MODEL PENAL CODE

OFFICIAL DRAFT AND EXPLANATORY NOTES

Complete Text of Model Penal Code as Adopted
at the 1962 Annual Meeting of
The American Law Institute
at Washington, D.C., May 24, 1962

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(The Explanatory Notes were prepared in connection with the revision of the Commentaries to the Model Penal Code. The Commentaries to Parts I and II of the Code have been published separately in six volumes.)

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FOREWORD

The Model Penal Code of the American Law Institute, completed in 1962, played an important part in the widespread revision and codification of the substantive criminal law of the United States that has been taking place in the last twenty years. New codes were enacted in Illinois effective in 1962; Minnesota and New Mexico in 1963; New York in 1967; Georgia in 1969; Kansas in 1970; Connecticut in 1971; Colorado and Oregon in 1972; Delaware, Hawaii, New Hampshire, Pennsylvania and Utah in 1973; Montana, Ohio and Texas in 1974; Florida, Kentucky, North Dakota and Virginia in 1975; Arkansas, Maine and Washington in 1976; South Dakota and Indiana in 1977; Arizona and Iowa in 1978; Missouri, Nebraska and New Jersey in 1979; Alabama and Alaska in 1980; and Wyoming in 1983. It is fair to say that these thirty-four enactments were all influenced in some part by the positions taken in the Model Code, though the extent to which particular formulations or approaches of the Model were adopted or adapted varied extensively from state to state. Georgia, Kansas, Minnesota, New Mexico and Virginia, for example, were content with much less ambitious efforts in their revisions than Delaware, Hawaii, Kentucky, New Jersey, New York, Pennsylvania, Oregon and Utah. In each case, however, the legislative process made a major effort to appraise the content of the penal law by a contemporary reasoned judgment—the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of the authority that it distributes and confers. To stimulate that process and assist its execution was the purpose of the Institute in undertaking preparation of the Model Code and of the Rockefeller Foundation in providing indispensable financial aid.

The process may not be over yet. Draft codes prepared in jurisdictions where enactment failed, notably California, Massachusetts, Michigan, Oklahoma, Tennessee and Vermont, may still be revived. There is a pending bill in West Virginia and work is under way in Rhode Island and South Carolina. Congress, moreover, has been working more than a decade on the drafting of an integrated code of our federal criminal law, building on the 1971 report of the National Commission on Reform of Federal Criminal Laws. There may well be further motion on that project.

The original publication of the Model Code consisted only of the thirteen Tentative Drafts, containing different portions of the text and accompanying Comments, that were considered by the Institute from 1953 to 1960; an initial Final Draft, containing revised text on responsibility, sentencing and correction, considered in 1961; and the Proposed Official Draft of the entire Code (without Comments) approved and promulgated in 1962. There was a strong demand for this material and it was frequently reprinted. A further and final publication was

originally contemplated when the Comments, prepared annually in the course of the previous decade, had been suitably updated. It was postponed, however, in favor of a more ambitious undertaking, a revision and expansion of the commentaries to explore and reflect the far-reaching legislative and judicial response to the Code. That response was plainly imminent by 1962, though its magnitude did not at once become apparent. By 1966, however, the Revised Penal Law had been enacted in New York and twenty-two state projects elsewhere were beginning or were under way.

A decade later, when twenty-four of the new codes had been enacted and legislation was in prospect in some other states, the time for undertaking final publication was believed to be at hand. A grant from the Law Enforcement Assistance Administration made the project possible and Professor R. Kent Greenawalt of Columbia University Law School was appointed Chief Reporter.

Three volumes, containing Part II of the Model Code, Definition of Specific Crimes, with revised Comments drafted by Professor Peter W. Low of the University of Virginia Law School as Reporter and Professor John Calvin Jeffries, Jr., also of Virginia, as Associate Reporter, were published in 1980 and were very well received. Three more volumes, containing Part I of the Code, General Provisions, with revised Comments drafted by Professor Greenawalt, Professor Low and Professor Malvina Halberstam (Article 1), with the assistance of Professor Sanford Fox (Articles 6 and 7), are in the printer's hands, with publication contemplated in the spring of 1985. These general formulations present a much more extensive treatment of pervasive problems of the penal law than had been developed heretofore in our legislative tradition or even in the European Codes. Their hospitable reception in much of the legislative and judicial work of recent years represents an important achievement of the Model Code.

