of such a crime as murder or burglary, but the prosecution has proof only that he somehow started the fire in the course of committing a crime. Against it are all the arguments against the felony-murder rule, plus the argument that is is much less needed as a practical matter. Many felonies carry a fairly great risk of death, and the death of the victim may prevent the prosecution from meeting the defendant's claim that a shooting was accidental. Few felonies carry much of a risk of burning; arson is less serious than murder; and it does not eliminate human witnesses (without invoking the felony-murder rule itself). The Commission has therefore omitted a felony-arson provision.

150.20. FAILURE TO REPORT A DANGEROUS FIRE

1. A PERSON WHO KNOWS THAT A FIRE IS ENDANGERING LIFE OR A SUBSTANTIAL AMOUNT OF PROPERTY IN WHICH A PERSON, NOT CONSENTING THERETO, OTHER THAN THE DEFENDANT HAS A POSSESSORY OR PROPRIETARY INTEREST, AND WHO KNOWS (A) THAT HE IS UNDER AN OFFICIAL OR CONTRACTUAL DUTY TO PREVENT OR COMBAT THE FIRE, OR (B) THAT THE FIRE WAS CAUSED, WHETHER LAWFULLY OR NOT, BY HIM OR WITH HIS ASSENT, OR ON PROPERTY IN HIS CUSTODY OR CONTROL, AND WHO FAILS TO GIVE A PROMPT FIRE ALARM IS GUILTY OF FAILURE TO REPORT A DANGEROUS FIRE.

IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER THIS SECTION THAT :

(A) THE DEFENDANT REASONABLY BELIEVED THAT THE GIVING OF A PROMPT FIRE ALARM WAS IMPOSSIBLE, OR FUTILE, OR INVOLVED A SUBSTANTIAL RISK OF SERIOUS PHYSICAL INJURY; OR

(B) THE DEFENDANT REASONABLY BELIEVED THAT A FIRE ALARM HAD ALREADY BEEN GIVEN OR WAS BEING PROMPTLY GIVEN BY ANOTHER PERSON; OR

(C) THE DEFENDANT FAILED TO GIVE A PROMPT FIRE ALARM BECAUSE HE WAS ENGAGED IN TAKING REASONABLE MEASURES TO PUT OUT OR CONTROL THE FIRE, OR RESCUE

PERSONS OR PROPERTY ENDANGERED BY THE FIRE.

2. NO PERSON SHALL BE CONVICTED FOR BOTH THE OFFENSE DESCRIBED IN SUBSECTION ONE AND ANOTHER OFFENSE PROHIBITED BY THIS PART WITH RESPECT TO THE BURNING OF THE SAME PROPERTY.

FAILURE TO REPORT A DANGEROUS FIRE IS A CLASS A MISDEMEANOR.

COMMENT

Unlike New York, the Model Penal Code in Section 220.1(3) punishes failure to control or report a dangerous fire in certain circumstances:

> . . . A person who knows that a fire is endangering life or a substantial amount of property of another and fails 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, commits a misdemeanor if:
>
> (a) he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire; or
>
> (b) the fire was started, albeit lawfully, by him or with his assent, or on property in his custody or control.

The law is necessarily cautious about punishing for omissions. The existence of a duty and casual relationship are often more difficult to determine than in the case of affirmative acts. But the Commission agrees with the American Law Institute that we have here an area where punishment for omission is proper. Great potential loss may be involved in indifference to combatting a fire, and such indifference suggests the possibility of wrongful starting of the fire, which it may be impossible to prove. Since usually turning in a fire alarm is practicable, we have recast the Model Penal Code section so that it punishes failure to turn in an alarm by persons under a duty to do so, and to make excuses for not doing so matters of affirmative defense. This conduct in not currently a Maryland crime.

Subsection two is designed to prevent punishing a defendant both for arson and for failure to report the fire involved in the arscn conviction.

SUBTITLE J — OFFENSES INVOLVING THEFT

PART 155: LARCENY 14725

INTRODUCTION 14727

Part 155 on Larceny defines and punishes misappropriations of property. Most American jurisdictions have recognized four basic varieties of criminal misappropriations: larceny, embezzlement, false pretenses, and receiving stolen goods. Larceny was a common law felony defined as the trespassory taking and carrying away of the personal property of another with intent to steal the same. Perkins, Criminal Law 234 (2d ed. 1969). History has had a greater effect than logic on the growth of the law of larceny. The requirement of a trespassory taking made larceny an offense against possession, but the English judges soon discovered that a servant who had control of a chattel belonging to his master had custody only and not possession and that when a bailee of a chattel "broke bulk," or otherwise terminated the bailment, possession reverted to the bailor. Thus, when the servant or bailee appropriated the property to his own use he committed a trespass and was guilty of common law larceny. An even more remarkable expansion of the law of larceny occurred in Pear's case in 1779, where the English judges held that Pear's use of fraud in the hiring of a horse meant that possession remained unaltered in the owner and that Pear's subsequent conversion of the horse was trespassory and therefore larceny. Larceny by trick thus became an established and troublesome part of the law of theft. The separate offense of embezzlement, on the other hand, was a product of a much-needed legislative initative in expanding the law of theft to cover misappropriations untouched by common law larceny. Starting with an Act of Parliament in 1799, numerous statutes have punished, under the name of embezzlement, fraudulent conversion, larceny by bailee, or (in Maryland only) larceny after trust, misappropriations by persons who have in their possession or control the property of another. A further legislative innovation in the law of theft was the offense of false pretenses. Most, if not all, American jurisdictions have passed statutes based on the English Act of 1757 which made criminal the obtaining of property by means of a false pretense. In modern times criminal receiving has also been made a separate substantive offense by statute. 14730 14731 14732 14733 14734 14735 14736 14737 14738 14739 14740 14741 14742 14743 14744 14745 14746 14747 14748 14749 14750 14751 14752 14753 14754 14755 14756 14757 14758 14759 14760 14761 14762 14763 14764 14765 14766

A number of states have consolidated these formerly distinct offenses into one offense designated "larceny" or "theft." The new criminal 14769 14770 14771

codes enacted in Wisconsin in 1955, Illinois in 1964, and New York in 1965 all opted for consolidation, as did the Model Penal Code in its Proposed Official Draft of 1962. The basic proposition in support of consolidation is that the distinctions between the discrete theft offenses are without criminological significance since they cover fundamentally similar kinds of acquisitive conduct. The theft by stranger associated with larceny, the theft by fiduciary associated with embezzlement, and the theft by swindler associated with false pretenses represent alternative techniques for pursuit of unlawful gain which may be advantageously grouped into a single offense. In each instance the offender misappropriates the property of another. Furthermore, the boundaries between the traditional theft offenses are often highly technical and obscure, and a major purpose of consolidation is to prevent such difficulties from resulting in the acquittals of undoubted thieves. In the leading case of Nolan v. State, 213 Md. 298, 131 A. 2d 851 (1957), a defendant convicted of embezzlement obtained a reversal of his conviction by convincing the Court of Appeals that he had committed larceny instead. In other cases where it is clear that the defendant has stolen the property of another the courts must still wrestle with archaic and obtuse distinctions to determine the appropriate box into which the defendant's conduct falls. See, e.g., Loker v. State, 250 Md. 677, 245 A. 2d 814 (1968); Farlow v. State, 9 Md. App. 515, 265 A. 2d 578 (1970).

Part 155 adopts the consolidation approach. No longer are there distinct offenses of larceny, embezzlement, false pretenses, extortion and receiving stolen goods. The misappropriations of property punished by the State are grouped under the three degrees of larceny. §155.05(1) makes clear that an indictment, information or warrant shall charge only larceny in the appropriate degree and should not contain any reference to the former offenses. §§155.25–155.45 define the various ways in which larceny may be committed. These specific sections bear some resemblances to the old offenses, but the conduct they proscribe is simply designated as larceny and under §155.05(1) the State need only charge larceny in the appropriate degree in the warrant, information or indictment and should make no reference to the specific sections of this Code which define the various ways larceny may be committed. The sample charge for the consolidated offense of larceny found in §155.05(1) should permit the simplified prosecution of theft offenses.

§155.05(2) through a bill of particulars insures that a defendant in a larceny prosecution receives adequate notice of the charge against him so that he can prepare his defense. The bill of particulars shall contain a brief statement of the facts upon which the State relies to support the charge of larceny. The State need not disclose its theory of the case or designate the appropriate box or section into which the defendant's conduct falls. §155.05(2)(a) provides that the statement of facts in the bill of particulars shall be "sufficient to provide the defendant with adequate notice of the accusation against him to enable him to prepare his defense." If the indictment charges larceny in the second degree under §155.15, either expressly or as an incorporated offense under §5.55, the bill of particulars shall in addition state which one or more of the subsections of §155.15 the defendant is accused of violating (e.g., that the defendant did steal a self-propelled vehicle, or property whose value exceeds $100). Court rules at present only authorize the court, on motion of the defendant, to order the State to file a bill of particulars. Rule 715(a). In false pretense cases, however, the State must file a bill of particulars upon demand of the defendant. Rule 715(b).

The Commission has generally classified theft offenses as of a higher degree than does the New York Penal Law.

155.00. LARCENY; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "PROPERTY" MEANS ANY MONEY, DOCUMENT, TANGIBLE PERSONAL PROPERTY, REAL PROPERTY, THING IN ACTION, EVIDENCE OF DEBT OR CONTRACT, OR ANY ARTICLE, SUBSTANCE, OR THING OF VALUE, AND INCLUDES PROPERTY BELONGING TO A GOVERNMENT OR ANY GOVERNMENTAL INSTRUMENTALITY. COMMODITIES OF A PUBLIC UTILITY NATURE, SUCH AS GAS, ELECTRICITY, STEAM AND WATER CONSTITUTE PROPERTY, BUT THE SUPPLYING OF SUCH A COMMODITY TO PREMISES FROM AN OUTSIDE SOURCE BY MEANS OF WIRES, PIPES, CONDUITS OR OTHER EQUIPMENT SHALL BE DEEMED A RENDITION OF A SERVICE RATHER THAN A SALE OR DELIVERY OF PROPERTY.

2. "PROPERTY OF ANOTHER" IS PROPERTY IN WHICH ANY PERSON OTHER THAN THE ACTOR HAS AN INTEREST WHICH THE ACTOR IS NOT AUTHORIZED TO INFRINGE AND INCLUDES PROPERTY IN WHICH THE ACTOR IS A CO-OWNER AND PROPERTY OF A PARTNERSHIP OF WHICH THE ACTOR IS A MEMBER.

THE PROPERTY OR INTEREST IN PROPERTY OF ONE'S SPOUSE

SHALL NOT BE DEEMED THE PROPERTY OF ANOTHER UNLESS THE PARTIES ARE LIVING APART PURSUANT TO A WRITTEN AGREEMENT OF SEPARATION OR TO A JUDICIAL DECREE.

PROPERTY IN POSSESSION OF THE ACTOR SHALL NOT BE DEEMED PROPERTY OF ANOTHER WHO HAS ONLY A SECURITY INTEREST THEREIN, EVEN IF LEGAL TITLE IS IN THE CREDITOR PURSUANT TO A CONDITIONAL SALES CONTRACT OR OTHER SECURITY AGREEMENT.

3. "DEPRIVE" MEANS (A) TO WITHHOLD PROPERTY OF ANOTHER PERMANENTLY OR FOR SO EXTENDED A PERIOD OR UNDER SUCH CIRCUMSTANCES AS TO APPROPRIATE IT OR A SUBSTANTIAL PORTION OF ITS ECONOMIC VALUE TO ONE'S OWN USE OR BENEFIT OR TO THAT OF ANOTHER NOT ENTITLED THERETO; OR (B) TO WITHHOLD PROPERTY OF ANOTHER WITH INTENT TO RESTORE IT ONLY IN RETURN FOR A REWARD OR OTHER COMPENSATION; OR (C) TO ABANDON OR ENCUMBER PROPERTY OF ANOTHER SO AS TO MAKE IT UNLIKELY THAT HE WILL RECOVER IT.

4. "OBTAIN" INCLUDES, BUT IS NOT LIMITED TO, THE BRINGING ABOUT OF A TRANSFER OR PURPORTED TRANSFER OF PROPERTY OR OF A LEGAL INTEREST THEREIN, WHETHER TO THE OBTAINER OR ANOTHER.

5. "SECRET TECHNICAL MATERIAL" MEANS A SAMPLE, CULTURE, MICRO-ORGANISM, SPECIMEN, RECORD, RECORDING, DOCUMENT, DRAWING OR ANY OTHER ARTICLE, MATERIAL, DEVICE, OR SUBSTANCE WHICH CONSTITUTES, REPRESENTS, EVIDENCES, REFLECTS, OR RECORDS A SCIENTIFIC, TECHNICAL, MANUFACTURING, EXPERIMENTAL OR DEVELOPMENTAL PROCESS, INVENTION, FORMULA, OR DATA OR ANY PART OR PHASE THEREOF, AND WHICH IS NOT, AND IS NOT INTENDED TO BE, AVAILABLE TO ANYONE OTHER THAN THE PERSON OR PERSONS RIGHTFULLY IN POSSESSION THEREOF OR SELECTED PERSONS HAVING ACCESS THERETO WITH HIS OR THEIR CONSENT, AND WHEN IT ACCORDS OR MAY ACCORD SUCH RIGHTFUL POSSESSORS AN ADVANTAGE OVER COMPETITORS OR OTHER PERSONS WHO DO NOT HAVE KNOWLEDGE OR THE BENEFIT THEREOF.

6. "SERVICE" MEANS ANY LABOR OR PROFESSIONAL SERVICE, PUBLIC ACCOMMODATION SERVICE, TRANSPORTATION SERVICE, RENTAL SERVICE, PUBLIC UTILITY SERVICE, COMMUNICATIONS SERVICE, OR ENTERTAINMENT SERVICE.

"PUBLIC ACCOMMODATION SERVICE" MEANS ANY LODGING SUPPLIED TO GUESTS OR CUSTOMERS BY ANY HOTEL, MOTEL, OR COMPARABLE ESTABLISHMENT AND ANY FOOD OR BEVERAGE SUPPLIED TO GUESTS OR CUSTOMERS BY ANY RESTAURANT, DRIVE-IN RESTAURANT, CAFETERIA, LUNCHROOM, LUNCH COUNTER, SODA FOUNTAIN, COCKTAIL LOUNGE, TAVERN, OR OTHER LIKE FACILITY.

"TRANSPORTATION SERVICE" MEANS THE MOVING OF PERSONS OR GOODS BY MEANS OF ANY SELF-PROPELLED VEHICLE.

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"RENTAL SERVICE" MEANS THE SUPPLYING OF ANY TANGIBLE PERSONAL PROPERTY.

"PUBLIC UTILITY SERVICE" MEANS THE SUPPLYING TO PREMISES BY A PUBLIC SERVICE COMPANY OR BY A MUNICIPALITY, COUNTY, OR AGENCY OF STATE OR LOCAL GOVERNMENT OF GAS, ELECTRICITY, STEAM, WATER, OR SIMILAR COMMODITIES BY MEANS OF WIRES, PIPES, CONDUITS, OR OTHER EQUIPMENT.

"COMMUNICATION SERVICE" MEANS THE TRANSMITTING OF MESSAGES OR INFORMATION BY MEANS OF ANY TELEPHONE, TELEGRAPH, RADIO, TELEVISION CABLE, OR OTHER MECHANICAL DEVICE.

"ENTERTAINMENT SERVICE" MEANS THE OFFERING TO THE PUBLIC OF ANY SHOW, MOTION PICTURE, PLAY, SPORTS EVENT, EXHIBITION, AMUSEMENT OR RECREATION.

7. "COIN MACHINE" MEANS A COIN BOX, TURNSTILE, VENDING MACHINE OR OTHER MECHANICAL OR ELECTRONIC DEVICE OR RECEPTACLE DESIGNED (A) TO RECEIVE A COIN OR BILL OR A TOKEN MADE FOR THE PURPOSE, AND (B) IN RETURN FOR THE INSERTION OR DEPOSIT THEREOF, AUTOMATICALLY TO OFFER, TO PROVIDE, TO ASSIST IN PROVIDING OR TO PERMIT THE ACQUISITION OF SOME PROPERTY OR SOME SERVICE.

8. "SLUG" MEANS AN OBJECT OR ARTICLE WHICH, BY VIRTUE OF ITS SIZE, SHAPE OR ANY OTHER QUALITY, IS CAPABLE OF BEING INSERTED OR DEPOSITED IN A COIN MACHINE AS AN IMPROPER SUBSTITUTE FOR A COIN, BILL OR TOKEN REQUIRED FOR THE OPERATION OF THE MACHINE.

COMMENT

§155.00 contains a number of very important definitions which clarify the law of theft. §155.00(1) defines "property" in broad terms to cover things of value. In past centuries grand larceny was a capital felony; and judges, in order to avoid excessive executions, defined quite restrictively the property which could be the subject of common law larceny. Among the exclusions from the "property" subject to common law larceny were realty, base animals, crops severed from the realty by the thief, deeds to land, contract rights, and negotiable bills and notes. To fill these gaps in the law of theft, the Maryland legislature has enacted a plethora of statutes punishing the larceny or other stealing of specific property which was not the subject of common law larceny. See, e.g., §158 of Article 27 on the taking of fish of another; §343 of Article 27 on the robbery or larceny of bonds, notes, checks, etc. These sections were necessary in the past because §§340 and 341 of Article 27 on

grand and petty larceny simply adopted the common law offense. They will no longer be necessary following the adoption of the comprehensive definition of "property" in §155.00(1). The second sentence in the definition of "property" is intended to coordinate the larceny sections in this Part with §165.30 on theft of public utility services. Under the definition of "public utility service" in §155.00(6), a person commits theft of public utility services under §165.30 when he misappropriates gas, electricity, steam, water or similar commodities supplied by a public service company to premises from an outside source by means of wires, pipes, conduits or other equipment. The second sentence in the definition of "property" operates to preclude a conviction of larceny in such cases.

The definition of "property of another" in §155.00(2) makes a number of clarifications in Maryland law. Maryland courts have recognized that larceny is an offense against possession of property owned by another and that an allegation in an indictment for larceny that the defendant stole the goods of another is sufficient if supported by proof that the person named in the indictment as the owner had any "legal interest or special property" in the goods, such as the right of a bailee or carrier to their possession, and such person need not hold legal title to the goods, Wersten v. State, 228 Md. 226, 179 A. 2d 364 (1962); Richardson v. State, 221 Md. 85, 156 A. 3d 436 (1959). The first paragraph of §155.00(2) retains this basic test and applies it in addition to theft between partners and between co-owners of property. At common law a partner or co-owner could not be convicted of stealing partnership or jointly owned property. Perkins, Criminal Law 244 (2d ed. 1969). The Maryland legislature has already changed the common law rule on the theft of partnership property. See §173 of Article 27. This paragraph of §155.00(2) rejects the common law rule altogether and protects the interests of partners and co-owners in partnership or jointly owned property from misappropriations by their fellow partners or co-owners. The second paragraph of §155.00(2) handles the difficult problem of interspousal theft. In cases where the victim of an alleged larceny is the spouse of the defendant, the prosecution must prove beyond a reasonable doubt that the conditions in the "unless" clause are met. This limitation should prevent the needless intervention of the criminal law into domestic squabbles. Finally, the third paragraph of §155.00(2) treats the problem of the person who possesses property subject to a security interest. Legal title to the property is very likely in the

secured creditor, but the debtor in possession probably regards himself as the owner of the property, subject only to an obligation to pay the debt. (Cf, Md. Code, Art. 95B, §9–202, a part of the Uniform Commercial Code.) The use of criminal sanctions to control the behavior of such debtors in possessing therefore presents unique problems which should be dealt with in the context of other provisions for the protection of creditors (see, e.g., Part 185 on Frauds on Creditors). Therefore, the general larceny section does not punish any misappropriations by the debtor in possession. Courts have generally reached the same result by considering the debtor in possession as the "owner" of the property for purposes of the law of theft. See Whitmore v. State, 238 Wis. 79, 298 N. W. 194 (1941).

§155.00(3) contains a definition of "deprive" which establishes the principal mental element required for the consolidated larceny offense. The "intent to steal" or animus furandi which was a material element of common law larceny required an intent to deprive the owner "permanently" of his property. Thus, an unauthorized taking or borrowing of the property of another with the intention of using it temporarily and then returning to the owner has never been considered larceny. The above definition of "deprive" basically retains this principle. The crime of larceny is a serious one and should not be extended to include deprivations that are trifling. §155.00(3)(a), however, does slightly expand the offense since it covers cases where the defendant intends to appropriate a "substantial portion" of the economic value of the property. A person who takes a perishable commodity of another with the intent of keeping it long enough for it to spoil commits larceny under this provision even though he intends eventually to return it. §155.00(3)(b) and (c) effect no further expansion since they simply codify instances where the defendant's intent has been treated as an intent to deprive the owner "permanently" of his property and the defendant could therefor be convicted of common law larceny. Courts have never considered the defendant's offer to return the property for a reward or other compensation as negating the intent to steal. Perkins, Criminal Law 269 (2d ed. 1969). Maryland courts have also ruled that a defendant who intentionally abandons or encumbers the property of another so as to make it unlikely the owner will recover it is guilty of larceny. Hadder v. State, 238 Md. 341, 209 A. 2d 70 (1965); Putinski v. State, 223 Md. 1, 161 A. 2d 117 (1960).

§155.00(4) contains a definition of "obtain" which derives from §155.00(2) of the New York Penal Law.

§155.00(5) contains a definition of "secret technical material" which derives from the definition of "secret scientific material" in §155.00(6) of the New York Penal Law. The New York definition has been rewritten and broadened to insure that it is not limited to secret "scientific" discoveries but that it covers in addition secret technical designs for the manufacture of new products. §155.15(3) treats larceny of secret technical materials as larceny in the second degree. The Commission decided against including in this Code a provision analogous to §165.15 of the New York Penal Law on the unlawful use of secret scientific material. That section punishes the unlawful use, disclosure or reproduction of secret scientific material where there has been no taking or other appropriation of property to the make the offense larceny. The Commission took the view that the civil law of trade secrets was the appropriate means for handling these matters.

§155.00(6) defines various "services." These definitions are used in the sections on larceny in this Part and on theft of services in Part 165. The one definition which is not explicitly referred to in any other section of this Code is that of "entertainment services." The Commission decided that a person who gains admission to a ball game or other entertainment by stealth should not be punished for larceny or theft of services. The definition has been retained in §155.00(6), however, to insure that a person who obtains entertainment services by means of a bad check shall be punished under §§190.05–190.15.

§155.00(7) and (8) contains definitions of "coin machine" and "slug" which derive from §170.50 of the New York Penal Law. The New York Penal Law has two separate sections on offenses involving slugs (§§170.55 and 170.60). The Commission decided not to adopt separate sections on the use of slugs but to punish the obtaining of property or services by the insertion or deposit of a slug in a coin machine as larceny by deception or theft of services. See §§155.30 and 165.20–165.30. These sections replace the unduly complex and verbose provisions covering the use of slugs found in §§56 and 57 of Article 27. For provisions replacing those parts of §56 dealing with counterfeiting and forgery of tokens, see §§170.00, 170.10, 170.15, 170.20 and 170.30 of this Code.

155.05. CONSOLIDATION OF THEFT OFFENSES

1. INDICTMENT, INFORMATION, OR WARRANT. IN ANY INDICTMENT, INFORMATION OR WARRANT FOR LARCENY IT SHALL BE SUFFICIENT TO STATE THE DEGREE OF LARCENY CHARGED AND TO USE A FORMULA SUBSTANTIALLY TO THE FOLLOWING EFFECT: "THAT A–B ON THE _____ DAY OF _____, 19 ___, IN THE COUNTY (CITY) AFORESAID, DID STEAL THE PROPERTY (HERE SPECIFYING THE PROPERTY STOLEN) OF C–D, IN VIOLATION OF ARTICLE 27, SECTION 155.10 (OR 155.15 OR 155.20, AS THE CASE MAY BE), OF THE ANNOTATED CODE OF MARYLAND; CONTRARY TO THE FORM OF THE ACT OF ASSEMBLY IN SUCH CASE MADE AND PROVIDED, AND AGAINST THE PEACE, GOVERNMENT AND DIGNITY OF THE STATE."

2. BILL OF PARTICULARS. IN ANY PROSECUTION FOR LARCENY IN A CIRCUIT COURT, IN THE CRIMINAL COURT OF BALTIMORE OR IN THE DISTRICT COURT, THE DEFENDANT SHALL BE ENTITLED TO A BILL OF PARTICULARS CONTAINING A BRIEF STATEMENT OF THE FACTS UPON WHICH THE STATE RELIES TO SUPPORT THE CHARGE, AND, IF THE INDICTMENT CHARGES LARCENY IN THE SECOND DEGREE EITHER EXPRESSLY OR AS AN INCORPORATED OFFENSE PURSUANT TO SECTION 5.55, A STATEMENT OF WHICH ONE OR MORE OF THE SUBSECTIONS OF SECTION 155.15 THE DEFENDANT IS ACCUSED OF VIOLATING, SO THAT THE DEFENDANT WILL BE PROVIDED WITH ADEQUATE NOTICE OF THE ACCUSATION AGAINST HIM TO ENABLE HIM TO PREPARE HIS DEFENSE. SUCH BILLS OF PARTICULARS SHALL BE FURNISHED IN ACCORDANCE WITH RULES OF PRACTICE AND PROCEDURE PRESCRIBED BY THE COURT OF APPEALS. SUCH RULES MAY PROVIDE FOR, AMONG OTHER THINGS (BUT WITHOUT LIMITATION THERETO): (I) THE FILING OF SUCH BILLS, WHETHER UPON DEMAND OR WITHOUT DEMAND, AND THE TIME OR TIMES FOR FILING THEM; (II) THE AMENDMENT OF SUCH BILLS AND NOTICE THEREOF TO THE DEFENDANT; AND (III) THE GRANTING OF CONTINUANCES IN CONSEQUENCE OF THE TIME OF FILING OF ANY SUCH BILL OR OF ANY AMENDMENTS OR PROPOSED AMENDMENTS THERETO.

3. OFFENSES INVOLVING BAD CHECKS. THE OBTAINING OF PROPERTY OR SERVICES BY A BAD CHECK AS DEFINED IN SECTIONS 190.05 TO 190.15 SHALL NOT BE PROSECUTED AS LARCENY AS DEFINED IN THIS PART UNLESS THE ACTOR MAKES A FALSE REPRESENTATION AS DEFINED IN SECTION 155.30(1) IN ADDITION TO ANY FALSE REPRESENTATION OR FALSE REPRESENTATIONS THAT THERE ARE SUFFICIENT FUNDS IN THE DRAWEE BANK TO COVER THE CHECK. IN ANY SUCH PROSECUTION FOR LARCENY THE PRESUMPTIONS DEFINED IN SECTION 190.20 SHALL APPLY TO THE SAME EXTENT AS IF THE PROSECUTION WERE UNDER SECTION 190.05, 190.10 OR 190.15.

COMMENT

§155.05 on the consolidation of the theft offenses has already been extensively discussed in

the Introduction to this Part. The purpose of the section is to simplify the prosecution of theft offenses. §155.05(1) contains a sample charge for the consolidated larceny offense similar to those presently found for a number of offenses in Article 27. See, e.g., §609 on indictment for false pretenses. §155.05(2) provides for the right of a defendant to have a bill of particulars in larceny prosecutions.

Prior to the approval in November, 1970, of the constitutional amendment establishing a District Court to replace the various courts of limited jurisdiction over criminal (as well as civil) cases, the Commission had drawn §155.05(2) so as to deal quite fully and explicitly with the furnishing of bills of particulars in larceny cases in the Circuit Courts or in the Criminal Court of Baltimore and in cases tried before a trial magistrate, a People's Court or the Municipal Court of Baltimore City. Essentially, such provisions are precedural; but because the rule-making power of the Court of Appeals was not thought then to extend to the courts of limited jurisdiction, it was deemed advisable to include them in a statute. Since the constitutional amendment just referred to not only establishes the District Court, but also appears to extend the rule-making power of the Court of Appeals to cover proceedings in that Court, it is now thought preferable that these matters be regulated by court rules rather than by statute.

The Commission therefore proposes to submit for the consideration of the Rules Committee and of the Court of Appeals the substance of the provisions originally drafted for inclusion in the statute. All of such provisions would fall within the scope of the last sentence of §155.05(2). It is thought that there might be some differences in the rules applicable to bills of particulars in the Circuit Courts or the Criminal Court of Baltimore and those applicable in the District Court largely because of possible differences in the formality of procedure or in relative promptness or immediacy of trial following the institution of proceedings in those courts.

If there should be widespread or substantial delay in making the District Court amendment operative throughout the State, it may be desirable to restore the long and elaborate provisions of §155.05(2) previously drafted.

§155.05(3) deals with the relationship between larceny and obtaining property or services by a bad

check (§§190.05-190.15). This Code punishes both offenses equally, but it is still necessary to define the extent of the overlap between the two offenses. Under present law every violation of the section on bad checks (§142 of Article 27) also necessarily involves a violation of the section on false pretenses (§140 of Article 27). The State does not need to establish any other fact under §140 than it must establish to prove a violation of §142. In other words, in a prosecution under §140 the State need not prove any misrepresentation intrinsic to the bad check itself. However, the presumptions in §142 that accompany the passing of a bad check only apply to prosecutions under that section and not to prosecutions under §140. Flanigan v. State, 232 Md. 13, 191 A. 2d 591 (1963); Waye v. State, 231 Md. 510, 191 A. 2d 428 (1963). §155.05(3) changes this existing pattern in several major respects. First, it specifically provides that the obtaining of property or services by a bad check shall not be prosecuted as larceny under this Part unless the actor makes a false representation in addition to any false representation that there are sufficient funds in the drawee bank to cover the check. The additional false representation must involve the identity of the actor or some other material matter not related to the worthlessness of the check. The purpose of this provision is to insure that the ten-day waiting period in §190.25 during which the actor may make the check good is not circumvented by prosecuting bad check cases as larceny. This provision is necessary because §155.30(1) on larceny by deception defines the term "false representation" broadly enough to cover the passing of a bad check. Of course, where there is an additional misrepresentation the State may prosecute the defendant for larceny without awaiting the expiration of the ten-day period. §155.05(3) specifically provides that in such cases the presumptions defined in §190.20 shall apply to the same extent as if the prosecution were for a bad check offense.

155.10. LARCENY IN THE THIRD DEGREE

A PERSON IS GUILTY OF LARCENY IN THE THIRD DEGREE WHENEVER HE IS GUILTY OF LARCENY UNDER ANY SECTION IN THIS PART.

LARCENY IN THE THIRD DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

For commentary, see §155.20.

155.15. LARCENY IN THE SECOND DEGREE

A PERSON IS GUILTY OF LARCENY IN THE SECOND DEGREE WHENEVER HE IS GUILTY OF LARCENY UNDER ANY SECTION IN THIS PART AND WHEN:

1. THE VALUE OF THE PROPERTY OR SERVICES INVOLVED EXCEEDS ONE HUNDRED DOLLARS; OR

2. THE PROPERTY CONSISTS OF A PUBLIC RECORD, AS DEFINED IN SECTION 175.00(4); OR

3. THE PROPERTY CONSISTS OF SECRET TECHNICAL MATERIAL; OR

4. THE PROPERTY CONSISTS OF A SELF-PROPELLED VEHICLE; OR

5. THE PROPERTY IS TAKEN FROM THE PERSON OF ANOTHER; OR

6. THE PROPERTY IS OBTAINED BY LARCENY AS DEFINED IN SECTION 155.35; OR

7. THE PROPERTY IS POSSESSED IN THE MANNER PROSCRIBED BY SECTION 155.45 AND THE PERSON POSSESSING IT IS A PAWNBROKER OR IS IN THE BUSINESS OF BUYING, SELLING OR OTHERWISE DEALING IN PROPERTY.

LARCENY IN THE SECOND DEGREE IS A CLASS D FELONY.

COMMENT

The gradation of larceny offenses is stated in this and the two following sections. For commentary thereon, see §155.20. What constitutes larceny is set forth in §§155.25–155.45.

155.20. LARCENY IN THE FIRST DEGREE

A PERSON IS GUILTY OF LARCENY IN THE FIRST DEGREE WHENEVER HE IS GUILTY OF LARCENY UNDER ANY SECTION IN THIS PART AND WHEN THE VALUE OF THE PROPERTY OR SERVICES INVOLVED EXCEEDS TEN THOUSAND DOLLARS.

LARCENY IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

§§155.10–155.20 divide the offense of larceny into three degrees based generally on the value or nature of the property or services appropriated. The Commission decided to treat misappropriations of property or services that do not exceed $100 as the lowest or third degree of larceny and, in order to

reach a relatively few major thefts, misappropriations in excess of $10,000 as first degree larceny. The New York Penal Law also has three degrees of larceny, but sets different monetary dividing lines between the degrees. §155.15(2)-(7) also treats various aggravated forms of larceny as larceny in the second degree regardless of the value of the property or services stolen. Of course, if the value of the property or services involved exceeds $10,000 in any of these cases, the defendant is guilty of larceny in the first degree under §155.20.

§§155.10-155.20 substantially modify the existing framework in Article 27 for the gradation of the theft offenses. §§340 and 341 on grand and petty larceny recognize two degrees of larceny with the dividing line between them set at $100. §§466 and 467 on receiving stolen goods also recognize two degrees of the offense with a dividing line at $100. §140 on false pretenses and §129 on embezzlement, however, do not divide those offenses into degrees. §§561-563 on threats also do not divide the offense into degrees but severly punish extortionate threats in a manner analogous to §155.15(6).

155.25. LARCENY BY UNAUTHORIZED TAKING OR DISPOSITION

1. EXCEPT AS PROVIDED IN SUBSECTION 2, A PERSON IS GUILTY OF LARCENY IF HE TAKES, OR EXERCISES UNAUTHORIZED CONTROL OVER, THE PROPERTY OF ANOTHER WITH INTENT TO DEPRIVE HIM THEREOF.

2. A PERSON DOES NOT COMMIT LARCENY BY TRESPASSING ON THE LAND OF ANOTHER OR BY OCCUPYING WITHOUT AUTHORIZATION THE LAND OF ANOTHER.

COMMENT

§155.25 on larceny by unauthorized taking or disposition derives from §223.1 of the Model Penal Code (Proposed Official Draft, 1962). The phrases "take" or "exercise unauthorized control over" the property of another with "intent to deprive" best describe the misappropriations of the common law larceny and embezzlement varieties which should be punished under the consolidated larceny offense. §155.25 thus replaces the numerous sections in Article 27 which deal with larceny and embezzlement. §155.25(2) reflects the Commission's belief that the trespasser, squatter or other person who wrongfully occupies a few square feet of his neighbor's or another's land should not be treated as a thief. This provision is necessary since the definition of "property" in §155.00(1) includes real property.

§155.00(2) and (3) also defines the terms "property of another" and "deprive."

155.30. LARCENY BY DECEPTION

A PERSON IS GUILTY OF LARCENY IF HE INTENTIONALLY OBTAINS PROPERTY OR LABOR OR PROFESSIONAL SERVICES OF ANOTHER BY DECEPTION. A PERSON DECEIVES IF HE INTENTIONALLY:

1. MAKES A FALSE REPRESENTATION, INCLUDING FALSE REPRESENTATIONS AS TO FACT, LAW, VALUE, INTENTION OR OTHER STATE OF MIND; BUT DECEPTION AS TO A PERSON'S INTENTION TO PERFORM A PROMISE OR TO ENGAGE IN PARTICULAR CONDUCT SHALL NOT BE INFERRED FROM THE FACT ALONE THAT HE DID NOT SUBSEQUENTLY PERFORM THE PROMISE OR ENGAGE IN SUCH CONDUCT; AND NO WARRANT, INDICTMENT OR INFORMATION SHALL ISSUE SOLELY UPON PROOF THAT A PERSON DID NOT PERFORM A PROMISE OR DID NOT ENGAGE IN PARTICULAR CONDUCT; OR

2. PREVENTS ANOTHER FROM DISCOVERING A FACT WHICH THE ACTOR KNOWS WOULD MATERIALLY AFFECT THE OTHER'S JUDGMENT OF A TRANSACTION; OR

3. FAILS TO CORRECT A FALSE IMPRESSION WHICH THE ACTOR KNOWS THAT HE PREVIOUSLY CREATED BY A FALSE REPRESENTATION OR FALSE REPRESENTATIONS; OR

4. INSERTS OR DEPOSITS A SLUG IN A COIN MACHINE OFFERING SUCH PROPERTY OR SERVICES.

THE TERM DECEIVE DOES NOT, HOWEVER, INCLUDE FALSITY AS TO MATTERS WHICH ARE NOT MATERIAL OR ARE EXAGGERATED STATEMENTS OR PUFFING WHICH ARE UNLIKELY TO DECEIVE ORDINARY PERSONS IN THE GROUP ADDRESSED.

COMMENT

§155.30 on larceny by deception proscribes the obtaining (see §155.00(4) for the definition of "obtain") of property or labor or professional services by deception. The section resembles §140 of Article 27 on the obtaining of property by false pretenses, but §155.30 is broader than the present section in that it covers the obtaining of labor and professional services and of an expanded category of property which includes real property. See the definition of "property" in §155.00(1). The present §140 only covers the obtaining of any "chattel, money or valuable security."

The four subsections of §155.30 spell out what is meant by deception. §155.30(1) is the most general provision and covers the intentional making

of any false representation. The words "false representation" are broad enough to cover not only false statements but also false tokens and worthless checks. §155.05(3), however, specifically provides that the obtaining of property or services by a bad check shall not be prosecuted as larceny under this Part unless there is some false representation in addition to one that the check is good. See the Commentary to that subsection. Maryland law previously required for the offense of obtaining property by false pretenses the making of a false representation of past or existing fact. Davis v. State, 229 Md. 139, 182 A. 2d 49 (1962); Willis v. State, 205 Md. 118, 106 A. 2d 85 (1954). §140 specifically provided that a "mere promise for future payment, though not intended to be performed, shall not be sufficient to authorize a conviction." §155.30(1) expands the category of false representations punishable by the criminal law to include in addition false representations of law, value, intention or other state of mind. This change reflects the trend around the country to punish defrauders who make only false promises or false statements on matters of intention, law or value. Too many confidence men have escaped prosecution in the past by limiting their falsehoods to matters of intention. Any danger that a creditor will use this expanded definition of false representation to treat the ordinary commercial default of his debtor as larceny by deception is met by the "but" clause in §155.30(1). That clause provides that the mere fact that a debtor did not perform his promise to pay does not support a prosecution or conviction for larceny based on this section. In such cases the creditor may not harass his debtor by securing an arrest warrant or otherwise commencing a prosecution for larceny. To bring a prosecution or secure a conviction for larcency the creditor must produce additional evidence that the debtor did not intend to perform his promise to pay. An example of such a case would be where the debtor absconds to the West Coast shortly after purchasing property on credit and is not heard from again by the creditor until his arrest. The debtor's absconding provides a strong basis for an inference that he did not intend to perform his promise to pay for the property.

§155.30(1) covers cases where the defendant obtains property or services by "making" a false representation. §155.30(2), on the other hand, covers a narrow range of cases where the defendant affirmatively prevents another party from discovering a material fact. A homeowner who sells his house by covering up a termite-infested wall

would fall within that provision. §155.30(3) is intended to cover instances where the defendant obtains property or services by intentionally failing to correct previous false representations. Finally, §155.30(4) implements the definitions of "slug" and "coin machine" found in §155.00(7) and (8). The insertion or deposit of a slug in a coin machine is treated as deceptive.

155.35. LARCENY BY EXTORTION

A PERSON IS GUILTY OF LARCENY IF HE INTENTIONALLY OBTAINS PROPERTY OR LABOR OR PROFESSIONAL SERVICES OF ANOTHER BY THREATENING TO:

1. CAUSE PHYSICAL INJURY TO SUCH OTHER OR TO A THIRD PERSON; OR

2. CAUSE PHYSICAL DAMAGE TO PROPERTY OF SUCH OTHER OR OF A THIRD PERSON; OR

3. ENGAGE IN OTHER CONDUCT CONSTITUTING A CRIME; OR

4. ACCUSE SOME PERSON OF A CRIME; OR

5. PUBLICIZE AN ASSERTED FACT, WHICH IF TRUE, WOULD TEND TO SUBJECT SOME PERSON TO HATRED, CONTEMPT OR RIDICULE, OR EXPOSE A SECRET; OR

6. PERFORM OR CAUSE TO BE PERFORMED ANY OTHER ACT WHICH WOULD NOT IN ITSELF MATERIALLY BENEFIT HIM BUT WHICH IS CALCULATED TO HARM ANOTHER PERSON MATERIALLY WITH RESPECT TO HIS HEALTH, SAFETY, BUSINESS, CALLING, CAREER, FINANCIAL CONDITION, REPUTATION OR PERSONAL RELATIONSHIPS.

COMMENT

§155.35 defines larceny by extortion as the obtaining of the property or labor or professional services of another by means of certain specified threats. Extortion is this treated as a form of misappropriation and consolidated as part of the general larceny offense. If the threats are unsuccessful and do not lead to an obtaining of property or services, the threatening party may still be prosecuted for attempted larceny or for coercion under §135.30. To initiate a prosecution for the conduct proscribed by this section, the State need only file a warrant, information or indictment for larceny as provided in §155.05(1), and need not charge extortion in the larceny indictment as New York requires. Of course, the State must comply with the requirements of

§155.05(2) on a bill of particulars. The statement of facts in the bill of particulars should adequately inform the defendant that the State plans to support its larceny charge by proving that the defendant obtained the property of another by means of specific threats. This warning is important because larceny by extortion is an aggravated form of larceny which carries stiffer penalties than other forms. See §155.15(6).

The enumeration in §155.35(1)-(6) of the threats covered by that section derives from §155.05(2)(e)(i)-(ix) of the New York Penal Law. The Commission deleted subdivisions vi, vii, and viii of the New York subsection on the ground that they were unnecessary and reworded subdivisions i - v (appearing as subsections 1-5 of §155.35 of this Code). §155.35(6), which derives from §155.05(2)(e)(ix) of the New York Penal Law, was the subject of much debate within the Commission. That subsection is a catchall and a number of Commission members believe it is over-broad. The majority of the Commission, however, strongly favors its inclusion in §155.35. Many extortionate schemes involve threats other than those enumerated in §155.35(1)-(5). Racketeers who prey on legitimate businesses only rarely threaten to blow up a plant unless they are paid off. Normally the racketeers threaten to use their influence to drive away a firm's customers or suppliers or to cause the firm labor trouble unless the firm is willing to line their pockets. Such threats to inflict economic losses on a legitimate business will not be covered by the criminal law unless §155.35(6) is retained. Other threats covered by §155.35(6) include a teacher's threat to flunk a pupil and a plant superintendent's threat to secure from an employer an employee's dismissal. The obtaining of property by such strong arm tactics should be punished. The restriction that the threatened act must not in itself materially benefit the threatening party is intended to exclude threats between competitors which are often a recognized part of the business scene. A businessman may threaten to attract the customers of a competitor by instituting a new advertising campaign unless the competitor pays him a certain sum. The obtaining of property by such a threat would not be criminal under §155.35(6) if the threatening party would benefit from the advertising campaign.

§155.35 makes several significant changes in Maryland law. First, §§561-563 of Article 27 on extortionate threats do not require for the completed offense any obtaining of property or

services but punish certain verbal or written threats made with intent to extort. §155.35, on the other hand, requires an obtaining of property or services for the completed offense. In addition, §§561–563 cover only threats to do injury to the person or property of anyone or to accuse any person of a crime or of anything which, if true, would tend to bring him into contempt or disrepute. §155.35(3) and (6) enlarges this list of threats.

155.40. LARCENY OF PROPERTY LOST, MISLAID OR DELIVERED BY MISTAKE

A PERSON IS GUILTY OF LARCENY IF HE EXERCISES CONTROL OVER PROPERTY OF ANOTHER WHICH HE KNOWS TO HAVE BEEN LOST OR MISLAID, OR TO HAVE BEEN DELIVERED UNDER A MISTAKE AS TO THE IDENTITY OF THE RECIPIENT OR THE NATURE OR AMOUNT OF THE PROPERTY, IF, WITH INTENT TO DEPRIVE THE OWNER THEREOF, HE FAILS TO TAKE MEASURES REASONABLY AVAILABLE TO ENABLE THE OWNER TO RECOVER THE PROPERTY.

COMMENT

§155.40 on larceny of property lost, mislaid or delivered by mistake derives from §155.05(2)(b) of the New York Penal Law, which in turn derives from §223.5 of the Model Penal Code (Proposed Official Draft 1962). While this section overlaps §155.25 on larceny by the unauthorized taking or disposition of the property of another, it is needed to resolve the vexing problems and fill the gaps presented by the misappropriation of lost, mislaid and misdelivered property. The common law notion that larceny required a trespassory taking made the actor's state of mind at the moment of finding or delivery determinative of guilt or innocence in such cases. If the finder or recipient of the misdelivered property intended to deprive the owner of the property at the time he took possession of it, there was a trespassory taking which sufficed for a larceny conviction. However, if the finder or recipient took possession of the property with an honest state of mind and only subsequently formulated a thieving intent and misappropriated the property, he could not be convicted of larceny because he had acquired lawful possession of the property and could not commit a trespass against it. The subsequent appropriation did not constitute embezzlement because there had been no express bailment or entrusting of the property.

Commentators have agreed that the search for an initial thieving state of mind is largely make believe. See Tentative Draft #2 of the Model Penal Code, pp. 83–85. Therefore, §155.40 concentrates on

the finder's or recipient's efforts to restore the property to the owner as the basis for determining guilt or innocence. The section permits conviction even where the original taking was honest in the sense that the finder or recipient intended to restore, but subsequently changed his mind; and it bars conviction where the finder or recipient takes reasonable measures to enable the owner to recover the property, even though he may have entertained a thieving purpose at some time during his possession.

§155.40 covers not only property delivered under a mistake as to the identity of the recipient but also under a mistake as to the nature or amount of the property.

155.45. LARCENY BY CRIMINAL POSSESSION

1. A PERSON IS GUILTY OF LARCENY IF HE POSSESSES STOLEN PERSONAL PROPERTY KNOWNING THAT IT HAS BEEN STOLEN, OR BELIEVING THAT IT HAS PROBABLY BEEN STOLEN, WITH INTENT TO DEPRIVE AN OWNER THEREOF. STOLEN PROPERTY MEANS PROPERTY WHICH HAS BEEN THE SUBJECT OF LARCENY.

2. PRESUMPTION OF KNOWLEDGE. THE REQUISITE KNOWLEDGE OR BELIEF MAY BE PRESUMED IN THE CASE OF A DEALER WHO:

(A) IS FOUND IN POSSESSION OR CONTROL OF PROPERTY STOLEN FROM TWO OR MORE PERSONS ON SEPARATE OCCASIONS; OR

(B) DURING THE YEAR PRECEDING THE CRIMINAL POSSESSION CHARGED, HAS ACQUIRED STOLEN PROPERTY IN A SEPARATE TRANSACTION; OR

(C) BEING A DEALER IN PROPERTY OF THE SORT POSSESSED, ACQUIRED IT FOR A CONSIDERATION WHICH HE KNEW WAS FAR BELOW ITS REASONABLE VALUE.

"DEALER" MEANS A PERSON IN THE BUSINESS OF BUYING OR SELLING GOODS.

3. IN ANY PROSECUTION FOR LARCENY BY CRIMINAL POSSESSION OF STOLEN PROPERTY, IT IS NOT A DEFENSE THAT:

(A) THE PERSON WHO STOLE THE PROPERTY HAS NOT BEEN CONVICTED, APPREHENDED OR IDENTIFIED; OR

(B) THE DEFENDANT STOLE OR PARTICIPATED IN THE STEALING OF THE PROPERTY; OR

(C) THE STEALING OF THE PROPERTY DID NOT OCCUR IN THIS STATE.

COMMENT

§155.45 on larceny by criminal possession consolidates the offense of receiving stolen goods into the general larceny offense. The major reason in support of this consolidation and against retaining receiving as a separate offense is that in many instances it is not clear whether the defendant found in possession of stolen property is the thief or the receiver of that property. The Maryland Court of Appeals has consistently held that the recent posession of stolen property may give rise either to the inference that the possessor is the thief or that he is the receiver. Jordan v. State, 219 Md. 36, 148 A. 2d 292 (1959). Courts have often struggled with the problem of which inference to draw. Jordan, supra; Rose v. State, 240 Md. 65, 212 A. 2d 742 (1965). Consolidation avoids such needless difficulties and permits a larceny conviction in all cases.

§§466–467 of Article 27 on receiving stolen goods do not define the offense. In the leading case of Jordan v. State, supra, the Maryland Court of Appeals outlined the four elements of the offense: (1) the property must be received; (2) it must, at the time of its receipt, be stolen property; (3) the receiver must have guilty knowledge that it is stolen property; and (4) his intent in receiving it must be fraudulent. §155.45 modifies these requirements in a number of ways. However, the modifications are often more a matter of clarification than substantive change. The major innovation is the substitution of the concept of "possession" for the traditional one of "receiving." This change permits the conviction for larceny of the person who stole the property upon proof that he criminally possessed the stolen property. A defendant, of course, can only be convicted once under §§155.10–155.20 for larceny of the same property. Making "possession" the gravamen of the offense should otherwise have little effect, because "receiving" is already broadly defined in this State to cover the obtaining of a measure of control or dominion over the property. Jordan v. State, supra. Maryland courts have also recognized the concept of "constructive possession" of stolen property codified in the definition of possession in §10.00(7) of this Code. See Polansky v. State, 205 Md. 362, 109 A. 2d 52 (1954). Other modifications of existing law found in §155.45(1) include the clarification of the mental element of the offense and the extension of the offense to cover all forms of personal property. Real property, however, is excluded from the coverage of §155.45. §155.45(2)

also contains a number of presumptions which should be helpful in prosecuting professional fences, while §155.45(3) contains several new provisions which should avoid interpretative difficulties. This section does not affect existing evidentiary rules about inferences which may be drawn from unexplained possession of recently stolen goods.

155.50. CLAIM OF RIGHT

IN ANY PROSECUTION FOR LARCENY, IT IS A DEFENSE THAT THE ACTOR HONESTLY BELIEVED THAT HE HAD A RIGHT TO, OR WAS ENTITLED TO, THE PROPERTY OR SERVICE INVOLVED OR THAT HE HAD A RIGHT TO ACQUIRE OR DISPOSE OF IT AS HE DID.

COMMENT

§155.50 establishes a broad claim of right defense available in all larceny prosecutions. This section generally follows existing decisional law in providing that the actor's claim of right need not be a reasonable one but must only be an honestly maintained one.

§155.50 operates in the following manner. The actor who "takes, or exercises unauthorized control over, the property of another" under §155.25 or who possesses the property of another under §155.45 has a claim of right defense if he honestly believes that he has a "right to" or is "entitled to" the property. The actor may believe that the property in question is abandoned or belongs to himself or that the owner of the property authorized him to act as he did with respect to the property. The actor who obtains the property or services of another by threats or deception under §155.30 or §155.35 also has a claim of right defense to a larceny prosecution if he honestly believes that he has a "right to" or is "entitled" to the property. The actor may believe that he is the owner of the property obtained or that it is due him as payment for a debt, compensation for goods or services, or restitution for a wrong. The final clause in §155.50 is intended to handle two additional situations: (1) where the defendant believes himself privileged to appropriate another's property in satisfaction of a debt or other claim, without any special claim to the particular property which he appropriates; (2) where an agent or other fiduciary sells or otherwise disposes of his principal's property under the mistaken belief that he had or would receive authority or instructions to do so. The Commission determined that a claim of right defense should be available in these two situations.

155.55. CORROBORATION

A PERSON WHO CRIMINALLY POSSESSES STOLEN PROPERTY AND A PERSON WHO HAS STOLEN SUCH PROPERTY ARE NOT ACCOMPLICES IN LARCENY FOR THE PURPOSE OF ANY RULE OF EVIDENCE REQUIRING CORROBORATION OF THE TESTIMONY OF AN ACCOMPLICE, UNLESS THE PERSON WHO CRIMINALLY POSSESSES THE PROPERTY HAD PARTICIPATED IN THE STEALING.

COMMENT

§155.55 on corroboration is necessary because Part 155 consolidates criminal possession and the other theft offenses into the single offense of larceny. A person who "takes, or exercises unauthorized control over, the property of another" under §155.25 or who obtains the property of another by deception or threats under §155.30 or §155.35 and the person who subsequently receives or possesses that property under §155.45 may therefore be considered accomplices for the purpose of the rule of evidence requiring in criminal cases corroboration of the testimony of an accomplice. §155.55 prevents this result except in cases where the receiver or possessor "participated" in the stealing. This resolution of the issue is consistent with present law. Osborn v. State, 4 Md. App. 57, 241 A. 2d 171 (1968).

155.60. RESTORATION AND RESTITUTION

UPON CONVICTION OF A DEFENDANT FOR ANY OFFENSE UNDER THIS PART THE COURT MAY:

1. ORDER RESTORATION OF ANY PROPERTY WHICH (A) HAS BEEN THE OBJECT OF THE OFFENSE, AND (B) HAS BEEN RECOVERED FROM THE DEFENDANT OR ANOTHER OR WHICH IS IN THE DEFENDANT'S POSSESSION OR CONTROL, TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN; AND

2. ORDER RESTITUTION OF THE VALUE OF ANY PROPERTY WHICH HAS BEEN THE OBJECT OF AN OFFENSE UNDER THIS PART TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN, TO THE EXTENT THAT SUCH PROPERTY IS NOT RESTORED; AND

3. ORDER RESTITUTION OF THE VALUE OF ANY SERVICES OBTAINED IN THE COMMISSION OF THE OFFENSE TO ANY PERSON OR PERSONS ENTITLED TO RESTITUTION THEREFOR.

COMMENT

This provision follows many current Maryland statutes allowing an order for restitution or restoration of stolen property.

PART 160: ROBBERY

INTRODUCTION

Part 160 defines and punishes the traditional offense of robbery. The sections in this Part replace §§486–488 of Article 27 on robbery. §§160.05–160.15 divide the offense into three degrees, while the present sections recognize only two degrees of robbery.

160.00. ROBBERY; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "FORCIBLY STEAL" MEANS INTENTIONALLY TO USE OR THREATEN IMMEDIATELY TO USE, IN THE COURSE OF COMMITTING A LARCENY, PHYSICAL FORCE UPON ANOTHER PERSON FOR THE PURPOSE OF:

(A) PREVENTING OR OVERCOMING RESISTANCE TO THE TAKING OF THE PROPERTY OR TO THE RETENTION THEREOF IMMEDIATELY AFTER THE TAKING; OR

(B) COMPELLING THE OWNER OF SUCH PROPERTY OR ANOTHER PERSON TO DELIVER UP THE PROPERTY OR TO ENGAGE IN OTHER CONDUCT WHICH AIDS IN THE COMMISSION OF THE LARCENY.

2. "LARCENY" MEANS ANY CONDUCT WHICH CONSTITUTES LARCENY IN ANY DEGREE ACCORDING TO PART 155.

3. "PROPERTY" HAS THE SAME DEFINITION AS IN SECTION 155.00(1).

COMMENT

The definition of "forcibly steal" – the conduct constituting robbery – is adapted from §160.00 of the New York Penal Law. Sections 486–488 of the present Article 27 on robbery simply codify the common law offense of robbery and set off an aggravating factor for first degree robbery. At common law, robbery was larceny from the person or in his presence by violence or intimidation. Cooper v. State, 9 Md. App. 478, 265 A. 2d 569 (1970); Perkins, Criminal Law 279 (2d ed., 1969). Part 160 retains this basic common law offense but broadens it somewhat by eliminating the common law requirement that the larceny must be committed from the victim's person or in his presence. Thus, under §160.00(1)(b), as applied in the subsequent sections, it would be robbery to hold up a person at gun point in his office and compel him to direct a

third person by telephone to deliver money to an agent of the holdup man. Likewise, under §160.00(1)(a), it would be forcible stealing and hence robbery to assault a person one block from his house, knock him unconcious so that he could not resist the stealing of his household goods, and then enter the victim's house and steal his property. In another respect the definition of forcible stealing makes robbery slightly narrower than the common law offense. The common law recognized threats to burn down a dwelling or to accuse of sodomy as well as threats of physical force as sufficient intimidation for robbery. Section 160.00, on the other hand, recognizes only threats to immediately use physical force.

160.05. ROBBERY IN THE THIRD DEGREE

A PERSON IS GUILTY OF ROBBERY IN THE THIRD DEGREE WHEN HE FORCIBLY STEALS PROPERTY.

ROBBERY IN THE THIRD DEGREE IS A CLASS D FELONY.

COMMENT

For commentary, see §160.15.

160.10. ROBBERY IN THE SECOND DEGREE

A PERSON IS GUILTY OF ROBBERY IN THE SECOND DEGREE WHEN HE FORCIBLY STEALS PROPERTY AND WHEN HE IS AIDED BY ANOTHER PERSON ACTUALLY PRESENT.

ROBBERY IN THE SECOND DEGREE IS A CLASS C FELONY.

COMMENT

For commentary, see §160.15.

160.15. ROBBERY IN THE FIRST DEGREE

A PERSON IS GUILTY OF ROBBERY IN THE FIRST DEGREE WHEN HE FORCIBLY STEALS PROPERTY AND WHEN, IN THE COURSE OF THE COMMISSION OF THE CRIME OR OF IMMEDIATE FLIGHT THEREFROM, HE OR ANOTHER PARTICIPANT IN THE CRIME:

1. CAUSES SERIOUS PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT IN THE CRIME; OR

2. IS ARMED WITH A DEADLY WEAPON; OR

3. IS ARMED WITH OR PRETENDS TO BE ARMED WITH, AND USES OR THREATENS THE IMMEDIATE USE OF, A DANGEROUS INSTRUMENT.

ROBBERY IN THE FIRST DEGREE IS A CLASS B FELONY.

COMMENT

§§160.05–160.15 follow the pattern of the New York Penal Law in dividing robbery into three degrees. Maryland at present has only two degrees of robbery; the aggravating factor for the first degree is robbery with a "dangerous or deadly weapon or accessory thereto." See §488 of Article 27. §160.10 treats as an additional aggravating factor the aid of another person actually present at the robbery. The presence of an accomplice increases the seriousness and dangerousness of the robbery and makes it robbery in the second degree. §160.15 spells out three separate aggravating factors for robbery in the first degree. The first aggravating factor, the infliction of serious physical injury on an innocent person, is new to Maryland law, while the latter two aggravating factors closely resemble the provision on a dangerous or deadly weapon in the present Maryland first degree robbery section. The definitions of the terms "deadly weapon" and "dangerous instrument" used in §160.15(2) and (3) are found in §10.00(11) and (12) of this Code. The new terminology clarifies the Maryland law of first degree "armed robbery" without substantially changing it. The dichotomy between "deadly weapon" and "dangerous instrument" does introduce one useful modification. If the State can prove that the robber had a loaded weapon, knife or other "deadly weapon" as defined in §10.00(11), it need only show that he was "armed" with it during the robbery to secure a first degree conviction. §10.00(12) defines "dangerous instrument" to include loaded and unloaded weapons, fake guns, and harmful substances in general. To secure a first degree conviction in cases involving "dangerous instruments", the State must show that the robber was armed or pretended to be armed with the dangerous instrument and in addition used or threatened the immediate use of it.

160.20. RESTORATION AND RESTITUTION

UPON CONVICTION OF A DEFENDANT FOR ANY OFFENSE UNDER THIS PART, THE COURT MAY:

1. ORDER RESTORATION OF ANY PROPERTY WHICH (A) HAS BEEN THE OBJECT OF THE OFFENSE, AND (B) HAS BEEN RECOVERED FROM THE DEFENDANT OR ANOTHER OR WHICH IS IN THE DEFENDANT'S POSSESSION OR CONTROL, TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN; AND

2. ORDER RESTITUTION OF THE VALUE OF ANY PROPERTY WHICH HAS BEEN THE OBJECT OF AN OFFENSE UNDER THIS PART

TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN, TO THE EXTENT THAT SUCH PROPERTY IS NOT RESTORED.

COMMENT

This provision follows many current Maryland statutes allowing an order for restitution or restoration of stolen property.

PART 165: OTHER OFFENSES RELATING TO THEFT

INTRODUCTION

Part 165 contains a number of theft offenses which proscribe conduct not covered by the consolidated larceny offense. The offenses in this Part all carry the same or lesser penalties than does petty or third degree larceny. §165.05 on misapplication of property is new and covers the unauthorized use or disposition of property by a fiduciary or bailee which involves a substantial risk of loss or detriment to the owner of the property but which may not involve the permanent or substantial deprivation required for larceny. §165.10 on the unauthorized use of a vehicle also covers temporary appropriations not reached by the consolidated larceny offense; it is a somewhat broader version of the present §349 of Article 27. § 165.11 follows § 120A of Article 27 in penalizing misuse of grocery carts. §165.15 on the unlawful use of a credit card punishes the mere unlawful use of the card and does not require, as does the consolidated larceny offense, the obtaining of property or services for the completed offense. §§165.20–165.30 on theft of services consolidate and expand the numerous haphazard, confusing and prolix sections in the present Article 27 dealing with the misappropriation of specific services. Such special sections have proved necessary because the offenses of larceny, embezzlement and false pretenses have been limited in the past to misappropriations of property. §§155.30 and 155.35 on larceny by deception and larceny by extortion partially change this situation by covering the obtaining of the "property or labor or professional services of another." The theft of other types of services (as defined in §155.00(6)) are covered by §§165.20–165.30 on theft of services. Finally, §165.35 on fraudulently obtaining a signature is a new provision which covers the obtaining of a signature of another by a knowing misrepresentation of fact, with intent to defraud or injure another, or to acquire a substantial benefit. §165.40, derived from §349A of Article 27, proscribes criminal possession of a motor vehicle master key. §165.45 is a standard restoration and restriction provision.

165.00. DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "PROPERTY" MEANS PROPERTY AS DEFINED IN SECTION 155.00(1).

2. "PROPERTY OF ANOTHER" MEANS PROPERTY OF ANOTHER AS DEFINED IN SECTION 155.00(2).

3. "SERVICE" MEANS SERVICE AS DEFINED IN SECTION 155.00(6).

COMMENT

§165.00 contains cross references to definitions which apply to Part 165.

165.05. MISAPPLICATION OF PROPERTY

A PERSON IS GUILTY OF MISAPPLICATION OF PROPERTY IF, HAVING BEEN ENTRUSTED AS A FIDUCIARY WITH THE PROPERTY OF ANOTHER OR POSSESSING THE PROPERTY OF ANOTHER UNDER AN AGREEMENT THAT THE SAME WILL BE RETURNED TO THE OWNER, HE USES OR DISPOSES OF THE PROPERTY IN A MANNER WHICH HE HAS NO SUBSTANTIAL REASON TO BELIEVE IS AUTHORIZED OR WOULD BE AUTHORIZED AND WHICH HE KNOWS INVOLVES SUBSTANTIAL RISK OF LOSS OR DETRIMENT TO THE OWNER OF THE PROPERTY.

MISAPPLICATION OF PROPERTY IS A CLASS A MISDEMEANOR.

COMMENT

§165.05 on misapplication of property covers misappropriations of the property of another which do not amount to larceny because the misappropriator does not intend to "deprive" the owner of his property. Common law larceny and the other theft offenses have generally required that the defendant intend to deprive the owner of his property. Common law larceny and the other theft offenses have generally required that the defendant intend to deprive the owner of his property either "permanently" of pretty close to it. The definition of "deprive" in §155.00(3) slightly relaxes this requirement, but there still remains a need for a section to cover bailees and fiduciaries who do not intend to deprive the owner of his property but who breach the agreement or trust under which they hold the property by recklessly investing it or using it for their own personal purposes. §165.05 is such a section. It punishes a fiduciary or bailee who uses or disposes of the property of another in a way which he knows involves a substantial risk of loss or detriment to the owner and in a manner which he has no substantial reason to believe is authorized

or would be authorized.

§165.05 combines features found in §165.00 of the New York Penal Law and §224.13 of the Model Penal Code (Proposed Official Draft 1962). The former section is a fairly narrow one which punishes bailees for encumbering the property of their bailors while the latter section only covers misapplications of entrusted property by trustees, guardians, executors, administrators and receivers. The Commission decided that the misapplication section should cover both fiduciaries and bailees who recklessly endanger the property of another. §5 of Article 27 on appropriations of property by bailee presently covers bailees for hire who use or appropriate the bailed property without the consent of the owner; it does not appear to require the "intent to deprive" associatied with the other theft offenses. §165.05 also replaces, in conjunction with the consolidated larceny offense in Part 155, numerous minor sections in Article 27 which narrowly proscribe various frauds by carriers, agents or fiduciaries. These sections often do not require that the defendant intend to steal the property.

165.10. THEFT OF USE OF A VEHICLE

A PERSON IS GUILTY OF THEFT OF USE OF A VEHICLE WHEN:

1. KNOWING THAT HE IS NOT AUTHORIZED OR PRIVILEGED TO DO SO, HE TAKES, OPERATES OR EXERCISES CONTROL OVER A VEHICLE; OR

2. HAVING CUSTODY OF A VEHICLE PURSUANT TO AN AGREEMENT BETWEEN HIMSELF AND THE OWNER THEREOF WHEREBY HE OR ANOTHER IS TO PERFORM FOR COMPENSATION A SPECIFIC SERVICE FOR THE OWNER INVOLVING THE MAINTENANCE, REPAIR OR USE OF SUCH VEHICLE, HE INTENTIONALLY USES OR OPERATES THE SAME, WITHOUT THE CONSENT OF THE OWNER, FOR HIS OWN PURPOSES IN A MANNER CONSTITUTING A GROSS DEVIATION FROM THE AGREED PURPOSE; OR

3. HAVING CUSTODY OF A VEHICLE PURSUANT TO AN AGREEMENT WITH THE OWNER THEREOF WHEREBY SUCH VEHICLE IS TO BE RETURNED TO THE OWNER AT A SPECIFIED TIME, HE INTENTIONALLY RETAINS OR WITHHOLDS POSSESSION THEREOF, WITHOUT THE CONSENT OF THE OWNER, FOR SO LENGTHY A PERIOD BEYOND THE SPECIFIED TIME AS TO RENDER SUCH RETENTION OR POSSESSION A GROSS VIOLATION OF THE AGREEMENT.

THEFT OF USE OF A VEHICLE IS A CLASS A MISDEMEANOR.

COMMENT

§165.10 punishes the unauthorized use of a vehicle. Common law larceny and the other theft offenses have traditionally applied only to permanent deprivations and not to the unauthorized use or borrowing of the property of another. The definition of "deprive" in §155.00(3) relaxes this requirement slightly, but the new consolidated larceny offense still only covers deprivations which are permanent or substantial. The unauthorized use of vehicles presents a special problem, and Maryland has long had an unauthorized use statute (presently §349 of Article 27) aimed primarily at automobile joy riding. §165.10(1) is a simplified and updated version of that statute. The term "vehicle" is defined in §10.00(14) and covers such vehicles as wagons, motor vehicles, boats, trains and airplanes. The Commission decided not to limit this section to the unauthorized use of self-propelled vehicles because often the unauthorized borrowing of a farm wagon or rowboat is a very serious matter in a rural or resort community. §165.10(1) does not cover, however, the unauthorized use of farm livestock presently covered by §349 of Article 27.

§165.10(2) is a new provision which covers a repairman who uses or operates a vehicle in his custody in gross violation of the repair agreement. §165.10(3) covers in addition the hirer or other bailee of a vehicle who retains or withholds possession of it in gross violation of the rental or other agreement giving him custody of the vehicle. This provision is an expanded version of §206 of Article 27, which presently covers the hirer of a motor vehicle who abandons or refuses to return the motor vehicle.

165.11. UNLAWFUL USE OF A GROCERY CART

1. THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS SECTION:

A. "GROCERY CART" MEANS A WHEELED CART OR SIMILAR DEVICE, BELONGING TO THE OWNER OF A GROCERY STORE, STORE, OR MARKET AND BEARING THE NAME AND ADDRESS OF THE OWNER CLEARLY MARKED THEREON, WHICH CART OR DEVICE IS INTENDED BY THE OWNER TO BE USED BY CUSTOMERS FOR THE PURPOSE OF ASSEMBLING OR CARRYING MATERIALS AT HIS PLACE OF BUSINESS.

B. "PREMISES" MEANS A PLACE OF BUSINESS AND ALL ATTENDANT PARKING FACILITIES.

2. A PERSON IS GUILTY OF UNLAWFUL USE OF A GROCERY CART WHEN:

A. HE REMOVES A GROCERY CART FROM THE PREMISES OF THE OWNER THEREOF WITHOUT THE CONSENT OF THE OWNER OR THE OWNER'S AGENT, WHEN NOTICE OF THE PROVISIONS OF THIS SECTION IS CLEARLY AND PROMINENTLY DISPLAYED AT ALL PUBLIC EXITS FROM THE GROCERY STORE, STORE, OR MARKET; OR

B. HE ABANDONS A GROCERY CART UPON THE STREETS, HIGHWAYS, OR ALLEYS OF THE STATE OF MARYLAND.

UNLAWFUL USE OF A GROCERY CART IS A VIOLATION.

COMMENT

This section is derived from the present Article 27, section 120A. A special provision is needed because mere removal of a grocery cart from the store without permission, or abandonment of a cart by one who could not be shown to have taken it away would not be larceny. The intent to deprive would not necessarily be adequate to satisfy section 155.00(3). The provision relating to damaging carts in section 120A is adequately dealt with by draft section 145.00.

165.15. UNLAWFUL USE OF A CREDIT CARD

1. A PERSON IS GUILTY OF UNLAWFUL USE OF A CREDIT CARD IF HE USES A CREDIT CARD WITH THE INTENT OF OBTAINING PROPERTY OR SERVICES, WITH THE KNOWLEDGE THAT:

(A) THE CARD IS STOLEN OR FORGED; OR

(B) THE CARD HAS BEEN REVOKED OR CANCELLED; OR

(C) FOR ANY OTHER REASON HIS USE OF THE CARD IS UNAUTHORIZED BY THE ISSUER OR UNAUTHORIZED BY THE PERSON TO WHOM ISSUED. IT IS AN AFFIRMATIVE DEFENSE TO PROSECUTION UNDER PARAGRAPH (C) THAT THE DEFENDANT WAS USING A CARD ISSUED TO HIM AND THEN HAD THE INTENT AND ABILITY TO MEET ALL OBLIGATIONS ARISING OUT OF THE USE OF THE CARD.

2. "CREDIT CARD" MEANS ANY INSTRUMENT, WHETHER KNOWN AS A CREDIT CARD, CREDIT PLATE, CHARGE PLATE, OR BY ANY OTHER NAME, 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.

UNLAWFUL USE OF A CREDIT CARD IS A CLASS A MISDEMEANOR.

COMMENT

§165.15 deals with the special problems raised by the unauthorized use of credit cards. The definition of "credit card" in §165.15(2) derives from §165.15(2) of the New York Penal Law, while the substantive provisions in §165.15(1) on the unlawful use of credit cards derive from §224.6 of the Model Penal Code (Proposed Official Draft 1962). §142 of Article 27 presently covers the fraudulent obtaining of a variety of property and services by means of a "credit card or credit authorization which he (the defendant) is not authorized to present and use for such purpose." §165.15 replaces this provision and defines more precisely what is meant by the unlawful use of a credit card. The defendant's use of a credit card is unlawful if he knows that the card is stolen or forged (§165.15(1)(a)), that the card has been revoked or cancelled (§165.10(1)(b)), or that the particular use of the card is not authorized by the issuer or by the person to whom the card is issued (§165.15(1)(c)). In cases falling within §165.15(1)(c), the defendant has available the affirmative defense that he was using a credit card issued to him and then had the intent and ability to meet all obligations arising out of his use of the card. This affirmative defense is intended to apply to uses of the card which violate restrictions imposed by the issuer limiting the use of the card to purchases under a certain amount or to the purchase of certain types of goods or services. This affirmative defense is only available to the person to whom the credit card is issued and not to the borrower of a card who uses it in excess of the authorized limits imposed by the issuer or by the owner of the card.

§165.15 also eliminates the provisions in §142 which make the unauthorized giving of a credit card prima facie evidence of an intent to defraud and which require for the completed offense both the obtaining of goods or services and the failure to pay for them upon presentation of the bill. The Commission believed that the problems arising from the fraudulent use of credit cards are serious enough to treat the unlawful use of a credit card as a completed offense.

165.20. THEFT OF SERVICES; PUBLIC ACCOMODATION SERVICES; TRANSPORTATION SERVICES

A PERSON COMMITS THEFT OF PUBLIC ACCOMMODATION SERVICES OR OF TRANSPORTATION SERVICES IF, WITH INTENT TO AVOID PAYING THE LAWFUL CHARGE FOR SUCH SERVICES, HE INTENTIONALLY

1. OBTAINS SUCH SERVICES BY FORCE OR BY ANY OF

THE THREATS IN SECTION 155.35(1)-(6); OR

2. OBTAINS SUCH SERVICES BY STEALTH, BY ANY FALSE TOKEN OR ANY MATERIAL MISREPRESENTATION OF FACT WHICH HE KNOWS TO BE FALSE, OR BY ANY MECHANICAL TAMPERING WITH THE EQUIPMENT OF THE SUPPLIER OF THE SERVICES; AND FAILS OR REFUSES TO PAY WHEN DUE THE LAWFUL CHARGE FOR THE SERVICES OBTAINED; OR

3. OBTAINS SUCH SERVICES BY INSERTING OR DEPOSITING A SLUG IN A COIN MACHINE; OR

4. FAILS OR REFUSES, WITHOUT REASONABLE EXPLANATION OR EXCUSE, TO PAY WHEN DUE THE LAWFUL CHARGE FOR SERVICES RENDERED TO HIM.

THEFT OF PUBLIC ACCOMMODATION SERVICES OR OF TRANSPORTATION SERVICES IS A CLASS B MISDEMEANOR.

COMMENT

§165.20 on the theft of public accommodation and transportation services is the first of three new sections in this Part on the theft of services. The following two sections punish the theft of rental services and the theft of public utility and communication services. In all prosecutions under these sections the State must prove the defendant intended to avoid paying the lawful charge for the service.

"Public accommodation services" and "transportation services" are defined in §155.00(6). §165.20(1) covers the obtaining of the service by force or threats. §165.20(2) punishes a person who obtains the service by stealth, deception or mechanical tampering and then fails or refuses to pay for it. The defendant who violates this provision cannot raise the defense that he lacked funds to pay for the service or that he did not expect to be charged the full price of it. In disallowing any such defense, §165.20(2) does not operate to punish an indigent for failing to pay his debts because it does not punish the failure or refusal to pay but the stealth, deception or tampering employed to obtain the service. The defendant is simply given an opportunity to avoid a prosecution by paying for the service when payment is due. The Commission did determine, however, to limit the deception covered by §165.20(2) to false representations of fact and not to adopt for this and the succeeding sections on theft of services the new rule adopted for §155.30(1) on larceny by deception that a false statement of intention or a false promise to pay is a false representation.

Thus, a person who with intent to defraud falsely states to the supplier of the service that he has enough money to pay for the service and then fails or refuses to do so violates §165.20(2), but he would not violate that subsection if he simply makes an express or implied promise to pay for the service which he has no intention of performing. Theft of services is a relatively new area for criminal liability and there is a significant danger of abuse if suppliers of services can threaten to prosecute for failure or refusal to pay for services solely on the basis of a person's inability or failure to perform his promise to pay. §165.20(4) does punish, however, the simple failure or refusal to pay for public accommodation or transporation services rendered if there is no reasonable explanation or excuse for the failure or refusal to pay. The most likely reasonable explanation or excuse would be lack of funds. Another example of a reasonable explanation or excuse would be a person's belief that he was being overcharged for the service. Finally, §165.20(3) implements the definitions of "slug" and "coin machine" in §155.00(7) and (8). The insertion or deposit of a slug in a coin machine is treated as theft of services when the requisite services are obtained just as it is treated as larceny by deception under §155.30 when property is obtained.

165.25. THEFT OF SERVICES; RENTAL SERVICES

A PERSON COMMITS THEFT OF RENTAL SERVICES IF, WITH INTENT TO AVOID PAYING THE LAWFUL CHARGE FOR SUCH SERVICES, HE INTENTIONALLY:

1. OBTAINS SUCH SERVICES BY FORCE OR BY ANY OF THE THREATS IN SECTION 155.35(1)-(6); OR

2. OBTAINS SUCH SERVICES BY STEALTH OR BY ANY FALSE TOKEN OR ANY MATERIAL MISREPRESENTATION OF FACT WHICH HE KNOWS TO BE FALSE; AND FAILS OR REFUSES TO PAY WHEN DUE THE LAWFUL CHARGE FOR THE SERVICES OBTAINED; OR

3. OBTAINS SUCH SERVICES BY INSERTING OR DEPOSITING A SLUG IN A COIN MACHINE; OR

4. TAMPERS WITH ANY METER OR OTHER MECHANICAL DEVICE WHICH MEASURES THE CHARGE FOR THE SERVICE.

THEFT OF RENTAL SERVICES IS A CLASS B MISDEMEANOR.

COMMENT

§165.25 on theft of rental services is quite similar in structure to the preceding section on

theft of public accommodation and transportation services. However, there is no provision in this section or in the following section on the theft of public utility and communications services similar to §165.20(4) which covers the failure or refusal to pay, without reasonable explanation or excuse, for services rendered. While such a provision is desirable in the area of public accommodation and transportation services, where payment is normally expected contemporaneously with or shortly after the rendition of the service, it is undesirable in the areas of rental services and public utility and communication services. In these areas the supplier of the service normally collects payment through a billing process and should not be able to use the criminal law to deal with customers who merely fail or refuse to pay their bills. §165.25(4) also contains a provision on tampering which is broader than the corresponding provision in §165.20(2). "Rental services" are defined in §155.00(6).

165.30. THEFT OF SERVICES; PUBLIC UTILITY SERVICES; COMMUNICATION SERVICES

A PERSON COMMITS THEFT OF PUBLIC UTILITY SERVICES OR OF COMMUNICATION SERVICES IF, WITH INTENT TO AVOID PAYING THE LAWFUL CHARGE FOR SUCH SERVICES, HE INTENTIONALLY

1. OBTAINS SUCH SERVICES BY FORCE OR BY ANY OF THE THREATS IN SECTION 155.35(1)–(6); OR

2. DAMAGES, CONNECTS, DISCONNECTS, TAPS, INTERFERES OR TAMPERS WITH THE EQUIPMENT OF THE SUPPLIER OF SUCH SERVICES; OR

3. OBTAINS SUCH SERVICES BY STEALTH OR BY ANY FALSE TOKEN OR ANY MATERIAL MISREPRESENTATION OF FACT WHICH HE KNOWS TO BE FALSE; OR

4. OBTAINS SUCH SERVICES BY INSERTING OR DEPOSITING A SLUG IN A COIN MACHINE.

THEFT OF PUBLIC UTILITY SERVICES OR OF COMMUNICATION SERVICES IS A CLASS B MISDEMEANOR.

COMMENT

§165.30 on theft of public utility and communication services is quite similar in structure to the two preceding sections on theft of services. "Public utility services" and "communication services" are defined in §155.00(6). §165.30(2) overlaps with §145.15(2) on criminal tampering in the second degree, because both sections proscribe the intentionally damaging, connecting,

disconnecting, tapping, interfering or tampering with public utility property. However, under §165.30(2) the prosecution must prove in addition that the defendant intended to avoid paying the lawful charge for a public utility or communication service. §165.30 resembles §165.25 in that it does not contain any provision punishing the unjustifiable failure or refusal to pay for public utility or communication services. Once again payment for these services is normally obtained through a billing process where the criminal law should play no role.

165.35. FRAUDULENTLY OBTAINING A SIGNATURE

A PERSON IS GUILTY OF FRAUDULENTLY OBTAINING A SIGNATURE WHEN, WITH INTENT TO DEFRAUD OR INJURE ANOTHER OR TO ACQUIRE A SUBSTANTIAL BENEFIT FOR HIMSELF OR A THIRD PERSON, HE OBTAINS THE SIGNATURE OF A PERSON TO A WRITTEN INSTRUMENT BY MEANS OF ANY MISREPRESNTATION OF FACT WHICH HE KNOWS TO BE FALSE.

FRAUDULENTLY OBTAINING A SIGNATURE IS A CLASS B MISDEMEANOR.

COMMENT

§165.35 on fraudulently obtaining a signature derives from §165.20 of the New York Penal Law. It is necessary because the definitions of "property" and "services" in §155.00 do not include a signature. The Commission determined that the obtaining of a signature of another under the narrow circumstances enumerated in §165.35 should be treated as criminal. Maryland does not presently treat such conduct as criminal.

165.40. CRIMINAL POSSESSION OF A MOTOR VEHICLE MASTER KEY

1. "MASTER KEY" AS USED IN THIS SECTION MEANS A KEY THAT WILL OPEN A NUMBER OF LOCKS, THE PROPER KEYS OF WHICH ARE NOT INTERCHANGEABLE.

2. A PERSON IS GUILTY OF CRIMINAL POSSESSION OF A MOTOR VEHICLE MASTER KEY IF HE POSSESSES A MOTOR VEHICLE MASTER KEY ADAPTED FOR OR CAPABLE OF BEING USED TO OPEN OR OPERATE A MOTOR VEHICLE IN THIS STATE.

3. IT IS A DEFENSE TO A PROSECUTION UNDER THIS SECTION THAT:

A. THE POSSESSION WAS PURSUANT TO LAWFUL USE IN PURSUIT OF A LEGITIMATE BUSINESS INTEREST OR WAS PURSUANT TO DEFENDANT'S LAW ENFORCEMENT DUTIES; OR

B. THE DEFENDANT DID NOT KNOW OR HAVE REASON TO KNOW THAT HE POSSESSED A MOTOR VEHICLE MASTER KEY.

CRIMINAL POSSESSION OF A MOTOR VEHICLE MASTER KEY IS A CLASS B MISDEMEANOR.

COMMENT

This section, adapted from Article 27, section 349A, punishes preparatory criminal conduct. It bears a relation to automobile theft similar to the relationship of possession of burglar's tools to the crime of burglary.

165.45. RESTORATION AND RESTITUTION

UPON CONVICTION OF A DEFENDANT FOR ANY OFFENSE UNDER THIS PART THE COURT MAY:

1. ORDER RESTORATION OF ANY PROPERTY WHICH (A) HAS BEEN THE OBJECT OF THE OFFENSE, AND (B) HAS BEEN RECOVERED FROM THE DEFENDANT OR ANOTHER OR WHICH IS IN THE DEFENDANT'S POSSESSION OR CONTROL, TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN; AND

2. ORDER RESTITUTION OF THE VALUE OF ANY PROPERTY WHICH HAS BEEN THE OBJECT OF AN OFFENSE UNDER THIS PART TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN, TO THE EXTENT THAT SUCH PROPERTY IS NOT RESTORED; AND

3. ORDER RESTITUTION OF THE VALUE OF ANY SERVICES OBTAINED IN THE COMMISSION OF THE OFFENSE TO ANY PERSON OR PERSONS ENTITLED TO RESTITUTION THEREFOR.

COMMENT

This provision follows many current Maryland statutes allowing an order for restitution or restoration of stolen property.

SUBTITLE K — OFFENSES INVOLVING FRAUD

PART 170: FORGERY AND RELATED OFFENSES

INTRODUCTION

Part 170 consolidates in simplified form the numerous prolix sections in the present Article 27 on forgery. The Maryland forgery sections (§§44–58) punish the forging and uttering of a variety of specified written instruments. The principal provision, §44, covers the forgery of "any deed, document or affidavit of waiver or release of

mechanics' lien, will, testament or codicil, bond, writing obligatory, bill of exchange, promissory note for the payment of money or property, endorsement or assignment of any bond, writing obligatory, bill of exchange, promissory note for the payment of money or property, acquittance or receipt for money or property, or any acquisition or receipt either for money or for property." The sections which follow are overlapping and verbose: §45 covers the forgery of any "commission, patent or pardon, or any warrant, certificate or other public security, whereby money may be drawn from the treasury of this State"; §46 covers forgery of public seals; §47 covers forgery of the Comptroller's stamp; §48 covers the forgery of "any warrant, letter or paper, writing or order, for payment of money or delivery of goods, or other valuable articles"; §49 covers the forgery of any manifest or note of any inspector of tobacco; §§50, 51, 52 deal with various forms of chicanery involving tobacco marks which are only remotely related to forgery; §53 covers the forgery of certificates of state stock; §54 covers the forgery of metallic checks used by any person engaged in hermetically sealing or canning fruits, vegetables or other articles of food; §55 covers the forgery of physicians' prescriptions; §56 covers the forgery of any ticket, coupon, token, coin, disc or slug used to pay any fare or fee; and §§57 and 58 proscribe the manufacture and use of slugs, a problem treated in the Theft Subtitle of this Code. As if this enumeration were not sufficient, the Court of Appeals in Reddick v. State, 219 Md. 95, 148 A. 2d 384 (1959), indicated that there is still a common law offense of forgery in Maryland which covers writings not enumerated in these sections. Common law forgery covers all writings having "apparent legal significance," a term which has naturally engendered much litigation, Perkins, Criminal Law 339–344 (2d ed. 1969).

Part 170 on Forgery and Related Offenses undertakes to put an end to the present confusion and duplication. §170.00 defines two categories of writings which are subject to the law of forgery. §§170.05 and 170.10 accordingly divide the forging of a writing into two degrees. §§170.15 and 170.20 continue the provisions found in most of the present forgery sections proscribing the uttering of a forged writing but redefine the offense to include possession as well as uttering. In addition, Part 170 defines several new offenses which should prove useful in punishing related forms of fraudulent conduct which do not amount to forgery. §§170.40 and 170.45 punish the fraudulent removal,

destruction, mutilation or concealment of writings which are capable of being forged, while §170.35 punishes the criminal simulation of works of art and other tangible things. Finally, §170.30 establishes the new offense of criminal possession of forgery devices.

170.00. FORGERY AND RELATED OFFENSES; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. A "WRITING OF THE FIRST CLASS" MEANS AN INSTRUMENT OR OBJECT CONTAINING WRITTEN OR PRINTED MATTER OR THE EQUIVALENT THEREOF WHICH IS OR PURPORTS TO BE

(A) A DEED, CREDIT CARD (AS DEFINED IN SECTION 165.15(2)), WILL, CODICIL, CONTRACT, ASSIGNMENT, COMMERCIAL INSTRUMENT, OR OTHER INSTRUMENT OR OBJECT WHEREBY LEGAL RIGHTS OR OBLIGATIONS ARE CREATED, TERMINATED OR TRANSFERRED, OR ANY INSTRUMENT OR OBJECT COMMONLY RELIED UPON IN BUSINESS OR COMMERCIAL TRANSACTIONS AS EVIDENCE OF DEBT OR PROPERTY RIGHTS; OR

(B) A PUBLIC RECORD, OR AN INSTRUMENT OR OBJECT FILED OR REQUIRED OR AUTHORIZED BY LAW TO BE FILED IN OR WITH A PUBLIC OFFICE OR PUBLIC SERVANT; OR

(C) A LICENSE, CERTIFICATE, COMMISSION, PARDON, OR OTHER INSTRUMENT OR OBJECT ISSUED OR CREATED BY A PUBLIC OFFICE, PUBLIC SERVANT OR GOVERNMENTAL INSTRUMENTALITY WHICH CONFERS A LEGAL RIGHT OR PRIVILEGE; OR

(D) PART OF AN ISSUE OF TOKENS, PUBLIC TRANSPORTATION TRANSFERS, CERTIFICATES OR OTHER ARTICLES MANUFACTURED AND DESIGNED FOR USE AS SYMBOLS OF VALUE USABLE IN PLACE OF MONEY FOR THE PURCHASE OF PROPERTY OR SERVICES; OR

(E) A PRESCRIPTION OF A DULY LICENSED PHYSICIAN OR OTHER PERSON AUTHORIZED TO ISSUE THE SAME FOR ANY DRUG OR ANY DEVICE USED IN THE TAKING OR ADMINISTERING OF DRUGS FOR WHICH A PRESCRIPTION IS REQUIRED BY LAW.

2. A "WRITING OF THE SECOND CLASS" MEANS AN INSTRUMENT OR OBJECT CONTAINING WRITTEN OR PRINTED MATTER OR THE EQUIVALENT THEREOF WHICH IS OR PURPORTS TO BE

(A) A MEMBERSHIP CARD OF A FRATERNAL, BUSINESS, OR PROFESSIONAL ASSOCIATION; OR

(B) A LABEL, STAMP, OR TRADEMARK WHICH

IDENTIFIES ANY MERCHANDISE AS THAT OF A PARTICULAR CRAFTSMAN, TRADESMAN, PACKER, OR MANUFACTURER; OR

(C) A DIPLOMA, AWARD, CERTIFICATE, LETTER, CARD, OR OTHER INSTRUMENT OR OBJECT COMMONLY RELIED ON TO ESTABLISH A PERSON'S IDENTITY, QUALIFICATIONS OR COMPETENCE.

COMMENT

The Commission decided to divide forgery into two degrees. §170.00 therefore defines "writings of the first class" and "writings of the second class" as a basis for distinguishing between forgery in the first degree and forgery in the second degree. For the definition of "writing of the first class" in §170.00(1), the Commission adopted subdivison (a) from §943.38 of the Wisconsin Code and subdivisions (b)–(e) from §170.10 of the New York Penal Law. Society is particularly concerned about the authenticity of writings of the first class; and §170.10 punishes their forgery as forgery in the first degree. The definition of "writing in the second class" in §170.00(2) comes chiefly from §943.38 of the Wisconsin Code, but subdivision (c) substantially revises and broadens the corresponding Wisconsin provision to include all indicia of identity, qualifications or competence. Writings of the second class are generally of less importance to society than writings of the first class; and §170.05 only punishes their forgery as forgery in the second degree. The New York Penal Law has an additional offense of forgery in the third degree (§170.05); it carries only misdemeanor penalties and covers the forgery of any writing "which is capable of being used to the advantage or disadvantage of some person." See the definition of "written instrument" in §170.00(1) of the Penal Law. Since almost any writing, including a private diary, could conceivably fall within that definition, the Commission rejected it as too broad.

The definitions of "writing of the first class" and "writing of the second class" basically cover in a simplified and modernized fashion all the writings covered by the present Maryland sections on forgery. §170.00(2)(a) and (c) go further and include certain writings not covered by any of the present sections. It is not fully clear whether the membership cards and indicia of competence covered by §170.00(2)(a) and (c) have apparent legal significance so as to be covered by common law forgery. The law probably did not go that far. Perkins, Criminal Law 342–344 (2d ed. 1969); Clark and Marshall, Crimes 961–965 (7th ed. 1967).

However, writings of this type can readily be used to defraud others, and the Commission decided to include them in the definition of writing of the second class. The "forging of innocuous documents, such as personal correspondence or the Gettysburg Address, would not be reached by these definitions.

170.05. FORGERY IN THE SECOND DEGREE

A PERSON IS GUILTY OF FORGERY IN THE SECOND DEGREE WHEN, WITH INTENT TO DEFRAUD, HE FALSELY MAKES, COMPLETES, ENDORSES, AUTHENTICATES OR ASSIGNS A WRITING OF THE SECOND CLASS SO THAT IT PURPORTS TO HAVE BEEN MADE, COMPLETED, ENDORSED, AUTHENTICATED OR ASSIGNED BY ANOTHER WHO DID NOT AUTHORIZE SUCH MAKING, COMPLETION, ENDORSEMENT, AUTHENTICATION OR ASSIGNMENT, OR SO THAT IT PURPORTS TO HAVE BEEN MADE, COMPLETED, ENDORSED, AUTHENTICATED OR ASSIGNED AT A TIME OR PLACE OTHER THAN WAS IN FACT THE CASE; OR FALSELY ALTERS A WRITING OF THE SECOND CLASS WITHOUT THE AUTHORITY OF ANYONE ENTITLED TO GRANT IT.

FORGERY IN THE SECOND DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

For commentary see §170.10.

170.10. FORGERY IN THE FIRST DEGREE

A PERSON IS GUILTY OF FORGERY IN THE FIRST DEGREE WHEN, WITH INTENT TO DEFRAUD, HE FALSELY MAKES, COMPLETES, ENDORSES, AUTHENTICATES OR ASSIGNS A WRITING OF THE FIRST CLASS SO THAT IT PURPORTS TO HAVE BEEN MADE, COMPLETED, ENDORSED, AUTHENTICATED OR ASSIGNED BY ANOTHER WHO DID NOT AUTHORIZE SUCH MAKING, COMPLETION, ENDORSEMENT, AUTHENTICATION OR ASSIGNMENT, OR SO THAT IT PURPORTS TO HAVE BEEN MADE, COMPLETED, ENDORSED, AUTHENTICATED OR ASSIGNED AT A TIME OR PLACE OTHER THAN WAS IN FACT THE CASE; OR FALSELY ALTERS A WRITING OF THE FIRST CLASS WITHOUT THE AUTHORITY OF ANYONE ENTITLED TO GRANT IT.