In the course of the revision of the commentaries, it became evident that a final, official publication of the complete text of the Model Penal Code would be of value. This volume is designed to serve that purpose. The proposed statutory formulations are accompanied by brief explanatory notes and references to the volume and page of the revised Commentaries (or, with respect to Parts III and IV of the Code, the Tentative Drafts) where detailed exposition will be found. The Explanatory Notes were prepared by Professor Greenawalt and his associates in the course of their revision of the Comments. Unlike the statutory text, which had the Institute's approval after a decade of consideration by the Council and Annual Meetings of the members, the notes and commentaries are the work of the Reporters.

HERBERT WECHSLER
Director
The American Law Institute

May 30, 1984

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MODEL PENAL CODE AND EXPLANATORY NOTES

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

Section 1.01. Title and Effective Date.

(1) This Act is called the Penal and Correctional Code and may be cited as P.C.C. It shall become effective on —.

(2) Except as provided in Subsections (3) and (4) of this Section, the Code does not apply to offenses committed prior to its effective date and prosecutions for such offenses shall be governed by the prior law, which is continued in effect for that purpose, as if this Code were not in force. For tbe purposes of this Section, an offense was committed prior to the effective date of the Code if any of the elements of the offense occurred prior thereto.

(3) In any case pending on or after the effective date of the Code, involving an offense committed prior to such date:

(a) procedural provisions of the Code shall govern, insofar as they are justly applicable and their application does not introduce confusion or delay;

(b) provisions of the Code according a defense or mitigation shall apply, with the consent of the defendant;

(c) the Court, with the consent of the defendant, may impose sentence under the provisions of the Code applicable to the offense and the offender.

(4) Provisions of the Code governing the treatment and the release or discharge of prisoners, probationers and parolees sball apply to persons under sentence for offenses committed prior to the effective date of the Code, except that the minimum or maximum period of their detention or supervision shall in no case be increased.

Explanatory Note

Section 1.01 sets forth the title of the Code and calls for a legislative specification of its effective date. It also addresses

the problem, inevitably posed by the enactment of a new code, whether it has any application to offenses committed or to cases pending prior to its effective date. Though such application is excluded generally, as the ex post facto prohibition requires, room is perceived for the retroactive application of merely procedural provisions and, with the consent of the defendant, of ameliorative or mitigative provisions. By the same token the Code sentencing provisions may be applied with the consent of the defendant and the correctional provisions are applied to persons under sentence so long as they do not increase the period of detention or supervision. Insofar as the Code does not apply to offenses committed prior to its effective date, the prior law is continued in effect as if the Code were not in force.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 2.

Section 1.02. Purposes; Principles of Construction.

(1) The general purposes of the provisions governing the definition of offenses are:

(a) to forhid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;

(b) to subject to puhlic control persons whose conduct indicates tbat they are disposed to commit crimes;

(c) to safeguard conduct that is without fault from condemnation as criminal;

(d) to give fair warning of the nature of the conduct declared to constitute an offense;

(e) to differentiate on reasonahle grounds between serious and minor offenses.

(2) The general purposes of the provisions governing the sentencing and treatment of offenders are:

(a) to prevent the commission of offenses;

(h) to promote the correction and rehabilitation of offenders;

(c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;

(d) to give falr warning of the nature of the sentences that may be imposed on conviction of an offense;

(e) to differentiate among offenders with a view to a just individualization in their treatment;

(f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;

(g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;

(h) to integrate responsibility for the administration of the correctional system in a State Department of Correction [or other single department or agency].

(3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.

Explanatory Note

Section 1.02 declares the purposes that the provisions governing the definition of offenses and the provisions governing the treatment of offenders, set forth elsewhere in the Code, should serve, and states the principles that should guide interpretation of the provisions of the Code.