FORGERY IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

§§170.05 and 170.10 divide the offense of forgery into two degrees. Both degrees require an intent to defraud. The lesser degree of forgery defined in §170.05 is a separate and distinct offense which does not encompass the greater degree of forgery defined in §170.10. If the forged writing is a writing of the first class, the

defendant is guilty of forgery in the first degree and cannot be convicted of forgery in the second degree since the latter is not a lesser included offense. There is no need to have a residual offense covering the forgery of both categories of writings because the dividing line between writings of the two classes is quite sharp and the prosecutor should have little difficulty in determining which degree to charge.

The Commission decided not to adopt the complex definitional and operative provisions in the New York Penal Law's sections on forgery. §§170.05 and 170.10 employ as models §943.38 of the Wisconsin Code and §224.1 of the Model Penal Code (Proposed Official Draft 1962). The types of conduct covered by the sections generally coincide with the conduct now considered common law or statutory forgery in Maryland. For instance, it is forgery to prepare or endorse with intent to defraud a writing and, without proper authority, to subscribe another's name to it, to sign a fictitious name to it, or to sign one's own name to it with the intention of having the writing accepted as the writing of another person with the same name. The making, endorsing, etc., of such a writing constitutes forgery under §§170.05 and 170.10 because the writing "purports to have been made, completed, endorsed, authenticated or assigned by another who did not so authorize." It is also forgery to prepare an instrument signed by oneself but falsely dated for the fraudulent purpose of defeating the rights of some other person. See the famous case of Queen v. Ritson, 1 C.C. 200 (1869) (forgery to fraudulently antedate a deed to make it appear prior to a genuine deed of a later date). Falsity of this variety goes to the authenticity or genuineness of the instrument. §§170.05 and 170.10 not only punish the fraudulent preparation of a writing so that it purports to have been prepared at a different time but also when it purports to have been prepared at a different place. Finally, it is forgery to fraudulently alter a writing in a material way. The final substantive clauses in both §§170.05 and 170.10 cover this conduct but eliminate the requirement that the alteration be material. Thus, it would be forgery if, with intent to defraud, the payee raises the figures on a check. Such an alteration was previously not considered to be forgery because the alteration, which did not affect the drawer's obligation on the instrument, was not material. However, the payee may very easily succeed in defrauding a person who cashes the check for the higher amount.

170.15 CRIMINAL POSSESSION OF A FORGED WRITING IN THE SECOND DEGREE

A PERSON IS GUILTY OF CRIMINAL POSSESSION OF A FORGED WRITING IN THE SECOND DEGREE WHEN, WITH KNOWLEDGE THAT IT IS FORGED AND WITH INTENT TO DEFRAUD, HE UTTERS OR POSSESSES A FORGED WRITING OF THE SECOND CLASS.

CRIMINAL POSSESSION OF A FORGED WRITING IN THE SECOND DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

For commentary, see §170.20.

170.20. CRIMINAL POSSESSION OF A FORGED WRITING IN THE FIRST DEGREE

A PERSON IS GUILTY OF CRIMINAL POSSESSION OF A FORGED WRITING IN THE FIRST DEGREE WHEN, WITH KNOWLEDGE THAT IT IS FORGED AND WITH INTENT TO DEFRAUD, HE UTTERS OR POSSESSES A FORGED WRITING OF THE FIRST CLASS.

CRIMINAL POSSESSION OF A FORGED WRITING IN THE FIRST DEGREE IS A CLASS D FELONY.

COMMENT

At common law, forging an instrument and uttering a forged instrument were distinct offenses. Uttering a forged instrument was defined as "offering as genuine an instrument known to be false, with intent to defraud." Perkins, Criminal Law 354 (2d ed. 1969). To be guilty of uttering, the defendant need not obtain any property and need not be the person who forges the instrument. Levy v. State, 225 Md. 201, 170 A. 2d 216 (1961). The forgery provisions in the present Article 27 generally combine forgery and uttering into one section (See, e.g., §44). §§170.15 and 170.20 of this Code treat uttering as a distinct offense and expand that offense to cover not only the uttering of a forged writing but also the possession of a forged writing with knowledge that it is forged and with intent to defraud. Since the crime of forgery is to a great extent aimed at fraudulent conduct preparatory to any misappropriation of property, this slight expansion is sensible. There is no reason to require an uttering for the completed offense. A prosecution should not be lost simply because a policeman catches a person who clearly intends to utter a forged writing in his possession before he has had an opportunity to do so.

170.25. CRIMINAL POSSESSION OF A FORGED WRITING; NO

DEFENSE

IN ANY PROSECUTION FOR CRIMINAL POSSESSION OF A FORGED WRITING IT IS NO DEFENSE THAT THE DEFENDANT FORGED OR PARTICIPATED IN THE FORGERY OF THE WRITING IN ISSUE.

COMMENT

§170.25 permits the State to prosecute the forger of a writing for the criminal possession of that writing. Often the prosecution does not know whether it has sufficient evidence to prove that the defendant forged the writing although it has a very strong case of criminal possession. In these instances the State should be able to prosecute the defendant on both charges.

The general provisions on multiple punishment in §5.30 of this Code would normally bar punishing the defendant for both forging and possessing the same forged writing. That bar would not apply, however, in the unusual situation where the defendant reacquired possession of the document which he had previously forged or possessed. In such a case his reacquired possession would constitute a separate offense from his original crime and hence would be a proper basis for a separate punishment.

170.30. CRIMINAL POSSESSION OF FORGERY DEVICES

A PERSON IS GUILTY OF CRIMINAL POSSESSION OF FORGERY DEVICES WHEN, WITH INTENT TO USE, OR TO AID OR PERMIT ANOTHER TO USE, THE SAME FOR PURPOSES OF FORGERY, HE MAKES OR POSSESSES ANY PLATE, DIE CR OTHER DEVICE, APPARATUS, EQUIPMENT, OR ARTICLE SPECIFICALLY DESIGNED FOR USE IN FORGING WRITTEN INSTRUMENTS.

CRIMINAL POSSESSION OF FORGERY DEVICES IS A CLASS D FELONY.

COMMENT

§170.30 on the criminal possession of forgery devices punishes preparatory conduct by a forger or member of a forgery ring. The section should prove useful because in many instances the prosecution finds it difficult to prove that a member or leader of a forgery ring forged or criminally possessed a particular writing and can only prove that he criminally possessed forgery devices.

170.35. CRIMINAL SIMULATION

A PERSON IS GUILTY OF CRIMINAL SIMULATION WHEN:

1. WITH INTENT TO DEFRAUD, HE MAKES OR ALTERS ANY TANGIBLE THING IN SUCH MANNER THAT IT APPEARS TO HAVE AN ANTIQUITY, RARITY, SOURCE OR AUTHORSHIP WHICH IT DOES NOT IN FACT POSSESS; OR

2. WITH KNOWLEDGE OF ITS TRUE CHARACTER AND WITH INTENT TO DEFRAUD, HE UTTERS OR POSSESSES AN ARTICLE OR OBJECT SO SIMULATED.

CRIMINAL SIMULATION IS A CLASS A MISDEMEANOR.

COMMENT

§170.35, which derives from §170.45 of the New York Penal Law, defines the new offense for Maryland of criminal simulation. The forgery sections (§§170.05 and 170.10) only cover the fraudulent making of a false writing and do not cover the fraudulent simulation of works of art, manuscripts, diagrams and other tangible things. §170.35(1) fills this gap by punishing the fraudulent making or alteration of any tangible thing so that it appears to have an antiquity, rarity, source or authorship which it does not in fact possess. §170.35(2) then punishes the criminal utterance or possession of a simulated article or object.

170.40. FRAUDULENT REMOVAL, DESTRUCTION, MUTILATION OR CONCEALMENT OF A WRITING IN THE SECOND DEGREE

A PERSON IS GUILTY OF THE FRAUDULENT REMOVAL, DESTRUCTION, MUTILATION OR CONCEALMENT OF A WRITING IN THE SECOND DEGREE WHEN, WITH INTENT TO DEFRAUD, HE INTENTIONALLY REMOVES, DESTROYS, MUTILATES OR CONCEALS A WRITING OF THE SECOND CLASS WITHOUT THE AUTHORITY OF ANYONE ENTITLED TO GRANT IT.

FRAUDULENT REMOVAL, DESTRUCTION, MUTILATION OR CONCEALMENT OF A WRITING IN THE SECOND DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

For commentary, see §170.45.

170.45. FRAUDULENT REMOVAL, DESTRUCTION, MUTILATION OR CONCEALMENT OF A WRITING IN THE FIRST DEGREE

A PERSON IS GUILTY OF THE FRAUDULENT REMOVAL, DESTRUCTION, MUTILATION OR CONCEALMENT OF A WRITING IN THE FIRST DEGREE WHEN, WITH INTENT TO DEFRAUD, HE INTENTIONALLY REMOVES, DESTROYS, MUTILATES OR CONCEALS A WRITING OF THE FIRST CLASS WITHOUT THE AUTHORITY OF ANYONE ENTITLED TO GRANT IT.

FRAUDULENT REMOVAL, DESTRUCTION, MUTILATION OR CONCEALMENT OF A WRITING IN THE FIRST DEGREE IS A CLASS D FELONY.

COMMENT

§§170.40 and 170.45 punish the fraudulent removal, destruction, mutilation or concealment of writings. The offense is divided into two degrees in the same manner as the offense of forgery in §§170.05 and 170.10. The writings covered by these sections are defined in §170.00 and are the same writings covered by the sections on forgery. Those sections, however, proscribe only the fraudulent making or alteration of a false writing. The additional coverage of §§170.40 and 170.45 is necessary because a fraudulent scheme may equally be furthered by the removal, destruction, mutilation or concealment of an existing writing as by the forgery of a new one.

PART 175: OFFENSES INVOLVING FALSE RECORDS

INTRODUCTION

Part 175 defines a number of offenses concerning false written statements or records. The sections in this Part follow in broad outline the sections of Article 175 of the New York Penal Law. In the past the making of a false statement in writing, even though done knowingly and intentionally, has not in itself generally constituted a crime. The former offense of false pretenses has always required an obtaining of property, while the crime of forgery has covered falsehoods concerning the authenticity of writings but not false statements in otherwise genuine writings. The Commission believes that the latter type of falsity should also be considered criminal in the circumstances outlined in the following sections. A writing or record containing false statements destroys people's trust in the accuracy of writings and may be used as a means to defraud in the same way as a forged writing. The offenses which follow therefore do not require the obtaining of property or services for their completion and resemble the forgery sections in their punishing of preparatory conduct where there is an intent to defraud or to perpetrate an intentional falsehood. Of course, if the defendant does obtain any property or services by means of the false statement, his conduct will most likely constitute larceny by deception under §155.30 of this Code.

At present Article 27 of the Maryland Code has

no general provisions analogous to the sections in Part 175 except for §148, which proscribes the fraudulent making or using of a false financial statement in terms similar to §175.35. The present Article 27 does contain, however, several sections which cover frauds involving specified documents or particular persons or products. See, e.g, §160 on frauds involving bills of lading; §174 on frauds involving corporate misrepresentations; and §§217–223 on frauds involving gold and silver. These cumbersome sections, each covering its own narrow area, are superseded by the sections in Part 175 on Offenses Involving false Records and by the general larceny and fraud sections in this Code.

175.00. OFFENSES INVOLVING FALSE RECORDS; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS APPLY TO THIS PART:

1. "RECORD" MEANS

(A) AN INSTRUMENT OR OBJECT CONTAINING WRITTEN, PRINTED, OR SPOKEN MATTER, OR THE EQUIVALENT THEREOF, WHICH IN ANY MANNER RECITES, EMBODIES, CONVEYS OR RECORDS INFORMATION; OR

(B) AN INSTRUMENT OR OBJECT DESIGNED OR STRUCTURED TO RECITE, EMBODY, CONVEY OR RECORD INFORMATION.

2. "ENTERPRISE" MEANS ANY ENTITY OF ONE OR MORE PERSONS, CORPORATE OR OTHERWISE, PUBLIC OR PRIVATE, ENGAGED IN BUSINESS, COMMERCIAL, PROFESSIONAL, INDUSTRIAL, ELEEMOSYNARY, SOCIAL, POLITICAL OR GOVERNMENTAL ACTIVITY.

3. "BUSINESS RECORD" MEANS ANY RECORD KEPT OR MAINTAINED BY AN ENTERPRISE FOR THE PURPOSE OF EVIDENCING OR REFLECTING ITS CONDITION OR ACTIVITY.

4. "PUBLIC RECORD" MEANS ANY RECORD CREATED OR RECEIVED IN AN OFFICIAL CAPACITY BY ANY PUBLIC OFFICE OR PUBLIC SERVANT.

COMMENT

§175.00 contains definitions of terms used throughout Part 175. The definitions of "business record" and "enterprise" derive generally from §175.00 of the New York Penal Law while the definitions of "record" and "public record" are new. The definition of "record" has been deliberately drafted broad enough to cover not only conventional writings but also magnetic tapes, IBM cards and

other modern devices used for record keeping purposes. Certainly the more modern recording devices should be protected from falsification in the same way as conventional writings. To take into account this broadened definition of "record", the heading of Part 175 has been designated "Offenses Involving False Records" rather than "Offenses Involving False Written Statements" as in the New York Penal Law.

The principal falsification sections (§§170.05 and 170.10) protect only "business records." A "business record" is defined in §170.00(3) to mean any record kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity. "Enterprise" is defined broadly enough to cover every kind of endeavor or project, private or public, for which records or kept. However, the crime is restricted to records kept or maintained by an enterprise for evidencing or reflecting its condition or activity. The sections on falsifying business records therefore do not cover written falsifications not made for record keeping purposes. Thus, an employee of a concern who makes a false financial statement not kept as a part of the issuing company's records but concocted and delivered to an outsider solely for the purpose of defrauding him does not violate these sections. This case would be covered by §175.35 on the issuing of a false financial statement. See Practice Commentary, McKinney's Penal Law 565.

175.05. FALSIFYING BUSINESS RECORDS IN THE SECOND DEGREE

A PERSON IS GUILTY OF FALSIFYING BUSINESS RECORDS IN THE SECOND DEGREE WHEN, WITH INTENT TO DEFRAUD, HE:

1. MAKES OR CAUSES A FALSE ENTRY IN THE BUSINESS RECORDS OF AN ENTERPRISE; OR

2. ALTERS, ERASES, OBLITERATES, DELETES, REMOVES OR DESTROYS A TRUE ENTRY IN THE BUSINESS RECORDS OF AN ENTERPRISE; OR

3. OMITS TO MAKE A TRUE ENTRY IN THE BUSINESS RECORDS OF AN ENTERPRISE IN VIOLATION OF A DUTY TO DO SO WHICH HE KNOWS TO BE IMPOSED UPON HIM BY LAW OR BY THE NATURE OF HIS POSITION; OR

4. PREVENTS THE MAKING OF A TRUE ENTRY OR CAUSES THE OMISSION THEREOF IN THE BUSINESS RECORDS OF AN ENTERPRISE.

FALSIFYING BUSINESS RECORDS IN THE SECOND DEGREE IS A CLASS B MISDEMEANOR.

COMMENT

For commentary, see §175.10.

175.10. FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE

A PERSON IS GUILTY OF FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE WHEN HE COMMITS THE CRIME OF FALSIFYING BUSINESS RECORDS IN THE SECOND DEGREE, AND WHEN HIS INTENT TO DEFRAUD INCLUDES AN INTENT TO COMMIT ANOTHER CRIME OR TO AID OR CONCEAL THE COMMISSION THEREOF.

FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

§§175.05 and 175.10 divide the offense of falsifying business records into two degrees. The lower or second degree requires an intent to defraud while the first degree requires in addition that the fraudulent intent "includes an intent to commit another crime or to aid or conceal the commission thereof." The first degree offense would thus cover cases such as that of the employee who is falsifying the company's records to cover up his own embezzlements.

In its general scope the offense is not limited to employees of an enterprise who have bookkeeping responsibilities but covers any employee of the enterprise or outsider who "makes or causes" a false entry in the business records of an enterprise (subsection 1), who "alters...or destroys" a true entry (subsection 2), who "omits to make" a true entry in knowing violation of a duty to do so (subsection 3), or who "prevents...or causes" the ommission of a true entry (subsection 4). Of course, the defendant must do any of these things with an intent to defraud. See Practice Commentary, McKinney's Penal Law 567.

175.15. TAMPERING WITH PUBLIC RECORDS IN THE SECOND DEGREE

A PERSON IS GUILTY OF TAMPERING WITH PUBLIC RECORDS IN THE SECOND DEGREE WHEN, KNOWING THAT HE DOES NOT HAVE THE AUTHORITY OF ANYONE ENTITLED TO GRANT IT, HE KNOWINGLY REMOVES, MUTILATES, DESTROYS, CONCEALS, MAKES A FALSE ENTRY IN OR FALSELY ALTERS ANY PUBLIC RECORD.

TAMPERING WITH PUBLIC RECORDS IN THE SECOND DEGREE IS A CLASS B MISDEMEANOR.

COMMENT

For commentary, see §175.20. 17236

175.20. TAMPERING WITH PUBLIC RECORDS IN THE FIRST DEGREE 17239 17240

A PERSON IS GUILTY OF TAMPERING WITH PUBLIC RECORDS IN THE FIRST DEGREE WHEN, KNOWING THAT HE DOES NOT HAVE THE AUTHORITY OF ANYONE ENTITLED TO GRANT IT, AND WITH INTENT TO DEFRAUD, HE KNOWINGLY REMOVES, MUTILATES, DESTROYS, CONCEALS, MAKES A FALSE ENTRY IN OR FALSELY ALTERS ANY PUBLIC RECORD. 17243 17244 17245 17246 17247 17248

TAMPERING WITH PUBLIC RECORDS IN THE FIRST DEGREE IS A CLASS D FELONY. 17251

COMMENT 17254

§§175.15 and 175.20 divide the new offense of tampering with public records into two degrees. For the lesser or second degree of the first offense there is no requirement of an intent to defraud while the first degree requires such an intent. These two sections punish both the public employee and the outsider who tamper with public records. 17258 17259 17260 17261 17262 17263

There is some overlap between these sections and the preceding sections which punish the fraudulent removal, mutilation, destruction or concealment of writings which are subject to the law of forgery (§§170.40 and 170.45) and the falsification of business records (§§175.05 and 175.10). These is also some overlap between §§175.15 and 175.20 and the general forgery sections (§§170.05 and 170.10) since both proscribe false alterations. However, those sections all require an intent to defraud. A person who knowingly removes, mutilates, destroys, conceals or falsifies a public record should be punished whether or not he has an intent to defraud because people generally rely on public records. §175.15 on tampering with public records in the second degree covers such conduct. Of course, the sections on criminal mischief (§§145.00–145.10) will punish any intentional damaging of public records, but those sections do not cover the falsification of them. There are also good reasons for retaining a separate section on tampering with public records in the first degree even though the general sections on falsifying business records and on the fraudulent removal, destruction, mutilation or concealment of writings subject to forgery already cover most if not all forms of tampering with public records where there is an intent to defraud (tampering with public records in the first degree). The importance of 17266 17267 17268 17269 17270 17271 17272 17273 17274 17275 17276 17277 17278 17279 17280 17281 17282 17283 17284 17285 17286 17287 17288 17289 17290 17291 17292

maintaining complete and accurate public records justifies a separate section which pinpoints the problem and punishes more severely those persons who tamper with public records than those who falsify ordinary business records.

175.25. OFFERING A FALSE RECORD FOR FILING IN THE SECOND DEGREE

A PERSON IS GUILTY OF OFFERING A FALSE RECORD FOR FILING IN THE SECOND DEGREE WHEN, KNOWING THAT A RECORD CONTAINS A MATERIAL FALSE STATEMENT OR MATERIAL FALSE INFORMATION, HE OFFERS OR PRESENTS IT TO A PUBLIC OFFICE OR PUBLIC SERVANT WITH THE KNOWLEDGE OR BELIEF THAT IT WILL BE FILED WITH, REGISTERED OR RECORDED IN OR OTHERWISE BECOME A PART OF THE RECORDS OF SUCH PUBLIC OFFICE OR PUBLIC SERVANT.

OFFERING A FALSE RECORD FOR FILING IN THE SECOND DEGREE IS A CLASS B MISDEMEANOR.

COMMENT

For commentary, see §175.30.

175.30. OFFERING A FALSE RECORD FOR FILING IN THE FIRST DEGREE

A PERSON IS GUILTY OF OFFERING A FALSE RECORD FOR FILING IN THE FIRST DEGREE WHEN, KNOWING THAT A RECORD CONTAINS A MATERIAL FALSE STATEMENT OR MATERIAL FALSE INFORMATION, AND WITH INTENT TO DEFRAUD ANYONE, HE OFFERS OR PRESENTS IT TO A PUBLIC OFFICE OR PUBLIC SERVANT WITH THE KNOWLEDGE OR BELIEF THAT IT WILL BE FILED WITH, REGISTERED OR RECORDED IN OR OTHERWISE BECOME A PART OF THE RECORDS OF SUCH PUBLIC OFFICE OR PUBLIC SERVANT.

OFFERING A FALSE RECORD FOR FILING IN THE FIRST DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

§§175.25 and 175.30 divide the new offense of offering a false instrument for filing into two degrees. The sections are similar in structure to the preceding §§175.15 and 175.20 on tampering with public records. While the sections on tampering proscribe the making of a false entry in a public record or the false alteration of a public record which is already on file, §§175.25 and 175.30 proscribe the offering of a false record for filing. The lesser degree requires only knowledge that the instrument contains a material false statement or material false information while the higher degree requires an intent to defraud. The importance of

maintaining accurate public records and files on which people can rely justifies punishing at the lower, class B misdemeanor level the person who knowingly offers a false record for filing even though that person has no intent to defraud.

The New York provisions (§§175.30 and 175.35 of the Penal Law) from which §§175.25 and 175.30 derive require for the first degree offense that the defendant intend to defraud the state or any political subdivision thereof. That restriction has been deleted, and §175.30 on offering a false record for filing in the first degree applies when the defendant intends to defraud "anyone." The section now covers cases where the defendant intends to defraud a fellow citizen, such as where he intends to defraud future purchasers of land by filing a deed containing material false statements or information. The Commission decided, however, to tighten up the New York sections and require not only (as does New York) that the defendant know that the record he is offering for filing contains a false statement or false information but to require in addition that the falsity be "material." In many instances individuals falsely state their age or some other aspect of their personal history on a record offered for filing. Often the individual's motivation is simple vanity, and his conduct should not be criminal unless the false statement of his age or other personal history is material (e.g. when there is an age qualification on a license application).

175.35. ISSUING A FALSE FINANCIAL STATEMENT

A PERSON IS GUILTY OF ISSUING A FALSE FINANCIAL STATEMENT WHEN, WITH INTENT TO DEFRAUD:

1. HE KNOWINGLY MAKES OR UTTERS A WRITTEN INSTRUMENT WHICH PURPORTS TO DESCRIBE THE FINANCIAL CONDITION OR ABILITY TO PAY OF SOME PERSON AND WHICH IS INACCURATE IN SOME MATERIAL RESPECT; OR

2. HE REPRESENTS IN WRITING THAT A WRITTEN INSTRUMENT PURPORTING TO DESCRIBE A PERSON'S FINANCIAL CONDITION OR ABILITY TO PAY AS OF A PRIOR DATE IS ACCURATE WITH RESPECT TO SUCH PERSON'S CURRENT FINANCIAL CONDITION OR ABILITY TO PAY, WHEREAS HE KNOWS IT IS MATERIALLY INACCURATE IN THAT RESPECT.

ISSUING A FALSE FINANCIAL STATEMENT IS A CLASS B MISDEMEANOR.

COMMENT

§175.35 on issuing a false financial statement, which comes verbatim from §175.45 of the New York Penal Law, replaces §148 of the present Article 27. The new section is thought to be a substantial improvement over the present version. §175.35(1) punishes a person who with intent to defraud makes or utters a writing which purports to describe the financial condition of some person and which the maker or utterer knows is inaccurate in some material respect. The present Maryland section is somewhat narrower. Its first paragraph only covers a person who makes or causes to be made a false written statement concerning the financial condition of himself or of a person in whom he is interested. More than a general intent to defraud is required by this paragraph, because the maker must have the intent to procure some benefit for himself or for the person in whom he is interested. The second paragraph of the present §148 punishes any person who obtains one of the enumerated benefits "upon the faith" of a financial statement which he knows to be false. This paragraph is broader in one respect that §175.35(1) because a person can obtain property "upon the faith" of a financial statement without uttering it. However, §148 is narrower than §175.35(1) in a far more important respect because §148 requires an obtaining for the completed offense; it therefore does not reach the preparatory conduct which forgery and falsification sections are intended to cover. §175.35(1) requires only a fraudulent making or uttering of a false financial statement and thus is more consistent with the whole purpose of the Parts in this Code on forgery and false records. In addition, the conduct covered by the second paragraph of §148 of the present Article 27 seems to be already covered by the section on larceny by deception (§155.30) in this Code. Finally, §175.35(2) resembles closely the third paragraph in §148. The one significant difference is that the former requires the representation to be in writing while §148 covers both oral and written representations but still requires that there be an obtaining for the completed offense.

175.40. PRESENTING A FALSE INSURANCE CLAIM

A PERSON IS GUILTY OF PRESENTING A FALSE INSURANCE CLAIM WHEN, WITH INTENT TO DEFRAUD AN INSURER WITH RESPECT TO AN ALLEGED CLAIM OF LOSS UPON A CONTRACT OF INSURANCE, HE KNOWINGLY PRESENTS TO THE INSURER OR TO AN AGENT THEREOF A WRITTEN INSTRUMENT CONTAINING A FALSE MATERIAL STATEMENT RELATING TO SUCH CLAIM.

PRESENTING A FALSE INSURANCE CLAIM IS A CLASS A

MISDEMEANOR.

COMMENT

§175.40 on presenting a false insurance claim derives form §175.50 of the New York Penal Law. There is no comparable provision in the present Maryland Criminal or Insurance Codes. Of course, if the person presenting the false claim actually receives payment from the insurance company, he is guilty of obtaining property by false pretenses under §140 of the present Code and larceny by deception under §155.30 of this Code. The defrauder's preparatory conduct may also be reached by the law of attempt; the presenting to the insurer of a false insurance claim quite clearly constitutes an attempt to obtain property by false pretenses. It does not matter that the insurance company does not believe the representation or discovers it to be false. Commonwealth v. Johnson, 312 Pa. 140, 167 Atl. 344 (1933); People v. Camodeca, 52, Cal. 2d 142, 338 P. 2d 903 (1959). §175.40 recognizes that false insurance claims present a serious problem which should be handled by a separate substantive section and not relegated to the law of attempt.

PART 180: CRIMINAL BREACH OF TRUST AND RELATED OFFENSES

INTRODUCTION

Historically, both under the common law and statutes, the offense of bribery has involved exclusively or primarily the corruption of public officials by bribe giving or bribe receiving. Part 200 of this Code deals with such offenses and Part 215 with the related field of interference with the administration of justice through the bribery or intimidation of witnesses or jurors or the compounding of a crime.

In more recent years, the corruption of persons in positions of private employment or trust by bribe giving or bribe receiving has increasingly become the subject of penal statutes. New York enacted in 1909 the first commercial bribery statute covering this form of corruption. At least twelve other states, not including Maryland, have followed New York's lead. The great majority of states, including Maryland (see §§24 and 25 of Article 27) have also enacted in recent years penal statutes dealing with the more restricted area of sports bribery. Part 180 of this Code deals with both of these subjects.

180.00. CRIMINAL BREACH OF TRUST

AN EMPLOYEE, AGENT OR FIDUCIARY IS GUILTY OF CRIMINAL BREACH OF TRUST WHEN, WITHOUT THE EXPRESS OR IMPLIED CONSENT OF HIS EMPLOYER, PRINCIPAL OR BENEFICIARY HE INTENTIONALLY SOLICITS, DEMANDS, ACCEPTS OR AGREES TO ACCEPT ANY BENEFIT FROM ANOTHER PERSON UPON AN AGREEMENT OR UNDERSTANDING THAT SUCH BENEFIT WILL INFLUENCE HIS CONDUCT IN RELATION TO HIS EMPLOYER'S, PRINCIPAL'S OR BENEFICIARY'S AFFAIRS IN A WAY HE KNOWS TO BE INCONSISTENT WITH HIS DUTIES.

CRIMINAL BREACH OF TRUST IS A CLASS A MISDEMEANOR.

COMMENT

For commentary, see §180.05.

180.05. INDUCING CRIMINAL BREACH OF TRUST

A PERSON IS GUILTY OF INDUCING A CRIMINAL BREACH OF TRUST WHEN HE INTENTIONALLY CONFERS, OR OFFERS OR AGREES TO CONFER, ANY BENEFIT UPON ANY EMPLOYEE, AGENT OR FIDUCIARY, WITHOUT THE EXPRESS OR IMPLIED CONSENT OF THE LATTER'S EMPLOYER, PRINCIPAL OR BENEFICIARY, WITH INTENT TO INFLUENCE HIS CONDUCT IN RELATION TO HIS EMPLOYER'S, PRINCIPAL'S OR BENEFICIARY'S AFFAIRS IN A WAY INCONSISTENT WITH HIS DUTIES.

INDUCING A CRIMINAL BREACH IS A CLASS A MISDEMEANOR.

COMMENT

§§180.00 and 180.05 on criminal breach of trust deal with corruption involving agents, employees and fiduciaries. The evil which these sections attempt to remedy can best be described by the familiar, though cynical adage "every man has his price." An agent, employee or fiduciary occupies a position in which his principal, employer or beneficiary trusts and relies upon his good faith. The agent, employee or fiduciary betrays that trust when he pretends to fulfill his duty of fidelity while in reality the considerations which guide his conduct are directed incompatibly toward his own self-interest. He is guilty of a criminal breach of trust under §180.00 when, without the consent of his principal, employer or beneficiary, he solicits or accepts a benefit upon an agreement or understanding that the benefit will affect his conduct in relation to his principal's, employer's or beneficiary's affairs. §180.05 also punishes the person who induces a criminal breach of trust by an agent, employee or fiduciary. These two sections follow the general pattern of commercial bribery

statutes by recognizing that there is no offense if the agent, employee or fiduciary accepts the benefit with the consent of his principal, employer or beneficiary. This feature pinpoints the offense as a breach of trust and distinguishes it from the bribery of a public servant, since the consent of a superior affords no defense to the public servant accepting the bribe or to the person who offers him the bribe. These considerations led the Commission to designate the offenses defined in §§180.00 and 180.05 as "criminal breach of trust" and "inducing criminal breach of trust" and to discard the more customary designations of "commercial bribery" and "commercial bribe receiving."

§§180.00 and 180.05 derive from the analogous New York sections on commercial bribery (§§180.00 and 180.05 of the Penal Law), but depart from them substantially in several respects. Restrictive court decisions have interpreted the New York sections to cover bribery only in a "commercial" or "trade" context. New York as a result has special provisions dealing with the bribery of officials of labor unions and penalizing such offenses more severely than commercial bribery. See §§180.00–180.30 of the Penal Law. This Code does not separately treat labor officials. §§180.00 and 180.05 of this Code are designated "criminal breach of trust" sections and are not intended to cover only bribery in a commercial context but to cover broadly the corruption of all agents, employees or fiduciaries. Labor unions, hospitals, educational institutions and other non-profit groups receive the same protection under these sections as do ordinary businesses. §§180.00 and 180.05 also depart from the wording of the corresponding New York sections in several other respects. Most importantly, the sections in this Code only cover cases where the benefit influences the conduct of the agent, employee or fiduciary "in a way inconsistent with his duties." Thus, there is no offense under §§180.00 and 180.05 if the agent, employee or fiduciary is influenced to do what he is entitled to do anyway (e.g. take a day off) but only if he is influenced to breach a duty he owes to his principal, employer or fiduciary. On the other hand, a purchasing agent or trustee violates the section when he purchases particular goods not on the basis of what is best for his principal but on the basis of a benefit or bribe he receives from a third person.

The New York Penal Law has an additional section (§180.20) which provides that in a prosecution for bribing a labor official "it is a

defense that the defendant conferred or agreed to confer the benefit involved upon the labor official as a result of conduct of the latter constituting larceny committed by means of extortion, or an attempt to commit the same, or coercion, or an attempt to commit coercion." New York has an analogous section which provides an identical defense to a defendant charged with bribing a public servant (§200.05 of the Penal Law). The Commission recognized the intent of these provisions to protect the bribe giver who has been threatened or intimidated by the bribe receiver. Of course, a defendant charged with any form of bribery has available the general defenses of justification and duress under Part 35 of this Code. Where however, neither of those defenses is sustainable, the Commission thought that pressure exerted on the defendant should not be a complete excuse from liability, but rather a matter in mitigation of the penalty at the time of sentencing.

180.10. CRIMINAL BREACH OF TRUST AND INDUCING CRIMINAL BREACH OF TRUST; NOT APPLICABLE TO BRIBERY AND BRIBE RECEIVING INVOLVING PUBLIC SERVANTS

SECTION 180.00 ON CRIMINAL BREACH OF TRUST AND SECTION 180.05 ON INDUCING CRIMINAL BREACH OF TRUST SHALL NOT APPLY TO OFFENSES COVERED BY SECTIONS 200.05 AND 200.10 ON BRIBERY AND BRIBE RECEIVING INVOLVING PUBLIC SERVANTS.

COMMENT

§§180.00 and 180.05 in this Part on criminal breach of trust and inducing criminal breach of trust are intended to cover corruption involving persons in positions of private employment or trust. §180.10 makes clear that bribery and bribe receiving involving public servants are not covered by these sections but are to be prosecuted under §§200.05 and 200.10 of this Code. Those sections are in Subtitle L which covers offenses against public administration.

180.15. SPORTS BRIBING; DEFINITIONS OF TERMS

1. "SPORTS CONTEST" MEANS ANY PROFESSIONAL OR AMATEUR SPORT OR ATHLETIC GAME OR CONTEST VIEWED BY THE PUBLIC.

2. "SPORTS PARTICIPANT" MEANS ANY PERSON WHO PARTICIPATES OR EXPECTS TO PARTICIPATE IN A SPORTS CONTEST AS A PLAYER, CONTESTANT OR MEMBER OF A TEAM, OR AS A COACH, MANAGER, TRAINER OR OTHER PERSON DIRECTLY ASSOCIATED WITH A PLAYER, CONTESTANT OR TEAM.

3. "SPORTS OFFICIAL" MEANS ANY PERSON WHO ACTS OR EXPECTS TO ACT IN A SPORTS CONTEST AS AN UMPIRE, REFEREE, JUDGE OR OTHERWISE TO OFFICIATE AT A SPORTS CONTEST.

COMMENT

For commentary, see §180.25.

180.20. SPORTS BRIBING

A PERSON IS GUILTY OF SPORTS BRIBING WHEN HE:

1. CONFERS, OR OFFERS OR AGREES TO CONFER, ANY BENEFIT UPON A SPORTS PARTICIPANT WITH INTENT TO INFLUENCE HIM NOT TO GIVE HIS BEST EFFORTS IN A SPORTS CONTEST; OR

2. CONFERS, OR OFFERS OR AGREES TO CONFER, ANY BENEFIT UPON A SPORTS OFFICIAL WITH INTENT TO INFLUENCE HIM TO PERFORM HIS DUTIES IMPROPERLY.

SPORTS BRIBING IS A CLASS D FELONY.

COMMENT

For commentary, see §180.25.

180.25. SPORTS BRIBE RECEIVING

A PERSON IS GUILTY OF SPORTS BRIBE RECEIVING WHEN:

1. BEING A SPORTS PARTICIPANT, HE SOLICITS, ACCEPTS OR AGREES TO ACCEPT ANY BENEFIT FROM ANOTHER PERSON UPON AN AGREEMENT OR UNDERSTANDING THAT HE WILL THEREBY BE INFLUENCED NOT TO GIVE HIS BEST EFFORT IN A SPORTS CONTEST; OR

2. BEING A SPORTS OFFICIAL, HE SOLICITS, ACCEPTS OR AGREES TO ACCEPT ANY BENEFIT FROM ANOTHER PERSON UPON AN AGREEMENT OR UNDERSTANDING THAT HE WILL PERFORM HIS DUTIES IMPROPERLY.

SPORTS BRIBE RECEIVING IS A CLASS E FELONY.

COMMENT

§§180.15 to 180.25 on sports bribery, which come directly from §§180.35–180.50 of the New York Penal Law, replace §§24 and 25 of the present Article 27. These sections complement the preceding sections on criminal breach of trust. While much that is covered by thses sections is already covered by the criminal breach of trust sections (§§180.00 and 180.05), these sections are still necessary because sports bribery carries stiffer penalties

than does criminal breach of trust and because amateur athletes who are offered or receive bribes do not fit within the categories of "agent, employee or fiduciary" covered by the criminal breach of trust sections. The Commission also determined that sports bribery required more particularized treatment than that provided by the general breach of trust sections. Professional gamblers pose a special danger of corrupting youthful sports participants and of undermining public confidence in athletic contests.

§§180.20 and 180.25 on sports bribery and sports bribe receiving are similar in their coverage to the present Maryland sections and chiefly clarify the law by defining what is meant by sports bribery. The new sections distinguish between the "sports participant" and the "sports official." Those terms are defined in §185.15. The bribery of a sports participant is described in terms of the participant not giving his "best efforts in a sports contest," while the bribery of a sports official is described in terms of the official's acting "improperly." §§180.20 and 180.25 also punish more harshly the outsider who bestows a bribe than the athlete or official who accepts one.

PART 185: FRAUDS ON CREDITORS

INTRODUCTION

Part 185 defines four offenses which protect creditors from frauds which are likely to prejudice their interests. §185.01 proscribes certain fraudulent practices affecting the integrity of insolvency proceedings and composition agreements. There is no comparable provision of similar scope in the present Maryland Code. §§185.05 and 185.10 deal with the problem of the debtor under a mortgage or other security agreement who attempts to defraud the secured creditor. The former section, which defines a new offense for Maryland, is narrowly limited to cover the debtor's unjustifiable failure to account for the sale of property subject to a mortgage or other security agreement. The latter section, on the other hand, contains important provisions on the debtor's fraudulent disposition of the property which replace the prolix and probably outmoded provisions of §214 of Article 27. Finally, §185.15 on defrauding judgment creditors replaces the provisions of §214 on frauds by execution debtors.

85.00. FRAUDS ON CREDITORS; DEFINITIONS OF TERMS

"PROPERTY" AND "OBTAIN" HAVE, RESPECTIVELY THE SAME

DEFINITIONS AS IN SECTION 155.00(1) AND 155.00(4).

COMMENT

This section merely provides a reference to definitions borrowed from the Larceny materials.

185.01. FRAUD IN INSOLVENCY

1. AS USED IN THIS SECTION, "ADMINISTRATOR" MEANS AN ASSIGNEE OR TRUSTEE FOR THE BENEFIT OF CREDITORS, A LIQUIDATOR, A RECEIVER OR ANY OTHER PERSON ENTITLED TO ADMINISTER PROPERTY FOR THE BENEFIT OF CREDITORS.

2. A PERSON IS GUILTY OF FRAUD IN INSOLVENCY WHEN, WITH INTENT TO DEFRAUD ANY CREDITOR AND KNOWING THAT PROCEEDINGS HAVE BEEN INSTITUTED FOR THE APPOINTMENT OF AN ADMINISTRATOR, OR KNOWING THAT A COMPOSITION AGREEMENT OR OTHER ARRANGEMENT FOR THE BENEFIT OF CREDITORS HAS BECOME EFFECTIVE, HE

(A) CONVEYS, TRANSFERS, REMOVES, CONCEALS, DESTROYS, ENCUMBERS OR OTHERWISE DISPOSES OF ANY PART OF OR ANY INTEREST IN THE DEBTOR'S ESTATE; OR

(B) OBTAINS ANY SUBSTANTIAL PART OF OR INTEREST IN THE DEBTOR'S ESTATE; OR

(C) PRESENTS TO ANY CREDITOR OR TO THE ADMINISTRATOR ANY WRITING OR RECORD RELATING TO THE DEBTOR'S ESTATE KNOWING THE SAME TO CONTAIN A FALSE MATERIAL STATEMENT; OR

(D) MISREPRESENTS OR FAILS OR REFUSES TO DISCLOSE TO THE ADMINISTRATOR THE EXISTENCE, AMOUNT OR LOCATION OF ANY PART OF OR ANY INTEREST IN THE DEBTOR'S ESTATE, OR ANY OTHER INFORMATION WHICH HE IS LEGALLY REQUIRED TO FURNISH TO SUCH ADMINISTRATOR.

FRAUD IN INSOLVENCY IS A CLASS A MISDEMEANOR.

COMMENT

§185.01 on fraud in insolvency derives from §185.00 of the New York Penal Law and defines a new criminal offense for Maryland. The section protects the integrity of insolvency proceedings and composition agreements by punishing various frauds committed during the insolvency proceeding or the effective operation of the composition agreement by the debtor, the administrator of the debtor's property, individual creditors, and other persons. Not covered by §185.01 are situations where a person's financial affairs are in bad shape and insolvency proceedings are threatened or likely at

some time in the future. In these instances preferences or conveyances to favored creditors should not be treated as criminal although they may be voidable under the federal bankruptcy statutes and the Uniform Fraudulent Conveyance Act in Article 39B of the Maryland Code. The Commission did not adopt the provision in the comparable New York section which extends the coverage of the section to situations where insolvency proceedings are "about to be instituted" or a composition agreement is "about to be made" partly to avoid penalizing efforts which might honestly be though desirable for all parties concerned to avoid insolvency proceedings and partly because of the vagueness of the words "about to be" in this context.

185.05. FRAUDULENT FAILURE TO ACCOUNT FOR SALE OF PROPERTY SUBJECT TO A MORTGAGE OR OTHER SECURITY AGREEMENT

A PERSON IS GUILTY OF FRAUDULENT FAILURE TO ACCOUNT FOR SALE OF PROPERTY SUBJECT TO A MORTGAGE OR OTHER SECURITY AGREEMENT WHEN

1. HAVING EXECUTED A MORTGAGE OR OTHER SECURITY AGREEMENT CREATING A SECURITY INTEREST IN PROPERTY SECURING A MONETARY OBLIGATION OWED TO A SECURED PARTY; AND

2. HAVING UNDER THE MORTGAGE OR OTHER SECURITY AGREEMENT BOTH THE RIGHT OF SALE OR OTHER DISPOSITION OF THE PROPERTY AND THE DUTY TO ACCOUNT TO THE SECURED PARTY FOR THE PROCEEDS OF DISPOSITION, HE SELLS OR OTHERWISE DISPOSES OF THE PROPERTY AND WITH INTENT TO DEFRAUD THE SECURED PARTY FAILS TO ACCOUNT TO THE SECURED PARTY FOR THE PROCEEDS OF DISPOSITION.

FRAUDULENT FAILURE TO ACCOUNT FOR SALE OF PROPERTY SUBJECT TO A MORTGAGE OR OTHER SECURITY AGREEMENT IS A CLASS A MISDEMEANOR.

COMMENT

§185.05 on fraudulent failure to account punishes the debtor under a mortgage or other security agreement who has the right to sell the collateral and a duty to account for the proceeds who sells or otherwise disposes of the property but who, with intent to defraud the secured party, fails to account to the secured party for the proceeds. The section does not cover all debtors but only those who have "executed a mortgage or other security agreement creating a security interest in property securing a monetary obligation owed to a secured party." The requirement that the debtor's

failure to account be with intent to defraud the secured party is intended to allow for situations in which by commercial custom or tacit agreement of the parties prompt accounting is not required or expected. In such circumstances, even though the debtor later becomes insolvent, his failure to account promptly does not of itself seem to require a criminal penalty. On the other hand, when a debtor knows he is expected to account for the proceeds of a sale or other disposition and simply fails to do so, he will have violated §185.05.

The term "security agreement" used in §§185.05 and 185.10 is defined in §9-104(h) of Art. 95B of the Maryland Code to mean an agreement which creates or provides for a security interest in personal property of fixtures. The term "mortgage" includes in addition real property mortgages because this Code uses the word property to include both real and personal property. See the definition of property in §10.00(20).

185.10. FRAUDULENT DISPOSITION OF PROPERTY SUBJECT TO MORTGAGE OR OTHER SECURITY AGREEMENT

A PERSON IS GUILTY OF FRAUDULENT DISPOSITION OF PROPERTY SUBJECT TO A MORTGAGE OR OTHER SECURITY AGREEMENT WHEN, KNOWING THAT THE PROPERTY IS SUBJECT TO A MORTGAGE OR OTHER SECURITY AGREEMENT CREATING OR PROVIDING FOR A SECURITY INTEREST IN THE PROPERTY, HE SELLS, ASSIGNS, ENCUMBERS, SECRETES, INJURES, DESTROYS OR OTHERWSIE DISPOSES OF ANY PART OF THE PROPERTY SUBJECT TO THE MORTGAGE OR OTHER SECURITY AGREEMENT, WITH THE INTENT THEREBY TO DEFRAUD THE SECURED PARTY.

FRAUDULENT DISPOSITION OF PROPERTY SUBJECT TO A MORTGAGE OR OTHER SECURITY AGREEMENT IS A CLASS A MISDEMEANOR.

COMMENT

§185.10 on the fraudulent disposition of property subject to a mortgage or other security agreement derives from §§185.10 and 185.15 of the New York Penal Law and in combination with §185.15 replaces §214 of the present Article 27. §214 punishes the mortgagor of personal property, the conditional sale vendee, the execution debtor, or the vendor in possession of personal property under a recorded bill of sale who with intent to defraud the secured party takes the property subject to such a security interest beyond the limits of the respective city or county where it is located or otherwise "removes, secretes, hypothecates, destroys or sells" the property.

§185.10 operates principally to restate and clarify the law rather than to change it. In one important respect, however, §185.10 is broader than the present §214. The present section covers only personal property, while §185.10 also covers the fraudulent disposition of mortgaged real property. See the Comment to §185.05. Mortgagors of real property who with intent to defraud sell or destroy the mortgaged property should not escape conviction simply because their fraud involves real rather than personal property. The Commission was not convinced by the contrary arguments that civil remedies already adequately protected the mortgagee and that this section would be abused by mortgagees who charge their mortgagors with "injuring" or "destroying" the mortgaged premises by allowing it to run down. The Commission determined that additional criminal sanctions were appropriate in this area and that the requirement that the mortgagor must be shown to "intend to defraud" sufficiently protected him from abusive prosecutions. In another respect, §185.10 is narrower than the present §214. The Commission rejected as outmoded the provision in §214 which covers the removal of the collateral "beyond the limits of the respective city or county where it is located."

185.15. DEFRAUDING JUDGMENT CREDITORS

A PERSON IS GUILTY OF DEFRAUDING JUDGMENT CREDITORS WHEN, SUBSEQUENT TO THE ENTRY OF A JUDGMENT, HE SELLS, ASSIGNS, ENCUMBERS, SECRETES, INJURES, DESTROYS, OR OTHERWISE DISPOSES OF PROPERTY IN HIS POSSESSION LEVIED ON AND TAKEN IN EXECUTION OF SUCH JUDGMENT WITH INTENT TO DEFRAUD A JUDGMENT CREDITOR.

DEFRAUDING JUDGMENT CREDITORS IS A CLASS A MISDEMEANOR.

COMMENT

§185.15 on defrauding judgment creditors completes the sections in this Part which protect the interest of creditors. §214 of Article 27 presently covers the "execution debtor in possession of personal property levied on and taken in execution" who with intent to defraud takes the property beyond the limits of the city or county where it is located or otherwise "removes, secretes, hypothecates, destroys or sells the same." §185.15, which replaces that provision, is likewise narrowly drawn to protect debtors from harassment by their creditors. The section only applies when a judgment has been entered and property levied on and taken in

execution of such judgment. §185.15, however, applies not only to execution debtors who remain in possession of their property but to any person in possession who disposes of the property with intent to defraud judgment creditors. §214, on the other hand, applies only to execution debtors.

PART 190: OTHER FRAUDS

INTRODUCTION

Part 190 completes Subtitle K of this Code on Offenses Involving Fraud. This chapter gathers together provisions on bad checks (§§190.00–190.25), false advertising (§190.30), criminal impersonation (§190.35), and unlawful collection practices (§190.40). These sections do not define any new offenses but clarify and improve existing provisions in the present Article 27. The Commission decided not to include in this Part a section on misconduct by corporate directors similar to §190.35 of the New York Penal Law because it determined that §§62 and 63 of the General Corporation Law in Article 23 already adequately covered the subject.

190.00. OBTAINING PROPERTY OR SERVICES BY A BAD CHECK; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THE PART:

1. "CHECK" MEANS ANY CHECK, DRAFT OR SIMILAR SIGHT ORDER FOR THE PAYMENT OF MONEY WHICH IS NOT POST-DATED WITH RESPECT TO THE TIME OF UTTERANCE.

2. "DRAWER" OF A CHECK MEANS A PERSON WHOSE NAME APPEARS THEREON AS THE PRIMARY OBLIGOR, WHETHER THE ACTUAL SIGNATURE BE THAT OF HIMSELF OR OF A PERSON PURPORTEDLY AUTHORIZED TO DRAW THE CHECK IN HIS BEHALF.

3. "REPRESENTATIVE DRAWER" MEANS A PERSON WHO SIGNS A CHECK AS DRAWER IN A REPRESENTATIVE CAPACITY OR AS AGENT OF THE PERSON WHOSE NAME APPEARS THEREON AS THE PRINCIPAL DRAWER OR OBLIGOR.

4. "UTTER." A PERSON "UTTERS" A CHECK WHEN, AS A DRAWER OR REPRESENTATIVE DRAWER THEREOF, HE DELIVERS IT OR CAUSES IT TO BE DELIVERED TO A PERSON WHO THEREBY ACQUIRES A RIGHT AGAINST THE DRAWER WITH RESPECT TO SUCH CHECK. ONE WHO DRAWS A CHECK WITH INTENT THAT IT BE SO DELIVERED IS DEEMED TO HAVE UTTERED IT IF THE DELIVERY OCCURS.

5. "PASS." A PERSON "PASSES" A CHECK WHEN, BEING A PAYEE, HOLDER OR BEARER OF A CHECK WHICH PREVIOUSLY HAS

BEEN OR PURPORTS TO HAVE BEEN DRAWN AND UTTERED BY ANOTHER, HE DELIVERS IT, FOR A PURPOSE OTHER THAN COLLECTION, TO A THIRD PERSON WHO THEREBY ACQUIRES A RIGHT WITH RESPECT THERETO.

6. "FUNDS" MEANS MONEY OR CREDIT.

7. "INSUFFICIENT FUNDS." A DRAWER HAS "INSUFFICIENT FUNDS" WITH A DRAWEE TO COVER A CHECK WHEN HE HAS NO FUNDS OR ACCOUNT WHATEVER, OR FUNDS IN AN AMOUNT LESS THAT THAT NEEDED TO COVER THE CHECK; AND A CHECK DISHONORED FOR "NO ACCOUNT" SHALL ALSO BE DEEMED TO HAVE BEEN DISHONORED FOR "INSUFFICIENT FUNDS."

8. "PROPERTY" MEANS PROPERTY AS DEFINED IN SECTION 155.00(1).

9. "SERVICE" MEANS SERVICE AS DEFINED IN SECTION 155.00(6).

10. "OBTAIN" MEANS OBTAIN AS DEFINED IN SECTION 155.00(4).

COMMENT

For commentary, see §190.15.

190.05. OBTAINING PROPERTY OR SERVICES BY A BAD CHECK IN THE THIRD DEGREE

A PERSON IS GUILTY OF OBTAINING PROPERTY OR SERVICES BY A BAD CHECK IN THE THIRD DEGREE WHEN:

1. (A) AS A DRAWER OR REPRESENTATIVE DRAWER, HE OBTAINS PROPERTY OR SERVICES BY UTTERING A CHECK KNOWING THAT HE OR HIS PRINCIPAL, AS THE CASE MAY BE, DOES NOT THEN HAVE SUFFICIENT FUNDS WITH THE DRAWEE TO COVER IT, AND (B) HE INTENDS OR BELIEVES AT THE TIME OF UTTERANCE THAT PAYMENT WILL BE REFUSED BY THE DRAWEE UPON PRESENTATION, AND (C) PAYMENT IS REFUSED BY THE DRAWEE UPON PRESENTATION; OR

2. (A) HE OBTAINS PROPERTY OR SERVICES BY PASSING A CHECK KNOWING THAT THE DRAWER THEREOF DOES NOT THEN HAVE SUFFICIENT FUNDS WITH THE DRAWEE TO COVER IT, AND (B) HE INTENDS OR BELIEVES AT THE TIME THE CHECK IS PASSED THAY PAYMENT WILL BE REFUSED BY THE DRAWEE UPON PRESENTATION, AND (C) PAYMENT IS REFUSED BY THE DRAWEE UPON PRESENTATION.

OBTAINING PROPERTY OR SERVICES BY MEANS OF A BAD CHECK IN THE THIRD DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

For commentary, see §190.15.

190.10. OBTAINING PROPERTY OR SERVICES BY A BAD CHECK IN THE SECOND DEGREE

A PERSON IS GUILTY OF OBTAINING PROPERTY OR SERVICES BY A BAD CHECK IN THE SECOND DEGREE WHEN HE OBTAINS PROPERTY OR SERVICES BY A BAD CHECK AS DEFINED IN §190.05 AND WHEN THE VALUE OF THE PROPERTY OR SERVICES SO OBTAINED EXCEEDS ONE HUNDRED DOLLARS.

OBTAINING PROPERTY OR SERVICES BY A BAD CHECK IN THE SECOND DEGREE IS A CLASS D FELONY.

COMMENT

For commentary, see §190.15.

190.15. OBTAINING PROPERTY OR SERVICES BY A BAD CHECK IN THE FIRST DEGREE

A PERSON IS GUILTY OF OBTANING PROPERTY OR SERVICES BY A BAD CHECK IN THE FIRST DEGREE WHEN HE OBTAINS PROPERTY OR SERVICES BY A BAD CHECK AS DEFINED IN §190.05 AND WHEN THE VALUE OR THE PROPERTY OR SERVICES SO OBTAINED EXCEEDS TEN THOUSAND DOLLARS.

OBTAINING PROPERTY OR SERVICES BY A BAD CHECK IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

§§190.00–190.15 on obtaining property or services by a bad check generally follow the corresponding sections in the New York Penal Law (§§190.00–190.05). There are two major departures, however, from the New York provisions. First, §§190.05–190.15 of this Code divide the offense into three degrees; the monetary dividing lines between the degrees coincide with those between the degrees of larceny. Second, §190.05 of the New York Penal Law requires for the completed offense only that the defendant issue a bad check, while §§190.05–190.15 of this Code require that the defendant obtain property or services by means of a bad check. The present Maryland section on bad checks (§142 of Article 27) also requires an obtaining of property or services for the completed offense. That section on the whole is very cumbersome and does not clearly define the proscribed conduct. In replacing §142 (as well as §144), the new sections chiefly clarify the law on bad checks rather than change it. The provision in the present §142 on the fraudulent use of credit cards is replaced by §165.15 of this Code on the unlawful use of a credit card.

§§190.05–190.15 on obtaining property or services by a bad check overlap with the section in this Code on larceny by deception (§155.30). Under present Maryland law a person who obtains property by means of a bad check is guilty of obtaining property by false pretenses (now designated larceny by deception) even though he makes no false representation extrinsic to the check itself. See Waye v. State, 231 Md. 510, 191 A. 2d 428 (1963). The Commission nevertheless determined that it was desirable to retain separate sections to deal with the difficulties associated with bad check prosecutions and to require that bad check cases be prosecuted under these sections. See §155.05(3).

The definitions found in §190.00 are consistent with modern commercial usage under the Uniform Commercial Code. §§190.05–190.15 then employ these definitions to make clear what is a bad check and to specify the fraudulent intent which is required for the offense. A bad check is one for which at the time of utterance or passage there are insufficient funds (as defined in §190.00(7)) to cover in the drawee band. A person has the requisite *mens rea* if he knows there are insufficient funds and "intends or believes at the time of utterance (or at the time the check is passed) that payment will be refused by the drawee upon presentation." However, there can be no completed offense until the drawee refuses payment upon presentation.

190.20. OBTAINING PROPERTY OR SERVICES BY A BAD CHECK; PRESUMPTIONS

1. WHEN THE DRAWER OF A CHECK HAS INSUFFICIENT FUNDS WITH THE DRAWEE TO COVER IT AT THE TIME OF UTTERANCE, THE SUBSCRIBING DRAWER OR REPRESENTATIVE DRAWER, AS THE CASE MAY BE, IS PRESUMED TO KNOW OF SUCH INSUFFICIENCY.

2. A SUBSCRIBING DRAWER OR REPRESENTATIVE DRAWER, AS THE CASE MAY BE, OF AN ULTIMATELY DISHONORED CHECK IS PRESUMED TO HAVE INTENDED OR BELIEVED THAT THE CHECK WOULD BE DISHONORED UPON PRESENTATION WHEN:

(A) THE DRAWER HAD NO ACCOUNT WITH THE DRAWEE AT THE TIME OF UTTERANCE; OR

(B) (I) THE DRAWER HAD INSUFFICIENT FUNDS WITH THE DRAWEE AT THE TIME OF UTTERANCE, AND (II) THE CHECK WAS PRESENTED TO THE DRAWEE FOR PAYMENT NOT MORE THAN THIRTY DAYS AFTER THE DATE OF UTTERANCE, AND (III) THE DRAWER HAD INSUFFICIENT FUNDS WITH THE DRAWEE AT THE TIME OF PRESENTATION.

3. DISHONOR OF A CHECK BY THE DRAWEE AND INSUFFICIENCY OF THE DRAWER'S FUNDS AT THE TIME OF PRESENTATION MAY PROPERLY BE PROVED BY INTRODUCTION IN EVIDENCE OF A NOTICE OF PROTEST OF THE CHECK, OR OF A CERTIFICATE UNDER OATH OF AN AUTHORIZED REPRESENTATIVE OF THE DRAWEE DECLARING THE DISHONOR AND INSUFFICIENCY, AND SUCH PROOF SHALL CONSTITUTE PRESUMPTIVE EVIDENCE OF SUCH DISHONOR AND INSUFFICIENCY.

COMMENT

§190.20 contains a number of presumptions which are helpful and often necessary in bad check cases. The present Maryland section on bad checks makes the giving of a worthless check "prima facie evidence of intent to cheat or defraud." The Court of Appeals said in Willis v. State, 205 Md. 118, 106 A. 2d 85, 88 (1954): "It was obviously because of the difficulty so frequently encountered in proving fraudulent intent that the Legislature provided in the Worthless Check Act that the giving of a worthless check raises a prima facie presumption of an intent to defraud." The new presumptions in §190.20 are more carefully and narrowly drawn, but should still be of great utility in bad check prosecutions. §190.20 eliminates the applicability of presumptions to a mere passer of a bad check. Presumptions as to the knowledge of the status of the drawer's account, and presumptions as to intent or belief based on the insufficiency of the funds and the subsequent dishonor of the check, may fairly be drawn only with respect to the drawer of the check. The simple passer of the check may not even know the drawer, and cannot fairly be presumed to be familiar with his bank account. Accordingly, the presumptions in §190.20(1) and (2) apply only to the drawer of a check and not to a passer.

190.25. OBTAINING PROPERTY OR SERVICES BY UTTERING OR PASSING A BAD CHECK; LIMITATION ON PROSECUTION

THE OBTAINING OF PROPERTY OR SERVICES BY UTTERING OR PASSING A BAD CHECK, WHEN THE UTTERING OR PASSING IS NOT ACCOMPANIED BY ANY FALSE REPRESENTATIONS OTHER THAN A FALSE REPRESENTATION OR FALSE REPRESENTATION THAT THERE ARE SUFFICIENT FUNDS WITH THE DRAWEE TO COVER THE CHECK, SHALL NOT BE PROSECUTED UNDER SECTION 190.05, 190.10 OR 190.15, OR UNDER ANY OTHER SECTION OF THE CRIMINAL CODE IF THE PERSON WHO SO OBTAINS THE PROPERTY OR SERVICE SHALL MAKE THE CHECK GOOD WITHIN TEN DAYS OF DISHONOR BY THE DRAWEE OF THE CHECK; AND NO SUCH PROSECUTION SHALL BE COMMENCED BY WARRANT, INFORMATION, INDICTMENT OR OTHERWISE UNTIL THE EXPIRATION OF SAID PERIOD OF TEN DAYS.

COMMENT 18303

§190.25 continues a provision found in the present Maryland section on bad checks (§142 of Article 27) which is aimed at preventing the harassment of prospective defendants in bad check cases. That provision prohibits the commencement of any bad check prosecution until ten days after dishonor and allows the defendant to escape prosecution altogether if he makes the check good within that time. §142 presently limits this protection to bona fide residents, but §190.25 extends it to all prospective defendants. §190.25 also prevents any circumvention of this ten-day protective hiatus afforded the defendant by prosecuting bad check cases under the larceny sections (§§155.10-155.20) or under any other section of this Code. The obtaining of property or services by uttering or passing a bad check cannot be prosecuted "under Section 190.05, 190.10, or 190.15, or under any other section of the Criminal Code," for ten days, during which the defendant has the opportunity to make the check good, if the defendant when he uttered or passed the bad check did not make any false representation other than a false representation that there were sufficient funds in the drawee bank to cover the check. A defendant may make such a representation by merely uttering or passing the bad check or by giving verbal assurances that there are sufficient funds in the drawee bank to cover the check. Of course, if the drawer of a bad check makes additional material misrepresentations concerning his identity, employment or other matters, he may be immediately arrested and prosecuted for larceny.

190.26. OBTAINING PROPERTY OR SERVICES BY A BAD CHECK; RESTORATION AND RESTITUTION

UPON CONVICTION OF A DEFENDANT FOR THE OFFENSE OF OBTAINING PROPERTY OR SERVICES BY A BAD CHECK IN ANY DEGREE THE COURT MAY:

1. ORDER RESTORATION OF ANY PROPERTY WHICH (A) HAS BEEN THE OBJECT OF THE OFFENSE AND (B) HAS BEEN RECOVERED FROM THE DEFENDANT OR ANOTHER OR WHICH IS IN THE DEFENDANT'S POSSESSION OR CONTROL, TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN; AND

2. ORDER RESTITUTION OF THE VALUE OF ANY PROPERTY WHICH HAS BEEN THE OBJECT OF THE OFFENSE TO ANY PERSON OR PERSONS HAVING A PROPERTY INTEREST THEREIN, TO THE EXTENT THAT SUCH PROPERTY IS NOT RESTORED; AND

3. ORDER RESTITUTION OF THE VALUE OF ANY SERVICES

OBTAINED IN THE COMMISSION OF THE OFFENSE TO ANY PERSON OR PERSONS ENTITLED TO RESTITUTION THEREFOR.

COMMENT

This provision follows many current Maryland statutes allowing an order for restitution or restoration of stolen property.

190.30. FALSE ADVERTISING

A PERSON IS GUILTY OF FALSE ADVERTISING WHEN, WITH INTENT TO PROMOTE THE SALE OR TO INCREASE THE CONSUMPTION OF PROPERTY OR SERVICES, HE MAKES OR CAUSES TO BE MADE A FALSE OR MISLEADING STATEMENT IN ANY ADVERTISEMENT ADDRESSED TO THE PUBLIC OR IN WRITING; BUT IN ANY PROSECUTION UNDER THIS SECTION, IT IS A DEFENSE THAT THE ALLEGEDLY FALSE OR MISLEADING STATEMENT WAS NOT KNOWINGLY OR RECKLESSLY MADE OR CAUSED TO BE MADE.

FALSE ADVERTISING IS A CLASS A MISDEMEANOR.

COMMENT

§190.30 on false advertising, which derives from §190.20 of the New York Penal Law, replaces the general provisions on false advertising in §§195 and 198 of Article 27. The new section defines more clearly and concisely the proscribed conduct. The comprehensive nature of §190.30 should also make unnecessary many of the minor sections in Article 27 which deal with false advertising and related frauds in the sale of particular products. See §§159, 164–168, 191, 195(b) and (c), 196–197, 214A, 217–223, 224–228, 231, 322, 563A. These sections should be repealed altogether unless the Legislature finds that a particular section or sections serve an important regulatory purpose. Sections in the latter category should be deleted from Article 27 and placed with the appropriate regulatory provisions. §195A of Article 27 differs from the above sections in that it is not a criminal statute at all but provides for civil penalties for false advertising which may be collected by the Attorney General in a civil action. This section should be removed from Article 27.

§195 of Article 27 presently requires for the mental element of false advertising that the advertiser know a statement in his advertisement is false or by the exercise of reasonable care should have known that it is false. The Commission decided against the imposition of criminal liability in this area based on negligence. §190.30 requires that the defendant act knowingly or recklessly with respect

to making or causing to be made a false or misleading statement in an advertisement. §190.20 of the New York Penal Law is not so generous to the defendant and simply provides him with an affirmative defense that the allegedly false or misleading statement was not knowingly or recklessly made or caused to be made. That section also covers advertisements addressed "to the public or to a substantial number of persons." In §190.30 of this Code, the vague word "substantial" has been eliminated. The section covers all advertisements "addressed to the public or in writing." The purpose of this limitation is to avoid the undue intrusion of the criminal law into the area of "sales talk" between buyer and seller. Of course, a seller's conduct may amount to larceny by deception if he obtains property or services by means of a material false representation. See §155.30 of this Code.

190.35. CRIMINAL IMPERSONATION

A PERSON IS GUILTY OF CRIMINAL IMPERSONATION WHEN WITH INTENT TO DECEIVE HE:

1. PRETENDS TO BE ANOTHER AND DOES AN ACT IN SUCH ASSUMED CHARACTER WITH INTENT TO OBTAIN A BENEFIT OR TO INJURE OR DEFRAUD ANOTHER; OR

2. PRETENDS TO BE A REPRESENTATIVE OF SOME PERSON OR ORGANIZATION AND DOES AN ACT IN SUCH PRETENDED CAPACITY WITH INTENT TO OBTAIN A BENEFIT OR TO INJURE OR DEFRAUD ANOTHER; OR

3. PRETENDS TO BE A PUBLIC SERVANT, OR WEARS OR DISPLAYS WITHOUT AUTHORITY ANY UNIFORM OR BADGE BY WHICH SUCH PUBLIC SERVANT IS LAWFULLY DISTINGUISHED, WITH INTENT TO INDUCE ANOTHER TO SUBMIT TO SUCH PRETENDED OFFICIAL AUTHORITY OR OTHERWISE TO ACT IN RELIANCE UPON THAT PRETENSE.

THIS SECTION SHALL NOT APPLY TO A PUBLIC SERVANT OR A PERSON ACTING ON BEHALF OF OR IN COOPERATION WITH A PUBLIC SERVANT WHEN HE IS ACTING TO APPREHEND OR INVESTIGATE A PERSON FOR CRIMINAL CONDUCT UNDER THE LAWS OF THIS STATE OR OF THE UNITED STATES.

CRIMINAL IMPERSONATION IS A CLASS A MISDEMEANOR.

COMMENT

§190.35 on criminal impersonation punishes a person who with intent to deceive impersonates another when the impersonator intends thereby to obtain a benefit for himself, to injure or defraud another, or to induce another to submit to pretended

official authority or to act in reliance upon that pretense. The Commission thought that a criminal impersonation statute should require such an intent because the criminal law should only be concerned with punishing fraud and oppression and should not proscribe innocent merrymaking even when the merrymaking involves disguising one's self as another person. Actors are not covered by §190.35 because while they intend to obtain a benefit for themselves through their performance they do not intend to deceive their audience. Finally, the penultimate sentence of §190.35 is intended to make clear that the whole section does not apply to undercover law enforcement activities.

The present Maryland sections dealing with criminal impersonation are §440 and §§181–183 of Article 27. Those sections cover only the impersonating of police officers (§440) and of officers or members of military, patriotic and fraternal organizations (§181) and the unauthorized wearing of the insignia, buttons, badges, etc., of military, patriotic and fraternal organizations (§§182–183). §§184–190 also establish a registration system for insignia which may well be retained in another Article of the Code but which should be removed from Article 27. §440 on impersonating a policeman is absorbed into §190.35(3) of this Code, which proscribes impersonation of public servants generally. "Public servant" is defined in §10.00(15). The provisions in §§181–183 on military, patriotic and fraternal organizations are superseded by §195.35(1) and (2) which cover in general terms a person's pretending to be another or to be the representative of some person or organization.

190.40. UNLAWFUL COLLECTION PRACTICES

A PERSON IS GUILTY OF UNLAWFUL COLLECTION PRACTICES WHEN, WITH INTENT TO ENFORCE A CLAIM OR JUDGMENT FOR MONEY OR PROPERTY, HE KNOWINGLY SENDS, MAILS OR DELIVERS TO ANOTHER PERSON A NOTICE, DOCUMENT OR OTHER INSTRUMENT WHICH HAS NO JUDICIAL OR OFFICIAL ORIGIN OR SANCTION AND WHICH IN ITS FORMAT OR APPEARANCE, SIMULATES A SUMMONS, COMPLAINT, COURT ORDER OR PROCESS, OR THE INSIGNIA, SEAL OR PRINTED FORM OF A FEDERAL, STATE OR LOCAL GOVERNMENT OR AN INSTRUMENTALITY THEREOF, OR IS OTHERWISE LIKELY TO INDUCE A BELIEF THAT SUCH NOTICE, DOCUMENT OR INSTRUMENT HAS A JUDICIAL OR OFFICIAL ORIGIN OR SANCTION.

UNLAWFUL COLLECTION PRACTICES IS A CLASS B MISDEMEANOR.

COMMENT

§190.40 on unlawful collection practices derives from §190.50 of the New York Penal Law and replaces §199 of Article 27, which covers the simulated use of court process. This section is necessary to deter the fraudulent intimidation of debtors. Of course, much that is covered by §190.40 is already covered by the forgery sections (§§170.05–170.10). However, a document which simulates court process or is likely to induce a belief that it is court process is not necessarily a forged document. Its maker may give it a deceptive appearance so that it seems to have been issued by the court but at the same time be very careful to make sure that upon close observation one could discover that document did not purport to be issued by the court. Such a document is not a forgery. The use of such a document to enforce a claim or judgment is covered by this section.

§190.40 is more concisely drafted than §199 of Article 27. The latter section apparently covers the simulation of the stationery of a government department even if there is no intent to enforce a claim or judgment thereby. §§190.40 requires such an intent in all cases.

(Misconduct by corporate directors

The Commission did not adopt a section on misconduct by corporate directors for inclusion in this Code because it determined that §§62 and 63 of the General Corporation Law in Article 23 already adequately covered the subject.)

SUBTITLE L – OFFENSES AGAINST PUBLIC ADMINISTRATION

PART 195: OFFICIAL MISCONDUCT AND OBSTRUCTION OF PUBLIC SERVANTS GENERALIY

INTRODUCTION

Part 195 contains four sections which punish misconduct by public servants and the obstruction or hindrance of public servants in the performance of their duties. §195.00 on official misconduct and §195.05 on obstructing government operations codify offenses which are at present in Maryland largely left to the common law. Both these sections apply generally to all public servants and to the obstruction of any lawful governmental function. §§195.10 and 195.15, on the other hand, deal with the special problems of refusing to aid a police officer and obstructing fire fighting operations. The former section defines a new offense for

Maryland, while the latter section replaces §11D of Article 27 on obstructing firemen.

195.00. OFFICIAL MISCONDUCT

A PUBLIC SERVANT IS GUILTY OF OFFICIAL MISCONDUCT WHEN, WITH INTENT TO OBTAIN A BENEFIT OR TO INJURE OR DEPRIVE ANOTHER PERSON OF A RIGHT OR BENEFIT:

1. HE COMMITS AN ACT RELATING TO HIS OFFICE BUT CONSTITUTING AN UNAUTHORIZED EXERCISE OF HIS OFFICIAL FUNCTIONS, KNOWING THAT SUCH ACT IS UNAUTHORIZED; OR

2. HE KNOWINGLY REFRAINS FROM PERFORMING A DUTY OF HIS OFFICE WHICH IS IMPOSED UPON HIM BY LAW OR IS CLEARLY INHERENT IN THE NATURE OF HIS OFFICE.

OFFICIAL MISCONDUCT IS A CLASS A MISDEMEANOR.

COMMENT

Official misconduct is not at present a statutory crime in Maryland but it is a common-law misdemeanor of uncertain dimensions. §80 of Article 27 on defalcations by revenue officers does not cover, however, a narrow variety of official misconduct. Perkins has defined the common law offense to cover a public official who, in the exercise of the duties of his office or while acting under color of law, (1) does any act which is wrongful in itself – malfeasance; (2) does any otherwise lawful act in a wrongful manner – misfeasance; or (3) omits to do any act which is required of him by the duties of his office – nonfeasance. Perkins, Criminal Law 482 (2d ed. 1969). Decisions by the Maryland Court of Appeals have recognized these three varieties of official misconduct. See Hitzelberger v. State, 174 Md. 152, 197 Atl. 605 (1938) (misfeasance – policeman warned houses of prostitution on police raids); Bennett v. State, 180 Md. 406, 24 A. 2d 786 (1942) (malfeasance – unauthorized signing of checks by county Treasurer); State v. Wheatley, 192 Md. 44, 63 A. 2d 644 (1949) (nonfeasance – dictum).

§195.00, which derives from §195.00 of the New York Penal Law, codifies the common-law misdemeanor of official misconduct; it covers all forms of malfeasance, misfeasance and nonfeasance by public servants. The common law terms are not employed, however, and it is not necessary to perform the difficult task of drawing the lines between them. §195.00(1) covers any "act" by a public servant which is "an unauthorized exercise" of his official functions. Acts may be unauthorized either because

they are wrongful in themselves or because, while they are lawful in themselves, they are executed in a wrongful manner. §195.00(2) covers any omission by a public servant from performing a duty imposed on him by law or clearly inherent in the nature of his office. "Public servant" is defined in §10.00(15).

§195.00 significantly differs from the present Maryland law with respect to the mental element of the offense. The proposed section requires that the public servant know that his acts are unauthorzied or that he has a duty to act, while the Maryland decisions often base liability on the official's negligence. See e.g., Bennett v. State, supra. This difference may be partly explained on the ground that the Bennett case primarily involved the official's removal from office and not his criminal punishment. Since §195.00 is a criminal statute and defines an offense carrying class A misdemeanor penalties, the mental element required should be higher than negligence. Provisions for the removal of public servants from office might well require only negligence or inefficiency as the basis for removal, but such provisions do not belong in the Criminal Code.

195.05. OBSTRUCTING GOVERNMENT OPERATIONS

A PERSON IS GUILTY OF OBSTRUCTING GOVERNMENT OPERATIONS WHEN HE INTENTIONALLY OBSTRUCTS, IMPAIRS OR HINDERS THE PERFORMANCE OF A LAWFUL GOVERNMENTAL FUNCTION OF THE STATE OR ANY POLITICAL SUBDIVISION THEREOF OR OF ANY GOVERNMENTAL INSTRUMENTALITY WITHIN THE STATE BY USING OR THREATENING THE IMMEDIATE USE OF VIOLENCE, FORCE, OR PHYSICAL INTERFERENCE OR OBSTACLE, OR BY MEANS OF ANY INDEPENDENTLY CRIMINAL ACT. IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT REASONABLY BELIEVED THAT THE GOVERNMENTAL FUNCTION WAS NOT LAWFUL.

OBSTRUCTING GOVERNMENT OPERATIONS IS A CLASS A MISDEMEANOR.

COMMENT

Obstructing justice is a common law misdemeanor of very uncertain proportions. As defined by Perkins, it covers "every wilful act of corruption, intimidation or force which tends in any way to distort or impede the administration of law either civil or criminal." Perkins, Criminal Law 494 (2d ed. 1969). §27 of Article 27 contains a statutory offense entitled obstructing justice, but that section is limited to the use of corruption, threats or force to impede or obstruct court

porceedings or court personnel. §27 was enacted in aid and definition of a class of criminal acts known to the common law as obstruction of justice, Romans v. State, 178 Md. 558, 16 A. 2d 642 (1940), and it is likely that Maryland still retains the broader common law offense.

§195.05. on obstructing government operations derives from §195.05 of the New York Penal Law. The New York section, however, has been substantially revised, particularly in light of the section in the proposed Michigan Criminal Code (Final Draft – September 1967) on obstructing government operations (§4505). §195.05 of this Code requires for the offense that the defendant intentionally obstruct, impair or hinder the performance of a lawful governmental function by using or by threatening the immediate use of violence, force, or physical interference or obstacle, or by means of any independently criminal act. This provision is probably broader than the common law offense because it covers the obstruction of any lawful governmental function and not just of law enforcement functions. The corruption or bribing of public servants, however, is not covered by §195.05 but by §200.05 on bribery.

In approving this provision the Commission recognized that spokesmen for pressure groups on political and social issues often threaten "to take some action" if the government does not meet their demands. Such threats are very likely protected by the First Amendment of the United States Constitution unless they are accompanied by the danger of immediate execution through violent or disruptive acts. The narrowly drafted provision in §195.05 proscribing threats is intended to apply only to those threats which may constitutionally be punished; it is thus limited to instances where the defendant threatens the immediate use of violence, force, or physical interference or obstacle. Of course, §195.05 does not raise any constitutional problems when it punishes the defendant who actually uses any of these means to obstruct government operations.

§195.05 covers such conduct as a physical assault on a public servant performing his official duties when the assaulting party intends thereby to obstruct, hinder or impair the performance of a governmental function. The section also covers such non-violent but disruptive tactics as blocking the movements of a public servant, preventing him from carrying out his official duties. Such tactics create a physical interference or obstacle which

obstructs the performance of a governmental function. §195.05 covers in addition any obstruction by an independently criminal act. Examples of independently criminal acts include a trespass or a breaking and entering. Often these criminal acts do not amount to a physical interference or obstacle so as to fall within that provision of §195.05.

§195.05 requires the prosecution prove that the governmental function obstructed was in fact lawful. The defendant's belief in the unlawfullness of the governmental function obstructed is relevant only to the extent that the section grants the defendant an affirmative defense that he reasonably believed that the governmental function was not lawful. Of course, while the illegality of the governmental function obstructed, or the defendant's reasonable belief in its illegality, will prevent a conviction under this section, they will not necessarily provide a defense when the charge is assault, criminal mischief, resisting arrest, or some other offense. Those specific sections, and the general justification sections in Part 35 of this Code, will determine what defenses are available. When the specific charge is obstructing government operations, however, it is appropriate to require that the function obstructed was in fact lawful and that the defendant did not reasonably believe it to be unlawful.

195.10. REFUSING TO AID A POLICE OFFICER

A PERSON IS GUILTY OF REFUSING TO AID A POLICE OFFICER WHEN, UPON COMMAND BY A UNIFORMED POLICE OFFICER OR BY A POLICE OFFICER OTHERWISE IDENTIFIABLE OR IDENTIFIED TO HIM AS SUCH, HE UNREASONABLY FAILS OR REFUSES TO AID SUCH POLICE OFFICER IN EFFECTING AN ARREST OR IN PREVENTING THE COMMISSION BY ANOTHER PERSON OF ANY CRIME. A PERSON DOES NOT UNREASONABLY FAIL OR REFUSE TO AID A POLICE OFFICER WHEN HE REASONABLY BELIEVES THAT THE RENDERING OF SUCH AID WOULD ENTAIL THE RISK OF DEATH OR SERIOUS PHYSICAL INJURY TO HIMSELF OR TO ANY PERSON OTHER THAN THE PERSON OR PERSONS WHOM THE POLICE OFFICER SEEKS TO ARREST OR TO PREVENT FROM COMMITTING AN OFFENSE.

REFUSING TO AID A POLICE OFFICER IS A CLASS B MISDEMEANOR.

COMMENT

§195.10 is a substantial revision of the analogous section in the New York Penal Law on refusing to aid a peace officer (§195.10). The definition of "police officer" is in §10.00(21).

Maryland has no comparable general provision at present requiring a private person to take affirmative action to assist a police officer.

§195.10 only requires a private citizen to render reasonable assistance to a police officer upon command in two carefully limited areas of special importance – effectuating an arrest and preventing another from committing a crime. Imposing on the citizen a duty to render reasonable assistance in these areas is a sound policy decision, because in these emergency situations slight assistance rendered by a bystander is often of great importance to the policeman. The officer holding a robber at gunpoint has a right to expect a bystander to call headquarters on the police radio or to render other reasonable assistance upon command. The final sentence in the principal paragraph of §195.10 has been added to make clear that the section does not require under any circumstances that a person risk death or serious physical injury to assist a police officer. Private citizens cannot be reasonably expected to assume such risks. A motorist commandeered by a police officer for a high-speed chase therefore need not respond no matter how important it is to catch the fleeing criminal.

Persons injured or killed while aiding a policeman under the provisions of this section should obtain compensation from the State in almost all cases. Under the Criminal Injuries Compensation Act of 1968, compensation is now available for injury or death incurred by a "victim of a crime" or by a person injured or killed "while trying to prevent a crime or an attempted crime from occurring in his presence or trying to apprehend a person who had committed a crime in his presence or had, in fact, committed a felony." See §5 of Article 26A.

195.15. OBSTRUCTING FIREFIGHTING OPERATIONS

1. A PERSON IS GUILTY OF OBSTRUCTING FIREFIGHTING OPERATIONS WHEN HE:

(A) INTENTIONALLY AND UNREASONABLY OBSTRUCTS THE EFFORTS OF ANY FIREMAN OR POLICE OFFICER IN EXTINGUISHING A FIRE OR IN PROCEEDING TO THE SCENE OF A FIRE OR RETURNING THEREFROM; OR

(B) INTENTIONALLY DISOBEYS A REASONABLE ORDER BY A PERSON KNOWN TO HIM TO BE A FIREMEN OR POLICE OFFICER WITH RESPECT TO THE PRESENCE OR CONDUCT OF PERSONS IN THE VICINITY OF A FIRE; OR

(C) WITHOUT JUSTIFICATION PREVENTS OR DISSUADES ANOTHER FROM EXTINGUISHING OR PREVENTING A FIRE.

2. "FIREMAN" MEANS ANY OFFICER, EMPLOYEE OR MEMBER OF A FIRE DEPARTMENT OR OF A VOLUNTEER FIRE COMPANY OR ANY OTHER PERSON VESTED BY LAW WITH THE DUTY TO EXTINGUISH FIRES.

OBSTRUCTING FIREFIGHTING OPERATIONS IS A CLASS B MISDEMEANOR.

COMMENT

§195.15 on obstructing firefighting operations replaces §11D of Article 27 on obstructing firemen. The new section contains a definition of "fireman" and protects both firemen and police officers from obstruction when they are at the scene of a fire or are proceeding to the scene of a fire or returning therefrom. §195.15 is thus broader than §11D, which only protects firemen proceeding to a fire or at the scene of a fire. §195.15(1)(c) is another new provision intended to cover persons who in a riot or other tense situation prevent or dissuade private citizens from extinguishing a fire. A person violates §195.15(1)(c) only if he intends to prevent or delay the extinguishing or preventing of the fire and not if he intends to protect the safety of private citizens whom he prevents or dissuades from fighting the fire.

PART 200: BRIBERY INVOLVING PUBLIC SERVANTS

INTRODUCTION

§50 of Article III of the Maryland Constitution requires that the legislature provide by law for the punishment of bribery involving public officials and for a grant of immunity to compel testimony in prosecutions for bribery. §§200.00 to 200.10 fulfill this obligation and replace §23 of the present Article 27. The immunity provision appears in §5.60. The traditional offense of bribery may be defined as the corrupt payment or receipt of a private price for official action; it covers the bribe giver as well as bribe taker. Perkins, Criminal Law 468–469 (2d ed. 1969). This Part continues that offense under the dual headings of bribery (§200.05) and bribe receiving (§200.10).

Part 215 deals with the related field of interference with the administration of justice through the bribery or intimidation of witnesses or jurors. §195.00 on official misconduct covers in

addition various forms of wrongdoing by public servants that do not amount to bribe receiving. §§180.00 and 180.05 on criminal breach of trust and inducing criminal breach of trust, on the other hand, proscribe bribe giving and bribe receiving involving agents, employees and fiduciaries who occupy positions of private employment or trust. §180.10 makes clear that bribery and bribe receiving involving public servants are not covered by §§180.00 and 180.05 but are to be prosecuted under §§200.05 and 200.10 of this Part.

Article 200 of the New York Penal Law contains additional sections which define new offenses to cover rewards for official misconduct, unlawful gratuities to public servants, and buying nominations for public office. The Commission rejected these sections because it determined that they were overbroad and that the bribery and official misconduct provisions already adequately covered wrongdoing involving public servants.

200.00. BRIBERY INVOLVING PUBLIC SERVANTS: DEFINITION OF TERM

THE FOLLOWING DEFINITION IS APPLICABLE TO THIS PART:

"ECONOMIC BENEFIT" MEANS ANY BENEFIT IN THE FORM OF MONEY OR PROPERTY, OR OF A FEE, REWARD, OR TESTIMONIAL, OR OF A COMMERCIAL INTEREST, OR OF ANYTHING ELSE, THE PRIMARY SIGNIFICANCE OF WHICH IS PECUNIARY OR ECONOMIC GAIN.

COMMENT

For commentary, see §200.10.

200.05. BRIBERY

A PERSON IS GUILTY OF BRIBERY WHEN HE CONFERS, OR OFFERS OR AGREES TO CONFER, ANY ECONOMIC BENEFIT UPON A PUBLIC SERVANT UPON ANY AGREEMENT OR UNDERSTANDING THAT SUCH PUBLIC SERVANT'S VOTE, OPINION, JUDGMENT, CONDUCT, DECISION OR EXERCISE OF DISCRETION AS A PUBLIC SERVANT WILL HEREBY BE INFLUENCED.

BRIBERY IS A CLASS C FELONY.

COMMENT

For commentary, see §200.10.

200.10. BRIBE RECEIVING

A PUBLIC SERVANT IS GUILTY OF BRIBE RECEIVING WHEN

HE SOLICITS, DEMANDS, ACCEPTS, RECEIVES, OR AGREES TO ACCEPT OR RECEIVE ANY ECONOMIC BENEFIT FROM A PERSON UPON AN AGREEMENT OR UNDERSTANDING THAT HIS VOTE, OPINION, JUDGMENT, CONDUCT, DECISION OR EXERCISE OF DISCRETION AS A PUBLIC SERVANT WILL THEREBY BE INFLUENCED.

BRIBE RECEIVING IS A CLASS C FELONY.

COMMENT

The Maryland Constitution requires that the legislature punish bribery and bribe receiving involving public officials. §50 of Article III reads:

> It shall be the duty of the General Assembly, at its first session, held after the adoption of this Constitution, to provide by Law for the punishment, by fine, or imprisonment in the Penitentiary, or both, in the discretion of the Court, of any person, who shall bribe, or attempt to bribe, any Execntive, or Judicial officer of the State of Maryland, or any member, or officer of the General Assembly of the State of Maryland, or of any Municipal corporation in the State of Maryland, or any Executive officer of such corporation, in order to influence him in the performance of any of his official duties; and, also, to provide by Law for the punishment, by fine, or imprisonment in the Penitentiary, or both, in the discretion of the Court, of any said officers, or members, who shall demand, or receive any bribe, fee, reward, or testimonial for the performance of his official duties, or for neglecting, or failing to perform the same; and, also, to provide by Law for compelling any person, so bribing, or attempting to bribe, or so demanding, or receiving a bribe, fee, reward, or testimonial, to testify against any person, or persons, who may have committed any of said offenses; provided, that any person, so compelled to testify, shall be exempted from trial and punishment of the offence, of which he may have been guilty; and any person, convicted of such offense, shall, as part of the punishment thereof, be forever disfranchised and disqualified from holding any office of trust, or profit, in this State.

The Commission drafted §§200.05 and 200.10 on bribery and bribe receiving in conformity with this constitutional requirement. The legislature fulfills its obligation under the Constitution to

provide for the punishment of bribery and bribe receiving involving public officials when it enacts these two sections and section 5.60 on the granting of an immunity from prosecution in order to compel testimony in bribery prosecutions. These three sections thus supersede the present §23 of Article 27 on bribery.

Both the constitutional provision and the present statutory section on bribery enumerate various public officials covered by the crime of bribery. §§200.05 and 200.10 do not enumerate particular officials but rely on the general definition of "public servant" in §10.00(15). That subsection defines "public servant" broadly enough to cover an officer or employee of any governmental unit in the state. It also covers de facto officers and employees who are not de jure (§10.00(15)(b)) and a person who has been elected or designated to become a public servant. No doubt the range of persons covered by this definition is broader than the public officials enumerated in the constitutional provision. §§200.05 and 200.10 are thus broad enough to cover and punish the bribery of all the public officials enumerated in the Constitution. There is no reason why the legislature, in performing its constitutional duty to define and punish the crime of bribery, must enumerate in the bribery sections the officials enumerated in the Constitution or must limit the coverage of the bribery sections to those officials. Any enumeration simply clutters up the Code. While the present Maryland statute on bribery (§23 of Article 27) does enumerate types of officials in a fashion similar to that of the Constitution, it adopts different wording than that of the Constitution and expands the coverage of the offense beyond that required by the Constitution. For instance, the Constitution mentions only "Executive officers," while §23 covers more broadly "any officer or employee." The Constitution also speaks only of executive officers of the State or of any municipal corporation in the State, while the statute covers "any officer or any employee of the State, or of any county, municipality or other political subdivision of the State." There is no doubt that the legislature performed its constitutional duty in enacting §23. Brown v. State, 233 Md. 288, 196 A. 2d 614 (1964).

The Commission considered a number of drafts which attempted to specify the corruption of public servants which should be punished as bribery. The term "bribe" is a difficult one to define. In particular, the Commission found the comparable New

York sections (§§200.00 and 200.05 of the Penal Law) dangerously broad because they punished the conferral of any "benefit" upon a public servant or the acceptance by a public servant of any "benefit." Read literally, that language would seem to punish the public servant who solicits or accepts the votes of individual citizens by favoring some favorite project of theirs. §§200.05 and 200.10 therefore employ the narrower term "economic benefit."

The definition of "economic benefit" in §200.00 is an adaption of §4701(3) of the proposed Michigan Code (Sept., 1967). The words "fee, reward, or testimonial" have been added to conform the coverage of the bribery and bribe receiving sections with that mandated by Section 50 of Article III of the Maryland Constitution. The statutory sections punishing bribery and bribe receiving must be at least as broad as the Constitution requires. This definition of "economic benefit" operates, however, so to limit the coverage of §§200.05 and 200.10 as to avoid the overbreadth feared by the Commission. Instances of horse-trading between public servants will not be covered if the public servants do not benefit economically. The definition of "economic benefit" thus effectively restricts the coverage of these sections to instances of corruption which would be covered by the common law offense. It accomplishes this objective without having to rely on the common law definition of "bribe" and without employing such vague adjectives as "corruptly."

§§200.05 and 200.10 on bribery and bribe receiving employ this new definition of "economic benefit." These sections cover the offering of an economic benefit to a public servant and the solicitation of an economic benefit by a public servant. The trend around the country is to include such preparatory conduct within the statutory formulations defining the substantive offense of bribery rather than relegating it to the law of attempt. There is also substantial authority that the preparatory conduct in fact constitutes the completed offense of bribery. Perkins, Criminal Law 476 (2nd ed. 1969). Of course, the general attempt sections will still cover some preliminary conduct that does not amount to an offer or solicitation within §§200.05 or 200.10. The broad coverage of those two sections and the general sections on attempt in Part 110 of this Code insure that the Legislature fulfills the constitutional mandate to punish attempted bribery.

§§200.05 and 200.10 make one other significant

change in the law of bribery. Section 50 of Article III of the Constitution requires that the bribe must be tendered "in order to influence him (the public servant) in the performance of any of his official duties"; and section 23 of Article 27 of the Code requires that the bribe must be tendered "in order to influence any such officer or person in the performance of any of his official duties." The Maryland Court of Appeals has construed "official duties" quite narrowly. In Sugarman v. State, 173 Md. 52, 195 Atl. 324 (1937), the Court held that a uniformed policeman on the beat was not acting in the performance of any "official duty" when he made an illegal arrest. Therefore, the person illegally arrested did not commit bribery when he offered the policeman some money to let him go. The result in this case is right as a matter of statutory interpretation but seems wrong on policy grounds. The legality of an arrest often rests on technicalities; the offering of money to the police officer is a corrupting influence whether or not the arrest is technically legal. §§200.05 and 200.10 intend to change this result by requiring only that the bribe must be offered for the purpose of influencing the public servant's vote, opinion, judgment, action, decision or exercise of discretion "as a public servant." It would not be bribery to offer a policeman-neighbor $10 to cut his shaggy lawn so as to improve the appearance of the neighborhood; but it would be bribery to offer him money to influence him in the performance of his job as a police officer. It no longer matters that "as a public servant" he was acting illegally. The effect of this change is to broaden slightly the offense of bribery. This is consistent with the constitutional provision because the legislature fulfills its constitutional duty when it enacts a bribery statute punishing an offense as broad as or broader than the bribery offense spelled out in section 50 of Article III of the Constitution. The legislature need not define the offense exactly as the Constitution does. Brown v. State, supra.

Sections 200.05 and 200.10 do not cover the bribery of voters, which is presently covered by §26-16 of Article 33. This offense may safely be left to the Election Code. Thus, Section 28 of Article 27 on bribery of voters would be repealed because it is unnecessary.

PART 205: ESCAPE AND RELATED OFFENSES

205.00. ESCAPE AND RELATED OFFENSES; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "DETENTION FACILITY" MEANS (A) ANY OF THE CORRECTIONAL OR REFORMATORY INSTITUTIONS UNDER THE DEPARTMENT OF CORRECTIONS AS ENUMERATED IN ARTICLE 27, SECTION 689; OR (B) ANY PLACE USED FOR THE CONFINEMENT, PURSUANT TO AN ORDER OF A COURT, OF A PERSON (I) CHARGED WITH OR CONVICTED OF AN OFFENSE, OR (II) CHARGED WITH BEING OR ADJUDICATED A YOUTHFUL OFFENDER, WAYWARD MINOR, JUVENILE DELINQUENT, OR DEFECTIVE DELINQUENT, OR (III) HELD FOR EXTRADITION OR AS A MATERIAL WITNESS, OR (IV) OTHERWISE CONFINED PURSUANT TO AN ORDER OF A COURT. AN ARREST WARRANT IS NOT AN ORDER OF A COURT WITHIN THE MEANING OF THE PRECEDING SENTENCE. A PERSON ESCAPES FROM A DETENTION FACILITY NOT ONLY WHEN HE ESCAPES FROM CONFINEMENT WITHIN ONE OF THE INSTITUTIONS OR PLACES SPECIFIED IN THE FIRST SENTENCE OF THIS SUBSECTION, BUT ALSO WHEN HE ESCAPES WHILE BEING TRANSPORTED TO THE FIRST OF SUCH INSTITUTIONS OR PLACES IN WHICH HE IS TO BE CONFINED, OR WHILE BEING TRANSPORTED FROM ONE SUCH INSTITUTION OR PLACE TO ANOTHER, OR WHILE HE IS TEMPORARILY ABSENT FROM SOME SUCH PLACE OR INSTITUTION IN CONNECTION WITH A WORK-RELEASE PROGRAM OR FOR ANY PURPOSE PURSUANT TO WHICH HE IS ALLOWED OR REQUIRED TO SPEND, WHILE UNDER A SENTENCE OF IMPRISONMENT, SOME PERIOD OF TIME OUTSIDE THE PHYSICAL CONFINES OF SUCH PLACE OR INSTITUTION.

2. "CUSTODY" MEANS RESTRAINT BY A PUBLIC SERVANT PURSUANT TO AN ARREST OR AN ORDER OF A COURT.

3. "CONTRABAND" MEANS ANY ARTICLE OR THING WHICH A PERSON CONFINED IN A DETENTION FACILITY IS PROHIBITED FROM OBTAINING OR POSSESSING BY STATUTE, RULE, REGULATION OR ORDER.

4. "DANGEROUS CONTRABAND" MEANS CONTRABAND WHICH IS CAPABLE OF SUCH USE AS MAY ENDANGER THE SAFETY OR SECURITY OF A DETENTION FACILITY OR ANY PERSON THEREIN.

5. "ESCAPE" HAS ITS ORDINARY MEANING; THE CULPABLE MENTAL STATE REQUIRED FOR ESCAPE IS INTENTION OR KNOWLEDGE.

COMMENT

These definitions will be discussed, as necessary, in the provisions in which they are used below.

205.05. ESCAPE IN THE THIRD DEGREE

A PERSON IS GUILTY OF ESCAPE IN THE THIRD DEGREE WHEN HE ESCAPES FROM CUSTODY.

ESCAPE IN THE THIRD DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

Escape in the third degree is the basic escape provision, covering any escape from custody. Custody is defined in §205.00 as "restraint by a public servant pursuant to an arrest or an order of a court." (Public servant is defined in §10.00(15)). The mental element required is intention or knowledge. Cases in which the prisoner knows he is escaping but does not desire it will be rare, but it is necessary to include the alternative of knowledge to be sure of covering, as a party to the escape under Part 20, a guard who can be shown to have knowingly permitted the escape without justification but not to have desired it.

205.10. ESCAPE IN THE SECOND DEGREE

A PERSON IS GUILTY OF ESCAPE IN THE SECOND DEGREE WHEN:

1. HAVING BEEN CONFINED PURSUANT TO AN ORDER OF A COURT, HE ESCAPES FROM A DETENTION FACILITY; OR

2. HAVING BEEN CONFINED PURSUANT TO AN ORDER OF A COURT, HE FAILS TO RETURN TO A DETENTION FACILITY PROMPTLY FOLLOWING TEMPORARY LEAVE GRANTED FOR A SPECIFIED PURPOSE OR A LIMITED PERIOD; OR

3. HE THREATENS OR INTENTIONALLY, KNOWINGLY, RECKLESSLY, OR WITH CRIMINAL NEGLIGENCE CAUSES PHYSICAL INJURY TO ANOTHER IN THE COURSE OF ESCAPING FROM CUSTODY; OR

4. HAVING BEEN ARRESTED FOR, CHARGED WITH OR CONVICTED OF A FELONY, HE ESCAPES FROM CUSTODY.

ESCAPE IN THE SECOND DEGREE IS A CLASS D FELONY.

COMMENT

Escape is aggravated to a class D felony by any one of four factors: (1) The escape is from a detention facility, where the defendant is confined pursuant to court order. (Detention facility is defined in §205.00 as a place used for confinement by the Department of Corrections or pursuant to a court order, and an escape from a detention facility includes not only an escape from a prison, jail, juvenile facility, institution for juvenile delinquents, or the like, but also an escape while being transported to or between such places or while allowed or authorized to be temporarily away from

such a place); (2) The defendant fails to return from temporary leave from a detention facility; (3) In the course of the escape, the defendant threatens, or is at fault in causing, physical injury to another; or (4) The defendant has been arrested for, charged with, or convicted of a felony. These provisions virtually limit third degree escapes to those arrested for misdemeanors, who have not yet had a court pass upon the issue of their confinement (an arrest warrant is not such a court order as will qualify for escape in the second degree), and who neither use or threaten force in the course of the escape.

The grading scheme in the escape offenses is based upon New York's, but the Commission has made some changes. The principal one is stress the presence of a court order rather than the nature of the place from which the escape is made as a factor of aggravation. We have adopted an additional provision to cover failure to return from prison leave and have also added threats or danger to others as a factor of aggravation. The broad definition of escape from a detention facility does not make subsection (2) redundant with respect to subsection (1); an escape involves a knowing departure from a permitted location. The prisoner who is on leave, and merely delays his return from a place where he is authorized to be, does not escape from a detention facility, even as this is broadly defined, but he does fall within the prohibition of subsection (2).

205.15. ESCAPE IN THE SECOND DEGREE; AFFIRMATIVE DEFENSE

IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION BASED ON SUBSECTION TWO OF SECTION 205.10 THAT THE DEFENDANT:

1. WAS PREVENTED FROM RETURNING TO THE SPECIFIED PLACE AT THE SPECIFIED TIME BY CIRCUMSTANCES TO THE CREATION OF WHICH HE DID NOT CONTRIBUTE IN RECKLESS DISREGARD OF THE REQUIREMENT TO RETURN; AND

2. DID NOT THEREAFTER UNREASONABLY FAIL, AS SOON AS HE WAS ABLE TO DO SO, TO RETURN VOLUNTARILY TO THE DETENTION FACILITY OR TO TAKE OTHER APPROPRIATE MEASURES TO PLACE HIMSELF IN OFFICIAL CUSTODY, IN EITHER CASE MAKING FULL AND PROMPT DISCLOSURE OF THE CIRCUMSTANCES.

COMMENT

The Commission has added a justification provision to deal with the situation in which the prisoner has a valid excuse for failure to return promptly from leave. It is required for this

defense, on which the accused has the burden of proof, that the prisoner not have been reckless in creating a situation making his return impossible and that he have taken prompt steps to rectify the situation, where possible.

205.20. ESCAPE IN THE FIRST DEGREE

A PERSON IS GUILTY OF ESCAPE IN THE FIRST DEGREE WHEN IN THE COURSE OF ESCAPING FROM CUSTODY HE INTENTIONALLY, KNOWINGLY, RECKLESSLY OR WITH CRIMINAL NEGLIGENCE CAUSES DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER OR MAKES USE OF A DEADLY WEAPON OR DANGEROUS INSTRUMENT.

ESCAPE IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

The most serious form of escape is that in which the escapee culpably injures or kills another or uses a deadly weapon or dangerous instrument. More serious instances of such conduct could be prosecuted as murder or attempted murder. Felony-murder provisions attach to escape in the first or second degree. See §125.05(2).

205.25. ESCAPE; AFFIRMATIVE DEFENSE

IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE OF ESCAPE, OTHER THAN ESCAPE FROM CUSTODY PURSUANT TO AN ORDER OF A COURT, THAT THE DEFENDANT WAS UNLAWFULLY PLACED OR MAINTAINED IN CUSTODY, IF:

1. THE ESCAPE INVOLVED NO SUBSTANTIAL RISK OF HARM TO THE PERSON OR PROPERTY OF ANYONE OTHER THAN THE DEFENDANT; OR

2. THE PERSON EXERCISING CUSTODY DID NOT ACT IN GOOD FAITH UNDER COLOR OF LAW.

COMMENT

In the Justification provisions, the Commission has adopted the view that, except in extreme circumstances, an arrestee may not justify the use of force to avoid arrest by a police officer, even if the arrest is in fact unlawful. See §35.26. A similar position is taken with respect to escape following an unlawful arrest. If confinement is not yet pursuant to a court order, and is in fact unlawful, and involves any substantial risk of harm to the person or property of another, a defense to an escape charge is allowed only if the person exercising custody did not act in

good faith under color of law. Where there is no substantial risk of harm to person or property, it is an affirmative defense merely that the arrest was unlawful and confinement was not pursuant to court order. Such a non-violent escape in response to an injustice does no harm that the law ought to punish.

205.30. PROMOTING PRISON CONTRABAND IN THE SECOND DEGREE

A PERSON IS GUILTY OF PROMOTING PRISON CONTRABAND IN THE SECOND DEGREE WHEN:

1. BEING A PERSON CONFINED IN A DETENTION FACILITY, HE KNOWINGLY MAKES, OBTAINS OR POSSESSES ANY CONTRABAND; OR

2. NOT BEING A PERSON CONFINED IN A DETENTION FACILITY, HE, OTHERWISE THAN (I) IN THE DISCHARGE OF HIS DUTY OR (II) WITH THE CONSENT OF THE GOVERNING BOARD OR CHIEF OFFICER OF SUCH DETENTION FACILITY, KNOWINGLY INTRODUCES ANY CONTRABAND INTO A DETENTION FACILITY OR KNOWINGLY POSSESSES ANY CONTRABAND THEREIN.

PROMOTING PRISON CONTRABAND IN THE SECOND DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

Promoting prison contraband is an offense which may be committed by a prisoner in a detention facility, an officer of a facility, or a visitor or correspondent. Contraband is defined as anything that a prisoner is prohibited from obtaining or possessing by statute, rule, regulation or order. (§205.00(3)). A prisoner is guilty of the offense when he knowingly makes, obtains or possesses contraband. Others may commit the offense by knowingly introducing contraband or possessing it in a detention facility, otherwise than in discharge of their duties (as in the case of a guard's authorized weapon or uniform), or with the consent of the governing board or chief officer of the facility.

205.35. PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE

A PERSON IS GUILTY OF PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE WHEN:

1. BEING A PERSON CONFINED IN A DETENTION FACILITY, HE KNOWINGLY MAKES, OBTAINS OR POSSESSES ANY DANGEROUS CONTRABAND; OR

2. NOT BEING A PERSON CONFINED IN A DETENTION FACILITY, HE, OTHERWISE THAN (I) IN THE DISCHARGE OF HIS

DUTY OR (II) WITH THE CONSENT OF THE GOVERNING BOARD OR CHIEF OFFICER OF SUCH DETENTION FACILITY, KNOWINGLY INTRODUCES ANY DANGEROUS CONTRABAND INTO A DETENTION FACILITY OR KNOWINGLY POSSESSES ANY DANGEROUS CONTRABAND THEREIN.

PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE IS A CLASS D FELONY.

COMMENT

The offense is aggravated, in the case of a prisoner or another, if the contraband is dangerous, i.e., capable of such use as may endanger the safety or security of a detention facility or any person therein. (§205.00(4)).

205.40. RESISTING ARREST

1. A PERSON IS GUILTY OF RESISTING ARREST WHEN, BY THE USE OR THREATENED USE OF FORCE, HE INTENTIONALLY PREVENTS OR ATTEMPTS TO PREVENT A POLICE OFFICER FROM EFFECTING AN ARREST OF HIMSELF OR ANOTHER PERSON.

2. IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER SUBSECTION ONE OF THIS SECTION THAT THE ARREST WAS IN FACT UNLAWFUL, AND, EITHER;

A. THE DEFENDANT KNEW THAT THE ARREST WAS UNLAWFUL AND NOT MADE IN GOOD FAITH; OR

B. THE DEFENDANT REASONABLY BELIEVED THAT THE ARREST WAS UNLAWFUL AND THAT IT WAS MADE BY ONE WHO WAS NEITHER A POLICE OFFICER NOR A PRIVATE PERSON WHO HAD BEEN DIRECTED OR AUTHORIZED TO ASSIST A POLICE OFFICER BY SUCH OFFICER.

RESISTING ARREST IS A CLASS A MISDEMEANOR.

COMMENT

The wording of this section on resisting arrest is governed by the scope of §35.26, dealing with justification for resisting unlawful arrest, which the Commission has limited to extreme situations. Since no justification would be available in the ordinary case of resisting lawful or unlawful arrest by a police officer, it is not absolutely necessary to have a separate offense of Resisting Arrest; such an act could be prosecuted as an ordinary assault or homicide. More serious instances will so be prosecuted under the proposed code. For example, causing or attempting to cause physical injury to a police officer with intent to prevent him from performing a lawful duty, can be

prosecuted as a class D felony; culpably causing serious physical injury to another person, in the course of and in futherance of the commission or attempted commission of a felony or of immediate flight therefrom, is a class C felony. (§§120.15(3); 120.25(4)). But it is as well to have the separate misdemeanor of resisting arrest, where the stress is on prevention of arrest rather than inflicting of injury.

205.45. BAIL JUMPING IN THE SECOND DEGREE

A PERSON IS GUILTY OF BAIL JUMPING IN THE SECOND DEGREE WHEN HE HAS BEEN RELEASED FROM CUSTODY OR ALLOWED TO REMAIN AT LIBERTY, EITHER UPON BAIL OR UPON HIS OWN RECOGNIZANCE, UPON CONDITION THAT HE WILL SUBSEQUENTLY APPEAR PERSONALLY IN CONNECTION WITH A CRIMINAL ACTION OR PROCEEDING, AND WHEN HE DOES NOT APPEAR PERSONALLY ON THE REQUIRED DATE.

BAIL JUMPING IN THE SECOND DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

This section punishes one released or allowed to remain at liberty on bail or on his own recognizance, when he fails to appear in connection with a criminal proceeding, in violation of an imposed condition.

205.50. BAIL JUMPING IN THE FIRST DEGREE

A PERSON IS GUILTY OF BAIL JUMPING IN THE FIRST DEGREE WHEN HE HAS BEEN RELEASED FROM CUSTODY OR ALLOWED TO REMAIN AT LIBERTY, EITHER UPON BAIL OR UPON HIS OWN RECOGNIZANCE, UPON CONDITION THAT HE WILL SUBSEQUENTLY APPEAR PERSONALLY IN CONNECTION WITH A CHARGE AGAINST HIM OF COMMITTING A FELONY, AND WHEN HE DOES NOT APPEAR PERSONALLY ON THE REQUIRED DATE.

BAIL JUMPING IN THE FIRST DEGREE IS A CLASS E FELONY.

COMMENT

The offense is aggravated if the person failing to appear is a felony defendant.

205.55. FAILING TO RESPOND TO AN APPEARANCE TICKET

1. A PERSON IS GUILTY OF FAILING TO RESPOND TO AN APPEARANCE TICKET WHEN, HAVING BEEN PERSONALLY SERVED WITH AN APPEARANCE TICKET, AS DEFINED IN SUBDIVISION TWO, BASED UPON HIS ALLEGED COMMISSION OF A MISDEMEANOR OR

VIOLATION, HE DOES NOT APPEAR PERSONALLY IN THE COURT IN WHICH SUCH APPEARANCE TICKET IS RETURNABLE ON THE RETURN DATE THEREOF.

2. AS USED IN THIS SECTION, AN APPEARANCE TICKET MEANS A WRITTEN NOTICE, WHETHER REFERRED TO AS A SUMMONS OR BY ANY OTHER NAME, ISSUED BY A POLICE OFFICER OR OTHER NON-JUDICIAL PUBLIC SERVANT AUTHORIZED BY LAW TO ISSUE THE SAME, DIRECTING A DESIGNATED PERSON TO APPEAR IN A DESIGNATED COURT AT A DESIGNATED FUTURE TIME IN CONNECTION WITH A CRIMINAL ACTION TO BE INSTITUTED IN SUCH COURT WITH RESPECT TO HIS ALLEGED COMMISSION OF A DESIGNATED OFFENSE.

3. THIS SECTION DOES NOT APPLY TO ANY CASE IN WHICH AN ALTERNATIVE TO RESPONSE TO AN APPEARANCE TICKET IS AUTHORIZED BY LAW AND THE ACTOR COMPLIES WITH SUCH ALTERNATIVE PROCEDURE.

FAILING TO RESPOND TO AN APPEARANCE TICKET IS A VIOLATION.

COMMENT

Failure to respond to a non-judicial summons or similar administrative order is made a violation under certain circumstances.

205.60. BAIL JUMPING AND FAILING TO RESPOND TO AN APPEARANCE TICKET; AFFIRMATIVE DEFENSE

IN ANY PROSECUTION FOR BAIL JUMPING IN EITHER DEGREE OR FAILING TO RESPOND TO AN APPEARANCE TICKET IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT:

1. WAS PREVENTED FROM APPEARING AT THE SPECIFIED TIME AND PLACE BY CIRCUMSTANCES TO THE CREATION OF WHICH HE DID NOT CONTRIBUTE IN RECKLESS DISREGARD OF THE REQUIREMENT TO APPEAR; AND

2. DID NOT THEREAFTER UNREASONABLY FAIL, AS SOON AS HE WAS ABLE TO DO SO, EITHER TO APPEAR VOLUNTARILY OR TO TAKE APPROPRIATE MEASURES TO INFORM THE COURT OF ALL OF THE RELEVANT CIRCUMSTANCES AND SUBMIT TO FURTHER ORDER OF THE COURT AS TO HIS APPEARANCE.

COMMENT

Since no mental element of the offense of bail jumping is stated, it is necessary to provide an affirmative defense to protect those whose failure to appear is excusable, where they did not unreasonably neglect to take steps to rectify the situation.

205.65. HINDERING PROSECUTION; DEFINITION OF TERM

1. AS USED IN SECTIONS 205.70, 205.75 AND 205.80, A PERSON "RENDERS CRIMINAL ASSISTANCE" WHEN, WITH INTENT TO PREVENT, HINDER OR DELAY THE DISCOVERY OR APPREHENSION OF, OR THE LODGING OF A CRIMINAL CHARGE AGAINST ANOTHER PERSON WHO HE KNOWS OR BELIEVES HAS COMMITTED A CRIME OR WHO HE KNOWS OR BELIEVES IS BEING SOUGHT BY LAW ENFORCEMENT OFFICIALS FOR THE COMMISSION OF A CRIME, OR WITH INTENT TO ASSIST A PERSON IN PROFITING OR BENEFITING FROM THE COMMISSION OF A CRIME, HE:

A. HARBORS OR CONCEALS SUCH PERSON; OR

B. WARNS SUCH PERSON OF IMPENDING DISCOVERY OR APPREHENSION; OR

C. PROVIDES SUCH PERSON WITH MONEY, TRANSPORTATION, WEAPON, DISGUISE OR OTHER MEANS OF AVOIDING DISCOVERY OR APPREHENSION; OR

D. PREVENTS OR OBSTRUCTS, BY MEANS OF FORCE, INTIMIDATION OR DECEPTION, ANYONE FROM PERFORMING AN ACT WHICH MIGHT AID IN THE DISCOVERY OR APPREHENSION OF SUCH PERSON OR IN THE LODGING OF A CRIMINAL CHARGE AGAINST HIM; OR

E. SUPPRESSES, BY ANY ACT OF CONCEALMENT, ALTERATION OR DESTRUCTION, ANY PHYSICAL OBJECT, WHICH HE IS NOT PRIVILEGED AS A MATTER OF LAW TO SUPPRESS, WHETHER OR NOT ADMISSIBLE IN EVIDENCE, WHICH MIGHT AID IN THE DISCOVERY OR APPREHENSION OF SUCH PERSON OR IN THE LODGING OF A CRIMINAL CHARGE AGAINST HIM; OR

F. AIDS SUCH PERSON TO SECRETE, DISGUISE, OR CONVERT THE PROCEEDS OF A CRIME, OR OTHERWISE PROFIT FROM A CRIME.

2. A PERSON MAY RENDER CRIMINAL ASSISTANCE WITHIN THE MEANING OF SUBSECTION ONE OF THIS SECTION NOTWITHSTANDING THAT THE PERSON WHOSE DISCOVERY, APPREHENSION, OR CHARGING THE DEFENDANT INTENDED TO PREVENT, HINDER, OR DELAY, OR WHOM THE DEFENDANT ASSISTED OR INTENDED TO ASSIST, IS NOT, HAS NOT BEEN, OR CANNOT BE PROSECUTED FOR A CRIME, OR A PROSECUTION AGAINST HIM IS NEVER COMPLETED OR CONCLUDED, OR HE IS ACQUITTED OF A CHARGE OF CRIME, OR HE IS CONVINCED OF OR HAS COMMITTED A CRIME OF A NATURE, GRADE, OR DEGREE DIFFERENT FROM THAT THE DEFENDANT BELIEVES HIM TO HAVE COMMITTED.

COMMENT

This is the basic definitional section for the offense which covers and somewhat expands the common law accessory after the fact concept. It is a crime

of purpose or intent, and the intent must be to prevent, hinder or delay discovery, apprehension or commencement of prosecution for a criminal offense, or to assist a person in profiting or benefiting from the commission of a crime. It is not necessary, as it was necessary at common law (State v. Magliano, 7 Md. App. 286, 255 A. 2d 470), that the person being protected or aided actually be convicted of a crime, as long as he has committed a crime, as the accused knows or believes, or the accused knows or believes he is being sought by law enforcement officials for the commission of a crime.

This intention must accompany one of a number of specified acts. These include harboring or concealing a suspect or warning him of impending discovery, providing him with money or other specified means of avoiding apprehension, improperly preventing others from aiding in apprehension or lodging a criminal charge, suppressing unprivileged physical evidence which might aid in discovery or apprehension, and aiding a suspect to profit from his crime.

Other provisions of the code apply to obstructive conduct after lodging of a charge or apprehension. See Parts 210 and 215, dealing with such matters as perjury, tampering with evidence, and contempt.

205.70. HINDERING PROSECUTION IN THE THIRD DEGREE

A PERSON IS GUILTY OF HINDERING PROSECUTION IN THE THIRD DEGREE WHEN HE RENDERS CRIMINAL ASSISTANCE TO A PERSON WHO HAS COMMITTED A CRIME.

HINDERING PROSECUTION IN THE THIRD DEGREE IS A CLASS B MISDEMEANOR.

COMMENT

The lowest grade of the offense of hindering prosecution is applicable to rendering criminal assistance to one who has committed any crime. Unlike common law, this section extends to misdemeanors as well as felonies.

205.75. HINDERING PROSECUTION IN THE SECOND DEGREE

A PERSON IS GUILTY OF HINDERING PROSECUTION IN THE SECOND DEGREE WHEN HE RENDERS CRIMINAL ASSISTANCE TO A PERSON WHO HAS COMMITTED A FELONY OTHER THAN A CLASS E FELONY.

HINDERING PROSECUTION IN THE SECOND DEGREE IS A

CLASS E FELONY.

COMMENT

The offense is aggravated if the crime committed by the person criminally assisted is a high grade of felony — class D or more serious.

205.80. HINDERING PROSECUTION IN THE FIRST DEGREE

A PERSON IS GUILTY OF HINDERING PROSECUTION IN THE FIRST DEGREE WHEN HE RENDERS CRIMINAL ASSISTANCE TO A PERSON WHO HAS COMMITTED A CLASS A FELONY, KNOWING OR BELIEVING THAT SUCH PERSON HAS ENGAGED IN THE CONDUCT CONSTITUTING SUCH CLASS A FELONY.

HINDERING PROSECUTION IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

The highest degree of the offense is reserved for punishment of one who knowingly renders criminal assistance to a murderer or other class A felon.

Note that, except under this section, a mistake by the defendant about what kind of crime the person to whom he is rendering criminal assistance has committed is irrelevant. The final clause of section 205.65(2) states that he may render criminal assistance even if the person assisted has committed a crime of a nature, grade, or degree different from that the defendant believes him to have committed. Since the statute does not provide that the state of mind established by the mistake prevents criminal liability, there is no defense of mistake under section 15.20(2); nor does the mistake negative the state of mind required by the statute to establish a material element of the offense under section 15.20(1). None of the other mistake provisions apply to sections 205.70 or 205.75 in the situation supposed. Therefore, when the person assisted has in fact committed a class D felony or more serious crime, the defendant who renders criminal assistance, as defined, is guilty of a class E felony, even if he believes, reasonably or otherwise, that a lesser crime has been committed. There is no good reason why the defendant who knows or believes he is aiding a criminal in one of the ways specified in section 205.65 should not take the risk that the criminal has committed a more serious offense than supposed, and it would often be difficult or impossible to prove what precise crime the defendant thought had been committed. If the defendant thinks the crime

more serious than it actually is, he may get something of a windfall and be subject to prosecution under section 205.70 rather than section 205.75.

However, since section 205.80 by its terms requires the defendant's knowledge or belief that the person aided has committed a class A felony, as well as the actual commission of the class A felony, the provisons of section 15.20 come into operation. If the defendant shows a mistaken belief that a lesser crime was committed by the person aided, this prevents imposition of the punishment specified in section 205.80, but under section 15.20(3) the defendant in such case could be convicted under section 205.80 and sentenced as if he had aided one who had committed the crime the defendant supposed to have been committed (according to section 205.70 or section 205.75).

Of course, if contrary to the defendant's belief, the person aided has committed no crime at all, the defendant is not guilty of hindering prosecution in any degree. He may, however, be guilty of an attempt under section 110.00, in view of the impossibility provisions of section 110.10.

PART 210: PERJURY

210.00. PERJURY; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "OATH" INCLUDES AN AFFIRMATION AND EVERY OTHER MODE AUTHORIZED BY LAW OF ATTESTING TO THE TRUTH OF THAT WHICH IS STATED.

2. "TESTIMONY" MEANS AN ORAL STATEMENT MADE UNDER OATH IN A PROCEEDING BEFORE ANY COURT, BODY, AGENCY, PUBLIC SERVANT OR OTHER PERSON AUTHORIZED BY LAW TO CONDUCT SUCH PROCEEDING AND TO ADMINISTER THE OATH OR CAUSE IT TO BE ADMINISTERED.

3. "STATEMENT" MEANS ANY REPRESENTATION, BUT INCLUDES A REPRESENTATION OF OPINION, BELIEF OR OTHER STATE OF MIND ONLY IF THE REPRESENTATION CLEARLY RELATES TO STATE OF MIND APART FROM OR IN ADDITION TO ANY FACTS WHICH ARE THE SUBJECT OF THE REPRESENTATION.

4. "MATERIAL" MEANS (A) IN THE CASE OF TESTIMONY, CAPABLE OF AFFECTING THE COURSE OR OUTCOME OF THE PROCEEDING, REGARDLESS OF THE ADMISSIBILITY OF THE STATEMENT IN QUESTION UNDER RULES OF EVIDENCE; AND (B) IN THE CASE OF ANY OTHER STATEMENT, CAPABLE OF AFFECTING THE

CONDUCT IN RESPONSE TO SUCH STATEMENT, OF ANY PUBLIC SERVANT INTENDED BY THE DEFENDANT TO RELY UPON IT.

5. "OATH REQUIRED BY LAW." AN AFFIDAVIT, DEPOSITION OR OTHER SUBSCRIBED WRITTEN INSTRUMENT IS ONE FOR WHICH AN "OATH IS REQUIRED BY LAW" WHEN, ABSENT AN OATH OR SWEARING THERETO, OR A STATEMENT OR CERTIFICATE THAT IT IS SUBMITTED UNDER PENALTIES OF PERJURY, IT DOES NOT OR WOULD NOT, ACCORDING TO STATUTE OR APPROPRIATE REGULATORY PROVISONS, HAVE LEGAL EFFICACY IN A COURT OF LAW OR BEFORE ANY PUBLIC OR GOVERNMENTAL BODY, AGENCY OR PUBLIC SERVANT TO WHOM IT IS OR MIGHT BE SUBMITTED.

6. "SWEAR FALSELY." A PERSON "SWEARS FALSELY" WHEN HE INTENTIONALLY MAKES A FALSE STATEMENT WHICH HE DOES NOT BELIEVE TO BE TRUE, EITHER (A) UNDER OATH IN A SUBSCRIBED WRITTEN INSTRUMENT, WHERE SUCH STATEMENT IS EITHER (I) ONE FOR WHICH AN OATH IS REQUIRED BY LAW, OR (II) ONE WHICH IS INTENDED TO MISLEAD A PUBLIC SERVANT IN THE PERFORMANCE OF HIS OFFICIAL FUNCTIONS, OR (B) WHILE GIVING TESTIMONY.

COMMENT

These definitions will be discussed, as necessary, in the provisions in which they are used below.

210.05. PERJURY IN THE THIRD DEGREE

A PERSON IS GUILTY OF PERJURY IN THE THIRD DEGREE WHEN HE SWEARS FALSELY.

PERJURY IN THE THIRD DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

As the Model Penal Code draftsmen put it, "False testimony and other misleading information to officials can convert governmental power into an instrument of injustice rather than justice, with unfortunate consequences not only for the individual whose life, freedom or property may be affected, but also for the community's general sense of security and confidence in the State. On the other hand, not all lying to officials can usefully or safely be made criminal." (Tent. Dr. #6, p. 100).

Perjury in the third degree is the basic false swearing offense, and is a lesser included offense for both of the two higher degrees of perjury, which are themselves mutually exclusive — one relating solely to false testimony, and the other solely to false written statements. There are four elements,

as appears in the definition of "swear falsely": (1) the statement must be false, (2) the accused must make the statement intentionally, not believing it to be true (uncertainty as to truth is sufficient), (3) the statement must be made under oath (or authorized substitute, such as affirmation), and (4) it must either be an "oral statement . . . in a proceeding before any court, body, agency, public servant or other person authorized by law to conduct such proceeding and to administer the oath of cause it to be administered," or a subscribed written statement for which an oath is required by law for legal efficacy or which is intended to mislead a public servant in the performance of his official functions.

The punishment of perjury in judicial and other official proceedings has been widely extended to cover a number of cases of false swearing in connection with official matters. Maryland (Art. 27, §435) extends the crime beyond common law perjury to "affidavits required by law to be taken; . . . affidavits to accounts or claims made for the purpose of inducing any court or officer to pass such accounts or claims; . . . affidavits required to be made to reports and returns made to the General Assembly or any officer of the government;. . . (and) affidavits or affirmations made pursuant to the Maryland Rules." It will be observed that the Maryland crime does not, as some modern codes do, extend to false affidavits in other contexts, e.g., affidavits made in connection with dealings between private parties, not intended to be presented to an official. The Model Penal Code points out that in the absence of an intention to defraud or the like (conduct punished elsewhere), there is no real need for putting criminal sanctions behind private oaths, and that there is some danger of the improper employment of perjury threats by small loan companies which have obtained oaths from debtors, and in similar situations. The Commission has defined the term "swear falsely," central to the perjury offenses, to exclude sworn statements (outside official proceedings) unless they are either required by law or intended to mislead a public servant in the performance of his official functions.

The definition of "oath required by law" makes it clear that when the law requires for legal efficacy that a statement be made under penalties of perjury, as is common, for example, in tax returns, such a statement, if false, may be perjury.

Following the Model Penal Code (§241.0(2)) and

the Draft Federal Code (§1354(4)), the Commission requires that if the alleged perjurious statement is one of opinion, belief or other state of mind, the representation clearly relate to state of mind apart from or in addition to any facts which are the subject of the representation. This eliminates prosecutions based on such grounds as those suggested in United States v. Remington, 191 F 2d (2 Cir. 1951), (See: Model Penal Code, T.D. #6, pp. 116 ff.), where the defendant was said to have misrepresented his belief as to his membership in the Communist Party, even though there may have been no misrepresentation as to his actual membership, and the tribunal was interested only in the fact of his past membership. However, where the question is directed not at actual membership, but at the witness's state of belief, e.g., "At that time, did you consider yourself a member of the party?" or "Give us your professional opinion, doctor," a perjury prosecution should be possible on the basis of a misstatement of belief. The language in the definition of "statement" is designed to make this distinction.

210.10. PERJURY IN THE SECOND DEGREE

A PERSON IS GUILTY OF PERJURY IN THE SECOND DEGREE WHEN HE SWEARS FALSELY AND WHEN HIS FALSE STATEMENT IS (A) MADE IN A SUBSCRIBED WRITTEN INSTRUMENT FOR WHICH AN OATH IS REQUIRED BY LAW, AND (B) MADE WITH INTENT TO MISLEAD A PUBLIC SERVANT IN THE PERFORMANCE OF HIS OFFICIAL FUNCTIONS, AND (C) MATERIAL TO THE ACTION, PROCEEDING OR MATTER INVOLVED.

PERJURY IN THE SECOND DEGREE IS A CLASS E FELONY.

COMMENT

Two additional elements are necessary to raise perjury in the third degree to perjury in the second degree. The first is the making of a subscribed written statement, for which the oath is required by law, with intent to mislead a public servant in the performance of his official functions. It should be noted that both the "oath required by law" and the "intent to mislead a public servant" are required here, while either alone is enough for perjury in the third degree. Thus it would be enough for third degree perjury, but not second degree perjury, that either (a) a bank director knowingly made false statements in the oath required to be taken and subscribed by Maryland Code, Art. 11, §34, or (b) that, in order to impress a public servant, the defendant intentionally presented a false statement under oath, even though no oath was required.

The other new requirement for perjury in the second degree is materiality. The Model Penal Code takes the position that despite difficulties, the common law requirement should be retained to distinguish the more serious forms of perjury from the basic offense. See T.D. #6, pp. 104 ff. Severe punishment should be reserved for those statements which have some tendency to distort the course or outcome of the proceeding or transaction, but even immaterial statements should be subject to some punishment, if only because in a borderline case of materiality, the courts would be likely to find the statement immaterial, and such statements should carry some penalty.

210.15. PERJURY IN THE FIRST DEGREE

A PERSON IS GUILTY OF PERJURY IN THE FIRST DEGREE WHEN HE SWEARS FALSELY AND WHEN HIS FALSE STATEMENT (A) CONSISTS OF TESTIMONY, AND (B) IS MATERIAL TO THE ACTION, PROCEEDING OR MATTER IN WHICH IT IS MADE.

PERJURY IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

Materiality, discussed in connection with second degree perjury, is also required for first degree perjury; in addition all of the requirements of third degree perjury must be present, and the statement must be in the form of testimony, as defined. This is the most serious form of false swearing, and in all of the draft codes it is punished most severely.

210.20. PERJURY; PLEADING AND PROOF WHERE INCONSISTENT STATEMENTS INVOLVED

WHERE A PERSON HAS MADE TWO STATEMENTS UNDER OATH WHICH ARE INCONSISTENT TO THE DEGREE THAT ONE OF THEM IS NECESSARILY FALSE, WHERE THE CIRCUMSTANCES ARE SUCH THAT EACH STATEMENT, IF FALSE, IS PERJURIOUSLY SO, AND WHERE EACH STATEMENT WAS MADE WITHIN THE JURISDICTION OF THIS STATE AND WITHIN THE PERIOD OF THE STATUTE OF LIMITATIONS FOR THE CRIME CHARGED, THE INABILITY OF THE STATE TO ESTABLISH SPECIFICALLY WHICH OF THE TWO STATEMENTS IS THE FALSE ONE DOES NOT PRECLUDE A PROSECUTION FOR PERJURY, AND SUCH PROSECUTION MAY BE CONDUCTED AS FOLLOWS:

1. THE INDICTMENT OR INFORMATION MAY SET FORTH THE TWO STATEMENTS AND, WITHOUT DESIGNATING EITHER, CHARGE THAT ONE OF THEM IS FALSE AND PERJURIOUSLY MADE.

2. THE FALSITY OF ONE OR THE OTHER OF THE TWO STATEMENTS MAY BE ESTABLISHED BY PROOF OR A SHOWING OF

THEIR IRRECONCILABLE INCONSISTENCY.

3. THE HIGHEST DEGREE OF PERJURY OF WHICH THE DEFENDANT MAY BE CONVICTED IS DETERMINED BY HYPOTHETICALLY ASSUMING EACH STATEMENT TO BE FALSE AND PERJURIOUS. IF UNDER SUCH CIRCUMSTANCES PERJURY OF THE SAME DEGREE WOULD BE ESTABLISHED BY THE MAKING OF EACH STATEMENT, THE DEFENDANT MAY BE CONVICTED OF THAT DEGREE AT MOST. IF PERJURY OF DIFFERENT DEGREES WOULD BE ESTABLISHED BY THE MAKING OF THE TWO STATEMENTS, THE DEFENDANT MAY BE CONVICTED OF THE LESSER DEGREE AT MOST.

COMMENT

This provision is designed to deal with the case where the prosecution can show that at least one of conflicting statements must be perjury, but is unable to prove which is actually false. Maryland Art. 27, §437, is similar.

210.25. PERJURY; AFFIRMATIVE DEFENSE

IN ANY PROSECUTION FOR PERJURY, IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT RETRACTED HIS FALSE STATEMENT IN THE COURSE OF THE PROCEEDING IN WHICH IT WAS MADE BEFORE SUCH FALSE STATEMENT SUBSTANTIALLY AFFECTED THE PROCEEDING AND BEFORE IT BECAME MANIFEST THAT ITS FALSITY WAS OR WOULD BE EXPOSED.

COMMENT

Model Penal Code §241.1(4) and Draft Federal Code §1354(3) contain almost identical provisions. Retraction is to be encouraged in order that the truth may be learned.

210.30. PERJURY; NO DEFENSE

IT IS NO DEFENSE TO A PROSECUTION FOR PERJURY THAT:

1. THE DEFENDANT WAS OR WOULD HAVE BEEN LEGALLY DISQUALIFIED TO TESTIFY AS A WITNESS TO THE FALSE STATEMENT ALLEGED; OR

2. THE DEFENDANT MISTAKENLY BELIEVED THE FALSE STATEMENT TO BE IMMATERIAL; OR

3. THE OATH WAS ADMINISTERED OR TAKEN IN AN IRREGULAR MANNER OR THAT THE AUTHORITY OR JURISDICTION OF THE ATTESTING OFFICER WHO ADMINISTERED THE OATH WAS DEFECTIVE, SO LONG AS THE PROCEEDING OR ACTION IS NOT VOID AS A MATTER OF LAW. A WRITTEN INSTRUMENT PURPORTING TO BE MADE UPON OATH AT ANY TIME WHEN THE DEFENDANT, OR A PERSON AUTHORIZED BY THE DEFENDANT, PRESENTS IT AS BEING SO VERIFIED SHALL BE DEEMED TO HAVE BEEN DULY SWORN.

COMMENT

The provision that disqualification to testify in the original proceeding is no defense is based on the common law and Model Penal Code §241.1(3) and Draft Federal Code §1354(2) but is somewhat more precisely worded. The justification for this seems clear enough; it should be no defense to a perjury charge that the accused had been convicted of perjury before his original testimony, and was technically disqualified as a witness. If the ground of disqualification is insanity, in the sense of statutory incapacity for criminal conduct on account of mental disorder, this is a defense to any charge of crime, but mere oath incapacity on account of mental disorder is not enough, where the accused has testified. There seems no reason to permit the defendant to litigate his mistaken belief in the immateriality of his statement. The problem of materiality is difficult, and it woud be hard for the jury in many cases to assess the defendant's belief as to materiality. If all the other elements of perjury are present, and the statement is in fact material, this should be sufficient. Accord Model Penal Code §241.1(2) and Draft Federal Code §1354(1).

Most modern codes make irregularities in administration of the oath no defense, and this seems sound. The common law reguires that the tribunal have jurisdiction for perjury, and this requirement is suggested in the definition of "testimony" (". . . person authorized by law to conduct such proceeding and to administer the oath or cause it to be administered"). The second sentence of subsection three is designed to punish the person making a false statement before an attesting officer when he anticipates that the instrument will be delivered with a jurat attached, and this in fact occurs, even if no oath was in fact administered.

210.35. PERJURY; REQUIREMENT OF CORROBORATION

IN ANY PROSECUTION FOR PERJURY, EXCEPT A PROSECUTION BASED UPON INCONSISTENT STATEMENTS PURSUANT TO SECTION 210.20, FALSITY OF A STATEMENT MAY NOT BE ESTABLISHED BY THE UNCORROBORATED TESTIMONY OF A SINGLE WITNESS.

COMMENT

Historically, perjury required two witnesses for conviction, but the common law rule has been relaxed to permit conviction if the testimony of a single witness is independently corroborated. Brown

v. State, 225 Md. 610 (1961). This relaxed rule is adopted by most modern codes. There is probably a better case for a special rule of corroboration in perjury than in most other crimes; the credibility of witnesses is almost necessarily a key issue in a perjury prosecution.

PART 215: OTHER OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS

INTRODUCTION

Part 215 deals with the interference with the administration of justice through the intimidation of witnesses or jurors (§§215.05–215.40), tampering with physical evidence (§215.45), and compounding a crime (§215.50). The purpose of these sections is to punish corruption, intimidation and fraud in judicial, legislative, administrative and other official proceedings. These sections complement §195.05 on obstructing government operations, which punishes a person who obstructs any lawful governmental function by using or threatening the immediate use of violence, force, or physical interference or obstacle, or by means of any independently criminal act. The sections in Part 215 proscribe many forms of intimidation and corruption not reached by §195.05, but their coverage is generally limited to protecting judicial or other official proceedings (as defined in §215.00(2)) from such interference. Much of the conduct covered by these sections was part of the common law offense of obstructing justice, which Maryland has codified in part in §27 of Article 27. That section proscribes the use of corruption, threats or force to influence, intimidate or impede any juror, witness or officer of the court or to obstruct or impede the due administration of justice. Part 215 also contains sections on criminal contempt (§215.55) and unlawful disclosure of matters relating to grand jury proceedings (§215.60).

215.00. DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "PHYSICAL EVIDENCE" MEANS ANY ARTICLE, OBJECT, DOCUMENT, RECORD OR OTHER THING OF PHYSICAL SUBSTANCE WHICH IS OR IS ABOUT TO BE PRODUCED OR USED AS EVIDENCE IN AN OFFICIAL PROCEEDING.

2. "OFFICIAL PROCEEDING" MEANS ANY ACTION OR PROCEEDING CONDUCTED OR TO BE CONDUCTED BY OR BEFORE A

JUDICIAL, LEGISLATIVE, ADMINISTRATIVE OR OTHER GOVERNMENTAL AGENCY OR OFFICIAL, IN WHICH EVIDENCE MAY PROPERLY BE OFFERED OR RECEIVED.

3. "TESTIMONY" MEANS ANY ORAL OR WRITTEN STATEMENTS, DOCUMENTS OR PHYSICAL EVIDENCE THAT MAY BE OFFERED IN AN OFFICIAL PROCEEDING.

COMMENT

§215.00 contains definitions used throughout Part 215. The definitions of "physical evidence" and "official proceeding" come from §215.35 of the New York Penal Law. The definition of "testimony" derives from §5001(3) of the proposed Michigan Criminal Code (Final Draft–September 1967).

215.05. BRIBING A WITNESS

A PERSON IS GUILTY OF BRIBING A WITNESS WHEN HE CONFERS, OR OFFERS OR AGREES TO CONFER, ANY BENEFIT UPON A WITNESS OR PERSON WHO MAY BE A WITNESS IN ANY OFFICIAL PROCEEDING UPON AN AGREEMENT OR UNDERSTANDING THAT (A) THE TESTIMONY OF SUCH PERSON WILL THEREBY INFLUENCED, OR (B) SUCH PERSON WILL ABSENT HIMSELF FROM, OR OTHERWISE AVOID OR SEEK TO AVOID APPEARING OR TESTIFYING AT, SUCH ACTION OR PROCEEDING.

BRIBING A WITNESS IS A CLASS C FELONY.

COMMENT

For commentary, see §215.10.

215.10. BRIBE RECEIVING BY A WITNESS

A WITNESS OR A PERSON WHO MAY BE A WITNESS IN ANY OFFICIAL PROCEEDING IS GUILTY OF BRIBE RECEIVING BY A WITNESS WHEN HE SOLICITS, ACCEPTS OR AGREES TO ACCEPT ANY BENEFIT FROM ANOTHER PERSON UPON AN AGREEMENT OR UNDERSTANDING THAT (A) HIS TESTIMONY WILL THEREBY BE INFLUENCED, OR (B) HE WILL ABSENT HIMSELF FROM, OR OTHERWISE AVOID OR SEEK TO AVOID APPEARING OR TESTIFYING AT, SUCH ACTION OR PROCEEDING.

BRIBE RECEIVING BY A WITNESS IS A CLASS C FELONY.

COMMENT

§§215.05 and 215.10 derive from §§215.00 and 215.05 of the New York Penal Law and deal with the corruption of witnesses. The common law offense of obstructing justice covered the bribing of a witness. Bribery of a witness is also covered by §27 of Article 27. §215.05 of this Code punishes

bribery of a witness, while §215.10 covers in addition bribe receiving by a witness.

The wording of §§215.05 and 215.10 closely parallels the wording of the prior sections on criminal breach of trust (§§180.00 and 180.05) and sports bribery (§§180.15 and 180.20). These sections all cover narrow areas where the Commission did not encounter the same difficulty in defining what is meant by a "bribe" as it did in connection with §§200.05 and 200.10 on bribery involving public servants. §215.05 defines a bribe as the conferring, or the offering or agreeing to confer, of any benefit upon a witness upon an agreement or understanding that his testimony will thereby be influenced or he will absent himself from an official proceeding. The phrase "upon an agreement or understanding" is used in the New York Penal Law and in this Code to be tantamount to "with the intent." See Practice Commentary, McKinney's Penal Law 725. No actual agreement of understanding is required for the completed offense; the bribe-giver need only seek to influence the witness through the offering or conferral of the benefit. "Benefit" is defined in §10.00(17). While the definition of benefit is quite broad, the role of the witness is a sensitive and important one and a witness should not receive any consideration at all to influence his testimony or to absent himself from an official proceeding.

215.15. INTIMIDATING A WITNESS

1. A PERSON IS GUILTY OF INTIMIDATING A WITNESS IF HE THREATENS A WITNESS OR A PERSON WHO MAY BE A WITNESS IN ANY OFFICIAL PROCEEDING WITH INTENT TO:

(A) INFLUENCE THE TESTIMONY OF THAT PERSON IN ANY WAY; OR

(B) INDUCE THAT PERSON TO ABSENT HIMSELF FROM, OR OTHERWISE AVOID APPEARING OR TESTIFYING AT, SUCH OFFICIAL PROCEEDING.

2. "THREATENS" MEANS TO INSTILL IN THE WITNESS A FEAR THAT THE DEFENDANT OR ANOTHER WILL ENGAGE IN ANY FORM OF CONDUCT COVERED BY SECTION 135.30(1)-(6).

INTIMIDATING A WITNESS IS A CLASS C FELONY.

COMMENT

For commentary, see §215.20.

215.20. TAMPERING WITH A WITNESS

A PERSON IS GUILTY OF TAMPERING WITH A WITNESS IF HE INTENTIONALLY INDUCES OR ATTEMPTS TO INDUCE A WITNESS OR A PERSON WHO MAY BE A WITNESS IN ANY OFFICIAL PROCEEDING TO:

1. GIVE TESTIMONY WHICH THE DEFENDANT KNOWS TO BE FALSE, OR UNLAWFULLY TO WITHHOLD TESTIMONY; OR

2. ABSENT HIMSELF FROM ANY OFFICIAL PROCEEDING TO WHICH HE HAS BEEN LEGALLY SUMMONED.

TAMPERING WITH A WITNESS IS A CLASS D FELONY.

COMMENT

§§215.15 and 215.20 on intimidating a witness and on tampering with a witness substantially revise the single section in the New York Penal Law on tampering with a witness (§215.10). In some respects they draw heavily from §§5015 and 5020 of the proposed Michigan Criminal Code (Draft, September 1967) on intimidating a witness and on tampering with a witness, but they also contain significant departures from the Michigan sections.

§§215.15 and 215.20 differentiate between intimidation and other forms of tampering. §215.15 singles ont intimidation for class C felony penalties because the administration of justice is severely handicapped when an organized criminal syndicate or a petty racketeer seeks to affect the outcome of a proceeding by threatening a witness. The term "threaten" employed in §215.15 is defined in the criminal coercion section of this Code (§135.30). While there is considerable overlap between these two sections, §215.15 has an independent effect since it does not reguire for the completed offense (as does §135.30) that the victim of the threats actually engage in or abstain from engaging in conduct in which he has a legal right to engage. All that §215.15 reguires is that the threatening party intend to influence the witness's testimony in any way or to induce the witness to absent himself from any official proceeding.

§215.20 on tampering with a witness is more narrowly drawn than is §215.15 on intimidating a witness. A person can induce a witness to invoke the privilege against self-incrimination or some other personal privilege without violating §215.20(1) and can induce a prospective witness who has not yet been summoned to an official proceeding to absent himself therefrom without violating §215.20(2). Such inducements, if accompanied by threats, would violate §215.15 because that section

covers intimidation with intent to influence a person's testimony in "any way" or to induce a person to absent himself from any official proceeding.

§215.20(1) is drafted to cover the case of the defendant who induces a witness to give testimony which the witness believes to be true but which the defendant knows to be false. While such conduct never constituted subornation of perjury, it did constitute obstruction of justice at common law. Anderson v. United States, 215 F. 2d 85 (6th Cir. 1954); Perkins, Criminal Law 498 (2d ed. 1969). §215.20(1), however, only covers the defendant who "induces" the giving of testimony which the defendant knows to be false, while the comparable section in the New York Penal Law punished any fraud or deceit practiced on a witness with intent that it "affect" his testimony. The Commission determined that the language of the New York section was too broad.

215.25. BRIBING A JUROR

A PERSON IS GUILTY OF BRIBING A JUROR WHEN HE CONFERS, OR OFFERS OR AGREES TO CONFER, ANY BENEFIT UPON A JUROR UPON AN AGREEMENT OR UNDERSTANDING THAT SUCH JUROR'S VOTE, OPINION, JUDGMENT, DECISION OR OTHER CONDUCT AS A JUROR WILL THEREBY BE INFLUENCED.

BRIBING A JUROR IS A CLASS C FELONY.

COMMENT

For commentary, see §215.30.

215.30. BRIBE RECEIVING BY A JUROR

A JUROR IS GUILTY OF BRIBE RECEIVING BY A JUROR WHEN HE SOLICITS, ACCEPTS OR AGREES TO ACCEPT ANY BENEFIT FROM ANOTHER PERSON UPON AN AGREEMENT OR UNDERSTANDING THAT HIS VOTE, OPINION, JUDGMENT, DECISION OR OTHER CONDUCT AS A JUROR WILL THEREBY BE INFLUENCED.

BRIBE RECEIVING BY A JUROR IS A CLASS C FELONY.

COMMENT

§§215.25 and 215.30 on bribing a juror and bribe receiving by a juror closely follow §§215.05 and 215.10 on bribery and bribe receiving involving witnesses. The common law offense of embracery covered this form of corruption, as does §26 of Article 27. "Juror" is defined in §10.00(16).

215.35. INTIMIDATING A JUROR

1. A PERSON IS GUILTY OF INTIMIDATING A JUROR IF HE THREATENS A JUROR WITH INTENT TO INFLUENCE THE JUROR'S VOTE, OPINION, DECISION OR OTHER CONDUCT AS A JUROR.

2. "THREATENS" MEANS TO INSTILL IN THE JUROR A FEAR THAT THE DEFENDANT OR ANOTHER WILL ENGAGE IN ANY FORM OF CONDUCT COVERED BY SECTION 135.30(1)-(6).

INTIMIDATING A JUROR IS A CLASS C FELONY.

COMMENT

For commentary, see §215.40.

215.40. TAMPERING WITH A JUROR

A PERSON IS GUILTY OF TAMPERING WITH A JUROR WHEN, WITH INTENT TO INFLUENCE A JUROR'S VOTE, OPINION, DECISION OR OTHER ACTION AS A JUROR, HE DIRECTLY OR INDIRECTLY COMMUNICATES OR ATTEMPTS TO COMMUNICATE WITH A JUROR, EXCEPT AS AUTHORIZED BY LAW.

TAMPERING WITH A JUROR IS A CLASS D FELONY.

COMMENT

§§215.35 and 215.40 on intimidating a juror and on tampering with a juror are closely modeled on §§215.15 and 215.20 on intimidating or tampering with a witness. They substantially revise §215.25 of the New York Penal Law on tampering with a juror.

215.45. TAMPERING WITH PHYSICAL EVIDENCE

A PERSON IS GUILTY OF TAMPERING WITH PHYSICAL EVIDENCE WHEN:

1. WITH INTENT THAT IT BE USED OR INTRODUCED IN AN OFFICIAL PROCEEDING OR A PROSPECTIVE OFFICAL PROCEEDING, HE (A) KNOWINGLY MAKES, DEVISES OR PREPARES FALSE PHYSICAL EVIDENCE, OR (B) PRODUCES OR OFFERS SUCH EVIDENCE AT SUCH A PROCEEDING KNOWING IT TO BE FALSE; OR

2. WITH INTENT TO IMPAIR THE VERITY OR AVAILABILITY OF PHYSICAL EVIDENCE IN AN OFFICIAL PROCEEDING OR PROSPECTIVE OFFICIAL PROCEEDING HE WITHOUT LEGAL RIGHT OR AUTHORITY (A) CONCEALS, ALTERS OR DESTROYS PHYSICAL EVIDENCE, OR (B) SUPPRESSES OR OTHERWISE MAKES UNAVAILABLE PHYSICAL EVIDENCE BY EMPLOYING FORCE, INTIMIDATION OR DECEPTION AGAINST ANY PERSON.

TAMPERING WITH PHYSICAL EVIDENCE IS A CLASS D FELONY.

COMMENT

§215.45 protects the integrity of official proceedings by proscribing tampering with physical evidence. §215.45(1) derives from §215.40(1) of the New York Penal Law and punishes the fabrication of physical evidence and the offering into evidence of fabricated physical evidence. §215.45(2) punishes the suppression of physical evidence and is a substantial revision of §215.40(2) of the New York Penal Law. §215.45(2) of this Code is also intended to cover the defendant who alters physical evidence with intent that it be introduced as altered. "Physical evidence" is defined in §215.00(1).

215.50. COMPOUNDING A CRIME

1. A PERSON IS GUILTY OF COMPOUNDING A CRIME WHEN:

(A) HE SOLICITS, ACCEPTS OR AGREES TO ACCEPT ANY BENEFIT UPON AN AGREEMENT OR UNDERSTANDING THAT HE WILL REFRAIN FROM INITIATING A PROSECUTION FOR A CRIME OR WILL WITHHOLD EVIDENCE OR OTHERWISE HANDICAP A PROSECUTION FOR A CRIME; OR

(B) HE CONFERS, OR OFFERS OR AGREES TO CONFER, ANY BENEFIT UPON ANOTHER PERSON UPON AN AGREEMENT OR UNDERSTANDING THAT SUCH OTHER PERSON WILL REFRAIN FROM INITIATING A PROSECUTION FOR A CRIME.

2. IN ANY PROSECUTION UNDER THIS SECTION, IT IS AN AFFIRMATIVE DEFENSE THAT THE BENEFIT DID NOT EXCEED AN AMOUNT WHICH THE DEFENDANT REASONABLY BELIEVED TO BE DUE TO HIM AS RESTITUTION OR IDEMNIFICATION FOR HARM CAUSED BY THE CRIME.

COMPOUNDING A CRIME IS A CLASS A MISDEMEANOR.

COMMENT

§215.50 on compounding a crime derives from §215.45 of the New York Penal Law. Compounding is an obstruction or perversion of justice because the offender bargains his way out of a criminal prosecution. §215.50 punishes both the offender and the victim of the crime in such cases. However, §215.50(2) realistically provides an affirmative defense to the victim of the crime who solicits, accepts or agrees to accept a benefit upon a reasonable belief that such a benefit is due to him as restitution or indemnification for a crime. Such an affirmative defense is not available to the offender himself.

215.55. CRIMINAL CONTEMPT 20521

1. A PERSON COMMITS THE CRIME OF CRIMINAL CONTEMPT IF: 20523

A. HE KNOWINGLY ENGAGES IN DISORDERLY, CONTEMPTUOUS, OR INSOLENT BEHAVIOR, COMMITTED DURING THE SITTING OF A COURT IN ITS IMMEDIATE VIEW AND PRESENCE, AND DIRECTLY TENDING TO INTERRUPT ITS PROCEEDINGS OR IMPAIR THE RESPECT DUE TO ITS LAWFUL AUTHORITY; OR 20525 20526 20527 20528 20529

B. HE INTENTIONALLY CREATES A BREACH OF PEACE OR DISTURBANCE UNDER CIRCUMSTANCES DIRECTLY TENDING TO INTERRUPT A COURT'S PROCEEDINGS; OR 20531 20532 20533

C. HE INTENTIONALLY DISOBEYS OR RESISTS THE LAWFUL WRIT, PROCESS, ORDER, DECREE, OR COMMAND OF A COURT; OR 20535 20536

D. AS AN ATTORNEY, CLERK, OR OTHER OFFICER OF A COURT, HE INTENTIONALLY FAILS TO PERFORM OR VIOLATES A DUTY OF HIS OFFICE TO SUCH COURT; OR 20538 20539 20540

E. KNOWING THAT HE IS NOT AUTHORIZED TO PRACTICE LAW, HE REPRESENTS HIMSELF TO BE AN ATTORNEY AND ACTS AS SUCH IN A COURT PROCEEDING; OR 20542 20543 20544

F. HE KNOWINGLY RECORDS OR ATTEMPTS TO RECORD THE DELIBERATION OF A JURY WHEN NOT LAWFULLY AUTHORIZED TO DO SO; OR 20546 20547

G. HE KNOWINGLY PUBLISHES A FALSE OR GROSSLY INACCURATE REPORT OF A COURT'S PROCEEDINGS; OR 20549 20550

H. HE ENGAGES IN ANY OTHER CONDUCT WHICH A COURT HAS INHERENT POWER TO PUNISH AS A CRIMINAL CONTEMPT. 20552 20553

2. IT IS A DEFENSE TO A PROSECUTION BASED ON SUBDIVISON C OF SUBSECTION 1 OF THIS SECTION THAT THE DEFENDANT'S DISOBEDIENCE OR RESISTANCE WAS PURSUANT TO A LAWFUL PRIVILEGE, CLAIMED AT THE TIME OF SUCH DISOBEDIENCE OR RESISTANCE. 20555 20556 20557 20558

3. NOTWITHSTANDING THE PROVISIONS OF PART 5 OF THIS ARTICLE (RELATING TO MULTIPLE PROSECUTIONS), A PROSECUTION FOR CRIMINAL CONTEMPT UNDER THIS SECTION IS NOT A BAR TO A SUBSEQUENT PROSECUTION FOR ANY OTHER OFFENSE ARISING OUT OF THE SAME INCIDENT IF THE COURT CERTIFIES IN THE JUDGMENT OF CONVICTION OF CRIMINAL CONTEMPT, OR IN THE ORDER TERMINATING THE PROSECUTION WITH ACQUITTAL OR DISMISSAL, THAT SUMMARY PROSECUTION WAS NECESSARY TO PREVENT REPETITION OF MISBEHAVIOR DISRUPTIVE OF AN ONGOING PROCEEDING AND THAT SUBSEQUENT PROSECUTION AS AN OFFENSE OTHER THAN CRIMINAL CONTEMPT IS WARRANTED. 20560 20561 20562 20563 20564 20565 20566 20567 20568 20569 20570

NO SENTENCE SHALL BE IMPOSED IN ANY SUCH SUBSEQUENT PROSECUTION UNTIL SENTENCE HAS BEEN IMPOSED FOR THE CONTEMPT. THE FINE WHICH WOULD OTHERWISE BE AUTHORIZED UPON CONVICTION IN SUCH SUBSEQUENT PROSECUTION SHALL BE REDUCED BY AN AMOUNT EQUAL TO ANY FINE ACTUALLY IMPOSED FOR THE CONTEMPT. WHERE THE DEFENDANT WHO HAS BEEN SENTENCED TO A TERM OF IMPRISONMENT FOR CRIMINAL CONTEMPT IS SUBSEQUENTLY SENTENCED TO A DEFINITE OR INDETERMINATE SENTENCE OF IMPRISONMENT FOR ANOTHER CRIME, WHICH, BUT FOR THE FIRST SENTENCE OF THIS SUBSECTION, WOULD BE BARRED BY THE PROVISIONS OF PART 5 RELATING TO MULTIPLE PROSECUTIONS:

A. IF THE DEFENDANT IS THEN SERVING THE SENTENCE OF IMPRISONMENT FOR THE CRIMINAL CONTEMPT OR HAS BEEN SENTENCED TO IMPRISONMENT FOR THE CRIMINAL CONTEMPT BUT HAS NOT YET BEGUN TO SERVE THE SENTENCE, THE SENTENCE FOR SUCH OTHER CRIME SHALL BE IMPOSED CONCURRENTLY WITH THE CONTEMPT SENTENCE, EXCEPT THAT THE DEFENDANT SHALL HAVE ANY SENTENCE ALREADY IMPOSED UNDER THE CRIMINAL CONTEMPT CONVICTION CREDITED AGAINST ANY DEFINITE SENTENCE IMPOSED OR AGAINST THE MAXIMUM AND MINIMUM, IF ANY, TERMS OF ANY INDETERMINATE SENTENCE IMPOSED; OR

B. IF THE DEFENDANT HAS COMPLETED SERVING A SENTENCE OF IMPRISONMENT FOR THE CONTEMPT, THE MAXIMUM TERM OF ANY DEFINITE OR INDETERMINATE SENTENCE OF IMPRISONMENT, EXCEPT A SENTENCE OF LIFE IMPRISONMENT, WHICH WOULD OTHERWISE BE AUTHORIZED TO BE IMPOSED FOR SUCH OTHER CRIME SHALL BE REDUCED BY THE TERM ACTUALLY IMPOSED BY THE SENTENCING JUDGE FOR THE CONTEMPT.

4. THIS SECTION SHALL NOT BE CONSTRUED TO DEPRIVE A COURT OF ITS POWER, BY CIVIL CONTEMPT PROCEEDINGS, TO COMPEL COMPLIANCE WITH ITS LAWFUL ORDER, OR TO COMPENSATE A COMPLAINANT FOR LOSSES SUSTAINED BY REASON OF DISOBEDIENCE OR RESISTANCE THERETO, IN ACCORDANCE WITH THE PREVAILING USAGES OF LAW AND EQUITY, INCLUDING THE POWER OF DETENTION. CRIMINAL CONTEMPT IS A CLASS A MISDEMEANOR, BUT IF THE CONTEMPT IS A DIRECT ONE, AND THE COURT ELECTS TO PUNISH IT SUMMARILY UNDER RULE P3 OF THE MARYLAND RULES, ANY SENTENCE OF IMPRISONMENT IMPOSED SHALL NOT EXCEED ONE HUNDRED AND SEVENTY-NINE DAYS.

COMMENT

As subsection (4) makes clear, this section deals with criminal contempt and does not affect civil contempt powers. Procedural matters are dealt with in Subtitle P of the Maryland Rules. Various problems of tampering with witnesses, and evidence are covered by other specific provisions of Part 215. (For Maryland provisions relating to direct contempts, see Article 26, §4 of the Annotated Code and cases there cited.)

Contemptuous behavior in court's presence, directly tending to interrupt proceedings or impair respect (§215.55(1)(a)): This is derived from N.Y. §215.50(1) and Michigan §5050(1)(a). It deals with the obvious case of disruption in the courtroom or conduct there insulting to the judge and is limited to conduct in the presence of the court directly harmful to orderly proceedings or proper decorum.

The required mental element is knowledge. While it is usually clear that the contempt defendant knew what he was doing, there may be a few ambiguous situations in which the court regards the behaviour as contemptuous within the section, but the contempt defendant claims that he did not realize that such an interpretation would be put on it. For example, suppose a trial regarded by the defendants as "political" in nature. A prominent leader of the group to whom the trial defendants belong is called as a witness. As he enters the courtroom to take the witness stand, he raises his fist (and perhaps calls out some such slogan as "Power to the People"); in response, friendly spectators stand up, raising clenched fists (and perhaps make some verbal response). Assume that a court could properly regard the conduct of witness and spectators as contemptuous if knowledge is present. The contempt defendants claim that they were merely engaging in their normal form of greeting on public occasions, that they were unfamiliar with courtroom etiquette, and that they intended no disruption or disrespect. Although such claims may be unfounded, and may sometimes be difficult to disprove, it seems fairly clear that it is unfair to the contempt defendants to refuse to hear them. In such cases it seems desirable that the court should first order the conduct stopped and give some form of advance notice that disobedience may result in a contempt conviction. Knowledge should therefore be specified.

Knowledge seems a more appropriate requirement than intention, since it would allow punishment where the defendant is warned, or otherwise knows the effect of his conduct, even though his purpose may not be disruption. So, in the example supposed, a defendant whose purpose was merely to demonstrate support and approval of the prospective witness, and who was indifferent to whether or not the proceedings were disrupted, could be punished, if he knew that disruption would occur or that the respect due to the lawful order of the court would be impaired.

Some question may be raised in connection with

the phrase, "directly tending to. . . impair the respect due to its authority." It has been suggested that the alternative: "directly tending to interrupt its proceedings," is sufficient to cover all of the situations that it is really important to punish, and that the words first quoted give trial judges unnecessary and dangerous power.

Is such power unnecessary? Suppose that counsel for the defendant in a "political" trial is more interested in confrontation and publicity than in winning the case or maintaining good relations with the bench. Without interrupting the proceedings, he continually addresses the court as, "Your Dishonor" and "Your Stupidity." This should be punished as contempt, but would not necessarily be reached as an interruption of the proceedings.

Is such power dangerous? It is possible that any jurisdiction might contain some unduly or unreasonably sensitive trial judge, who would like to punish as contempt minor irregularities in dress in counsel or witnesses, or any reguests that the judge disqualify himself for bias, or any suggestion that counsel regards a ruling as wrong or unfair. Instances of such use or misuse of the contempt power would probably be very rare and appellate courts could be expected to reverse contempt convictions in borderline situations in these categories, particularly in view of the reguirement of knowledge and the reguirement of impairment of "respect due to" (emphasis supplied) the court's authority.

Creating a disturbance directly tending to interrupt proceedings (§215.55(1)(b)): Derivation: Mich. §5050(1)(b); N.Y. §215.50(2). This goes a little beyond the first subdivison, to reach disturbances in the corridor or outside the courtroom window.

Disobeying lawful order; defense of privilege (§215.55(1)(c) and (2)): Derivation: N.Y. §215.50(3); Draft Federal Code §§1341(1)(c), 1342, 1343. This covers a wide range of conduct, and includes intentional disobedience to formal and informal, written and oral commands of all sorts. The defense in subsection two may be unnecessary. Probably a court would assume that valid privilege is a bar to conviction, but it may be prudent to make this explicit.

Court's officer's violation of official duty (§215.55(1)(d)): Derivation: Mich. §5050(1)(c); Draft Federal Code §1341. It is only knowing

violation of a duty to the court, and not some failure with respect to a client, other attorney, or litigant, which will invoke this provision.

Non-attorney's purporting to be and acting as attorney (§215.55(1)(e)): Derivation: Mich. §5050(1)(e). This is a useful provision. Particularly in large cities, it is possible for an unlicensed person, with sufficient experience, ability, and luck, to appear in a number of cases before it is recognized that he is not a lawyer. This might require reopening of cases and create a considerable burden on the administration of justice.

Recording jury deliberations (§215.55(1)(f)): Derivation: Mich. §5050(1)(f). This also seems sound, in view of the secrecy of such deliberations and the possibility of invalidating jury deliberations via such recording.

Knowing publication of false report of proceedings (§215.55(1)(g)): Derivation: N.Y. §215.50(5); Mich. §5050(1)(d). This provision is historically within the contempt power, and is narrower than some claimed powers of doubtful constitutionality.

Omitted provisions — refusal of jurors to serve, and the like: N.Y. §215.50(6) and Mich. §5050(1)(g) extend the contempt provision to permit control of recalcitrant jurors. This is unnecessary in Maryland in view of the provisions of Article 51. See §§5(b) and 9(f), which directly punish failure to appear or serve as a juror. Other punishment provisions appear in §§10(f) and 13.

Omitted provisons — picketing and the like near the court to affect result: N.Y. §215.50(7) is similar enough to our draft section 240.25(2) (aggravated disorderly conduct), so that it has been omitted here.

Other conduct punishable (§215.55(h)): In Ex parte Sturm, 152 Md. 114, 120-121 (1927), the Court of Appeals said:

> The judicial power to punish for contempt did not emanate from the statute just cited. (Code, Art. 26, Sec. 4) It is a common law power possessed, independently of statute, by our courts of constitutional origin. As this Court said in Kelly v. Montebello Park Co., 141 Md. 205, quoting from the opinion of Judge Bartol in Ex Parte Maulsby, reported in

13 Md. 625: "A contempt is an offense at common law; it is not created by the Act of 1853 (Code, Art. 26, sec. 4), nor is the jurisdiction to punish it conferred by that act alone. 'It is an offense against the court, as an organ of public justice. The right of punishing for contempts by summary conviction is inherent in all courts of justice and legislative assemblies, and is essential for their protection and existence. It is a branch of the common law adopted and sanctioned by our State Constitution.' Yates' Case, 9 John. 417."

It appears likely from this passage that if the statute purported to restrict the "inherent" power of a court to punish for contempt, the courts would hold that such a statute was ineffective as invading the judicial province. It is therefore desirable to add a new subdivision (1)(h): "He engages in any other conduct which a court has inherent power to punish as a criminal contempt."

This approach may be somewhat inconsistent with the Commission's policy of defining all offenses, but seems unavoidable because of the peculiar nature of criminal contempt and the probable legislative incapacity under the Sturm case to limit its scope. Doubt exists, but Professor Perkins (p. 538 of Perkins on Criminal Law (2d ed., 1969) appears to believe that the Supreme Court would allow contempt punishment for a publication having a tendency to, and made for the purpose of, influencing the outcome of pending litigation, whatever the result might be if the publication amounted merely to criticism of the judge's action in past (or even present) litigation, for example.

Punishment: It is possible that the courts might hold that the legislature has no power to limit the punishment for contempt. If so, the grading of the offense, limiting imprisonment to a maximum of six months, might be invalidated, but it seems likely that the courts would follow a reasonable legislative guideline as to punishment. The reason for the special 179 day provision as to direct contempts punished summarily is that if the possible penalty for an offense is six months or more, the defendant is entitled to a jury trial, and the judge's power to control court disruption is impaired. See Roll v. State, 15 Md. App. 31, at 49, 288 A. 2d 605, 615 (1972), modified on other grounds, 267 Md. 714, 298 A 2d 867 (1973), and Thomas v. State, _____ Md. App. _____, 320 A. 2d 538, 539 (footnote 2) (1974).

Multiple prosecutions: The draft's subsection (3) is derived from Draft Federal Code §1341(3). N.Y. §215.55 adopts a similar principle with respect to criminal contempts punishable under another section of the Code, and its draft jeopardy provisions (Proposed New York Criminal Procedure Law, §20.20(3)) is so worded as not to bar another criminal charge based on the same factual situation as a contempt proceeding, at least if the contempt proceeding is summary, and not based on an indictment or information. The problem would not arise frequently. If the other crime were very serious (e.g., a witness shoots and kills an attorney during cross-examination), the judge would be unlikely to invoke his contempt power; the witness would simply be arrested and charged with murder. If the other crime were relatively trivial (e.g., disorderly conduct in the courtroom), punishment for contempt would be likely, but there would seldom be any reason to prosecute for the other crime as well. (The subsection gives specific guides to prevent unfair double sentencing as to imprisonment or fines, wherever the ordinary bars to double prosecution are lifted. Sentences other than imprison or fine seem adequately regulated by the ordinary sentencing provisions.) However there is a kind of situation in which a judge might give summary punishment for contempt, and in which it would be undesirable for a subsequent prosecution for another offense barred. Suppose that a spectator fires a shot at a witness during a trial, apparently injuring him only slightly. The judge might give summary punishment for contempt primarily in order to continue the proceeding without further interruption. This should not bar subsequent prosecution for assault. The draft would permit the judge to allow such subsequent prosecution.

215.60. UNLAWFUL GRAND JURY DISCLOSURE

A PERSON IS GUILTY OF UNLAWFUL GRAND JURY DISCLOSURE WHEN, BEING A GRAND JUROR, A PUBLIC PROSECUTOR, A GRAND JURY STENOGRAPHER, A GRAND JURY INTERPRETER, A POLICE OFFICER GUARDING A WITNESS IN A GRAND JURY PROCEEDING, OR A CLERK, ATTENDANT, WARDEN OR OTHER PUBLIC SERVANT HAVING OFFICIAL DUTIES IN OR ABOUT A GRAND JURY ROOM OR PROCEEDING, HE INTENTIONALLY DISCLOSES TO ANOTHER THE NATURE OR SUBSTANCE OF ANY GRAND JURY TESTIMONY, OR ANY DECISION, RESULT OR OTHER MATTER ATTENDING A GRAND JURY PROCEEDING WHICH IS REQUIRED BY LAW TO BE KEPT SECRET, EXCEPT IN THE PROPER DISCHARGE OF HIS OFFICIAL DUTIES OR UPON WRITTEN ORDER OF THE COURT.

UNLAWFUL GRAND JURY DISCLOSURE IS A CLASS B MISDEMEANOR.

COMMENT

This provision is taken from New York. It seems sound and is recommended without substantial change.

NOTE ON OMITTED PROVISIONS RE CONTEMPT IN LEGISLATIVE AND ADMINISTRATIVE PROCEEDINGS

§§215.60 and 215.65 of the New York Penal Code deal respectively with contempt of legislative bodies and committees thereof and contempt of temporary state commissions. No comparable provisions are included in this draft. There seems to be no need here for the latter of these provisions.

With regard to contempt of legislative bodies, it was stated in Ex parte Maulsby, 13 Md. 625, above cited, that legislative bodies, as well as courts have inherent power to punish for contempt. Section 23 of Article III of the Constitution recognizes the right of each House to exercise such power against a person, not a member, during a session of the General Assembly "for disrespectful or disorderly behavior in its presence, or for obstructing any of its proceedings, or any of its officers in execution of their duties;" but limits imprisonment "at any one time" to ten days. See also Section 24 of Article III as to the powers of the House of Delegates when acting as the Grand Inquest of the State. Later provisions of that section deal with other investigatory or supervisory powers of the House or of a joint committee of the House and Senate.

SUBTITLE M — OFFENSES AGAINST PUBLIC HEALTH, PUBLIC MORALS AND THE FAMILY

PART 220: CONTROLLED DANGEROUS SUBSTANCES AND RELATED OFFENSES

220.00. GENERAL INTENT AND PURPOSE

THIS PART INSOFAR AS IT DEFINES OFFENSES INVOLVING OR RELATED TO CONTROLLED DANGEROUS SUBSTANCES AND PROVIDES PUNISHMENTS THEREFOR IS ADOPTED IN FURTHERANCE OF THE LEGISLATIVE FINDINGS, DECLARATIONS AND PURPOSES SET FORTH IN SECTION 801 OF THE MARYLAND CONTROLLED DANGEROUS SUBSTANCES ACT, §§801–817, INCLUSIVE, OF ARTICLE 27B OF THE ANNOTATED CODE OF MARYLAND AS NOW IN FORCE OR AS HEREAFTER AMENDED OR SUPPLEMENTED, SAID ACT

BEING HEREINAFTER REFERRED TO AS THE REGULATORY ACT.

COMMENT

This Part and the accompanying Regulatory Act (Art. 27B, §§ 801ff.) are derived, with relatively little change, from sections 276ff. of Article 27 of the Annotated Code of Maryland, relating to controlled dangerous substances. Since the General Assembly has so recently revised the law in this very troublesome area, the Commission has chosen not to depart, without good reason, from the substance of the present law. In conformity with its policy that, generally, regulatory provisions should not be a part of a Criminal Code, it has transferred the provisions of the present law partly to the Criminal Code and partly to a Regulatory Act. A few provisions of the present law properly belong in a new procedure code, and these are indicated by notes to the sections of the Regulatory Act. Commentary on the sections is limited to notes on derivation and explanation of changes made.

This section is new. It is necessary because of the separation of the criminal and regulatory provisions.

220.05. CONTROLLED DANGEROUS SUBSTANCES; DEFINITIONS OF TERMS

AS USED IN THIS PART —

1. THE FOLLOWING TERMS AND PHRASES SHALL HAVE THE MEANINGS SET FORTH IN §802 OF THE REGULATORY ACT: ADMINISTER, AGENT, AUTHORITY, BUREAU OF NARCOTIC AND DANGEROUS DRUGS, CONTROLLED DANGEROUS SUBSTANCE, COUNTERFEIT CONTROLLED DANGEROUS SUBSTANCE, DEPARTMENT, DELIVER OR DELIVERY, DEPRESSANT OR STIMULANT DRUG, DISPENSE, DISTRIBUTE, DRUG, DRUG DEPENDENT PERSON, MARIHUANA, MANUFACTURE, NARCOTIC DRUG, OPIATE, PERSON, POSSESSION, PRACTITIONER, PHYSICIAN, DENTIST, VETERINARIAN, HOSPITAL.

2. THE FOLLOWING TERMS AND PHRASES SHALL HAVE THE MEANINGS STATED BELOW:

(A) SCHEDULE OR SCHEDULES SHALL MEAN ONE OR MORE OF SCHEDULES I, II, III, IV AND V AS CONTAINED IN SECTION 804 OF THE REGULATORY ACT.

(B) PRESCRIPTION DRUG SHALL HAVE THE MEANING SET FORTH IN §802(U) OF THE REGULATORY ACT.

(C) REGISTRANT SHALL MEAN A PERSON REGISTERED PURSUANT TO THE REGULATORY ACT.

(D) CONTROLLED DANGEROUS SUBSTANCE MANUFACTURING ARTICLE MEANS ANY MACHINE, EQUIPMENT, INSTRUMENT, DEVICE OR COMBINATION THEREOF WHICH IS ADAPTED FOR THE PRODUCTION OF A CONTROLLED DANGEROUS SUBSTANCE.

(E) CONTROLLED DANGEROUS SUBSTANCE COUNTERFEITING ARTICLE MEANS ANY PUNCH, DIE, PLATE, STONE, OR ANY OTHER EQUIPMENT WHICH IS DESIGNED TO PRINT, IMPRINT OR REPRODUCE THE TRADEMARK, TRADE NAME OR OTHER IDENTIFYING MARK, IMPRINT OR DEVICE OF ANOTHER OR LIKENESS OF ANY OF THE FOREGOING UPON ANY DRUG OR CONTAINER OR LABELING THEREOF SO AS TO RENDER SUCH DRUG A COUNTERFEIT SUBSTANCE.

COMMENT

This section adopts the definitions in Article 27, sections 277 and 300, without substantial change, and adds a few more definitions which are helpful in the drafting of the new provisions.

220.10. TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE THIRD DEGREE

1. EXCEPT AS AUTHORIZED BY THE REGULATORY ACT, A PERSON IS GUILTY OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE THIRD DEGREE WHEN HE:

(A) MANUFACTURES, DISTRIBUTES OR DISPENSES A CONTROLLED DANGEROUS SUBSTANCE;

(B) CREATES, DISTRIBUTES OR POSSESSES WITH INTENT TO DISTRIBUTE, A COUNTERFEIT SUBSTANCE;

(C) MANUFACTURES, DISTRIBUTES, OR POSSESSES A CONTROLLED DANGEROUS SUBSTANCE MANUFACTURING ARTICLE;

(D) MANUFACTURES, DISTRIBUTES, OR POSSESSES ANY CONTROLLED DANGEROUS SUBSTANCE COUNTERFEITING ARTICLE;

(E) KNOWINGLY KEEPS OR MAINTAINS ANY PREMISES (INCLUDING ANY DWELLING HOUSE, APARTMENT, BUILDING, VEHICLE OR VESSEL) FOR THE PURPOSE OF THE ILLEGAL ADMINISTRATION TO OTHER PERSONS OF A CONTROLLED DANGEROUS SUBSTANCE OR FOR THE MANUFACTURE, DISTRIBUTION, DISPENSING, STORAGE OR CONCEALMENT OF A CONTROLLED DANGEROUS SUBSTANCE;

(F) POSSESSES A CONTROLLED DANGEROUS SUBSTANCE UNDER SUCH CIRCUMSTANCES AND IN SUFFICIENT QUANTITY TO REASONABLY INDICATE AN INTENT TO MANUFACTURE, DISTRIBUTE OR DISPENSE THE SAME UNLAWFULLY;

(G) USES IN THE COURSE OF MANUFACTURE OR DISPOSITION OF THE CONTROLLED DANGEROUS SUBSTANCE A REGISTRATION NUMBER WHICH IS FICTITIOUS, REVOKED, SUSPENDED OR ISSUED TO ANOTHER PERSON.

2. AS USED IN THIS SUBSECTION, THE TERM "PROHIBITED ARTICLE" INCLUDES ANY CONTROLLED DANGEROUS SUBSTANCE MANUFACTURING ARTICLE AND ANY CONTROLLED DANGEROUS SUBSTANCE COUNTEREEITING ARTICLE. IN ANY PROSECUTION FOR THE POSSESSION OF A PROHIBITED ARTICLE BASED UPON SUBSECTION 1(C) OR (D) OF THIS SECTION 220.10 OR UPON SECTION 220.15 OR SECTION 220.20 EOR A HIGHER DEGREE OE AN OFFENSE PROSCRIBEL UNDER EITHER OF SAID SUBSECTIONS OF THIS SECTION, IT IS AN AFEIRMATIVE DEFENSE THAT THE DEFENDANT DID NOT KNOW AND DID NOT HAVE REASONABLE CAUSE TO BELIEVE THAT HE WAS IN POSSESSION OF A PROHIBITED ARTICLE.

TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE THIRD DEGREE IS A CLASS E FELONY. ANY SENTENCE TO PAY A FINE FOR THIS OFEENSE SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT EXCEEDING $15,000, OR A SENTENCE TO PAY AN EXTENDED FINE, ACCORDING TO THE PROVISIONS OF SECTION 75.05(2).

COMMENT

This and the two sections following are based on Article 27, §§286, 288, and 289(b). They are the principal penal sections punishing the unauthorized manufacture, distribution, or dispensing (or possession with intent to manufacture, etc.) of controlled dangerous substances, the keeping of premises for the illegal administration of such, and the use of a false registration number. This section also punishes conduct relating to counterfeit substances and manufacturing equipment for real or counterfeit substances.

In chapter 642 of the laws of 1972, the General Assembly added the following subsection to section 288 of Article 27:

> (c) It is unlawful for any practitioner to prescribe, administer, manufacture, distribute, dispense, or possess any controlled dangerous substance or controlled paraphernalia except in the course of his regular professional duties, and in conformance with both the provisions of this subtitle and the standards of his particular profession relating to any such controlled dangerous substance or controlled paraphernalia. Any practitioner who violates any of the provisions of this subsection shall

be subject to the penalties specified in subsection (b) of this section; and any controlled dangerous substances or controlled paraphernalia so manufactured, distributed, dispensed, possessed, prescribed, or administered in violation of this subsection shall be deemed contraband.

In some respect this provision seems overbroad; for example it punishes a practitioner's possession of controlled paraphernalia (which may be capable of innocent use) outside the scope of his professional duties – so a diabetic veterinarian who possesses a hypodermic syringe for self-administration of insulin appears to be in literal violation of the act. In its reference to professional standards which may not be clearly specified in the regulatory act or elsewhere, it is dangerously vague for a criminal provision. To the extent that chapter 642 embodies what the Commission believes would be the desired policy of the Legislature and is legally enforceable, its prohibitions are reflected in the draft, primarily in sections 220.10(a) and 220.35.

Most of the changes in the language of the draft are not substantive, but the following should be noted: (1) Knowledge is required for the portion of the offense relating to maintaining of premises; that is, the accused must know of the improper use of the premises. The offense is a serious one, and knowledge does not necessarily accompany maintenance of the premises, so a mental element should be proved. (No proof of mental element is required for similar regulatory provisions relating to maintenance of premises; see 807(a)(7).) (2) It is made an affirmative defense to a charge of manufacture, distribution or possession of certain manufacturing and counterfeiting articles that the accused did not know or have reasonable cause to believe that he possessed such an article. This provision replaces, as to manufacturing articles, phrasing similar to that used in the present statute and the draft as to possession (with intent to manufacture, etc.) of controlled dangerous substances, which speaks of possession under circumstances reasonably indicating an appropriate intention. The present statute does not specify a required mental element as to counterfeiting articles, though probably such an intention would usually be clear from the fact of possession itself. A provision of the present section 289 of Article 27 relating to registration numbers has been incorporated in the draft of this section; the remaining provision of section 289 is unnecessary,

since the conduct covered is already dealt with by the first subsection of the draft section.

Penalty provisions approximate those in the present act. The present statute permits imprisonment for up to 20 years for offenses relating to narcotic drugs on Schedules I or II of section 279 (804 in the draft). The Commission, following its general sentencing pattern, makes similar conduct a class B felony, with a maximum 15 year penalty. Offenses relating to other Schedule I or II substances, which at present carry a five year maximum, are made class C felonies (10 year maximum). Offenses relating to Schedule III, IV, or V substances carry the same maximum five year penalties under the present act and the draft. Section 75.05(3) of the draft permits the fixing of different fines than those provided for felonies generally for specific felonies, and the Commission has retained the maximum figures under the present law, which figures are higher than those set out for felonies generally in section 75.05(1). Very severe fines may well be justified for profitable drug trafficking, even when the prosecution can not prove the specific amount of gain required as a basis for an extended fine under section 75.05(2).

220.15. TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE SECOND DEGREE

A PERSON IS GUILTY OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE SECOND DEGREE WHEN HE PERFORMS ANY ACT PROHIBITED IN §220.10 OF THIS PART WITH RESPECT TO A CONTROLLED DANGEROUS SUBSTANCE CLASSIFIED IN SCHEDULES I OR II OF §804 OF THE REGULATORY ACT.

TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE SECOND DEGREE IS A CLASS C FELONY. ANY SENTENCE TO PAY A FINE FOR THIS OFFENSE SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT EXCEEDING $15,000, OR A SENTENCE TO PAY AN EXTENDED FINE, ACCORDING TO THE PROVISIONS OF SECTION 75.15(2).

COMMENT

See the Comment for section 220.10.

220.20. TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE FIRST DEGREE

A PERSON IS GUILTY OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE FIRST DEGREE WHEN HE PERFORMS ANY ACT PROHIBITED BY §220.15 OF THIS PART WITH RESPECT TO ANY CONTROLLED DANGEROUS SUBSTANCE WHICH IS A NARCOTIC DRUG INCLUDED IN SCHEDULES I OR II OF §804 OF THE

REGULATORY ACT.

TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE FIRST DEGREE IS A CLASS B FELONY. NOTWITHSTANDING THE PROVISIONS OF ARTICLE 43B, SECTIONS 12 AND 13, A DEFENDANT CONVICTED OF TRAFFICKING IN A CONTROLLED DANGEROUS SUBSTANCE IN THE FIRST DEGREE SHALL NOT BE PREVENTED, PROHIBITED, OR MADE INELIGIBLE FROM PARTICIPATING IN THE REHABILITATION PROGRAM THEREUNDER, AS AMENDED FROM TIME TO TIME, BECAUSE OF THE LENGTH OF SENTENCE. ANY SENTENCE TO PAY A FINE FOR THIS DEFENSE SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT EXCEEDING $25,000, OR A SENTENCE TO PAY AN EXTENDED FINE, ACCORDING TO THE PROVISIONS OF SECTION 75.15(2).

COMMENT

See the Comment for section 220.10.

220.25. UNLAWFUL POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE

1. A PERSON IS GUILTY OF UNLAWFUL POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE WHEN HE:

(A) POSSESSES OR ADMINISTERS TO ANOTHER ANY CONTROLLED DANGEROUS SUBSTANCE, UNLESS SUCH SUBSTANCE WAS OBTAINED DIRECTLY, OR PURSUANT TO A VALID PRESCRIPTION OR ORDER FROM A PRACTITIONER, WHILE ACTING IN THE COURSE OF HIS PROFESSIONAL PRACTICE; PROVIDED, HOWEVER, THAT THIS SUBSECTION SHALL NOT APPLY TO THE POSSESSION OR USE OF MARIHUANA; OR

(B) OBTAINS OR ATTEMPTS TO OBTAIN A CONTROLLED DANGEROUS SUBSTANCE OR PROCURES OR ATTEMPTS TO PROCURE THE ADMINISTRATION OF ANY CONTROLLED DANGEROUS SUBSTANCE BY (I) FRAUD, DECEIT, MISREPRESENTATION OR SUBTERFUGE, OR (II) BY THE FORGERY OR ALTERATION OF A PRESCRIPTION OR A WRITTEN ORDER, OR (III) BY THE CONCEALMENT OF ANY MATERIAL FACT OR BY THE USE OF FALSE NAME OR ADDRESS, OR (IV) BY FALSELY ASSUMING THE TITLE OF OR REPRESENTING HIMSELF TO BE A MANUFACTURER, DISTRIBUTOR OR PRACTITIONER, OR (V) BY MAKING OR UTTERING ANY FALSE OR FORGED PRESCRIPTION OR WRITTEN ORDER; OR

(C) AFFIXES ANY FALSE OR FORGED LABEL TO A PACKAGE, CONTAINER OR OTHER RECEPTACLE CONTAINING ANY CONTROLLED DANGEROUS SUBSTANCE, OR OMITS, REMOVES, ALTERS OR OBLITERATES ANY LABEL OR SYMBOL ON ANY SUCH CONTROLLED DANGEROUS SUBSTANCE AS REQUIRED BY THE FEDERAL, STATE, OR LOCAL LAW.

2. INFORMATION COMMUNICATED TO A PHYSICIAN IN AN EFFORT TO OBTAIN A CONTROLLED DANGEROUS SUBSTANCE IN VIOLATION OF THE PROVISIONS OF SUBSECTION 1(B) HEREOF

SHALL NOT BE DEEMED A PRIVILEGED COMMUNICATION.

3. IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE BASED UPON SUBSECTION 1(A) OF THIS SECTION THAT IN THE CIRCUMSTANCES OF THE CASE THE DEFENDANT DID NOT KNOW AND DID NOT HAVE REASONABLE CAUSE TO BELIEVE THAT THE CONTROLLED DANGEROUS SUBSTANCE POSSESSED OR ADMINISTERED BY HIM WAS NOT OBTAINED DIRECTLY, OR PURSUANT TO A VALID PRESCRIPTION OR ORDER FROM A PRACTITIONER.