Subsection (1) sets forth the general purposes of the provisions governing the definition of offenses. Within a framework in which the dominant theme is the prevention of offenses, a number of specific factors are articulated which are believed to be the principal objectives of the definitional process. The major goal is to forbid and prevent conduct that threatens substantial harm to individual or public interests and that at the same time is both unjustifiable and inexcusable. Subsidiary themes are to subject those who are disposed to commit crimes to public control, to prevent the condemnation of conduct that is without fault, to give fair warning of the conduct declared to be criminal, and to differentiate between serious and minor offenses on reasonable grounds.

Subsection (2) states the general purposes of the provisions governing the sentencing and treatment of offenders, again within the general framework of a preventive scheme. Subsidiary goals in this case are to promote the correction and rehabilitation of offenders, within a scheme that safeguards them against excessive, disproportionate or arbitrary punishment, to give fair warning of the possible dispositions for criminal offenses, and to differentiate among offenders with a view to just individualization of treatment. It is also among the goals of the sentencing and treatment provisions to define and coordinate the functions of courts and other agencies responsible for dealing with offenders,

to advance the use of science in the sentencing and correctional process, and to integrate responsibility for the correctional system into a single department or agency.

Subsection (3) replaces the rule that penal statutes should be "strictly construed" with the command that criminal statutes should be construed according to their fair import, and that ambiguities should be resolved by an interpretation that will further the general principles stated in this Section, including specifically the fair warning provision, and the special purposes of the statute involved. It is also provided that these general principles should guide the exercise of discretion by the courts in cases where more specific criteria stated in the Code are not decisive.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 15.

Section 1.03. Territorial Applicability.

(1) 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 such an element occurs within this State; or

(b) conduct occurring outside the State is sufficient under the law of this State to constitute an attempt to commit an offense within the State; 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 such 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 that 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 based on a statute of this State that expressly prohibits conduct outside the State, when the conduct bears a reasonable relation to a legitimate interest of this State and the actor knows or should know that his conduct is likely to affect that interest.

(2) Subsection (1)(a) does not apply when either causing a specified result or a purpose to cause or danger of causing such a 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 when 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 purposely 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), and if the body of a homicide victim is found within the State, it is presumed that such result occurred within the State.

(5) This State includes the land and water and the air space above such land and water with respect to which the State has legislative jurisdiction.

Explanatory Note

This section sets forth the circumstances in which a person "may be convicted" under the law of the forum state. The authority of a state to convict under its law encompasses two legal concepts: jurisdiction and application of forum law. Unlike civil actions, where jurisdiction and choice of law are separate questions, in the administration of criminal law these concepts are merged, since it has long been a maxim of American jurisprudence that a state will not enforce the penal laws of another state. Thus, in enumerating the types of conduct to which a state may apply its criminal law, the section is also delineating the scope of the state's criminal jurisdiction. The section sets forth a number of alternative bases for jurisdiction, thus rejecting the old common law doctrines of strict territoriality and of assigning exclusive jurisdiction to the state where the last element occurred.

On the premise that it is particularly desirable in a federated state to increase jurisdictional options and that if a state's assertion of jurisdiction does not result in unfairness to the person charged, the state should be accorded jurisdiction over all those who engage in conduct that affects the state's interests, the Code proposes broad jurisdictional bases, within the limits of due process. Thus, the section provides that a state has jurisdiction when 1) conduct or a result that is an element of the offense occurs

within the state; 2) conduct outside the state constitutes an attempt or conspiracy within the state or is prohibited by a statute of the state specifically directed at such out-of-state conduct; 3) conduct within the state constitutes an attempt, solicitation, complicity in or conspiracy to commit an offense in another state; or 4) the offense consists of an omission to perform a legal duty within the state. These bases of jurisdiction are subject to conditions and qualifications to ensure that the state's assertion of jurisdiction does not result in unfairness to the defendant. For example, a result within the state is not a basis for jurisdiction if: 1) it is caused by lawful conduct outside the state, unless the actor purposely or knowingly caused the result within the state; or 2) it is caused by conduct within the state but the result was designed or likely to occur in a jurisdiction where it would not constitute an offense, unless a legislative purpose to declare the conduct criminal regardless of the place of the result clearly appears. Conspiracy outside the state is a basis for jurisdiction only if an overt act occurs within the state; and an omission is a basis for jurisdiction only if it involves a legal duty imposed by the state with respect to domicile, residence, or a relationship to a person, thing or transaction in the state.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 35.