UNLAWFUL POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE IS A CLASS E FELONY. ANY SENTENCE TO PAY A FINE FOR THIS OFFENSE SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT TO EXCEED $15,000, OR A SENTENCE TO PAY AN EXTENDED FINE, ACCORDING TO THE PROVISIONS OF SECTION 75.15(2).

COMMENT

This section adopts substantially the definitional portions of section 287 of the current statute, insofar as they relate to possession or administration of controlled dangerous substances (other than marihuana), or the obtaining or attempt to obtain the possession of, or the procuring or attempt to procure the administration of controlled dangerous substances by fraud, forgery, concealment, or the like, or misconduct relating to labeling. Failure to know or have reasonable cause to know that a substance had not been obtained properly is newly made an affirmative defense to a charge of possession or administration. The maximum five year penalty is similar to the four years possible under the current provision. An increased fine provision, allowing the same maximum as in the present act, has been included, with perhaps less justification than in the draft sections immediately preceding, since no suggestion of commercial trafficking need be present for a violation of the present section. The Commission thinks the increase fine worth retaining; however, it has reduced the maximum from $25,000 to $15,000, which is more in line with the amounts provided for in §§220.15ff. Subsection (2) of the draft follows a similar evidentiary rule in the current section. The limited Maryland privilege for a patient's communication to a psychiatrist (Art. 35, §13A) gives this provision some applicability.

So much of section 287(b) as related to the obtaining or attempting to obtain by fraud, etc., controlled paraphernalia is omitted from the draft. Actual possession, whether by fraud or otherwise, is punished by section 220.35 of the draft, and an attempt to possess unlawfully is punishable under Part 110 as an attempt. Other provisions of section

287, dealing with paraphernalia and with marihuana are dealt with in other sections of the draft of this Part.

220.30. UNLAWFUL POSSESSION OF MARIHUANA

1. EXCEPT AS AUTHORIZED BY THE REGULATORY ACT, A PERSON IS GUILTY OF UNLAWFUL POSSESSION OF MARIHUANA WHEN HE POSSESSES MARIHUANA.

2. IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE BASED UPON THIS SECTION THAT IN THE CIRCUMSTANCES OF THE CASE THE DEFENDANT DID NOT KNOW AND DID NOT HAVE REASONABLE CAUSE TO BELIEVE THAT HE WAS IN POSSESSION OF MARIHUANA.

UNLAWFUL POSSESSION OF MARIHUANA IS A CLASS A MISDEMEANOR.

COMMENT

This section is derived from section 287 and reflects the legislative policy to provide a lesser penalty for possession of marihuana. It is a class A misdemeanor in the draft and therefore carries a maximum term of imprisonment of six months (as opposed to the present one year) and a maximum fine of $1000 (no change, unless the alternative fine, based on defendant's gain is imposed under §75.10(5)). The defendant's failure to know or have reasonable cause to believe that he was in possession of marihuana is made an affirmative defense.

220.35. UNLAWFUL POSSESSION OF PARAPHERNALIA

1. A PERSON IS GUILTY OF UNLAWFUL POSSESSION OF PARAPHERNALIA WHEN HE HAS IN HIS POSSESSION—

(A) A HYPODERMIC SYRINGE, NEEDLE OR OTHER IMPLEMENT WITH INTENT TO USE THE SAME TO ADMINISTER A CONTROLLED DANGEROUS SUBSTANCE UNLAWFULLY; OR

(B) GELATIN CAPSULES, GLASSINE ENVELOPES OR ANY OTHER CONTAINER SUITABLE FOR THE ILLEGAL MANUFACTURE, DISTRIBUTION, OR DISPENSING OF A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO USE THE SAME FOR THE ILLEGAL MANUFACTURE, DISTRIBUTION OR DISPENSING OF A CONTROLLED DANGEROUS SUBSTANCE; OR

(C) LACTOSE, QUININE, MANNITE, MANITOL, DEXTROSE, SUCROSE, PROCAINE HYDROCHLORIDE OR ANY OTHER SUBSTANCE SUITABLE AS A DILUENT OR ADULTERANT IN THE MANUFACTURE, DISTRIBUTION, OR DISPENSING OF A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO USE THE SAME FOR THE ILLEGAL MANUFACTURE, DISTRIBUTION, OR DISPENSING OF A

CONTROLLED DANGEROUS SUBSTANCE.

2. EVIDENCE OF CIRCUMSTANCES TENDING TO INDICATE AN INTENTION TO USE ANY OF THE ABOVE DESCRIBED ARTICLES IN VIOLATION OF PARAGRAPH (B) OR (C) OF SUBSECTION 1 SHALL INCLUDE, BUT SHALL NOT BE LIMITED TO, THE QUANTITY OF SUCH ARTICLES AND THE CLOSE PROXIMITY THEREOF TO ANY, OR ANY OTHER, MATERIALS OR EQUIPMENT, WHETHER OR NOT ENUMERATED ABOVE, COMMONLY USED IN THE ILLEGAL MANUFACTURE OR DISTRIBUTION OF CONTROLLED DANGEROUS SUBSTANCES, SUCH AS BUT NOT LIMITED TO ANY OF THE FOLLOWING: SCALES, SIEVES, STRAINERS, MEASURING SPOONS, STAPLES AND STAPLERS.

UNLAWFUL POSSESSION OF PARAPHERNALIA IS A CLASS E FELONY. ANY SENTENCE TO PAY A FINE FOR THIS OFFENSE SHALL BE A SENTENCE TO PAY AN AMOUNT, FIXED BY THE COURT, NOT TO EXCEED $15,000, OR A SENTENCE TO PAY AN EXTENDED FINE, ACCORDING TO THE PROVISIONS OF SECTION 75.15(2).

COMMENT

This section is a rewriting of section 287(d). No substantive change is intended, except that the classification of the offense as a class E felony increases the possible maximum imprisonment from four to five years. An increased fine provision is retained, but the maximum is reduced from $25,000 to $15,000 in the interest of conformity to the fines for other violations of provisions of this Part.

220.36. MISCONDUCT WITH RESPECT TO A PRESCRIPTION DRUG

1. A PERSON IS GUILTY OF MISCONDUCT WITH RESPECT TO A PRESCRIPTION DRUG WHEN HE:

A. MANUFACTURES, SELLS, DISPENSES, DISTRIBUTES, OBTAINS, ADVERTISES, OR POSSESSES WITH INTENT TO DISTRIBUTE A PRESCRIPTION DRUG CONTRARY TO THE PROHIBITIONS OR REQUIREMENTS OF SECTION 817 OF THE REGULATORY ACT; OR

B. OBTAINS OR ATTEMPTS TO OBTAIN A PRESCRIPTION DRUG BY (I) FRAUD, DECEIT, MISREPRESENTATION, OR SUBTERFUGE, (II) THE FORGERY OR INTENTIONAL ALTERATION OF A PRESCRIPTION OR A WRITTEN ORDER, (III) THE INTENTIONAL CONCEALMENT OF ANY MATERIAL FACT OR THE USE OF FALSE NAME OR ADDRESS, (IV) FALSELY ASSUMING THE TITLE OF OR REPRESENTING HIMSELF TO BE A MANUFACTURER, DISTRIBUTOR OR PRACTITIONER, OR (V) KNOWINGLY MAKING OR UTTERING ANY FALSE OR FORGED PRESCRIPTION OR WRITTEN ORDER; OR

C. INTENTIONALLY AFFIXES ANY FALSE OR FORGED LABEL TO A PACKAGE, CONTAINER, OR OTHER RECEPTACLE

CONTAINING ANY PRESCRIPTION DRUG, OR INTENTIONALLY OMITS, REMOVES, ALTERS, OR OBLITERATES ANY LABEL OR SYMBOL ON A PRESCRIPTION DRUG AS REQUIRED BY FEDERAL, STATE, OR LOCAL LAW.

2. IT IS AN AFFIRMATIVE DEFENSE TO A CHARGE BASED UPON THIS SECTION THAT IN THE CIRCUMSTANCES OF THE CASE THE DEFENDANT DID NOT KNOW AND DID NOT HAVE REASONABLE CAUSE TO BELIEVE THAT THE SUBSTANCE IN QUESTION WAS A PRESCRIPTION DRUG. MISCONDUCT WITH RESPECT TO A PRESCRIPTION DRUG IS A CLASS E FELONY.

COMMENT

This section is derived from the criminal provisions of section 300. The possible maximum prison sentence of that section is increased from two to five years and there is also an increase in the maximum fine. Sometimes conduct prohibited by this section is punished more severely in other areas of the code, e.g. larceny by deception (section 155.30) if the value of the goods exceeds $100, or forgery in the first degree (section 170.10), where there is an intent to defraud.

Appropriate words indicating culpable mental state are inserted, and the device of the affirmative defense in subsection (2), used elsewhere in similar situation in this Part, is adopted to relieve the prosecution of an unreasonable proof requirement without turning the section into an absolute liability offense.

220.40. WRONGFUL FILLING OF PRESCRIPTION

A PERSON IS GUILTY OF WRONGFUL FILLING OF PRESCRIPTION WHEN HE, BEING ENGAGED IN THE BUSINESS OF SELLING DRUGS OR CONTROLLED DANGEROUS SUBSTANCES OR OF COMPOUNDING OR OF DISPENSING PHYSICIANS' PRESCRIPTIONS, KNOWINGLY SELLS OR DELIVERS TO ANY PERSON A DRUG OR CONTROLLED DANGEROUS SUBSTANCE, OTHER OR DIFFERENT FROM THE DRUG OR CONTROLLED DANGEROUS SUBSTANCE ORDERED OR CALLED FOR BY SUCH PERSON, OR CALLED FOR IN A PHYSICIAN'S PRESCRIPTION.

WRONGFUL FILLING OF PRESCRIPTION IS A CLASS B MISDEMEANOR.

COMMENT

This section is derived from section 300(i). It is newly classified as a class B misdemeanor.

220.45. UNLAWFUL MAILING OF DRUGS

A PERSON IS GUILTY OF UNLAWFUL MAILING OF DRUGS WHEN HE MAILS ANY PRESCRIPTION DRUG, CONTRCLLED DANGEROUS SUBSTANCE OR MEDICINE, WHETHER BY BULK MAILING TO "RESIDENT", OR "OCCUPANT", OR TO A NAMED ADDRESSEE WHO HAS NOT REQUESTED THAT SUCH PRESCRIPTION DRUG, CONTROLLED DANGEROUS SUBSTANCE, OR MEDICINE BE MAILED TO HIM.

THE PROVISIONS OF THIS SECTION SHALL NOT APPLY TO THE MAILING OF ANY DRUGS TO THOSE PERSONS, INSTITUTIONS OR CORPORATIONS WHO, UNDER THE LAWS OF MARYLAND, ARE PERMITTED TO DISPENSE, PRESCRIBE OR ADMINISTER SUCH DRUGS.

UNLAWFUL MAILING OF DRUGS IS A CLASS B MISDEMEANOR.

COMMENT

This section is derived from section 300(j). It is newly classified as a class B misdemeanor.

220.50. MISCONDUCT WITH RESPECT TO A HARMFUL SUBSTANCE

1. "HARMFUL SUBSTANCE", AS USED IN THIS SECTION, MEANS ANY DRUG, NOXIOUS SUBSTANCE, OR CHEMICAL, CONTAINING ANY KETONES, ALDEHYDES, ORGANIC ACETATES, ETHER, CHLORINATED HYDROCARBONS, OR OTHER SUBSTANCES CONTAINING SOLVENTS RELEASING TOXIC VAPORES, AND WHICH (A) IS NEITHER A CONTROLLED DANGEROUS SUBSTANCE, NOR AN ANESTHESIA WHEN USED FOR MEDICAL PURPOSES; AND (B) WHEN INHALED OR SMELLED IN EXCESSIVE QUANTITIES CAUSES CONDITIONS OF INTOXICATION, INEBRIATION, EXCITEMENT, STUPEFACTION, OR DULLING OF THE BRAIN OR NERVOUS SYSTEM. EXAMPLES OF HARMFUL SUBSTANCES ARE FINGERNAIL POLISH AND MODEL AIRPLANE GLUE.

2. A PERSON IS GUILTY OF MISCONDUCT WITH RESPECT TO A HARMFUL SUBSTANCE WHEN HE:

A. INTENTIONALLY INHALES OR SMELLS A HARMFUL SUBSTANCE IN SUCH QUANTITIES AS TO CAUSE A CONDITION OF INTOXICATION, INEBRIATION, EXCITEMENT, STUPEFACTION, OR DULLING OF THE BRAIN OR NERVOUS SYSTEM; OR

B. DISTRIBUTES, OR POSSESSES WITH INTENT TO DISTRIBUTE, TO ANY PERSON UNDER THE AGE OF EIGHTEEN, A HARMFUL SUBSTANCE, WITH THE INTENTION OR KNOWLEDGE THAT THE MINOR WILL INHALE OR SMELL THE HARMFUL SUBSTANCE IN VIOLATION OF SUBSECTION (2)(A); OR

C. INSTRUCTS ANY PERSON UNDER THE AGE OF EIGHTEEN IN THE PRACTICE OF INHALING OR SMELLING THE HARMFUL SUBSTANCE IN VIOLATION OF SUBSECTION (2)(A).

MISCONDUCT WITH RESPECT TO A HARMFUL SUBSTANCE IS A CLASS E FELONY.

COMMENT 21489

This section is derived from sections 301 and 301A. No substantive change, except as to penalty, is intended. 21492 21493

220.55. BURDEN OF PROOF; AFFIRMATIVE DEFENSES 21496

1. PROOF THAT A DEFENDANT IS THE DULY AUTHORIZED HOLDER OF AN APPROPRIATE REGISTRATION CR ORDER FORM ISSUED UNDER THE REGULATORY ACT, OR THAT HE FALLS WITHIN ANY EXEMPTION, PROVISO OR EXCEPTION SET FORTH IN THIS PART OR IN THE REGULATORY ACT, SHALL BE A MATTER OF AFFIRMATIVE DEFENSE, AS DEFINED IN SECTION 25.00, IN ANY PROSECUTION FOR VIOLATION OF A PROVISION OF THIS PART. 21498 21499 21500 21501 21502 21503

2. IT IS AN AFFIRMATIVE DEFENSE TO ANY PROSECUTION UNDER THIS PART THAT THE DEFENDANT WAS, AT THE RELEVANT TIME, A DULY AUTHORIZED OFFICER OF THE UNITED STATES, THIS STATE, OR ANY POLITICAL SUBDIVISION OF THIS STATE, THAT HE WAS THEN ENGAGED IN THE ENFORCEMENT OR PROSECUTION OF THIS PART, OR OF THE REGULATORY ACT, OR OF ANY LAW OR MUNICIPAL ORDINANCE RELATING TO CONTROLLED DANGEROUS SUBSTANCES, AND THAT HIS CONDUCT WAS INCIDENTAL TO THE DISCHARGE OF HIS OFFICIAL DUTIES. 21505 21506 21507 21508 21509 21510 21511

COMMENT 21514

This is a rewording of section 299(b), as affected by section 299(a). 21517 21518

220.60. WITNESSES' IMMUNITY 21521

NO PERSON SHALL, UPON PAIN OF CONTEMPT OF COURT, REFUSE TO TESTIFY CONCERNING ANY VIOLATIONS OF THE PROVISIONS OF THIS PART BECAUSE HIS TESTIMONY MIGHT TEND TO INCRIMINATE HIM OR IMPLICATE HIM IN SUCH VIOLATIONS, AND EVERY SUCH PERSON SHALL BE A COMPETENT WITNESS AND COMPELLABLE TO TESTIFY AGAINST ANY PERSON WHO MAY HAVE COMMITTED ANY OF THE OFFENSES SET FORTH UNDER THIS PART; PROVIDED THAT ANY PERSON SO COMPELLED TO TESTIFY ON BEHALF OF THE STATE IN ANY SUCH CASE SHALL BE EXEMPT FROM PROSECUTION, TRIAL AND PUNISHMENT FOR ANY AND ALL SUCH CRIMES AND OFFENSES ABOUT WHICH SUCH PERSON WAS SO COMPELLED TO TESTIFY. 21523 21524 21525 21526 21527 21528 21529 21530 21531

COMMENT 21534

This is derived from section 299(c), without substantial change. 21537 21538

220.65. NOTICE OF CONVICTION 21541

UPON THE CONVICTION OF ANY PERSON FOR A VIOLATION OF ANY PROVISION OF THIS PART, A COPY OF THE JUDGMENT AND 21543 21544

SENTENCE AND OF THE OPINION OF THE COURT, IF ANY OPINION BE FILED, SHALL BE SENT BY THE CLERK OF THE COURT TO THE BOARD, OFFICER OR AGENCY, IF ANY, BY WHOM THE CONVICTED DEFENDANT HAS BEEN LICENSED OR REGISTERED TO PRACTICE HIS PROFESSION OR TO CARRY ON HIS BUSINESS. ANY SUCH BOARD, OFFICER OR AGENCY MAY REVOKE OR SUSPEND SUCH LICENSE OR REGISTRATION OR SO REPRIMAND ANY SUCH PERSON SO CONVICTED. A DUPLICATE COPY OF THE JUDGMENT AND SENTENCE AND OPINION, IF ANY OPINION BE FILED, SHALL BE SENT TO THE DEPARTMENT. PROVIDED, HOWEVER, THAT THIS SECTION SHALL NOT APPLY IN CASES WHERE PROBATION WITHOUT RECORD HAS BEEN GRANTED OR ORDERED, PURSUANT TO SECTION 65.25 OF THIS CODE, UNLESS AND UNTIL SUCH PROBATION IS REVOKED.

COMMENT

This is an adaptation of section 299(d), with changes to reflect the new probation without record provisions in section 65.25.

CONTROLLED DANGEROUS SUBSTANCES AND RELATED OFFENSES — REGULATORY ACT

INTRODUCTION

This Regulatory Act contains the residue of the material in Article 27, sections 276ff., after the substantive criminal provisions have been transferred to the new Article 27, Part 220. Some of the material in the Regulatory Act should probably be transferred or reconsidered at the time of revising materials on criminal procedure. The Commission on Criminal Law has tried to avoid substantive changes in the Regulatory Act, regarding such changes as beyond the scope of its task.

Sections of the former statute are all accounted for in the comments to the various sections of the Regulatory Act, except for the ones mentioned in this paragraph. Sections 286 and 289 of the former Article 27 form the basis for draft sections 220.10, 220.15, and 220.20. Section 287 forms the basis for Criminal Code draft sections 220.25, 220.30, and 220.35. Section 288, which is partly absorbed into section 220.10, is also included in part in section 807 of the Regulatory Act. Section 290 has been omitted, in favor of the general draft code provisions dealing with attempts and conspiracies in Parts 105 and 110. Section 291 is omitted as unnecessary in view of the provisions of section 5.10(3). Section 292 is omitted because the Commission does not think it desirable to set up a special plan, differing only slightly from its

probation without record provisions, for controlled dangerous substance offences alone. The principal differences between the Commission proposal for offenses generally in section 65.25 and the provisions of Section 292 are (1) that the Commission proposal does not permit such disposition for any offense more serious than a class D felony, and (2) that the Commission proposal, while it refers to the "history, character and condition of the defendant" as matters to be considered by the sentencing judge, does not limit such disposition to first controlled dangerous substance offenders. If desired, these two differences (or either of them) could be eliminated by adopting all (or part) of the following subsection (5) for section 65.25 of the Criminal Code:

> 5. Special provisions relating to convictions under Part 220.
>
> The following conditions apply to any grant or order of probation without record with respect to an offense under Part 220:
>
> 1. Notwithstanding the provisions of subsection one of this section, such a grant or order may be made as to any felony, misdemeanor or violation; and
>
> 2. No such grant or order shall be made if it is established to the satisfaction of the court that the defendant has previously been convicted of (or granted probation without record with respect to) any offense under this Part or under any prior law of this State or the laws of the United States or of any other state relating to controlled dangerous substances defined in this Part.

Section 293 allows double imprisonment, or double fine, or both, for a second or subsequent controlled dangerous substance offender. The Commission can not reconcile this precise form of increased sentence with its general sentencing provisions, but it does see merit to a more severe treatment of repetition in controlled dangerons substance offenses than in ordinary offenses. See Criminal Code sections 70.16 and 70.20.

801. LEGISLATIVE FINDINGS AND DECLARATIONS; PURPOSE AND CONSTRUCTION

(A) THE GENERAL ASSEMBLY FINDS AND DECLARES THAT MANY OF THE SUBSTANCES INCLUDED WITHIN THIS SUBHEADING HAVE A USEFUL AND LEGITIMATE MEDICAL PURPOSE AND ARE

NECESSARY TO MAINTAIN THE HEALTH AND GENERAL WELFARE OF THE PEOPLE OF THE STATE OF MARYLAND.

THE GENERAL ASSEMBLY, HOWEVER, FINDS AND DECLARES THAT THE ILLEGAL MANUFACTURE, DISTRIBUTION, POSSESSION, AND ADMINISTRATION OF CONTROLLED DANGEROUS SUBSTANCES HAVE A SUBSTANTIAL AND DETRIMENTAL EFFECT ON THE HEALTH AND GENERAL WELFARE OF THE PEOPLE OF THE STATE OF MARYLAND. IT IS THE PURPOSE OF THIS SUBHEADING TO ESTABLISH A UNIFORM LAW CONTROLLING THE MANUFACTURE, DISTRIBUTION, POSSESSION, AND ADMINISTRATION OF CONTROLLED DANGEROUS SUBSTANCES AND RELATED PARAPHERNALIA IN ORDER TO INSURE THEIR AVAILABILITY FOR LEGITIMATE MEDICAL AND SCIENTIFIC PURPOSES, BUT TO PREVENT THEIR ABUSE WHICH RESULTS IN A SERIOUS HEALTH PROBLEM TO THE INDIVIDUAL AND REPRESENTS A SERIOUS DANGER TO THE WELFARE OF THE PEOPLE OF THE STATE OF MARYLAND.

(B) THE PROVISIONS OF THIS SUBHEADING SHALL BE LIBERALLY INTERPRETED AND CONSTRUED SO AS TO EFFECTUATE ITS GENERAL PURPOSE AS STATED HEREINABOVE.

COMMENT

This section follows section 276 without substantial change.

802. DEFINITIONS

THE FOLLOWING WORDS AND PHRASES AS USED IN THIS SUBHEADING SHALL HAVE THE FOLLOWING MEANINGS UNLESS THE CONTEXT OTHERWISE REQUIRES:

(A) "ADMINISTER" SHALL MEAN TO INTRODUCE A SUBSTANCE INTO THE SYSTEM OF A HUMAN BEING OR ANIMAL BY INJECTION, INHALATION, INGESTION, APPLICATION TO THE SKIN, OR ANY COMBINATION THEREOF OR BY ANY OTHER MEANS.

(B) "AGENT" SHALL MEAN AN EMPLOYEE OR OTHER AUTHORIZED PERSON WHO ACTS ON BEHALF OF OR AT THE DIRECTION OF A MANUFACTURER, DISTRIBUTOR OR PRACTITIONER BUT DOES NOT INCLUDE A COMMON OR CONTRACT CARRIER, PUBLIC WAREHOUSEMAN OR EMPLOYEE THEREOF.

(C) "AUTHORITY" SHALL MEAN THE DRUG ABUSE AUTHORITY UNDER THE JURISDICTION OF THE DEPARTMENT.

(D) "BUREAU OF NARCOTICS AND DANGEROUS DRUGS" SHALL MEAN THE BUREAU OF NARCOTICS AND DANGEROUS DRUGS OF THE UNITED STATES DEPARTMENT OF JUSTICE.

(E) (INTENTIONALLY LEFT BLANK)

(F) "CONTROLLED DANGEROUS SUBSTANCE" SHALL MEAN ANY DRUG, SUBSTANCE OR IMMEDIATE PRECURSOR IN SCHEDULES I

THROUGH V OF §804. THE TERM SHALL NOT INCLUDE DISTILLED SPIRITS, WINE, MALT BEVERAGES OR TOBACCO AS THOSE TERMS ARE SET IN ARTICLE 2B OF THE CODE.

(G) "COUNTERFEIT CONTROLLED DANGEROUS SUBSTANCE" MEANS A CONTROLLED DANGEROUS SUBSTANCE, OR THE CONTAINER OR LABELING OF WHICH, WITHOUT AUTHORIZATION, BEARS THE TRADEMARK, TRADE NAME, OR OTHER IDENTIFYING MARK, IMPRINT, NUMBER OR DEVICE, OR ANY LIKENESS THEREOF, OF A MANUFACTURER, DISTRIBUTOR, OR DISPENSER OTHER THAN THE PERSON WHO IN FACT MANUFACTURED, DISTRIBUTED OR DISPENSED ANY SUCH SUBSTANCE AND WHICH THEREBY FALSELY PURPORTS OR IS REPRESENTED TO BE THE PRODUCT OF OR TO HAVE BEEN DISTRIBUTED BY ANY OTHER SUCH MANUFACTURER, DISTRIBUTOR, OR DISPENSER.

(H) "DEPARTMENT" SHALL MEAN THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE OF THIS STATE.

(I) "DELIVER" OR "DELIVERY" SHALL MEAN THE ACTUAL, CONSTRUCTIVE, OR ATTEMPTED TRANSFER, EXCHANGE, OR DELIVERING OF A CONTROLLED DANGEROUS SUBSTANCE FROM ONE PERSON TO ANOTHER WITH OR WITHOUT REMUNERATION, WHETHER OR NOT THERE EXISTS AN AGENCY RELATIONSHIP.

(J) "DEPRESSANT OR STIMULANT DRUG" SHALL MEAN—

(I) A DRUG WHICH CONTAINS ANY QUANTITY OF (A) BARBITURIC ACID OR ANY OF THE SALTS OF BARBITURIC ACID; OR (B) ANY DERIVATIVE OF BARBITURIC ACID WHICH HAS BEEN DESIGNATED BY THE SECRETARY OF HEALTH, EDUCATION AND WELFARE AS HABIT FORMING UNDER §502(D) OF THE FEDERAL FOOD, DRUG, AND COSMETIC ACT (21 U.S.C. 352(D)); OR

(II) A DRUG WHICH CONTAINS ANY QUANTITY OF (A) AMPHETAMINE OR ITS OPTICAL ISOMERS; (B) ANY SALT OF AMPHETAMINE OR ANY SALT OF AN OPTICAL ISOMER OF AMPHETAMINE; OR (C) ANY SUBSTANCE WHICH THE ATTORNEY GENERAL OF THE UNITED STATES, AFTER INVESTIGATION, HAS FOUND TO BE, AND BY REGULATION DESIGNATED AS, HABIT FORMING BECAUSE OF ITS STIMULANT EFFECT ON THE CENTRAL NERVOUS SYSTEM.

(III) LYSERGIC ACID DIETHYLAMIDE; OR

(IV) ANY DRUG WHICH CONTAINS ANY QUANTITY OF A SUBSTANCE WHICH THE ATTORNEY GENERAL OF THE UNITED STATES, AFTER INVESTIGATION, HAS FOUND TO HAVE, AND BY REGULATION DESIGNATED AS HAVING, A POTENTIAL FOR ABUSE BECAUSE OF ITS DEPRESSANT OR STIMULANT EFFECT ON THE CENTRAL NERVOUS SYSTEM OR ITS HALLUCENOGENIC EFFECT.

(K) "DISPENSE" SHALL MEAN TO DELIVER A CONTROLLED DANGEROUS SUBSTANCE TO THE ULTIMATE USER OR THE HUMAN RESEARCH SUBJECT BY OR PURSUANT TO THE LAWFUL ORDER OF A

PRACTITIONER, INCLUDING THE PRESCRIBING, ADMINISTERING, PACKAGING, LABELING, OR COMPOUNDING NECESSARY TO PREPARE THE SUBSTANCE FOR SUCH DELIVERY. "DISPENSER" IS A PRACTITIONER WHO DISPENSES.

(L) "DISTRIBUTE" SHALL MEAN TO DELIVER OTHER THAN BY DISPENSING A CONTROLLED DANGEROUS SUBSTANCE. "DISTRIBUTOR" MEANS A PERSON WHO DISTRIBUTES.

(M) "DRUG" MEANS (1) SUBSTANCES RECOGNIZED IN THE OFFICIAL UNITED STATES PHARMACOPOEIA, OFFICIAL HOMEOPATHIC PHARMACOPOEIA OF THE UNITED STATES, OR OFFICIAL NATIONAL FORMULARY, OR ANY SUPPLEMENT TO ANY OF THEM; AND (2) SUBSTANCES INTENDED FOR USE IN THE DIAGNOSIS, CURE, MITIGATION, TREATMENT, OR PREVENTION OF DISEASE IN MAN OR OTHER ANIMALS; AND (3) SUBSTANCES (OTHER THAN FOOD) INTENDED TO AFFECT THE STRUCTURE OR ANY FUNCTION OF THE BODY OF MAN OR OTHER ANIMALS; AND (4) SUBSTANCES INTENDED FOR USE AS A COMPONENT OF ANY ARTICLE SPECIFIED IN CLAUSE (1), (2), OR (3) OF THIS PARAGRAPH; BUT DOES NOT INCLUDE DEVICES OR THEIR COMPONENTS, PARTS, OR ACCESSORIES.

(N) "DRUG DEPENDENT PERSON" SHALL MEAN A PERSON WHO IS USING A CONTROLLED DANGEROUS SUBSTANCE AND WHO IS IN A STATE OF PSYCHIC OR PHYSICAL DEPENDENCE, OR BOTH, ARISING FROM ADMINISTRATION OF THAT CONTROLLED DANGEROUS SUBSTANCE ON A CONTINUOUS BASIS. DRUG DEPENDENCE IS CHARACTERIZED BY BEHAVIORAL AND OTHER RESPONSES WHICH INCLUDE A STRONG COMPULSION TO TAKE THE SUBSTANCE ON A CONTINUOUS BASIS IN ORDER TO EXPERIENCE ITS PSYCHIC EFFECTS, OR TO AVOID THE DISCOMFORT OF ITS ABSENCE.

(O) "MARIHUANA" SHALL MEAN ALL PARTS OF THE PLANT CANNABIS SATIVE L., WHETHER GROWING OR NOT; THE SEEDS THEREOF; THE RESIN EXTRACTED FROM ANY PART OF SUCH PLANT; AND EVERY COMPOUND, MANUFACTURE, SALT, DERIVATIVE, MIXTURE, OR PREPARATION OF SUCH PLANT, ITS SEEDS OR RESIN, BUT SHALL NOT INCLUDE THE MATURE STALKS OF SUCH PLANT, FIBER PRODUCED FROM SUCH STALKS, OIL OR CAKE MADE FROM THE SEEDS OF SUCH PLANT, ANY OTHER COMPOUND, MANUFACTURE, SALT, DERIVATIVE, MIXTURE, OR PREPARATION OF SUCH MATURE STALKS (EXCEPT THE RESIN EXTRACTED THEREFROM), FIBER, OIL, OR CAKE, OR THE STERILIZED SEED OF SUCH PLANT WHICH IS INCAPABLE OF GERMINATION.

(P) "MANUFACTURE" SHALL MEAN THE PRODUCTION, PREPARATION, PROPAGATION, COMPOUNDING, CONVERSION OR PROCESSING OF A CONTROLLED DANGEROUS SUBSTANCE EITHER DIRECTLY OR INDIRECTLY BY EXTRACTION FROM SUBSTANCES OF NATURAL ORIGIN, OR INDEPENDENTLY BY MEANS OF CHEMICAL SYNTHESIS OR BY A COMBINATION OF EXTRACTION AND CHEMICAL SYNTHESIS AND INCLUDES ANY PACKAGING OR REPACKAGING OF THE SUBSTANCE OR LEBELING OR RELABELING OF ITS CONTAINERS, EXCEPT THAT THIS TERM DOES NOT INCLUDE THE

PREPARATION OR COMPOUNDING OF A CONTROLLED DANGEROUS SUBSTANCE BY AN INDIVIDUAL FOR HIS OWN USE OF THE PREPARATION, COMPOUNDING, PACKAGING OR LABELING OF A CONTROLLED DANGEROUS SUBSTANCE: (1) BY A PRACTITIONER AS AN INCIDENT TO HIS ADMINISTERING OR DISPENSING OF A CONTROLLED DANGEROUS SUBSTANCE IN THE COURSE OF HIS PROFESSIONAL PRACTICE, OR (2) BY A PRACTITIONER, OR BY HIS AUTHORIZED AGENT UNDER HIS SUPERVISION, FOR THE PURPOSE OF, OR AS AN INCIDENT TO, RESEARCH, TEACHING OR CHEMICAL ANALYSIS AND NOT FOR SALE.

(Q) "NARCOTIC DRUG" SHALL MEAN ANY OF THE FOLLOWING, WHETHER PRODUCED DIRECTLY OR INDIRECTLY BY EXTRACTION FROM SUBSTANCES OF VEGETABLE ORIGIN, OR INDEPENDENTLY BY MEANS OF CHEMICAL SYNTHESIS, OR BY A COMBINATION OF EXTRACTION AND CHEMICAL SYNTHESIS; AND WHICH HAVE BEEN FOUND TO PRESENT AN EXTREME DANGER TO THE HEALTH AND WELFARE OF THE COMMUNITY BECAUSE OF THEIR ADDICTION-FORMING AND ADDICTION-SUSTAINING LIABILITIES:

(I) "OPIATE" SHALL MEAN ANY SUBSTANCE HAVING AN ADDICTION-FORMING OR ADDICTION-SUSTAINING LIABILITY SIMILAR TO MORPHINE OR BEING CAPABLE OF CONVERSION INTO A DRUG HAVING SUCH ADDICTION-FORMING OR ADDICTION-SUSTAINING LIABILITY. IT DOES NOT INCLUDE, UNLESS SPECIFICALLY DESIGNATED AS CONTROLLED UNDER §803 OF THIS SUBHEADING THE DEXTROROTATORY ISOMER OF 3-METHOXY-N-METHYL-MORPHINAN AND ITS SALTS (DEXTROMETHORPHAN). IT DOES INCLUDE ITS RACEMIC AND LEVOROTATORY FORMS; AND "OPIUM POPPY" WHICH SHALL MEAN THE PLANT OF THE SPECIES PAPAVER SOMNIFERUM L., EXCEPT THE SEEDS THEREOF, AND "POPPY STRAW" WHICH SHALL MEAN ALL PARTS, EXCEPT THE SEEDS, OF THE OPIUM POPPY, AFTER MOWING; AND "COCA LEAVES" WHICH SHALL MEAN COCAINE AND ANY COMPOUND, MANUFACTURE, SALT, DERIVATIVE, MIXTURE OR PREPARATION OF COCA LEAVES, EXCEPT DERIVATIVES OF COCA LEAVES WHICH DO NOT CONTAIN COCAINE, ECGONINE OR SUBSTANCES FROM WHICH COCAINE OR ECGONINE MAY BE SYNTHESIZED OR MADE;

(II) A COMPOUND, MANUFACTURE, SALT, DERIVATIVE, OR PREPARATION OF OPIUM, COCA LEAVES, OR OPIATES;

(III) A SUBSTANCE AND ANY COMPOUND, MANUFACTURE, SALT, DERIVATIVE, OR PREPARATION THEREOF WHICH IS CHEMICALLY IDENTICAL WITH ANY OF THE SUBSTANCES REFERRED TO IN CLAUSES (I) AND (II), EXCEPT THAT THE WORDS "NARCOTIC DRUG" AS USED IN THIS SECTION INCLUDE DECOCAINIZED COCA LEAVES OR EXTRACTS OF COCA LEAVES, WHICH EXTRACTS DO NOT CONTAIN COCAINE OR ECGONINE.

(R) "PERSON" SHALL MEAN ANY CORPORATION, ASSOCIATION, PARTNERSHIP OR ONE OR MORE INDIVIDUALS.

(S) "POSSESSION" SHALL MEAN THE EXERCISE OF ACTUAL OR CONSTRUCTIVE DOMINION OR CONTROL OVER A THING BY ONE OR MORE PERSONS.

(T) "PRACTITIONER" SHALL MEAN ONE OF THE FOLLOWING:

(I) A PHYSICIAN, DENTIST, VETERINARIAN, SCIENTIFIC INVESTIGATOR, OR OTHER PERSON LICENSED, REGISTERED OR OTHERWISE PERMITTED TO DISTRIBUTE, DISPENSE, CONDUCT RESEARCH WITH RESPECT TO OR ADMINISTER A CONTROLLED DANGEROUS SUBSTANCE IN THE COURSE OF PROFESSIONAL PRACTICE OR RESEARCH IN THIS STATE.

(A) "PHYSICIAN" SHALL MEAN ANY PERSON AUTHORIZED BY LAW TO PRACTICE MEDICINE IN THIS STATE.

(B) "DENTIST" AND "VETERINARIAN" SHALL MEAN ANY PERSON AUTHORIZED BY LAW TO PRACTICE DENTISTRY OR VETERINARY MEDICINE IN THIS STATE.

(II) A PHARMACY, LABORATORY, HOSPITAL OR OTHER INSTITUTION LICENSED, REGISTERED, OR OTHERWISE PERMITTED TO DISTRIBUTE, DISPENSE, CONDUCT RESEARCH WITH RESPECT TO OR TO ADMINISTER A CONTROLLED DANGEROUS SUBSTANCE IN THE COURSE OF PROFESSIONAL PRACTICE OR RESEARCH IN THE STATE.

(A) "HOSPITAL" SHALL MEAN AN INSTITUTION FOR THE CARE AND TREATMENT OF THE SICK AND INJURED APPROVED BY THE DEPARTMENT OF HEALTH, STATE OF MARYLAND, AS PROPER TO BE ENTRUSTED WITH THE CUSTODY OF CONTROLLED DANGEROUS SUBSTANCES UNDER THE DIRECTION OF A PHYSICIAN, DENTIST, OR VETERINARIAN.

(U) "PRESCRIPTION DRUGS" SHALL MEAN AND INCLUDE ANY DRUG INTENDED FOR USE BY MAN WHICH, BECAUSE OF ITS TOXICITY OR OTHER POTENTIALITY FOR HARMFUL EFFECT, OR THE METHOD OF ITS USE, OR THE COLLATERAL MEASURES NECESSARY FOR ITS USE, BEARS A CAUTIONARY LABEL WARNING AGAINST DISPENSING WITHOUT A PRESCRIPTION UNDER FEDERAL LAW OR IS DESIGNATED BY THE DEPARTMENT AS NOT SAFE FOR USE EXCEPT UNDER THE SUPERVISION OF A PRACTITIONER LICENSED BY LAW TO ADMINISTER SUCH DRUGS. PROVIDED THAT THIS TERM SHALL NOT MEAN ANY CONTROLLED DANGEROUS SUBSTANCE AS DEFINED IN THIS SUBHEADING.

COMMENT

Except for the final subsection (u), which is taken from section 300, these definitions are taken from section 277 without substantial change. In subsection (g) we have substituted "counterfeit controlled dangerous substance" for "counterfeit substance" in the interest of clarity.

803. CONTROL OF SUBSTANCES

(A) DUTY OF DEPARTMENT — THE DEPARTMENT SHALL CONTROL ALL SUBSTANCES ENUMERATED IN 804 OF THIS SUBHEADING AND MAY, BY MOTION OR ON THE PETITION OF ANY INTERESTED PARTY PURSUANT TO THE PROCEDURES OF THE ADMINISTRATIVE PROCEDURE ACT, AND AFTER NOTICE AND HEARING, ADD A SUBSTANCE AS A CONTROLLED DANGEROUS SUBSTANCE. IN MAKING SUCH A DETERMINATION THE DEPARTMENT SHALL CONSIDER THE FOLLOWING:

(1) ITS ACTUAL OR RELATIVE POTENTIAL FOR ABUSE;

(2) SCIENTIFIC EVIDENCE OF ITS PHARMACOLOGICAL EFFECT, IF KNOWN;

(3) STATE OF CURRENT SCIENTIFIC KNOWLEDGE REGARDING THE SUBSTANCE;

(4) ITS HISTORY AND CURRENT PATTERN OF ABUSE;

(5) THE SCOPE, DURATION, AND SIGNIFICANCE OF ABUSE;

(6) WHAT, IF ANY, RISK THERE IS TO THE PUBLIC HEALTH;

(7) ITS PSYCHIC OR PHYSIOLOGICAL DEPENDENCE LIABILITY; AND

(8) WHETHER THE SUBSTANCE IS AN IMMEDIATE PRECURSOR OF A SUBSTANCE ALREADY CONTROLLED UNDER THIS SUBHEADING.

AFTER CONSIDERING THE ABOVE FACTORS, THE DEPARTMENT SHALL MAKE FINDINGS WITH RESPECT THERETO AND SHALL ISSUE AN ORDER CONTROLLING THE SUBSTANCE IF IT FINDS THAT THE SUBSTANCE HAS A POTENTIAL FOR ABUSE.

(B) PRECURSORS OF CONTROLLED PRECURSORS — IF THE DEPARTMENT DESIGNATES A SUBSTANCE AS AN IMMEDIATE PRECURSOR, SUBSTANCES WHICH ARE PRECURSORS OF THE CONTROLLED PRECURSOR SHALL NOT BE SUBJECT TO CONTROL SOLELY BECAUSE THEY ARE PRECURSORS OF THE CONTROLLED PRECURSOR.

(C) NEW SUBSTANCES CONTROLLED UNDER FEDERAL LAW — UPON RECEIPT BY THE DEPARTMENT OF NOTICE THAT A SUBSTANCE NOT THEN CONTROLLED UNDER THIS SUBHEADING HAS BEEN DESIGNATED AS CONTROLLED UNDER FEDERAL LAW, THE DEPARTMENT SHALL, WITHIN A REASONABLE TIME THEREAFTER, EITHER BRING SUCH NEW SUBSTANCE UNDER CONTROL UNDER THIS SUBHEADING IN ACCORDANCE WITH SUBSECTION (A) OF THIS SECTION OR, IF THE DEPARTMENT OBJECTS TO BRINGING SAID SUBSTANCE UNDER CONTROL UNDER THIS SUBHEADING, THE DEPARTMENT SHALL CAUSE TO BE PUBLISHED AND MADE PUBLIC

THE REASONS FOR SUCH OBJECTION AND SHALL AFFORD ALL INTERESTED PARTIES AN OPPORTUNITY TO BE HEARD. AT THE CONCLUSION OF SUCH HEARING, THE DEPARTMENT SHALL PUBLISH AND MAKE PUBLIC ITS DECISION, WHICH SHALL BE FINAL. AN APPEAL FROM A DESIGNATION MADE PURSUANT TO THIS SECTION SHALL NOT STAY THE EFFECT OF SUCH DESIGNATION.

(D) UPDATING AND REPUBLISHING SCHEDULES — THE DEPARTMENT SHALL UPDATE AND REPUBLISH A SCHEDULE ON A SEMIANNUAL BASIS FOR TWO YEARS FROM JULY 1, 1970, AND THEREAFTER ON AN ANNUAL BASIS.

COMMENT

This provision substantially reenacts section 278, the only change of importance being in subsection (c). The present subsection (c) leaves ambiguous the status in Maryland of a drug newly controlled under federal law, during such time as the Department may be considering objection to its inclusion or rescheduling. The draft section provides a clear procedure and allows opportuntiy for hearing upon notice.

804. SCHEDULES

THE FOLLOWING SCHEDULES INCLUDE THE CONTROLLED DANGEROUS SUBSTANCES LISTED OR TO BE LISTED BY WHATEVER OFFICIAL NAME, COMMON OR USUAL NAME, CHEMICAL NAME, OR TRADE NAME DESIGNATED.

(A) SCHEDULE I — IN DETERMINING THAT A SUBSTANCE COMES WITHIN THIS SCHEDULE, THE DEPARTMENT SHALL FIND:

(1) A HIGH POTENTIAL FOR ABUSE, AND

(2) NO ACCEPTED MEDICAL USE IN THE UNITED STATES, AND

(3) A LACK OF ACCEPTED SAFETY FOR USE UNDER MEDICAL SUPERVISION.

THE FOLLOWING ARE CONTROLLED DANGEROUS SUBSTANCES AND ARE INCLUDED IN THIS SCHEDULE:

A. ANY OF THE FOLLOWING OPIATES, INCLUDING THEIR ISOMERS, ESTERS, ETHERS, SALTS, AND SALTS OF ISOMERS, ESTERS, AND ETHERS, UNLESS SPECIFICALLY EXCEPTED, WHENEVER THE EXISTENCE OF SUCH ISOMERS, ESTERS, ETHERS AND SALTS IS POSSIBLE WITHIN THE SPECIFIC CHEMICAL DESIGNATION:

1. ACETYLMETHADOL.
2. ALLYLPRODINE.
3. ALPHACETYLMETHADOL.

4. ALPHAMEPRODINE.
5. ALPHAMETHADOL.
6. BENZETHIDINE.
7. BETACETYLMETHADOL.
8. BETAMEPRODINE.
9. BETAMETHADOL.
10. BETAPRODINE.
10A. BEZITRAMIDE.
11. CLONITAZENE.
12. DEXTROMORAMIDE.
13. DEXTRORPHAN.
14. DIAMPROMIDE.
15. DIETHYLTHIAMBUTENE.
16. DIMENOXADOL.
17. DIMEPHEPTANOL.
18. DIMETHYLTHIAMBUTENE.
19. DIOXAPHETYL BUTYRATE.
20. DIPIPANONE.
21. ETHYLMETHYLTHIAMBUTENE.
22. ETONITAZENE.
23. ETOXERIDINE.
24. FURETHIDINE.
25. HYDROXYPETHIDINE.
25A. ISOMETHADONE.
26. KETOBEMIDONE.
27. LEVOMORAMIDE.
27A. LEVOMETHORPHAN.
28. LEVOPHENACYLMORPHAN.
29. MORPHERIDINE.
30. NORACYMETHADOL.
31. NORLEVORPHANOL.
32. NORMETHADONE.
33. NORPIPANONE.
34. PHENADOXONE.
35. PHENAMPROMIDE.
36. PHENOMORPHAN.
37. PHENOPERIDINE.
38. PIRITRAMIDE.
39. PROHEPTAZINE.
40. PROPERIDINE.
41. RACEMETHORPHAN.
42. RACEMORAMIDE.
43. RACEMORPHAN.
44. TRIMEPERIDINE.

B. ANY OF THE FOLLOWING OPIUM DERIVATIVES, THEIR SALTS, ISOMERS AND SALTS OF ISOMERS, UNLESS SPECIFICALLY EXCEPTED, WHENEVER THE EXISTENCE OF SUCH SALTS, ISOMERS AND SALTS OF ISOMERS IS POSSIBLE WITHIN THE SPECIFIC CHEMICAL DESIGNATION:

1. ACETORPHINE.
2. ACETYLOCODONE.
3. BENZYLMORPHINE.
4. CODEINE METHYLBROMIDE.

5. CODEINE-N-OXIDE. 22024
6. CODOXIME. 22025
7. CYPRENORPHINE. 22026
8. DESOMORPHINE. 22027
9. ETHYLMORPHINE METHYLIODIDE. 22028
10. ETORPHINE. 22029
11. ETORPHINE 3-METHYLETHER. 22030
12. HEROIN. 22031
13. HYDROMORPHINOL. 22032
14. METHYLDESORPHINE. 22033
15. METHYLDIHYDROMORPHINONE. 22034
16. METHYLHYDROMORPHINE. 22035
17. MORPHINE METHYLBROMIDE. 22036
18. MORPHINE METHYLCHLORIDE. 22037
19. MORPHINE METHYLSULFONATE. 22038
20. MORPHINE-N-OXIDE. 22039
21. MYROPHINE. 22040
22. NICOCODEINE. 22041
23. NICODICODINE. 22042
24. NICOMORPHINE. 22043
25. NORCODEINE. 22044
26. NORMORPHINE. 22045
27. PHOLCODINE. 22046
28. THEBACON. 22047

C. ANY MATERIAL, COMPOUND, MIXTURE OR PREPARATION WHICH CONTAINS ANY QUANTITY OF THE FOLLOWING HALLUCINOGENIC OR HALLUCINOGENIC-LIKE SUBSTANCES, THEIR SALTS, ISOMERS AND SALTS OF ISOMERS, UNLESS SPECIFICALLY EXCEPTED, WHENEVER THE EXISTENCE OF SUCH SALTS, ISOMERS AND SALTS OF ISOMERS IS POSSIBLE WITHIN THE SPECIFIC CHEMICAL DESIGNATION: 22050 22051 22052 22053 22054 22055

1. BUFOTENINE. 22058
2. DIETHYLTRYPTAMINE. 22059
3. DIMETHYLTRYPTAMINE. 22060
4. 4-METHYL-2, 5-DIMETHOXYAMPHETAMINE. 22061
5. IBOGAINE. 22062
6. LYSERGIC ACID DIETHYLAMIDE. 22063
7. MARIHUANA. 22064
8. MESCALINE. 22065
9. PEYOTE. 22066
10. PSILOCYBIN. 22067
11. PSILOCYN. 22068
12. TETRAHYDROCANNABINOL. 22069
13. 3, 4-METHYLENEDIOXYAMPHETAMINE. 22070
14. 5-METHOXY-3, 4-METHYLENEDIOXYAMPHETAMINE. 22071
15. 3, 4, 5-TRIMETHOXY AMPHETAMINE. 22072
16. N-NETHYL-3-PIPERIDYL BENZILATE. 22073
17. N-ETHYL-3-PIPERIDYL BENZILATE. 22074

(B) SCHEDULE II - IN DETERMINING THAT A SUBSTANCE COMES WITHIN THIS SCHEDULE, THE DEPARTMENT SHALL FIND: 22077 22078

1. A HIGH POTENTIAL FOR ABUSE, AND 22080

2. CURRENTLY ACCEPTED MEDICAL USE IN THE UNITED STATES, OR CURRENTLY ACCEPTED MEDICAL USE WITH SEVERE RESTRICTIONS, AND

3. ABUSE MAY LEAD TO SEVERE PSYCHIC OR PHYSICAL DEPENDENCE.

THE FOLLOWING ARE CONTROLLED DANGEROUS SUBSTANCES AND ARE INCLUDED IN THIS SCHEDULE:

A. ANY OF THE FOLLOWING SUBSTANCES EXCEPT THOSE NARCOTIC DRUGS LISTED IN OTHER SCHEDULES WHETHER PRODUCED DIRECTLY OR INDIRECTLY BY EXTRACTION FROM SUBSTANCES OF VEGETABLE ORIGIN, OR INDEPENDENTLY BY MEANS OF CHEMICAL SYNTHESIS, OR BY COMBINATION OF EXTRACTION AND CHEMICAL SYNTHESIS:

1. OPIUM, COCA LEAVES, AND OPIATE;

2. ANY SALT, COMPOUND, DERIVATIVE, OR PREPARATION OF OPIUM, COCA LEAVES, OR OPIATE;

3. ANY SALT, COMPOUND, DERIVATIVE, OR PREPARATION THEREOF WHICH IS CHEMICALLY EQUIVALENT OR IDENTICAL WITH ANY OF THE SUBSTANCES REFERRED TO IN CLAUSES 1 AND 2, EXCEPT THAT THESE SUBSTANCES SHALL NOT INCLUDE DECOCAINIZED COCA LEAVES OR EXTRACTION OF COCA LEAVES, WHICH EXTRACTIONS DO NOT CONTAIN COCAINE OR ECGONINE; AND SHALL NOT INCLUDE THE ISOQUINOLINE ALKALOIDS OF OPIUM;

4. OPIUM, POPPY AND POPPY STRAW.

B. ANY OF THE FOLLOIWNG OPIATES, INCLUDING THEIR ISOMERS, ESTERS, ETHERS, SALTS, AND SALTS OF ISOMERS, ESTERS AND ETHERS, UNLESS SPECIFICALLY EXCEPTED, WHENEVER THE EXISTENCE OF SUCH ISOMERS, ESTERS, ETHERS AND SALTS IS POSSIBLE WITHIN THE SPECIFIC CHEMICAL DESIGNATION:

1. ALPHAPRODINE.

2. ANILERIDINE.

3. DIPHENOXYLATE.

4. FENTANYL.

5. LEVORPHANOL.

6. METAZOCINE.

7. METHADONE.

8. METHADONE – INTERMEDIATE,

4-CYANO-2-DIMETHYLAMINO-4, 4-DIPHENYL BUTANE.

9. MORAMIDE - INTERMEDIATE, 2-METHYL-3-MORPHOLINO-1, 1-DIPHENYL-PROPANE-CARBOXYLIC ACID.

10. PETHIDINE.

11. PETHIDINE - INTERMEDIATE - A, 4-CYANO-1-METHYL-4-PHENYLPIPERIDINE.

12. PETHIDINE - INTERMEDIATE - B, ETHYL-4-PHENYLPIPERIDINE-4-CARBOXYLATE.

13. PETHIDINE - INTERMEDIATE - C, 1-METHYL-4-PHENYLPIPERIDINE-4-CARBOXYLIC ACID.

14. PHENAZOCINE.

15. PIMINODINE.

C. METHAMPHETAMINE, ITS SALTS, OPTICAL ISOMERS, AND SALTS OF OPTICAL ISOMERS.

D. ANY MATERIAL, COMPOUND, MIXTURE, OR PREPARATION WHICH CONTAINS ANY QUANTITY OF THE FOLLOWING SUBSTANCES HAVING A POTENTIAL FOR ABUSE ASSOCIATED WITH A STIMULANT EFFECT ON THE CENTRAL NERVOUS SYSTEM:

1. AMPHETAMINE, ITS SALTS, OPTICAL ISOMERS, AND SALTS OF ITS OPTICAL ISOMERS.

2. PHENMATRAZINE AND ITS SALTS.

3. ANY SUBSTANCE WHICH CONTAINS ANY QUANTITY OF METHAMPHETAMINE, INCLUDING ITS SALTS, OPTICAL ISOMERS, AND SALTS OF ITS OPTICAL ISOMERS, IN COMBINATION WITH ONE OR MORE ACTIVE NONNARCOTIC INGREDIENTS IN RECOGNIZED THERAPEUTIC AMOUNTS.

4. METHYLPHENIDATE.

(C) SCHEDULE III - IN DETERMINING THAT A SUBSTANCE COMES WITHIN THIS SCHEDULE, THE DEPARTMENT SHALL FIND:

1. A POTENTIAL FOR ABUSE LESS THAN THE SUBSTANCES LISTED IN SCHEDULES I AND II; AND

2. WELL DOCUMENTED AND APPROVED MEDICAL USE IN THE UNITED STATES; AND

3. ABUSE MAY LEAD TO MODERATE OR LOW PHYSICAL DEPENDENCE OR HIGH PSYCHOLOGICAL DEPENDENCE.

THE FOLLOWING ARE CLASSES OF CONTROLLED DANGEROUS

SUBSTANCES AND ARE INCLUDED IN THIS SCHEDULE: 22188

A. UNLESS LISTED IN ANOTHER SCHEDULE, ANY MATERIAL, COMPOUND, MIXTURE, OR PREPARATION WHICH CONTAINS ANY QUANTITY OF THE FOLLOWING SUBSTANCES HAVING A POTENTIAL FOR ABUSE ASSOCIATED WITH A DEPRESSANT EFFECT ON THE CENTRAL NERVOUS SYSTEM: 22190 22191 22192 22193 22194

1. ANY SUBSTANCE WHICH CONTAINS ANY QUANTITY OF A DERIVATIVE OF BARBITURIC ACID, OR ANY SALT OF A DERIVATIVE OF BARBITURIC ACID, EXCEPT THOSE SUBSTANCES WHICH ARE SPECIFICALLY LISTED IN OTHER SCHEDULES. 22196 22197 22198 22199

2. CHLORHEXADOL. 22201

3. GLUTETHIMIDE. 22203

4. LYSERGIC ACID. 22205

5. LYSERGIC ACID AMIDE. 22207

6. METHYPRYLON. 22209

7. PHENCYCLIDINE. 22211

8. SULFONDIETHYLMETHANE. 22213

9. SULFONETHYLMETHANE. 22215

10. SULFONMETHANE. 22217

B. NALORPHINE. 22219

C. ANY MATERIAL, COMPOUND, MIXTURE, OR PREPARATION CONTAINING LIMITED QUANTITES OF ANY OF THE FOLLOWING NARCOTIC DRUGS, OR ANY SALTS THEREOF: 22221 22222 22223

1. NOT MORE THAN 1.80 GRAMS OF CODEINE PER 100 MILLILITERS OR NOT MORE THAN 90 MILLIGRAMS PER DOSAGE UNIT, WITH AN EQUAL OR GREATER QUANTITY OF AN ISOQUINOLINE ALKALOID OF OPIUM. 22225 22226 22227 22228

2. NOT MORE THAN 1.80 GRAMS OF CODEINE PER 100 MILLILITERS OR NOT MORE THAN 90 MILLIGRAMS PER DOSAGE UNIT, WITH ONE OF MORE ACTIVE, NONNARCOTIC INGREDIENTS IN RECOGNIZED THERAPEUTIC AMOUNTS. 22230 22231 22232 22233

3. NOT MORE THAN 300 MILLIGRAMS OF DIHYDROCODEINONE PER 100 MILLILITERS OR NOT MORE THAN 15 MILLIGRAMS PER DOSAGE UNIT, WITH A FOURFOLD OR GREATER QUANTITY OF AN ISOQUINOLINE ALKALOID OF OPIUM. 22235 22236 22237 22238

4. NOT MORE THAN 300 MILLIGRAMS OF DIHYDROCODEINONE PER 100 MILLILITERS OR NOT MORE THAN 15 22240 22241

MILLIGRAMS PER DOSAGE UNIT, WITH ONE OR MORE ACTIVE, NONNARCOTIC INGREDIENTS IN RECOGNIZED THERAPEUTIC AMOUNTS.

5. NOT MORE THAN 1.80 GRAMS OF DIHYDROCODEINE PER 100 MILLILITERS OR NOT MORE THAN 90 MILLIGRAMS PER DOSAGE UNIT, WITH ONE OR MORE ACTIVE, NONNARCOTIC INGREDIENTS IN RECOGNIZED THERAPEUTIC AMOUNTS.

6. NOT MORE THAN 300 MILLIGRAMS OF ETHYLMORPHINE PER 100 MILLILITERS OR NOT MORE THAN 15 MILLIGRAMS PER DOSAGE UNIT, WITH ONE OR MORE ACTIVE, NONNARCOTIC INGREDIENTS IN RECOGNIZED THERAPEUTIC AMOUNTS.

7. NOT MORE THAN 500 MILLIGRAMS OF OPIUM PER 100 MILLILITERS OR PER 100 GRAMS, OR NOT MORE THAN 25 MILLIGRAMS PER DOSAGE UNIT, WITH ONE OR MORE ACTIVE, NONNARCOTIC INGREDIENTS IN RECOGNIZED THERAPEUTIC AMOUNTS. NOT MORE THAN 100 MILLIGRAMS OF OPIUM PER 100 MILLILITERS OR PER 100 GRAMS, OR NOT MORE THAN 5 MILLIGRAMS PER DOSAGE UNIT.

8. NOT MORE THAN 50 MILLIGRAMS OF MORPHINE PER 100 MILLILITERS OR PER 100 GRAMS WITH ONE OR MORE ACTIVE, NONNARCOTIC INGREDIENTS IN RECOGNIZED THERAPEUTIC AMOUNTS.

D. TALWIN.

E. METHAQUALONE.

(D) SCHEDULE IV - IN DETERMINING THAT A SUBSTANCE COMES WITHIN THIS SCHEDULE, THE DEPARTMENT SHALL FIND THAT:

1. THE SUBSTANCE HAS A LOW POTENTIAL FOR ABUSE RELATIVE TO THE SUBSTANCES LISTED IN SCHEDULE III; AND

2. THE SUBSTANCE HAS CURRENTLY ACCEPTED MEDICAL USE IN TREATMENT IN THE UNITED STATES; AND

3. ABUSE OF THE SUBSTANCE MAY LEAD TO LIMITED PHYSICAL DEPENDENCE OR PSYCHOLOGICAL DEPENDENCE RELATIVE TO THE SUBSTANCES IN SCHEDULE III.

THE FOLLOWING ARE CONTROLLED SUBSTANCES AND ARE INCLUDED IN THIS SCHEDULE:

A. ANY MATERIAL, COMPOUND, MIXTURE, OR PREPARATION WHICH CONTAINS ANY QUANTITY OF THE FOLLOWING SUBSTANCES HAVING A POTENTIAL FOR ABUSE ASSOCIATED WITH A

DEPRESSANT EFFECT ON THE CENTRAL NERVOUS SYSTEM:

1. BARBITAL.
2. CHLORAL BETAINE.
3. CHLORAL HYDRATE.
4. ETHCHLORVYNOL.
5. ETHINAMATE.
6. METHOHEXITAL.
7. MEPROBAMATE.
8. METHYLPHENOBARBITAL.
9. PARALDEHYDE.
10. PETRICHLORAL.
11. PHENOBARBITAL.

B. THE DEPARTMENT MAY EXCEPT BY RULE ANY COMPOUND, MIXTURE, OR PREPARATION CONTAINING ANY DEPRESSANT SUBSTANCE LISTED IN SUBSECTION (A) FROM THE APPLICATION OF ALL OR ANY PART OF THIS ACT IF THE COMPOUND, MIXTURE, OR PREPARATION CONTAINS ONE OR MORE ACTIVE MEDICINAL INGREDIENTS NOT HAVING A DEPRESSANT EFFECT ON THE CENTRAL NERVOUS SYSTEM, AND IF THE ADMIXTURES ARE INCLUDED THEREIN IN COMBINATIONS, QUANTITY, PROPORTION, OR CONCENTRATION THAT VITIATE THE POTENTIAL FOR ABUSE OF THE SUBSTANCES WHICH HAVE A DEPRESSANT EFFECT ON THE CENTRAL NERVOUS SYSTEM.

(E) SCHEDULE V — IN DETERMINING THAT A SUBSTANCE COMES WITHIN THIS SCHEDULE, THE DEPARTMENT SHALL FIND:

1. A LOW POTENTIAL FOR ABUSE RELATIVE TO THE SUBSTANCES LISTED IN SCHEDULE IV; AND

2. CURRENTLY ACCEPTED MEDICAL USE IN THE UNITED STATES; AND

3. LIMITED PHYSICAL DEPENDENCE AND/OR PSYCHOLOGICAL DEPENDENCE LIABILITY RELATIVE TO THE SUBSTANCES LISTED IN SCHEDULE IV.

THE FOLLOWING ARE CONTROLLED DANGEROUS SUBSTANCES AND ARE INCLUDED IN THIS SCHEDULE:

A. ANY COMPOUND, MIXTURE, OR PREPARATION CONTAINING LIMITED QUANTITIES OF ANY OF THE FOLLOWING NARCOTIC DRUGS OR ANY SALTS THEREOF, WHICH ALSO CONTAINS ONE OR MORE NONNARCOTIC ACTIVE MEDICINAL INGREDIENTS IN SUFFICIENT PROPORTION TO CONFER UPON THE COMPOUND, MIXTURE, OR PREPARATION, VALUABLE MEDICINAL QUALITIES OTHER THAN THOSE POSSESSED BY THE NARCOTIC DRUG ALONE:

1. NOT MORE THAN 200 MILLIGRAMS OF CODEINE PER 100 MILLILITERS OR PER 100 GRAMS;

2. NOT MORE THAN 100 MILLIGRAMS OF DIHYDROCODEINE PER 100 MILLILITERS OR PER 100 GRAMS;

3. NOT MORE THAN 50 MILLIGRAMS OF ETHYLMORPHINE PER 100 MILLILITERS OR PER 100 GRAMS;

4. NOT MORE THAN 2.5 MILLIGRAMS OF DIPHENOXYLATE AND NOT LESS THAN 25 MICROGRAMS OF ATROPINE SULFATE PER DOSAGE UNIT.

COMMENT

This section makes no substantial change in the present section 279, except that it follows the suggestion of Judge Scanlan in Cook v. State, 18 Md. App. 395, 306 A. 2d 627 (1973), that an apparently inadvertent departure from the federal statute be corrected by changing the word "substances" near the beginning of subsection (a)(3)(a) to the word "opiate," for the reasons suggested by Judge Scanlan.

805. RULES AND REGULATIONS CONCERNING MANUFACTURE, DISTRIBUTION AND DISPENSING; FEES

THE DEPARTMENT IS AUTHORIZED TO PROMULGATE RULES AND REGULATIONS AND TO CHARGE REASONABLE FEES RELATING TO THE REGISTRATION AND CONTROL OF THE MANUFACTURE, DISTRIBUTION, AND DISPENSING OF CONTROLLED DANGEROUS SUBSTANCES WITHIN THE STATE.

COMMENT

This section makes no change in the present section 280.

806. REGISTRATION GENERALLY

(A) PERSONS REQUIRED TO REGISTER ANNUALLY - EVERY PERSON WHO MANUFACTURES, DISTRIBUTES, OR DISPENSES ANY CONTROLLED DANGEROUS SUBSTANCE WITHIN THE STATE OR WHO PROPOSES TO ENGAGE IN THE MANUFACTURE, DISTRIBUTION, OR DISPENSING OF ANY CONTROLLED DANGEROUS SUBSTANCE WITHIN THE STATE, SHALL OBTAIN ANNUALLY A REGISTRATION ISSUED BY THE DEPARTMENT IN ACCORDANCE WITH THE RULES AND REGULATIONS PROMULGATED BY THE DEPARTMENT. PERSONS REGISTERED BY THE DEPARTMENT UNDER THIS SUBHEADING TO MANUFACTURE, DISTRIBUTE OR DISPENSE CONTROLLED DANGEROUS SUBSTANCES ARE AUTHORIZED TO POSSESS, MANUFACTURE, DISTRIBUTE, OR DISPENSE SUCH SUBSTANCES (INCLUDING ANY SUCH ACTIVITY IN THE CONDUCT OF RESEARCH) TO THE EXTENT AUTHORIZED BY THEIR REGISTRATION AND IN CONFORMITY WITH THE OTHER PROVISIONS OF THIS SUBHEADING.

(B) PERSONS EXEMPT FROM REGISTRATION - THE FOLLOWING PERSONS SHALL NOT BE REQUIRED TO REGISTER AND IN ADDITION TO THE AFOREMENTIONED REGISTRANTS WHILE ACTING IN THE COURSE OF THEIR BUSINESS OR PROFESSION MAY

LAWFULLY POSSESS CONTROLLED DANGEROUS SUBSTANCES UNDER THE PROVISIONS OF THIS SUBHEADING:

(1) AN AGENT, OR AN EMPLOYEE THEREOF, OF ANY REGISTERED MANUFACTURER, DISTRIBUTOR, OR DISPENSER OF ANY CONTROLLED DANGEROUS SUBSTANCE IF SUCH AGENT IS ACTING IN THE USUAL COURSE OF HIS BUSINESS OR EMPLOYMENT;

(2) A COMMON OR CONTRACT CARRIER OR WAREHOUSEMAN, OR AN EMPLOYEE THEREOF, WHOSE POSSESSION OF ANY CONTROLLED DANGEROUS SUBSTANCE IS IN THE USUAL COURSE OF HIS BUSINESS OR EMPLOYMENT;

(3) AN ULTIMATE USER OR A PERSON IN POSSESSION OF ANY CONTROLLED DANGEROUS SUBSTANCE PURSUANT TO A LAWFUL ORDER OF A PRACTITIONER, WHILE ACTING IN GOOD FAITH AND IN THE ORDINARY COURSE OF BUSINESS OR PROFESSIONAL PRACTICE;

(C) WAIVING REQUIREMENT FOR REGISTRATION — THE DEPARTMENT MAY, BY REGULATION, WAIVE THE REQUIREMENT FOR REGISTRATION OF CERTAIN MANUFACTURERS, DISTRIBUTORS, OR DISPENSERS IF THE DEPARTMENT FINDS IT CONSISTENT WITH THE PUBLIC HEALTH AND SAFETY.

(D) SEPARATE REGISTRATION REQUIRED FOR EACH PLACE OF BUSINESS OR PRACTICE — A SEPARATE REGISTRATION SHALL BE REQUIRED AT EACH PRINCIPAL PLACE OF BUSINESS OR PROFESSIONAL PRACTICE WHERE THE APPLICANT MANUFACTURES, DISTRIBUTES, OR DISPENSES CONTROLLED DANGEROUS SUBSTANCES.

(E) INSPECTION OF ESTABLISHMENT — THE DEPARTMENT IS AUTHORIZED TO INSPECT THE ESTABLISHMENT OF A REGISTRANT OR APPLICANT FOR REGISTRATION IN ACCORDANCE WITH THE RULES AND REGULATIONS PROMULGATED BY THE DEPARTMENT.

(F) MANUFACTURERS AND DISTRIBUTORS TO BE REGISTERED UNLESS INCONSISTENT WITH PUBLIC INTEREST — THE DEPARTMENT SHALL REGISTER AN APPLICANT TO MANUFACTURE OR DISTRIBUTE CONTROLLED DANGEROUS SUBSTANCES INCLUDED IN SCHEDULES I THROUGH V UNLESS THE DEPARTMENT DETERMINES THAT THE ISSUANCE OF SUCH REGISTRATION IS INCONSISTENT WITH THE PUBLIC INTEREST. IN DETERMINING THE PUBLIC INTEREST, THE FOLLOWING FACTORS SHALL BE CONSIDERED:

(1) MAINTENANCE OF EFFECTIVE CONTROLS AGAINST DIVERSION OF PARTICULAR CONTROLLED DANGEROUS SUBSTANCES AND ANY SCHEDULE I OR II SUBSTANCE COMPOUNDED THEREFROM INTO OTHER THAN LEGITIMATE MEDICAL, SCIENTIFIC, OR INDUSTRIAL CHANNELS;

(2) COMPLIANCE WITH APPLICABLE STATE, FEDERAL, AND LOCAL LAW;

(3) PRIOR CONVICTION RECORD OF APPLICANT UNDER FEDERAL, STATE, AND LOCAL LAWS RELATING TO THE MANUFACTURE, DISTRIBUTION, OR DISPENSING OF SUCH SUBSTANCES;

(4) PAST EXPERIENCE IN THE MANUFACTURE AND DISTRIBUTION OF CONTROLLED DANGEROUS SUBSTANCES, AND THE EXISTENCE IN THE ESTABLISHMENT OF EFFECTIVE CONTROLS AGAINST DIVERSION; AND

(5) SUCH OTHER FACTORS AS MAY BE RELEVANT TO AND CONSISTENT WITH THE PUBLIC HEALTH AND SAFETY.

(G) RESTRICTIONS UPON MANUFACTURERS AND DISTRIBUTORS REGISTERED UNDER SUBSECTION (F) — REGISTRATION GRANTED UNDER SUBSECTION (F) OF THIS SECTION SHALL NOT ENTITLE A REGISTRANT TO MANUFACTURE AND DISTRIBUTE CONTROLLED DANGEROUS SUBSTANCES IN SCHEDULE I OR II OTHER THAN THOSE SPECIFIED IN THE REGISTRATION.

(H) PRACTITIONERS — PRACTITIONERS SHALL BE REGISTERED BY THE DEPARTMENT TO DISPENSE ANY CONTROLLED SUBSTANCES OR TC CONDUCT RESEARCH WITH CONTROLLED SUBSTANCES IN SCHEDULES II THROUGH V IF THEY ARE AUTHORIZED TO DISPENSE OR CONDUCT RESEARCH UNDER THE LAWS OF THIS STATE. THE DEPARTMENT NEED NOT REQUIRE SEPARATE REGISTRATION UNDER THIS SECTION FOR PRACTITIONERS ENGAGING IN RESEARCH WITH NONNARCOTIC CONTROLLED SUBSTANCES IN SCHEDULES II THROUGH V WHERE THE REGISTRANT IS ALREADY REGISTERED UNDER THIS SECTION IN ANOTHER CAPACITY. PRACTITIONERS REGISTERED UNDER FEDERAL LAW TO CONDUCT RESEARCH WITH SCHEDULE I SUBSTANCES MAY CONDUCT RESEARCH WITH SCHEDULE I SUBSTANCES WITHIN THIS STATE UPON FURNISHING THE DEPARTMENT EVIDENCE OF THAT FEDERAL REGISTRATION.

(I) INITIAL REGISTRATION OF MANUFACTURERS, DISTRIBUTORS AND DISPENSERS — THE DEPARTMENT SHALL INITIALLY PERMIT PERSONS TO REGISTER WHO OWN OR OPERATE ANY ESTABLISHMENT ENGAGED IN THE MANUFACTURE, DISTRIBUTION OR DISPENSING OF ANY CONTROLLED DANGEROUS SUBSTANCES PRIOR TO JULY 1, 1970, AND WHO ARE REGISTERED OR LICENSED BY THE STATE.

(J) COMPLIANCE BY MANUFACTURERS AND DISTRIBUTORS WITH FEDERAL LAW REGARDING REGISTRATION — COMPLIANCE BY MANUFACTURERS AND DISTRIBUTORS WITH THE PROVISIONS OF THE FEDERAL LAW RESPECTING REGISTRATION (EXCLUDING FEES) SHALL BE DEEMED COMPLIANCE WITH THIS SECTION.

COMMENT

This section makes no change in the present section 281.

807. SUSPENSION, REVOCATION AND DENIAL OF REGISTRATION

(A) GROUNDS FOR SUSPENSION OR REVOCATION – A REGISTRATION PURSUANT TO §806, AS AMENDED FROM TIME TO TIME, TO MANUFACTURE, DISTRIBUTE, OR DISPENSE A CONTROLLED DANGEROUS SUBSTANCE, MAY BE SUSPENDED OR REVOKED BY THE DEPARTMENT UPON A FINDING THAT THE REGISTRANT:

(1) HAS MATERIALLY FALSIFIED ANY APPLICATION FILED PURSUANT TO THIS SUBHEADING CR REQUIRED BY THIS SUBHEADING;

(2) HAS BEEN CONVICTED OF OR HAS COMMITTED AN OFFENSE UNDER PART 220 OF THE CRIMINAL CODE OR ANY OF THE PRIOR LAWS OF THIS STATE, OF THE UNITED STATES, OR OF ANY STATE, RELATING TO ANY SUBSTANCES DEFINED HEREIN AS A CONTROLLED DANGEROUS SUBSTANCE; OR

(3) HAS HAD HIS FEDERAL REGISTRATION SUSPENDED OR REVOKED BY COMPETENT FEDERAL AUTHORITY AND IS NO LONGER AUTHORIZED BY FEDERAL LAW TO ENGAGE IN THE MANUFACTURING, DISTRIBUTION, OR DISPENSING OF CONTROLLED DANGEROUS SUBSTANCES;

(4) HAS OMITTED, REMOVED, ALTERED, OR OBLITERATED A SYMBOL REQUIRED BY THE FEDERAL LAW;

(5) HAS REFUSED OR FAILED TO MAKE, KEEP OR FURNISH ANY RECORD, NOTIFICATION, ORDER FORM, STATEMENT, INVOICE OR INFORMATION REQUIRED UNDER THIS SUBHEADING;

(6) HAS REFUSED ANY ENTRY INTO ANY PREMISES OR INSPECTION AUTHORIZED BY THIS SUBHEADING;

(7) HAS KEPT OR MAINTAINED ANY STORE, SHOP, WAREHOUSE, DWELLING HOUSE, BUILDING, VEHICLE, BOAT, AIRCRAFT, OR ANY PLACE WHATEVER, WHICH IS RESORTED TO BY PERSONS USING CONTROLLED DANGEROUS SUBSTANCES IN VIOLATION OF PART 220 OF THE CRIMINAL CODE FOR THE PURPOSE OF USING SUCH SUBSTANCES, OR WHICH IS USED FOR THE KEEPING OR SELLING OF THE SAME IN VIOLATION OF PART 220 OF THE CRIMINAL CODE; OR

(8) HAS VIOLATED ANY OF THE PROVISIONS OF THIS SUBHEADING.

(B) LIMITATION OF REVOCATION OR SUSPENSION – THE DEPARTMENT MAY LIMIT REVOCATION OR SUSPENSION OF A REGISTRATION TO THE PARTICULAR CONTROLLED DANGEROUS SUBSTANCE WITH RESPECT TO WHICH GROUNDS FOR REVOCATION OR SUSPENSION EXIST.

(C) ORDER TO SHOW CAUSE; PROCEEDINGS GENERALLY –

BEFORE TAKING ACTION PURSUANT TO THIS SECTION OR PURSUANT TO A DENIAL OF REGISTRATION OR TO A REFUSAL OF RENEWAL OF REGISTRATION UNDER §806, THE DEPARTMENT SHALL SERVE UPON THE APPLICANT OR REGISTRANT AN ORDER TO SHOW CAUSE WHY REGISTRATION SHOULD NOT BE DENIED, REVOKED, SUSPENDED, OR RENEWAL REFUSED. THE ORDER TO SHOW CAUSE SHALL CONTAIN A STATEMENT OF THE BASIS THEREOF AND SHALL CALL UPON THE APPLICANT OR REGISTRANT TO APPEAR BEFORE THE DEPARTMENT AT A TIME AND PLACE STATED IN THE ORDER, BUT IN NO EVENT LESS THAN THIRTY DAYS AFTER THE DATE OF RECEIPT OF THE ORDER. IN THE CASE OF A DENIAL OF RENEWAL OF REGISTRATION THE SHOW CAUSE ORDER SHALL BE SERVED NOT LATER THAN 30 DAYS BEFORE THE EXPIRATION OF THE REGISTRATION. PROCEEDINGS TO DENY, REVOKE, OR SUSPEND SHALL BE CONDUCTED PURSUANT TO THIS SECTION IN ACCORDANCE WITH THE ADMINISTRATIVE PROCEDURE ACT. SUCH PROCEEDINGS SHALL BE INDEPENDENT OF, AND NOT IN LIEU OF, CRIMINAL PROSECUTIONS OR OTHER PROCEEDINGS UNDER THIS SUBHEADING OR ANY LAW OF THE STATE. PROCEEDINGS TO REFUSE RENEWAL OF REGISTRATION SHALL NOT ABATE THE EXISTING REGISTRATION WHICH SHALL REMAIN IN EFFECT PENDING THE OUTCOME OF THE ADMINISTRATIVE HEARING.

(D) EMERGENCY SUSPENSION – THE DEPARTMENT MAY, IN ITS DISCRETION, SUSPEND ANY REGISTRATION SIMULTANEOUSLY WITH THE INSTITUTION OF PROCEEDINGS UNDER THIS SECTION IN CASES WHERE IT FINDS THAT THERE IS AN IMMINENT DANGER TO THE PUBLIC HEALTH OR SAFETY. SUCH SUSPENSION SHALL CONTINUE IN EFFECT UNTIL THE CONCLUSION OF SUCH PROCEEDINGS, INCLUDING JUDICIAL REVIEW THEREOF, UNLESS SOONER WITHDRAWN BY THE DEPARTMENT OR DISSOLVED BY THE APPROPRIATE CIRCUIT COURT OR THE SUPREME BENCH OF BALTIMORE CITY AS THE CASE MAY BE.

(E) SEALING AND DISPOSITION OF CONTROLLED DANGEROUS SUBSTANCES – IN THE EVENT THE DEPARTMENT SUSPENDS OR REVOKES A REGISTRATION GRANTED UNDER §RA6, ALL CONTROLLED DANGEROUS SUBSTANCES OWNED OR POSSESSED BY THE REGISTRANT PURSUANT TO SUCH REGISTRATION AT THE TIME OF SUSPENSION OR THE EFFECTIVE DATE OF THE REVOCATION ORDER, AS THE CASE MAY BE, MAY IN THE DISCRETION OF THE DEPARTMENT BE PLACED UNDER SEAL. NO DISPOSITION MAY BE MADE OF SUBSTANCES UNDER SEAL UNTIL THE TIME FOR TAKING AN APPEAL HAS ELAPSED OR UNTIL*ALL APPEALS HAVE BEEN CONCLUDED UNLESS THE COURT, UPON APPLICATION THEREFOR, ORDERS THE SALE OF PERISHABLE SUBSTANCES AND THE DEPOSIT OF THE PROCEEDS OF THE SALE WITH THE COURT. UPON A REVOCATION ORDER BECOMING FINAL, ALL SUCH CONTROLLED DANGEROUS SUBSTANCES SHAIL BE FORFEITED TO THE STATE.

(F) NOTICE TO BUREAU OF NARCOTICS AND DANGEROUS DRUGS – THE BUREAU OF NARCOTICS AND DANGEROUS DRUGS SHALL PROMPTLY BE NOTIFIED OF ALL ORDERS SUSPENDING OR REVOKING REGISTRATION AND ALL FORFEITURES OF CONTROLLED DANGEROUS SUBSTANCES.

COMMENT

The only substantial changes in this section are in subsection (a). Even here, the corresponding section 282 is generally followed. In subdivision (2) of subsection (a) changes have been made to reflect the transfer to Part 220 of the criminal provisions of the current statute. The opening words have been changed from "Has been convicted of an offense under this subheading" to "Has been convicted or or has committed an offense under Part 220 of the Criminal Code." The new words " or has committed" do not actually make a substantive change, because under the current provision commission (without conviction) is a sufficient basis for action under the final subdivision of the subsection: "Has violated any of the provisions of this subheading." This last subsection can no longer refer to that portion of the provisions transferred to Part 220; hence the need for the change in subdivision (2). Subdivisions (4), (5), (6), and (7) are not in the original section 282; they are derived from section 288, subsection (a), subdivisions (3), (4), and (5), which subdivisions are omitted from Part 220, as more suitable for administrative than criminal treatment, and subdivision (6), which, as absorbed in §220.10(e), requires knowledge for a criminal conviction, but here does not.

808. RECORDS AND INVENTORIES REQUIRED OF REGISTRANTS

UPON JULY 1, 1970, EACH REGISTRANT MANUFACTURING, DISTRIBUTING OR DISPENSING CONTROLLED DANGEROUS SUBSTANCES IN SCHEDULES, I, II, III, IV, OR V SHALL MAKE A COMPLETE AND ACCURATE RECORD OF ALL STOCKS OF SUCH DANGEROUS SUBSTANCES ON HAND. THEREAFTER, COMPLETE AND ACCURATE RECORDS OF ALL SUCH DANGEROUS SUBSTANCES SHALL BE MAINTAINED FOR TWO YEARS. EACH TWO YEAR PERIOD AFTER JULY 1, 1970, AT THE TIME OF HIS REGULAR FISCAL INVENTORY, EACH REGISTRANT MANUFACTURING, DISTRIBUTING OR DISPENSING CONTROLLED DANGEROUS SUBSTANCE SHALL PREPARE AN INVENTORY OF EACH DANGEROUS SUBSTANCE IN HIS POSSESSION. RECORDS AND INVENTORIES SHALL CONTAIN SUCH INFORMATION AS SHALL BE PROVIDED BY RULES AND REGULATIONS PROMULGATED BY THE DEPARTMENT. THIS SECTION SHALL NOT APPLY TO PRACTITIONERS WHO LAWFULLY PRESCRIBE OR ADMINISTER, BUT NOT OTHERWISE DISPENSE, CONTROLLED DANGEROUS SUBSTANCES LISTED IN SCHEDULES II, III, IV OR V, IN §804 OF THIS SUBHEADING. COMPLIANCE WITH THE PROVISIONS OF THE FEDERAL LAW RESPECTING RECORDS AND REPORTS SHALL BE DEEMED COMPLIANCE WITH THIS SECTION.

COMMENT

This is the present section 283, without substantial change.

809. ORDER FORMS REQUIRED FOR DISTRIBTUION OF SUBSTANCES IN SCHEDULES I AND II

CONTROLLED DANGEROUS SUBSTANCES IN SCHEDULES I AND II SHALL BE DISTRIBUTED ONLY BY A REGISTRANT PURSUANT TO AN ORDER FORM. COMPLIANCE WITH THE PROVISIONS OF THE FEDERAL LAW RESPECTING ORDER FORMS FOR THESE SCHEDULES SHALL BE DEEMED COMPLIANCE WITH THIS SECTION.

COMMENT

This section makes no change in the present section 284.

810. PRESCRIPTIONS REQUIRED IN CERTAIN INSTANCES

(A) SCHEDULE II DRUGS - EXCEPT WHEN DISPENSED DIRECTLY BY A PRACTITIONER, OTHER THAN A PHARMACIST, TO AN ULTIMATE USER, NO CONTROLLED DANGEROUS SUBSTANCE INCLUDED IN SCHEDULE II, WHICH IS A PRESCRIPTION DRUG AS DETERMINED UNDER ARTICLE 43, MAY BE DISPENSED WITHOUT THE WRITTEN PRESCRIPTION OF A PRACTITIONER: PROVIDED, THAT IN EMERGENCY SITUATIONS, AS PRESCRIBED BY THE DEPARTMENT BY REGULATION, SUCH DRUG MAY BE DISPENSED UPON ORAL PRESCRIPTION REDUCED PROMPTLY TO WRITING AND FILED BY THE PHARMACIST, IF SUCH ORAL PRESCRIPTION IS AUTHORIZED BY FEDERAL LAW. PRESCRIPTIONS SHALL BE RETAINED IN CONFORMITY WITH THE REQUIREMENTS OF SECTION RA8 OF THIS SUBHEADING AS AMENDED FROM TIME TO TIME. NO PRESCRIPTION FOR A SCHEDULE II SUBSTANCE MAY BE REFILLED.

(A-1) NO PRACTITIONER SHALL DISPENSE METHADONE, DIRECTLY OR BY PRESCRIPTION, UNLESS HE IS ASSOCIATED WITH A CONTROLLED DRUG THERAPY PROGRAM SANCTIONED BY THE DRUG ABUSE ADMINISTRATION OF THE DEPARTMENT OR UNLESS AN EMERGENCY OR MEDICAL SITUATION, AS PRESCRIBED BY THE DEPARTMENT BY REGULATION, IN COOPERATION WITH THE MEDICAL AND CHIRURGICAL FACULTY OF MARYLAND, EXISTS.

(A-2) NO PRACTITIONER SHALL DISPENSE METHAMPHETAMINE, DIRECTLY OR BY PRESCRIPTION, EXCEPT IN RECOGNIZED CASES OF MEDICAL NEED, AS PRESCRIBED BY THE DEPARTMENT BY REGULATION IN COOPERATION WITH THE MEDICAL AND CHIRURGICAL FACULTY OF MARYLAND.

(B) SCHEDULE III AND IV DRUGS - EXCEPT WHEN DISPENSED DIRECTLY BY A PRACTITIONER, OTHER THAN A PHARMACIST, TO AN ULTIMATE USER, NO CONTROLLED DANGEROUS SUBSTANCE INCLUDED IN SCHEDULE III OR IV WHICH IS A PRESCRIPTION DRUG AS DETERMINED UNDER ARTICLE 43, MAY BE DISPENSED WITHOUT A WRITTEN OR ORAL PRESCRIPTION. SUCH

PRESCRIPTION MAY NOT BE FILLED OR REFILED MORE THAN SIX MONTHS AFTER THE DATE THEREOF OR BE REFILLED MORE THAN FIVE TIMES AFTER THE DATE OF THE PRESCRIPTION, UNLESS RENEWED BY THE PRACTITIONER.

(B–1) NO PRACTITIONER SHALL DISPENSE AMPHETAMINE, DIRECTLY OR BY PRESCRIPTION, EXCEPT IN RECOGNIZED CASES OF MEDICAL NEED, AS PRESCRIBED BY THE DEPARTMENT BY REGULATION IN COOPERATION WITH THE MEDICAL AND CHIRURGICAL FACULTY OF MARYLAND.

(C) SCHEDULE V SUBSTANCES – NO CONTROLLED DANGEROUS SUBSTANCE INCLUDED IN SCHEDULE V MAY BE DISTRIBUTED OR DISPENSED OTHER THAN FOR A MEDICAL PURPOSE; AND IN ADDITION TO COMPLIANCE WITH THE PROVISIONS OF THIS SUBHEADING AND THE FEDERAL REQUIREMENTS, ANY SUCH PRACTITIONER SHALL UPON DISPENSING ANY SUCH CONTROLLED DANGEROUS SUBSTANCE SECURELY AFFIX TO THE CONTAINER THEREOF, IN ADDITION TO ANY OTHER LABEL ALREADY AFFIXED THERETO, A LABEL BEARING THE DISPENSER'S NAME AND SIGNATURE, HIS REGISTRY NUMBER, THE DATE ON WHICH DISPENSED, AND THE PURCHASER'S NAME.

COMMENT

This is the present section 285, without substantial change. In new subdivisions (a–1), (a–2), and (b–1) are the 1972 Methadone changes.

811. ADMINISTRATIVE INSPECTIONS AND WARRANTS

(A) ISSUANCE AND EXECUTION OF ADMINISTRATIVE INSPECTION WARRANTS SHALL BE AS FOLLOWS:

(1) ANY JUDGE OF THIS STATE MAY, WITHIN HIS JURISDICTION, AND UPON PROPER OATH OR AFFIRMATION SHOWING PROBABLE CAUSE, AS DEFINED HEREINAFTER, ISSUE WARRANTS FOR THE PURPOSE OF CONDUCTING ADMINISTRATIVE INSPECTIONS AUTHORIZED BY THIS SUBHEADING OR REGULATIONS THEREUNDER, AND SEIZURES OF PROPERTY APPROPRIATE TO SUCH INSPECTIONS. FOR THE PURPOSES OF THIS SECTION, "PROBABLE CAUSE" MEANS A VALID PUBLIC INTEREST IN THE EFFECTIVE ENFORCEMENT OF THE SUBHEADING OR REGULATIONS SUFFICIENT TO JUSTIFY ADMINISTRATIVE INSPECTION OF THE AREA, PREMISES, BUILDING OR CONVEYANCE IN THE CIRCUMSTANCES SPECIFIED IN THE APPLICATION FOR THE WARRANT.

(2) A WARRANT SHALL ISSUE ONLY UPON AN AFFIDAVIT OF AN OFFICER OR EMPLOYEE DULY DESIGNATED AND HAVING KNOWLEDGE OF THE FACTS ALLEGED, SWORN TO BEFORE THE JUDGE AND ESTABLISHING THE GOUNDS FOR ISSUING THE WARRANT. IF THE JUDGE IS SATISFIED THAT GROUNDS FOR THE APPLICATION EXIST OR THAT THERE IS PROBABLE CAUSE TO BELIEVE THEY EXIST, HE SHALL ISSUE A WARRANT IDENTIFYING THE AREA, PREMISES, BUILDING, OR CONVEYANCE TO BE

INSPECTED, THE PURPOSE OF SUCH INSPECTION, AND, WHERE APPROPRIATE, THE TYPE OF PROPERTY TO BE INSPECTED, IF ANY. THE WARRANT SHALL IDENTIFY THE ITEM OR TYPES OF PROPERTY TO BE SEIZED, IF ANY. THE WARRANT SHALL BE DIRECTED TO A PERSON AUTHORIZED TO EXECUTE IT. THE WARRANT SHALL STATE THE GOUNDS FOR ITS ISSUANCE AND THE NAME OF THE PERSON OR PERSONS WHOSE AFFIDAVIT HAS BEEN TAKEN IN SUPPORT THEREOF. IT SHALL COMMAND THE PERSON TO WHOM IT IS DIRECTED TO INSPECT THE AREA, PREMISES, BUILDING, OR CONVEYANCE IDENTIFIED FOR THE PURPOSE SPECIFIED, AND, WHERE APPROPRIATE, SHALL DIRECT THE SEIZURE OF THE PROPERTY SPECIFIED. THE WARRANT SHALL DIRECT THAT IT BE SERVED DURING NORMAL BUSINESS HOURS. IT SHALL DESIGNATE THE JUDGE TO WHOM IT SHALL BE RETURNED.

(3) A WARRANT ISSUED PURSUANT TO THIS SECTION MUST BE EXECUTED AND RETURNED WITHIN TEN DAYS OF ITS DATE. IF PROPERTY IS SEIZED PURSUANT TO A WARRANT, THE PERSON EXECUTING THE WARRANT SHALL GIVE TO THE PERSON FROM WHOM OR FROM WHOSE PREMISES THE PROPERTY WAS TAKEN A COPY OF THE WARRANT AND A RECEIPT FOR THE PROPERTY TAKEN OR SHALL LEAVE THE COPY AND RECEIPT AT THE PLACE FROM WHICH THE PROPERTY WAS TAKEN. THE RETURN OF THE WARRANT SHALL BE MADE PROMPTLY AND SHALL BE ACCOMPANIED BY A WRITTEN INVENTORY OF ANY PROPERTY TAKEN. THE INVENTORY SHALL BE MADE IN THE PRESENCE OF THE PERSON EXECUTING THE WARRANT AND OF THE PERSON FROM WHOSE POSSESSION OR PREMISES THE PROPERTY WAS TAKEN, IF THEY ARE PRESENT, OR IN THE PRESENCE OF AT LEAST ONE CREDIBLE PERSON OTHER THAN THE PERSON EXECUTING THE WARRANT. THE JUDGE, UPON REQUEST, SHALL DELIVER A COPY OF THE INVENTORY TO THE PERSON FROM WHOM OR FROM WHOSE PREMISES THE PROPERTY WAS TAKEN AND TO THE APPLICANT FOR THE WARRANT.

(4) THE JUDGE WHO HAS ISSUED A WARRANT UNDER THIS SECTION SHALL ATTACH TO THE WARRANT A COPY OF THE RETURN AND ALL PAPERS FILED IN CONNECTION THEREWITH AND SHALL FILE THEM WITH THE CLERK OF THE COURT FROM WHICH THE WARRANT WAS ISSUED.

(B) THE DEPARTMENT IS AUTHORIZED TO MAKE ADMINISTRATIVE INSPECTIONS OF CONTROLLED PREMISES IN ACCORDANCE WITH THE FOLLOWING PROVISIONS AND TO DESIGNATE WHO MAY MAKE SEIZURES OF PROPERTY PURSUANT TO THE PROVISIONS OF THIS SECTION;

(1) FOR PURPOSES OF THIS SECTION ONLY, "CONTROLLED PREMISES" MEANS:

(A) PLACES WHERE PERSONS REGISTERED OR EXEMPTED FROM REGISTRATION REQUIREMENTS UNDER THIS SUBHEADING ARE REQUIRED TO KEEP RECORDS; AND

(B) PLACES INCLUDING FACTORIES,

WAREHOUSES, ESTABLISHMENTS, AND CONVEYANCES WHERE PERSONS REGISTERED OR EXEMPTED FROM REGISTRATION REQUIREMENTS UNDER THIS SUBHEADING ARE PERMITTED TO HOLD, MANUFACTURE, COMPOUND, PROCESS, SELL, DELIVER, OR OTHERWISE DISPOSE OF ANY CONTROLLED DANGEROUS SUBSTANCE.

(2) WHEN SO AUTHORIZED BY AN ADMINISTRATIVE INSPECTION WARRANT ISSUED PURSUANT TO SUBSECTION (A) OF THIS SECTION AN OFFICER OR EMPLOYEE DESIGNATED BY THE DEPARTMENT, UPON PRESENTING THE WARRANT AND APPROPRIATE CREDENTIALS TO THE OWNER, OPERATOR, OR AGENT IN CHARGE, SHALL HAVE THE RIGHT TO ENTER CONTROLLED PREMISES FOR THE PURPOSE OF CONDUCTING AN ADMINISTRATIVE INSPECTION.

(3) WHEN SO AUTHORIZED BY AN ADMINISTRATIVE INSPECTION WARRANT, AN OFFICER OR EMPLOYEE DESIGNATED BY THE DEPARTMENT SHALL HAVE THE RIGHT —

(A) TO INSPECT AND COPY RECORDS REQUIRED BY THIS SUBHEADING TO BE KEPT;

(B) TO INSPECT, WITHIN REASONABLE LIMITS AND IN A REASONABLE MANNER, CONTROLLED PREMISES AND ALL PERTINENT EQUIPMENT, FINISHED AND UNFINISHED MATERIAL, CONTAINERS AND LABELLING FOUND THEREIN, AND, EXCEPT AS PROVIDED IN SUBSECTION (B)(5) OF THIS SECTION, ALL OTHER THINGS THEREIN (INCLUDING RECORDS, FILES, PAPERS, PROCESSES, CONTROLS, AND FACILITIES) BEARING ON VIOLATION OF THIS SUBHEADING; AND

(C) TO INVENTORY ANY STOCK OF ANY CONTROLLED DANGEROUS SUBSTANCE THEREIN AND OBTAIN SAMPLES OF ANY SUCH SUBSTANCE.

(4) THE DEPARTMENT AND ITS AGENTS SHALL HAVE AUTHORITY TO INSPECT WITHOUT A WARRANT BOOKS AND RECORDS PURSUANT TO THIS SUBHEADING AND TO ENTER AND CONDUCT ADMINISTRATIVE INSPECTIONS (INCLUDING SEIZURES OF PROPERTY) WITHOUT A WARRANT:

(A) WITH THE CONSENT OF THE OWNER, OPERATOR, OR AGENT IN CHARGE OF THE CONTROLLED PREMISES;

(B) IN SITUATIONS PRESENTING IMMINENT DANGER TO HEALTH OR SAFETY;

(C) IN SITUATIONS INVOLVING INSPECTION OF CONVEYANCES WHERE THERE IS REASONABLE CAUSE TO BELIEVE THAT THE MOBILITY OF THE CONVEYANCE MAKES IT IMPRACTICABLE TO OBTAIN A WARRANT;

(D) IN ANY OTHER EXCEPTIONAL OR EMERGENCY CIRCUMSTANCE WHERE TIME OR OPPORTUNITY TO APPLY FOR A WARRANT IS LACKING; AND,

(E) IN ALL OTHER SITUATIONS WHERE A WARRANT IS NOT LEGALLY REQUIRED.

(5) EXCEPT WHEN THE OWNER, OPERATOR, OR AGENT IN CHARGE OF THE CONTROLLED PREMISES SO CONSENTS IN WRITING, NO INSPECTION AUTHORIZED BY THIS SECTION SHALL EXTEND TO

(A) FINANCIAL DATA;

(B) SALES DATA OTHER THAN SHIPMENTS DATA; OR

(C) PRICING DATA.

COMMENT

This section follows the present section 294.

812. INJUNCTIONS AGAINST VIOLATIONS

IN ADDITION TO THE OTHER REMEDIES PROVIDED BY THIS SUBHEADING AND NOTWITHSTANDING ANY OTHER PROVISIONS OF LAW, THE DEPARTMENT, THE ATTORNEY GENERAL, AND THE STATE'S ATTORNEY OF ANY COUNTY OR BALTIMORE CITY, AS THE CASE MAY BE, MAY APPLY TO THE APPROPRIATE COURT FOR A TEMPORARY OR PERMANENT INJUNCTION RESTRAINING ANY PERSON FROM VIOLATION OF ANY PROVISIONS OF THIS SUBHEADING IRRESPECTIVE OF WHETHER OR NOT THERE EXISTS AN ADEQUATE REMEDY AT LAW.

COMMENT

This section makes no change in the present section 295.

813. ENFORCEMENT OF SUBHEADING; COOPERATIVE ARRANGEMENTS; PLANT ERADICATION PROGRAMS

IT IS HEREBY MADE THE DUTY OF THE DEPARTMENT AND THOSE OF ITS OFFICERS, AGENTS, INSPECTORS AND REPRESENTATIVES WHO ARE SO DESIGNATED BY THE SECRETARY OF THE DEPARTMENT AND OF ALL POLICE OFFICERS AND STATE'S ATTORNEYS WITHIN THE STATE TO ENFORCE ALL PROVISIONS OF THIS SUBHEADING EXCEPT THOSE SPECIFICALLY DELEGATED, AND TO COOPERATE WITH ALL AGENCIES CHARGED WITH THE ENFORCEMENT OF THE LAWS OF THE UNITED STATES, OF THIS STATE AND OF ANY POLITICAL SUBDIVISION OF THIS STATE AND OF ALL OTHER STATES OR POLITICAL SUBDIVISIONS THEREOF RELATING TO CONTROLLED DANGEROUS SUBSTANCES. TO THIS END, THE DEPARTMENT IS AUTHORIZED TO:

(1) ARRANGE FOR THE EXCHANGE OF INFORMATION BETWEEN GOVERNMENTAL OFFICIALS CONCERNING THE USE AND ABUSE OF DANGEROUS SUBSTANCES;

(2) COORDINATE AND COOPERATE IN TRAINING PROGRAMS ON DANGEROUS SUBSTANCE LAW ENFORCEMENT AT THE LOCAL AND STATE LEVELS;

(3) COOPERATE WITH THE FEDERAL BUREAU OF NARCOTICS AND DANGEROUS DRUGS BY ESTABLISHING A CENTRALIZED UNIT WHICH WILL ACCEPT, CATALOGUE, FILE, AND COLLECT STATISTICS OBTAINED FROM LAW-ENFORCEMENT AGENCIES, INCLUDING RECORDS OF DRUG DEPENDENT PERSONS CONVICTED OF DRUG OFFENSES AND OTHER DANGEROUS SUBSTANCE LAW OFFENDERS WITHIN THE STATE, AND MAKE SUCH INFORMATION AVAILABLE FOR FEDERAL, STATE, AND LOCAL LAW-ENFORCEMENT PURPOSES; AND

(4) CONDUCT PROGRAMS OF ERADICATION AIMED AT DESTROYING WILD OR ILLICIT GROWTH OF PLANT SPECIES FROM WHICH CONTROLLED DANGEROUS SUBSTANCES MAY BE EXTRACTED.

COMMENT

This section makes no change in the present section 296.

814. FORFEITURES AND SEIZURES GENERALLY; MOTOR VEHICLES

(A) PROPERTY SUBJECT TO FORFEITURE — THE FOLLOWING SHALL BE SUBJECT TO FORFEITURE AND NO PROPERTY RIGHT SHALL EXIST IN THEM:

(1) ALL CONTROLLED DANGEROUS SUBSTANCES WHICH HAVE BEEN MANUFACTURED, DISTRIBUTED, DISPENSED, ACQUIRED, OR POSSESSED IN VIOLATION OF THE PROVISIONS OF THIS SUBHEADING OR OF PART 220 OF THE CRIMINAL CODE;

(2) ALL RAW MATERIALS, PRODUCTS AND EQUIPMENT OF ANY KIND WHICH ARE USED, OR INTENDED FOR USE, IN MANUFACTURING, COMPOUNDING, PROCESSING, DELIVERING, IMPORTING, OR EXPORTING ANY CONTROLLED DANGEROUS SUBSTANCE IN VIOLATION OF THE PROVISIONS OF THIS SUBHEADING OR OF PART 220 OF THE CRIMINAL CODE;

(3) ALL PROPERTY WHICH IS USED, OR INTENDED FOR USE, AS A CONTAINER FOR PROPERTY DESCRIBED IN PARAGRAPHS (1) AND (2);

(4) ALL CONVEYANCES INCLUDING AIRCRAFT, VEHICLES, OR VESSESLS, WHICH ARE USED, OR INTENDED FOR USE, TO TRANSPORT, OR IN ANY MANNER TO FACILITATE THE TRANSPORTATION, SALE, RECEIPT, POSSESSION, OR CONCEALMENT OF PROPERTY DESCRIBED IN (1) OR (2), EXCEPT THAT:

(I) NO CONVEYANCE USED BY ANY PERSON AS A COMMON CARRIER OR VEHICLE FOR HIRE IN THE TRANSACTION OF BUSINESS AS A COMMON CARRIER OR VEHICLE FOR HIRE SHALL BE SEIZED OR FORFEITED UNDER THIS

SUBHEADING UNLESS IT APPEARS THAT THE OWNER OR OTHER PERSON IN CHARGE OF THE CONVEYANCE WAS A CONSENTING PARTY OR PRIVY TO A VIOLATION OF THIS SUBHEADING OR OF PART 220 OF THE CRIMINAL CODE; AND

(II) NO CONVEYANCE SHALL BE FORFEITED UNDER THE PROVISIONS OF THIS SECTION BY REASON OF ANY ACT OR OMISSION ESTABLISHED BY THE OWNER THEREOF TO HAVE BEEN COMMITTED OR OMITTED BY ANY PERSON OTHER THAN SUCH OWNER WHILE SUCH CONVEYANCE WAS UNLAWFULLY IN THE POSSESSION OF A PERSON OTHER THAN THE OWNER IN VIOLATION OF THE CRIMINAL LAWS OF THE UNITED STATES, OR OF ANY STATE;

(5) ALL BOOKS, RECORDS, AND RESEARCH, INCLUDING FORMULAS, MICROFILM, TAPES, AND DATA WHICH ARE USED, OR INTENDED FOR USE, IN VIOLATION OF THE PROVISIONS OF THIS SUBHEADING OR OF PART 220 OF THE CRIMINAL CODE;

(6) ALL MONEY OR CURRENCY WHICH SHALL BE FOUND IN CLOSE PROXIMITY TO CONTRABAND CONTROLLED DANGEROUS SUBSTANCES OR CONTROLLED PARAPHERNALIA OR WHICH OTHERWISE HAS BEEN USED OR INTENDED FOR USE IN CONNECTION WITH THE ILLEGAL MANUFACTURE, DISTRIBUTION, DISPENSING OR POSSESSION OF CONTROLLED DANGEROUS SUBSTANCES OR CONTROLLED PARAPHERNALIA.

(B) SEIZURE OF PROPERTY SUBJECT TO FORFEITURE — ANY PROPERTY SUBJECT TO FORFEITURE UNDER THIS SUBHEADING MAY BE SEIZED UPON PROCESS ISSUED BY ANY COURT HAVING JURISDICTION OVER THE PROPERTY EXCEPT THAT SEIZURE WITHOUT SUCH PROCESS MAY BE MADE WHEN—

(1) THE SEIZURE IS INCIDENT TO AN ARREST OR A SEARCH UNDER A SEARCH WARRANT OR AN INSPECTION UNDER AN ADMINISTRATIVE INSPECTION WARRANT;

(2) THE PROPERTY SUBJECT TO SEIZURE HAS BEEN THE SUBJECT OF A PRIOR JUDGMENT IN FAVOR OF THE STATE IN A CRIMINAL INJUNCTION OR FORFEITURE PROCEEDING UNDER THIS SUBHEADING;

(3) THERE IS PROBABLE CAUSE TO BELIEVE THAT THE PROPERTY IS DIRECTLY OR INDIRECTLY DANGEROUS TO HEALTH OR SAFETY; OR

(4) THERE IS A PROBABLE CAUSE TO BELIEVE THAT THE PROPERTY HAS BEEN USED OR INTENDED TO BE USED IN VIOLATION OF THIS SUBHEADING.

IN THE EVENT OF SEIZURE PURSUANT TO PARAGRAPHS (3) AND (4) OF THIS SUBSECTION, PROCEEDINGS UNDER SUBSECTION (D) OF THIS SECTION SHALL BE INSTITUTED PROMPTLY, EXCEPT ALL PROCEEDINGS RELATING TO MONEY OR CURRENCY, WHICH SHALL BE INSTITUTED WITHIN NINETY (90) DAYS FROM THE DATE OF FINAL DISPOSITION OF CRIMINAL PROCEEDINGS WHICH ARISE

OUT OF PART 220 OF THE CRIMINAL CODE.

(I) ALL APPLICATIONS FOR FORFEITURE OF MONEY OR CURRENCY CONTRABAND SHALL BE MADE BY THE DIRECTOR OF FINANCE OF BALTIMORE CITY OR BY THE COUNTY TREASURER AND SUCH APPLICATIONS SHALL BE BY PETITION, AFFIDAVIT AND SHOW CAUSE ORDER,

(II) THE PETITION, AFFIDAVIT AND SHOW CAUSE ORDER SHALL BE SERVED IN THE FIRST INSTANCE PURSUANT TO RULE 104 OF THE MARYLAND RULES OF PROCEDURE OR RULE NO. 104 OF THE MARYLAND DISTRICT RULES, AND THEREAFTER, THE SUMMONS HAVING BEEN RETURNED NON EST, THE DIRECTOR OF FINANCE OF BALTIMORE CITY OR COUNTY TREASURER MAY PROCEED PURSUANT TO RULE 105, SUBSECTION 2, AND SUBSECTION 3 OF THE MARYLAND RULES OF PROCEDURE AS AMENDED, OR RULE NO. 104H OF THE MARYLAND DISTRICT RULES.

(C) SEIZED PROPERTY NOT REPLEVIABLE; SEALING OR REMOVAL OF SEIZED PROPERTY. — PROPERTY TAKEN OR DETAINED UNDER THIS SECTION SHALL BE REPLEVIABLE, BUT SHALL BE DEEMED TO BE IN THE CUSTODY OF THE PERSON WHO SEIZED SAID PROPERTY SUBJECT ONLY TO THE ORDERS AND DECREES OF THE COURT OR THE OFFICIAL HAVING JURISDICTION THEREOF. WHENEVER PROPERTY IS SEIZED UNDER THE PROVISIONS OF THIS SUBHEADING, THE PERSON WHO SEIZED SAID PROPERTY MAY:

(1) PLACE THE PROPERTY UNDER SEAL;

(2) REMOVE THE PROPERTY TO A PLACE DESIGNATED BY THE COURT.

(D) WHENEVER PROPERTY IS FORFEITED UNDER THIS SUBHEADING, THE POLITICAL SUBDIVISION IN WHICH SUCH PROPERTY WAS SEIZED, OR, IF THE PROPERTY WAS SEIZED BY STATE AUTHORITIES, THE STATE MAY:

(1) RETAIN THE PROPERTY FOR OFFICIAL USE EXCEPT, WHENEVER COIN OR CURRENCY IS SEIZED BY THE BALTIMORE CITY POLICE, AND FORFEITED UNDER THIS SUBHEADING, IT SHALL BE SURRENDERED TO THE CITY OF BALTIMORE FOR DISPOSITION ACCORDING TO THIS SECTION;

(2) SELL ANY FORFEITED PROPERTY WHICH IS NOT REQUIRED TO BE DESTROYED BY LAW AND WHICH IS NOT HARMFUL TO THE PUBLIC, PROVIDED THAT THE PROCEEDS BE DISPOSED OF FOR PAYMENT OF ALL PROPER EXPENSES OF THE PROCEEDINGS FOR FORFEITURE AND SALE INCLUDING EXPENSES OF SEIZURE, MAINTENANCE OF CUSTODY, ADVERTISING AND COURT COSTS;

(3) REQUIRE AN APPROPRIATE AGENCY TO TAKE CUSTODY OF THE PROPERTY AND REMOVE IT FOR DISPOSITION IN ACCORDANCE WITH LAW, OR DESTRUCTION.

(E) SEIZURE AND SUMMARY FORFEITURE OF CONTRABAND —

ALL SUBSTANCES LISTED IN SCHEDULE I THAT ARE POSSESSED, TRANSFERRED, SOLD OR OFFERED FOR SALE IN VIOLATION OF THE PROVISIONS OF THIS SUBHEADING OR PART 220 OF THE CRIMINAL CODE SHALL BE DEEMED CONTRABAND AND SEIZED AND SUMMARILY FORFEITED TO THE STATE. SIMILARLY, ALL SUBSTANCES LISTED IN SCHEDULE I, WHICH ARE SEIZED OR COME INTO THE POSSESSION OF THE STATE, THE OWNERS OF WHICH ARE UNKNOWN, SHALL BE DEEMED CONTRABAND AND SUMMARILY FORFEITED TO THE STATE.

(1) ALL SPECIES OF PLANTS FROM WHICH CONTROLLED SUBSTANCES IN SCHEDULES I AND II MAY BE DERIVED WHICH HAVE BEEN PLANTED OR CULTIVATED IN VIOLATION OF THIS SUBHEADING, OR OF WHICH THE OWNERS OR CULTIVATORS ARE UNKNOWN, OR WHICH ARE WILD GROWTHS, MAY BE SEIZED AND SUMMARILY FORFEITED TO THE STATE.

(2) THE FAILURE, UPON DEMAND BY THE DEPARTMENT, OR ITS DULY AUTHORIZED AGENT, OF THE PERSON IN OCCUPANCY OR IN CONTROL OF LAND OR PREMISES UPON WHICH SUCH SPECIES OF PLANTS ARE GROWING OR BEING STORED, TO PRODUCE AN APPROPRIATE REGISTRATION, OR PROOF THAT HE IS THE HOLDER THEREOF, SHALL CONSTITUTE AUTHORITY FOR SEIZURE AND FORFEITURE.

(F) MOTOR VEHICLES – STANDARDS FOR SEIZURE – IN EXERCISING THE AUTHORITY TO SEIZE MOTOR VEHICLES PURSUANT TO THIS SECTION THE FOLLOWING STANDARDS SHALL BE UTILIZED:

(1) A MOTOR VEHICLE USED IN VIOLATION OF THIS SECTION SHALL BE SEIZED AND FORFEITURE RECOMMENDED TO THE STATE'S ATTORNEY WHEN:

(I) CONTROLLED DANGEROUS SUBSTANCES IN ANY QUANTITY ARE SOLD OR ATTEMPTED TO BE SOLD IN VIOLATION OF PART 220 OF THE CRIMINAL CODE;

(II) ALTHOUGH THE VIOLATOR HAS NOT SOLD OR ATTEMPTED TO SELL CONTROLLED DANGEROUS SUBSTANCES IN VIOLATION OF PART 220 OF THE CRIMINAL CODE, AN AMOUNT OF SUCH SUBSTANCES OR PARAPHERNALIA IS LOCATED WHICH WOULD REASONABLY INDICATE THAT SALE IS CONTEMPLATED BY THE VIOLATOR.

(III) THE TOTAL CIRCUMSTANCES OF THE CASE DICTATE THAT SEIZURE AND FORFEITURE IS JUSTIFIED; THESE CIRCUMSTANCES WOULD INCLUDE SUCH FACTORS AS THE FOLLOWING:

(A) THE POSSESSION OF CONTROLLED DANGEROUS SUBSTANCES;

(B) AN EXTENSIVE CRIMINAL RECORD OF THE VIOLATOR;

(C) A PREVIOUS CONVICTION OF THE VIOLATOR FOR A CONTROLLED DANGEROUS SUBSTANCES VIOLATION;

(D) CORROBORATED INFORMATION IS DEVELOPED INDICATING THAT THE VIOLATOR IS OR WAS RECENTLY A SELLER, OR FREQUENTLY ASSOCIATES WITH INDIVIDUALS KNOWN TO BE DISTRIBUTORS OF ILLEGAL CONTROLLED DANGEROUS SUBSTANCES OR PARAPHERNALIA;

(E) CIRCUMSTANCES OF THE ARREST;

(F) THE MANNER IN WHICH THE VEHICLE WAS BEING USED.

(2) A MOTOR VEHICLE USED IN VIOLATION OF PART 220 OF THE CRIMINAL CODE SHALL NOT BE SEIZED AND FORFEITURE SHALL NOT BE RECOMMENDED TO THE STATE'S ATTORNEY WHEN:

(I) THE MOTOR VEHICLE IS BEING USED BY A MEMBER OF THE FAMILY OTHER THAN THE REGISTERED OWNER AND CONTROLLED DANGEROUS SUBSTANCES OR PARAPHERNALIA ARE LOCATED THEREIN IN A QUANTITY INSUFFICIENT TO SUGGEST A SALE IS CONTEMPLATED, AND WHERE NO SALE WAS MADE OR ATTEMPTED AND THE REGISTERED OWNER NEITHER KNEW NOR SHOULD HAVE KNOWN THAT SUCH MATERIAL WAS IN THE MOTOR VEHICLE;

(II) AN INNOCENT REGISTERED OWNER LENDS HIS MOTOR VEHICLE TO ANOTHER AND THE LATTER OR SOMEONE INVITED INTO THE MOTOR VEHICLE BY SUCH PERSON CAUSES CONTROLLED DANGEROUS SUBSTANCES OR PARAPHERNALIA TO BE BROUGHT INTO THE VEHICLE WITHOUT THE KNOWLEDGE OF THE OWNER.

(III) THE MOTOR VEHICLE FALLS WITHIN THE PROVISIONS OF SUBSECTION (A)(4)(I) OR (II) OF THIS SECTION.

(3) FORFEITURE OF THE MOTOR VEHICLE USED IN VIOLATION OF THIS SUBTITLE SHALL BE RECOMMENDED TO THE STATE'S ATTORNEY ONLY AFTER THE CHIEF LAW-ENFORCEMENT OFFICER OF THE POLICE DEPARTMENT, BUREAU OR FORCE WHICH SEIZED THE MOTOR VEHICLE HAS PERSONALLY REVIEWED THE FACTS AND CIRCUMSTANCES OF THE SEIZURE AND HAS PERSONALLY DETERMINED, ACCORDING TO THE ABOVE GUIDELINES, THAT FORFEITURE IS WARRANTED AND SO REPRESENTS IN WRITING TO THE APPROPRIATE STATE'S ATTORNEY.

(G) SAME – NOTICE TO ADMINISTRATOR OF MOTOR VEHICLES; CERTIFYING NAME AND ADDRESS OF OWNER – UPON THE SEIZURE OF A MOTOR VEHICLE AND THE RECOMMENDATION FOR FORFEITURE, THE STATE'S ATTORNEY FOR THE COUNTY OR CITY OF BALTIMORE WHERE THE SEIZURE IS MADE SHALL NOTIFY THE ADMINISTRATOR OF MOTOR VEHICLES BY CERTIFIED MAIL OF THE

SEIZURE AND OF THE MOTOR OR SERIAL NUMBER OF THE MOTOR VEHICLE SEIZED. THE ADMINISTRATOR SHALL PROMPTLY CERTIFY TO THE STATE'S ATTORNEY THE NAME AND ADDRESS OF THE OWNER. THE TERM "OWNER" IN THIS SUBTITLE INCLUDES LIENHOLDER AS WELL AS OWNER AS THOSE TERMS ARE DEFINED IN ARTICLE 66 1/2 OF THE CODE.

(H) SAME — NOTICE TO OWNER — THE STATE'S ATTORNEY FOR THE COUNTY OR BALTIMORE CITY WHERE THE SEIZURE IS MADE SHALL NOTIFY THE OWNER OF THE MOTOR VEHICLE BY CERTIFIED MAIL OF THE SEIZURE AND OF THE DETERMINATION BY THE STATE'S ATTORNEY OF WHETHER THE OWNER KNEW OR SHOULD HAVE KNOWN THAT THE MOTOR VEHICLE WAS BEING, OR WAS TO BE, USED IN VIOLATION OF PART 220 OF THE CRIMINAL CODE.

(I) SAME — SURRENDER OF VEHICLE TO OWNER — IF THE STATE'S ATTORNEY DETERMINES INDEPENDENT OF THE DECISION OF THE POLICE DEPARTMENT, BUREAU OR FORCE WHICH SEIZED THE MOTOR VEHICLE THAT THE MOTOR VEHCILE FALLS WITHIN THE PURVIEW OF SUBSECTION (F)(2)(I), (II) OR (III) OR THAT THE STANDARDS TO BE UTILIZED PURSUANT TO SUBSECTION (F)(1) WERE NOT MET HE SHALL SURRENDER THE VEHICLE UPON REQUEST TO THE OWNER.

(J) SAME — PETITION FOR FORFEITURE — IF THE STATE'S ATTORNEY DETERMINES THAT THE VEHICLE SHALL BE FORFEITED TO THE STATE, HE SHALL PETITION THE CIRCUIT COURT OF THE APPROPRIATE SUBDIVISION IN THE NAME OF THE STATE OF MARYLAND AGAINST THE MOTOR VEHICLE AS DESIGNATED BY MAKE, MODEL, YEAR, AND MOTOR OR SERIAL NUMBER. THE PETITION SHALL ALLEGE THE SEIZURE AND SET FORTH IN GENERAL TERMS THE CAUSES OR GROUNDS OF FORFEITURE. IT SHALL ALSO PRAY THAT THE MOTOR VEHICLE BE CONDEMNED AS FORFEITED TO THE STATE AND DISPOSED OF ACCORDING TO LAW.

(K) SAME — SERVICE ON OWNER — IF THE OWNER OR OWNERS OF THE VEHICLE ARE UNKNOWN OR CANNOT BE FOUND, NOTICE OF THE SEIZURE AND INTENDED FORFEITURE PROCEEDINGS SHALL BE MADE BY PUBLICATION IN ONE OR MORE NEWSPAPERS PUBLISHED IN THE COUNTY IN WHICH THE ACTION IS BROUGHT IF THERE BE ONE SO PUBLISHED, AND IF NOT, IN A NEWSPAPER HAVING A SUBSTANTIAL CIRCULATION IN SAID COUNTY. IN BALTIMORE CITY THE NOTICE SHALL BE PUBLISHED IN ONE OR MORE OF THE DAILY NEWSPAPERS PUBLISHED IN THE CITY. THE NOTICE SHALL STATE THE SUBSTANCE AND OBJECT OF THE ORIGINAL PETITION AND GIVE NOTICE OF THE INTENDED FORFEITURE PROCEEDINGS.

(L) SAME — ANSWER BY OWNER — WITHIN 30 DAYS AFTER SERVICE OF THE NOTICE OF SEIZURE AND INTENDED FORFEITURE PROCEEDINGS OR WITHIN 30 DAYS AFTER THE DATE OF PUBLICATION, THE OWNER OF THE MOTOR VEHICLE SEIZED MAY FILE AN ANSWER UNDER OATH TO THE PETITION.

(M) SAME — BOND BY OWNER FOR POSSESSION — IF THE

OWNER OF SEIZED MOTOR VEHICLE DESIRES TO OBTAIN POSSESSION THEREOF BEFORE TBE HEARING ON THE PETITION FILED AGAINST THE VEHICLE, THE CLERK OF THE COURT WHERE THE PETITION IS FILED SHALL HAVE AN APPRAISAL MADE BY THE SHERIFF OF THE COUNTY OR CITY IN WHICH THE COURT IS LOCATED. THE SHERIFF SHALL PROMPTLY INSPECT AND RENDER AN APPRAISAL OF THE VALUE OF THE VEHICLE AND RETURN THE APPRAISAL, IN WRITING, UNDER OATH, TO THE CLERK OF THE COURT IN WHICH THE PROCEEDINGS ARE PENDING. UPON THE FILING OF THE APPRAISAL, THE OWNER MAY GIVE BOND PAYABLE TO THE STATE OF MARYLAND IN AN AMOUNT EQUAL TO THE APPRAISED VALUE OF THE VEHICLE PLUS COURT COSTS WHICH MAY ACCRUE, WITH SECURITY TO BE APPROVED BY THE CLERK, AND CONDITIONED FOR THE PERFORMANCE ON THE FINAL JUDGMENT OF THE COURT AFTER THE HEARING ON THE PETITION, THE COURT DIRECTS THAT THE MOTOR VEHICLE OR SUCH INTEREST OR EQUITY AS THE OWNER MAY HAVE THEREIN, BE FORFEITED, JUDGMENT MAY THEREUPON BE ENTERED AGAINST THE OBLIGORS ON THE BOND FOR THE PENALTY THEREOF, WITHOUT FURTHER OR OTHER PROCEEDING, TO BE DISCHARGED BY THE PAYMENT OF THE APPRAISED VALUE OF THE VEHICLE SO SEIZED AND FORFEITED AND COSTS, UPON WHICH JUDGMENT EXECUTION MAY ISSUE.

(N) SAME — CUSTODY PENDING PROSECUTION; TIME FOR HEARING ON FORFEITURE — SUBJECT TO THE PROVISIONS PERMITTING POSTING OF A BOND, THE COURT SHALL RETAIN CUSTODY OF THE MOTOR VEHICLE PENDING PROSECUTION OF THE PERSON ACCUSED AND IN CASE SUCH PERSON BE FOUND GUILTY, THE MOTOR VEHICLE SHALL REMAIN IN THE CUSTODY OF THE COURT UNTIL THE HEARING ON THE FORFEITURE IS HELD. THE HEARING SHALL BE SCHEDULED NO MORE THAN 30 DAYS AFTER CONVICTION OF THE DEFENDANT, AND REASONABLE NOTICE SHALL BE GIVEN TO THOSE PARTIES FILING AN ANSWER TO THE PETITION.

(O) SAME — ORDERING FORFEITURE WHEN ANSWER NOT FILED — IF NO TIMELY ANSWER IS FILED, THE COURT SHALL HEAR EVIDENCE UPON THE MOTOR VEHICLE'S USE IN VIOLATION OF PART 220 OF THE CRIMINAL CODE AND SHALL UPON SATISFACTORY PROOF THEREOF, ORDER THE MOTOR VEHICLE FORFEITED TO THE STATE.

(P) SAME — ORDERING RELEASE — AT THE SCHEDULED HEARING, ANY OWNER WHO FILED A TIMELY ANSWER MAY SHOW BY COMPETENT EVIDENCE THAT THE MOTOR VEHICLE WAS NOT IN FACT USED IN VIOLATION OF PART 220 OF THE CRIMINAL CODE OR THAT HE NEITHER KNEW NOR SHOULD HAVE KNOWN THAT THE MOTOR VEHICLE WAS BEING, OR WAS TO BE USED. UPON THE DETERMINATION THAT THE MOTOR VEHICLE WAS NOT SO USED, THE COURT SHALL ORDER THAT THE MOTOR VEHICLE BE RELEASED TO THE OWNER.

(Q) SAME — ORDERING FORFEITURE AFTER HEARING — IF AFTER A FULL HEARING THE COURT DECIDES THAT THE VEHICLE WAS USED IN VIOLATION OF PART 220 OF THE CRIMINAL CODE OR

THAT THE OWNER KNEW OR SHOULD HAVE KNOWN THAT THE MOTOR VEHICLE WAS BEING, OR WAS TO BE SO USED, THE COURT SHALL ORDER THAT THE MOTOR VEHICLE BE FORFEITED TO THE STATE.

(R) SAME – ORDERING SALE OF VEHICLE SUBJECT TO SECURITY INTEREST – IF THE COURT SHALL DETERMINE THAT THE FORFEITED MOTOR VEHICLE BE SUBJECT TO A BONA FIDE RECORDED SECURITY INTEREST CREATED WITHOUT THE KNOWLEDGE THAT THE MOTOR VEHICLE WAS BEING, OR WAS TO BE, USED IN VIOLATION OF PART 220 OF THE CRIMINAL CODE, THE COURT SHALL ORDER THAT THE MOTOR VEHICLE BE SOLD BY THE STATE.

(S) SAME – PROCEDURE FOR SALE – IF A VEHICLE IS ORDERED TO BE SOLD UNER THE PROVISIONS OF THIS SECTION, THE SALE SHALL BE AT PUBLIC AUCTION AT SOME PLACE WHICH IS OPEN, CONVENIENT, AND ACCESSIBLE TO THE PUBLIC, AT ANY TIME BETWEEN 10 O'CLOCK A.M. AND 6 O'CLOCK P.M. ON ANY WEEKDAY, PROVIDED THE TIME, PLACE AND TERMS OF THE SALE, TOGETHER WITH A DETAILED DESCRIPTION OF THE VEHICLE OR PART THEREOF, IS INSERTED IN ONE OR MORE NEWSPAPERS OF GENERAL CIRCULATION IN THE CITY OR COUNTY WHERE THE SALE IS TO TAKE PLACE, AT LEAST ONCE EACH WEEK FOR TWO SUCCESSIVE WEEKS PRIOR TO THE SALE.

(T) SAME – DISPOSITION OF PROCEEDS OF SALE – THE PROCEEDS OF SALE SHALL BE APPLIED FIRST TO PAYMENT OF ALL PROPER EXPENSES OF THE PROCEEDINGS FOR FORFEITURE AND SALE INCLUDING EXPENSES OF SEIZURE, MAINTENANCE OF CUSTODY, ADVERTISING AND COURT COSTS; SECONDLY, TO PAYMENT OF THE BALANCE DUE ON A LIEN (IF ANY). THE BALANCE (IF ANY) SHALL BE DEPOSITED IN THE GENERAL FUNDS OF THE STATE.

(U) SAME – DISPOSITION OF PROCEEDS ON BOND FOR POSSESSION – ANY SUMS REALIZED ON ANY BOND POSTED TO GRAIN POSSESSION OF THE VEHICLE SHALL BE APPLIED AS PROVIDED FOR PROCEEDS OF SALE EXCEPT THAT NO SUCH SUMS SHALL BE PAID IN SATISFACTION OF ANY LIEN ON THE VEHICLE.

(V) SAME – TERMS OF SALE; TITLE – ANY SALE ORDERED PURSUANT TO THIS SECTION SHALL BE MADE FOR CASH AND VEST IN THE PURCHASER A CLEAR AND ABSOLUTE TITLE TO THE MOTOR VEHICLE SOLD.

(W) SAME – VEHICLES SUBJECT TO SECTION – THIS SECTION APPLIES TO MOTOR VEHICLES AS THE TERM IS DEFINED IN ARTICLE 66 1/2 OF THIS CODE.

COMMENT

This is the present section 297, without substantial change. References to offenses in Part 220 are inserted where appropriate.

815. BURDEN OF PROOF; WITNESSES' IMMUNITY; SEARCH

AND SEIZURES; HEARSAY EVIDENCE; AUTHORITY OF STATE POLICE

(A) BURDEN OF PROOF – IT SHALL NOT BE NECESSARY FOR THE STATE TO NEGATE ANY EXEMPTION, PROVISO OR EXCEPTION SET FORTH IN THIS SUBHEADING IN ANY TRIAL, HEARING, OR OTHER PROCEEDING UNDER THIS SUBHEADING, AND THE BURDEN OF PROOF OF ANY SUCH EXEMPTION, PROVISO OR EXCEPTION SHALL BE UPON THE PERSON CLAIMING ITS BENEFIT. IN THE ABSENCE OF PROOF THAT A PERSON IS THE DULY AUTHORIZED HOLDER OF AN APPROPRIATE REGISTRATION OR ORDER FORM ISSUED UNDER THIS SUBHEADING, HE SHALL BE PRESUMED NOT TO BE THE HOLDER OF SUCH REGISTRATION OR FORM, AND THE BURDEN OF PROOF SHALL BE UPON HIM TO REBUT SUCH PRESUMPTION.

(B) WITNESSES' IMMUNITY – NO PERSON SHALL, UPON PAIN OF CONTEMPT OF COURT, REFUSE TO TESTIFY CONCERNING ANY VIOLATIONS OF THE PROVISIONS OF THIS SUBHEADING BECAUSE HIS TESTIMONY MIGHT TEND TO INCRIMINATE HIM OR IMPLICATE HIM IN SUCH VIOLATIONS, PROVIDED THAT ANY PERSON SO COMPELLED TO TESTIFY ON BEHALF OF THE STATE IN ANY SUCH CASE SHALL BE EXEMPT FROM PROSECUTION, TRIAL AND PUNISHMENT FOR ANY AND ALL SUCH CRIMES AND OFFENSES ABOUT WHICH SUCH PERSON WAS SO COMPELLED TO TESTIFY.

(C) STANDARD GOVERNING ARREST, SEARCH AND SEIZURE – NOTWITHSTANDING ANY OTHER PROVISION OF LAW TO THE CONTRARY, ANY VIOLATION OF ANY PROVISION OF THIS SUBHEADING SHALL BE DEEMED TO BE A FELONY FOR PURPOSES OF ARREST, SEARCH AND SEIZURE REGARDLESS OF WHETHER A DEFENDANT IS SUBSEQUENTLY CHARGED WITH OR CONVICTED OF A VIOLATION WHICH AMOUNTS ONLY TO A MISDEMEANOR.

(D) USE OF HEARSAY EVIDENCE – NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, AT ANY HEARING RELATING TO BAIL OR SENTENCING ARISING OUT OF ANY VIOLATION OR ALLEGED VIOLATION OF ANY PROVISION OF THIS SUBHEADING, HEARSAY EVIDENCE SHALL BE ADMISSIBLE IF RELEVANT TO THE ISSUE AND IF THE UNDERLYING CIRCUMSTANCES UPON WHICH IT IS BASED AND THE RELIABILITY OF THE SOURCE OF THE INFORMATION ARE DEMONSTRATED.

(E) AUTHORITY OF STATE POLICE – NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, THE STATE POLICE MAY INITIATE INVESTIGATIONS AND OTHERWISE ENFORCE THE PROVISIONS OF THIS SUBHEADING THROUGHOUT THE STATE WITHOUT ANY LIMITATION AS TO ACTIVITIES WITHIN MUNICIPAL CORPORATIONS OR OTHER SUBDIVISIONS.

COMMENT

This section is based on section 298. Subsections (b) and (d) are here ommitted; they are appropriate for the criminal code and have formed

the bases for sections 220.55(2) and 220.60, respectively. Those provisions of subsections (a) and (c) appropriate to the Regulatory Act appear here; other provisions of these subsections appear in section 220.55(1) and 220.65. Subsections (e), (f), and (g) of section 298 should eventually be transferred to or considered in the formulation of the new provisions on criminal procedure. They appear here temporarily as subsections (c), (d), and (e).

816. PAYMENTS BY STATE POLICE IN CONNECTION WITH PURCHASE

(A) THE SUPERINTENDENT OF STATE POLICE MAY PAY ANY PERSON, FROM FUNDS APPROPRIATED FOR THE MARYLAND STATE POLICE, INTELLIGENCE DIVISION, FOR INFORMATION CONCERNING A VIOLATION OF PART 220 OF THE CRIMINAL CODE OR OF THIS REGULATORY ACT, A SUM OR SUMS OF MONEY HE DEEMS APPROPRIATE, WITHOUT REFERENCE TO ANY MOIETIES OR REWARDS TO WHICH THE PERSON MAY OTHERWISE BE ENTITLED BY LAW.

(B) MONEYS EXPENDED FROM APPROPRIATIONS OF THE MARYLAND STATE POLICE, INTELLIGENCE DIVISION, FOR PURCHASE OF CONTROLLED DANGEROUS SUBSTANCES AND SUBSEQUENTLY RECOVERED SHALL BE REIMBURSED TO THE CURRENT APPROPRIATION FOR THAT AGENCY.

(C) THE SUPERINTENDENT OF STATE POLICE MAY ADVANCE FUNDS IN CONNECTION WITH THE ENFORCEMENT OF THIS SECTION.

COMMENT

This section is derived, without substantial change, from section 299.

817. PRESCRIPTION DRUGS

(A) DISPENSED ONLY ON PRESCRIPTION — ANY DRUG WHICH BEARS A CAUTIONARY LABEL WARNING AGAINST DISPENSING WITHOUT A PRESCRIPTION UNDER FEDERAL LAW SHALL BE DISPENSED ONLY:

(I) UPON THE WRITTEN PRESCRIPTION OF A PRACTITIONER LICENSED BY LAW TO ADMINISTER SUCH DRUGS, OR

(II) UPON THE ORAL PRESCRIPTION OF SUCH PRACTITIONER, WHICH SHALL BE REDUCED TO WRITING AND FILED BY THE PHARMACIST, OR

(III) BY REFILLING ANY SUCH WRITTEN OR ORAL PRESCRIPTION IF SUCH REFILLING IS AUTHORIZED BY THE PRESCRIBER, EITHER IN THE ORIGINAL PRESCRIPTION OR BY ORAL DIRECTION. SUCH AUTHORIZATION MUST BE REDUCED TO WRITING AND FILLED BY THE PHARMACIST.

(B) LABEL REQUIRED – ANY PRESCRIPTION DRUG DISPENSED BY FILLING OR REFILLING A WRITTEN OR ORAL PRESCRIPTION OF A PRACTITIONER LICENSED BY LAW TO ADMINISTER SUCH DRUGS SHALL IN ADDITION TO ANY REQUIREMENTS OF THE DEPARTMENT OR FEDERAL LAW BEAR A LABEL CONTANING THE NAME AND ADDRESS OF THE DISPENSER, THE SERIAL NUMBER AND DATE OF THE PRESCRIPTION, THE NAME OF THE PURCHASER, AND, IF STATED IN THE PRESCRIPTION, THE NAME AND ADDRESS OF THE PATIENT, AND THE DIRECTIONS FOR USE AS CONTAINED IN THE WRITTEN OR ORAL PRESCRIPTION. 23504 23505 23506 23507 23508 23509 23510 23511 23512 23513

(C) EXEMPT SALES – THE PROVISIONS OF THIS SUBHEADING SHALL NOT APPLY TO SALES OF DANGEROUS DRUGS MADE TO REGISTERED PRACTITIONERS OF PHARMACY, MEDICINE, DENTISTRY, OR VETERINARY MEDICINE, OR TO SALES MADE BY ANY MANUFACTURER, WHOLESALE DRUGGIST, OR LICENSED PHARMACIST TO ANOTHER MANUFACTURER, WHOLESALE DRUGGIST, OR LICENSED PHARMACIST OR TO A HOSPITAL OR INSTITUTION OPERATING A DISPENSARY IN WHICH A PRACTITIONER LICENSED BY LAW TO ADMINSTER PRESCRIPTION DRUGS IS IN CHARGE, PROVIDING RECORDS OF SUCH SALES ARE MAINTAINED, AND AVAILABLE FOR INSPECTION, SHOWING DATE OF SALE, NAME AND ADDRESS OF PURCHASER, AND QUANTITY PURCHASED. 23515 23516 23517 23518 23519 23520 23521 23522 23523 23524 23525

(D) APPLICABILITY OF SECTION GENERALLY; ADVERTISING DRUGS – (I) GENERALLY THE PROVISIONS OF THIS SECTION SHALL APPLY TO THE SALE BY ANY MANUFACTURER, WHOLESALE DRUGGIST, RETAIL PHARMACIST, OR JOBBER OF PRESCRIPTION DRUGS, TO ANY PERSON, OTHER THAN THOSE LEGALLY QUALIFIED AND AUTHORIZED TO PURCHASE AND HOLD SAME FOR USE OR RESALE, AND TO ANY PRACTITIONER'S ASSISTANT WHO IS NOT LEGALLY LICENSED TO ADMINISTER DANGEROUS DRUGS. (II) NO PERSON SHALL BE PERMITTED TO ADVERTISE THROUGH ANY MEDIA OTHER THAN A PROFESSIONAL OR TRADE PUBLICATION ANY CONTROLLED DANGEROUS DRUG OR PRESCRIPTION DRUG BY EITHER ITS "TRADE NAME" OR BY ITS GENERIC OR FORMULARY NAME. 23527 23528 23529 23530 23531 23532 23533 23534 23535 23536 23537 23538

(E) DRUGS, DEVICES OR SUPPLIES USED FOR FARM ANIMALS, ETC.; SEEDS, FEED, FERTILIZERS, INSECTICIDES, ETC.; DRUGS FOR WHICH PRESCRIPTION NOT REQUIRED – THE PROVISIONS OF THIS SUBSECTION SHALL NOT APPLY TO THE DISTRIBUTION OF PRESCRIPTION DRUGS, AS DEFINED IN THIS SECTION, DEVICES OR SUPPLIES OF ANY KIND WHATSOEVER FOR THE TREATMENT, CARE OR CURE OF FARM ANIMALS, POULTRY, FOWL, OR OTHER ANIMALS USED IN FURTHERANCE OF FARMING ACTIVITIES, PROVIDING FURTHER THAT THE PROVISIONS OF THIS SUBHEADING SHALL NOT APPLY TO THE SALE OR OFFERING FOR SALE, OR DISTRIBUTION OF SEEDS, FEED FOR LIVESTOCK AND POULTRY, FERTILIZERS, LIME, LAND PLASTER, FUNGICIDES AND INSECTICIDES, NOR APPLY TO ANY DRUG WHICH ON JUNE 1, 1961 MIGHT BE SOLD WITHOUT A PRESCRIPTION. 23540 23541 23542 23543 23544 23545 23546 23547 23548 23549 23550 23551 23552 23553

(F) RULES AND REGULATIONS – THE DEPARTMENT IS HEREBY AUTHORIZED TO PROMULGATE NECESSARY REGULATIONS AND 23555 23556

INTERPRETATIONS, NOT INCONSISTENT WITH LAW, FOR THE ADMINISTRATION AND ENFORCEMENT OF THIS SECTION.

COMMENT

This section is based on section 300. Criminal provisions have been transferred to section 220.36 of the draft criminal code. Subsection (a) of section 300 appears as section RA2(u). For subsections (i) and (j) see section 220.40 and 220.45. The remaining subsections are, with minor changes, retained here.

818. MISCELLANEOUS PROVISIONS

(A) CIVIL SEIZURES, FORFEITURES AND INJUNCTIVE PROCEEDINGS COMMENCED PRIOR TO THE EFFECTIVE DATE OF THIS SUBHEADING - CIVIL SEIZURES OR FORFEITURES AND INJUNCTIVE PROCEEDINGS COMMENCED PRIOR TO THE EFFECTIVE DATE OF THIS SUBHEADING SHALL NOT BE AFFECTED BY ANY SUCH REPEAL OR AMENDMENT, OR ABATED BY REASON, THEREOF.

(B) PENDING ADMINISTRATIVE PROCEEDINGS; CONTROL OF DRUGS CONTROLLED PRIOR TO THE EFFECTIVE DATE OF THIS SUBHEADING - ALL ADMINISTRATIVE PROCEEDINGS PENDING BEFORE THE DEPARTMENT ON THE EFFECTIVE DATE OF THIS SUBHEADING SHALL BE CONTINUED AND BROUGHT TO FINAL DETERMINATION IN ACCORD WITH LAWS AND REGULATIONS IN EFFECT PRIOR TO SUCH DATE. SUCH DRUGS PLACED UNDER CONTROL TO SUCH DATE WHICH ARE NOT LISTED WITHIN SCHEDULES I THROUGH V SHALL AUTOMATICALLY BE CONTROLLED AND LISTED IN THE APPROPRIATE SCHEDULE.

(C) APPLICABILITY OF SUBHEADING - THE PROVISIONS OF THIS SUBHEADING SHALL BE APPLICABLE TO VIOLATIONS OF LAW, SEIZURES AND FORFEITURE, INJUNCTIVE PROCEEDINGS, ADMINISTRATIVE PROCEEDINGS AND INVESTIGATIONS WHICH OCCUR FOLLOWING ITS EFFECTIVE DATE.

(D) EXISTING ORDERS, RULES AND REGULATIONS - ANY ORDERS, RULES, AND REGULATIONS WHICH HAVE BEEN PROMULGATED UNDER ANY LAW AFFECTED BY THIS SUBHEADING WHICH ARE IN EFFECT ON THE DAY PRECEDING THE EFFECTIVE DATE OF THIS SUBHEADING SHALL CONTINUE IN EFFECT UNTIL MODIFIED, SUPERSEDED OR REPEALED BY THE DEPARTMENT.

(E) SHORT TITLE - THIS SUBHEADING MAY BE CITED AS THE MARYLAND CONTROLLED DANGEROUS SUBSTANCES AND RELATED OFFENSES REGULATORY ACT.

(F) JURISDICTION OF DISTRICT COURT - THE DISTRICT COURT SHALL HAVE CONCURRENT JURISDICTION WITH THE CIRCUIT COURT OF ANY COUNTY OR THE CRIMINAL COURT OF BALTIMORE TO HEAR AND DETERMINE ANY ALLEGED VIOLATION OF ANY PROVISION OF THIS SUBHEADING WHICH DCES NOT AMOUNT TO A FELONY,

UNLESS EITHER THE STATE OR THE DEFENDANT SHALL PRAY A JURY TRIAL.

(G) RULES AND REGULATIONS - THE DEPARTMENT SHALL HAVE THE AUTHORITY TO ADOPT SUCH RULES AND REGULATIONS AS ARE NECESSARY TO CARRY OUT THE POWER GRANTED HEREIN.

COMMENT

Subsection (a) of the present section 302 is unnecessary in the Regulatory Act and otherwise covered in the Criminal Code in section 5.05. The remaining subsections are here retained with minor changes. The provisions of draft subsection (f) should eventually be incorporated in the procedural material.

PART 225: GAMBLING OFFENSES

INTRODUCTION

The primary question is whether gambling should be punished at all. Maryland's legal system of racetrack betting and the electorate's recent overwhelming approval by referendum of a State lottery suggest that public opinion does not regard gambling as an evil which must necessarily be subjected to criminal penalties. State supervised gambling in these areas may seem tolerable, of course, only (1) because it is believed to be honestly run, and (2) because it provides needed revenue, and (3) because it is believed that in such a system none of the profits will become available to organized crime.

Professor Herbert L. Packer, in The Limits of the Criminal Sanction (Stanford, 1968), pp. 348 ff., suggests the arguments against criminal sanctions here: Despite sweeping prohibitions and many arrests, the sanction is demonstrably ineffective: nationally, sums involved in illegal gambling are estimated to reach $50 billion annually, with profits of perhaps $6 to $7 billion. Large numbers of police and court personnel are involved, to little effect. It is a "victimless crime" based on a consensual transaction, easy to arrange and hard to detect, with few complaints or leads from those involved. Light penalties for those convicted exert little deterrent force; heavier penalties or sustained intensive law enforcement would not be supported by public opinion, which regards gambling as a minor vice at worst, and sees little difference between the perhaps technically criminal, but universal, pastime of private betting and the commercial operation. The nature of the enforcement

problems produces a very high incidence of search and seizure, wiretapping, and other criminal procedure problems for such a trivial crime. The way in which commercial gambling is organized – bookmakers who operate by telephone for the middle class, as opposed to highly visible numbers runners for the poor – causes police enforcement tactics to appear to be biased against the gambling of the poor, because enforcement is easier and more easily observed on the streets of the ghetto. All of this tends to produce disrespect for the law. Perhaps most important, our gambling laws, according to Packer, represent our most generous subsidy to organized crime and provide the incentive for widespread law enforcement and police corruption, because only a large organization can provide the services and protection needed for a gambling operation, and the laws give criminal elements a monopoly for the "license fees" represented by court fines and bribes to officials.

If the three objectives mentioned in the first paragraph can be met, it would seem that there might be public acceptance for other kinds of gambling supervised by the State, or for public gambling operated by legitimate non-governmental groups, and that a general decriminalization of gambling might be possible and the evils suggested above might be avoided.

But the effects of complete or partial legalization on the existing situation are not easy to predict. With complete legalization, it is possible that the present illegal gambling organizations would retain their monopolistic position and any connections they have with other criminal activities, and that organized crime would be making even more money out of gambling than at present. If state governments or other strong legitimate institutions move into gambling, and if the legalization of gambling is broad enough so that the gambling public can find lawful outlets for its tastes – but only through such approved institutions, the present operations might be put out of business. There is a question whether the legitimate operations can prove flexible enough to attract most potential customers. The contemplated State lottery, for example, may not, with weekly drawings, attract the many gamblers who want to make daily bets. It is unlikely that any State scheme can provide the credit arrangements often available to steady customers of current gambling operations. Predictions of success or failure are highly speculative, and public or legislative reaction to the various possible schemes is impossible for the

Commission to predict.

We therefore suggest that the Legislature ask the Governor to appoint a special commission to study and report on (1) the probable effects of abolition of criminal penalties for gambling, and, if abolition is thought desirable, (2) the relative merits of private, as opposed to State regulated or controlled operations, as to certain forms of gambling, (3) the need for new kinds of criminal, licensing, or administrative regulation of such matters as honesty of the operation and the rate of return or profit to be permitted for forms of public gambling, and (4) the extent to which the State should attempt to profit financially from various forms of gambling, whether by way of profit sharing, taxes, or licensing.

Until such a study can be completed, the Commission believes that criminal penalties must continue. Part 225 is designed to serve in the interim while decriminalization is being considered, and thereafter if the usual criminal penalties are to be retained.

225.00. GAMBLING OFFENSES; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "CONTEST OF CHANCE" MEANS ANY CONTEST, GAME, GAMING SCHEME OR GAMING DEVICE IN WHICH THE OUTCOME DEPENDS IN A MATERIAL DEGREE UPON AN ELEMENT OF CHANCE, NOTWITHSTANDING THAT SKILL OF THE CONTESTANTS MAY ALSO BE A FACTOR THEREIN.

2. "GAMBLING". A PERSON ENGAGES IN GAMBLING WHEN HE STAKES OR RISKS SOMETHING OF VALUE UPON THE OUTCOME OF A CONTEST OF CHANCE OR A FUTURE CONTINGENT EVENT NOT UNDER HIS CONTROL OR INFLUENCE, UPON AN AGREEMENT OR UNDERSTANDING THAT HE WILL RECEIVE SOMETHING OF VALUE IN THE EVENT OF A CERTAIN OUTCOME. GAMBLING DOES NOT INCLUDE BONA FIDE BUSINESS TRANSACTIONS VALID UNDER THE LAW OF CONTRACTS, INCLUDING BUT NOT LIMITED TO CONTRACTS FOR THE PURCHASE OR SALE AT A FUTURE DATE OF SECURITIES OR COMMODITIES, AND AGREEMENTS TO COMPENSATE FOR LOSS CAUSED BY THE HAPPENING OF CHANCE, INCLUDING BUT NOT LIMITED TO CONTRACTS OF INDEMNITY OR GUARANTY AND LIFE, HEALTH OR ACCIDENT INSURANCE.

3. "PLAYER" MEANS A PERSON WHO ENGAGES IN ANY FORM OF GAMBLING SOLELY AS A CONTESTANT OR BETTOR, WITHOUT RECEIVING OR BECOMING ENTITLED TO RECEIVE ANY PROFIT THEREFROM OTHER THAN PERSONAL GAMBLING WINNINGS, AND WITHOUT OTHERWISE RENDERING ANY MATERIAL ASSISTANCE

TO THE ESTABLISHMENT, CONDUCT OR OPERATION OF THE PARTICULAR GAMBLING ACTIVITY. A PERSON WHO GAMBLES AT A SOCIAL GAME OF CHANCE ON EQUAL TERMS WITH THE OTHER PARTICIPANTS THEREIN DOES NOT OTHERWISE RENDER MATERIAL ASSISTANCE TO THE ESTABLISHMENT, CONDUCT OR OPERATION THEREOF BY PERFORMING, WITHOUT FEE OR REMUNERATION, ACTS DIRECTED TOWARD THE ARRANGEMENT OF FACILITATION OF THE GAME, SUCH AS INVITING PERSONS TO PLAY. PERMITTING THE USE OF PREMISES THEREFOR AND SUPPLYING CARDS OR OTHER EQUIPMENT USED THEREIN. A PERSON WHO ENGAGES IN "BOOKMAKING", AS DEFINED IN THIS SECTION IS NOT A "PLAYER." THE BURDEN OF INJECTING THE ISSUE THAT HE IS PLAYER IS ON THE DEFENDANT, BUT THIS DOES NOT SHIFT THE BURDEN OF PROOF.

4. "ADVANCE GAMBLING ACTIVITY." A PERSON "ADVANCES GAMBLING ACTIVITY" WHEN, ACTING OTHER THAN AS A PLAYER, HE ENGAGES IN CONDUCT WHICH MATERIALLY AIDS ANY FORM OF GAMBLING ACTIVITY. SUCH CONDUCT INCLUDES BUT IS NOT LIMITED TO CONDUCT DIRECTED TOWARD THE CREATION OR ESTABLISHMENT OF THE PARTICULAR GAME, CONTEST, SCHEME, DEVICE, OR ACTIVITY INVOLVED, TOWARD THE ACQUISITION OR MAINTENANCE OF PREMISES, PARAPHERNALIA, EQUIPMENT, OR APPARATUS THEREFOR, TOWARD THE SOLICITATION OR INDUCEMENT OF PERSONS TO PARTICIPATE THEREIN, TOWARD THE ACTUAL CONDUCT OF THE PLAYING PHASES THEREOF, TOWARD THE ARRANGEMENT OF ANY OF ITS FINANCIAL OR RECORDING PHASES, TOWARD THE PROVISION OF ANY INSURANCE AGAINST THE LOSS OF SOMETHING OF VALUE USED AS GAMBLING STAKES, OR TOWARD ANY OTHER PHASE OF ITS OPERATION. ONE ADVANCES GAMBLING ACTIVITY WHEN, HAVING SUBSTANTIAL PROPRIETARY OR OTHER AUTHORITATIVE CONTROL OVER PREMISES BEING USED WITH HIS KNOWLEDGE FOR PURPOSES OF GAMBLING ACTIVITY, HE PERMITS SUCH TO OCCUR OR CONTINUE OR MAKES NO EFFORT TO PREVENT ITS OCCURRENCE OR CONTINUATION. ONE ADVANCES GAMBLING ACTIVITY WHEN HE PUBLISHES OR AIDS IN PUBLISHING AN ACCOUNT OF ANY LOTTERY, STATING WHEN OR WHERE THE SAME IS TO BE DRAWN, OR THE PRIZES THEREIN, OR WHERE ANY TICKET MAY BE OBTAINED THEREIN.

5. "PROFIT FROM GAMBLING ACTIVITY." A PERSON "PROFITS FROM GAMBLING ACTIVITY" WHEN, OTHER THAN AS A PLAYER, HE ACCEPTS OR RECEIVES MONEY OR OTHER PROPERTY PURSUANT TO AN AGREEMENT OR UNDERSTANDING WITH ANY PERSON WHEREBY HE PARTICIPATES OR IS TO PARTICIPATE IN THE PROCEEDS OF GAMBLING ACTIVITY.

6. "SOMETHING OF VALUE" MEANS ANY MONEY OR PROPERTY, ANY TAKEN, OBJECT OR ARTICLE EXCHANGEABLE FOR MONEY OR PROPERTY, OR ANY FORM OF CREDIT OR PROMISE DIRECTLY OR INDIRECTLY CONTEMPLATING TRANSFER OF MONEY OR PROPERTY OR OF ANY INTEREST THEREIN, OR INVOLVING EXTENSION OF A SERVICE, ENTERTAINMENT OR A PRIVILEGE OF PLAYING AT A GAME OR SCHEME WITHOUT CHARGE.

7. "GAMBLING DEVICE" MEANS ANY DEVICE, MACHINE, PARAPHERNALIA OR EQUIPMENT WHICH IS USED OR USABLE IN THE PLAYING PHASES OF ANY GAMBLING ACTIVITY, WHETHER SUCH ACTIVITY CONSISTS OF GAMBLING BETWEEN PERSONS OR GAMBLING BY A PERSON INVOLVING THE PLAYING OF A MACHINE. NOTWITHSTANDING THE FOREGOING, LOTTERY TICKETS, POLICY SLIPS AND OTHER ITEMS USED IN THE PLAYING PHASES OF LOTTERY AND POLICY SCHEMES ARE NOT GAMBLING DEVICES.

8. "SLOT MACHINE" MEANS A GAMBLING DEVICE WHICH IS DESIGNED TO OPERATE IN SUCH MANNER THAT, DEPENDING UPON ELEMENTS OF CHANCE, IT MAY EJECT SOMETHING OF VALUE, EITHER COMPLETELY AUTOMATICALLY OR WITH THE AID OF SOME PHYSICAL ACT BY THE PLAYER. A DEVICE SO CONSTRUCTED, OR READILY ADAPTABLE OR CONVERTIBLE TO SUCH USE, IS NOT LESS A SLOT MACHINE BECAUSE IT IS NOT IN WORKING ORDER OR BECAUSE SOME MECHANICAL ACT OF MANIPULATION OR REPAIR IS REQUIRED TO ACCOMPLISH ITS ADAPTATION, CONVERSION OR WORKABILITY. NOR IS IT ANY LESS A SLOT MACHINE BECAUSE, APART FROM ITS USE OR ADAPTABILITY AS SUCH, IT MAY ALSO SELL OR DELIVER SOMETHING OF VALUE ON A BASIS OTHER THAN CHANCE. A MACHINE WHICH SELLS ITEMS OF MERCHANDISE WHICH ARE EQUIVALENT VALUE, IS NOT A SLOT MACHINE MERELY BECAUSE SUCH ITEMS DIFFER FROM EACH OTHER IN COMPOSITION, SIZE, SHAPE OR COLOR.

9. "BOOKMAKING" MEANS ADVANCING GAMBLING ACTIVITY BY UNLAWFULLY ACCEPTING BETS FROM MEMBERS OF THE PUBLIC AS A BUSINESS, RATHER THAN IN A CASUAL OR PERSONAL FASHION, UPON THE OUTCOMES OF FUTURE CONTINGENT EVENTS.

10. "LOTTERY" MEANS AN UNLAWFUL GAMBLING SCHEME IN WHICH (A) THE PLAYERS PAY OR AGREE TO PAY SOMETHING OF VALUE FOR CHANCES, REPRESENTED AND DIFFERENTIATED BY NUMBERS OR BY COMBINATIONS OF NUMBERS OR BY SOME OTHER MEDIUM, ONE OR MORE OF WHICH CHANCES ARE TO BE DESIGNATED THE WINNING ONES; AND (B) THE WINNING CHANCES ARE TO BE DETERMINED BY A DRAWING OR BY SOME OTHER METHOD BASED UPON THE ELEMENT OF CHANCE; AND (C) THE HOLDERS OF THE WINNING CHANCES ARE TO RECEIVE SOMETHING OF VALUE.

11. "POLICY" OR "THE NUMBERS GAME" MEANS A FORM OF LOTTERY IN WHICH THE WINNING CHANCES OR PLAYS ARE NOT DETERMINED UPON THE BASIS OF A DRAWING OR OTHER ACT ON THE PART OF PERSONS CONDUCTING OR CONNECTED WITH THE SCHEME, BUT UPON THE BASIS OF THE OUTCOME OR OUTCOMES OF A FUTURE CONTINGENT EVENT OR EVENTS OTHERWISE UNRELATED TO THE PARTICULAR SCHEME.

COMMENT

The chief source for this Part is the New York Penal Code, as amended. A few provisions from the Draft Michigan Revised Criminal Code (which was largely based on the New York model) and from

Maryland's Article 27 have been incorporated.

The definitions here will be commented upon, as necessary, at the sections to which they apply.

225.05. PROMOTING GAMBLING

A PERSON IS GUILTY OF PROMOTING GAMBLING WHEN HE KNOWINGLY ADVANCES OR PROFITS FROM GAMBLING ACTIVITY.

PROMOTING GAMBLING IS A CLASS A MISDEMEANOR.

COMMENT

This is the basic gambling offense, designed to replace individual sections dealing with various forms of gambling. A single form of indictment will be appropriate for most gambling charges, and there will be no opportunity to argue that the accused was charged with operating a different kind of scheme than the one he actually used.

The offense consists of advancing or profiting from gambling activity. To simplify slightly the definitional provisions of section 225.00, "gambling" involves staking or risking something of value (broadly defined) either (a) on the outcome of a contest of chance (any contest, game, gaming scheme, or gaming device, where chance materially affects the outcome, even if skill is also involved) or (b) on a future contingent event, not under the gambler's control or influence, upon the understanding that he will receive something of value in the event of a certain outcome (bona fide business and insurance transactions are expressly excluded, in accord with a Michigan modification of the New York draft). Part (a) of the definition is broad enough to make almost any game or contest, except those like chess, where chance is an insignificant or absent factor, a possible subject of gambling. Part (b) allows a bet on the outcome of a chess game played by others than the bettors or of an election, for example, to be gambling.

"Players" are excluded from those who advance or profit from gambling activity, and are thus not punishable as such. A "player" is one who is involved merely as a contestant or bettor, receiving nothing but personal gambling winnings from the enterprise. A bookmaker is expressly not a player; a social host, who gambles on equal terms with his guests, and merely, without payment, arranges for the game or furnishes facilities for the game, does not thereby forfeit his status as a player. Players, in accord with a Michigan provision, must

inject into evidence the defense that they are mere players, but the prosecution retains the burden of proof to show that they are not such if there is something to suggest that they are.

Those who are not players, or who are more than players, may commit the offense by advancing gambling activity, that is, materially aiding gambling activity, as by conduct directed toward setting up the game, assisting in providing premises or equipment, inducing people to participate, conducting the play, publicizing the activity, insuring bets, or arranging the financial or recording phases of the activity, for example. One who controls premises, used as he knows for gambling, commits the offense by permitting it to continue or making no effort to stop it. In the alternative one may commit the offense by acting (other than as a mere player) so as to profit from gambling activity by receiving money or other property pursuant to an understanding involving participation in the proceeds of gambling activity.

These provisions seem broad enough to cover all of the "professional" participants in a gambling operation. The policy expressed by these provisions is that private social gambling, whatever its moral status, is accepted or tolerated by most people, and should not be punished, on grounds of individual liberty or waste of police resources. Similarly it seems pointless to threaten to punish (and he is rarely actually punished) the ordinary player in non-private gambling activity.

New York provides for increased punishment for certain large scale gambling operators. (See the present New York Penal Law sections 225.10 - Promoting gambling in the first degree, and 225.20 - Possession of gambling records in the first degree.) While the Commission agrees that a distinction of the kind suggested may have merit, it believes that the grounds for increasing punishment present unacceptable problems of proof, as a practical matter. It has therefore provided for only a single offense here and in possession of gambling records.

225.10. POSSESSION OF GAMBLING RECORDS

A PERSON IS GUILTY OF POSSESSION OF GAMBLING RECORDS WHEN HE POSSESSES ANY WRITING, PAPER, INSTRUMENT OR ARTICLE:

1. HAVING THE APPEARANCE OF A RECORD USED IN THE OPERATION OR PROMOTION OF A BOOKMAKING SCHEME OR ENTERPRISE AND APPARENTLY SUITABLE FOR SUCH USE; OR

2. HAVING THE APPEARANCE OF A RECORD USED IN THE OPERATION, PROMOTION OR PLAYING OF A LOTTERY OR POLICY SCHEME OR ENTERPRISE AND APPARENTLY SUITABLE FOR SUCH USE; EXCEPT THAT IN ANY PROSECUTION UNDER THIS SUBDIVISION, IT IS A DEFENSE THAT THE WRITING, PAPER, INSTRUMENT OR ARTICLE POSSESSED BY THE DEFENDANT CONSTITUTED, REFLECTED OR REPRESENTED PLAYS, BETS OR CHANCES OF THE DEFENDANT HIMSELF IN A NUMBER NOT EXCEEDING TEN; OR

3. WHICH CONSIST OF ANY PAPER OR PAPER PRODUCT IN SHEET FORM CHEMICALLY CONVERTED TO NITROCELLULOSE HAVING EXPLOSIVE CHARACTERISTICS; OR

4. WHICH CONSISTS OF ANY WATER SOLUBLE PAPER OR PAPER DERIVATIVE IN SHEET FORM.

POSSESSION OF GAMBLING RECORDS IS A CLASS A MISDEMEANOR.

COMMENT

As to an aggravated form of this offense in New York, see the final paragraph of the comment to the preceding section.

This offense consists of possessing things which appear to be records used in the operation or promotion of bookmaking, in the operation, promotion, or playing of lotteries, or of flash paper or water soluble paper, it being a defense in the lottery situation that the records represented the defendant's own plays in a number not exceeding ten. The broad phrasing of the offense makes the State's task relatively easy here, but without the existence of two defenses, as to which the prosecution retains the burden of proof if the accused offers credible evidence as to the existence of the defense or defenses, there would be an over-broad absolute liability offense. Section 225.15 makes it a defense that the record, although of a kind appropriate to gambling operations, was not in fact so used or intended to be used. Section 225.25 makes it a defense that the defendant neither knew nor had reasonable cause to know the contents of the records possessed. This latter section replaces language in the New York draft requiring proof of "knowledge of the character thereof" as a part of the prosecution's main case. It would seem that it is fair not to require the prosecution to prove such knowledge unless the defense denies knowledge and offers evidence to support this denial, as long as the burden of proof remains on the prosecution.

225.15. POSSESSION OF GAMBLING RECORDS; DEFENSE

IN ANY PROSECUTION FOR POSSESSION OF GAMBLING RECORDS, IT IS A DEFENSE THAT THE WRITING, PAPER, INSTRUMENT OR ARTICLE POSSESSED BY THE DEFENDANT WAS NEITHER USED NOR INTENDED TO BE USED IN THE OPERATION OR PROMOTION OF A BOOKMAKING SCHEME OR ENTERPRISE, OR IN THE OPERATION, PROMOTION OR PLAYING OF A LOTTERY OR POLICY SCHEME OR ENTERPRISE.

COMMENT

This provision is discussed in the comment to section 225.10.

225.20. POSSESSION OF A GAMBLING DEVICE

A PERSON IS GUILTY OF POSSESSION OF A GAMBLING DEVICE WHEN HE MANUFACTURES, SELLS, TRANSPORTS, PLACES OR POSSESSES, OR CONDUCTS OR NEGOTIATES ANY TRANSACTION AFFECTING OR DESIGNED TO AFFECT OWNERSHIP, CUSTODY OR USE OF:

1. A SLOT MACHINE; OR

2. ANY OTHER GAMBLING DEVICE, BELIEVING THAT THE SAME IS TO BE USED IN THE ADVANCEMENT OF UNLAWFUL GAMBLING ACTIVITY.

POSSESSION OF A GAMBLING DEVICE IS A CLASS A MISDEMEANOR.

COMMENT

This section covers gambling devices, defined as equipment which is used or usable in the playing phases of any gambling activity, other than lottery tickets or policy slips (conduct with respect to which is punishable as possession of gambling records), including the slot machine, defined, subject to a number of qualifications, as a device which, in return for a coin or other object, may, depending on chance, return something of value.

What is punished is the manufacture, sale, transporting, placing, possessing of such devices, or the conducting or negotiating of any transaction affecting or designed to affect ownership, custody, or use or such devices. If the gambling device is something other than a slot machine, the prosecution must also establish, as a part of its main case, that the defendant believed that the device was to be used in the advancement of unlawful gambling activity. (Otherwise, the prosecution might be able to make a prima facie case simply by proving that

the accused possessed a deck of playing cards, because of the broad definition of a gambling device.)

Section 225.25 provides a defense when the defendant neither knew nor had cause to know the character of the gambling device; the New York draft, as in the similar situation with respect to gambling records, discussed in connection with section 225.10, required this to be proved as a part of the prosecution's main case. The Commission has made it a defense, without shifting the burden of proof.

225.25. GAMBLING OFFENSES; DEFENSE

IN ANY PROSECUTION UNDER SECTION 225.10 OR 225.20, IT IS A DEFENSE THAT THE DEFENDANT NEITHER KNEW NOR HAD REASONALBE CAUSE TO KNOW THE CONTENTS OF THE GAMBLING RECORDS OR THE CHARACTER OF THE GAMBLING DEVICE, WITH RESPECT TO WHICH HIS CONDUCT FORMS THE BASIS FOR THE PROSECUTION.

COMMENT

This provision is discussed in the Comments to the sections to which the provision refers.

225.30. GAMBLING OFFENSES; EVIDENCE

IN ANY PROSECUTION UNDER THIS PART IN WHICH IT IS MATERIAL TO PROVE THE OCCURRENCE OF A SPORTING EVENT, A PUBLISHED REPORT OF ITS OCCURRENCE IN ANY DAILY NEWSPAPER, MAGAZINE OR OTHER PERIODICALLY PRINTED PUBLICATION OF GENERAL CIRCULATION SHALL BE ADMISSIBLE IN EVIDENCE TO PROVE THE OCCURRENCE OF SUCH EVENT.

COMMENT

The hearsay rule ordinarily bars proof of a newspaper account of an event to show its occurrence, but for the kind of events involved in gambling transactions, a limited exception to the rule seems appropriate. It would ordinarily be a waste of time to call witnesses to prove that a particular horse race was actually held, at least in the absence of any proof to the contrary, if the newspaper routinely reported the results.

225.35. LOTTERY OFFENSES; NO DEFENSE

ANY OFFENSE DEFINED IN THIS PART WHICH CONSISTS OF THE COMMISSION OF ACTS RELATING TO A LOTTERY IS NO LESS CRIMINAL BECAUSE THE LOTTERY ITSELF IS DRAWN OR CONDUCTED WITHOUT THE STATE AND IS NOT VIOLATIVE OF THE LAWS OF THE

JURISDICITON IN WHICH IT WAS SO DRAWN OR CONDUCTED.

COMMENT

This is taken from the New York Code and is self-explanatory.

225.40. GAMBLING OFFENSES; AFFIRMATIVE DEFENSE

1. THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS SECTION:

A. "RELIGIOUS OR CHARITABLE ORGANIZATION" MEANS A RELIGIOUS, CHARITABLE, EDUCATIONAL, MEDICAL RESEARCH, MEDICAL TREATMENT, CIVIC, FRATERNAL, PATRIOTIC, OR WAR VETERANS' ORGANIZATION, OR AN ORGANIZATION DESIRING TO RAISE MONEY FOR A NON-PROFIT VOLUNTEER FIRE COMPANY, AMATEUR ATHLETIC GROUP, OR STATE, CITY, OR COUNTY FAIR. "RELIGIOUS OR CHARITABLE PURPOSES" MEANS THE PURPOSES OF THE RELIGIOUS OR CHARITABLE ORGANIZATION FOR WHOSE BENEFIT THE GAMBLING IS CONDUCTED.

B. "SOCIAL CLUB FOR PERSONS SIXTY YEARS OF AGE OR OLDER" MEANS AN ORGANIZATION COMPOSED SOLELY OF PERSONS SIXTY YEARS OF AGE OR OLDER AND FORMED PRIMARILY FOR SOCIAL PURPOSES.

2. IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION FOR VIOLATION OF ANY PROVISION OF THIS PART THAT THE DEFENDANT'S CONDUCT WAS NOT CONNECTED WITH ANY GAMBLING OTHER THAN A PERMITTED GAMBLING OPERATION. "PERMITTED GAMBLING OPERATION" MEANS EITHER:

A. GAMBLING AUTHORIZED BY THE GENERAL ASSEMBLY OF MARYLAND AND OPERATED BY OR UNDER THE SUPERVISION AND CONTROL OF MARYLAND OR AN AGENCY THEREOF; OR

B. GAMBLING FOR THE BENEFIT OF A RELIGIOUS OR CHARITABLE ORGANIZATION OR A SOCIAL CLUB FOR PERSONS SIXTY YEARS OF AGE OR OLDER SATISFYING ALL OF THE FOLLOWING REQUIREMENTS:

I. THE ORGANIZATION IS A BONA FIDE RELIGIOUS OR CHARITABLE ORGANIZATION OR A BONA FIDE SOCIAL CLUB FOR PERSONS SIXTY YEARS OF AGE OR OLDER WHICH RECEIVES ALL OF THE PROFITS OF SUCH GAMBLING FOR RELIGIOUS OR CHARITABLE PURPOSES OR FOR THE PURPOSES OF THE SOCIAL CLUB; AND

II. THE MANAGEMENT AND OPERATION OF SUCH GAMBLING IS SOLELY BY MEMBERS OR EMPLOYEES OF SUCH ORGANIZATION, WHOSE COMPENSATION, IF ANY, FOR SUCH MANAGEMENT OR OPERATION DOES NOT VARY IN ANY WAY ACCORDING TO THE INCOME OR PROFITS FROM SUCH GAMBLING;

AND

III. THE GAMBLING IS CONDUCTED PURSUANT TO A PREVIOUSLY ISSUED LICENSE TO CONDUCT SUCH GAMBLING, OBTAINED FROM THE GOVERNING BODY OF THE MUNICIPALITY OR COUNTY, AS THE CASE MAY BE, IN WHICH SUCH GAMBLING TAKES PLACE, OR FROM A DESIGNATED AGENCY OF SUCH GOVERNING BODY. NOTHING HEREIN REQUIRES SUCH GOVERNING BODY TO ISSUE OR AUTHORIZE THE ISSUANCE OF ANY SUCH LICENSES, BUT IF IT DOES SO, IT MAY CHARGE REASONABLE FEES THEREFOR AND PROVIDE REASONABLE RULES AND REGULATIONS FOR SUCH LICENSING, RELATING TO (A) PROCEDURES FOR ISSUANCE AND REVOCATION FOR CAUSE OF SUCH LICENSES, (B) THE FURNISHING OF EVIDENCE THAT THE LICENSEE IS IN COMPLIANCE WITH SUBDIVISIONS (I) AND (II) OF THIS SUBDIVISION (2)(B), (C) ANY ACCOUNTING, AUDITING, OR INVESTIGATORY PROCEDURES DEEMED NECESSARY, AND (D) THE TYPES OF GAMBLING PERMITTED AND THE PLACES AND TIMES AT WHICH GAMBLING MAY TAKE PLACE.

COMMENT

Subsection (2)(a) excludes from criminality participants in gambling authorized by and operated by or under the supervision of the State, as, for example, authorized betting on horse racing and legalized lotteries.

As to subsection (2)(b), there is, of course, an initial policy question as to whether or not gambling for charity (or, as permitted by section 260A of Article 27, enacted in 1974, for social clubs for persons sixty years of age or older) should be exempted, as to how broadly "charity" should be construed (the section is intended to allow the possibility of a license to any organization permitted by Article 27 to conduct gambling in any of the local jurisdictions), and as to whether any rules should be state wide or by local option. It would seem that there is no significant reason for prohibiting such gambling, per se, if it is not offensive to people in the locality affected. The draft therefore makes it a local option matter, by requiring a county license, and making it clear that the county may elect to grant no licenses at all. The county may also permit only certain forms of charitable gambling, e.g., Bingo. Formation of licensing provisions is provided for.

Additional requirements are imposed to assure that the charity is the sole beneficiary of the profits from the operation and does the managing itself. It may not be run by "employees" who are "on commission."

225.45. FORFEITURE OF GAMBLING DEVICES AND GAMBLING PROCEEDS

1. ANY GAMBLING DEVICE OR GAMBLING RECORD POSSESSED OR USED IN VIOLATION OF THIS PART IS FORFEITED TO THE STATE, AND SHALL BY COURT ORDER BE TURNED OVER TO THE DEPARTMENT OF MARYLAND STATE POLICE FOR WHATEVER DISPOSITION ITS SUPERINTENDENT MAY ORDER.

2. ANY MONEY, CURRENCY, OR CASH SEIZED OR CAPTURED BY ANY POLICE OFFICER IN CONNECTION WITH ANY ARREST FOR A VIOLATION OF THIS PART SHALL BE DEEMED PRIMA FACIE TO BE CONTRABAND OF LAW, AND SHALL BE DISPOSED OF AS FOLLOWS:

A. ALL RIGHTS, TITLE, AND INTEREST IN AND TO SUCH MONEY, CURRENCY, OR CASH SHALL IMMEDIATELY VEST IN AND TO THE LOCAL GOVERNMENT OF THE CITY OF BALTIMORE OR OF THE COUNTY IN WHICH SUCH MONEY, CURRENCY, OR CASH WAS SEIZED, AND NO SUCH MONEY, CURRENCY, OR CASH SHALL BE RETURNED TO ANY PERSON CLAIMING THE SAME, OR TO ANY OTHER PERSON, EXCEPT IN THE MANNER HEREINAFTER IN THIS SECTION PROVIDED.

B. PENDING TRIAL OR ULTIMATE DISPOSITION OF THE CHARGE OR CHARGES, INDICTMENT OR INDICTMENTS, GROWING OUT OF ANY ARREST IN CONNECTION WITH WHICH ANY SUCH MONEY, CURRENCY OR CASH MAY HAVE BEEN SO SEIZED OR CAPTURED, THE SAME SHALL BE DEPOSITED IN AN INTEREST-BEARING ACCOUNT AND ACCOUNTED FOR BY THE COUNTY TREASURER OF THE COUNTY OR THE DIRECTOR OF FINANCE IN BALTIMORE CITY.

C. IF THE TRIAL OR OTHER ULTIMATE DISPOSITION OF SUCH CHARGE OR CHARGES, INDICTMENT OR INDICTMENTS, RESULTS IN A RECORD OF CONVICTION BEING ENTERED AGAINST THE PERSON OR PERSONS SO ARRESTED, IN CONNECTION WITH WHICH THE SAID MONEY, CURRENCY, OR CASH MAY HAVE BEEN SO SEIZED OR CAPTURED, THE COUNTY TREASURER OF THE COUNTY OR DIRECTOR OF FINANCE IN BALTIMORE CITY SHALL WITHIN NINETY DAYS FROM THE DATE OF THE RECORD OF THE ENTRY OF SUCH CONVICTION, UNLESS THE CASE IS APPEALED TO AN APPELLATE COURT, FOR AN ORDER DECLARING AND ORDERING THAT SUCH MONEY, CURRENCY OR CASH IN THE CUSTODY OF THE DIRECTOR OF FINANCE OR COUNTY TREASURER SHALL BE FORFEITED TO THE SOLE USE AND GAIN OF THE COUNTY OR CITY. THE COURT TO WHICH ANY SUCH APPLICATION HAS BEEN DIRECTED SHALL ESTABLISH TO ITS SATISFACTION THAT THERE IS NO PENDING AND UNDETERMINED SUIT OR PROCEEDING WHICH HAS BEEN FILED IN ANY COURT OF COMPETENT JURISDICTION, AGAINST THE DIRECTOR OF FINANCE OR TREASURER, SEEKING A RETURN OR RECOVERY OF THE MONEY, CURRENCY OR CASH SO HELD IN CUSTODY, BEFORE THE COURT SHALL PROCEED SO TO ORDER A FORFEITURE OF SUCH MONEY, CURRENCY OR CASH TO THE COUNTY.

ALL APPLICATIONS FOR THE FORFEITURE OF CONTRABAND SHALL BE BY PETITION AND A COPY OF THE PETITION AND SHOW CAUSE ORDER SHALL BE SERVED IN THE FIRST INSTANCE PURSUANT TO RULE 104 OF THE MARYLAND RULES OF PROCEDURE OR RULE NO. 104 OF THE MARYLAND DISTRICT RULES, AND THEREAFTER, THE SUMMONS HAVING BEEN RETURNED NON EST, THE DIRECTOR OF FINANCE OF BALTIMORE CITY OR COUNTY TREASURER MAY PROCEED PURSUANT TO RULE 105, SUBSECTION 2 AND SUBSECTION 3 OF THE MARYLAND RULES OF PROCEDURE AS AMENDED, OR RULE NO. 104H OF THE MARYLAND DISTRICT RULES.

D. IF THE TRIAL OR OTHER ULTIMATE DISPOSITION OF SUCH CHARGE OR CHARGES, INDICTMENT OR INDICTMENTS, RESULTS IN AN ACQUITTAL OR DISMISSAL IN FAVOR OF THE PERSON OR PERSONS SO ARRESTED, IN CONNECTION WITH WHICH THE MONEY, CURRENCY OR CASH MAY HAVE BEEN SEIZED OR CAPTURED, THE SAME SHALL BE RETURNED TO THE PERSON FROM WHOM TAKEN ON THE EXPIRATION OF NINETY DAYS FROM SUCH ACQUITTAL OR DISMISSAL, UNLESS SOME OTHER PERSON OR PERSONS CLAIMING TO OWN ANY OR ALL OF THE MONEY, CURRENCY, OR CASH SHALL HAVE, WITHIN NINETY DAYS FROM THE DATE OF THE RECORD OF THE ENTRY OF SUCH ACQUITTAL OR DISMISSAL APPLIED TO THE CURCUIT COURT OF THE COUNTY, FOR AN ORDER DECLARING AND ORDERING THAT SUCH MONEY, CURRENCY OR CASH IN THE CUSTODY OF THE DIRECTOR OF FINANCE OR COUNTY TREASURER IS THE PROPERTY OF THE PERSON OR PERSONS SO APPLYING AND SHOULD BE RETURNED TO HIM OR THEM FORTHWITH BY THE DIRECTOR OF FINANCE OR TREASURER. IN THE EVENT SOME OTHER PERSON OR PERSONS SO APPLY, THE COURT SHALL HEAR AND DETERMINE THE ISSUE AS IN OTHER CASES AT LAW.

COMMENT

Subsection one is adapted from section 6140 of the draft Michigan Code, and subsection two is substantially the present article 27, section 264, except that the provisions have been made State-wide.

225.50. CIVIL ACTIONS FOR GAMBLING WINNINGS AND LOSSES

1. ANY PLAYER WHO LOSES MONEY GAMBLING MAY RECOVER THE SAME AS IF IT WERE A COMMON DEBT FROM ANY WINNER FROM SUCH PLAYER IF SUCH WINNER EITHER (A) HAS BEEN FINALLY CONVICTED OF A VIOLATION OF THIS PART IN CONNECTION WITH THE GAMBLING INVOLVED, OR (B) IS PROVED IN THE CIVIL ACTION BY A PREPONDERANCE OF THE EVIDENCE TO HAVE ENGAGED IN CONDUCT IN VIOLATION OF THIS PART IN CONNECTION WITH THE GAMBLING.

2. ANY PLAYER IN A LOTTERY ENTITLED TO RECOVER UNDER THE PROVISIONS OF SUBSECTION (1) SHALL BE ENTITLED TO MINIMUM DAMAGES OF ONE HUNDRED DOLLARS.

3. NO COURT SHALL ENTER A JUDGMENT FOR THE RECOVERY OF GAMBLING WINNINGS, WHETHER OR NOT THE GAMBLING IS PROHIBITED BY THIS PART, UNLESS THE PLAINTIFF ESTABLISHES BY A PREPONDERANCE OF THE EVIDENCE THAT HE WOULD HAVE AN AFFIRMATIVE DEFENSE UNDER SECTION 225.40 IF CHARGED WITH AN OFFENSE UNDER THIS PART.

COMMENT

This section was suggested by Article 27, sections 243, 244, and 349. Some changes have been made to bring the material up to date and into conformity with the provisions of the draft code.

PART 230: PROSTITUTION OFFENSES

INTRODUCTION

As has been done with other parts of this proposed Code, the Commission has used the New York Penal Code as its starting point in drafting the Prostitution Offense provisions and has also consulted present Maryland law and the Model Penal Code. The result resembles the New York Code superficially but contains a number of significant alterations. The overall effect of the new provisions should be to simplify greatly our present law.

Prostitution is an organized industry, involving in its operations many persons who perform roles different from that of the prostitute herself. The Proposed Prostitution Offense Code is designed to provide a variety of weapons for use against all of the participants in the industry. In considering the value of any one of the sections, *infra*, it should be remembered that to strike at any part of the industry, strikes at the whole industry, and, *a fortiori*, at all of its parts.

The Commission considered the question whether prostitution ought to be legalized in Maryland and rejected the idea on the following grounds: (1) Prostitution is a prime source of veneral disease, since a single prostitute often services an average of 20 male customers a day; (2) the community is likely to be offended by the notoriety it might acquire by becoming "wide open" to prostitution; (3) the profits available to those who live off prostitution provide a motive for the exploitation of weak, young and dependent female citizens by compelling or enticing them to become prostitutes; (4) prostitution is to some extent an organized criminal activity and supports other types of organized crime, such as narcotic use.

230.00. PROSTITUTION OFFENSES; DEFINITIONS OF TERMS 24424

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART: 24427

1. "SEXUAL CONDUCT" MEANS SEXUAL INTERCOURSE OR ANY OTHER ACT DONE FOR THE PURPOSE OF SEXUAL GRATIFICATION. WHEN PERFORMED FOR THE PURPOSE OF GRATIFYING THE SEXUAL DESIRE OF EITHER PARTY, "SEXUAL CONDUCT" INCLUDES, BUT IS NOT LIMITED TO, 24429 24430 24431 24432

(A) CONTACT BETWEEN THE HAND, MOUTH, ANUS, PENIS, VULVA OR BODY OF ONE PERSON AND THE PENIS OR VULVA OF ANOTHER PERSON; AND 24434 24435 24436

(B) INFLICTION OF PAIN OR PUNISHMENT BY ONE PERSON UPON ANOTHER PERSON; AND 24438 24439

(C) EXPOSURE OF THE NUDE BODY OR SEXUAL ORGANS OF ONE PERSON TO ANOTHER PERSON. 24441 24442

2. "ADVANCE PROSTITUTION." A PERSON "ADVANCES PROSTITUTION" WHEN, ACTING OTHER THAN AS A PROSTITUTE OR AS A PATRON THEREOF, HE OR SHE INTENTIONALLY CAUSES OR AIDS A PERSON TO COMMIT OR ENGAGE IN PROSTITUTION, PROCURES OR SOLICITS PATRONS FOR PROSTITUTION, PROVIDES PERSONS OR PREMISES FOR PROSTITUTION PURPOSES, OPERATES OR ASSISTS IN THE OPERATION OF A HOUSE OF PROSTITUTION OR A PROSTITUTION ENTERPRISE, OR ENGAGES IN ANY OTHER CONDUCT DESIGNED TO INSTITUTE, AID OR FACILITATE AN ACT OR ENTERPRISE OF PROSTITUTION. 24444 24445 24446 24447 24448 24449 24450 24451 24452

3. "PROFIT FROM PROSTITUTION." A PERSON PROFITS FROM PROSTITUTION WHEN HE OR SHE, ACTING OTHER THAN AS A PROSTITUTE RECEIVING COMPENSATION FOR PERSONALLY RENDERED PROSTITUTION SERVICES, ACCEPTS OR RECEIVES MONEY OR OTHER PROPERTY PURSUANT TO AN AGREEMENT OR UNDERSTANDING WHEREBY HE OR SHE PARTICIPATES OR IS TO PARTICIPATE IN THE PROCEEDS OF PROSTITUTION ACTIVITY. 24454 24455 24456 24457 24458 24459

4. "HOUSE OF PROSTITUTION." A "HOUSE OF PROSTITUTION" IS ANY PLACE WHERE PROSTITUTION IS REGULARLY CARRIED ON BY ONE PERSON UNDER THE CONTROL, MANAGEMENT OR SUPERVISION OF ANOTHER PERSON OR BY ARRANGEMENT WITH ANOTHER PERSON. IT NEED NOT BE A PLACE OF RESIDENCE. 24461 24462 24463 24464 24465

COMMENT 24468

As in the case of the Proposed Sex Offender Code, definitions are included in the Proposed Prostitution Offense Code for the purpose of saving space and clarifying the meaning of key terms. Brief discussions of the definitions follow. 24471 24472 24473 24474

1. "Sexual conduct." This term, which describes the behavior for hire which is the essence of the prohibited conduct described in §§230.05 and 230.10, is designed to be considerably broader than simple sexual intercourse because prostitutes are often paid to perform other types of sexual acts. Prostitutes and their customers are rarely observed in the actual act of sexual intercourse, and it would frustrate efforts of law enforcement authorities if prostitutes and their customers, when found in a house of prostitution during a raid or otherwise discovered under circumstances indicating that prostitution was going on, were able to elude conviction because the State could not prove, for example, that intercourse rather than buggery, fellation or voyeurism was the reason the parties had disrobed. The definition of sexual conduct thus includes all of the principal sexual acts which are commonly sold by prostitutes.