Section 1.04. Classes of Crimes; Violations.

(1) An offense defined by this Code or by any other statute of this State, for which a sentence of [death or of] imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, misdemeanors or petty misdemeanors.

(2) A crime is a felony if it is so designated in this Code or if persons convicted thereof may be sentenced [to death or] to imprisonment for a term that, apart from an extended term, is in excess of one year.

(3) A crime is a misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto.

(4) A crime is a petty misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto or if it is defined by a statute other than this Code that now provides that persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is less than one year.

(5) An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon

conviction or if it is defined by a statute other than this Code that now provides that the offense shall not constitute a crime. A violation does not constitute a crime and conviction of a violation sball not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

(6) Any offense declared by law to constitute a crime, without specification of the grade thereof or of the sentence authorized upon conviction, is a misdemeanor.

(7) An offense defined by any statute of this State other than this Code shall be classified as provided in this Section and the sentence that may be imposed upon conviction thereof shall hereafter be governed by this Code.

Explanatory Note

This section sets forth several important principles of the Code. First, it provides that any offense for which a sentence of death or imprisonment is authorized constitutes a crime, and classifies crimes as felonies, misdemeanors, and petty misdemeanors, based on the length of incarceration that may be imposed. Section 6.01(1) further subdivides felonies into three classes. There are thus for sentencing purposes five categories of crime under the Code.

Second, it creates a noncriminal class of offenses, designated "violations," for which only a fine or other civil penalty is authorized. It is envisaged that this class will primarily include regulatory offenses based on strict liability and certain minor offenses such as traffic violations.

Third, the section performs the necessary rationalizing task of subjecting criminal enactments found in a jurisdiction's other statutes to the sentencing structure of the criminal code.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 67.

Section 1.05. All Offenses Defined hy Statute; Application of General Provisions of the Code.

(1) No conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State.

(2) The provisions of Part I of the Code are applicable to offenses defined by other statutes, unless the Code otherwise provides.

(3) This Section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.

Explanatory Note

This section accomplishes two important goals of codification: it abolishes common law offenses and makes the Code provisions

on criminal responsibility, defenses, and sentencing applicable to all offenses, whether defined by the Code or other statutes.

Subsection (1) provides that no conduct constitutes an offense unless it is defined as a crime or violation by statute, thus abolishing common law offenses. Subsection (2) provides that unless the Code specifies otherwise, Part I of the Code, which establishes rules of liability, justification, criminal responsibility, and sentencing and treatment of offenders, applies to offenses defined by statutes other than the Code. Subsection (3) indicates that the section is not intended to apply to contempt powers or to sanctions employed to enforce civil judgments or decrees.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 74.

Section 1.06. Time Limitations.

(1) A prosecution for murder may be commenced at any time.

(2) Except as otherwise provided in this Section, prosecutions for other offenses are subject to the following periods of limitation:

(a) a prosecution for a felony of the first degree must be commenced within six years after it is committed;

(b) a prosecution for any other felony must be commenced within three years after it is committed;

(c) a prosecution for a misdemeanor must be commenced within two years after it is committed;

(d) a prosecution for a petty misdemeanor or a violation must be commenced within six months after it is committed.

(3) If the period prescribed in Subsection (2) has expired, a prosecution may nevertheless be commenced for:

(a) any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; and

(b) any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment or within two years thereafter, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

(4) An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of con-

duct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced either when an indictment is found [or an information filed] or when a warrant or other process is issued, provided that such warrant or process is executed without unreasonable delay.

(6) The period of limitation does not run:

(a) during any time when the accused is continuously absent from the State or has no reasonably ascertainable place of abode or work within the State, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; or

(b) during any time when a prosecution against the accused for the same conduct is pending in this State.

Explanatory Note

This section sets forth the period within which prosecution for an offense must be commenced. It provides a time limitation for all offenses except murder, a prosecution for which may be commenced at any time.

Subsection (2) specifies four periods of limitation: six years for felonies of the first degree; three years for less serious felonies; two years for misdemeanors; and six months for petty misdemeanors and violations.