2. "Advance prostitution." This definition describes in detail a second basic type of activity which must be prohibited if the prostitution industry is to be controlled – viz. being an accomplice to prostitution activities. It is the object of the Proposed New Prostitution Offense Code to simplify by lumping specific types of activity connected with the prostitution industry into a few general offenses such as Prostitution, Patronizing Prostitution, Promoting Prostitution and Permitting Prostitution. Description of the term "advance prostitution" in detail in the definitional section, permits a more succinct lumping of abetting offenses into degrees of "Promoting Prostitution" defined in §§230.20, 230.25 and 230.30. "Promoting Prostitution," in which "advancing prostitution" is a key term, includes the most common prostitution industry activities, such as enticing a person to commit prostitution, procuring, providing premises for prostitution purposes or otherwise assisting in the operation of a prostitution enterprise. It is desired to be as inclusive as possible without reaching situations of only remote and unintentional support to prostitution activities – e.g., the sale by a grocer of food to a prostitute would not be "advancing prostitution."

3. "Profit from prostitution." This definition describes a type of activity which has traditionally been prohibited as a part of the overall law enforcement effort to control prostitution. It is most commonly known under the label "Receiving the Earnings of a Prostitute." "Profit from prostitution" is a key term used in definitions of the degrees of "Promoting

Prostitution" set forth in §§230.20, 230.25 and 230.30.

4. "House of prostitution." This definition is self-explanatory except that it should be noted that the meaning of "house" herein is considerably broader than the old fashioned stereotype of the dwelling house on the wrong side of the tracks with a red light over the front door. The modern premises where prostitution is regularly carried on is more likely to be a tavern, a nightclub, an apartment, a hotel or motel, a steambath or a milk bar than a private dwelling house. For effective control of the prostitution industry, intentional operation of all of such types of places for prostitution purposes must be prohibited.

230.05. PROSTITUTION

A PERSON IS GUILTY OF PROSTITUTION WHEN HE OR SHE ENGAGES OR AGREES OR OFFERS TO ENGAGE IN SEXUAL CONDUCT WITH ANOTHER PERSON OTHER THAN HIS OR HER SPOUSE IN RETURN FOR REMUNERATION OR COMPENSATION OF ANY SORT.

PROSTITUTION IS A CLASS B MISDEMEANOR.

COMMENT

The new §230.05 prohibits the conduct presently made unlawful by Article 27, §§15(g) and 16. The old and the new provisions are essentially the same except that the new statute spells out the meaning of the term "for hire" to be "remuneration or compensation of any sort" and the definition of "sexual conduct" in §230.00 spells out in greater detail the type of activities which can be the subject of prostitution.

230.10. PATRONIZING A HOUSE OF PROSTITUTION

A PERSON IS GUILTY OF PATRONIZING A HOUSE OF PROSTITUTION WHEN HE OR SHE ENTERS OR REMAINS IN A PLACE FOR THE PURPOSE OF ENGAGING IN SEXUAL CONDUCT THEREIN WITH KNOWLEDGE OR REASONABLE CAUSE TO KNOW THAT SUCH PLACE IS A HOUSE OF PROSTITUTION.

PATRONIZING PROSTITUTION IS A CLASS B MISDEMEANOR.

COMMENT

This section makes it a minor offense to be in a house of prostitution for the purpose of engaging in sexual conduct. Patronizing a prostitute is presently prohibited in Maryland by Article 27, §§15(b) and 15(f) where the customer is found in a

disorderly house, and the prohibition is regularly enforced by the Baltimore City Police.

The Commission considered the question whether the prostitute's customer should be punished and decided that he should for two reasons: (1) The ultimate law enforcement goal is to control the prostitution industry in which the customer is an essential element and (2) in some cases of raids upon houses of prostitution it may assist the police to have grounds for arresting the customers along with those persons known to be prostitutes or agents of the house.

230.15. PROSTITUTION AND PATRONIZING A HOUSE OF PROSTITUTION; NO DEFENSE

IN ANY PROSECUTION FOR PROSTITUTION OR PATRONIZING A HOUSE OF PROSTITUTION, IT IS NO DEFENSE THAT:

1. THE PARTIES TO THE SEXUAL CONDUCT WERE OF THE SAME SEX; OR

2. THE PERSON WHO RECEIVED, AGREED TO RECEIVE OR SOLICITED REMUNERATION OR COMPENSATION WAS A MALE AND THE PERSON WHO PAID OR AGREED OR OFFERED TO PAY SUCH REMUNERATION OR COMPENSATION WAS A FEMALE.

COMMENT

This section includes within the scope of the prohibitions aimed at combatting the prostitution industry (1) homosexual prostitution and (2) prostitution by male prostitutes with female customers. Homosexual prostitution is a serious problem which involves a number of youths in homosexual activities and may contribute to their becoming homosexuals for life. It is an important source of venereal disease. Prostitution by male prostitutes with females is less common and probably communicates less venereal disease than prostitution by females or homosexual prostitution. Nevertheless, it is undesirable to some extent for all of the reasons applicable to other types of prostitution.

230.20. PROMOTING PROSTITUTION IN THE THIRD DEGREE

A PERSON IS GUILTY OF PROMOTING PROSTITUTION IN THE THIRD DEGREE WHEN HE OR SHE INTENTIONALLY ADVANCES OR PROFITS FROM PROSTITUTION.

PROMOTING PROSTITUTION IN THE THIRD DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

The three degrees of Promoting Prostitution in the Proposed Prostitution Offense Code lump together the following types of prostitution industry activities, which are presently prohibited in the Maryland Criminal Code:

1. Street offenses such as loitering when designed to facilitate an act or enterprise of prostitution, transporting for prostitution purposes and soliciting. (See Art. 27, §§15(b), 15(d), 15(e), 15(f), 15(g) and 16.)

2. Living off the earnings of a prostitute. (See Art. 27, §§429, 430 and 431.)

3. Using premises for prostitution purposes. (See Art. 27, §§15(a), 15(b). 15(c), 15(f), 125, 426, 428, 429 and 431.)

4. Procuring. (See Art. 27, §§426, 427, 428, 429, 431 and 432.) Key terms in the promoting prostitution section are "advance prostitution," "profit from prostitution" and "house of prostitution." All are defined in §230.00.

The basic offense of Promoting Prostitution is defined in §230.20, "Promoting Prostitution in the Third Degree" which includes any intentional advancement or profiting from prostitution.

230.25. PROMOTING PROSTITUTION IN THE SECOND DEGREE

A PERSON IS GUILTY OF PROMOTING PROSTITUTION IN THE SECOND DEGREE WHEN HE OR SHE INTENTIONALLY:

1. ADVANCES OR PROFITS FROM PROSTITUTION EITHER ALONE OR IN ASSOCIATION WITH OTHERS, BY MANAGING, SUPERVISING, CONTROLLING OR PROVIDING THE PREMISES OF A HOUSE OF PROSTITUTION OR A PROSTITUTION BUSINESS OR ENTERPRISE INVOLVING PROSTITUTION ACTIVITY BY TWO OR MORE PROSTITUTES; OR

2. ADVANCES OR PROFITS FROM PROSTITUTION OF A PERSON LESS THAN EIGHTEEN YEARS OLD.

PROMOTING PROSTITUTION IN THE SECOND DEGREE IS A CLASS D FELONY.

COMMENT

The higher degrees of Promoting Prostitution are defined in terms of the basic offense (defined in §230.20) aggravated by designated factors deemed

to render the conduct more offensive or indicative of larger scale prostitution activities. In the case of the second degree offense, Promoting Prostitution is increased to the proportions of a class D felony if the prostitute whose prostitution is advanced or profited from is a minor less than 18 years old or if the prostitution activity involved is a business on a large enough scale to involve the activities of two or more prostitutes.

230.30. PROMOTING PROSTITUTION IN THE FIRST DEGREE

A PERSON IS GUILTY OF PROMOTING PROSTITUTION IN THE FIRST DEGREE WHEN HE OR SHE INTENTIONALLY:

1. ADVANCES PROSTITUTION BY COMPELLING A PERSON BY FORCE OR INTIMIDATION TO ENGAGE IN PROSTITUTION, OR PROFITS FROM SUCH COERCIVE CONDUCT BY ANOTHER; OR

2. ADVANCES OR PROFITS FROM PROSTITUTION OF A PERSON LESS THAN SIXTEEN YEARS OLD.

PROMOTING PROSTITUTION IN THE FIRST DEGREE IS A CLASS C FELONY.

COMMENT

Promoting Prostitution is considered to be more serious when the prostitute is less than 16 years old or coercive conduct is used to involve her in prostitution. Such aggrevating factors escalate the misdemeanor offense defined in §230.20 to Promoting Prostitution in the first degree, a class C felony, when they are present.

230.35. PERMITTING PROSTITUTION

A PERSON IS GUILTY OF PERMITTING PROSTITUTION WHEN, HAVING OWNERSHIP, POSSESSION OR CONTROL OF PREMISES, HE OR SHE KNOWINGLY PERMIT SUCH PREMISES TO BE USED FOR PROSTITUTION PURPOSES.

PERMITTING PROSTITUTION IS A CLASS B MISDEMEANOR.

COMMENT

The offense of permitting prostitution is designed to strike at the landlord who knowingly permits his premises to be used for prostitution purposes but is not visibly involved as an accomplice to the prostitution activities. The State can, of course, provide civil and administrative remedies (e.g., the tort of Nuisance) to force such a landlord to evict the offending tenants. The instant minor misdemeanor offense adds

to the arsenal of weapons available to prod him into action.

230.40. EXPLOITING USE OF PREMISES FOR LEWDNESS

A PERSON IS GUILTY OF EXPLOITING THE USE OF PREMISES FOR LEWDNESS WHEN:

(1) HE HAS OWNERSHIP, POSSESSION OR CONTROL OF PREMISES, OR IS ACTING FOR OR IN CONJUNCTION WITH A PERSON HAVING OWNERSHIP, POSSESSION OR CONTROL THEREOF; AND

(2) HE KNOWINGLY PERMITS SUCH PREMISES TO BE USED REGULARLY OR FREQUENTLY BY THREE OR MORE PERSONS NOT REGULARLY RESIDING THEREAT FOR THE PURPOSE OF THERE ENGAGING IN SEXUAL CONDUCT BETWEEN PERSONS NOT MARRIED TO EACH OTHER; AND

(3) HE KNOWINGLY RECEIVES A CONSIDERATION FOR PERMITTING SUCH USE OF THE PREMISES.

"PREMISES," AS USED IN THIS SECTION, INCLUDES (1) A GROUP OF BUILDINGS MANAGED AS A SINGLE ENTERPRISE, OR (2) A BUILDING, WHETHER OR NOT IT CONTAINS PORTIONS SET ASIDE FOR SEPARATE USE, OR (3) A PORTION OF A BUILDING, WHICH PORTION HAS BEEN SET ASIDE FOR SEPARATE USE. PREMISES CONTAINING PORTIONS SET ASIDE FOR SEPARATE USE ARE "USED REGULARLY OR FREQUENTLY" WITHIN THE MEANING OF THIS SECTION, WHETHER THE USE IS OF THE SAME OR DIFFERENT PORTIONS. PREMISES ARE USED "BY THREE OR MORE PERSONS" WHETHER OR NOT MORE THAN TWO PERSONS USE THEM AT ONE TIME.

EXPLOITING THE USE OF PREMISES FOR LEWDNESS IS A CLASS B MISDEMEANOR.

COMMENT

This Section is designed to cover the keeping of places which purposely cater on a regular basis to persons who perform immoral sexual activities therein, including places which masquerade as "steam baths" in order to provide facilities for persons to practice homosexuality. Such places constitute nuisances to the neighborhoods in which they are located similar to the nuisance of a house of prostitution but might not come within the definition of "house of prostitution" in §230.00(4) because the sexual activity transacted on the premises is not sold. This section penalizes only owners or operators of commercial enterprises and does not apply to residential situations which lack the aspects of commercialized sex common to both the house of prostitution and such place as the

homosexual "steam bath." It is limited to acts done by the owners or operators with knowledge of the regular use of the premises for immoral sexual conduct by at least three people.

This section punishes the owner or operator of an establishment, not the patrons thereof. However, a patron could be liable as an accomplice upon a showing of active involvement in the enterprise substantial enough to allow it to be inferred that he acted in conjunction with a person having ownership, position or control.

230.45. EVIDENCE

ON THE ISSUE WHETHER A PLACE IS A HOUSE OF PROSTITUTION OR IS USED TO PROMOTE LEWDNESS, EVIDENCE SHALL BE ADMISSIBLE OF ITS GENERAL REPUTE AND THE REPUTE OF THE PERSONS WHO RESIDE IN OR FREQUENT THE PLACE; PROVIDED, HOWEVER, THAT EVIDENCE OF REPUTE ALONE SHALL NOT BE SUFFICIENT TO ESTABLISH THAT A PLACE IS A HOUSE OF PROSTITUTION OR IS USED TO PROMOTE LEWDNESS. EVIDENCE SHALL ALSO BE ADMISSIBLE OF THE FREQUENCY, TIMING AND DURATION OF VISITS BY NON-RESIDENTS OF SUCH PLACE OR HOUSE.

COMMENT

It is often difficult to get competent evidence to convict the operators of even the most notorious and flourishing prostitution enterprise and the like because its customers as well as its agents are usually reluctant to give evidence against the enterprise. To facilitate prosecutions, the instant section makes reputation evidence admissible as to the character of premises alleged to have been used for prostitution purposes. This section also applies to reputation evidence regarding the use of premises for lewdness. Reputation evidence cannot be used, however, to prove an individual defendant's involvement in the activities of the house.

230.50. PROSTITUTION OFFENSES; DEFENSE

1. "SEXUAL DYSFUNCTION TREATMENT PROGRAM," AS USED IN THIS SECTION MEANS A PROGRAM OF MEDICAL TREATMENT, OR RESEARCH ASSOCIATED WITH MEDICAL TREATMENT, UNDER THE EXCLUSIVE MANAGEMENT AND DIRECTION OF ONE OR MORE PHYSICIANS LICENSED TO PRACTICE MEDICINE IN THIS STATE, WHICH IS DESIGNED TO STUDY OR TREAT SEXUAL DYSFUNCTION.

2. IT IS A DEFENSE IN A PROSECUTION BROUGHT UNDER ANY SECTION OF THIS PART THAT THE CONDUCT FORMING THE

BASIS FOR THE PROSECUTION WAS AN ASPECT OF THE OPERATION OF A SEXUAL DYSFUNCTION TREATMENT PROGRAM.

COMMENT

None of the arguments noted in the Introduction to this Part against legalizing prostitution apply to medical programs of the nature dealt with in this section. Whatever the morality or wisdom of such programs, they do not constitute prostitution under any proper definition. At least one such program is now in operation in this State; it is said not to use surrogate sexual partners – which medical judgment might call for – largely because of concern about the prostitution prohibition.

PART 235: OBSCENITY

235.00. OBSCENITY; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "OBSCENE." ANY MATTER IS OBSCENE IF (A) TAKEN AS A WHOLE, IT APPEALS TO PRURIENT INTEREST IN SEX, AND (B) IT DEPICTS OR DESCRIBES SEXUAL CONDUCT IN A PATENTLY OFFENSIVE WAY, AND (C) TAKEN AS A WHOLE IT DOES NOT HAVE SERIOUS LITERARY, ARTISTIC, POLITICAL, OR SCIENTIFIC VALUE. APPEAL AND OFFENSIVENESS SHALL BE JUDGED WITH REFERENCE TO ORDINARY ADULTS IN THE STATE, EXCEPT THAT IF IT APPEARS FROM THE CHARACTER OF THE MATERIAL OR THE CIRCUMSTANCES OF ITS DISSEMINATION TO BE DESIGNED FOR CHILDREN OR ANOTHER SPECIALLY SUSCEPTIBLE AUDIENCE, APPEAL SHALL BE JUDGED WITH RESPECT TO THE SPECIFIC AUDIENCE FOR WHICH IT IS DESIGNED. UNDEVELOPED PHOTOGRAPHS, MOLDS, AND SIMILAR MATERIAL MAY BE FOUND TO BE OBSCENE NOTWITHSTANDING THAT PROCESSING OR OTHER ACTS MAY BE REQUIRED TO MAKE THE OBSCENITY APPARENT.

2. "MATTER" MEANS MATERIAL OR PERFORMANCE.

3. "MATERIAL" MEANS ANYTHING TANGIBLE WHICH IS CAPABLE OF BEING USED OR ADAPTED TO AROUSE INTEREST, WHETHER THROUGH THE MEDIUM OF READING, OBSERVATION, SOUND OR IN ANY OTHER MANNER.

4. "PERFORMANCE" MEANS ANY PLAY, MOTION PICTURE, DANCE, OR OTHER EXHIBITION PERFORMED BEFORE AN AUDIENCE.

5. "PROMOTE" MEANS TO MANUFACTURE, ISSUE, SELL, PROVIDE, LEND, MAIL, DELIVER, TRANSFER, TRANSMUTE, PUBLISH, DISTRIBUTE, CIRCULATE, DISSEMINATE, PRESENT, EXHIBIT, OR ADVERTISE, OR TO OFFER OR AGREE TO DO THE SAME.

6. "PROMOTE FOR RESALE" MEANS, FOR PURPOSES OF RESALE, TO MANUFACTURE, ISSUE, SELL, PROVIDE, MAIL, DELIVER, TRANSFER, TRANSMUTE, PUBLISH, DISTRIBUTE, CIRCULATE, DISSEMINATE, OR TO OFFER OR AGREE TO DO THE SAME.

7. "MINOR" MEANS ANY PERSON LESS THAN EIGHTEEN YEARS OLD.

8. "SEXUAL CONDUCT" MEANS:

A. AN ACT OF SEXUAL INTERCOURSE, MASTURBATION, HOMOSEXUALITY, OR BESTIALITY, OR, WHEN APPARENTLY PERFORMED FOR THE PURPOSE OF SEXUAL STIMULATION OR GRATIFICATION, AN ACT OF (I) DISPLAY OF NUDITY, OR (II) EXCRETION, OR (III) TOUCHING A PERSON'S CLOTHED OR UNCLOTHED GENITALS, PUBIC AREA, OR BUTTOCKS; OR

B. AN INCIDENT OF SEXUAL EXCITEMENT OR SADO-MASOCHISTIC ABUSE.

9. "SEXUAL EXCITEMENT" MEANS:

A. THE CONDITION OF THE HUMAN MALE OR FEMALE GENITALS WHEN IN A STATE OF SEXUAL STIMULATION OR AROUSAL; OR

B. THE SENSUAL EXPERIENCES OF HUMANS ENGAGING IN OR WITNESSING SEXUAL CONDUCT DESCRIBED IN SUBSECTION (8)(A) OR (9)(A), SADO-MASOCHISTIC ABUSE, OR IN WITNESSING NUDITY.

10. "SADO-MASOCHISTIC ABUSE" MEANS FLAGELLATION OR TORTURE BY OR UPON A PERSON CLAD IN UNDERGARMENTS, A MASK OR BIZARRE COSTUME, OR THE CONDITION OF BEING FETTERED, BOUND, OR OTHERWISE PHYSICALLY RESTRAINED ON THE PART OF ONE SO CLOTHED, WHEN APPARENTLY PERFORMED FOR THE PURPOSE OF SEXUAL STIMULATION OR GRATIFICATION.

11. "NUDITY" MEANS UNCOVERED, OR LESS THAN OPAQUELY COVERED, POST-PUBERTAL HUMAN GENITALS OR PUBIC AREAS, OR THE COVERED HUMAN GENITALS IN A DISCERNABLY TURGID STATE.

COMMENT

The original Commission draft of this Part has been revised in the light of Miller v. California, 413 U.S. 15 (1973), and related cases decided on the same day. As the justices concede, constitutional and definitional difficulties have, over many years, caused divisions within the Court on the question of obscenity, and it does not appear that Miller has put an end to these divisions. The majority

opinion, on which this draft is based, is adhered to by only five of the justices; of the others, three have concluded that there can be no valid prohibitions of obscenity, except possibly in situations not presented by the Miller group of cases (involving children, or adults who wish to avoid exposure to obscene matter), and one has concluded that the constitution allows no prohibitions at all. There is a fairly strong likelihood that the Miller rule will be changed or dropped as membership on the Court or the views of its members change.

It should be noted that while obscenity itself, which is notoriously difficult to define, may enjoy no constitutional protection, expression falling just short of obscenity may not be curbed. Statutory language must be as clear as possible, must not cover too wide an area of prohibition, and must not place impermissible burdens on booksellers and other purveyors of the fruits of protected free expression.

In addition to constitutional doubts, there are divergent policy views to be considered. What seems filth to one man may seem healthy plain speaking to another. Patterns of conventional speech and behavior change rapidly and are different in different social groups. People differ as to how harmful pornography is, if it is harmfull at all, and as to whether the costs of criminal enforcement of obscenity laws are justified in terms of results. These doubts and disagreements exist among the members of the Commission and its staff, but the Commission believes that there is sufficient public demand for attempts to enforce obscenity laws so that draft legislation should be prepared for the consideration of the General Assembly.

The New York provisions have contributed substantially to the structure and some of the auxiliary definitions of this Part. The Commission has also considered the draft Michigan Criminal Code (1967), partly based on the New York Article 235.

The definitions in this section will be considered, as necessary, in connection with the appropriate provisions in the sections which follow.

235.05. OBSCENITY IN THE THIRD DEGREE

A PERSON IS GUILTY OF OBSCENITY IN THE THIRD DEGREE WHEN, KNOWING ITS CONTENT AND CHARACTER, HE:

1. PROMOTES FOR PECUNIARY GAIN, OR POSSESSES WITH

INTENT TO PROMOTE FOR PECUNIARY GAIN, ANY OBSCENE MATERIAL; OR

2. FOR PECUNIARY GAIN, PRODUCES, PRESENTS, OR DIRECTS AN OBSCENE PERFORMANCE OR PARTICIPATES IN A PORTION THEREOF WHICH IS OBSCENE OR WHICH CONTRIBUTES TO ITS OBSCENITY.

OBSCENITY IN THE THIRD DEGREE IS A CLASS A MISDEMEANOR.

COMMENT

This section deals with the basic problem of hard core pornography.

The mental requirement for this grade of the offense (as it is for higher grades of the offense) is knowledge of the content and character of material or performance involved. This appears to be constitutionally mandated; see Mishkin v. State of New York, 383 U.S. 502, 511 (1966), where the court said that the "Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

New York, in section 225.10(1) provides: "A person who promotes . . . obscene material, or possesses the same with intent to promote . . . it, in the course of his business is presumed to do so with knowledge of its contents and character." (There is a similar presumption as to material harmful to minors in New York section 235.22(1).) The constitutionality of this section has been upheld in New York. In People v. Kirkpatrick (Crim. Ct., City of New York, 1970), the court assumed that a more than 50% probability that a bookseller would know the character and contents of his wares would suffice to meet the constitutional standard. The Southern District of New York decided Milky Way Productions, Inc. v. Leary (1970), largely on the gounds that the defendant presented no real evidence to show that the presumption was factually unreasonable and that the American Law Institute, some years previously, had recommended a similar presumption. The inference involved has been said without much analysis by the Second Circuit in Overstock Book Co. v. Barry, 436 F. 2d 1289 (1970), to be more similar to inferences that the United States Supreme Court has approved than to others it has disapproved. However, the Commission has grave doubts that it could withstand a strong attack. For one thing, in Turner v. United States, 396 U.S. 398

(1970), decided too late for consideration by any of the aforementioned courts except for the court in Barry, in which it was cited, there is an implication that the reasonable doubt standard may be applied to test the constitutional validity of presumptions in the future. (See McCormick on Evidence (2d ed., 1972), p. 816). It seems a close question as to whether a bookseller more probably than not would know the contents of a particular book he sells, and quite difficult to establish — from the mere fact of possession with intent to sell in the course of his business — such knowledge beyond a reasonable doubt. The draft therefore abandons this presumption. The trier of fact will remain free to draw inferences of knowledge in the usual ways — for example, from the blatant character of the material, or from proof of notice as to specific items through complaints received from responsible sources.

One way to commit the offense is to promote (defined to include, among other things, to manufacture, sell, lend, transfer, transmute, publish, distribute, present, exhibit or advertise, or to offer or agree to do any of these) material (defined to include anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner), which is obscene. "Obscene" is defined in such a way as to conform to the apparent requirements of the Supreme Court, announced in Miller v. California, 413 U.S. 15 (1973), and related cases decided on the same day.

The Miller court said, ". . . We now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. (Footnote citing Oregon and Hawaii statutes as examples of such definition omitted.) A state offense must also be limited to works which, taken as a whole, appeal to the purient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." (413 U.S. 15, 24) The definition of obscene in section 235.00(1) closely follows this passage. The only significant departure is in the substitution of "depict or describe" for "portray" in the opinion. This is done to prevent the construction that only pictures, as opposed to narrative, can be obscene; the Court expressly decided that non-pictorial matter may be obscene in one of the related cases, Kaplan v.

California, 413 U.S. 115 (1973). Miller provides that the standards for the first two elements (appeal to prurient interest and patent offensiveness) need not be national, and the draft definition uses a State Standard for them.

The requirement of sexual conduct – and sexual conduct which is expressly defined – is met in draft subsections 235.00(8)ff. Specific examples of the Miller Court and the cited Oregon and Hawaii materials have been consulted in preparing the draft, which includes as sexual conduct, the "ultimate sexual acts," masturbation, excretory functions, and "lewd exhibition of the genitals" expressly allowed by the opinion (when specifically described and meeting other requirements of the definition) and some other borderline conduct which seems to be includable and is derived from the Oregon and Hawaii statutes.

The described conduct, according to the definitions and the related provisions of the draft, must be depicted or described in a patently offensive way, and, taken as a whole, it must appeal to the prurient interest in sex and at the same time lack serious literary, artistic, political, or scientific value. Material, e.g., an undeveloped photograph, may be obscene even though further processing is required to make the obscenity apparent. (This final provision of 235.00(1) is taken from Michigan.)

The offense may be committed not only by promoting, or possessing with intent to promote, obscene material, but also by producing, presenting, or directing an obscene performance (which includes a play, motion picture, dance or other exhibition performed before an audience), or participating in a portion thereof which is obscene or which contributes to its obscenity. Note that the section does not reach a mere ticket seller or usher in a theatre presenting an obscene performance (but does reach a bookstore clerk who knowingly sells an obscene book). It is clear from notes to the New York Penal Law (see Supplementary Practice Commentary accompanying a 1971 amendment to New York section 235.15) that this result is intended. Whether this is based on difficulties of draftsmanship or on a policy matter – the bookstore clerk is arguably more directly involved in the prohibited conduct than any single ticket seller or usher at a theatre – is not clear.

The Commission has decided to depart from New York and follow Michigan in one important respect:

it punishes only where a motive of pecuniary gain is involved. The Michigan Revision Committee explains its view (at page 483 of the printed Final Draft of the Michigan Revised Criminal Code, September, 1967) as follows:

> The Committee believes that the emphasis in this area should be on commercial distribution of pornographic material. We would not open up to prosecution, police investigation, search, etc. every person who in the privacy of his home exhibits pornographic materials to a few friends (cf. Redmond v. United States, . . . 384 U.S. 264, . . . (1966)). The pecuniary consideration limitation should not, however, exempt "private clubs" that promote pornographic performances, since the concept of pecuniary gain obviously is broad enough, to encompass indirect consideration via additional sales of liquor, food, etc.

It should be noted that the proposed removal of certain private, adult, consensual homosexual conduct from criminal sanctions (see Part 130) does not prevent prosecution under this section for performances or descriptions of such conduct, under this section, any more than heterosexual obscenity would be protected. So, a night club act which involved depiction of heterosexual or homosexual intercourse, or displays of nudity (as defined) apparently performed for the purpose of sexual stimulation or gratification, would be prohibited if, taken as a whole, it appealed to prurient interest in sex and lacked serious literary, artistic, political, or scientific value.

235.10. OBSCENITY IN THE THIRD DEGREE; INTENT TO PROMOTE FOR PECUNIARY GAIN; PRIMA FACIE EVIDENCE

PROOF OF POSSESSION OF SIX OR MORE SUBSTANTIALLY IDENTICAL COPIES OF ANY OBSCENE MATERIAL IS PRIMA FACIE EVIDENCE OF POSSESSION WITH INTENT TO PROMOTE SUCH MATERIAL FOR PECUNIARY GAIN.

COMMENT

Possession, wholly for private purposes, of obscene material may be impossible for the State to punish under Stanley v. Georgia, 394 U.S. 557 (1969), but private collectors are extremely unlikely to have six substantially identical items for their own private purposes. We have avoided the use of "presumptions" where possible in the proposed

code, and have here used the Michigan approach of prima facie evidence. Both New York and Michigan have provisions similar to this one.

235.15. OBSCENITY IN THE SECOND DEGREE

A PERSON IS GUILTY OF OBSCENITY IN THE SECOND DEGREE WHEN:

1. WITH KNOWLEDGE OF ITS CHARACTER AND CONTENT, HE PROMOTES TO OR FOR THE USE OF OR GIVES TO A MINOR ANY OBSCENE MATERIAL; OR

2. KNOWING THE CHARACTER AND CONTENT OF AN OBSCENE MOTION PICTURE, SHOW, OR OTHER PRESENTATION, HE

A. EXHIBITS SUCH MOTION PICTURE, SHOW, OR OTHER PRESENTATION TO A MINOR; OR

B. SELLS TO A MINOR AN ADMISSION TICKET OR PASS TO PREMISES WHEREON THERE IS EXHIBITED SUCH MOTION PICTURE, SHOW,OR OTHER PRESENTATION; OR

C. ADMITS A MINOR TO PREMISES WHEREON THERE IS EXHIBITED OR TO BE EXHIBITED SUCH MOTION PICTURE, SHOW, OR OTHER PRESENTATION.

OBSCENITY IN THE SECOND DEGREE IS A CLASS E FELONY.

COMMENT

This section deals with the presentation or distribution of obscene matter to minors. The suggestion in Ginsburg v. New York, 390 U.S. 629 (1968) that a legislature may provide a different and broader definition of obscenity for minors than for adults (followed in the prior Commission draft) probably does not survive Miller v. California, 413 U.S. 15 (1973), which disapproves the approach to the problem of obscenity taken by the Court at the time of Ginsburg, and appears to wish to avoid such distinctions. Since the permitted Miller definition of obscenity for adults is considerably broader than before, the difference between the draft definition of obscenity and the former draft's special definition of material harmful to minors is not very significant. While the definition of obscenity on the whole remains the same for adults and minors, section 235.00(1) provides that "appeal to prurient interest" required for obscenity, shall be judged with reference to children if the matter is designed for an audience of children, a provisions which would probably not be found inconsistent with the Miller approach.

The main feature of the section is to provide more severe penalties for dissemination to minors. The dividing line between minors and adults (see section 235.00(7)) is set at the current Maryland age of eighteen, rather than the New York age of seventeen.

The Commission has a choice here, like the choice as to obscenity for adults, as to whether to prohibit only commercial distribution of materials to minors. Although the main problem is commercial distribution, the Michigan Committee noted, at page 485 of its report, that commercial distributors might promote non-commercial distribution for the purpose of broadening their potential markets for commercial sales. Parents who feel it important to protect their children from such material may find it somewhat easier to do so in an atmosphere which does not require proof of a commercial transaction before criminal penalties can be invoked.

The second subsection deals with the special problem of the obscene motion picture or other performance. Not only the presentation of or participation in such a show to minors is punished (as in the case of obscene performances generally), but also the sale of admission tickets to minors, and the admission of minors to premises where the exhibition takes place. Here the protection of minors seem to call for provisions similar to those used in sales of alcoholic beverages; these provisions deliberately place a burden on sellers to determine the age of patrons.

235.20. OBSCENITY IN THE SECOND DEGREE; AFFIRMATIVE DEFENSE

IN ANY PROSECUTION FOR OBSCENITY IN THE SECOND DEGREE IT IS AN AFFIRMATIVE DEFENSE THAT:

1. THE DEFENDANT HAD REASONABLE CAUSE TO BELIEVE THAT THE MINOR INVOLVED WAS EIGHTEEN YEARS OLD OR MORE; AND

2. SUCH MINOR EXHIBITED AT THE TIME OF THE TRANSACTION A DRAFT CARD, DRIVER'S LICENSE, BIRTH CERTIFICATE, OR OTHER OFFICIAL OR APPARENTLY OFFICIAL DOCUMENT PURPORTING TO ESTABLISH THAT SUCH MINOR WAS EIGHTEEN YEARS OLD OR MORE.

COMMENT

This section is derived from New York. It is desirable and may be constitutionally necessary. See People v. Tannenbaum, 18 N.Y. 2d 268, 220 N.E.

2d 783 (1966). It allows an affirmative defense to a bookseller, ticket seller, or the like who had reasonable cause to believe that the minor was at least eighteen years old when the minor exhibited such evidence as a driver's license to support his apparent age.

235.25. OBSCENITY IN THE FIRST DEGREE

A PERSON IS GUILTY OF OBSCENITY IN THE FIRST DEGREE WHEN, KNOWING ITS CONTENT AND CHARACTER, HE PROMOTES FOR RESALE OR POSSESSES WITH INTENT TO PROMOTE FOR RESALE, ANY OBSCENE MATERIAL.

OBSCENITY IN THE FIRST DEGREE IS A CLASS D FELONY.

COMMENT

This section deals with the pornography wholesaler as a felon. It applies to one who, with the requisite knowledge of the content and character of the material, manufactures, issues, sells, provides, mails, delivers, transfers, transmutes, publishes, distributes, circulates, disseminates, or offers or agrees to do any of these for purposes of resale. If the dissemination of obscene material is to be punished, it is sensible to attack the source by providing severe penalties.

235.30. OBSCENITY IN THE FIRST OR THIRD DEGREE; AFFIRMATIVE DEFENSE

IN ANY PROSECUTION FOR OBSCENITY IN THE FIRST DEGREE OR OBSCENITY IN THE THIRD DEGREE, IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT KNEW OR REASONABLY BELIEVED THAT THE PERSONS TO WHOM ALLEGEDLY OBSCENE MATERIAL WAS DISSEMINATED, OR THE AUDIENCE TO AN ALLEGEDLY OBSCENE PERFORMANCE, CONSISTED OF PERSONS OR INSTITUTIONS HAVING SCIENTIFIC, EDUCATIONAL, GOVERNMENTAL, OR OTHER SIMILAR JUSTIFICATION FOR POSSESSING OR VIEWING THE SAME.

COMMENT

Since there is necessarily a commercial element in both obscenity in the first degree and obscenity in the third degree, this section (taken without substantial change from New York) would have little application to those directly supplying an audience, but it would be necessary to protect a proprietary school charging a fee in connection with a psychology course in which obscene movies were shown to the class for valid educational purposes. It would also be necessary to protect the wholesalers or retailers who supplied the school

ANY CROSS OR OTHER RELIGIOUS OR POLITICAL SYMBOL UPON ANY PRIVATE OR PUBLIC PROPERTY WITHIN THIS STATE WITHOUT THE EXPRESS CONSENT OF THE OWNER OF SUCH PROPERTY AND WITHOUT FIRST GIVING NOTICE TO THE FIRE DEPARTMENT WHICH SERVICES THE AREA IN WHICH SUCH BURNING IS TO TAKE PLACE; OR

3. HE KNOWINGLY CARRIES OR POSSESSES AT ANY PUBLIC MEETING OR GATHERING OR ON THE OCCASION OF ANY PUBLIC PROCESSION, OTHERWISE THAN AS A POLICE OFFICER OR MEMBER OF THE ARMED FORCES OR MILITIA, OR AS A MEMBER OF A COLLEGE OR PUBLIC SCHOOL OR PRIVATE SCHOOL MEETING THE REQUIREMENTS SET FORTH IN SECTION 12 OF ARTICLE 77 OR AS A LICENSED PRIVATE DETECTIVE OR SPECIAL POLICEMAN ANY OFFENSIVE WEAPON OR OTHER ARTICLE MADE OR ADAPTED FOR USE FOR CAUSING INJURY TO THE PERSON, OR INTENDED BY THE PERSON HAVING IT WITH HIM FOR SUCH USE BY HIM; OR

4. WITH INTENT TO PREVENT OR DISRUPT THE TRANSACTION OF THE BUSINESS OF A LAWFUL MEETING OR GATHERING OR TO PREVENT OR DISRUPT A LAWFUL PROCESSION, HE INTENTIONALLY DOES ANY ACT OR MAKES ANY PROTRACTED COMMOTION, UTTERANCE, GESTURE OR DISPLAY PREVENTING OR DISRUPTING ITS ORDERLY CONDUCT.

AGGRAVATED DISORDERLY CONDUCT IS A CLASS A MISDEMEANOR.

COMMENT

Subsection 1.

The statute here resembles the courthouse picketing provision in Cox v. Louisiana with the use of a specific distance limitation in place of the word "near". Compare Section 215.50(7) of the New York Code.

Subsection 2.

This statute is the existing Maryland cross burning statute, Art. 27 §10A, broadened to include political as well as religious symbols. Compare South Carolina Code Section 16.116. A requirement of wilfullness has been added.

Subsection 3.

This statute finds its inspiration in provisions of the present state militia law, see Art. 65 §35, and see the similar Illinois statute sustained in Presser v. Illinois, 116 U.S. 252 (1886). There are similar provisions in English law, see Section 4 of the British Public Order Act 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6. Offensive weapon is broadly defined to include articles (e.g., long

flashlights) innocent in themselves but intended by the person carrying them for offensive use. See Section 1 of the British Prevention of Crime Act, 1953, 1 + 2, Eliz. 2, ch. 14. The exemptions are confined to schools, militia and law enforcement and similar officers. Other groups are proscribed from parading with offensive weapons, but may parade in uniform under the following sections.

There are also exceptions for parades and gatherings of members of colleges and schools as such similar to those contained in the analogous existing American and English legislation.

Subsection 4.

This section relating to disturbance of public meetings is more specific than §240.20(4) of the New York Code, which is deemed overbroad in its application to hecklers and like persons. The approach taken here is that of the British Public Meeting Act, 1908, 8 Edw. 7, c. 66, which stresses a purpose "of preventing the transaction of the business for which the meeting was called together." See also the Model Penal Code, §250.8. The section has been revised to reach only acts or protracted verbal actions (as distinct from routine heckling) which prevent or disrupt the orderly conduct of a meeting or procession. Language dealing with interference with meetings or processions has been eliminated as has the language relating to provocative utterances, gestures or displays.

245.35. HARASSMENT

A PERSON IS GUILTY OF HARASSMENT WHEN, WITH INTENT TO HARASS, ANNOY OR ALARM ANOTHER PERSON, HE INTENTIONALLY ENGAGES IN PICKETING OR OTHERWISE DEMONSTRATES BEFORE OR ABOUT THE RESIDENCE OR DWELLING PLACE OF AN INDIVIDUAL, OTHER THAN A RESIDENCE OR DWELLING PLACE ALSO USED AS THE PRINCIPAL PLACE OF BUSINESS OF SUCH INDIVIDUAL.

HARASSMENT IS A VIOLATION.

COMMENT

The harassment provisions in the New York Code have been eliminated here, it being deemed undesirable to include such minor private wrongs in a state penal code. It should further be noted that the deletion of the provisions of §240.25 of the New York Code is supported by substantial authority. Thus some recent cases, e.g., University Committee to End the War in Vietnam v. Gunn, 289 F. Supp. 469,

with materials for such a course.

(Were pecuniary gain not required, the section would plainly be necessary as a matter of sound policy and perhaps even as a matter of constitutional law; even "obscenity" might well be protected as free speech in such circumstances.)

235.35. DESTRUCTION OF MATERIAL

UPON CONVICTION OF THE DEFENDANT OF AN OFFENSE MADE CRIMINAL BY THIS PART, OR OF A SOLICITATION, CONSPIRACY, OR ATTEMPT TO COMMIT SUCH AN OFFENSE, THE COURT, WHEN THE CONVICTION BECOMES FINAL, MAY ORDER ANY MATERIAL WHICH IS OBSCENE, WITH RESPECT TO WHICH THE DEFENDANT STANDS CONVICTED, AND WHICH REMAINS IN THE POSSESSION OF OR UNDER CONTROL OF THE STATE'S ATTORNEY OR ANY LAW ENFORCEMENT AGENCY, TO BE DESTROYED, AND THE COURT MAY CAUSE TO BE DESTROYED ANY SUCH MATERIAL IN ITS POSSESSION OR UNDER ITS CONTROL.

COMMENT

This provision is adapted from Maryland Article 27, section 425.

PART 240: OFFENSES AGAINST THE FAMILY

240.00. UNLAWFULLY SOLEMNIZING A MARRIAGE

A PERSON IS GUILTY OF UNLAWFULLY SOLEMNIZING A MARRIAGE WHEN:

1. KNOWING THAT HE IS NOT AUTHORIZED BY THE LAWS OF THIS STATE TO DO SO, HE PERFORMS A MARRIAGE CEREMONY OR PRESUMES TO SOLEMNIZE A MARRIAGE; OR

2. BEING AUTHORIZED BY THE LAWS OF THIS STATE TO PERFORM MARRIAGE CEREMONIES AND TO SOLEMNIZE MARRIAGES, HE PERFORMS A MARRIAGE CEREMONY OR SOLEMNIZES A MARRIAGE KNOWING THAT A LEGAL IMPEDIMENT TO SUCH MARRIAGE EXISTS.

UNLAWFULLY SOLMNIZING A MARRIAGE IS A CLASS A MISDEMEANOR.

COMMENT

This section is taken directly from the current New York Penal Code. It is similar to the present Article 27, section 39 of the Maryland Code.

240.05. UNLAWFULLY ISSUING A DISSOLUTION DECREE

A PERSON IS GUILTY OF UNLAWFULLY ISSUING A

DISSOLUTION DECREE WHEN, NOT BEING A JUDICIAL OFFICER AUTHORIZED TO ISSUE DECREES OF DIVORCE OR ANNULMENT, HE ISSUES A WRITTEN INSTRUMENT RECITING OR CERTIFYING THAT HE OR SOME OTHER PURPORTEDLY BUT NOT ACTUALLY AUTHORIZED PERSON HAS ISSUED A VALID DECREE OF CIVIL DIVORCE, ANNULMENT OR OTHER DISSOLUTION OF A MARRIAGE.

UNLAWFULLY ISSUING A DISSOLUTION DECREE IS A CLASS A MISDEMEANOR.

COMMENT

This section is also copied from New York. The strongest objection to the section is that prosecutions under it would be rare, but occasions might arise in which the section would be useful. Usually schemes for issuing false decrees for money could be prosecuted as larceny, but if the recipient knows the decree is fraudulent, there might be no other method of proceeding against the culprit.

240.06. UNLAWFULLY MARRYING

A PERSON IS GUILTY OF UNLAWFULLY MARRYING WHEN HE

1. MARRIES ANY PERSON RELATED WITHIN ANY OF THE DEGREES OF KINDRED OR AFFINITY PROHIBITED BY THE LAWS OF THIS STATE; OR

2. MARRIES WITHOUT A LICENSE REQUIRED BY LAW.

UNLAWFULLY MARRYING IS A CLASS B MISDEMEANOR.

COMMENT

This section is adapted from Maryland Article 27, sections 390, 391, and 395. Provisions relating to prohibited degrees and licenses are found in Article 62. Note that sex offenses, including incest, are covered in Part 130 of the draft.

240.10. UNLAWFULLY PROCURING A MARRIAGE LICENSE

A PERSON IS GUILTY OF UNLAWFULLY PROCURING A MARRIAGE LICENSE WHEN HE PROCURES A LICENSE TO MARRY ANOTHER PERSON AT A TIME WHEN HE HAS A LIVING SPOUSE, OR THE OTHER PERSON HAS A LIVING SPOUSE.

UNLAWFULLY PROCURING A MARRIAGE LICENSE IS A CLASS A MISDEMEANOR.

COMMENT

Under a broad attempt statute, it might be possible to convict for attempted bigamy for conduct

described in this section, but it is uncertain enough to warrant this special treatment. It is desirable to have a convenient criminal charge which can be brought before the bigamous marriage actually takes place. The New York language is unchanged.

240.15. BIGAMY

A PERSON IS GUILTY OF BIGAMY WHEN HE CONTRACTS OR PURPORTS TO CONTRACT A MARRIAGE WITH ANOTHER PERSON AT A TIME WHEN HE HAS A LIVING SPOUSE, OR THE OTHER PERSON HAS A LIVING SPOUSE.

BIGAMY IS A CLASS E FELONY.

COMMENT

This provision also follows New York. It considerably simplifies the language of the present Maryland statute, Article 27, section 18, which contains provisions relating to property rights, more appropriately treated elsewhere in the Annotated Code. It makes both spouses of the bigamous marriage guilty of bigamy, without resort to rules relating to accomplices. The important issue of the mental element in bigamy is discussed under the next section.

240.20. UNLAWFULLY MARRYING, UNLAWFULLY PROCURING A MARRIAGE LICENSE; BIGAMY; AFFIRMATIVE DEFENSE

IN ANY PROSECUTION FOR UNLAWFULLY MARRYING, UNLAWFULLY PROCURING A MARRIAGE LICENSE, OR FOR BIGAMY, IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT ACTED UNDER A REASONABLE BELIEF THAT BOTH HE AND THE OTHER PERSON TO THE MARRIAGE OR PROSPECTIVE MARRIAGE WERE THEN ELIGIBLE TO ENTER INTO A LAWFUL CIVIL MARRIAGE.

COMMENT

This section follows New York, except for omission of references to the New York crime of adultery, not proposed as a crime in this draft, and for some rephrasing in the interest of clarity. It resolves the much debated issue of what, it any, mens rea should be required for the offense by shifting the burden of persuasion to the accused and requiring him to show that he reasonably believed that both parties were unmarried.

Most American jurisdictions, including Maryland, say that no criminal intent is necessary for bigamy, and that erroneous belief as to marital status is no defense. See Braun v. State, 230 Md. 82 (1962). These cases commonly are dealing with

fact situations in which there has been a doubtful dissolution of the marriage, and in which a prudent person would retain some question as to his marital status, even though the prosecution might have difficulty in persuading a jury beyond a reasonable doubt that the accused knew that he was ineligible to marry. The present draft should not unduly hamper prosecution in such cases, since the accused must persuade the jury that he acted reasonably.

A minority view, supported by most of the commentators, is that bigamy is a serious offense, for which a guilty mind ought to be required. This view is apt to prevail in the statistically rarer kind of case in which the accused has acted entirely reasonably. The common "Enoch Arden provision" found in the present Maryland statute avoids a harsh result in one case of this kind, where a spouse has disappeared and nothing has been heard of him for a number of years. His estate may have been settled. Surely, his spouse should not be convicted of a crime for remarrying. Such statutes do not cover all meritorious cases however. See, e.g., a leading English case, The Queen v. Tolson, 23 Q.B.D. 168 (1889), where the wife remarried before the Enoch Arden period had expired, after hearing apparently reliable information that her husband had perished in a shipwreck. Nothing short of a defense of reasonable belief seems acceptable here. The Model Penal Code would go even further than the proposed draft and not always require that the accused's mistake be reasonable. (P.C.D., §230.1).

(Note: The crime of incest is treated in Part 130, dealing with Sex Offenses. Adultery, currently punishable by a fine of $10 in Maryland (Article 27, section 4), is not continued as a criminal offense in the proposed draft.)

Note with regard to Offenses Relating to Children and Incompetents

(Article 260 of the New York Penal Law).

Most of the material in the corresponding portion of the New York Code deals with children and is dealt with in Maryland under the Courts and Judicial Proceedings Article, under the heading of Juvenile Causes. See §§260.00 to 260.15 of the New York Penal Law and §§ 3-801,ff., and §§4-501,ff., of the Maryland Article. It is thought unnecessary to add to those provisions, and this draft does not undertake to do so. §260.15 of the New York Code has no counterpart in Maryland and seems contrary to what was said in Craig v. State, 220 Md. 590 (1959),

and see Note, 21 Md. L. Rev. 262 (1961).

§260.25 of the New York Penal Law relating to endangering the welfare of an incompetent person was considered, but it was not thought desirable to recommend its adoption here.

SUBTITLE N — OFFENSES AGAINST PUBLIC ORDER AND PUBLIC SENSIBILITIES

PART 245: OFFENSES AGAINST PUBLIC ORDER

245.00. OFFENSES AGAINST PUBLIC ORDER; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "PUBLIC PLACE" MEANS A PLACE TO WHICH THE PUBLIC OR A SUBSTANTIAL GROUP OF PERSONS HAS ACCESS, AND INCLUDES, BUT IS NOT LIMITED TO, HIGHWAYS, TRANSPORTATION FACILITIES, SCHOOLS, PLACES OF AMUSEMENT, PARKS, PLAYGROUNDS, AND HALLWAYS, LOBBIES AND OTHER PORTIONS OF APARTMENT HOUSES AND HOTELS NOT CONSTITUTING ROOMS OR APARTMENTS DESIGNED FOR ACTUAL RESIDENCE.

2. "TRANSPORTATION FACILITY" MEANS ANY CONVEYANCE, PREMISES OR PLACE USED FOR OR IN CONNECTION WITH PUBLIC PASSENGER TRANSPORTATION, WHETHER BY AIR, RAILROAD, MOTOR VEHICLE OR ANY OTHER METHOD. IT INCLUDES AIRCRAFT, WATERCRAFT, RAILROAD CARS, BUSES, AND AIR, BOAT, RAILROAD AND BUS TERMINALS AND STATIONS AND ALL APPURTENANCES THERETO.

COMMENT

These definitions are drawn from the corresponding section of the New York Code.

245.05. RIOT

A PERSON IS GUILTY OF RIOT, WHEN WITH FOUR OR MORE OTHER PERSONS, HE KNOWINGLY ENGAGES IN TUMULTUOUS AND VIOLENT CONDUCT CONSTITUTING A CRIME OR VIOLATION OR IN CONDUCT IN VIOLATION OF ANY PROVISION OF PART 155 AND THEREBY CAUSES OR CREATES A GRAVE RISK OF CAUSING PUBLIC ALARM.

RIOT IS A CLASS E FELONY.

COMMENT

1. and 2. Should the number of participants be defined at 3, 5 or some greater number and should there be degrees of riot depending on the number of

participants? Should violations of police orders be a separate offense or an element of the offense?

The New York Code as enacted utilizes the number five; as proposed, the number used was three. Chapter 791 of the New York Acts of 1967 added a new offense of first degree riot (§240.06) where ten persons participated and a person other than the participants suffers personal injury or substantial property damage results. The Michigan Code uses the number five, see Mich. Comp. L. §752, 541 (1968). The Model Penal Code utilizes the number three, though it makes it optional (Proposed Official Draft, §250.1.) The Common law misdemeanor of riot involved the number three (M.P.C. Tent. Dr. No. 13, at 18); the felony of riot created by the Riot Act of 1714, 1 Geo. 1, st. 2, c. 5 involved twelve or more persons. The Illinois Code utilizes the number two (§25–1); the proposed federal Code the number five (§1801); Md. Code, Art 41, §15B relating to emergency powers of the Governor, enacted by Chapter 70 of the Acts of 1968, utilizes the number three. The Illinois Code framers explain the use of the number two in connection with the anti-vigilante provisions of that Code, on the ground that "such (prohibited) action is as likely to be exercised today by persons acting in concert as by five or more in 1905." The Model Penal Code framers note, "The line between individual and 'mob' action must be drawn somewhat arbitrarily; the critical number could as well be five as three. It makes a difference whether the legislature contemplates typical law enforcement teams of two in a squad car, and whether communications are good enough to have substantial numbers of police present in short order. Certainly for the lone policeman, difficulties begin when he must deal with three or more miscreants at once." (Tent. Dr. #13 at 21). The framers of the Federal Code observe in defending use of the number five: "This question should be approached from the point of view of what numbers wreak extraordinary problems for a mobile, modern, urban police force." (Study Draft, p. 231).

The Model Penal Code framers define several interests served by riot statutes:

> "(1) to create an offense analogous to conspiracy but without requiring that the object be criminal – i.e., multi-party conspiracy to engage in tortious or other 'unlawful' behavior (a purpose rejected by the Model Penal Code)
>
> (2) to provide aggravated penalties for

disorderly conduct where the number of participants makes the behavior especially alarming

(3) to provide penal sanctions for disobeying police orders directing a disorderly mob to disperse

(4) in connection with (3), to subject to police orders persons present but not shown to be implicated in the disorderly behavior – a kind of expanded 'complicity', necessitated by the fact that police cannot be expected to distinguish participants from non-participants intermingled in a mob."

The Model Penal Code regards the last three bases as proper ones; the New York and Michigan provisions are founded essentially on the second and fourth purposes. The Model Penal Code (§250.1(2)) and proposed Federal Code (§1804) contain separate sections reminiscent of the 1714 Riot Act relating to failure to obey police orders which fulfill the third purpose listed by the Model Penal Code framers. The framers of the Federal Code note the "dangers in creating offenses defined by police 'orders'" but take the view that "the emergency of riot conditions justifies explicit recognition of a police discretion which is otherwise disguised as arrest for 'participating' in a riot." (Study Draft, p. 234). The critical attitudes of several justices of the Supreme Court toward legislation making criminality a function of police orders is noted below in the discussion of disorderly conduct. It is believed undesirable to include such a provision in the ordinary penal code. If violation of police orders in connection with offenses involving five or more persons is to be made the cause of legal intervention, it would seem best for that intervention to be founded either on the legislation regulating and requiring the proclamation of a state of emergency by the Governor similar to present Art. 41, §15B or on the common law powers of preventive detention until the end of an insurrection associated with a state of qualified martial law. Cf. Fairman, The Law of Martial Rule, and Sterling v. Constantin, 287 U.S. 378. It would seem undesirable to introduce the offense of violation of police orders as an accepted part of a penal code applicable to normal conditions since such an effort might be productive of constitutional difficulties in light of recent case law, whatever the wisdom of these decisions. Such a view, of course, does not preclude the use of evidence of violation of police orders as evidence to show intent, or to aggravate

punishment.

In light of the factors above mentioned, the code provision follows New York and Michigan law in using five rather than three as the controlling number and in dispensing with a provision making violations of police orders a separate offense or an element of the offense.

3. Should the riot provision contain a requirement that the participants be "acting in concert" or "acting together" as under the Michigan or Illinois law, or should this requirement be eliminated, as under the New York law, the Model Penal Code and the existing and proposed federal law?

The Model Penal Code commentary observes on this question:

> "It is of course necessary to prove that the rioters were involved in a common disorder; it is not enough to show that numerous individuals were engaged in similar unrelated activities. (Aron v. City of Wausau, 98 Wis. 592, 74 N.W. 354 (1898) (30 people simultaneously exploding fireworks on Fourth of July does not make a riot so as to subject city to liability to injured passerby) *** if the participants in a lawful picket line suddenly and concertedly pick up rocks and hurl them at strikers attempting to go through the line, there is a riot. People v. Bundte, 87 Cal. App. 2d 735, 197 p. 2d 823 (1948) cert. denied 337 U.S. 915). A special problem arises where the Riot Act specifies that the rioters must 'act together'; and it has been held that a battle between two gangs does not subject both groups to joint indictment for a single riot. (Citations omitted) Such a holding seems quite unrelated to the rationale of riot law or the problems facing police summoned to quell a free-for-all. They can hardly be expected to sort out teams, and nothing would be gained if they did. The formulation of riot here proposed, 'participating in a course of disorderly conduct', avoids the difficulty since it is not limited to participation with allies. Mere presence without taking part by word or deed is not participation." (Tent. Dr. #13, at 21-22).

The question was the subject of considerable discussion in the majority and dissenting opinions

in United States v. Matthews, 419 F. 2d 1177 (D.C. Cir. 1969) involving the question whether looters and scavengers not breaking into or entering stores to loot but picking up looted articles outside stores were within the coverage of the then extant District of Columbia riot statute. The majority of the court held that a construction of the statute which regarded such looters and scavengers as "engaging in violent and tumultuous conduct" by reason of "the tendency of appellant's conduct to outrage, and to perpetuate the atmosphere of violence and tumult all around him" where such conduct was knowing and intentional was not invalid. "The public disturbance with which this statute deals is undoubtedly compounded of unlawful conduct variously deriving from purposeful destructiveness and foolish greed. That the latter does not offer as ugly a face does not mean that the two do not interact upon each other and make a common, albeit perhaps unequal contribution to the evil against which the statute is aimed." (419 F. 2d at 1182–84). The dissenting opinion of Judge Wright urged that common purpose and intent was a constitutional requirement, notwithstanding the majority's view that "recognition of the spontaneity of many recent riots is crucial." (419 F. 2d at 1180 n. 5). Judge Wright further urged that the statute under consideration as construed by the majority did not require the defendant's act to be independently criminal to be punishable and did not require an individual charged under it to himself do a violent or turbulent act. He appears to have caricatured the majority opinion in saying this (see 419 F. 2d at 1184 n. 11). Judge Wright went on to observe: "Counsel have cited no cases and I have found none, upholding the constitutionality of a riot-statute which contained none of these clarifying and limiting provisions. In recent years, numerous three-judge District Courts have passed on the constitutionality of various state riot and unlawful assembly statutes. But in each case where the statute was upheld, the court found or read in one or more of these protective provisions." (419 F. 2d at 1191).

Judge Wright referred to the decisions in Heard v. Rizzo, 281 F. Supp. 720, 739 (E.D. Pa. 1968), affd. 392 U.S. 646 (1968); Landry v. Daley, 280 F. Supp. 938, 954–55 (1968), appeal dismissed as untimely filed, 393 U.S. 220 (1968); and Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967) as imposing a 'concert of action' coupled with act of violence requirement to save a statute from charges of vagueness. But in Landry v. Daley the court was confronted with the Illinois statute which

expressly contained a concert of action requirement to which the court merely pointed as one feature saving it from vagueness; in Heard v. Rizzo the court was confronted with a statute which merely penalized "riot" without defining it and the court merely had recourse to the common law definitions including 'concert of action' to give it some meaning and did not suggest that a statute more broadly defining riot would be unconstitutional and in Carmichael v. Allen, the court mentioned the concert of action requirement of Georgia case law in a footnote, added in passing and as an afterthought, without in any way suggesting that this limitation, as distinct from the limitation to violent conduct, was necessary to save the statute. See 267 F. Supp. 985, footnote 10a.

It is therefore believed that if the modern type of riot is to be effectively reached, the concert of action requirement should cease and must be abandoned for the reasons stated in Judge McGowan's majority opinion in United States v. Matthews. It is believed, however, that the dissenting opinion in United States v. Matthews is sound in suggesting that a requirement that the defendant's conduct be independently unlawful be expressly imposed by statute, as in the New York and Michigan codes by requiring that the conduct be "wrongful", see also M.P.C. Tent. Dr. #13, at 21, 22–23, consistent with the judgment eliminating common-law conspiracy. The dissenting opinion in United States v. Matthews may also be sound in suggesting that a riot statute should impose a requirement that a defendant's conduct, as distinct from that of other participants in a riot, be violent and tumultuous since the limitation to wrongful conduct would still embrace jaywalking and littering and similar trivial acts. (419 F. 2d at 1190). The New York and Michigan statutes, unlike the District of Columbia statute at issue in Matthews, appear to do this. However, it is difficult to follow Judge Wright's attempt to portray scavenging as not violent or tumultuous in a riot context. In order to avoid any ambiguity with respect to this common problem, inclusion of an express provision placing conduct in violation of the larceny provisions of the Code on the same footing as violent and tumultuous conduct has been deemed desirable.

The accompanying riot provision has been drafted in accordance with these principles. The penalty provision is that of the New York Code and proceeds on the theory that aggravation of penalty is a major purpose of a riot statute. The view of

the proposed federal criminal code, §1803, which makes engaging in a riot a class B misdemeanor on the theory that there is diminished culpability in mob actions, summary procedures should be made available and riot defined as a petty offense, and recognition be given to the possibility that an innocent observer may be convicted as a participant, is rejected, these being in essence arguments against a separate riot statute and not grounds for vitiating its deterrent value.

245.10. UNLAWFUL ASSEMBLY

A PERSON IS GUILTY OF UNLAWFUL ASSEMBLY WHEN HE ASSEMBLES OR JOINS WITH FOUR OR MORE OTHER PERSONS FOR THE PURPOSE OF ENGAGING IN CONDUCT CONSTITUTING THE CRIME OF RIOT.

UNLAWFUL ASSEMBLY IS A CLASS A MISDEMEANOR.

COMMENT

The unlawful assembly provision, as in the New York and Michigan Codes, generally follows the riot provision. The provision utilized here is drafted in such a way as to make clear that a person need not initially assemble with others to engage in conduct constituting the crime of riot in order to be guilty of unlawful assembly if at some time after the inception of the assembly he joins with other persons for the purpose of engaging in such conduct. The section thus avoids reaching mere bystanders while reaching persons who, though initially bystanders or latecomers, join in or encourage the unlawful assembly.

245.15. INCITING TO RIOT

A PERSON IS GUILTY OF INCITING TO RIOT WHEN, INTENDING TO CAUSE OR TO AID OR ABET THE INSTITUTION OR MAINTENANCE OF A RIOT, HE URGES, OR DOES AN ACT OR ENGAGES IN CONDUCT THAT URGES AND IS INTENDED TO URGE, OTHER PERSONS TO COMMIT (A) ACTS OF UNLAWFUL FORCE OR VIOLENCE, OR (B) THE UNLAWFUL BURNING OR DESTROYING OF PROPERTY, OR (C) THE UNLAWFUL INTERFERENCE WITH A PUBLIC OFFICER IN THE DISCHARGE OF HIS DUTY.

INCITING TO RIOT IS A CLASS A MISDEMEANOR.

COMMENT

The New York Code was amended by Chapter 791 of the Acts of 1967 to include as §240.08 an offense of inciting to riot. "A person is guilty of inciting to riot when he urges ten or more persons

to engage in tumultuous and violent conduct of a kind likely to create public alarm." The validity of this provision was upheld, the court reading in a requirement of intent and clear and present danger, in People v. Wingtun, 314 N.Y.S. 2d 489 (Co. Ct. 1970), and in People v. Ascher, 57 Misc. 2d 249, 291 N.Y.S 2d. 648 (Crim. Ct. 1968). The statute was deemed useful since it omits the unlawful assembly requirement that the acquiesence of four other persons be obtained. See the commentary in 39 McKinney's Consolidated Laws of New York, p. 121. There is a similar Michigan statute, Mich., Comp. L. §752, 542 (1968), dicussed in Comment. The Proposed Michigan Criminal Code and Offenses Against Public Order. 14 Wayne Law Review 980 (1968), which contains an intent requirement and likewise does not expressly refer to "clear and present danger". The Study Draft of the proposed federal criminal code limits the incitement provisions to "current or impending" riots "to avoid constitutional issues under the First Amendment". It is believed that the intent language of the Michigan statute, substantially adopted here, is sufficient to do this without going so far for reasons set forth in the commentary to the solicitation section. §100.00. See also Wechsler, The Future of Political and Intellectual Freedom, 46 Va. Q. Rev. 369, 376–81 (1970).

Note on Criminal Anarchy

The validity of the New York provision on this subject has been upheld in several federal and state court decisions but was avoided by the Supreme Court in its disposition of the cases reargued before it on November 29, 1970. See Samuels v. Mackell and Fernandez v. Mackell, 401 U.S. 66 (1971). See also Samuels v. Mackell, 288 F. Supp. 348 (S.D. N.Y. 1968) (Friendly, J.) and People v. Epton, 19 N.Y. 2d 496, 227 N.E. 2d 829, appeal dismissed, 390 U.S. 29 (1968), upholding the New York statute.

It is believed that the problems sought to be dealt with by criminal anarchy provisions may ordinarily be better served by prosecution under specific disorderly conduct provisions such as those set out below, relating to the time, place and manner of expression or, in some instances, by prosecution under the solicitation statute for solicitation of specific crimes. In the view of some, there may be circumstances in which a prosecution under a more general provision serves a useful purpose, and this legislative judgment is embodied in the provisions of Article 85A §2 of the

Ober law, which provisions have not been invalidated. The Commission has taken the former view, believing that prosecutions under criminal anarchy provisions have been so encumbered as to be valueless, that such provisions have on occasion been abused, and that the provisions of draft Section 245.70 constitute a more limited, tested and appropriate approach to the problems sought to be dealt with by "criminal anarchy" statutes.

245.20. LEADING ORGANIZED CRIME

1. FOR PURPOSES OF THIS SECTION, A "CRIMINAL SYNDICATE" MEANS AN ASSOCIATION OF TEN OR MORE PERSONS ENGAGING, OR HAVING THE PURPOSE OF ENGAGING, ON A CONTINUING BASIS IN VIOLATION OF ANY ONE OR MORE PROVISIONS OF THIS CODE, OR OF THE CRIMINAL OR PENAL PROVISIONS OF ANY STATUTE OF THIS STATE FOR THE PROTECTION OF BORROWERS OR DEBTORS AGAINST USURY, OR OF ARTICLE 2B OF THE ANNOTATED CODE OF MARYLAND (ALCOHOLIC BEVERAGES) IN: (A) TRAFFICKING IN CONTROLLED DANGEROUS SUBSTANCES IN ANY DEGREE (AS DEFINED IN PART 220), EXPLOSIVES, ALCOHOLIC BEVERAGES, WEAPONS, OR STOLEN GOODS; (B) GAMBLING; (C) PROSTITUTION; (D) EXTORTION; (E) COERCION; (F) USURY; (G) FORGERY; (H) COUNTERFEITING; OR (I) ASSERTING FALSE CLAIMS THROUGH FRAUD, ARSON, OR OTHERWISE. IF MORE THAN TEN PERSONS ARE SO ASSOCIATED, ANY GROUP OF TEN OR MORE OF THEM CONSTITUTES A CRIMINAL SYNDICATE, THOUGH IT IS OR WAS ONLY A PART OF A LARGER ASSOCIATION; AND IT SHALL NOT BE NECESSARY FOR THE STATE, IN ANY PROSECUTION UNDER THIS SECTION, EITHER IN THE INDICTMENT OR BY EVIDENCE, TO IDENTIFY ALL OF THE MEMBERS OF THE ASSOCIATION.

2. AN "ASSOCIATION" EXISTS WITHIN THE MEANING OF THIS SECTION, AMONG PERSONS WHO COLLABORATE IN CARRYING ON OR FURTHERING THE ACTIVITIES OR PURPOSES OF A CRIMINAL SYNDICATE ALTHOUGH

(A) ASSOCIATES MAY NOT KNOW EACH OTHER'S IDENTITY;

(B) MEMBERSHIP IN THE ASSOCIATION MAY CHANGE FROM TIME TO TIME; AND

(C) ONE OR MORE ASSOCIATES MAY STAND IN A WHOLESALER–RETAILER OR OTHER ARM'S LENGTH RELATIONSHIP WITH OTHER ASSOCIATES AS TO ACTIVITIES OR DEALINGS BETWEEN THEMSELVES IN AN ILLICIT DISTRIBUTION OPERATION.

3. A PERSON IS GUILTY OF LEADING ORGANIZED CRIME IF HE ORGANIZES, MANAGES, DIRECTS, SUPERVISES OR FINANCES A CRIMINAL SYNDICATE, OR KNOWINGLY INCITES OR INDUCES OTHERS TO ENGAGE IN VIOLENCE OR INTIMIDATION TO PROMOTE OR FURTHER ITS CRIMINAL OBJECTIVES, OR WITH INTENT TO

PROMOTE OR FURTHER ITS CRIMINAL OBJECTIVES FURNISHES ADVICE, ASSISTANCE OR DIRECTION IN THE CONDUCT, FINANCING OR MANAGEMENT OF ITS AFFAIRS, OR INTENTIONALLY PROMOTES OF FURTHER ITS CRIMINAL OBJECTIVES BY INDUCING OR COMMITTING ANY ACT OR OMISSION BY A PUBLIC SERVANT IN VIOLATION OF HIS OFFICIAL DUTY. NO PERSON SHALL BE CONVICTED UNDER THIS SECTION ON THE BASIS OF LIABILITY AS AN ACCOMPLICE UNLESS HE AIDS OR PARTICIPATES IN VIOLATING THIS SECTION IN ONE OF THE WAYS HEREIN SPECIFIED.

LEADING ORGANIZED CRIME IS A CLASS A FELONY IF THE NUMBER OF ASSOCIATES EXCEEDS TWENTY-FIVE OR IF THE ACTIVITY OF THE ASSOCIATION EMBRACES ONE OR MORE CLASS A OR CLASS B FELONIES. OTHERWISE THE OFFENSE IS A CLASS B FELONY.

COMMENT

This provision is new. It is designed to permit imposition of heavy penalties on those who are leaders in organized criminal activities, but who can not be reached, or can not be conveniently reached, by other provisions. Where such leaders can be prosecuted under Part 20 as parties to a very serious offense such as murder (or for hindering prosecution under sections 205.65 ff.), there is no need for a special provision, for they can be punished (except for hindering prosecution) as severly as the person who actually commits the offense. Conviction of such leaders for conspiracy under Part 105 would permit punishment only for an offense one grade lower than the crime conspired at; the Commission as a general matter does not wish to encourage conspiracy prosecutions where the offense conspired at has been committed.

Leaders of organized crime present greater dangers than ordinary conspirators, who usually represent no greater threat to society than those who actually commit the crimes conspired at. The perils of increased monopoly power and efficiency in organized crime justify the severe treatment here provided.

Subsection one is designed to identify the sorts of groups, the leaders of which should be subject to prosecution. At least ten persons must be involved (and at least twenty-five for the severest penalties); groups of fewer persons do not present the significant threats with which the section is concerned. The criminal objectives of the group are also specified. These include the kinds of crimes usually associated with organized crime. As previously suggested, prosecution of the leaders as parties would be appropriate in the case

of very serious offenses committed by underlings, and these serious offenses are therefore not included here.

Subsection two, with the final portion of subsection one, makes prosecution simpler by not requiring identification of all of the group or proof that all members know each others' identities. Membership may change from time to time, and such associates as purchasers and sellers of contraband may be members.

Subsection three defines the offense in terms of organizing, managing, directing, supervising, or financing, or of knowingly inciting or inducing others to engage in violence or intimidation to promote or further the criminal objectives of the group, or of furnishing certain other specified kinds of advice or assistance, including the promoting of or commission of corrupt acts by public servants. Since the provision is aimed at the leaders, the subsection provides that others who aid the leaders, but do not themselves engage in the specified conduct, are not punishable as parties to the offense.

245.25. DISORDERLY CONDUCT

A PERSON IS GUILTY OF DISORDERLY CONDUCT WHEN:

1. KNOWING THAT HE WILL CAUSE PUBLIC INCONVENIENCE, ANNOYANCE OR ALARM HE ENGAGES IN FIGHTING OR IN VIOLENT, TUMULTUOUS OR THREATENING BEHAVIOR, OR MAKES UNREASONABLE NOISE; OR

2. HE, IN A PUBLIC PLACE, INTENTIONALLY USES OR DISPLAYS ABUSIVE OR OBSCENE LANGUAGE OR MAKES AN OBSCENE GESTURE (A) WHERE THE LANGUAGE OR GESTURE HAS A DIRECT TENDENCY TO CAUSE ACTS OF VIOLENCE BY THE PERSON OR PERSONS TO WHOM INDIVIDUALLY, THE USE OR DISPLAY IS ADDRESSED OR (B) WHERE THE LANGUAGE OR GESTURE IS INTENDED TO CAUSE PUBLIC INCONVENIENCE, ANNOYANCE OR ALARM AND THERE IS NO BONA FIDE INTENTION TO EXERCISE A CONSTITUTIONAL RIGHT OF FREE EXPRESSION OF IDEAS; OR

3. KNOWING THAT HE WILL CAUSE PUBLIC INCONVENIENCE, ANNOYANCE OR ALARM, OR RECKLESSLY, HE CREATES A PHYSICALLY HAZARDOUS OR PHYSICALLY OFFENSIVE CONDITION BY AN ACT (OTHER THAN VERBAL EXPRESSION OR THE DISSEMINATION OF LITERATURE) WHICH SERVES NO LEGITIMATE PURPOSE; OR

4. HE ENGAGES IN PICKETING OR MASS DEMONSTRATIONS IN SUCH A MANNER AS HE KNOWS OR SHOULD KNOW BARS OR UNREASONABLY (A) INTERFERES WITH FREE INGRESS OR EGRESS

TO AND FROM ANY CUSTOMARY ENTRANCE TO PUBLIC PREMISES, STATE PROPERTY, COUNTY OR MUNICIPAL COURTHOUSE, CITY HALL, PUBLIC OFFICE BUILDING, JAIL OR PUBLIC BUILDING OR PROPERTY OWNED BY THE STATE OF MARYLAND, OR ANY COUNTY OR MUNICIPAL GOVERNMENT LOCATED THEREIN, OR (B) INTERFERES WITH THE TRANSACTION OF PUBLIC BUSINESS OR ADMINISTRATION OF JUSTICE THEREIN OR THEREON CONDUCTED, OR (C) OBSTRUCTS OR INTERFERES WITH FREE USE OF PUBLIC STREETS, PUBLIC SIDEWALKS OR OTHER PUBLIC WAYS ADJACENT OR CONTIGUOUS THERETO; OR

5. HE PLACES ANY TRASH, JUNK, REFUSE OR INJURIOUS SUBSTANCE OR OTHER OBJECT ON ANY PUBLIC STREET, SIDEWALK, WAY OR OTHER PUBLIC PROPERTY WITH INTENT TO CAUSE PUBLIC INCONVENIENCE, ANNOYANCE OR ALARM; OR

6. HE CONGREGATES WITH OTHER PERSONS IN A PUBLIC PLACE WITHOUT A BONA FIDE INTENTION TO EXERCISE A CONSTITUTIONAL RIGHT OF FREE EXPRESSION OF IDEAS, AND REFUSES TO COMPLY WITH A LAWFUL ORDER OF THE POLICE TO DISPERSE; OR

7. IF OVER SIXTEEN YEARS OF AGE, HE APPEARS IN ANY PUBLIC PLACE, STREET, SIDEWALK OR WAY, OR ON ANY PUBLIC PROPERTY, OR ON PRIVATE PROPERTY WITHOUT THE WRITTEN PERMISSION OF THE OWNER AND THE OCCUPANT OF SUCH PROPERTY, USING A MASK OR OTHER MEANS OF CONCEALING IDENTITY OTHER THAN AS NECESSARY IN CONNECTION WITH AN OCCUPATION, TRADE OR PROFESSION, A CIVIL DEFENSE EXERCISE OR EMERGENCY, OR A THEATRICAL PRODUCTION OR LEGALLY PERMITTED MASQUERADE PARTY; OR

8. HE INTENTIONALLY THROWS OUT OF ANY MOVING VEHICLE ANY BOTTLE, OR ANY ARTICLE OF GLASS, WOOD, METAL OR STONE.

DISORDERLY CONDUCT IS A VIOLATION.

COMMENT

General statement:

The definition of this offense is not without its difficulties in light of recent case law questioning the validity of many state statutes in this area on the basis of asserted vagueness.

The present Maryland statutes are found in Art. 27, §§121, 122, 123 and 124 (1969 supp.). The provisions of Art. 27, §123 prohibiting "acting in a disorderly manner to the disturbance of the public peace" were sustained in Bachellar v. State, 3 Md. App. 626 (1968), (but on appeal held unconstitutional as applied, 397 U.S. 564 (1970)) and were sustained in Luthardt v. State, 6 Md. App.

251 (1969). The provisions of Art. 27, §124 prohibiting "entering upon the land or premises of any other person * * * and willfully acting in a disorderly manner by making loud and unseemly noises or by profanely cursing or swearing or using obscene language or acting in any other disorderly manner while therein" were sustained in Drews v. State, 224 Md. 186 (1961), reversed and remanded on other grounds 378 U.S. 547, and in Harris v. State, 237 Md. 299 (1965), in both of which cases it was held that refusal or failure to obey a reasonable and lawful request by a police officer fairly made to prevent a disturbance to the peace constituted disorderly conduct and that, as so construed, the statute was not invalid. Cf. Colten v. Kentucky, 407 U.S. 104 (1972).

In addition, it has been held that a conspiracy or combination to riotously and tumultuously assemble and gather together to disturb the peace constitutes a common-law offense in Maryland and that the definition of this offense is not unconstitutionally vague. Winkler v. State, 194 Md. 1 (1949). It would appear that the provisions of Art. 27, §122, as amended by Chapter 520 of the Acts of 1967, now including all "public places" and not merely those previously enumerated in the statute, might be taken as superseding the common-law offense of breach of the peace. This is by no means certain, however. See Messina v. State, 212 Md. 60 (1957), and Kirkorian v. State, 233 Md. 324 (1964), holding that the common-law offense of indecent exposure survived enactment of Art. 27, §122 as it existed previous to 1967, notwithstanding that that section specifically dealt with indecent exposure in named public places. Similarly, other common-law offenses in this area appear to survive in Maryland, including blasphemy and profanity, common scolding, disturbing religicus meetings and unlawful assembly. See the catalogue of Maryland common law offenses in Maryland Self Survey Commission, Fourth and Final Report (1960), at 176-78. On the common-law offenses of riot, rout and unlawful assemblage see Cohen v. State, 173 Md. 216.

In addition to these general statutory and common-law provisions, there are a number of more specific enactments in the present Code. These include Art. 27, §577A, relating to refusals to leave public buildings and grounds on request, Art. 27, §470, relating to disturbance of religious meetings, Art. 27, §555A, relating to unlawful use of telephone, Art. 27, §10A, relating to burning of religious symbols, Art. 27, §20, relating to

blasphemy, Art. 27, §§265–67, relating to desecration of graveyards, and Article 27, §459, relating to throwing objects from moving trains.

The New York Code contains the following definition of disorderly conduct:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or

2. He makes unreasonable noise; or

3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or

4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or

5. He obstructs vehicular or pedestrian traffic; or

6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

7. He creates a hazardous or physically offensive condition by act which serves no legitimate purpose.

Disorderly conduct is a violation.

There are a number of difficulties with this formulation. In Cox v. Louisiana, 379 U.S. 536 (1964), the Supreme Court invalidated as "unconstitutionally vague in its overly broad scope" (379 U.S. at 551) a Louisiana statute almost identical in terms to §240.20(6) of the New York statute. The following is a comparison of the language of the two statutes:

Louisiana	New York
Intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned thereby.	Intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof.
Crowds or congregates with	Congregates with other

others in or upon a public place (etc.)	persons in a public place.	26245 26246
Fails and refuses to disperse and move on when ordered so to do by any law enforcement officer of any municipality (etc.)	Refuses to comply with a lawful order of the police to disperse.	26248 26249 26250 26251 26252

The Supreme Court pointed out (Justice Goldberg speaking for five members of the Court) that "the statutory crime consists of two elements: (1) congregating with others 'with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned' and (2) a refusal to move on after having been ordered to do so by a law enforcement officer. While the second part of this offense is narrow and specific, the first element is not. The Louisiana Supreme Court in this case defined the term 'breach of the peace' as 'to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet.'" This language was deemed unconstitutionally vague, the Court referring to its decision in Terminello v. Chicago, 337 U.S. 1, at 3, holding that the language "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm" was unconstitutionally vague. See also Coates v. Cincinnati, 402 U.S. 611 (1971). 26255 26256 26257 26258 26259 26260 26261 26262 26263 26264 26265 26266 26267 26268 26269 26270 26271 26272 26273

Justice Black concurred in this phase of the Cox decision. His expressions on vagueness, however, stress the element not stressed by Justice Goldberg: The discretion given to the police officer (379 U.S. at 577). The recent decision in Colten v. Kentucky, 407 U.S. 104 (1972), upholding a conviction under a Kentucky statute identical to §230.20(6) of the New York Code on the basis that the Kentucky court construed the statute as applicable "only where there is no bona fide intention to exercise a constitutional right or where the individual's interest in expression is 'miniscule'," suggests that this element may not be fatal to validity. Justices White and Harlan in Cox held that the statute was unconstitutionally applied in light of Edwards v. South Carolina, 372 U.S. 299 (379 U.S. at 591); Justice Clark concurred solely on equal protection grounds based on an exemption for labor unions in the statute. His suggestion was followed up by the Supreme Court's recent decision in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). The suggestion of Colten is followed here, and §245.25(6) is an appropriately restricted 26276 26277 26278 26279 26280 26282 26283 26284 26285 26286 26287 26288 26289 26290 26291 26292 26293 26294 26295

version of §240.20(6) of the New York Code.

It should be noted that in United States v. Jones, 244 F. Supp. 181 (S.D. N.Y. 1965), affd. 365 F. 2d 675 (2d Cir. 1966), Cox was held not to prevent convictions for obstructing courthouse doors under a similarly worded New York disorderly conduct statute, the Court relying on a limiting construction of the statute by the New York Court of Appeals requiring "a color of disorder and violence" (365 F. 2d at 677) or "conduct producing consternation and alarm among the general public" (244 F. Supp. at 184).

In Gregory v. Chicago, 394 U.S. 111, the Supreme Court held that a general disorderly conduct statute similar to Art. 27, §123(c) and Art. 27, §122 of the present Maryland Code could not be constitutionally applied to a demonstration, otherwise lawful, solely by reason of the failure of the demonstrators to disperse when requested to do so. In so holding the Court observed "however reasonable the police request may have been and however laudable the police motives, petitioners were charged and convicted for holding a demonstration, not for a refusal to obey a police officer. The trial judge charged solely in terms of the Chicago ordinance. Neither the ordinance nor the charge defined disorderly conduct as the refusal to obey a police order." Justices Black and Douglas, concurring, strongly suggested that the disorderly conduct ordinance, construed by the Illinois Supreme Court as applying only to instances where "there is an imminent threat of violence, the police have made all reasonable efforts to protect the demonstrators, the police have requested that the demonstration be stopped and explained the request, if there be time, and there is a refusal of the police request" (22 L. Ed. 2d at 141) might nevertheless, as there construed, be unconstitutionally vague since "guilt shall depend on the mere refusal to obey a policeman's order" (22 L. Ed. 2d at 142). Their opinion concludes with an appeal for narrowly drawn statutes "protecting the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people either for homes * * * or for public and other buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools and hospitals" (22 L. Ed. 2d at 140). It further suggests "a narrowly drawn statute forbidding disruptive picketing or demonstrating in a residential neighborhood" (22 L. Ed. 2d at 141), and indicated that constitutional inhibitions had not reached the point where

"churches would be compelled to welcome into their buildings invaders who come but to scoff and jeer; streets and highways and public buildings would cease to be available for the purposes for which they were constructed and dedicated whenever demonstrators and picketers wanted to use them for their own purposes." (22 L. Ed. 2d at 144).

In Brown v. Louisiana, 383 U.S. 131 (1966) the Court rendered a decision which also cast into doubt the validity of §240.20(6) of the New York law if unmodified. The decision in Brown involved the same Louisiana statute at issue in Cox. Three justices, Fortas, Warren and Douglas, held in substance that a peaceful demonstration in a public library could not be reached by any statute since it was conduct protected by the First Amendment. They did not, apparently, regard the invalidation of the statute in Cox for vagueness as applied to public streets dispositive since "the incident leading to the present convictions occured in a public library and might be thought to raise materially different questions" (383 U.S. at 135). Brennan, J. concurring in the result, held the statute overbroad as applied to public buildings on the authority of Cox. White, J. concurring, would reverse the convictions only by reason of lack of evidence of criminal conduct, but noted that he would sustain the conviction even in the absence of further evidence of criminal conduct if there were "some explicit statute, ordinance or library regulation of general application". Black, Clark, Harlan and Stewart, JJ. dissenting, distinguished Cox on the basis that "public buildings such as libraries, schoolhouses, fire departments, courthouses and executive mansions are maintained to perform certain specific and vital functions. Order and tranquility of a sort entirely unknown to the public streets are essential to their normal operation * * * Furthermore, the vice of discriminatory enforcement which contaminates the public street phase of this statute, does not beset the statute's application to activity in public buildings. In the public building, unlike the street, peace and quiet is a fast and necessary rule, and as a result there is much less room for peace officers to abuse their authority in enforcing the 'public building' phase of the statute." (383 U.S. at 157).

It thus may be that New York §245.20(6) can pass constitutional muster even if unmodified as applied at least to public buildings. However, it clearly should be modified and can be supplemented by narrowly drawn statutes relating to obstruction of buildings, parade permits, and court house

picketing. In Cameron v. Johnson, 390 U.S. 611 (1968) the Court unanimously upheld a Mississippi statute rendering it unlawful

> "to engage in picketing or mass demonstrations in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises, state property, county or municipal courthouses, city halls, office buildings, jails or other public buildings or property owned by the State of Mississippi, or any county or municipal government located therein, or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or unreasonably interfere with free use of public streets, sidewalks, or other public ways adjacent or contiguous thereto."

Fortas and Douglas, JJ., though recognizing the validity of the statute, took the view that it had been improperly applied.

In Cox v. Louisiana, 379 U.S. 536, 553 (1964), the Court also invalidated a conviction for violating a statute providing:

> "No person shall willfully obstruct the free convenient and normal use of any public * * * street (etc.), by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein."

The Court did not pass on the question whether this prohibition was itself invalid, though it intimated clearly that, at least, "some open area must be preserved for outdoor assemblies" (379 U.S. at 555 n. 13). Instead, it invalidated the statute on the basis that, since the authorities occasionally allowed parades or meetings, "the situation is then the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials." In this connection, the Court alluded to the statute reposing unbridled discretion in the Chief of Police involved in Fields v. South Carolina, which was said to involve "obvious constitutional problems", and to numerous other cases involving such unlimited discretion. The Court noted that "appropriate, limited discretion under properly drawn statutes, concerning the time, place, duration or manner of use of the streets for public assemblies may be rested in administrative officials, provided that

such limited discretion is exercised (with uniformity)" (379 U.S. at 558), citing in this connection Cox v. New Hampshire, 312 U.S. at 576 and Poulos v. New Hampshire, 345 U.S. at 403.

The statute involved in Cox v. New Hampshire simply required a parade permit, and had been construed by the state courts as making mandatory issuance of a permit "if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such changes in conditions or changes in time, place and manner as would avoid disturbance." (312 U.S. at 576). This approach to regulation of street demonstrations is urged by at least some of the commentators. See Freund, The Supreme Court of the United States (Meridian ed. 1961), at 79, 90-91; Kalven, The Negro and the First Amendment (1965), at 204-07. In Shuttlesworth v. Birmingham, 394 U.S. 147, 155 n. 4 (1969), the Supreme Court suggested that a permit statute would be valid if limited to regulation in the interest of traffic conditions of time and place but that validity would be dependent on the provision of prompt judicial review. See also Grayned v. City of Rockford, 92 S. Ct. 2294 (1972).

In Cox v. Louisiana, 379 U.S. 559 (1964), the Supreme Court unanimously took the view that a Louisiana statute curbing persons who "with the intent of interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness or court officer in the discharge of his duty pickets or parades in or near a building housing a court" was valid. This provision was said to be modeled on the federal statute (379 U.S. at 561). The opinion of the Court by Justice Goldberg, expressing the views of five justices, noted that the word "near" partook of some lack of specificity, but held that this "may not render the statute unconstitutionally vague at least as applied to a demonstration within the sight and hearing of those in the courthouse." It went on to take the view that this lack of specificity vested discretion in administrative officials, who had in this instance at first permitted the demonstration, and that therefore there was no statutory violation on the facts of the case. The Court in a footnote referred, with apparent approval, to "the express limitation proscribing certain acts within 500 feet of foreign embassies, legations, or consulates within the District of Columbia, 52 Stat. 30 (1938), DC Code, 1961, §22-1115. See also McKinney's New York laws, Penal Law §600 (prohibiting certain activities within 200

feet of a courthouse)." (379 U.S. at 568 n. 1). On the matter of intent, Justice Goldberg's opinion significantly held "Louisiana surely has the right to infer the appropriate intent from circumstantial evidence." "A group of demonstrators parading and picketing before a courthouse where a criminal charge is pending, in protest against the arrest of those charged, may be presumed to intend to influence judges, jurors, witnesses, or court officials." (379 U.S. at 567). The opinion of Justices Black, Harlan and White took the view that the statute was valid and no permission could be given to violate it, as did Justice Clark, who in his separate opinion noted that the Louisiana statute was taken in haec verba from 18 U.S.C. §1507, "which was written by members of this Court after disturbances similar to the one here occurred at buildings housing federal courts. Naturally, the Court could hardly be expected to hold its progeny invalid * * * It has been said that an author is always pleased with his own work."

It is apparent that the cases above discussed make clear the desirability of modifying the definition of disorderly conduct and, by reason of the difficulties encountered in applying disorderly conduct statutes to preserve order in connection with political demonstrations, supplementing these statutes with narrowly drawn but tested statutes aimed at the more serious forms of political disorder and violence.

This approach has been followed here.

Subsection 1.

This provision, with grammatical changes, is substantially identical to Section 245.20(1) of the New York Code. Knowledge has been substituted for intention as the appropriate mental element because the provision should not be limited to those who desire public inconvenience, annoyance, or alarm. It is enough that they know that their fighting or similar behavior will have that result.

Subsection 2.

This provision is a substitute for Section 240.20(3) of the New York Code. The Draft Code here submitted contains no constitutionally dubious provision analogous to Section 240.25(2) of the New York Code penalizing the public use of abusive or obscene language with the mere intent to harass, annoy or alarm another person. Such minor private wrongs or private nuisances are not deemed

appropriate for inclusion in a state penal code. Cf. University Committee to End the War in Vietnam v. Gunn, 289 F. Supp. 469, 478 (W.D. Texas, 1968); Williams v. District of Columbia, 419 F. 2d 638 (D.C. Cir., 1969). (five to four decision). The limitation of the first subsection to "fighting words" is to render the statute consistent with Goodling v. Wilson, 405 U.S. 518; Cohen v. California, 403 U.S. 15 and Rosenfeld v. New Jersey, 92 S. Ct. 2479 (1972). The second subsection, directed at public profanity or obscenity intended to cause public inconvenience, annoyance or alarm and not intended as a bona fide exercise of first amendment rights of free expression of ideas is suggested by the decision of the court in Colten v. Kentucky, 407 U.S. 104 (1972).

Subsection 3.

Since recklessness is sufficient for guilt under this subsection, it is unnecessary, under section 15.15(3), to specify any more culpable mental state, but the Commission has substituted knowledge for the alternative New York reference to intent, as more descriptive of the usual situation. Otherwise, this provision is a narrowed version of Section 240.20(7) of the New York Code, the so-called catch-all provision of that statute which has here been narrowed by requiring the condition created to be not merely "hazardous" but "physically hazardous." In addition, verbal expression and the dissemination of literature have been expressly excluded from the so-called "catch-all" provision. As here drafted the provision will still reach such activities as the short circuiting of electronic and electrical devices, the setting off of fireworks, the creation of offensive odors, etc.

The exclusion of verbal expression is made in the conviction that such expression is more appropriately dealt with by the specific provisions of the statute and other statutes. The exclusion of littering resulting from the dissemination of literature could be deemed constitutionally requisite. See Schneider v. State, 308 U.S. 147 (1939); Jamison v. Texas, 316 U.S. 52 (1942); Flower v. U.S., 407 U.S. 197 (1972), at least where the literature is of a non-commercial character. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). Commercial littering is believed more appropriately dealt with by local ordinance.

Subsection 4.

This section is a narrowed version of the

statute upheld by the Supreme Court in Cameron v. Johnson, 390 U.S. 611 (1968). A requirement has been added of intent or scienter. In addition, the more definite word "bars" has been substituted for "obstructs", and the application of the section has been restricted to interference with passage through customary entrances, as distinct from locked or little-used doors. The word "public" has been added in two places to make clear that the statute does not relate to private sidewalks or private office buildings.

Subsection 5.

This section is a modified version of present sections 449 (injurious substances) and 468 (trash) of Article 27. Intent is required. Compare Section 30 of the Self-Survey Commission Draft Code.

Subsection 6.

This section is modeled on certain of the so-called "anti-klan" laws, e.g., S.C. Code, §16.114. It reaches not merely demonstrations by masked persons but also the wearing of masks by persons bent on more individualized mischief, e.g., bank robbers, etc. A similar provision appears as part of the New York Code loitering provisions (N.Y. Code, §240.35(4)). The New York Code section reaches only masked persons loitering "with others" and lacks exceptions other than a masquerade party exception. The section as here drawn applies only to persons over sixteen years of age, eliminating problems resulting from Halloween observances and the like. The provision limiting the masquerade party exception to "legally permitted" events is in recognition of the existence of local ordinances, not intended to be displaced, requiring permits for such events in some political subdivisions of the state. The validity of anti-mask wearing statutes appears clearly established. See e.g., Schumann v. New York, 270 F. Supp. 730 (S.D. N.Y., 1967).

245.30. AGGRAVATED DISORDERLY CONDUCT

A PERSON IS GUILTY OF AGGRAVATED DISORDERLY CONDUCT WHEN:

1. WITH INTENT TO INTERFERE WITH, OBSTRUCT OR IMPEDE THE ADMINISTRATION OF JUSTICE, OR WITH INTENT TO INFLUENCE ANY JUDGE, JUROR, WITNESS OR COURT OFFICER IN THE DISCHARGE OF HIS DUTY, HE PICKETS OR PARADES IN OR WITHIN 300 FEET OF A BUILDING HOUSING A COURT; OR

2. HE INTENTIONALLY BURNS OR CAUSES TO BE BURNED

478 (W.D. Tex. 1968), suggest that statutes penalizing verbal conduct on the basis of its anticipated disturbance of other persons are of questionable validity where the anticipated quantum of disturbance is slight. For these reasons the New York courts have narrowly construed §240.25(2). See People v. Hotchkiss, 59 Misc. 2d 823, 300 N.Y. Supp. 2d 405 (County Ct., 1969) holding that it does not constitute harassment to tell an arresting officer "if I could have drawn my gun fast enough I would have shot you", the Court founding its decision in part on lack of a course of conduct, and see People v. Sharpe, 207 Misc. 39, 136 N.Y. Supp. 2d 494 (1955). The constitutional problems are explored in Williams v. District of Columbia, 419 F. 2d 638 (D.C. Cir., 1969) (5 to 4 decision) holding that provisions like §240.25(2) are constitutionally valid only to the extent that they reach fighting words and words so grossly offensive to members of the public as to amount to a nuisance. See also Goodling v. Wilson and Cohen v. California, supra. It should further be noted that the Model Penal Code contains only severely limited provisions dealing with private profanity. See §250.09 and Tentative Draft No. 13 at page 53. It is believed that the disorderly conduct provisions are sufficient to deal with these questions where public alarm or offense results. The provisions of §240.25(1) dealing with certain batteries and attempts and threats of batteries (see Chapter 791 of the New York Acts of 1957) have not been followed here, since to the extent it has been deemed desirable to reach such assaults and threats of assaults the matters have been dealt with in the assault section of the Code and in the menacing statute, §170.15. Similarly, the 'following,' 'hazing,' and catch-all provisions of the New York harassment statute relate to minor private wrongs not appropriately included in a state penal code.

In place of the New York provisions there has been included as a harassment statute a provision aimed at residential picketing, the wrong in which is properly reviewed as a form of harassment. The Maryland legislature recognized this wrong by enactment of Art. 27, §580A, by Chapter 773 of the Acts of 1971. The exemption for labor disputes in that statute renders its validity doubtful in light of Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).

This section follows the suggestions contained in the opinions of Justices Black and Douglas in Gregory v. Chicago, supra. The validity of prohibitions of this practice is supported by

numerous Supreme Court decisions, including some of those above quoted as well as UAW v. Empl. Relations Board, 351 U.S. 266, 274 (1956); Garner v. Teamsters' Union, 346 U.S. 485, 488 (1953); Allen Bradley v. Wisconsin Board, 315 U.S. 740, 479 (1942); and by Kamin, Residential Picketing and the First Amendment, 61 Nw. U. L. Rev. 177 (1966) and Comment, Picketing the Homes of Public Officials, 34 U. Chi. L. Rev. 106 (1966). The validity of such statutes has been noted by the Attorney General of Maryland, 32 Opinions of the Attorney General 129 (1947), and injunctions against such picketing, viewed as an invasion of privacy, have been granted by a Maryland Court. Molofsky v. Bundy, 39 U.S. L. Week 2582 (Cir. Ct. Balt. City, April 16, 1966). There is a Hawaiian statute. Hawaii Rev. Laws §300.2 (1955) which serves as a model. For early recognition of the desirability of such prohibitions, See Mill, On Liberty, Ch. III (1859). ("An opinion that corndealers are starvers of the poor * * * ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corndealer, or when handed about among the same mob in the form of a placard.")

The requirement that a particular dwelling place be picketed is designed to immunize picketing of a neighborhood or similar large area, such as that assertedly involved in the Gregory case; the exclusion of picketing of the principal place of business of an individual is in line with suggestions of commentators and a recent Pennsylvania case and appears sufficient to protect the legitimate interests of labor unions without the inclusion of an exemption provision which might render the general prohibition unconstitutional under the rule of Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

See the discussion of the English law at 122 A.L.R. at 737. Legislation recently enacted by Parliament as part of the new Industrial Relations Law provided special penalties for residential picketing in labor disputes. The Commission believes this English provision to be as inappropriate as an exemption for union activities, and believes that the law relating to residential picketing should be limited but general.

Unlike the case with respect to some residential picketing statutes in other jurisdictions, an intent to harass has been required here.

245.40. AGGRAVATED HARASSMENT

A PERSON IS GUILTY OF AGGRAVATED HARASSMENT WHEN, WITH INTENT TO ANNOY OR ALARM ANOTHER PERSON, HE:

1. COMMUNICATES WITH A PERSON, ANONYMOUSLY OR OTHERWISE, BY TELEPHONE, OR BY TELEGRAPH, MAIL OR ANY OTHER FORM OF WRITTEN COMMUNICATION, IN A MANNER LIKELY TO CAUSE ANNOYANCE OR ALARM AND SERVING NO LEGITIMATE PURPOSE; OR

2. MAKES A TELEPHONE CALL, WHETHER OR NOT A CONVERSATION ENSUES, WITH NO PURPOSE OF LEGITIMATE COMMUNICATION.

AGGRAVATED HARASSMENT IS A CLASS A MISDEMEANOR.

COMMENT

This provision is directly drawn from §240.30 of the New York Code with the deletion of the word "harass" in the definition, and with the addition to Subsection 1 of language requiring an absence of legitimate purpose. It is believed that as thus redrawn the section will avoid any possible first amendment problems.

245.45. OBSTRUCTING A PUBLIC WAY

1. FOR PURPOSES OF THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE MEANINGS SET FORTH BELOW:

(A) A "PUBLIC WAY" SHALL MEAN A STREET, SIDEWALK OR OTHER WAY OPEN TO THE USE OF THE PUBLIC;

(B) "LOCAL PUBLIC AUTHORITY" MEANS THE OFFICIAL OR BODY AUTHORIZED TO GRANT PERMITS FOR PARADES, MEETINGS, OR OTHER ASSEMBLIES TO USE PUBLIC WAYS IN A MANNER WHICH MAY OR WILL BLOCK OR OBSTRUCT ONE OR MORE PUBLIC WAYS FOR ORDINARY VEHICULAR OR PEDESTRIAN TRAFFIC OR RENDER THE SAME IMPASSABLE FOR SUCH TRAFFIC WITHOUT SUBSTANTIAL INCONVENIENCE OR HAZARD; AND IN THE ABSENCE OF ANY LOCAL LAW, ORDINANCE OR REGULATION*PROVIDING OTHERWISE, THIS TERM SHALL MEAN THE POLICE COMMISSIONER OF BALTIMORE CITY, THE CHIEF OF POLICE OF ANY COUNTY OR MUNICIPALITY OF THIS STATE, OR IF NO SUCH CHIEF OF POLICE, THEN THE SHERIFF OF THE COUNTY.

2. A PERSON IS GUILTY OF OBSTRUCTING A PUBLIC WAY WHEN HE KNOWINGLY, ALONE OR WITH OTHERS, OBSTRUCTS VEHICULAR OR PEDESTRIAN TRAFFIC ON A PUBLIC WAY WITHOUT A PERMIT HAVING BEEN ISSUED THEREFOR IN ACCORDANCE WITH THE PROVISIONS OF SUBSECTIONS (3)-(5) OF THIS SECTION, OR VIOLATES ANY RESTRICTION OR LIMITATION CONTAINED IN SUCH A PERMIT.

3. APPLICATION FOR A PERMIT FOR USE OF PUBLIC WAYS MAY BE FILED BY ANY NATURAL PERSON AND SHALL IN THE ABSENCE OF EXTRA-ORDINARY AND UNFORSEEABLE CIRCUMSTANCES BE FILED NOT LESS THAN SEVENTY-TWO HOURS PRIOR TO THE COMMENCEMENT OF THE PUBLIC MEETING, GATHERING OR PROCESSION. SUCH APPLICATIONS SHALL BE FILED ON A FORM PRESCRIBED BY THE ATTORNEY GENERAL, WHICH FORM SHALL CONTAIN A STATEMENT AS TO THE FOLLOWING MATTERS WITH RESPECT TO THE PROPOSED PUBLIC MEETING, GATHERING, OR PROCESSION.

(A) THE TIME AND DATE OF COMMENCEMENT;

(B) THE ESTIMATED NUMBER OF PARTICIPANTS;

(C) THE CONTEMPLATED DURATION;

(D) THE PLACE OR ROUTE;

(E) THE IDENTITY OF THE SPONSORING PERSONS OR ORGANIZATIONS; AND

(F) THE PROPOSED ARRANGEMENTS FOR REACHING THE ASSEMBLY POINT, AND FOR DEPARTURE AT THE END THEREOF.

4. UPON RECEIPT OF AN APPLICATION, THE LOCAL AUTHORITY MAY (1) IMPOSE CONDITIONS OR RESTRICTIONS RESPECTING THE TIME, PLACE, DURATION, AND ROUTE OF THE MEETING, GATHERING, OR PROCESSION IF SUCH CONDITIONS ARE NECESSARY TO MINIMIZE INTERFERENCE WITH THE CONVENIENCE OF THE PUBLIC IN THE USE OF PUBLIC WAYS OR (2) REFUSE A PERMIT IF GRANT OF THE PERMIT UPON CONDITIONS OR RESTRICTIONS IS INSUFFICIENT TO PREVENT SERIOUS INTERFERENCE WITH THE CONVENIENCE OF THE PUBLIC IN THE USE OF PUBLIC WAYS.

5. ANY LOCAL AUTHORITY IMPOSING CONDITIONS OR RESTRICTIONS UPON A PERMIT OR REFUSING A PERMIT SHALL MAKE AVAILABLE TO THE APPLICANT AT THE PLACE OF FILING THE APPLICATION, A WRITTEN NOTICE OF ITS ACTION, AND A STATEMENT OF THE NATURE OF ANY CONDITIONS OR RESTRICTIONS AND THE REASONS THEREFOR WITHIN ONE DAY OF THE RECEIPT OF THE AFORESAID WRITTEN APPLICATION AND SHALL, UPON WRITTEN REQUEST BY THE PERSON FILING APPLICATION, FILE A PETITION IN EQUITY WITHIN ONE DAY OF SUCH REQUEST TO REVIEW SUCH RESTRICTIONS IN THE CIRCUIT COURT OF THE JURISDICTION IN WHICH THE MEETING, GATHERING OR PROCESSION IS TO BE HELD, WHICH SHALL PROMPTLY, AFTER NOTICE TO THE APPLICANT, HEAR SUCH PETITION AND SHALL RENDER ITS DECISION THEREON UPON TRIAL OR DEFAULT WITHIN ONE DAY OF THE DATE OF ITS FILING, UNLESS SUCH TIME SHALL BE EXTENDED BY TRIAL OR BY AGREEMENT OF THE APPLICANT. AN IMMEDIATE APPEAL FROM ANY DECISION OF THE CIRCUIT COURT UPHOLDING OR IMPOSING RESTRICTIONS WILL LIE TO THE COURT OF SPECIAL APPEALS,

WHICH SHALL ADVANCE THE CASE UPON ITS DOCKET.

6. IT IS A DEFENSE THAT THE DEFENDANT DID NOT KNOW OF THE LACK OF A PERMIT OR OF THE VIOLATION OF THE RESTRICTIONS CONTAINED THEREIN.

OBSTRUCTING A PUBLIC WAY IS A VIOLATION.

COMMENT

See Shuttleworth v. Birmingham, 394 U.S. 147 (1969), suggesting a statute drawn in these terms.

The application referred to by §245.45(3) need not be filed by a sponsor of or contemplated participant in the proposed activity. Cf. the precedent referred to in 61 Md. State Bar Assn. Transactions, 224, 234 (1956).

245.50. LOITERING

A PERSON IS GUILTY OF LOITERING WHEN HE:

1. REMAINS OR WANDERS ABOUT IN A PUBLIC PLACE FOR THE PURPOSE OF SOLICITING OR BEING SOLICITED TO ENGAGE IN PROSTITUTION, AS DEFINED IN PART 230; OR

2. REMAINS OR WANDERS ABOUT IN A PUBLIC PLACE FOR THE PURPOSE OF SOLICITING ANOTHER PERSON TO ENGAGE IN DEVIATE SEXUAL INTERCOURSE OR OTHER SEXUAL BEHAVIOR OF A DEVIATE NATURE; PROVIDED THAT NO PROSECUTION MAY BE INSTITUTED OR MAINTAINED UNDER THIS SUBSECTION UNLESS THE ALLEGED OFFENSE WAS BROUGHT TO THE NOTICE OF PUBLIC AUTHORITY BY COMPLAINT BY A PERSON OTHER THAN A PERSON ACTING AS OR IN COOPERATION WITH A POLICE OFFICER; OR

3. REMAINS IN OR WANDERS ABOUT IN A TRANSPORTATION FACILITY, UNLESS SPECIFICALLY AUTHORIZED TO DO SO, FOR THE PURPOSE OF SOLICITING OR ENGAGING IN ANY BUSINESS, TRADE, OR COMMERCIAL TRANSACTIONS INVOLVING THE SALE OF MERCHANDISE OR SERVICES; OR

4. AFTER BEING REQUESTED TO LEAVE BY PROPER AUTHORITY, REMAINS IN ANY TRANSPORTATION FACILITY, UNDER CIRCUMSTANCES INDICATING THAT HE IS NOT THERE FOR A PURPOSE RELATED TO USE OF A TRANSPORTATION FACILITY; OR

5. REMAINS IN A PUBLIC PLACE WITH ONE OR MORE PERSONS FOR THE PURPOSE OF UNLAWFUL POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE, AS DEFINED IN SECTION 220.25, OR OF UNLAWFUL POSSESSION OF MARIHUANA, AS DEFINED IN SECTION 220.30; OR

6. REMAINS IN OR ABOUT ANY PLACE WHERE ALCOHOLIC BEVERAGES ARE SOLD TO BE CONSUMED ON THE PREMISES, WITH

THE PERMISSION OF THE PROPRIETOR, FOR THE PURPOSE OF BEGGING OR SOLICITING ANYONE IN SUCH PREMISES TO PURCHASE ALCOHOLIC BEVERAGES FOR THE PERSON BEGGING OR SOLICITING.

LOITERING IS A VIOLATION.

COMMENT

General statement:

The definitions utilized in the subsections deviate from the New York Code by not ntilizing the word "loiters", it being deemed undesirable to define loitering in terms of itself. In the event it is deemed preferable to substitute the word "loiter" for the words "remain or wander about" where they appear, a separate definitional section should be included. One approach to definition is suggested by People v. Bell, 306 N.Y. 110, 115 N.E. 2d 821 (1953) where a statute penalizing persons found loitering or sleeping, etc. in railroad stations, etc. and unable to give a satisfactory explanation of their presence was upheld against a charge of vagueness, the requirement of satisfactory account being held to require only an account which shows that the person has come there for some purpose which would not render him a trespasser. (Contrast Ricks v. District of Columbia, 414 F. 2d 1104 (D.C. Cir., 1968) where this obvious limiting construction was not attempted). If "loiter" is to be defined, the definition perhaps might be "remains (etc.) under circumstances suggesting that the person has come to the place for some purpose which would render him a trespasser. Among the circumstances which may be considered are the facts that the actor takes flight upon appearance of a peace officer or manifestly endeavors to conceal himself or any object." Cf. Model Penal Code §250.6.

The Commission has omitted, on grounds of triviality, snbsections 1 and 2 of the New York Loitering Statute relating tc loitering for the purpose of begging and loitering for the purpose of gambling. It is believed that the first problem is best dealt with by local ordinance and that the second subsection in reality is little more than an authorization for arrest on suspicion since card playing, etc., for stakes in public places is not an evil of great consequence.

Subsection 1 is a section directed at solicitatien for prostitution, which permits the use of police decoys. The Model Penal Code contains such a section, §251.2(1)(b). There is no

corresponding provision in the New York Code, a provision appearing in the Study Draft of the Code penalizing loitering for the purpose of soliciting commission of "a lewd or a sexual act" being restricted to deviate acts in light of criticism of its overbreadth. See Comment, 64 COLUM. L. REV. 1969 at 1555 (1964). This commentator noted that M.P.C. §251.3 was restricted to deviate sexual relations but overlooked the provision of §251.2(1)(b) of the Model Penal Code prohibiting solicitation for prostitution. In consequence the New York Code contains no loitering-prostitution provision. While the Columbia Law Review commentator suggested that such a loitering provision relating to public solicitation for heterosexual relations presented difficulties, since "the necessary element of compensation in the offense of prostitution is not established merely by sexually provocative behavior", it is believed that a loitering-prostitution provision may be useful in making prosecution possible where evidence of solicitation for hire falling short of "hotel-room" evidence is available. In consequence of the lack of such a provision, efforts have been made to prosecute prostitutes under §240.35(6) of the New York Code, the "identity and good account" section, or under various disorderly conduct provisions. Subsection (6) of the New York statute was held unconstitutional in People v. Beltrand, 314 N.Y.S. 2d 276 (Crim. Ct. 1970) a prostitution case, the opinion taking the view that the two elements of the offense were (1) suspicion and (2) loitering generally as distinct from loitering in a specific location or for a specific purpose. The view was taken that neither of these elements could constitutionally be made the basis of a criminal offense, though the court distinguished the Model Penal Code suspicious loitering provision, M.P.C. §250.6 on the ground that the Model Penal Code provision required not merely "suspicion that he may be engaged or about to engage in crime" but rather "alarm for the safety of persons or property in the vicinity." The Model Penal Code framers, in using the "alarm" language, explained "This seems desirable to save the Section from attack and possible invalidation as a subterfuge by which the police would be empowered to arrest and search without probable cause." Comment to §250.6. The court in the Beltrand case also took the view that failure to respond or convincingly respond to an inquiry about identity or purposes was not in itself an element of the subsection 6 offense, and noted that serious constitutional questions in light of the privileges against self-incrimination and the Miranda case, would arise if it were made so. The

court took note however of what it characterized as the "common law right of police inquiry of suspicious persons" recognized in Terry v. Ohio, 392 U.S. 1 (1968) and People v. Morales, 396 U.S. 102 (1969), both cases arising under so-called "stop and frisk" statutes. On the invalidity of general suspicious loitering statutes the court also cited Seattle v. Drew, 70 Wash. 2d 405, 423 P. 2d 522 (1967). See also People v. Diaz, 4 N.Y. 2d 469, 176 N.Y.S. 2d 313, 151 N.E. 2d 871 (1958)

An earlier New York prostitution related case, People v. Williams, 55 Misc. 2d 774, 286 N.Y.S. 2d 575 (1967) held arrests of prostitutes under subsection 6 improper on the ground that under the New York Code prostitution was defined only as a violation whereas subsection 6 reached only "circumstances justifying suspicion that (the person) may be engaged or about to engage in crime." The court accordingly found it unnecessary to pass on the constitutionality of subsection 6, though it expressed grave doubt as to such constitutionality. In the course of its opinion, the court noted "In recent months, this city has been overrun by streetwalkers attracted to the sidewalks of New York by the largesse of the new Penal Law * * * which reduced the maximum penalty for prostitution from six months incarceration or a possible three year reformatory term, to a maximum sentence of 15 days."

It is evident that if a prostitution-loitering section is to appear in the Code it must be specific and a catch-all loitering provision cannot be relied on to deal with this problem. Further it is believed that the public interest in suppression of prostitution which the sexual offenses sections of the Code regard as sufficient to justify suppression, on public health and suppression of organized crime grounds, of private as well as public prostitution (cf. M.P.C. §251.2, Comments) is sufficient to justify the use of decoy policemen and the omission of provisions such as those in proposed subsection 4 above, requiring private complaint.

The utility and reasonableness of a prostitution-loitering provision as a supplement to the prostitution provisions themselves is that it dispenses with the need for hotel-room evidence or evidence of actual payment. Thus, evidence of loitering without any visible purpose, verbal or physical approaches to members of the opposite sex without apparent prior acquaintance, and the sort of evidence alluded to in M.P.C. §251.2(6): the general repute of hotels visited and the "frequency, timing and duration of visits" would themselves be

sufficient to establish violation without the necessity of direct evidence of payment. A loitering--prostitution statute was upheld in State v. Armstrong, 282 Minn. 39, 162 N.W. 2d 357. Cf. Government of Virgin Islands v. Rodriguez, 300 F. Supp. 860 (D.V.I.).

It is believed that a general loitering statute such as that contained in subsection 6 of the New York loitering provisions, involves grave constitutional problems. See, in addition to the cases already referred to, the decisions of the Supreme Court of the United States in Johnson v. Florida, 391 U.S. 596 and Shuttlesworth v. Birmingham, 382 U.S. 87 (1965), and Papachriston v. Jacksonville, 405 U.S. 156 (1972) and the decision of the New York Court of Appeals in People v. Schamberger, 24 N.Y. 2d 288, 300 N.Y. 2d 100, 248 N.E. 2d 16 (1969), a case arising under subsection 6. See also Ricks v. United States (Ricks I), 414 F. 2d 1097 (D.C. Cir., 1968). In the Schamberger case conviction of a person who refused to respond to police inquiry when found walking at 3 A.M. without evident lawful purpose along the highway in a residential area where burglaries had previously occurred was held outside the scope of subsection 6. If a general loitering statute is regarded as desirable, the Model Penal Code provision, §250.6, approvingly referred to in the Seattle and Beltrand cases should be utilized rather than subsection 6 of the New York statute, perhaps with deletion of the provision that refusal to identify oneself may be considered in determining whether alarm is warranted. No general loitering provision is included in the present draft.

Since Part 230 of the draft code defines prostitution to include deviate sexual intercourse for hire, there is no need for an additional provision relating to solicitation for such a purpose. The draft does not penalize such soliciation when it is not for hire, in conformity with what is understood to be the judgment of the Commission in relation to the Code provisions on sex offenses:

> The draft does not prohibit soliciting for homosexual behavior where homosexual conduct for hire is not involved. Instead it is contemplated that another portion of the proposed new criminal code will prohibit such soliciting in public where it amounts to an annoyance or a public nuisance.

Fisher, The Sex Offender Provisions of

the Proposed New Maryland Criminal Code, 30 Md. L. Rev. 91, 109 (1970).

Subsection 2 is a section designed to permit prosecutions of public solicitations for deviate sexual relations not for hire upon complaint of persons suffering annoyance thereby. See Fisher, supra, at 109. As with Section 251.3 of the Model Penal Code (which, however, does not require a private complaint), the provision is justified "upon the ground that the main objective is to suppress the open flouting of prevailing moral standards as a sort of nuisance in public thoroughfares and parks." The requirement of a private complaint eliminates the use of police decoys. Even where solicitation for hire is not involved, wholly apart from the interests of users of parks, etc. it would seem that persons whose business establishments or whose restrooms are the scene of or are in the proximity of solicitation of deviate sexual conduct have an interest deserving of protection, whatever view is taken of the scope of immunity to be afforded private sexual conduct. The interests of such persons could perhaps be protected by a narrower formulation reaching loitering repeatedly or with others, coupled with a prohibition of solicitation of one with whom the actor had "no previous acquaintance." It is believed, however, that once the problem of the decoy policeman is eliminated, there can be no valid objection to a general prohibition activated by private complaint, with its accompanying principle that persons soliciting deviate sexual relations in public still do so at some peril.

Subsections 3 and 4 are inspired by the New York Code Subsections 7 and 8. They are aimed at persons snatching luggage in transportation terminals, degenerates, etc. The validity of similar provisions was upheld in People v. Bell, 306 N.Y. 110, 115 N.E. 2d 821 (1953), the court regarding the statute as a prohibition against lingering about in stations under circumstances which fall short of rendering a person an implied licensee or invitee. Subsection 3 as here drawn deletes the New York provision relating to loitering for the purpose of singing, dancing, etc. on grounds of triviality. Cf. Thompson v. City of Louisville, 362 U.S. 199 (1960) the so-called "shuffling Sam" Supreme Court case. Subsection 4 requires a request to leave.

Subsection 5 is drawn from the New York subsection 9, which was reclassified a Class B misdemeanor by Chapter 668 of the New York Laws of

1968. A similar section was upheld in People v. Pagnetta, 25 N.Y. 23, 333, 305 N.Y.S. 2d 484, 253 N.E. 2d 202 (1969) as applied to a situation in which defendant was able to discard a liquid believed to be a narcotic drug so it could not be identified, but in which the circumstances of the defendant's public gathering with others, the possession of narcotics implements by one member of the group, and the police officer's expert testimony as to the common practices of addicts was held sufficient for conviction. The court observed that the statute was not a subterfuge designed to allow arrests on less than probable cause, but had an independent purpose and was designed to prevent non-addicts from encountering congregated narcotics addicts in public places. See also Burmaister v. New York Police Department, 275 F. Supp. 690 (S.D. N.Y., 1968).

This statute is to be distinguished from the "narcotics vagrancy" statute invalidated in Ricks v. United States (Ricks II), 414 F. 2d 1111 (D.C. Cir., 1968). That statute penalized loitering and failure to give a good account when engaged in by any person who was a narcotic drug user or who had been convicted of narcotic drug use. There was no limiting provision relating to intent such as that in §245.50(5) requiring that the loitering be for the purpose of narcotic drug use. Accordingly the statute was held to give inadequate warning of the conduct prohibited and to be unconstitutionally vague, the court distinguishing statutes such as that involved in United States v. National Dairy Products Corp., 377 U.S. 29 (1963) which were saved from vagueness by a requirement of specific intent or purpose.

It is believed that this statute serves a useful law enforcement function, by allowing the police to deal with congregations of narcotics addicts in places such as school and college grounds where exposure of members of the public to narcotics use is a pressing evil, independent of the act of possession or use by addicts themselves.

Subsection 6 is a remodeled version of the present "female sitter" law, Art. 27 §152. As drawn, the statute would not be limited to females and is similar to a statute sustained in Wright v. Mann, 144 Cal. App. 2d 843, 301 Pac. 2d 997 (1956).

245.55. CREATING A DISTURBANCE AT AN ATHLETIC CONTEST

A PERSON IS GUILTY OF CREATING A DISTURBANCE AT AN ATHLETIC CONTEST WHEN HE DRINKS OR HAS IN HIS POSSESSION

ANY INTOXICATING BEVERAGE WHILE IN ATTENDANCE AS A SPECTATOR OR OTHERWISE AT ANY PLACE WHERE ANY ELEMENTARY SCHOOL, JUNIOR HIGH SCHOOL OR HIGH SCHOOL ATHLETIC CONTEST IS TAKING PLACE AND CAUSES A PUBLIC DISTURBANCE.

CREATING A DISTURBANCE AT AN ATHLETIC CONTEST IS A VIOLATION.

COMMENT

In the original draft, this section is a general intoxication section, but all of the intoxication provisions of Article 27, section 123, except for the provision reproduced above, were repealed in 1972 and now appear in Article 2C of the Code (Alcoholism). The draft section has therefore been reduced to its former subsection (1)(c). The legislature did not retain the provisions of draft subsections (2) and (3) for the athletic contest prohibition, although they were substantially retained for the provisions which now appear in Article 2C. (See Article 2C, sections 203, 307). If they are to be applied to the athletic contest situation, the provision should be transferred to Article 2C, section 201.

245.60. CRIMINAL NUISANCE

A PERSON IS GUILTY OF CRIMINAL NUISANCE WHEN:

1. BY CONDUCT CONSTITUTING A CRIME OR VIOLATION HE KNOWINGLY OR RECKLESSLY CREATES OR MAINTAINS A CONDITION OF A CONTINUING NATURE WHICH ENDANGERS THE SAFETY OR HEALTH OF FIVE OR MORE PERSONS; OR

2. HE CONDUCTS OR MAINTAINS ANY PREMISES, PLACE OR RESORT FOR THE PURPOSE OF PROVIDING FACILITIES FOR PERSONS TO ENGAGE IN CONDUCT CONSTITUTING A CRIME OR VIOLATION.

CRIMINAL NUISANCE IS A CLASS B MISDEMEANOR.

COMMENT

This section is a sharply restricted version of the New York provision. Subsection 1 reaches only conduct unlawful in itself, such as violations of ordinances and safety regulations, in order to avoid reintroducing under the guise of a criminal nuisance provision anything resembling a common law crime. Subsection 1 is further limited to require the improper conduct to be of a continuing nature, thus eliminating such offenses as reckless driving from the purview of this provision. A danger to the safety or health of five or more persons is

required, the Code being more specific in this respect than the New York statute. The New York provision has been deemed undesirable both by reason of its undue breadth on its face and by reason of the experience under the similar prior New York provisions. The annotations to these provisions reveal that the majority of reported cases involve clearly unwarranted prosecutions aimed at ventilation of political or neighborhood grievances. Whatever the desirability of such provisions or doctrines in the civil law of tort, it is believed that a criminal code should provide a higher threshold of wrongdoing, and that the criminal courts should not be made forums for the thrashing out of disputed issues in the fields of land use and environmental control.

Subsection 2 is a limited version of subsection 2 of the New York criminal nuisance provision. As here drawn the provision requires a purpose of providing facilities for persons to engage in conduct constituting a crime or violation. This requirement of purpose is consistent with the judgment of the Commission in declining to include in the Code a criminal facilitation provision similar to Art. 155 of the New York Code and is also consistent with the adoption by the Commission of the views with respect to conspiracy and complicity embodied in the Falcone decision discussed in the commentary to Part 105. Thus, a restaurant keeper whose restaurant was regularly patronized by members of the Mafia would not be exposed to criminal liability by reason of his normal service of them and by reason of his knowledge that they were engaged in unlawful conduct or the planning of unlawful conduct unless he in some way made their purposes his own, as by setting up the restaurant at their behest to provide a retreat, or by agreeing to warn them of the approach of law enforcement personnel, etc.

245.65. FALSELY REPORTING AN INCIDENT

A PERSON IS GUILTY OF FALSELY REPORTING AN INCIDENT WHEN, KNOWING THE INFORMATION REPORTED, CONVEYED OR CIRCULATED TO BE FALSE OR BASELESS, HE:

1. INITIATES OR CIRCULATES A FALSE REPORT OR WARNING OF ALLEGED OCCURRENCE OR IMPENDING OCCURRENCE OF A FIRE, EXPLOSION, CRIME, CATASTROPHE OR EMERGENCY UNDER CIRCUMSTANCES IN WHICH IT IS LIKELY THAT PUBLIC ALARM OR INCONVENIENCE WILL RESULT; OR

2. REPORTS, BY WORD OR ACTION, TO ANY AGENCY OR ORGANIZATION AUTHORIZED BY LAW TO DEAL WITH EMERGENCIES

INVOLVING DANGER TO LIFE OR PROPOERTY, AN ALLEGED OCCURRENCE OR IMPENDING OCCURRENCE OF A FIRE, EXPLOSION OR OTHER CATASTROPHE OR EMERGENCY WHICH DID NOT IN FACT OCCUR OR DOES NOT IN FACT EXIST; OR

3. REPORTS TO A LAW ENFORCEMENT OFFICER OR AGENCY (A) THE ALLEGED OCCURRENCE OF AN OFFENSE OR INCIDENT WHICH DID NOT IN FACT OCCUR; OR (B) AN ALLEGEDLY IMPENDING OCCURRENCE OF AN OFFENSE OR INCIDENT WHICH IN FACT IS NOT ABOUT TO OCCUR; OR (C) FALSE INFORMATION IMPLICATING ANOTHER PERSON RELATING TO AN ACTUAL OFFENSE OR INCIDENT.

FALSELY REPORTING AN INCIDENT IS A CLASS B MISDEMEANOR.

COMMENT

This section is substantially the New York provision with minor verbal changes.

245.70. ENDANGERING PUBLIC ORDER

A PERSON IS GUILTY OF ENDANGERING PUBLIC ORDER WHEN:

1. HE ACTIVELY TAKES PART, WITH A PURPOSE TO FURTHER ITS OBJECTIVES, IN THE ORGANIZATION, TRAINING, CONTROL OR MANAGEMENT OF AN ASSOCIATION OF PERSONS WHICH HE KNOWS TO BE (A) ORGANIZED AND TRAINED OR ORGANIZED AND EQUIPPED FOR THE PURPOSE OF ENABLING ITS MEMBERS TO BE EMPLOYED IN USURPING THE FUNCTIONS OF THE POLICE OR MILITIA; OR (B) ORGANIZED AND TRAINED OR ORGANIZED AND EQUIPPED FOR THE PURPOSE OF ENABLING ITS MEMBERS TO USE PHYSICAL FORCE IN PROMOTING ANY POLITICAL OBJECT; OR (C) ORGANIZED AND TRAINED OR ORGANIZED AND EQUIPPED FOR THE PURPOSE OF ENGAGING IN THE PRACTICE OF GUERRILLA WARFARE OR SABOTAGE; OR

2. HE ACTIVELY TAKES PART IN ANY MEETING OR GATHERING WHICH HE KNOWS TO BE CONDUCTED FOR THE PURPOSE OF PREPARING PERSONS TO ENGAGE IN THE UNLAWFUL USE OF A MACHINE GUN AS DEFINED IN SECTION 255.00(9), OR IN GUERRILLA WARFARE OR SABOTAGE OR FOR THE PRACTICE OF MILITARY EXERCISE, MOVEMENTS OR EVOLUTIONS, OR AT SUCH A MEETING KNOWINGLY CONDUCTS OR RECEIVES SUCH INSTRUCTION, TRAINING, OR DRILLING, OTHER THAN AS A PUBLIC OFFICER, A MEMBER OF THE ARMED FORCES OR MILITIA OR (IN THE CASE OF MEETINGS AND GATHERINGS FOR THE PRACTICE OF MILITARY EXERCISE, MOVEMENTS OR EVOLUTIONS) A MEMBER OF A COLLEGE OR PUBLIC SCHOOL OR PRIVATE SCHOOL MEETING THE REQUIREMENTS SET FORTH IN SECTION 12 OF ARTICLE 77; OR

3. HE, WITH INTENT OF USING PHYSICAL FORCE IN PROMOTING ANY POLITICAL OBJECT, IN ANY PUBLIC PLACE OR AT ANY PUBLIC MEETING, GATHERING OR PROCESSION WEARS, WITH

OTHERS, ANY UNIFORM OR DEVICE, STRAP, KNOT OR OTHER DISTINGUISHING DRESS OF A CHARACTER ORDINARILY WORN BY MEMBER OF A POLICE FORCE, MILITARY FORCE OR OTHER PUBLIC ORGANIZATION, OTHER THAN AS A PUBLIC OFFICER, A MEMBER OF THE ARMED FORCES OR MILITIA, OR AS A SPECIAL POLICEMAN.

ENDANGERING PUBLIC ORDER IS A CLASS A MISDEMEANOR.

COMMENT

These provisions are aimed at paramilitary organizations, and find their anlogies in various provisions of the present state militia law, in the British Public Order Act of 1936, and in the provisions of 18 U.S.C. §2386. Compare §1104 of the proposed Federal Criminal Code. The provisions as here drawn are founded on the premise that any form of private paramilitary organization whether for an aggressive purpose or for purposes of self-defense or vigilante activity, is inconsistent with the maintenance of the rule of law and should be proscribed, a judgment in accord with that of the extant English statutes and with that of the existing state militia law.

Subsection 1.

This section in conception is derived from the provisions in section 2 of the British Public Order Act of 1936. Subsection (a) of paragraph 7 has been altered to require that associations within it be organized and trained rather than organized or trained, and is no longer phrased in the disjunctive, since it would appear that any problems resulting from the Yates and Scales cases would be obviated if acts beyond initial organization were required. The British statute so provides in section (b) but not in its section (a). In addition to the provisions drawn from the British statute, a new provision, subparagraph (c), drawn from section 11460 of the California Penal Code, enacted in that State by Chapter 1221 of the Acts of 1965, has been added to reach organizations "organized and trained or organized and equipped for the purpose of engaging in the practice of guerilla warfare or sabotage".

Subsection 2.

This section, like the one preceding it, finds its inspiration in provisions of the Maryland militia law limiting the conduct of military exercises by private groups, see Art. 65, §35, and in corresponding and more specific British legislation. See the Unlawful Drilling Act, 1819,

60 Geo. III + 1 Geo. IV, c. 1, and Section 2 of the Public Order Act, 1936, 1 Edw. 8 + 1 Geo. 6, c. 6. The section relating to training in the use of arms has been drafted as so to avoid reaching rifle and pistol clubs, etc. by limiting it tc weapons defined in section 255.00(9). That statute relates to machine guns, which are broadly defined as weapons "from which more than one cartridge may be discharged, automatically, without manual reloading, by a single function of the trigger." The provisions of the statute relating to military training have been drawn to include training in guerilla warfare or sabotage and the exceptions relating to military drilling have been drawn to include students at military schools and public and private schools and colleges. On the validity of prohibition of unauthorized drilling, see Presser v. Illinois, 116 U.S. 252 (1886).

Subsection 3.

A new section has been added aimed at the wearing of political uniforms. This section is inspired by section 1 of the British Public Order Act of 1936, aimed at Sir Oswald Mosley's Black Shirts, which prohibits, subject to certain exceptions the "wearing (of) *** uniform signifying association with any political organization or with the promotion of any political object" as a measure to impair political intimidation and the wearing of uniform to facilitate street fighting by enabling persons bent on violence to recognize their allies. The Commission has noted the possible relevance to such a prohibition of the recent Supreme Court decision in the Tinker case relating to the wearing of protest arm bands by school children, and similar reductio ad absurdum problems. It is believed that these problems have been obviated by the draft which has drawn on a provision of the existing state militia law, Section 49 of Article 65, aimed at the wearing of simulated military uniforms. As drafted, the intent provision, requiring intent of "using physical force in promoting any political object" is drawn from the British law with the deletion of the words "or displaying" in the English statute. The prohibited uniform wearing must take place "with others". The arm-band and button problem is met by precluding only the public wearing of "any uniform or device, strap, knot or other distinguishing dress of a character customarily worn by members of a police force, military force or other public organization." The exceptions in the statute are limited to public officers, licensed special policemen and private detectives and members of the armed forces and militia. No exception for scout

organizations, military schools or veterans groups, etc. appears needed in view of the intent requirement and the discrimination worked by such an exception in favor of specified private groups would appear to create constitutional problems rather than solve them. It is believed that the statute as drafted cannot be said to raise constitutional problems of free expression, particularly given the existing provisions in the militia laws not only of Maryland but of most states throughout the country. Such statutes are described as fully consistent with a "pattern of equal rights and equal treatment" and as directed as "preventing aggravation of existing cleavages by prohibiting the wearing of uniforms" in Kirchheimer, Political Justice (1961), at 168.

That nondiscriminatory statutes restricting uniform-wearing are valid has been repeatedly recognized by the Supreme Court. See Schacht v. United States, 398 U.S. 58 (1970); Koehl v. Resor, 296 F. Supp. 558 (E.D. Va., 1969), appeal dismissed 397 U.S. 1023 (1970), distinguishing Tinker v. Des Moines School District, 393 U.S. 503 (1969), and see Tinker, supra, 393 U.S. at 511, stressing the discriminatory character of the armband regulation there at issue. See also Presser v. Illinois, 116 U.S. 252 (1886) and United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

245.75. MISUSE OF A SOUND DEVICE

1. THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS SECTION:

(A) "SOUND DEVICE" SHALL MEAN ANY DEVICE OR APPARATUS FOR THE AMPLIFICATION OF SOUNDS FROM ANY RADIO, PHONOGRAPH OR OTHER SOUND-PRODUCING DEVICE OR ANY DEVICE OR APPARATUS FOR THE REPRODUCTION OR AMPLIFICATION OF THE HUMAN VOICE OR OTHER SOUNDS.

(B) "OUTDOOR PUBLIC PLACE" MEANS A PLACE TO WHICH THE PUBLIC OR A SUBSTANTIAL GROUP OF PERSONS HAS ACCESS OTHER THAN FOR PURPOSES REQUIRING THE USE OF AMPLIFIED SOUNDS, AND INCLUDES, BUT IS NOT LIMITED TO STREETS, ALLEYS, HIGHWAYS, PARKS AND PLAYGROUNDS. IT DOES NOT INCLUDE STADIUM AND OUTDOOR AMPHITHEATRES.

2. A PERSON IS GUILTY OF MISUSE OF A SOUND DEVICE WHEN HE KNOWINGLY, IN, NEAR, OR ADJACENT TO ANY OUTDOOR PUBLIC PLACE:

A. OPERATES A SOUND DEVICE WHICH IS AUDIBLE AT A DISTANCE IN EXCESS OF THREE HUNDRED FEET, OR WHICH UTILIZES MORE THAN FIFTEEN WATTS OF POWER IN THE LAST STATE OF AMPLIFICATION; OR

B. OPERATES A SOUND DEVICE DURING THE PERIOD BETWEEN ONE-HALF HOUR AFTER SUNSET AND ONE-HALF HOUR BEFORE SUNRISE; OR

C. OPERATES A SOUND DEVICE TO COMMUNICATE COMMERCIAL OR BUSINESS ADVERTISING; OR

D. OPERATES A SOUND DEVICE WITHIN THREE HUNDRED FEET OF A SCHOOL, COURTHOUSE OR PLACE OF WORSHIP DURING HOURS OF SCHOOL, COURT OR WORSHIP RESPECTIVELY, OR WITHIN THREE HUNDRED FEET OF A HOSPITAL.

MISUSE OF A SOUND DEVICE IS A CLASS B MISDEMEANOR.

COMMENT

This section finds its inspiration in the statutes proposed by the National Institute of Municipal Law Officers in its Report No. 123 (1948), in a comment at 58 Yale Law Journal 335 (1948), and in the provisions of §435-6.0 of the New York City Administrative Code.

The limitation on hours of operation is phrased in terms drawn from the motor vehicle code rather than in terms of fixed times of day. The distance limitations with respect to certain public buildings are drawn from the provisions above referred to. The definition of prohibited equipment in terms of watts of power rather than decibels follows the approach favored by the NIMLO code and the Yale commentators and avoids difficult problems of measurement and proof; the wattage and distance figures used are those of the NIMLO code. The ban on commercial advertising follows the suggestion of the New York commentator and the practice in New York and appears valid under the principles of Valentine v Christensen, 316 U.S. 52 and Breard v. Alexandria, 341 U.S. 622.

The proposed statute applies to all sound equipment as well as sound trucks, unlike some other statutes. Accordingly, an exemption for stadiums and amphitheatres, etc. has been included.

The validity of statutes imposing restrictions on the time, place, manner and volume of use of sound equipment is well established. See the dictum in Saia v. New York, 334 U.S. 558, 560-61 (1948), and the holdings in Kovacs v. Cooper, 336 U.S. 77 (1949) in Commonwealth v. Geuss, 168 Pa. Super. 22, 76 A.2d 500 affirmed, 368 Pa. 290, 81 A.2d 553, appeal dismissed 342 U.S. 912 (1952). in Chester Branch N.A.A.C.P. v. Chester, 253 F. Supp. 707 (1966), and in Mister Softee of Illinois v. Chicago,

42 Ill. App. 2d 414, 192 N.E.2d 424 (1966). See also the dicta in Cohen v. California, 403 U.S. 15, 21–22 (1971), and Grayned v. City of Rockford, 92 S. Ct. 2294, 2303 (1972).

It is believed that the present approach is as satisfactory as and less cumbersome than the permit system embodied in the NIMLO statute. The need for a provision of statewide applicability is suggested by the recent invalidation of the Baltimore City ordinance and the questionable validity of many similar provisions in other subdivisions.

PART 250: OFFENSES AGAINST PUBLIC SENSIBILITIES

250.00. PUBLIC LEWDNESS

A PERSON IS GUILTY OF PUBLIC LEWDNESS WHEN, IN A PUBLIC PLACE, HE INTENTIONALLY EXPOSES THE PRIVATE OR INTIMATE PARTS OF HIS BODY IN A LEWD MANNER OR COMMITS ANY OTHER LEWD ACT.

PUBLIC LEWDNESS IS A CLASS B MISDEMEANOR.

COMMENT

This provision is taken directly from Section 245.00 of the New York Code.

250.01. PUBLIC DISPLAY OF OBSCENE MATERIAL

A PERSON IS GUILTY OF PUBLIC DISPLAY OF OBSCENE MATERIAL WHEN, WITH KNOWLEDGE OF ITS CHARACTER AND CONTENT, HE DISPLAYS OR PERMITS TO BE DISPLAYED IN OR ON ANY WINDOW, SHOWCASE, NEWSSTAND, DISPLAY RACK, WALL, DOOR, BILLBOARD, DISPLAY BOARD, VIEWING SCREEN, MOVING PICTURE SCREEN, MARQUEE, OR SIMILAR PLACE, IN SUCH MANNER THAT THE DISPLAY IS EASILY VISIBLE FROM OR IN ANY PUBLIC STREET, SIDEWALK, THOROUGHFARE, OR TRANSPORTATION FACILITY, ANY PICTORIAL, THREE-DIMENSIONAL, OR OTHER OBSCENE MATERIAL, AS DEFINED IN SECTION 235.00.

PUBLIC DISPLAY OF OBSCENE MATERIAL IS A CLASS B MISDEMEANOR.

COMMENT

This section is directed at a public display of obscene material, whether or not promotion for pecuniary gain or display to minors is involved. It might be punished under the Part 235 materials on obscenity, but placing it here, in the Part relating to offenses against public sensibilities, emphasizes the reason for its existence—to prevent the obtrusion, in public places, of obscene material

upon those who do not wish to view it. Part 235 prohibits promotion of obscene matter for pecuniary gain or promotion to minors; this Part prohibits offensive public obscene displays. Note that nothing in the proposed code bars private possession of obscene matter by an adult, or the non-commercial display of obscene matter to a willing, adult audience. So, for example, there is nothing to bar a non-profit "museum of obscenity" open to adults only, as long as the advertising for such a museum is not itself obscene.

The section is derived, with some change, from New York section 245.11.

250.05. CRUELTY TO ANIMALS

A PERSON IS GUILTY OF CRUELTY TO ANIMALS WHEN HE INTENTIONALLY:

1. SUBJECTS OR ATTEMPTS TO SUBJECT ANY ANIMAL TO CRUEL MISTREATMENT OR TO DISEASE; OR

2. KILLS OR INJURES OR ATTEMPTS TO KILL OR INJURE ANY ANIMAL BELONGING TO ANOTHER WITHOUT LEGAL PRIVILEGE OR CONSENT OF THE OWNER; OR

3. ABANDONS ANY ANIMAL OVER WHICH HE HAS OWNERSHIP, POSSESSION, CHARGE OR CONTROL.

NOTHING CONTAINED IN SUBDIVISIONS ONE OR TWO OF THIS SECTION SHALL BE DEEMED APPLICABLE TO ACCEPTED VETERINARY PRACTICES AND ACTIVITIES CARRIED ON FOR SCIENTIFIC RESEARCH.

CRUELTY TO ANIMALS IS A CLASS A MISDEMEANOR.

COMMENT

This provision is an altered version of Section 250.35 of the Draft New York Law which was enacted in that State but which was repealed in 1965 in favor of the earlier provisions which were transferred to the Agricultural and Markets Law of that State. As here enacted, three of the first four subsections of the New York Draft Law are retained. New York's second subsection, relating to administration of poison, is unnecessary in view of the remaining provisions, or otherwise overly broad. The fifth subsection relating to cock fighting is deleted since it is understood that there have been several abortive efforts in the Maryland Legislature in recent years to prohibit cock fighting. It is the view of the Commission that the judgment of the General Assembly on this question should be

respected in the drafting of a comprehensive penal law and that any change should come by specific enactment. The exemption provision for veterinary practices and scientific research is drawn from Section 250.11 of the model penal code which is deemed preferable to the complicated licensing provisions of New York law. An example of "legal privilege" referred to in subsection two would be the destruction of stray animals by lawful authority. The word "disease" in subsection one is designed, among other things, to cover attempts to eliminate whole species of animals through infection.

It is contemplated that these provisions will replace the cruelty to animals provisions contained in present Article 27 Sections 59, 60, 62 and 69. The remaining more specific provisions should be transferred to other sections of the Annotated Code with whatever conforming amendments seem appropriate. It should be noted that these provisions would not alter or affect the provisions of law relating to the humane slaughter of livestock contained in Article 27 Section 333 a through d, which also should be transferred to some other appropriate section of the Code.

250.10. FLAG DESECRATION

1. "FLAG," AS USED IN THIS SECTION, MEANS A FLAG, STANDARD, COLOR, ENSIGN, OR SHIELD OF THE UNITED STATES OR OF THIS STATE, OR ANY COPY, PICTURE, OR REPRESENTATION OF ANY OF THEM.

2. A PERSON IS GUILTY OF FLAG DESECRATION WHEN HE KNOWINGLY CASTS CONTEMPT UPON ANY FLAG BY PUBLICLY MUTILATING, DEFACING, DEFILING, BURNING, OR TRAMPLING UPON IT, UNDER CIRCUMSTANCES NOT PROTECTED BY THE FIRST OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OR NOT SPECIFICALLY AUTHORIZED BY THE LAWS OF THE UNITED STATES OR OF THIS STATE.

FLAG DESECRATION IS A CLASS A MISDEMEANOR

COMMENT

This statute derives from the federal flag desecration statute, 18 U.S.C. §700(a), and borrows some ideas from the present Maryland flag desecration subtitle, Article 27, sections 81 ff. The central provision of the Maryland statute, section 83, appears to be unconstitutional insofar as it generally prohibits "casting contempt" upon the flag, other than by specified physical acts of destruction of mutilation. Compare the

Massachusetts statute held unconstitutionally vague in Smith v. Goguen, __U.S.__, 42 U.S. Law Week 4393 (March 25, 1974). For this reason the more specific language of the federal provision is followed.

Even so, a line of cases suggests that to some extent, free speech provisions of the constitution may protect symbolic conduct with respect to the flag. The scope of this possible protection is by no means clear. Authorities having some bearing on this question include the concurring and dissenting opinions in the Smith case and O'Brien v. U.S., 391 U.S. 367 (1968), allowing punishment of draft card burning; Halter v. Nebraska, 205 U.S. 36 (1907), dealing with advertising use of the flag, but sometimes read more broadly; Street v. N.Y., 394 U.S. 76 (1969), refusing to permit application of a state statute to words alone; Radich v. N.Y., 401 U.S. 531 (1971), upholding, by an equally divided court, a state conviction for displaying a sculpture of a phallic symbol wrapped in the American flag; Crosson v. Silver, 319 F. Supp. 1084 (D. Ariz., 1970), indicating that a state may not prohibit flag desecration merely to preserve loyalty or patriotism, in the absence of an interest in preventing breaches of the peace; and Korn v. Elkins, 317 F. Supp. 138 (D. Md., 1970), holding that the Maryland statute cannot be applied to justify prohibition of publication of a student magazine picturing a flag burning on its cover. The draft attempts to prohibit flag desecration to the extent constitutionally permissible

Commercial or advertising use of the flag should be dealt with as a regulatory offense, elsewhere in the Annotated Code. Cf. Article 41, section 91.

250.15. INTERFERENCE WITH A BURIED BODY

1. A PERSON IS GUILTY OF INTERFERENCE WITH A BURIED BODY WHEN HE KNOWINGLY REMOVES OR ATTEMPTS TO DISTURB OR REMOVE ANY DEAD BODY FROM ITS PLACE OF BURIAL IN ANY BURIAL GROUND OR VAULT.

2. IT IS A DEFENSE TO A PROSECUTION UNDER THIS SECTION THAT THE STATE'S ATTORNEY OF THE CITY OR COUNTY IN WHICH SUCH BURIED BODY IS LOCATED HAS AUTHORIZED IN WRITING THE DISTURBANCE OR REMOVAL OF SUCH BODY FOR ANY OF THE FOLLOWING PURPOSES:

(A) ASCERTAINMENT OF THE CAUSE OF DEATH OF THE PERSON WHOSE BODY IS SO REMOVED, OR

(B) REBURIAL, FOR GOOD CAUSE, UPON THE

REQUEST OF THE PERSONAL REPRESENTATIVE OF OR A MEMBER OF THE FAMILY OF THE PERSON WHOSE BODY IS SO REMOVED, OR

(C) REBURIAL IN A BURIAL GROUND OR VAULT, UPON REMOVAL FROM AN ABANDONED CEMETERY.

INTERFERENCE WITH A BURIED BODY IS A CLASS A MISDEMEANOR.

COMMENT

Much activity relating to graveyard desecration is punishable under provisions relating to criminal trespass (sections 140.05 ff.), criminal damage to property (sections 145.00 ff.), or disorderly conduct (section 245.25), but actual disturbance or removal of a buried body is not directly dealt with by those sections. This provision is adapted from Article 27, sections 265 ff., of the Annotated Code of Maryland.

250.20. WRONGFULLY OPENING A LETTER

A PERSON IS GUILTY OF WRONGFULLY OPENING A LETTER WHEN, KNOWING THAT NO PERSON TO WHOM THE LETTER IS ADDRESSED OR DIRECTED HAS CONSENTED TO HIS OPENING IT AND THAT HE IS NOT OTHERWISE AUTHORIZED OR PRIVILEGED TO DO SO, HE INTENTIONALLY OPENS A LETTER ADDRESSED OR DIRECTED TO ANOTHER PERSON OR TO PERSONS OTHER THAN HIMSELF.

WRONGFULLY OPENING A LETTER IS A VIOLATION.

COMMENT

This section is derived from Art. 27, sec. 354, which traces its history back to 1713, before there was any modern postal service. While federal penalties for interference with the mail would be applicable to most cases covered by this section, they would not apply to letters not sent through the mail or to mail after it has reached its destination.

Liability is limited to the defendant who knows that he is not an addressee or otherwise authorized or privileged to open the letter.

PART 255: WEAPONS

INTRODUCTION

One of the most troublesome questions of code reform is the "gun control" issue. There are fundamental questions of policy. Some favor criminalization of virtually all private ownership

or possession of firearms. At the opposite extreme, others, noting that people, not guns, commit crimes, would limit any state control to unlawful use of weapons, or perhaps to barring possession by narrow classes of persons, such as the insane or those convicted previously of crimes involving weapons. Still others favor elaborate licensing provisions for most weapons. Members of the Commission take various positions as to what is desirable, but believe that none of the three positions above mentioned would prove wholly acceptable to people of the State at the present time.

Public fear of crimes of violence committed with firearms is justifiable, and it demands a fairly wide-ranging series of controls, even if this causes some inconvenience or deprivation to law-abiding citizens who would never use their firearms improperly. It is not enough to wait until a weapon is used to commit a violent crime, or until it is clear that it is about to be used; it will then be too late in many cases for society to prevent tradgedy. Yet, prohibitions which are too sweeping are unacceptable. Particularly with the large number of guns in circulation, rather freely available to those disposed to commit crimes, many frightened citizens are simply unwilling to give up what, rightly or wrongly, they regard as necessary protection from intruding criminals. Hunters and hobbyists want to continue their innocent pursuits. A shotgun in the hands of a farmer is not the same thing as a Saturday Night Special in the hands of a drug addict. Elaborate licensing systems for all classes of weapons present difficult administrative and drafting problems — problems which the Commission has not seen satisfactorily resolved in other states.

Indeed, no generally adequate drafting model for a comprehensive weapons code for a state such as Maryland has been found, and what is presented here is partly modeled on the recent handgun legislation in this State, partly on the New York provisions, and partly on our own drafts.

In terms of policy, our general solution has been to divide weapons into two classes. As to the first class of weapons, (including, for example, machine guns) possession and various other conduct is virtually barred, except to persons specially licensed and a few other narrow classes of persons. Handguns, a special sub-class of this group, continue to be governed by a scheme, largely dependent on licensing, like that of the present Maryland law. Regulatory provisons, dealing with

licensing and related matters, have, in accordance with our general policy, been removed from the Criminal Code to a Regulatory Act, which is to be found in Article 27B, § 850, ff. Criminal provisions relating to handguns will be found in section 255.15, and those relating to other weapons in the class in sections 255.05 and 255.10. Exemptions for handguns and other weapons will be found in section 255.20.

The second class includes a broad range of weapons for which the strict controls provided for the first class are unnecessary or impracticable. As to these weapons, only specific conduct has been prohibited. (Such conduct is also prohibited with respect to the first class of weapons.) The relevant section is 255.30.

Special provisions dealing with defaced firearms (section 255.25), dangerous weapons on school property (section 255.35), and firearms or explosives in relation to aircraft (section 255.40) are included.

Punishment: Our punishment scheme is roughly that of the New York Penal Law. First weapons offenses of a minor nature are class A misdemeanors, carrying a maximum prison term of six months; if the defendant is a "prior offender" (defined in section 255.00(5)) the offense is a class D felony, carrying a maximum prison term of seven years. Most of the more serious offenses are Class D felonies except when committed by "prior offenders", when they become class B felonies, punishable by a maximum prison term of fifteen years (with court power to impose a minimum term of up to five years).

For repeating offenders, the provisions of section 70.10 and 70.15 are relevant. Where a specified violent felony (including a weapons felony) is involved, a "crime of violence" is committed. This allows, under the conditions set out in section 70.10, for a ten to thirty year sentence, if the defendant has been previously convicted of two other felonies, at least one of which was another crime of violence. Extended terms for certain third felony offenders are also provided under section 70.15.

It is difficult to compare the sentencing provisons of the Commission's draft with those of the present Maryland statute. The whole scheme of Subtitle E (Sentencing) is different in a number of ways from current provisons. One point of particular interest should be noted, however. Under

the provisions of the draft, only class B felons or "repetitive violent felony offenders" could receive minimum prison terms, and only as to the latter would the trial judge be required to impose a minimum term. The Maryland law as to mandatory minimum terms is uncertain. While there appears to be a number of mandatory minima imposed by Article 27, section 36B(b) of the Maryland Code, it is likely that some or even all of these are affected by the provisions of section 643 (reinacted in 1972), allowing the sentencing judge to impose a lesser penalty of the same character in lieu of any proscribed minimum penalty, wherever a minimum and a maximum are given.

If we take the mandatory minima of section 36B(b) at face value, the Commission draft provides nothing comparable, except in the case of defendants qualifying as repetitive violent felony offenders. This is in accordance with the Commission's belief that minimum sentences should not be lightly imposed or required to be imposed even in such potentially dangerous situations as the carrying of handguns.

In the first place, it is easy to construct a case in which most legislators and judges would not want to impose the mandatory minimum sentence literally required by the present section 36B. Suppose a defendant who has served a prior sentence for carrying a firearm and thereafter led a blameless life, until convincingly threatened with unjustifiable violence by another, at which point he begins to carry without license, a firearm, purely for defensive purposes. If he is caught under circumstances not falling within one of the exceptions set forth in the section, the section appears to require at least a one year minimum sentence. While a judge might find the circumstances appropriate for a jail sentence in some cases of this sort, such a sentence would not always be wise.

In the second place, sentencing for weapons offenses should bear a logical relationship to sentences generally. There is no effective mandatory minimum sentence (for more than one day) in Maryland for carrying an ordinary knife, for threatening another with a knife, or even for killing him with a knife, if the crime be manslaughter, no matter how many times the offense is committed. The reason for this is that, while in most such cases of repetition a jail sentence is appropriate, it is not appropriate in all cases. Despite the seriousness of the gun situation, the same considerations apply.

The draft code allows severe sentences for those who have committed weapons offenses. In some situations, they are more severe than the present law. For example, it increases the sentence for a weapons offender who has within the last five years committed any felony (not merely other weapons offenses). The real need is for a fair and flexible system of punishment and a strong program of enforcement and prosecution.

The Reporter acknowledges with appreciation a number of suggestions made for improving the original draft of the Weapons Part by Messrs. Weldon H. Clark, Jr. (Legislative Chairman, Maryland and D.C. Rifle and Pistol Association, Inc.), Michael J. Parker (attorney), Maurice Gershberg (Vice-President, Garrison Rifle & Revolver Club), and William A. Jackson (Secretary and General Counsel, Fairchild Industries). While not all of these suggestions were adopted, many of them were either accepted as offered or contributed to revisions which, it is hoped, produced a better and more workable draft.

255.00. WEAPONS; DEFINITIONS OF TERMS

THE FOLLOWING DEFINITIONS ARE APPLICABLE TO THIS PART:

1. "DISPOSE OF" MEANS TO ABANDON, GIVE, GIVE AWAY, LEASE, LOAN, KEEP FOR SALE, OFFER, OFFER FOR SALE, SELL, TRANSFER, OR OTHERWISE DISPOSE OF, BUT DOES NOT MEAN TO DESTROY OR TO RENDER UNSUITABLE FOR USE AS A WEAPON WITHOUT SUBSTANTIAL REPAIR, AND DOES NOT INCLUDE VOLUNTARY SURRENDER TO AN AGENCY OF FEDERAL, STATE OR LOCAL GOVERNMENT OR VOLUNTARY RETURN TO A LAWFUL POSSESSOR.

2. "GRAVITY KNIFE" MEANS ANY KNIFE WHICH HAS A BLADE WHICH IS RELEASED FROM THE HANDLE OR SHEATH THEREOF BY THE FORCE OF GRAVITY OR THE APPLICATION OF CENTRIFUGAL FORCE WHICH, WHEN RELEASED, IS LOCKED IN PLACE BY MEANS OF A BUTTON, SPRING, LEVER, OR OTHER DEVICE.

3. "SWITCHBLADE KNIFE" MEANS ANY KNIFE WHICH HAS A BLADE WHICH OPENS AUTOMATICALLY BY HAND PRESSURE APPLIED TO BUTTON, SPRING OR OTHER DEVICE IN THE HANDLE OF THE KNIFE.

4. "BLUNT WEAPON" MEANS ANY CLUB, BILLY, BLACKJACK, BLUDGEON, SANDCLUB, SLUNGSHOT, METAL KNUCKLES, OR DEVICE WHICH IS SPECIALLY ADAPTED, OR THE PRINCIPAL USE OF WHICH IS, WHILE HELD IN THE HAND, TO STRIKE BLOWS AGAINST HUMAN BEINGS, WHICH BLOWS ARE NOT INTENDED, OR NOT INTENDED PRIMARILY, TO CUT OR PUNCTURE THE SKIN.

5. "PRIOR OFFENDER" MEANS A PERSON WHO, NOT BEING SPECIFICALLY AUTHORIZED BY LAW, ADMINISTRATIVE REGULATION OR ORDER, OR COURT ORDER, OR GRANTED ADMINISTRATIVE RELIEF UNDER TITLE 18 U.S.C. §925(E), TO POSSESS A WEAPON, AT A TIME WHEN THE OFFENSE WITH WHICH HE OR ANOTHER PERSON IS NOW CHARGED WAS ALLEGEDLY COMMITTED, EITHER WAS A FUGITIVE FROM JUSTICE OR HAD WITHIN THE NEXT PRECEDING FIVE YEARS EITHER (A) BEEN FINALLY CONVICTED OF A CRIME PUNISHABLE UNDER THE PROVISIONS OF THIS PART OR A CRIME OF VIOLENCE AS DEFINED IN SECTION 70.10(1)(A); OR (B) BEEN RELEASED FROM ANY PENITENTIARY OR OTHER PRISON WHERE HE WAS SERVING A SENTENCE ON ACCOUNT OF AN OFFENSE DESCRIBED IN SUBDIVISION (A) HEREOF.

6. "FIREARM" MEANS ANY LOADED OR UNLOADED PISTOL, REVOLVER, RIFLE, SHOTGUN, OR OTHER WEAPON WHICH WILL OR IS DESIGNED TO OR MAY READILY BE CONVERTED TO EXPEL A PROJECTILE BY THE ACTION OF AN EXPLOSIVE, EXCEPT THAT IT DOES NOT INCLUDE, EXCEPT FOR PURPOSES OF SECTION 255.30(3), AN ANTIQUE FIREARM OR A FIREARM IN PERMANENTLY INOPERABLE CONDITION WHICH IS KEPT AS A CURIO OR MUSEUM PIECE OR FOR EDUCATIONAL PURPOSES.

7. "ANTIQUE FIREARM" MEANS (A) ANY FIREARM (INCLUDING ANY FIREARM WITH A MATCHLOCK, FLINTLOCK, PERCUSSION CAP, OR SIMILAR TYPE OF IGNITION SYSTEM) MANUFACTURED IN OR BEFORE 1898; OR (B) ANY REPLICA OF ANY FIREARM DESCRIBED IN SUBDIVISION (A) IF SUCH REPLICA (I) IS NOT DESIGNED OR REDESIGNED FOR USING RIMFIRE OR CONVENTIONAL CENTERFIRE FIXED AMMUNITION, OR (II) USES RIMFIRE OR CONVENTIONAL CENTERFIRE FIXED AMMUNITION WHICH IS NO LONGER MANUFACTURED IN THE UNITED STATES AND WHICH IS NOT READILY AVAILABLE IN THE ORDINARY CHANNELS OF COMMERCIAL TRADE.

8. "FIREARM SILENCER" MEANS ANY INSTRUMENT, ATTACHMENT, WEAPON OR APPLIANCE FOR CAUSING THE FIRING OF ANY FIREARM TO BE SILENT, OR INTENDED TO LESSEN OR MUFFLE THE NOISE OF THE FIRING OF ANY FIREARM.

9. "MACHINE GUN" MEANS ANY FIREARM FROM WHICH MORE THAN ONE CATRIDGE MAY BE DISCHARGED, AUTOMATICALLY, WITHOUT MANUAL RELOADING, BY A SINGLE FUNCTION OF THE TRIGGER.

10. "HANDGUN" MEANS ANY PISTOL, REVOLVER, OR OTHER FIREARM DESIGNED TO BE HELD AND FIRED BY THE USE OF A SINGLE HAND; THE TERM ALSO INCLUDES A SHORT-BARRELED SHOTGUN AND A SHORT-BARRELED RIFLE.

11. "SHOTGUN" MEANS A FIREARM DESIGNED OR REDESIGNED, MADE OR REMADE, AND INTENDED TO BE FIRED FROM THE SHOULDER AND DESIGNED OR REDESIGNED AND MADE OR REMADE TO USE THE ENERGY OF THE EXPLOSIVE IN A FIXED SHOTGUN SHELL TO FIRE THROUGH A SMOOTH BORE EITHER A

NUMBER OF BALL SHOT OR A SINGLE PROJECTILE FOR EACH SINGLE PULL OF THE TRIGGER. 28237

12. "SHORT-BARRELED SHOTGUN" MEANS A SHOTGUN HAVING ONE OR MORE BARRELS LESS THAN EIGHTEEN INCHES IN LENGTH AND ANY WEAPON MADE FROM A SHOTGUN (WHETHER BY ALTERATION, MODIFICATION, OR OTHERWISE) IF SUCH WEAPON AS MODIFIED HAS AN OVERALL LENGTH OF LESS THAN TWENTY-SIX INCHES. 28239 28240 28241 28242 28243

13. "RIFLE" MEANS A FIREARM DESIGNED OR REDESIGNED, MADE OR REMADE, AND INTENDED TO BE FIRED FROM THE SHOULDER AND DESIGNED OR REDESIGNED AND MADE OR REMADE TO USE THE ENERGY OF THE EXPLOSIVE IN A FIXED METALLIC CARTRIDGE TO FIRE ONLY A SINGLE PROJECTILE THROUGH A RIFLED BORE FOR EACH SINGLE OF THE TRIGGER. 28245 28246 28247 28248 28249 28250

14. THE TERM "SHORT-BARRELED RIFLE" MEANS A RIFLE HAVING ONE OR MORE BARRELS LESS THAN SIXTEEN INCHES IN LENGTH AND ANY WEAPON MADE FROM A RIFLE (WHETHER BY ALTERATION, MODIFICATION, OTHERWISE) IF SUCH WEAPON, AS MODIFIED, HAS AN OVERALL LENGTH OF LESS THAN TWENTY-SIX INCHES. 28252 28253 28254 28255 28256

15. "DEALER" MEANS ANY PERSON ENGAGED IN THE BUSINESS OF SELLING FIREARMS AT WHOLESALE OR RETAIL, OR ANY PERSON ENGAGED IN THE BUSINESS OF REPAIRING SUCH FIREARMS. 28258 28259 28260

16. "APPLICANT" HAS THE SAME MEANING AS IN SECTION 852 OF ARTICLE 27B. 28262 28263

17. "DEFACE" MEANS TO REMOVE, DEFACE, ALTER, OR DESTROY (A) MANUFACTURER'S SERIAL NUMBER, OR (B) ANY IDENTIFICATION MARK PLACED ON A FIREARM BY OR FOR A LAW ENFORCEMENT AGENCY, UNLESS THE IDENTIFICATION MARK IS REMOVED, DEFACED, ALTERED, OR DESTROYED BY THE AGENCY OR AFTER IT HAS LAWFULLY DISPOSED OF THE FIREARM. 28266 28268 28269 28270

18. "DANGEROUS WEAPON" MEANS A KNIFE, DAGGER, RAZOR, NUNCHAKU, BLUNT WEAPON, BOMB OR SIMILAR EXPLOSIVE OR INCENDIARY DEVICE, OR FIREARM, EXCEPT THAT IT DOES NOT, (A) IN SUBSECTIONS 1 OR 2 OF SECTION 255.30 OR IN SECTION 255.35 INCLUDE A KNIFE, DAGGER, OR RAZOR OF A KIND NORMALLY USED LAWFULLY AS A HOUSEHOLD, OCCUPATIONAL, SPORTING, EDUCATIONAL, OR RECREATIONAL INSTRUMENT, OR (B) IN SUBSECTION 1 OR 2 OF SECTION 255.30, WHERE THE PROHIBITED POSSESSOR IS A PERSON WHO (I) IS SUCH SOLELY BECAUSE HE IS UNDER THE AGE OF EIGHTEEN YEARS, AND (II) IS AT LEAST TWELVE YEARS OF AGE, INCLUDE A RIFLE OR SHOTGUN OTHER THAN A SHORT-BARRELED RIFLE OR SHORT-BARRELED SHOTGUN, WHEN SUCH RIFLE OR SHOTGUN IS POSSESSED WITH THE PERMISSION OF A PARENT OR GUARDIAN OF SUCH PERSON. 28272 28273 28274 28275 28276 28277 28278 28279 28280 28281 28282 28283 28284 28285

19. "PROHIBITED POSSESSOR" MEANS A PERSON WHO IS NOT SPECIFICALLY AUTHORIZED BY LAW, ADMINISTRATIVE REGULATION OR ORDER, OR COURT ORDER, TO BE A POSSESSOR, AND WHO IS:

A. A PRIOR OFFENDER; OR

B. A FUGITIVE FROM JUSTICE; OR

C. AN HABITUAL DRUNKARD, OR A PERSON WHO IS VISIBLY UNDER THE INFLUENCE OF ALCOHOL; OR

D. AN ADDICT OR HABITUAL USER OF NARCOTICS, BARBITURATES OR AMPHETAMINES, OR A PERSON WHO IS VISIBLY UNDER THE INFLUENCE OF DRUGS; OR

E. A PERSON WHO, AT A TIME WHEN THE OFFENSE WITH WHICH HE OR ANOTHER PERSON IS NOW CHARGED WAS ALLEGEDLY COMMITTED, (I) HAD, WITHIN THE NEXT PRECEDING FIVE YEARS, SPENT MORE THAN THIRTY CONSECUTIVE DAYS IN ANY MEDICAL INSTITUTION FOR TREATMENT OF A MENTAL DISORDER, AND (II) WAS NOT THEN IN POSSESSION OF A PHYSICIAN'S CERTIFICATE ISSUED SINCE HIS MOST RECENT PERIOD OF THIRTY CONSECUTIVE DAYS IN SUCH INSTITUTION, CERTIFYING THAT HE IS CAPABLE OF POSSESSING A FIREARM OR OTHER DANGEROUS WEAPON WITHOUT UNDUE DANGER TO HIMSELF OR OTHERS; OR

F. A PERSON WHO IS OF UNSOUND MIND; OR

G. A PERSON WHO IS UNDER THE AGE OF EIGHTEEN YEARS.

20. "FUGITIVE FROM JUSTICE" MEANS ANY PERSON WHO HAS ESCAPED FROM A PENAL INSTITUTION OR HAS FLED FROM A SHERIFF OR OTHER PEACE OFFICER WITHIN THIS STATE, OR IN ANY STATE, TERRITORY OR THE DISTRICT OF COLUMBIA, OR POSSESSION OF THE UNITED STATES TO AVOID PROSECUTION OR PUNISHMENT FOR A FELONY OR CRIME PUNISHABLE UNDER THE PROVISIONS OF THIS PART, OR TO AVOID GIVING TESTIMONY IN ANY CRIMINAL PROCEEDING, AND WHO HAS NOT SUBSEQUENTLY RETURNED TO OFFICIAL CUSTODY IN CONNECTION WITH PROSECUTION OR PUNISHMENT OR THE GIVING OF SUCH TESTIMONY.

21. "NUNCHAKU" MEANS A DEVICE, SUITABLE AS A WEAPON FOR CAUSING DEATH OR SERIOUS PHYSICAL INJURY, CONSISTING OF TWO PIECES OF WOOD, METAL OR PLASTIC, OR OTHER LIKE SUBSTANCE, CONNECTED BY CHAIN, ROPE, LEATHER, OR OTHER FLEXIBLE MATERIAL NOT EXCEEDING TWENTY-FOUR INCHES IN LENGTH.

COMMENT

Comments on the definitions in this section

are contained in the material accompanying the sections to which the definitions apply.

255.05. MISCONDUCT WITH RESPECT TO A PROHIBITED WEAPON IN THE SECOND DEGREE

ANY PERSON WHO KNOWINGLY MANUFACTURES, TRANSPORTS OR SHIPS, POSSESSES, OR DISPOSES OR ANY GRAVITY KNIFE, SWITCHBLADE KNIFE, NUNCHAKU, OR BLUNT WEAPON IS GUILTY OF MISCONDUCT WITH RESPECT TO A PROHIBITED WEAPON IN THE SECOND DEGREE.

MISCONDUCT WITH RESPECT TO A PROHIBITED WEAPON IN THE SECOND DEGREE IS A CLASS D FELONY IF THE DEFENDANT IS A PRIOR OFFENDER; OTHERWISE IT IS A CLASS A MISDEMEANOR.

COMMENT

This and the following section deal with weapons which should not ordinarily be available to private citizens. They serve little or no legitimate function as necessary protective devices, nor are they in common use for commercial or recreational purposes. There are a few collectors and hobbyists whose interest are protected by a narrowly drawn exemption. See section 255.20(f). Otherwise, the only significant private use for such weapons is to harm others or to further crime. The crime of misconduct with respect to a prohibited weapon is divided into two degrees, following a division suggested by New York sections 265.05 and 265.10, according to the factors of danger and likelihood of use in criminal enterprise. In both degrees of the crime, the conduct proscribed is the knowing manufacture, transporting or shipping, possessing, or disposing of the weapon (the last defined in section 255.05(1) to include, among other things, transferring or offering to transfer by gifts, sale, or loan). Prohibition of this wide range of conduct is consistent with the policy of keeping weapons of the sort dealt with here out of private hands. (Note that New York (followed in this draft) does not punish the purchase or attempt to purchase such weapons, except as an attempt or solicitation under Parts 100 and 110 of the Code. Punishment would be graded one level below the crime attempted or solicited.)

The weapons dealt with in the present section, which describes the lesser degree of the offense, are gravity knives and switchblade knives, with definitions copied from the New York provisions (see 255.00(2) and (3), following New York Revised Penal Law sections 265.00(5) and (4)), and blunt weapons, newly defined. New York (section 265.05(3)) has a

list of weapons much the same as the "club, billy, blackjack, bludgeon, sandclub, slungshot," and "metal knuckles" specified in draft section 255.00(4), but does not include the concluding general description of a "device which is specially adapted, or the principal use of which is, while held in the hand, to strike blows against human beings, which blows are not intended, or not intended primarily, to cut or puncture the skin." The concluding part of the general description excludes cutting and stabbing instruments, which apart from the gravity and switchblade knives specifically mentioned in the section, have legitimate uses. Not all things could be used as clubs are covered by the section, of coursel the ordinary baseball bat, while it could be used as a club, is neither specifically adapted for striking blows against human beings, nor primarily used for this purpose. The addition of the "nunchaku" (defined in section 255.00(21)) was suggested by the 1974 Laws of Maryland, ch. 718.

Section 255.10, in which the punishments are more severe, contains the general prohibitions relating to bombs, firearm silencers (defined in draft section 255.00(8)), adapted from New York section 265.00(2), and machine guns.

This Part does not deal with the problem of regulation of explosive material generally, which is primarily not a matter of crime control. Article 38A, sections 26ff, of the Maryland Code presently deal with the general problem. Part 255 of the present draft deals only with bombs or bombshells and, in section 255.30(4) with explosives when possessed with intent to be used in specific ways.

The definition of "machine gun" in section 255.00(9) is adapted from chapter 53 of the Internal Revenue Code of 1954, as amended, under the Uniform Machine Gun Act (first enacted in 1933). The Uniform Act does not prohibit outright the possession of machine guns; it punishes only possession or use of a machine gun in the perpetration or attempted perpetration of a (defined) crime of violence or for "an aggressive purpose." There are presumptions as to aggressive purpose and use which may not be constitutional, and various ancillary provisions, including one for registration of machine guns. Since 1934, there has been strict federal regulation of machine guns under chapter 53 of the Internal Revenue Code, and the Uniform Act has become largely obsolete. A registration provision is retained in RA7; criminal penalties, in addition to those provided for in the

following section, are provided for other forms of misconduct with a machine gun. (See sections 255.25 ff.)

The section contains an incidental reference to "firearm" the broad definition of which is adapted from 18 U.S.C.A. 921(a)(3) and appears in section 255.00(6). The definition is so drafted that prohibitions relating to firearms do not include "antique firearms" (defined in section 255.00(7), copied from Article 27, section 36F(a)(1) of the Maryland Code) or firearms in permanently inoperable condition, kept as curios or museum pieces or for educational purposes. Otherwise all loaded or unloaded pistols, revolvers, rifles or shotguns, or other weapons which will or are designed to or may be readily converted to expel a projectile by the action of an explosive are included. (Rifles and shotguns are defined in section 255.00(13) and (11)).

Note that for both sections, a number of exemptions exist. See section 265.20.

For purposes of punishment the crimes in sections 255.05 and 255.10 are graded as class A misdemeanors and class D felonies respectively. However, if the defendant is a "prior offender" the crimes are respectively class D felonies and class B felonies. This reflects the special danger which exists when prohibited weapons are in the hands of serious offenders. A "prior offender" is defined in section 255.05(5) as one who within the five years preceding the offense charged was either convicted of a "crime of violence" (see section 70.10(1)(a)) or a crime under this Part, or was released from or has escaped from prison, where he was serving a sentence on account of such a crime.

255.10. MISCONDUCT WITH RESPECT TO A PROHIBITED WEAPON IN THE FIRST DEGREE

ANY PERSON WHO KNOWINGLY MANUFACTURES, TRANSPORTS OR SHIPS, POSSESSES, OR DISPOSES OF ANY BOMB OR SIMILAR EXPLOSIVE OR INCENDIARY DEVICE, FIREARM SILENCER, OR MACHINE GUN IS GUILTY OF MISCONDUCT WITH RESPECT TO A PROHIBITED WEAPON IN THE FIRST DEGREE.

MISCONDUCT WITH RESPECT TO A PROHIBITED WEAPON IN THE FIRST DEGREE IS A CLASS B FELONY IF THE DEFENDANT IS A PRIOR OFFENDER; OTHERWISE IT IS A CLASS D FELONY.

COMMENT

For an explanation of this section, see the

comment to section 255.05.

255.15. MISCONDUCT WITH RESPECT TO A HANDGUN

1. ANY PERSON WHO:

A. AS A DEALER, SELLS OR TRANSFERS A HANDGUN CONTRARY TO THE PROVISIONS OF SECTION 852 OF ARTICLE 27B; OR

B. AS AN APPLICANT FOR PURCHASE OR TRANSFER, KNOWINGLY OR RECKLESSLY MAKES ANY FALSE STATEMENT OR PROVIDES ANY FALSE INFORMATION IN AN APPLICATION REQUIRED BY SECTION 852 OF ARTICLE 27B; OR

C. KNOWINGLY TRANSPORTS OR SHIPS, WEARS, OR CARRIES A HANDGUN; IS GUILTY OF MISCONDUCT WITH RESPECT TO A HANDGUN.

2. NOTWITHSTANDING THE PROVISIONS OF SUBSECTION (1)(C), CONDUCT IS NOT A VIOLATION OF THIS SECTION IF:

A. THE HANDGUN IS WORN OR CARRIED (I) ON LAND OWNED OR LEASED BY THE DEFENDANT OR A MEMBER OF HIS IMMEDIATE FAMILY; (II) OR AT A BONA FIDE PLACE OR RESIDENCE OF THE DEFENDANT OR A BONA FIDE PLACE OF BUSINESS OPERATED AND SUBSTANTIALLY OWNED OR LEASED BY THE DEFENDANT; OR (III) AT A BONA FIDE PLACE OF BUSINESS OF AN EMPLOYER OF THE DEFENDANT, WHEN THE DEFENDANT IS A SUPERVISORY EMPLOYEE AUTHORIZED BY HIS EMPLOYER TO WEAR OR CARRY SUCH HANDGUN AND ACTING WITHIN THE SCOPT OF HIS EMPLOYMENT; OR (IV) AT A PLACE OF BUSINESS OF A DEALER OR AT A PLACE OF LEGAL PURCHASE OR SALE OF THE HANDGUN; OR (V) AT A BONA FIDE GUN SHOW; OR (VI) AT A LAWFUL SPORTING, RECREATIONAL OR EDUCATIONAL EVENT OR ACTIVITY AT WHICH THE WEARING OR CARRYING OF A HANDGUN SERVES SOME LEGITIMATE PURPOSE IN CONNECTION WITH SUCH EVENT OR ACTIVITY, SUCH AS, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, HUNTING, TRAPPING, FORMAL OR INFORMAL TARGET PRACTICE, A TARGET MATCH, A DRAMATIC PERFORMANCE, A DOG OBEDIENCE TRAINING CLASS OR SHOW, OR A HUNTER SAFETY OR HOME SAFETY CLASS; OR

B. THE HANDGUN IS BEING TRANSPORTED, WHILE UNLOADED AND CARRIED IN A CLOSED CASE, OR IN A HOLSTER CLOSED BY A STRAP, BUTTON-DOWN FLAP, OR COMPARABLE DEVICE, BETWEEN TWO PLACES WHERE SUCH HANDGUN MAY BE LAWFULLY WORN OR CARRIED ACCORDING TO THE PROVISIONS OF SUBDIVISION (A) OF THIS SUBSECTION.

MISCONDUCT WITH RESPECT TO A HANDGUN IS A CLASS D FELONY IF THE DEFENDANT IS A PRIOR OFFENDER; OTHERWISE IT IS A CLASS A MISDEMEANOR.

COMMENT

This section derives primarily from the recent Maryland handgun legislation in Article 27, sections 36B ff, and prior legislation dealing with licensing of sale or transfer of pistols and revolvers in Article 27, section 441ff. The licensing provisions of section 442 are transferred to a Regulatory Act in Article 27B, § 852. Violations of section 852, by "dealers" (the definition in section 255.00(15) is copied from the present section 441(d)) in the unlawful transfer of handguns, or by applicants for transfer in making false statements, are covered by draft section 255.15(1)(a) and (1)(b) respectively. The knowing transporting or shipping, wearing, or carrying of a handgun (under circumstances not excepted by section 255.20) is made a crime by section 255.15(1)(c).

Disposition of a handgun is not itself punished under this subsection, because regulation of the disposition of the many handguns lawfully in circulation is better treated under the special scheme of section 255.30. Manufacture of a handgun is not prohibited by current Maryland law, and it is not prohibited here because (1) such manufacture is already closely controlled by chapter 44 of Title 18 U.S.C.; (2) it is advisable to avoid purely technical violations that may result from the application of state regulation to the hand-fitting and assembly of legally purchased handgun frames by competitive target shooters; and (3) the possession of home-made "zip guns" by youths is prohibited elsewhere (sections 255.30(2) and 255.00(19)(g); see also 255.30(3)).

Subsection (1)(c) of this section should be compared with subsection (3) of section 245.30 (Aggravated Disorderly Conduct), which punishes as a class A misdemeanor the knowing possession at a public meeting of an offensive weapon or any "other article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him." (Certain persons are exempted from the prohibition.) The two provisions are similar but both seem necessary. The Aggravated Disorderly Conduct section creates a more sweeping prohibition, since it does not necessarily require intenton to injure, but it is limited to public gatherings and the like, where it is reasonable to have stricter requirements.

Regulation of the ordinary handgun purchaser continues to be in terms of his wearing or carrying (transporting) handguns (once lawfully obtained), or in terms of the criminal use of handguns specified

in subsequent sections of this Part. Note the exemptions specified in section 265.20 and the places of permitted wearing or carrying specified in section 255.15(2).

The definition of "handgun" in section 255.00(10) is a slight adaptation of phrasing suggested by Michael J. Parker, Esquire, and based on definitions being used in present federal handgun bills. It is a somewhat more precise description of what a handgun actually is than the slightly differing definitions of "handgun" in Article 27, section 36F(a), and "pistol or revolver" in Article 27, section 441(c) (relevant to licensing of transfers), but does not materially change the objects described. A reference to signal, starter, or blank pistols in section 441(c) has been dropped. The definition of handgun entails further definitions of "shotgun," "short-barreled shotgun," "rifle," and "short-barreled rifle" (in sections 255.00(11), (12), (13), and (14)); these are copied or adapted from section 36F. In substance a "handgun" includes any pistol, revolver, short-barreled shotgun, short-barreled rifle, or other firearm designed to be held and fired by the use of a single hand.

Section 255.15(2) provides that, notwithstanding the provisions of subsection (1), certain conduct is not in violation of the section. The description of this non-criminal conduct is derived from the present subsections 36B(c)(3) and (4). In substance subsection (2) allows wearing or carrying a handgun at specified places under specified circumstances, and it allows transportation of handguns, while unloaded and carried in an enclosed holster or case, between two specified places where they may be lawfully worn or carried. The effect of the draft is to liberalize slightly the circumstances in which handguns may be worn or carried. There is no change in substance as to wearing or carrying a handgun at the defendant's residence, place of business, employer's place of business, or at land owned or leased by the defendant, but the draft also allows wearing or carrying at land owned or leased by a member of defendant's family. (Usually, but not always, such a place would be included anyway as the residence, place of business, or employer's place of business of the defendant.) The suggestions of Mr. Parker and of Mr. Weldon H. Clark, Legislative Chairman of the Maryland and D.C. Rifle and Pistol Association, Inc., have contributed to the revision and slight expansion of the list of sporting or recreational events and activities at which handguns may be worn

or carried.

Note also the exemptions relating to handguns and other weapons in section 255.20.

The punishment scheme for misconduct with respect to handguns is similar to the scheme for section 255.05, the comment to which section should be consulted.

255.20. MISCONDUCT WITH RESPECT TO A PROHIBITED WEAPON OR HANDGUN; EXEMPTIONS

1. "PROHIBITED WEAPON" MEANS A GRAVITY KNIFE, SWITCHBLADE KNIFE, NUNCHAKU, BLUNT WEAPON, BOMB OR SIMILAR EXPLOSIVE OR INCENDIARY DEVICE, FIREARM SILENCER, OR MACHINE GUN.

2. SECTION 255.05, 255.10, AND 255.15(1)(C) SHALL NOT APPLY TO:

A. THE MANUFACTURE, TRANSPORTING OR SHIPPING, OR POSSESSION OF A PROHIBITED WEAPON AS MERCHANDISE BY A MANUFACTURER OR DEALER THEREIN, WHEN (I) IN THE CASE OF A MANUFACTURER, SUCH MANUFACTURER IS CURRENTLY REGISTERED ACCORDING TO THE PROVISIONS OF TITLE 26 U.S.C. §5802, AND SUCH CONDUCT IS INCIDENTAL TO THE CARRYING ON IF ITS BUSINESS AS MANUFACTURER; OR (II) IN THE CASE OF A MANUFACTURER OR DEALER, SUCH MATERIAL IS INTENDED SOLELY FOR, AND, WHEN TRANSPORTED OR SHIPPED, IS TRANSPORTED OR SHIPPED DIRECTLY TO A DEALER OR A REGULARLY CONSTITUTED OR APPOINTED STATE OR MUNICIPAL POLICE DEPARTMENT OR POLICE OFFICER, OR A DETENTION FACILITY AS DEFINED IN SECTION 205.00(1), OR THE MILITARY SERVICE OF THIS OR ANOTHER STATE OF THE UNITED STATES, OR A MUSEUM OR EDUCATIONAL INSTITUTION SPECIFIED IN SUBDIVISION (2)(E), OR A TRANSFEREE TO WHOM THE WEAPON HAS BEEN PROPERLY REGISTERED ACCORDING TO THE PROVISIONS OF TITLE 26 U.S.C. §5841(B); OR

B. THE TRANSPORTING OR SHIPPING OR DISPOSITION OF A HANDGUN AS MERCHANDISE OR AS MATERIAL FOR REPAIR BY A MANUFACTURER OR DEALER, LICENSED UNDER SECTION 853 OF ARTICLE 27B, WHEN SUCH HANDGUN IS INTENDED FOR LAWFUL SALE OR DISPOSITION DIRECTLY TO A DEALER LICENSED UNDER SECTION 853 OF ARTICLE 27B. OR TO A PURCHASER OR TRANSFEREE UNDER SECTION 852 OF ARTICLE 27B, OR TO A REGULARLY CONSTITUTED OR APPOINTED STATE OR MUNICIPAL POLICE DEPARTMENT OR POLICE OFFICER, OR TO A DETENTION FACILITY AS DEFINED IN SECTION 205.00(1), OR TO THE MILITARY SERVICE OF THIS OR ANOTHER STATE OR OF THE UNITED STATES OR A MEMBER THEREOF, OR, IN THE CASE OF A HANDGUN WHICH IS POSSESSED FOR PURPOSES OR REPAIR BY A MANUFACTURER OR DEALER, TO THE PERSON WHO PRESENTED IT FOR REPAIR OR ONE LAWFULLY ENTITLED TO ITS POSSESSION; OR

C. THE REGULAR AND ORDINARY TRANSPORT OF A PROHIBITED WEAPON OR HANDGUN AS MERCHANDISE BY A COMMON CARRIER OR CONTRACT CARRIER; OR

D. THE TRANSPORTING OR SHIPPING, POSSESSION, WEARING OR CARRYING, OR DISPOSITION OF A PROHIBITED WEAPON OR HANDGUN, PURSUANT TO FEDERAL OR STATE LAW, REGULATION, OR ORDER, BY (I) A PERSON IN THE MILITARY SERVICE OF THE STATE OF MARYLAND, A POLICE OFFICER, OR AN EMPLOYEE OF A DETENTION FACILITY AS DEFINED IN SECTION 205.00(1); OR (II) A PERSON IN THE MILITARY OR OTHER SERVICE OF THE UNITED STATES; OR

E. THE TRANSPORTING OR SHIPPING, POSSESSION, OR DISPOSITION OF A PROHIBITED WEAPON OR HANDGUN, BY A MUSEUM AS A PART OF ITS COLLECITON OR AN EDUCATIONAL INSTITUTION FOR EDUCATIONAL PURPOSES OR BY AN AUTHORIZED EMPLOYEE OF SUCH MUSEUM OR INSTITUTION, IF (I) SUCH MUSEUM OR INSTITUTION IS OPERATED BY THE UNITED STATES OR THE STATE OF MARYLAND OR A POLITICAL SUBDIVISION THEREOF, OR BY AN ORGANIZATION DETERMINED BY THE UNITED STATES INTERNAL REVENUE SERVICE TO BE AN ORGANIZATION DESCRIBED IN SECTION 170(C) OF TITLE 26 OF THE UNITED STATES CODE AS A RECIPIENT OF A CHARITABLE CONTRIBUTION, AND (II) REASONABLE PRECAUTIONS ARE TAKEN WITH RESPECT TO THEFT OR MISUSE OF SUCH MATERIAL; OR

F. THE TRANSPORTING OR SHIPPING, POSSESSION, OR DISPOSITION OF A GRAVITY KNIFE, SWITCHBLADE KNIFE, NUNCHAKU, OR BLUNT WEAPON WHEN (I) SUCH CONDUCT IS INCIDENTAL TO DEALING WITH THE SAID MATERIAL SOLELY AS A CURIO, ORNAMENT, OR KEEPSAKE; AND (II) REASONABLE PRECAUTIONS ARE TAKEN WITH RESPECT TO THEFT OR MISUSE OF SUCH MATERIAL; OR

G. A PROHIBITED WEAPON OR HANDGUN ACQUIRED BY A PERSON OTHERWISE THAN BY INTENTIONALLY TAKING, PURCHASING, OR EXCHANGING, OR BY INTER VIVOS GIFT, AS, FOR EXAMPLE, BY OPERATION OF LAW, OR IN A FIDUCIARY CAPACITY AS THE PROPERTY OR FORMER PROPERTY OF AN INSOLVENT, INCAPACITATED, OR DECEASED PERSON, IF SUCH PERSON (I) DOES NOT KNOWINGLY RETAIN SUCH MATERIAL FOR A PERIOD EXCEEDING THIRTY DAYS WITHOUT, DURING SUCH THIRTY DAY PERIOD, APPLYING FOR INSTRUCTIONS AS TO ITS DISPOSITION TO A COURT HAVING JURISDICTION OVER THE PROPERTY OR TO THE SUPERINTENDENT OF THE MARYLAND STATE POLICE, AND (II) DOES NOT FAIL TO COMPLY WITH SUCH INSTRUCTIONS, AND (III) DOES NOT WEAR, CARRY, OR DISPOSE OF SUCH MATERIAL OTHERWISE THAN ACCORDING TO SUCH INSTRUCTIONS; OR

H. THE POSSESSION OR TRANSPORTING OR SHIPPING OF A PROHIBITED WEAPON OR HANDGUN ACQUIRED BY FINDING OR TAKING FROM AN AGGRESSOR, TO THE EXTENT AND

FOR THE TIME REASONABLY NECESSARY TO SURRENDER IT TO AN AGENCY OF FEDERAL, STATE, OR LOCAL GOVERNMENT, OR, WHERE IT IS PRACTICABLE TO DO SO SOONER, TO RETURN IT SAFELY TO A PERSON WHO MAY LAWFULLY POSSESS IT; OR

I. A HANDGUN, WHEN THE DEFENDANT HAS BEEN ISSUED A PERMIT, THEN IN EFFECT, TO WEAR, CARRY, OR TRANSPORT A HANDGUN UNDER SECTION 854 OF ARTICLE 27B, AND THE HANDGUN IS BEING WORN, CARRIED, OR TRANSPORTED IN ACCORDANCE WITH SUCH PERMIT; OR

J. A MACHINE GUN WHICH IS (I) DULY REGISTERED UNDER TITLE 26 U.S.C., §5841, TO THE PERSON IN POSSESSION THEREOF, AND (II) IF BROUGHT INTO THIS STATE OR DELIVERED TO HIM OR ACQUIRED BY IN THIS STATE MORE THAN SEVENTY-TWO HOURS PREVIOUSLY, IS DULY REGISTERED TO THE PERSON IN POSSESSION UNDER SECTION 857 OF ARTICLE 27B, AND (III) IS, WHEN NOT IN USE, STORED WITH ITS BOLT OR OTHER VITAL PARTS SECURED IN A BANK SAFETY DEPOSIT BOX OR OTHER PLACE APPROVED FOR STORAGE BY THE SUPERINTENDENT OF THE MARYLAND STATE POLICE, PURSUANT TO SECTION 857 OF ARTICLE 27B.

3. AN EXEMPTION SPECIFIED IN THIS SECTION IS AN AFFIRMATIVE DEFENSE.

COMMENT

This section contains a number of exemptions relating to the manufacture, transporting or shipping, possession, wearing or carrying, and disposition of some or all of the weapons regulated by the preceding three sections. The subdivisions of section two are, except in three instances, applicable to all of such weapons. Subdivisions (2)(a) and (2)(b) might have been placed respectively with the first two and with the third of the preceding sections, to which they apply, but they are sufficiently similar in scope so that it seems clearer to place them together here. Subdivision (2)(j), relating only tc handguns, is placed in this section rather than in section 255.15 because of the possibility that a similar licensing scheme for carrying other weapons may be enacted at some later date; if so, amendments to carry out such a scheme will be simpler under the present arrangement. Note that as to all of the exemptions, the defendant, under subsection (3), has the burden of persuasion.

Conduct by a manufacturer or dealer: Subdivisions (2)(a) and (2)(b), adapted from New York section 265.20(7), protect the legitimate conduct of ma ufacturers of and dealers in generally prohibited weapons and handguns, specifying the

persons to whom they may be shipped (limited generally to other dealers, governmental authorities, and museums or educational institutions, or in the case of handguns, to persons who take under a license). Subdivision (2)(a)(i) allows a manufacturer registered under chapter 53 of the Internal Revenue Code (relating to machine guns, destructive devices, and certain other firearms), who is adequately controlled by federal law, to engage in conduct incidental to its business. Handguns are treated in a separate subdivision because of the special related State licensing provisions.

Conduct by a transporter: Subdivision (2)(c) is adapted from New York section 265.20(8) and exempts the proper transporting of the weapons.

Conduct by governmental authorities: Subdivision (2)(d) adapted from New York section 265.20(1)(a) and (b) and 265.20(2), exempts the stated federal and state and military, police, detention facility, and other personnel.

Conduct by museums and educational institutions: Subdivision (2)(e), exempting conduct of defined museums and educational institutions, is new, but seems required under any system which prohibits generally the possession of weapons. The limitation to governmental institutions or institutions qualifying as charities under the Internal Revenue Code is designed to prevent illicit stockpiling of weapons by pretended museums or schools, or by private individuals operating colorable museums. Note the requirement that reasonable precautions be taken with respect to theft or misuse of weapons held by qualifying institutions.

Conduct by keepers of certain weapons as curios, etc.: Subdivision (2)(f) was suggested by the proposed Revised Texas Penal Code, §46.03 (Final Draft, Oct., 1970). A number of people have war souvenirs or similar knives or blunt weapons, kept as curios or keepsakes. If reasonable precautions are taken, they probably do not present any significant danger, and it would appear impracticable to use a licensing system, such as used for handguns. This section provides a limited exemption for such situations.

Conduct by certain fiduciaries and the like: Subdivision (2)(g) is also new, but logically required to exempt those who, for example, acquire weapons as executors or administrators. Such people

are to apply for instructions for disposition to an appropriate court or to the State Police, and are protected if they do so promptly and follow the instructions received.

Conduct by finders, etc.: Subdivision (2)(h) was also suggested by the proposed Revised Texas Penal Code, §46.03. Unlike the people described in the previous subsection, finders and those who take weapons from aggressors are not essentially passive recipients, but they may be justified in coming into possession of weapons. This subdivision allows them to retain possession briefly, with a view to returning the weapon to a government agency or lawful possessor. Such disposition of the material is not punishable because of the limitations in the definition of "dispose of" in section 255.00(1).

Handgun permits: Article 27, section 36E, of the Maryland Code, setting up a system of permits for carrying handguns, has been transferred in the draft to section 854 of the Regulatory Act. Subdivision (2)(i) of section 255.20 exempts conduct which is allowed by such a permit.

Machine gun registrants: Subdivision (2)(j) provides an exemption for persons authorized under federal law to possess machine guns. A number of persons have been so authorized to possess machine guns in collections or for research, educational, or historical purposes. Blanket prohibitions under State law would deprive these persons of legitimate activities, and, in some cases, of substantial investments. Since the acquisition, possession, transportation, and manufacture of machine guns is closely controlled federally (chapter 44 of Title 18 and chapter 53 of Title 26, U.S.C.), a State licensing requirement (see section 857 of the Regulatory Act), together with provisions demanding reasonable care to prevent such weapons from falling into unauthorized hands, suffices to avoid any significant danger. The exemption requires that the bolt of the machine gun be kept secured when not in use. (State registration provisions are similar to those now existing under the Uniform Machine Gun Act, Art. 27, sections 372 ff.)

255.25. MISCONDUCT WITH RESPECT TO A DEFACED FIREARM

1. ANY PERSON WHO:

A. KNOWINGLY DEFACES A FIREARM; OR

B. POSSESSES A DEFACED FIREARM;

IS GUILTY OF MISCONDUCT WITH RESPECT TO A DEFACED FIREARM.

2. IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER SUBDIVISION (1)(B) THAT:

A. THE DEFENDANT DID NOT KNOW THAT THE FIREARM WAS DEFACED; OR

B. THE DEFENDANT INTENDED TO SURRENDER THE DEFACED FIREARM TO THE POLICE AND HAD NOT UNREASONABLY NEGLECTED SO TO SURRENDER IT OR UNREASONABLY DELAYED IN SO SURRENDERING IT AFTER DISCOVERY THAT IT WAS DEFACED.

MISCONDUCT WITH RESPECT TO A DEFACED FIREARM IS A CLASS D FELONY IF THE DEFENDANT IS A PRIOR OFFENDER; OTHERWISE IT IS A CLASS A MISDEMEANOR.

COMMENT

This provision was suggested by New York section 265.05(8). The definition of "deface" in the draft section 255.00(17) is somewhat narrower than the corresponding provision of New York section 265.00(6), and limits itself to marks which, as a practical matter are used for identification purposes by law enforcement agencies. The obliteration of identifying numbers or marks on weapons to disguise their origin indicates a professsional criminal enterprise of considerable danger to society and justifies severe punishment. Since it would often be difficult or impossible to show plainly that one in possession of a defaced weapon either did the defacing himself or knowingly obtained a defaced weapon, the burden of persuasion is placed on the defendant to show the unlikely fact that he was unaware that his weapon was defaced.

The crime is ordinarily a class A misdemeanor, but, unlike other offenses in this part (see the comment to section 255.05) it becomes a class D felony when committed by a prior offender. It is unnecessary to provide even more severe penalties for possession of a defaced machine gun, since the possession penalties themselves for machine guns are severe enough and the exemptions for the possession offense are narrow.

255.30. MISCONDUCT WITH RESPECT TO A DANGEROUS WEAPON OR OTHER WEAPON

ANY PERSON WHO:

1. DISPOSES OF A DANGEROUS WEAPON TO A PERSON WHOM HE KNOWS OR SHOULD KNOW TO BE A PROHIBITED

POSSESSOR; OR

2. BEING A PROHIBITED POSSESSOR, KNOWINGLY PURCHASES, OBTAINS, OR POSSESSES A DANGEROUS WEAPON; OR

3. CARRIES, WEARS, TRANSPORTS, OR POSSESSES A DANGEROUS WEAPON OR ANY WEAPON, INSTRUMENT, ARTICLE, OR SUBSTANCE WHICH IS OR APPEARS TO BE READILY CAPABLE OF CAUSING DEATH OR SERIOUS PHYSICAL INJURY, WITH INTENT TO USE SUCH DANGEROUS WEAPON OR OTHER WEAPON UNLAWFULLY TO CAUSE DEATH, SERIOUS PHYSICAL INJURY, OR FEAR OF DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER; OR

4. CARRIES, WEARS, OR TRANSPORTS A DANGEROUS WEAPON WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS; IS GUILTY OF MISCONDUCT WITH RESPECT TO A DANGEROUS WEAPON OR OTHER WEAPON.

MISCONDUCT WITH RESPECT TO A DANGEROUS WEAPON OR OTHER WEAPON IS A CLASS D FELONY IF THE DEFENDANT IS A PRIOR OFFENDER; OTHERWISE IT IS A CLASS A MISDEMEANOR.

COMMENT

Prior sections in this Part have provided for sweeping prohibitions with respect to some weapons and for a licensing scheme as to handguns. The function of this section is to deal with a very broad class of weapons or potential weapons, many of them capable of innocent use. It is impracticable to prohibit or license many of them. But it is possible to prohibit narrow classes of conduct of a potentially dangerous nature with respect to them. Various sections of the Maryland and New York codes have provisions of this sort. See, for example, in New York, sections 265.05(7) (explosives), 265.05(9) (weapons possessed with intent to use unlawfully), and 265.10(5) (disposition to juveniles). For current Maryland provisions, see Article 27, section 36 (concealed weapons; weapons carried openly with intent to injure), 36B (use of handgun in certain crimes), and 488 (robbery with dangerous or deadly weapon). This draft section is however essentially new in its generality.

The first two subsections deal with a fairly broad class of weapons, defined as "dangerous weapons" in section 255.00(18). (This definition is deliberately different from the definitions for "deadly weapon" and "dangerous instrument" in section 10.00(11) and (12), which are not suitable for the purpose of this section.) These "dangerous weapons" include, with one exception to be noted later, all of the weapons (but not firearm silencers, which are not themselves weapons)

specified previously in the sections of this Part, most of which carry definitions in section 255.00: gravity knives, switchblade knives, blunt weapons, bombs or bombshells, and firearms (including machine guns, handguns, and other firearms). In addition, "dangerous weapons" include knives, daggers, and razors, not of a kind normally used as household, occupational, sport, educational, or recreational instruments – in other words, any knifelike object, not normally having a legitimate use.

As to "dangerous weapons", the following conduct is forbidden: they may not be disposed of to, obtained by, or possessed by certain classes of people as to whom the risk of dangerous conduct with respect to weapons seems high. These people are defined as "prohibited possessors" in section 255.00(19), and include "prior offenders" (see 255.00(5), "fugitives from justice" (defined in 255.00(20) to include escapees from detention facilities and those who have fled from police officers to escape prosecution or punishment for a felony or crime prohibited by this Part, or to avoid giving testimony), habitual drunkards or narcotics addicts or persons visibly under the influence of alcohol or drugs, persons within the last five years institutionalized for the treatment of mental disorder (with some limitations), or persons of unsound mind, and persons under the age of eighteen years. "Prohibited possessors" form a class similar to the class of persons described in section 852 of Article 27B in relation to sales of handguns by dealers and section 853 of Article 27B in relation to dealers in handguns. In effect the restrictions as to disposition appropriate to sales of handguns by dealers are extended to the transfer of "dangerous weapons" generally, whether or not by dealers. (Note that the provisions of section 5.40 in effect bar double prosecution for offenses under this section and offenses involving the Regulatory Act.) There is an exception to this broad prohibition as to rifles and shotguns (other than short-barreled rifles and shotguns), possessed by one who is a "prohibited possessor" solely because of age, and who is at least twelve years of age and has the permission of a parent or guardian.

It should be noted that in two respects the "prohibited possessors" of subsections (1) and (2) form smaller sub-classes than are provided under the Federal Gun Control Act of 1968: (1) The draft's "prior offender" includes one who, at the time of his offense, had, within the next preceding five years, been convicted of a crime of violence (roughly, felonies of homicide, kidnapping, assault,

rape, sodomy, arson, robbery, burglary of a dwelling, weapons offenses, and other felonies involving actual or threatened use of a deadly weapon or actual or threatened serious physical injury), or had been released from prison after serving a sentence for a crime of violence. The corresponding federal provisions (see, e.g., title 18 U.S.C., §922(h); 18 U.S.C. (Appendix), §1202(a)) speak of one who is under indictment for (under §922 only) or who has been convicted of a crime punishable by imprisonment for more than one year, other than offenses pertaining to anti-trust violations, unfair trade practices, restraints of trade, and the like, or other than state offenses which are classified by the state as misdemeanors and punishable by imprisonment for two years or less, and are not offenses involving firearms or explosives. Administrative relief may be granted under §925(c) in certain cases. The federal language covers a wider range of offenses and has no five year cut-off provision. (2) The draft's mental illness provision makes a "prohibited possessor" of one who has, within the preceding five years, spent more than thirty consecutive days in any medical institution for treatment of a mental disorder unless he has a physician's certificate. The federal provisions speak, under §922, of one who has been adjudicated as a mental defective or who has been committed to any mental instituion (construed strictly in U.S. v. Hansel, 474 F.2d 1120 (C.A.8, 1973), so as not to include a sufferer from mental disease who was not a defective and had merely been ordered hospitalized for observation; but construed as not limited to one who was then defective or under an order of commitment in U.S. v. Buffaloe, 449 F.2d 779 (C.A.4, 1971)), and, under §1202, of one who has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent. The federal provisions are narrower, in that they do not cover all voluntary mental patients who have been hospitalized for thirty consecutive days, but broader, in that there is no five year cut-off period. There is no administrative relief provision. (The present Maryland classes also differ from the federal provisions.) The draft provisions seem sounder than the federal ones. It should be noted that the federal and State provisions do not cover the same conduct. The prohibitions in title 18, §922 relate to federal licensees (importers, dealers, manufacturers, and collectors) and to transactions in or closely relating to interstate or foreign commerce; the provisions of §1202 are also limited to conduct in or affecting interstate or foreign commerce. As a

practical matter, all dealers are federal licensees, but purely private intrastate transactions are not covered. Many of the transactions covered in §255.30 would not be affected at all by the federal statute. Wherever the federal prohibition is applicable and broader, it would of course control, but it is questionable whether it is desirable to adhere for all cases to the federal standard.

As to the significance of the prior offender categories for the purpose of increasing sentence here and in other sections of this Part, this judgment surely can be formed independently from the federal standard.

The third subsection applies not only to the "dangerous weapons" previously described, but to any weapon, instrument, article or substance which is or appears to be readily capable of causing death or serious physical injury. The carrying, wearing, transporting or possessing of such an instrument with intent to use it unlawfully or cause death or serious physical injury, or fear of such, is penalized. (As in New York, no special significance is attached to the carrying of the difficult to define "concealed" weapon.) While the intent specified may often be difficult to establish, it should be recalled that other sections in the Part punish conduct, not involving proof of such an intent, with respect to the most common kinds of offensive weapons. The potential weapons included only in this subsection are capable of substantial innocent use, and it is proper to require proof of intent for punishment.

The fourth subsection prohibits carrying, wearing, or transporting a dangerous weapon while under the influence of alcohol or drugs. The provision is broader than Article 27, section 36E(k), which applies only to handguns.

Subsections (3) and (4) should be read in connection with a number of other provisions of this draft code which make the possession of weapons an aggravating factor. See, e.g., Part 120 (Assault and Related Offenses), passim; section 130.20 (Rape in the first degree); section 140.25 (Burglary in the second degree); and section 160.15 (Robbery in the first degree).

Punishment grading is similar to the scheme explained in the comment to section 255.05.

255.35. MISCONDUCT WITH RESPECT TO A DANGEROUS WEAPON ON PUBLIC SCHOOL PROPERTY

1. ANY PERSON WHO KNOWINGLY CARRIES A DANGEROUS WEAPON ON PUBLIC SCHOOL PROPERTY IN THIS STATE IS GUILTY OF MISCONDUCT WITH RESPECT TO A DANGEROUS WEAPON ON PUBLIC SCHOOL PROPERTY.

2. IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER THIS SECTION THAT THE DEFENDANT WAS ACTING IN THE COURSE OF HIS DUTY AS A PERSON HIRED BY THE BOARD OF EDUCATION IN THE COUNTY OR IN WHICH THE PUBLIC SCHOOL IS LOCATED, SPECIFICALLY FOR THE PURPOSE OF GUARDING PUBLIC SCHOOL PROPERTY, OR IN THE COURSE OF HIS DUTY AS A POLICE OFFICER.

3. IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER THIS SECTION THAT THE DEFENDANT WAS AN INSTRUCTOR FOR OR A MEMBER OF A CURRICULAR OR EXTRA-CURRICULAR PROGRAM, SPECIFICALLY APPROVED BY THE PUBLIC SCHOOL, UNDER WHICH PROGRAM THE CONDUCT OF THE DEFENDANT WAS AUTHORIZED BY THE SCHOOL.

MISCONDUCT WITH RESPECT TO A DANGEROUS WEAPON ON PUBLIC SCHOOL PROPERTY IS A CLASS E FELONY.

COMMENT

This section is proposed on account of the special Maryland revisions relating to deadly weapons and handguns on public school property. (See Article 27, Section 36A and 36B.) A special danger exists, justifying special treatment. Some of the acts specified here could be punished more severely under other, overlapping provisions of this Part, but this section assures that the carrying of a "dangerous weapon" (defined in 255.00(15) and explained in the comment to section 255.30) on public school property is at least a class E felony, unless the weapon is carried by a police officer of special guard, or unless it is carried as a part of an authorized school program. The provision for authorized school programs is new. It is designed to permit such things as weapons safety classes (conducted by persons other than police officers in the course of their duties) the use of weapons in school plays.

255.40. MISCONDUCT WITH RESPECT TO A FIREARM OR EXPLOSIVE IN RELATICN TO AIRCRAFT

1. ANY PERSON WHO KNOWINGLY CARRIES ON OR ABOUT HIS PERSON A FIREARM OR EXPLOSIVE WHILE ABOARD OR WITH INTENT TO BOARD AN AIRCRAFT ENGAGED IN CERTIFICATED AIR COMMERCE SERVICES IS GUILTY OF MISCONDUCT WITH RESPECT TO A FIREARM OR EXPLOSIVE IN RELATICN TO AIRCRAFT.

2. IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER THIS SECTION THAT THE DEFENDANT'S CONDUCT WAS AUTHORIZED BY STATE OR FEDERAL LAW OR REGULATION.

3. NOTHING IN THIS SECTION SHALL AUTHORIZE ANY ACTION INCOMPATIBLE WITH, OR LIMIT ANY ACTION AUTHORIZED BY, PROVISIONS OF FEDERAL LAW OR REGULATIONS.

MISCONDUCT WITH RESPECT TO A FIREARM OR EXPLOSIVE IN RELATION TO AIRCRAFT IS A CLASS C FELONY.

COMMENT

This section is taken with no substantial change from Article 27, section 36A—1.

WEAPONS — REGULATORY ACT

INTRODUCTION

The Regulatory Act consists of provisions for licensing handgun dealers, transfer of handguns by dealers, handgun permits (for carrying handguns), seizure and forfeiture of weapons, and limited search. These provisions are adapted from material formerly in Article 27 of the Maryland Code. Since they are primarily regulatory rather than criminal, they are recommended for transfer. Some of the provisions should be incorporated into any new code of criminal procedure.

In general policy matters have not been reviewed in connection with material in the Regulatory Act. Provisions are often taken as they now exist; sometimes they are rearranged for clarity, or modified to make them fit better with the related criminal provisions.

851. DEFINITIONS OF TERMS

DEFINITIONS IN PARTS 10 AND 255 OF THE CRIMINAL CODE ARE APPLICABLE TO THIS REGULATORY ACT.

COMMENT

This is merely a definitional section, and it illustrates the close relation between the Regulatory Act and Part 255 of the Criminal Code. Definitions in Part 255 which are applicable to the Regulatory Act are discussed in comments to Part 255.

852. SALE OR TRANSFER OF HANDGUNS BY DEALERS

1. A DEALER SHALL REQUIRE A PROSPECTIVE PURCHASER

OR TRANSFEREE, OTHER THAN ANOTHER DEALER LICENSED UNDER SECTION 853, OF ANY HANDGUN TO BE SOLD OR TRANSFERRED BY THE DEALER TO EXECUTE IN TRIPLICATE AN APPLICATION TO PURCHASE OR TRANSFER, WHICH APPLICATION SHALL CONTAIN, IN ADDITION TO THE NAME AND ADDRESS OF THE DEALER:

A. THE FOLLOWING INFORMATION TO BE FURNISHED BY THE PROSPECTIVE PURCHASER OR TRANSFEREE:

I. APPLICANT'S NAME, ADDRESS, OCCUPATION, SOCIAL SECURITY ACCOUNT NUMBER, MARYLAND DRIVER'S LICENSE NUMBER (IF LICENSED TO DRIVE IN THIS STATE), HOME AND BUSINESS TELEPHONE NUMBER (IF ANY), PLACE AND DATE OF BIRTH, HEIGHT, WEIGHT, RACE, EYE AND HAIR COLOR, AND SIGNATURE. IN THE EVENT THE APPLICANT IS A CORPORATION, THE APPLICATION SHALL BE COMPLETED AND EXECUTED BY A CORPORATE OFFICER WHO IS A RESIDENT OF THE JURISDICTION IN WHICH THE APPLICATION IS MADE; AND

II. A STATEMENT BY THE APPLICANT THAT HE:

A. IS NOT UNDER INDICTMENT FOR, AND, EITHER (1) HAS NOT BEEN CONVICTED IN ANY COURT OF A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR, OTHER THAN A FEDERAL OR STATE OFFENSE PERTAINING TO ANTI-TRUST VIOLATION, UNFAIR TRADE PRACTICE, RESTRAINT OF TRADE, OR OTHER SIMILAR OFFENSE RELATING TO THE REGULATION OF BUSINESS PRACTICES AS THE SECRETARY OF THE TREASURY MAY BY REGULATION DESIGNATE PURSUANT TO TITLE 18 U.S.C., §921(A)(20), OR OTHER THAN A STATE OFFENSE WHICH DOES NOT INVOLVE A FIREARM OR EXPLOSIVE AND WHICH IS CLASSIFIED BY THE LAWS OF THE STATE AS A MISDEMEANOR AND PUNISHABLE BY A TERM OF TWO YEARS OR LESS, OR (2) HAS BEEN GRANTED ADMINISTRATIVE RELIEF PURSUANT TO TITLE 18 U.S.C., §925(C); AND

B. IS NOT A FUGITIVE FROM JUSTICE; AND

C. IS NOT AN HABITUAL DRUNKARD; AND

D. IS NOT AN ADDICT OR AN HABITUAL USER OF NARCOTICS, BARBITURATES OR AMPHETAMINES; AND

E. HAS NOT BEEN ADJUDICATED AS A MENTAL DEFECTIVE AND HAS NOT BEEN COMMITTED TO ANY MENTAL INSTITUTION; AND

F. IS AT LEAST EIGHTEEN YEARS OF AGE; AND

G. HAS OR HAS NOT SUBMITTED A

PRIOR APPLICATION AND, IF SO, WHEN AND WHERE; AND

III. THE DATE AND HOUR THE APPLICATION WAS DELIVERED IN COMPLETED FORM TO THE PROSPECTIVE SELLER OR TRANSFEROR BY THE PROSPECTIVE PURCHASER OR TRANSFEREE; AND

B. A LEGEND STATING, "ANY FALSE INFORMATION SUPPLIED OR STATEMENT MADE, IF SUPPLIED OR MADE KNOWINGLY OR RECKLESSLY, IS, IF THE MAKER OR SUPPLIER IS A PRIOR OFFENDER WITHIN THE MEANING OF SECTION 255.00 OF THE CRIMINAL CODE, A CLASS D FELONY WHICH MAY BE PUNISHED BY IMPRISONMENT FOR A PERIOD OF NOT MORE THAN SEVEN YEARS, OR A FINE OF NOT MORE THAN $5,000, OR BOTH, OR OTHERWISE AS PROVIDED BY LAW, AND IS OTHERWISE A CLASS A MISDEMEANOR WHICH MAY BE PUNISHED BY IMPRISONMENT FOR A PERIOD OF NOT MORE THAN SIX MONTHS, OR A FINE OF NOT MORE THAN $1,000, OR BOTH, OR OTHERWISE AS PROVIDED BY LAW."

2. THE DEALER SHALL PROMPTLY AFTER RECEIVING AN APPLICATION TO PURCHASE OR TRANSFER, COMPLETED IN ACCORDANCE WITH SUBSECTION 1 ABOVE, FORWARD ONE COPY OF THE SAME, BY CERTIFIED MAIL, TO THE SUPERINTENDENT OF THE MARYLAND STATE POLICE. THE COPY FORWARDED TO THE SAID SUPERINTENDENT SHALL CONTAIN THE SIGNATURE OF THE PROSPECTIVE SELLER OR TRANSFEROR. THE PROSPECTIVE SELLER OR TRANSFEROR SHALL RETAIN ONE COPY OF THE APPLICATION FOR A PERIOD OF NOT LESS THAN THREE YEARS. THE PROSPECTIVE PURCHASER OR TRANSFEREE SHALL BE ENTITLED TO THE REMAINING COPY OF THE APPLICATION.

3. THE SUPERINTENDENT OF THE MARYLAND STATE POLICE MAY REQUEST THE ASSISTANCE OF THE POLICE COMMISSIONER OF BALTIMORE CITY, THE CHIEF OF POLICE IN ANY COUNTY, CITY, OR INCORPORATED MUNICIPALITY MAINTINING A POLICE FORCE, OR THE SHERIFF IN A COUNTY NOT MAINTAINING A POLICE FORCE AND SHALL PROMPTLY UPON RECEIPT OF AN APPLICATION TO PURCHASE OR TRANSFER CONDUCT AN INVESTIGATION IN ORDER TO DETERMINE THE TRUTH OR FALSITY OF THE INFORMATION SUPPLIED AND STATEMENTS MADE IN SAID APPLICATION. IF IT BE THEREUPON DETERMINED THAT ANY FALSE INFORMATION OR STATEMENT HAS BEEN SUPPLIED OR MADE BY THE APPLICANT, OR THAT THE APPLICATION HAS NOT BEEN PROPERLY COMPLETED, THE SAID SUPERINTENDENT OR ANY SPECIFIC MEMBER OF THE STATE POLICE AUTHORIZED BY THE SUPERINTENDENT TO ACT AS HIS AGENT IN MATTERS RELATING TO HANDGUN SALES SHALL NOTIFY THE PROSPECTIVE SELLER OR TRANSFEROR, IN WRITING, WITHIN SEVEN DAYS FROM THE DATE THE EXECUTED APPLICATION TO PURCHASE OR TRANSFER WAS FORWARDED BY CERTIFIED MAIL, OF HIS DISAPPROVAL OF SAID APPLICATION. WRITTEN NOTIFICATION OF SUCH DISAPPROVAL SHALL BE THEREAFTER FORWARDED BY THE SAID SUPERINTENDENT AND/OR HIS DULY AUTHORIZED AGENT OR AGENTS TO THE PROSPECTIVE PURCHASER OR TRANSFEREE. THE DATE UPON WHICH THE EXECUTED APPLICATION TO PURCHASE OR TRANSFER WAS

FORWARDED BY CERTIFIED MAIL BY THE PROSPECTIVE SELLER OR TRANSFEROR SHALL BE CONSIDERED AS THE FIRST DAY OF THE SEVEN-DAY PERIOD ALLOWED FOR NOTICE OF DISAPPROVAL TO THE SAID PROSPECTIVE SELLER OR TRANSFEROR. IF THE SEVENTH DAY OF THE SEVEN-DAY PERIOD ALLOWED FOR THE SAID NOTICE OF DISAPPROVAL SHALL FALL ON A SUNDAY OR LEGAL HOLIDAY, THE COMPUTATION PERIOD SHALL BE EXTENDED TO THE FIRST DAY NEXT FOLLOWING, WHICH IS NEITHER A SUNDAY NOR A LEGAL HOLIDAY.

4. NO DEALER SHALL SELL OR TRANSFER ANY HANDGUN UNTIL AFTER SEVEN DAYS SHALL HAVE ELAPSED FROM THE TIME AN APPLICATION TO PURCHASE OR TRANSFER SHALL HAVE BEEN FORWARDED BY THE PROSPECTIVE SELLER OR TRANSFEROR TO THE SUPERINTENDENT OF THE MARYLAND STATE POLICE.

5. NO DEALER SHALL SELL OR TRANSFER A HANDGUN TO AN APPLICANT WHOSE APPLICATION HAS BEEN TIMELY DISAPPROVED, UNLESS SUCH DISAPPROVAL HAS BEEN SUBSEQUENTLY WITHDRAWN BY THE SUPERINTENDENT OF THE MARYLAND STATE POLICE AND/OR HIS DULY AUTHORIZED AGENT OR AGENTS OR OVERRULED BY THE ACTION OF THE COURTS PURSUANT TO SUBSECTION 6 BELOW.

6. ANY PROSPECTIVE PURCHASER OR TRANSFEREE AGGRIEVED BY THE ACTION OF THE STATE POLICE MAY REQUEST A HEARING WITHIN 30 DAYS FROM THE DATE WHEN WRITTEN NOTICE WAS FORWARDED TO SUCH AGGRIEVED PERSON BY WRITING TO THE SUPERINTENDENT OF STATE POLICE, WHO SHALL GRANT THE HEARING WITHIN FIFTEEN DAYS OF SAID REQUEST. SAID HEARING AND SUBSEQUENT PROCEEDINGS OF JUDICIAL REVIEW, IF ANY, THEREUPON FOLLOWING SHALL BE CONDUCTED IN ACCORDANCE WITH THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT.

7. ANY DEALER WHO SELLS OR TRANSFERS A HANDGUN IN COMPLIANCE WITH THIS SECTION SHALL FORWARD A COPY OF THE WRITTEN NOTIFICATION OF SUCH COMPLETED TRANSACTION, WITHIN SEVEN DAYS FROM THE DATE OF DELIVERY OF THE SAID HANDGUN, TO THE SUPERINTENDENT OF THE MARYLAND STATE POLICE, WHOSE DUTY IT SHALL BE TO MAINTAIN A PERMANENT RECORD OF ALL SUCH COMPLETED SALES AND TRANSFERS OF HANDGUNS IN THE STATE. THE NOTIFICATIONS SHALL CONTAIN AN IDENTIFYING DESCRIPTION OF THE HANDGUN SOLD OR TRANSFERRED INCLUDING ITS CALIBER, MAKE, MODEL, MANUFACTURER'S SERIAL NUMBER, IF ANY, AND ANY OTHER SPECIAL OR PECULIAR CHARACTERISTICS OR MARKING BY WHICH THE SAID HANDGUN MAY BE IDENTIFIED.

8. ALL RESTRICTIONS IMPOSED BY THE LAWS, ORDINANCES OR REGULATIONS OF ALL SUBORDINATE JURISDICTIONS WITHIN THE STATE OF MARYLAND ON SALE OF HANDGUNS ARE SUPERSEDED BY THIS SECTION, AND THE STATE OF MARYLAND HEREBY PREEMPTS THE RIGHTS OF SUCH JURISDICTIONS TO REGULATE THE SALE OF HANDGUNS.

9. VIOLATIONS OF THIS SECTION SHALL BE PUNISHED AS FOLLOWS:

A. THE SALE OR TRANSFER OF ANY HANDGUN BY A DEALER OTHERWISE THAN IN ACCORDANCE WITH THE PROVISIONS OF SUBSECTIONS 1, 2, 4, AND 5 OF THIS SECTION, OR THE SUPPLYING OF ANY FALSE INFORMATION OR THE MAKING OF ANY FALSE STATEMENT BY A PROSPECTIVE PURCHASER OR TRANSFEREE WITH RESPECT TO AN APPLICATION REQUIRED BY SUBSECTION 1 OF THIS SECTION SHALL BE PUNISHED AS PROVIDED BY SECTION 255.15 OF THE CRIMINAL CODE.

B. A DEALER WHO FAILS TO COMPLY WITH SUBSECTION 7 OF THIS SECTION SHALL BE GUILTY OF A CLASS A MISDEMEANOR AND PUNISHED ACCORDING TO THE PROVISIONS OF SUBTITLE E OF THE CRIMINAL CODE.

COMMENT

This section is adapted from Article 27, section 442, of the Maryland Code. There has been some rearrangement of the materials in this long section, in the hope of improving clarity, some modification of language, a transfer of most of the penalty provisions to Part 255, and a change there in the penalties to conform to the general sentencing scheme of the Code.

The present section 442(a) appears as 852(8), with only a minor technical change.

The present subsections 442(b), (d) and (e), have been reworked in 852(1) and (4), with a number of changes in wording. There are also a number of substantive changes: (1) For the statement that the applicant has never been convicted of a crime of violence or an offense relating to pistols, the draft substitutes in subdivision (1)(a)(ii)(A) language derived from the Federal Gun Control Act of 1968 (title 18 U.S.C., §921(a)(20), 922(d)), because, as a practical matter, firearms dealers are federal licensees and not permitted to sell to the class described in the draft, which is broader than the class described in present Maryland law. (Note that the Commission prefers a somewhat different standard as to convicted persons and persons who have suffered from mental disease, dealt with in the next sentence, and adopts it in another context; see the fourth paragraph of the comment to draft section 255.30 of the Criminal Code.) (2) Similarly, for a statement that an applicant has never spent more than thirty consecutive days in a mental institution, subsection (1)(a)(ii)(E) substitutes the standard required of federal licensees, that the recipient has not been adjudicated as a mental

defective and has not been committed to any mental institution. (3) In accordance with the principle of generally lowering the age or majority, the twenty-one year age limit is reduced to eighteen in draft subsection (1)(a)(ii)(F). (4) The legend required by the present section 442(d) is changed to conform to the penalty scheme of the draft code. (See also the paragraph of comment below relating to section 442(j).) More identification information has been required to subdivision (1)(a)(i).

The present subsection 442(c) becomes 852(2), with only minor technical changes.

The present subsection 442(f) appears as 852(3) without change, except that the words, "city, or incorporated municipality", have been added after the word "county", near the beginning of the subsection.

The present subsection 442(g) appears, with minor technical changes, as 852(5).

The present subsection 442(h) appears as 852(6), without change.

The present subsection 442(i) appears as 852(7), with minor technical changes.

The present subsection 442(j) is omitted. Draft section 852(1) has been rewritten to exclude dealers licensed under section 853 from the application requirement; for practical purposes, the former subsection (j) appears to have eliminated any such requirement. The portion of subsection (j) exempting certain personnel of governmental organizations from the licensing requirement seems unjustified and has been dropped. Of course, such personnel do not violate the provisions of Part 255 by the use of weapons as a part of their ordinary duties.

The present subsection 442(k) is revised substantially to remove most of the penalty provisions to Part 255.

853. LICENSING OF HANDGUN DEALERS

1. NO PERSON SHALL ENGAGE IN THE BUSINESS OF SELLING HANDGUNS UNLESS HE LAWFULLY POSSESSES AND CONSPICUOUSLY DISPLAYS AT HIS PLACE OF BUSINESS, IN ADDITION TO ANY OTHER LICENSE REQUIRED BY LAW, A DEALER'S LICENSE ISSUED BY THE SUPERINTENDENT OF THE MARYLAND STATE POLICE OR HIS DULY AUTHORIZED AGENT OR AGENTS. SUCH LICENSE SHALL IDENTIFY THE LICENSEE AND THE LOCATION

OF HIS PLACE OF BUSINESS. ONE SUCH LICENSE SHALL BE REQUIRED FOR EACH PLACE OF BUSINESS WHERE PISTOLS OR REVOLVERS ARE SOLD.

2. LICENSES REQUIRED BY SUBDIVISION 1 ABOVE SHALL EXPIRE ON THE 30TH DAY OF JUNE NEXT FOLLOWING THE FIRST ISSUANCE OF THE LICENSE AND OF EACH YEAR THEREAFTER. THE INITIAL FEE FOR SUCH LICENSE SHALL BE FORTY DOLLARS ($40.00), AND THE ANNUAL RENEWAL SHALL BE TEN DOLLARS ($10.00), PAYABLE TO THE COMPTRCLLER OF THE STATE OF MARYLAND. SUCH LICENSES SHALL NOT BE TRANSFERABLE NOR SHALL ANY REFUND OR PRORATION OF THE ANNUAL FEE THEREFOR BE ALLOWED. PROVIDED, HOWEVER, THAT BEFORE ANY LICENSEE CHANGES HIS PLACE OF BUSINESS HE SHALL SO INFORM THE SUPERINTENDENT OF THE MARYLAND STATE POLICE OR HIS DULY AUTHORIZED AGENT OR AGENTS AND SURRENDER HIS LICENSE, WHEREUPON THE SAID SUPERINTENDENT OR HIS DULY AUTHORIZED AGENT OR AGENTS SHALL, IF NO CAUSE EXISTS FOR THE REVOCATION OF SUCH LICENSE, ISSUE A NEW LICENSE, WITHOUT FEE, COVERING THE NEW PLACE OF BUSINESS FOR THE DURATION OF THE UNEXPIRED TERM OF THE SURRENDERED LICENSE.

3. THE APPLICATION FOR A HANDGUN DEALER'S LICENSE SHALL BEAR THE FOLLOWING LEGEND: "ANY FALSE INFORMATION SUPPLIED OR STATEMENT MADE, IF SUPPLIED OR MADE KNOWINGLY OR RECKLESSLY, IS A CLASS E FELONY WHICH MAY BE PUNISHED BY IMPRISONMENT FOR A PERIOD OF NOT MORE THAN FIVE YEARS, OR A FINE OF NOT MORE THAN $5,000, OR BOTH, OR OTHERWISE AS PROVIDED BY LAW."

4. THE APPLICATION FOR A HANDGUN DEALER'S LICENSE SHALL CONTAIN THE FOLLOWING INFORMATION:

A. APPLICANT'S NAME, ADDRESS, OCCUPATION, SOCIAL SECURITY ACCOUNT NUMBER, MARYLAND DRIVERS LICENSE NUMBER (IF LICENSED TO DRIVE IN THE STATE), HOME AND BUSINESS TELEPHONE NUMBER (IF ANY), PLACE AND DATE OF BIRTH, HEIGHT, WEIGHT, RACE, EYE AND HAIR COLOR, AND SIGNATURE. IN THE EVENT THE APPLICANT IS A CORPORATION, THE APPLICATION SHALL BE COMPLETED AND EXECUTED BY A CORPORATE OFFICER WHO IS A RESIDENT OF THE JURISDICTION IN WHICH THE APPLICATION IS MADE; AND

B. A CLEAR AND RECOGNIZABLE PHOTOGRAPH OF THE APPLICANT, EXCEPT WHERE SUCH PHOTOGRAPH HAS BEEN SUBMITTED WITH A PRIOR YEAR'S APPLICATION; AND

C. A SET OF THE APPLICANT'S FINGERPRINTS, EXCEPT WHERE SUCH FINGERPRINTS HAVE BEEN SUBMITTED WITH A PRIOR YEAR'S APPLICATION; AND

D. A STATEMENT BY THE APPLICANT THAT HE OR SHE:

I. IS A CITIZEN OF THE UNITED STATES;

AND

II. IS AT LEAST EIGHTEEN YEARS OF AGE; AND

III. IS NOT UNDER INDICTMENT FOR, AND, EITHER (A) HAS NOT BEEN CONVICTED IN ANY COURT OF A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR, OTHER THAN A FEDERAL OR STATE OFFENSE PERTAINING TO ANTITRUST VIOLATION, UNFAIR TRADE PRACTICE, RESTRAINT OF TRADE, OR OTHER SIMILAR OFFENSE RELATING TO THE REGULATION OF BUSINESS PRACTICES AS THE SECRETARY OF THE TREASURY MAY BY REGULATION DESIGNATE PURSUANT TO TITLE 18 U.S.C., §921(A)(20), OR OTHER THAN A STATE OFFENSE WHICH DOES NOT INVOLVE A FIREARM OR EXPLOSIVE AND WHICH IS CLASSIFIED BY THE LAWS OF THE STATE AS A MISDEMEANOR AND PUNISHABLE BY A TERM OF TWO YEARS OR LESS, OR (B) HAS BEEN GRANTED ADMINISTRATIVE RELIEF PURSUANT TO TITLE 18 U.S.C., §925(C); AND

IV. IS NOT A FUGITIVE FROM JUSTICE; AND

V. IS NOT A HABITUAL DRUNKARD; AND

VI. IS NOT AN ADDICT OR AN HABITUAL USER OF NARCOTICS, BARBITURATES OR AMPHETAMINES; AND

VII. HAS NOT BEEN ADJUDICATED AS A MENTAL DEFECTIVE AND HAS NOT BEEN COMMITTED TO ANY MENTAL INSTITUTION.

5. THE SUPERINTENDENT OF THE MARYLAND STATE POLICE AND/OR HIS DULY AUTHORIZED AGENT OR AGENTS SHALL CONDUCT AN INVESTIGATION IN ORDER TO DETERMINE THE TRUTH OR FALSITY OF THE INFORMATION SUPPLIED AND STATEMENTS MADE IN AN APPLICATION FOR A HANDGUN DEALER'S LICENSE. IF IT BE THEREUPON DETERMINED THAT ANY FALSE INFORMATION OR STATEMENT HAS BEEN SUPPLIED OR MADE BY THE APPLICANT, OR THAT THE APPLICATION HAS NOT BEEN PROPERLY COMPLETED, THE SAID SUPERINTENDENT AND/OR HIS DULY AUTHORIZED AGENT OR AGENTS SHALL FORWARD WRITTEN NOTIFICATION TO THE PROSPECTIVE LICENSEE OF HIS OR THEIR DISAPPROVAL OF SAID APPLICATION.

6. NO PERSON SHALL ENGAGE IN THE BUSINESS OF SELLING HANDGUNS WHOSE APPLICATION FOR A HANDGUN DEALER'S LICENSE HAS BEEN DISAPPROVED, UNLESS SUCH DISAPPROVAL HAS BEEN SUBSEQUENTLY WITHDRAWN BY THE SUPERINTENDENT OF THE MARYLAND STATE POLICE AND/OR HIS DULY AUTHORIZED AGENT OR AGENTS OR OVERRULED BY THE ACTION OF THE COURTS PURSUANT TO SUBDIVISION 7 BELOW.

7. ANY PERSON AGGRIEVED BY THE ACTION OF THE SUPERINTENDENT OF THE MARYLAND STATE POLICE AND/OR HIS

DULY AUTHORIZED AGENT OR AGENTS MAY APPEAL THE DISAPPROVAL OF HIS OR HER APPLICATION FOR A HANDGUN DEALER'S LICENSE TO THE CIRCUIT COURT OF THE COUNTY WHERE THE APPLICANT'S INTENDED PLACE OF BUSINESS IS TO BE CONDUCTED OR TO THE BALTIMORE CITY COURT, IF THE APPLICANT'S INTENDED PLACE OF BUSINESS IS TO BE CONDUCTED WITHIN THE LIMITS OF BALTIMORE CITY. SUCH APPEAL MUST BE FILED NOT LATER THAN THIRTY DAYS FROM THE DATE WRITTEN NOTIFICATION OF DISAPPROVAL TO THE PROSPECTIVE LICENSEE WAS MAILED BY THE SAID SUPERINTENDENT AND/OR HIS DULY AUTHORIZED AGENT OR AGENTS. THE COURT WHEREIN AN APPEAL IS PROPERLY AND TIMELY FILED SHALL AFFIRM OR REVERSE THE DETERMINATION OF DISAPPROVAL RENDERED BY THE SAID SUPERINTENDENT AND/OR HIS DULY AUTHORIZED AGENT OR AGENTS, DEPENDING UPON WHETHER IT FINDS THAT ANY FALSE INFORMATION OR STATEMENT WAS SUPPLIED OR MADE BY THE APPLICANT, OR THAT THE APPLICATION WAS NOT PROPERLY COMPLETED. A FURTHER APPEAL TO THE COURT OF APPEALS MAY BE PROSECUTED BY EITHER THE SUPERINTENDENT OF THE MARYLAND STATE POLICE OR THE APPLICANT FROM THE DECISION REACHED BY THE CIRCUIT COURT OR BALTIMORE CITY COURT IN ACCORDANCE WITH THIS SUBDIVISION.

8. THE SUPERINTENDENT OF THE MARYLAND STATE POLICE AND/OR HIS DULY AUTHORIZED AGENT OR AGENTS SHALL REVOKE AN ISSUED HANDGUN DEALER'S LICENSE, BY WRITTEN NOTIFICATION FORWARDED TO THE LICENSEE, UNDER ANY OF THE FOLLOWING CIRCUMSTANCES:

A. WHEN IT IS DISCOVERED FALSE INFORMATION OR STATEMENTS HAVE BEEN SUPPLIED OR MADE IN AN APPLICATION REQUIRED BY THIS SECTION; OR

B. IF THE LICENSEE IS CONVICTED OF A FELONY IN THIS STATE OR ELSEWHERE, OR OF ANY OF THE PROVISIONS OF PART 255 OF THE CRIMINAL CODE, OR IS A FUGITIVE FROM JUSTICE, OR IS AN HABITUAL DRUNKARD, OR IS ADDICTED TO OR AN HABITUAL USER OF NARCOTICS, BARBITURATES OR AMPHETAMINES, OR HAS SPENT MORE THAN THIRTY CONSECUTIVE DAYS IN ANY MEDICAL INSTITUTION FOR TREATMENT OF A MENTAL DISORDER OR DISORDERS, UNLESS THE LICENSEE PRODUCES A PHYSICIAN'S CERTIFICATE, ISSUED SUBSEQUENT TO THE LAST PERIOD OF INSTITUTIONALIZATION, CERTIFYING THAT THE LICENSEE IS CAPABLE OF POSSESSING A HANDGUN WITHOUT UNDUE DANGER TO HIMSELF OR HERSELF, OR TO OTHERS.

9. NO PERSON SHALL ENGAGE IN THE BUSINESS OF SELLING HANDGUNS WHOSE HANDGUN DEALER'S LICENSE HAS BEEN REVOKED, UNLESS SUCH REVOCATION HAS BEEN SUBSEQUENTLY WITHDRAWN BY THE SUPERINTENDENT OF THE MARYLAND STATE POLICE AND/OR HIS DULY AUTHORIZED AGENT OR AGENTS OR OVERRULED BY THE ACTION OF THE COURTS PURSUANT TO SUBDIVISION 10 BELOW.

10. ANY PROSPECTIVE DEALER AGGRIEVED BY THE ACTION

OF THE STATE POLICE MAY REQUEST A HEARING WITHIN THIRTY (30) DAYS FROM THE DATE WHEN WRITTEN NOTICE WAS FORWARDED TO SUCH AGGRIEVED PERSON BY WRITING TO THE SUPERINTENDENT OF STATE POLICE, WHO SHALL GRANT THE HEARING WITHIN FIFTEEN DAYS OF SAID REQUEST. SAID HEARING AND SUBSEQUENT PROCEEDINGS OF JUDICIAL REVIEW, IF ANY, THEREUPON FOLLOWING SHALL BE CONDUCTED IN ACCORDANCE WITH THE PROVISIONS OF THE ADMINISTRATIVE ACT. A SUSPENSION OR REVOCATION SHALL NOT TAKE EFFECT WHILE AN APPEAL IS PENDING.

11. NO DEALER SHALL FAIL TO COMPLY WITH THE PROVISIONS OF THIS SECTION OR SHALL KNOWINGLY OR RECKLESSLY SUPPLY ANY FALSE INFORMATION OR MAKE ANY FALSE STATEMENT IN THE INFORMATION REQUIRED TO BE FURNISHED BY HIM BY SUBDIVISION 4 OF THIS SECTION.

VIOLATION OF THIS SUBDIVISION IS A CLASS E FELONY, AND SHALL BE PUNISHED IN ACCORDANCE WITH SUBTITLE E OF THE CRIMINAL CODE.

COMMENT

This section is adapted from Article 27, section 443, of the Maryland Code. Subsections (a), (b), (e), (f), (g), (i) and (j), are followed respectively, with only minor changes, in 853(1), (2), (5), (6), (7), (9) and (10).

The legend requirements of the present subsection (c) are changed in the new subsection (3) to conform to the new penalty provisions.

Changes in the applicant's statement in the present subsection (d) are made in the draft subsection (4), similar to those discussed in the Comment in subsection 852(1) and (4). See title 18 U.S.C., §923(d)(1)(B).

Subsection (k) becomes subsection (11) in the draft. It drops the provision that each day of unlawful sale consitutes a separate offense, a provision which appears to have no point, in view of the provisions of the sentencing code barring consecutive sentences.

The crime becomes a class E felony. This increases the maximum term of imprisonment now allowed by section 488 from three to five years.

854. HANDGUN PERMITS

1. ISSUANCE. A PERMIT TO CARRY A HANDGUN SHALL BE ISSUED WITHIN A REASONABLE TIME BY THE SUPERINTENDENT OF THE MARYLAND STATE POLICE, UPON APPLICATION UNDER OATH

THEREFOR, TO ANY PERSON WHOM HE FINDS:

A. IS EIGHTEEN YEARS OF AGE OR OLDER; AND

B. HAS NOT BEEN CONVICTED OF A FELONY OR OF A MISDEMEANOR FOR WHICH A SENTENCE OF IMPRISONMENT FOR MORE THAN ONE YEAR HAS BEEN IMPOSED OR, IF CONVICTED OF SUCH A CRIME, HAS BEEN PARDONED OR HAS BEEN GRANTED RELIEF PURSUANT TO TITLE 18, §925(C) OF THE UNITED STATES CODE; AND

C. HAS NOT BEEN COMMITTED TO ANY DETENTION, TRAINING, OR CORRECTIONAL INSTITUTION FOR JUVENILES FOR LONGER THAN ONE YEAR AFTER AN ADJUDICATION OF DELINQUENCY BY A JUVENILE COURT; PROVIDED, HOWEVER, THAT A PERSON SHALL NOT BE DISQUALIFIED BY VIRTUE OF THIS PARAGRAPH (C) IF, AT THE TIME OF THE APPLICATION, MORE THAN TEN YEARS HAS ELAPSED SINCE HIS RELEASE FROM SUCH INSTITUTION; AND

D. HAS NOT BEEN CONVICTED OF ANY OFFENSE INVOLVING THE POSSESSION, USE, OR DISTRIBUTION OF CONTROLLED DANGEROUS SUBSTANCES; AND IS NOT PRESENTLY AN ADDICT, AN HABITUAL USER OF ANY CONTROLLED DANGEROUS SUBSTANCE NOT UNDER LEGITIMATE MEDICAL DIRECTION OR AN ALCOHOLIC; AND

E. HAS, BASED ON THE RESULTS OF INVESTIGATION, NOT EXHIBITED A PROPENSITY FOR VIOLENCE OR INSTABILITY WHICH MAY REASONABLY RENDER HIS POSSESSION OF A HANDGUN A DANGER TO HIMSELF OR OTHER LAW-ABIDING PERSONS; AND

F. HAS, BASED ON THE RESULTS OF INVESTIGATION, GOOD AND SUBSTANTIAL REASON TO WEAR, CARRY, OR TRANSPORT A HANDGUN, PROVIDED HOWEVER, THAT THE PHRASE "GOOD AND SUBSTANTIAL REASON" AS USED HEREIN SHALL BE DEEMED TO INCLUDE A FINDING THAT SUCH PERMIT IS NECESSARY AS A REASONABLE PRECAUTION AGAINST APPREHENDED DANGER.

2. FEE. THE SUPERINTENDENT MAY CHARGE A NONREFUNDABLE FEE NOT TO EXCEED $15.00, PAYABLE AT THE TIME AN APPLICATION FOR A PERMIT OR RENEWAL OF A PERMIT IS FILED. ALL SUCH FEES COLLECTED BY THE SUPERINTENDENT SHALL BE CREDITED TO A SPECIAL FUND FOR THE ACCOUNT OF THE MARYLAND STATE POLICE. THE EXPENSES OF ADMINISTERING THE PROVISIONS OF THIS SECTION, EXCEPT FOR THE PER DIEM COMPENSATION AND EXPENSES OF THE HANDGUN PERMIT REVIEW BOARD, SHALL BE PAID FROM THE SPECIAL FUND, BUT NOTHING SHALL PRECLUDE THE GOVERNOR FROM INCLUDING GENERAL FUND APPROPRIATIONS IN HIS EXECUTIVE BUDGET FOR SUCH PURPOSES IF THE SPECIAL FUND IS INADEQUATE THEREFOR.

3. EXPIRATION AND RENEWAL. A PERMIT ISSUED UNDER THIS SECTION SHALL EXPIRE ON THE LAST DAY OF THE HOLDER'S

BIRTH MONTH FOLLOWING TWO YEARS AFTER ITS ISSUANCE. THE PERMIT MAY BE RENEWED, UPON APPLICATION AND PAYMENT OF THE RENEWAL FEE, FOR SUCCESSIVE PERIODS OF TWO YEARS EACH, IF THE APPLICANT, AT THE TIME OF APPLICATION, POSESSES THE QUALIFICATIONS SET FORTH IN THIS SECTION FOR THE ISSUANCE OF A PERMIT.

4. LIMITATIONS IN PERMIT. THE SUPERINTENDENT MAY, IN ANY PERMIT ISSUED UNDER THIS SECTION, LIMIT THE GEOGRAPHIC AREA, CIRCUMSTANCES, OR TIMES DURING THE DAY, WEEK, MONTH, OR YEAR IN OR DURING WHICH THE PERMIT IS EFFECTIVE. THE SUPERINTENDENT MAY REDUCE THE COST OF THE PERMIT ACCORDINGLY, IF THE PERMIT IS GRANTED FOR ONE DAY ONLY AND AT ONE PLACE ONLY.

5. POSSESSION OF PERMIT; HANDGUNS TO WHICH APPLICABLE. ANY PERSON TO WHOM A PERMIT SHALL BE ISSUED OR RENEWED SHALL CARRY SUCH PERMIT IN HIS POSSESSION EVERY TIME HE CARRIES, WEARS, OR TRANSPORTS A HANDGUN. A PERMIT ISSUED PURSUANT TO THIS SECTION SHALL BE VALID FOR ANY HANDGUN LEGALLY IN THE POSSESSION OF THE PERSON TO WHOM THE PERMIT WAS ISSUED.

6. REVOCATION. THE SUPERINTENDENT MAY REVOKE ANY PERMIT ISSUED OR RENEWED AT ANY TIME UPON A FINDING THAT (I) THE HOLDER NO LONGER SATISFIES THE QUALIFICATIONS SET FORTH IN SUBSECTION (1), OR (II) THE HOLDER OF THE PERMIT HAS VIOLATED SUBSECTION (5) HEREOF. A PERSON HOLDING A PERMIT WHICH IS REVOKED BY THE SUPERINTENDENT SHALL RETURN THE PERMIT TO THE SUPERINTENDENT WITHIN TEN DAYS AFTER RECEIPT OF NOTICE OF THE REVOCATION. ANY PERSON WHO FAILS TO RETURN A REVOKED PERMIT IN VIOLATION OF THIS SECTION SHALL BE GUILTY OF A CLASS A MISDEMEANOR AND SHALL BE PUNISHED IN ACCORDANCE WITH SUBTITLE E OF THE CRIMINAL CODE.

7. HANDGUN PERMIT REVIEW BOARD. (I) THERE IS CREATED A HANDGUN PERMIT REVIEW BOARD AS A SEPARATE AGENCY WITHIN THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES. THE BOARD SHALL CONSIST OF FIVE MEMBERS APPOINTED FROM THE GENERAL PUBLIC BY THE GOVERNOR WITH THE ADVICE AND CONSENT OF THE SENATE OF MARYLAND AND SHALL HOLD OFFICE FOR TERMS OF THREE YEARS. THE MEMBERS SHALL HOLD OFFICE FOR A TERM OF ONE, TWO, AND THREE YEARS, RESPECTIVELY, TO BE DESIGNATED BY THE GOVERNOR. AFTER THE FIRST APPOINTMENT, THE GOVERNOR SHALL ANNUALLY APPOINT A MEMBER OF THE BOARD IN THE PLACE OF THE MEMBER WHOSE TERM SHALL EXPIRE. MEMBERS OF THE BOARD SHALL BE ELIGIBLE FOR REAPPOINTMENT. IN CASE OF ANY VACANCY IN THE BOARD, THE GOVERNOR SHALL FILL THE VACANCY BY THE APPOINTMENT OF A MEMBER TO SERVE UNTIL THE EXPIRATION OF THE TERM FOR WHICH THE PERSON HAD BEEN APPOINTED. EACH MEMBER OF THE BOARD SHALL RECEIVE PER DIEM COMPENSATION AS PROVIDED IN THE BUDGET FOR EACH DAY ACTUALLY ENGAGED IN THE DISCAHRGE OF HIS OFFICIAL DUTIES AS WELL AS

REIMBURSEMENT FOR ALL NECESSARY AND PROPER EXPENSES. (II) ANY PERSON WHOSE APPLICATION FOR A PERMIT OR RENEWAL OF A PERMIT HAS BEEN REJECTED OR WHOSE PERMIT HAS BEEN REVOKED OR LIMITED MAY REQUEST THE BOARD TO REVIEW THE DECISION OF THE SUPERINTENDENT BY FILING A WRITTEN REQUEST FOR REVIEW WITH THE BOARD WITHIN TEN DAYS AFTER RECEIPT OF WRITTEN NOTICE OF THE SUPERINTENDENT'S ACTION. THE BOARD SHALL EITHER SUSTAIN, REVERSE, OR MODIFY THE DECISION OF THE SUPERINTENDENT UPON A REVIEW OF THE RECORD, OR CONDUCT A HEARING WITHIN THIRTY DAYS AFTER RECEIPT OF THE REQUEST. IF THE ACTION TAKEN BY THE BOARD RESULTS IN THE REJECTION OF AN APPLICATION FOR A PERMIT OR THE REVOCATION OR LIMITATION OF A PERMIT, THE BOARD SHALL SUBMIT IN WRITING TO THAT PERSON THE REASONS FOR THE ACTION TAKEN BY THE BOARD. (III) ANY HEARING AND ANY SUBSEQUENT PROCEEDINGS OF JUDICIAL REVIEW SHALL BE CONDUCTED IN ACCORDANCE WITH THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT; PROVIDED, HOWEVER, THAT NO COURT OF THIS STATE SHALL ORDER THE ISSUANCE OR RENEWAL OF A PERMIT OR ALTER ANY LIMITATIONS ON A PERMIT PENDING FINAL DETERMINATION OF THE PROCEEDING. (IV) ANY PERSON WHOSE APPLICATION FOR A PERMIT OR RENEWAL OF A PERMIT HAS NOT BEEN ACTED UPON BY THE SUPERINTENDENT WITHIN 60 DAYS AFTER THE APPLICATION WAS SUBMITTED, MAY REQUEST THE BOARD FOR A HEARING BY FILING A WRITTEN REQUEST FOR SUCH A HEARING WITH THE BOARD.

8. MEANING OF "SUPERINTENDENT". AS USED IN THIS SECTION, SUPERINTENDENT MEANS THE SUPERINTENDENT OF THE MARYLAND STATE POLICE, ACTING DIRECTLY OR THROUGH HIS DULY AUTHORIZED OFFICERS AND AGENTS.

9. SUPERSEDED PROVISIONS. ALL RESTRICTIONS IMPOSED BY THE LAW, ORDINANCES, OR REGULATIONS OF THE POLITICAL SUBDIVISIONS ON THE WEARING, CARRYING, OR TRANSPORTING OF HANDGUNS ARE SUPERSEDED BY THIS SECTION, AND THE STATE OF MARYLAND HEREBY PREEMPTS THE RIGHT OF THE POLITICAL SUBDIVISIONS TO REGULATE SAID MATTERS.

COMMENT

This section is taken from Article 27, section 36E. There are only two changes which are other than technical. The age limit in 854(1)(a), formerly 36E(a)(1), is lowered from twenty-one to eighteen. The penalty provision in 854(6), formerly 36E(f) is changed to conform to the penalty provisions of the draft code.

The present subsections (h) and (i) were transitional in nature and are now obsolete. They are therefore omitted.

Subsection (9) is derived from section 6 of ch. 13, Acts of 1972. (See Editor's note to Art.

27, §36C.) Compare 852(8), supra.

855. SEIZURE AND FORFEITURE

1. PROPERTY SUBJECT TO SEIZURE AND FORFEITURE. THE FOLLOWING ITEMS OF PROPERTY SHALL BE SUBJECT TO SEIZURE AND FORFEITURE, AND, UPON FORFEITURE, NO PROPERTY RIGHT SHALL EXIST IN THEM:

A. ANY HANDGUN BEING WORN, CARRIED, OR TRANSPORTED IN VIOLATION OF SECTION 255.15(1)(C) OF THE CRIMINAL CODE.

B. ALL AMMUNITION OR OTHER PARTS OF OR APPURTENANCES TO ANY SUCH HANDGUN WORN, CARRIED, OR TRANSPORTED BY SUCH PERSON OR FOUND IN THE IMMEDIATE VICINITY OF SUCH HANDGUN.

2. PROCEDURE RELATING TO SEIZURE.

A. ANY PROPERTY SUBJECT TO SEIZURE UNDER SUBSECTION (1) HEREOF MAY BE SEIZED BY ANY DULY AUTHORIZED POLICE OFFICER, AS AN INCIDENT TO AN ARREST OR SEARCH AND SEIZURE.

B. ANY SUCH OFFICER SEIZING SUCH PROPERTY UNDER THIS SECTION SHALL EITHER PLACE THE PROPERTY UNDER SEAL OR REMOVE THE SAME TO A LOCATION DESIGNATED EITHER BY THE MARYLAND STATE POLICE OR BY THE LAW-ENFORCEMENT AGENCY HAVING JURISDICTION IN THE LOCALITY.

3. PROCEDURE RELATING TO FORFEITURE.

A. UPON THE SEIZURE OF PROPERTY PURSUANT TO THIS SECTION, THE STATE'S ATTORNEY SHALL NOTIFY ANY OFFICIAL AGENCY WHICH REGISTERS SUCH PROPERTY OF THE SEIZURE AND SHALL REQUEST THE NAME AND ADDRESS OF THE OWNER THEREOF. IF, AS A RESULT OF SUCH INQUIRY, OR ANY OTHER INQUIRY WHICH HE MAY CONDUCT, THE STATE'S ATTORNEY DETERMINES THE NAME AND ADDRESS OF THE OWNER OF THE PROPERTY, HE SHALL NOTIFY THE OWNER BY CERTIFIED MAIL OF THE SEIZURE AND OF THE STATE'S ATTORNEY'S DETERMINATION OF WHETEHR THE OWNER KNEW OR SHOULD HAVE KNOWN OF THE MISCONDUCT IN VIOLATION OF SECTION 255.15(1)(C) OF THE CRIMINAL CODE.

B. IF THE STATE'S ATTORNEY DETERMINES THAT THE OWNER NEITHER KNEW NOR SHOULD HAVE KNOWN OF THE MISCONDUCT IN VIOLATION OF SECTION 255.15(1)(C) OF THE CRIMINAL CODE, HE SHALL SURRENDER THE PROPERTY UPON REQUEST TO THE OWNER UNLESS HE DETERMINES THAT THE PROPERTY IS NEEDED AS EVIDENCE IN A PENDING CRIMINAL CASE, IN WHICH EVENT HE SHALL RETURN THE PROPERTY UPON THE FINAL CONCLUSION OF THE CASE OR CASES IN WHICH THE PROPERTY IS NEEDED AS EVIDENCE.

C. IF THE STATE'S ATTORNEY DETERMINES THAT THE PROPERTY SHOULD BE FORFEITED TO THE STATE, HE SHALL PETITION THE CIRCUIT COURT OF THE APPROPRIATE SUBDIVISION IN THE NAME OF THE STATE OF MARYLAND AGAINST THE PROPERTY AS DESIGNATED BY MAKE, MODEL, YEAR, AND SERIAL NUMBER OR OTHER IDENTIFYING CHARACTERISTICS. THE PETITION SHALL ALLEGE THE SEIZURE AND SET FORTH IN GENERAL TERMS THE CAUSES OR GROUNDS OF FORFEITURE. IT SHALL ALSO PRAY THAT THE PROPERTY BE CONDEMNED AS FORFEITED TO THE STATE AND DISPOSED OF ACCORDING TO LAW.

D. IF THE OWNER OR OWNERS OF THE PROPERTY ARE UNKNOWN OR CANNOT BE FOUND, NOTICE OF THE SEIZURE AND INTENDED FORFEITURE PROCEEDINGS SHALL BE MADE BY PUBLICATION IN ONE OR MORE NEWSPAPERS PUBLISHED IN THE COUNTY IN WHICH THE ACTION IS BROUGHT IF THERE BE ONE SO PUBLISHED, AND IF NOT, IN A NEWSPAPER HAVING A SUBSTANTIAL CIRCULATION IN SAID COUNTY. IN BALTIMORE CITY THE NOTICE SHALL BE PUBLISHED IN ONE OR MORE OF THE DAILY NEWSPAPERS PUBLISHED IN THE CITY. THE NOTICE SHALL STATE THE SUBSTANCE AND OBJECT OF THE ORIGINAL PETITION AND GIVE NOTICE OF THE INTENDED FORFEITURE PROCEEDINGS.

E. WITHIN 30 DAYS AFTER SERVICE OF THE NOTICE OF SEIZURE AND INTENDED FORFEITURE PROCEEDINGS OR WITHIN 30 DAYS AFTER THE DATE OF PUBLICATION, THE OWNER OF THE PROPERTY SEIZED MAY FILE AN ANSWER UNDER OATH TO THE PETITION.

F. THE COURT SHALL RETAIN CUSTODY OF THE SEIZED PROPERTY PENDING PROSECUTION OF THE PERSON ACCUSED OF VIOLATING SECTION 255.15(1)(C) OF THE CRIMINAL CODE AND IN CASE SUCH PERSON BE FOUND GUILTY, THE PROPERTY SHALL REMAIN IN THE CUSTODY OF THE COURT UNTIL THE HEARING ON THE FORFEITURE IS HELD. THE HEARING SHALL BE SCHEDULED NO MORE THAN 30 DAYS AFTER CONVICTION OF THE DEFENDANT, AND REASONABLE NOTICE SHALL BE GIVEN TO THOSE PARTIES FILING AN ANSWER TO THE PETITION.

G. IF NO TIMELY ANSWER IS FILED, THE COURT SHALL HEAR EVIDENCE UPON THE USE OF THE PROPERTY IN VIOLATION OF SECTION 255.15(1)(C) OF THE CRIMINAL CODE AND SHALL UPON SATISFACTORY PROOF THEREOF, ORDER THE PROPERTY FORFEITED TO THE STATE.

H. AT THE SCHEDULED HEARING, ANY OWNER WHO FILED A TIMELY ANSWER MAY SHOW BY COMPETENT EVIDENCE THAT THE PROPERTY WAS NOT IN FACT USED IN VIOLATION OF SECTION 255.15(1)(C) OF THE CRIMINAL CODE OR THAT HE NEITHER KNEW OR SHOULD HAVE KNOWN THAT THE PROPERTY WAS BEING, OR WAS TO BE SO USED. UPON THE DETERMINATION THAT THE PROPERTY WAS NOT SO USED, THE COURT SHALL ORDER THAT THE PROPERTY BE RELEASED TO THE OWNER.

I. IF AFTER A FULL HEARING THE COURT

DECIDES THAT THE PROPERTY WAS USED IN VIOLATION OF SECTION 255.15(1)(C) OF THE CRIMINAL CODE OR THAT THE OWNER KNEW OR SHOULD HAVE KNOWN THAT THE PROPERTY WAS BEING, OR WAS TO BE SO USED, THE COURT SHALL ORDER THAT THE PROPERTY BE FORFEITED TO THE STATE.

4. DISPOSITION OF FORFEITED PROPERTY. WHENEVER PROPERTY IS FORFEITED UNDER THIS SECTION, IT SHALL BE TURNED OVER TO THE STATE SECRETARY OF GENERAL SERVICES WHO MAY (I) ORDER THE PROPERTY RETAINED FOR OFFICIAL USE OF STATE AGENCIES, OR (II) MAKE SUCH OTHER DISPOSTION OF THE PROPERTY AS HE MAY DEEM APPROPRIATE.

COMMENT

This section is derived from Article 27, section 36C. It should be reconsidered and perhaps transferred at the time of enacting a code of criminal procedure. There are no substantive changes. The Commission considered extending the provisions of the present law, relating only to the wearing, carrying, or transporting of handguns, to all of the weapons violations of Part 255, but did not do so because of reports of difficulties encountered in attempts to proceed under the section.

856. LIMITED SEARCH

1. ANY POLICE OFFICER WHO, IN THE LIGHT OF HIS OBSERVATIONS, INFORMATION, AND EXPERIENCE, HAS A REASONABLE BELIEF THAT (I) A PERSON MAY BE WEARING, CARRYING, OR TRANSPORTING A HANDGUN IN VIOLATION OF PART 255 OF THE CRIMINAL CODE, (II) BY VIRTURE OF HIS POSSESSION OF A HANDGUN, SUCH PERSON IS OR MAY BE PRESENTLY DANGEROUS TO THE OFFICER OR TO OTHERS, (III) IT IS IMPRACTICABLE, UNDER THE CIRCUMSTANCES, TO OBTAIN A SEARCH WARRANT; AND (IV) IT IS NECESSARY FOR THE OFFICER'S PROTECTION OR THE PROTECTION OF OTHERS TO TAKE SWIFT MEASURES TO DISCOVER WHETHER SUCH PERSON IS, IN FACT, WEARING, CARRYING, OR TRANSPORTING A HANDGUN, MAY:

A. APPROACH THE PERSON AND IDENTIFY HIMSELF AS A LAW-ENFORCEMENT OFFICER;

B. REQUEST THE PERSON'S NAME AND ADDRESS, AND, IF THE PERSON IS IN A VEHICLE, HIS LICENSE TO OPERATE THE VEHICLE, AND THE VEHICLE'S REGISTRATION; AND

C. ASK SUCH QUESTIONS AND REQUEST SUCH EXPLANATIONS AS MAY BE REASONABLY CALCULATED TO DETERMINE WHETHER THE PERSON IS, IN FACT, UNLAWFULLY WEARING, CARRYING, OR TRANSPORTING A HANDGUN IN VIOLATION OF PART 255 OF THE CRIMINAL CODE, AND, IF THE PERSON DOES NOT GIVE AN EXPLANATION WHICH DISPELS THE REASONABLE BELIEF

WHICH HE HAD, HE MAY

D. CONDUCT A SEARCH OF THE PERSON, LIMITED TO A PATTING OR FRISKING OF THE PERSON'S CLOTHING IN SEARCH OF A HANDGUN. THE POLICE OFFICER IN ACTING UNDER THIS SECTION SHALL DO SO WITH DUE REGARD TO ALL CIRCUMSTANCES OF THE OCCASION, INCLUDING BUT NOT LIMITED TO THE AGE, APPEARANCE, PHYSICAL CONDITION, MANNER, AND SEX OF THE PERSON APPROACHED.

2. IN THE EVENT THAT THE OFFICER DISCOVERS THE PERSON TO BE WEARING, CARRYING, OR TRANSPORTING A HANDGUN, HE MAY DEMAND THAT THE PERSON PRODUCE EVIDENCE THAT HE IS ENTITLED TO SO WEAR, CARRY, OR TRANSPORT THE HANDGUN PURSUANT TO PART 255 OF THE CRIMINAL CODE. IF THE PERSON IS UNABLE TO PRODUCE SUCH EVIDENCE, THE OFFICER MAY THEN SEIZE THE HANDGUN AND ARREST THE PERSON.

3. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO LIMIT THE RIGHT OF ANY POLICE OFFICER TO MAKE ANY OTHER TYPE OF SEARCH, SEIZURE, AND ARREST WHICH MAY BE PERMITTED BY LAW, AND THE PROVISIONS HEREOF SHALL BE IN ADDITION TO AND NOT IN SUBSTITUTION OF OR LIMITED BY THE PROVISIONS OF §594B OF ARTICLE 27C.

4. ANY POLICE OFFICER SUED IN A CIVIL ACTION FOR CONDUCTING A SEARCH OR SEIZURE PURSUANT TO THIS SECTION WHICH IS ALLEGED TO BE UNREASONABLE AND UNLAWFUL SHALL, UPON HIS REQUEST, BE DEFENDED IN SAID ACTION AND ANY APPEALS THEREFROM, BY THE ATTORNEY GENERAL.

5. EVERY POLICE OFFICER WHO CONDUCTS A SEARCH OR SEIZURE PURSUANT TO THIS SECTION SHALL, WITHIN TWENTY-FOUR HOURS AFTER SUCH SEARCH OR SEIZURE, FILE A WRITTEN REPORT WITH THE LAW-ENFORCEMENT AGENCY BY WHICH HE IS EMPLOYED DESCRIBING THE CIRCUMSTANCES SURROUNDING THE SEARCH OR SEIZURE AND THE REASONS THEREFOR ON A FORM PRESCRIBED BY THE SECRETARY OF PUBLIC SAFETY AND CORRECTIONAL SERVICES. SUCH REPORT SHALL INCLUDE THE NAME OF THE PERSON SEARCHED. A COPY OF ALL SUCH REPORTS SHALL BE SENT TO THE SUPERINTENDENT OF THE MARYLAND STATE POLICE.

COMMENT

This section is derived from Article 27, section 36D. It should be reconsidered and perhaps transferred at the time of enacting a code of criminal procedure. There are no substantive changes.

857. MACHINE GUN REGISTRATION AND REGISTERS

1. EVERY MACHINE GUN BROUGHT INTO THIS STATE OTHER THAT BY A CONTRACT CARRIER OR COMMON CARRIER AND

EVERY MACHINE GUN DELIVERED OR ACQUIRED WITHIN THIS STATE SHALL BE REGISTERED, AS PROVIDED IN THIS SECTION, WITHIN SEVENTY-TWO HOURS OF ITS ENTRY, DELIVERY, OR ACQUISITION, AND ANNUALLY THEREAFTER.

2. BLANKS FOR REGISTRATION SHALL BE PREPARED BY THE SUPERINTENDENT OF THE MARYLAND STATE POLICE AND FURNISHED UPON REQUEST. THE APPLICATION FOR REGISTRATION AS FILED MUST:

A. SHOW THE MODEL AND SERIAL NUMBER OF THE GUN; THE NAME, ADDRESS, AND OCCUPATION OF THE PERSON IN POSSESSION; AND FOR WHOM AND THE PURPOSE FOR WHICH THE GUN WAS REQUIRED; AND

B. CONTAIN AN AFFIRMATION THAT THE PERSON IN POSSESSION OWNS OR RENTS A DESCRIBED STORAGE FACILITY WHICH COMPLIES WITH SUBSECTION (4), AND, WHEN RENTED, CONTAIN AN ORIGINAL OR COPY OF A RENTAL RECEIPT FROM SUCH STORAGE FACILITY; AND

C. BE SIGNED BY THE PERSON IN POSSESSION.

3. REGISTRATION DATA SHALL NOT BE SUBJECT TO INSPECTION BY THE PUBLIC.

4. THE SUPERINTENDENT OF THE MARYLAND STATE POLICE SHALL APPROVE A BANK SAFETY DEPOSIT BOX AS A STORAGE FACILITY, AND SHALL APPROVE ANY LOCKED VAULT, SAFE, OR OTHER PLACE OF STORAGE WHICH HE FINDS SATISFACTORILY SECURE.

5. REGISTRATIONS EXISTING PURSUANT TO FORMER ARTICLE 27, SECTION 379 OF THE ANNOTATED CODE OF MARYLAND ON THE EFFECTIVE DATE OF THIS ACT SHALL CONTINUE IN EFFECT ACCORDING TO THE TERMS OF SECTION 379 AND SHALL SATISFY THE REQUIREMENTS OF THIS SECTION UNTIL EXPIRATION OF THE TERM OF SUCH REGISTRATION, AT WHICH TIME RE-REGISTRATION ACCORDING TO THE PROVISIONS OF THIS SECTION IS REQUIRED.

6. EVERY MANUFACTURER OF A MACHINE GUN SHALL KEEP A REGISTER OF ALL MACHINE GUNS MANUFACTURED OR HANDLED BY HIM. THIS REGISTER SHALL SHOW THE METHOD AND SERIAL NUMBER, DATE OF MANUFACTURE, SALE, LOAN, GIFT, DELIVERY OR RECEIPT OF EVERY MACHINE GUN, THE NAME, ADDRESS, AND OCCUPATION OF THE PERSON TO WHOM THE MACHINE GUN WAS DISPOSED OF, OR FROM WHOM IT WAS RECEIVED; AND THE PURPOSE FOR WHICH IT WAS ACQUIRED BY THE PERSON TO WHOM THE MACHINE GUN WAS DISPOSED OF, OR FROM WHOM RECEIVED. UPON DEMAND EVERY MANUFACTURER SHALL PERMIT ANY MARSHAL, SHERIFF, OR POLICE OFFICER TO INSPECT HIS ENTIRE STOCK OF MACHINE GUNS, PARTS, AND SUPPLIES THEREFOR, AND SHALL PRODUCE THE REGISTER, HEREIN REQUIRED, FOR INSPECTION. A VIOLATION OF ANY PROVISION OF THIS SUBSECTION IS

PUNISHABLE BY A FINE OF NOT MORE THAN ONE HUNDRED DOLLARS.

COMMENT

This section is derived from requirements of the Uniform Machine Gun Act. See former Art. 27, sections 278 and 379. Provisions requiring safe storage of machine gun bolts to avoid criminal liability, contained in section 255.15(2)(j) of the Criminal Code, require the storage regulations found here.

858. RIFLES AND SHOTGUNS; PURCHASES BY RESIDENTS IN CONTIGUOUS STATE; SALES TO RESIDENTS OF CONTIGUOUS STATES

1. "CONTIGUOUS STATE," AS USED IN THIS SECTION, MEANS ANY STATE HAVING A COMMON BOUNDARY LINE WITH THE STATE OF MARYLAND: PENNSYLVANIA, DELEWARE, VIRGINIA, OR WEST VIRGINIA.

2. IT SHALL BE LAWFUL FOR ANY MARYLAND RESIDENT TO PURCHASE A RIFLE OR SHOTGUN FROM A FEDERALLY LICENSED GUN DEALER IN A CONTIGUOUS STATE IF THE PURCHASER IS ELIGIBLE TO PURCHASE A RIFLE OR SHOTGUN UNDER THE LAWS OF SUCH STATE.

3. IT SHALL BE LAWFUL FOR ANY RESIDENT OF A CONTIGUOUS STATE TO PURCHASE A RIFLE OR SHOTGUN FROM A FEDERALLY LICENSED GUN DEALER IN THIS STATE IF THE PURCHASER IS ELIGIBLE TO PURCHASE A RIFLE OR SHOTGUN UNDER THE LAWS OF THE STATE OF MARYLAND.

COMMENT

These sections are derived from former Article 27, sections 481A and 481B. They take advantage of a provision of the Federal Gun Control Act of 1968. See title 18, §922(b).

PART 260: OTHER OFFENSES AGAINST PUBLIC SAFETY

260.00. UNLAWFULLY POSSESSING NOXIOUS MATERIAL

1. AS USED IN THIS SECTION, "NOXIOUS MATERIAL" MEANS ANY CONTAINER WHICH CONTAINS ANY DRUG OR OTHER SUBSTANCE CAPABLE OF GENERATING OFFENSIVE, NOXIOUS OR SUFFOCATING FUMES, GASES OR VAPORS.

2. A PERSON IS GUILTY OF UNLAWFULLY POSSESSING NOXIOUS MATERIAL WHEN HE POSSESSES SUCH MATERIAL UNDER CIRCUMSTANCES EVINCING AN INTENT TO USE IT OR TO CAUSE IT TO BE USED TO INFLICT PHYSICAL INJURY UPON OR TO CAUSE ANNOYANCE TO A PERSON, OR TO DAMAGE PROPERTY OF ANOTHER,

OR TO DISTURB THE PUBLIC PEACE.

3. IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION UNDER THIS SECTION THAT THE DEFENDANT, AT THE RELEVANT TIME, WAS:

A. A PERSON IN THE MILITARY SERVICE OF THE STATE OF MARYLAND, A POLICE OFFICER, AN EMPLOYEE OF A DETENTION FACILITY AS DEFINED IN SECTION 205.00(1), OR A PERSON IN THE MILITARY OR OTHER SERVICE OF THE UNITED STATES; AND

B. THEN ACTING IN THE AUTHORIZED COURSE OF HIS EMPLOYMENT.

UNLAWFULLY POSSESSING NOXIOUS MATERIAL IS A CLASS B MISDEMEANOR.

COMMENT

This section, adapted from New York Penal Law section 270.05, is directed against the possession of tear gas bombs and the like. Such conduct is not necessarily reached by section 255.30(3), which is limited in scope to defined dangerous weapons and other things which are or appear to be readily capable of causing death or serious physical injury. Since police officers and the like may properly intend to inflict physical injury with such material in the course of their duties, an affirmative defense provision for such cases has been added.

260.05. CREATING A HAZARD

A PERSON IS GUILTY OF CREATING A HAZARD WHEN:

1. HAVING PLACED OR PERMITTED THE PLACING, OUTSIDE OF ANY BUILDING IN A PLACE ACCESSIBLE TO CHILDREN, ANY UNCRATED AND ABANDONED OR DISCARDED ICEBOX, REFRIGERATOR, OR FREEZER CABINET, HAVING A CAPACITY OF MORE THAN ONE AND ONE-HALF CUBIC FEET AND A DOOR OR LID WHICH LOCKS OR FASTENS AUTOMATICALLY WHEN CLOSED AND WHICH CANNOT EASILY BE OPENED FROM THE INSIDE, HE FAILS TO REMOVE THE DOOR, LID, OR LOCKING OR FASTENING DEVICE; OR

2. BEING THE OWNER OR OTHERWISE HAVING POSSESSION OF PROPERTY UPON WHICH AN ABANDONED WELL OR CESSPOOL IS LOCATED, HE FAILS TO COVER THE SAME WITH SUITABLE PROTECTIVE CONSTRUCTION.

CREATING A HAZARD IS A CLASS B MISDEMEANOR.

COMMENT

This section is derived from New York Penal Law section 270.10. Some of the language of Maryland Article 27, section 334 (Abandoned and discarded iceboxes) has been used in subsection (1).

260.10. UNLAWFUL USE OF A PARTY LINE

1. AS USED IN THIS SECTION:

A. "PARTY LINE" MEANS A SUBSCRIBER'S LINE TELEPHONE CIRCUIT, CONSISTING OF TWO OR MORE MAIN TELEPHONE STATIONS CONNECTED THEREWITH, EACH STATION WITH A DISTINCTIVE RING OR TELEPHONE NUMBER.

B. "EMERGENCY" MEANS A SITUATION IN WHICH PROPERTY OR HUMAN LIFE ARE IN JEOPARDY, AND THE PROMPT SUMMONING OF AID IS ESSENTIAL.

2. A PERSON IS GUILTY OF UNLAWFUL USE OF A PARTY LINE WHEN:

A. BEING INFORMED THAT SUCH LINE IS NEEDED FOR AN EMERGENCY CALL TO A FIRE DEPARTMENT OR POLICE DEPARTMENT OR FOR MEDICAL AID FOR AMBULANCE SERVICE, HE INTENTIONALLY FAILS IMMEDIATELY TO RELINQUISH SUCH LINE; OR

B. HE SECURES THE USE OF SUCH LINE BY FALSELY STATING THAT SUCH LINE IS NEEDED FOR AN EMERGENCY CALL, WHEN HE KNOWS THAT SUCH STATEMENT IS FALSE.

UNLAWFUL USE OF A PARTY LINE IS A CLASS B MISDEMEANOR.

COMMENT

This section is derived from Article 27, section 557, of the Maryland Code, which in turn appears to have been derived from an earlier form of New York Penal Law section 270.15. A few changes have been made to clarify the provisions or bring the language into conformity with the usual language of the draft.

Subsection (c) of the Maryland section has been omitted here. It is regulatory in nature, dealing with the placing of notices of the criminal provisions in telephone books. It should be transferred to another article.

NOTE ON OFFENSES RELATING TO FIREWORKS

New York Penal Law section 270.00 deals with the sale, possession, etc., of fireworks. This section has been intentionally omitted, in view of the provisions of

Maryland Article 38A, section 15 ff., which appear to deal completely and adequately with the problem. It is a borderline question as to whether some of the provisions of what is primarily a regulatory statute should appear in the Criminal Code, but it seems a satisfactory solution to leave the Maryland provisions as they now stand, in a separate article.

ADDENDUM

PROPOSED AMENDMENTS RELATING TO DISTRICT COURT JURISDICTION

COURTS AND JUDICIAL PROCEEDINGS ARTICLE

TITLE 4. DISTRICT COURT — JURISDICTION

SUBTITLE 3. CRIMINAL JURISDICTION

4-301. EXCLUSIVE ORIGINAL JURISDICTION.

EXCEPT AS PROVIDED IN §4-302, THE DISTRICT COURT HAS EXCLUSIVE ORIGINAL JURISDICTION IN A CRIMINAL CASE IN WHICH A PERSON AT LEAST 16 YEARS OLD, OR A CORPORATION IS CHARGED WITH VIOLATION OF THE VEHICLE LAWS, OR THE STATE BOAT ACT, OR RULES AND REGULATIONS ADOPTED PURSUANT TO IT, OR IN WHICH A PERSON AT LEAST 18 YEARS OLD OR A CORPORATION IS CHARGED WITH:

(1) COMMISSION OF ANY OFFENSE, DEFINED BY THE CRIMINAL CODE OF MARYLAND, WHICH IS A CLASS E FELONY, A CLASS A MISDEMEANOR, A CLASS B MISDEMEANOR, OR A VIOLATION; OR

(2) COMMISSION OF ANY OFFENSE, OTHER THAN A FELONY, WHICH IS:

(A) AN OFFENSE DEFINED ELSEWHERE IN THE PUBLIC GENERAL LAWS OF MARYLAND THAN IN THE CRIMINAL CODE OF MARYLAND;

(B) AN OFFENSE DEFINED IN THE PUBLIC LOCAL LAWS OF MARYLAND;

(C) A VIOLATION OF A COUNTY, MUNICIPAL, OR OTHER ORDINANCE;

(D) A CRIMINAL VIOLATION OF A STATE, COUNTY, OR MUNICIPAL RULE OR REGULATION; OR

(E) DOING OR OMITTING TO DO ANY ACT MADE PUNISHABLE BY A FINE, IMPRISONMENT, OR OTHER PENALTY AS PROVIDED BY THE PARTICULAR LAW, ORDINANCE RULE, OR REGULATION DEFINING THE VIOLATION.

4-302. EXCEPTIONS.

(A) FELONIES. EXCEPT AS PROVIDED IN §4-301(2), THE DISTRICT COURT DOES NOT HAVE JURISDICTION TO TRY A CRIMINAL CASE CHARGING THE COMMISSION OF A FELONY.

(B) JUVENILE CAUSES. EXCEPT AS PROVIDED IN §4-303, THE DISTRICT COURT DOES NOT HAVE CRIMINAL JURISDICTION TO TRY A CASE IN WHICH A JUVENILE COURT HAS EXCLUSIVE ORIGINAL JURISDICTION.

(C) CONCURRENT JURISDICTION CASES. THE JURISDICTION OF THE DISTRICT COURT IS CONCURRENT WITH THAT OF THE CIRCUIT COURT IN A CRIMINAL CASE IN WHICH THE CHARGE IS:

(1) AN OFFENSE, DEFINED BY THE CRIMINAL CODE OF MARYLAND, WHICH IS A CLASS C FELONY OR A CLASS D FELONY; OR

(2) AN OFFENSE, NOT DEFINED BY THE CRIMINAL CODE OF MARYLAND, IN WHICH THE PENALTY MAY BE CONFINEMENT OF THREE YEARS OR MORE OR A FINE OF $2,500 OR MORE.

(D) JURY TRIAL. (1) THE DISTRICT COURT IS DEPRIVED OF JURISDICTION IF A DEFENDANT IS ENTITLED TO AND DEMANDS A JURY TRIAL AT ANY TIME PRIOR TO TRIAL IN THE DISTRICT COURT.

(2) A DEFENDANT MAY DEMAND A JURY TRIAL IN A CRIMINAL CASE IF THE PENALTY FOR THE OFFENSE WITH WHICH HE IS CHARGED PERMITS IMPRISONMENT FOR A PERIOD IN EXCESS OF THREE MONTHS; THE STATE MAY NOT DEMAND A JURY TRIAL.

(E) SEVERAL OFFENSES. EXCEPT AS PROVIDED IN SUBTITLE 5, THE DISTRICT COURT DOES NOT HAVE JURISDICTION OF AN OFFENSE OR OFFENSES OTHERWISE WITHIN THE DISTRICT COURT'S JURISDICTION IF A PERSON IS CHARGED WITH AN OFFENSE OR OFFENSES ARISING FROM THE SAME CIRCUMSTANCES BUT NOT WITHIN THE DISTRICT COURT'S JURISDICTION. IN THIS CASE, THE CIRCUIT COURT FOR THE COUNTY HAS EXCLUSIVE ORIGINAL JURISDICTION OVER ALL THE OFFENSES.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect January 1, 1977.

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