Subsection (3) extends the period for offenses involving fraud or breach of fiduciary duty and for offenses based on misconduct in office by a public officer or employee. It permits commencement of prosecution a year after discovery in the former case and two years after the accused has left public office in the latter, but limits the time by which the otherwise applicable period may be extended for either of the above offenses to three years.

Subsections (4) and (5) define when an offense is "commenced" for statute of limitations purposes.

Subsection (6) provides that the period shall not run (a) during any time when the accused was continuously absent from the state or had no reasonably ascertainable place of abode or work in the state or (b) during any time when a prosecution for the same conduct was pending against the accused in the forum state. In the circumstances described in (a), the time by which the otherwise applicable period may be extended is limited to three years.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 85.

Section 1.07. Method of Prosecution When Conduct Constitutes More Than One Offense.

(1) Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may estahlish the commission of more than one offense, the defendant may be prosecuted for eaeh such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other, as defined in Subsection (4) of this Section; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to estahlish the commission of the offenses; or

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) 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 such conduct constitute separate offenses.

(2) Limitation on Separate Trials for Multiple Offenses. Except as provided in Subsection (3) of this Section, a defendant shall not he subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(3) Authority of Court to Order Separate Trials. When a defendant is charged with two or more offenses based on the same conduct or arising from the same eriminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

(4) Conviction of Included Offense Permitted. A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or

(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

(5) Submission of Included Offense to Jury. The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

Explanatory Note for Sections 1.07–1.11

Sections 1.07 to 1.11 involve different aspects of double jeopardy protection.

Section 1.07 states a general rule barring separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, when those offenses are within the jurisdiction of the same court and are known to the prosecuting officer at the time of the original trial. The court, however, is permitted to order separate trials if justice so requires. The section also specifies the situations in which conviction for more than one offense based on the same conduct is precluded. It also authorizes a conviction of included offenses, as defined, and permits but does not obligate the court to submit to the jury an included offense when the evidence affords no rational basis for conviction of that offense, rather than the crime charged. In prohibiting multiple trials in many situations where multiple convictions are permissible, the section thus imposes compulsory joinder.

Section 1.08 sets forth the circumstances in which a prior prosecution is a bar to a subsequent prosecution for the same offense, in the narrowest sense of a violation of the same statutory provision based on the same facts. It provides that a bar arises if the prior prosecution resulted in an acquittal or conviction, was improperly terminated, or necessarily required a determination inconsistent with a fact or legal proposition that must be established for conviction of the offense charged in the subsequent prosecution.

Section 1.09 sets forth the circumstances under which a prior prosecution is a bar to a subsequent prosecution for a different offense, whether the second offense is based on different facts or on a different provision of the statute. It complements the joinder requirements and included offense standards of Section 1.07 by barring separate prosecution for offenses of which the defendant could have been convicted at the first trial or for which joinder was required under Section 1.07. But it goes beyond the

terms of Section 1.07 in banning any subsequent prosecution unless the second offense requires proof of a fact not required for the first offense and is intended to prevent a different harm or evil. Section 1.07 taken alone would permit separate trials if ordered by the court in the interests of justice or if the second offense was not initially known to the prosecutor. Section 1.09 forecloses the possible operation of these exceptions in instances specified above.

Section 1.10 sets forth the circumstances in which prosecution in one jurisdiction bars prosecution in another jurisdiction for conduct that constitutes an offense in both jurisdictions. In sharply restricting the possibilities of prosecution in the second jurisdiction, it makes substantial inroads on the traditional "dual sovereignties" rule that each jurisdiction is free to proceed as it wishes so long as its own actions, taken by themselves, do not violate double jeopardy safeguards. The section does, however, permit the second jurisdiction to go forward if the offense it prosecutes requires proof of a fact not required for the initial offense and is designed to prevent a substantially different harm or evil.

Section 1.11 provides that a prior prosecution is not a bar under the preceding sections if it was before a court that lacked jurisdiction; the judgment was held invalid in a subsequent proceeding; or it was procured by the defendant without the knowledge of the appropriate prosecuting officer for the purpose of avoiding the sentence that might otherwise be imposed.

AIthough these Code provisions were promulgated by the Institute prior to the Supreme Court decision in *Benton v. Maryland*, 395 U.S. 784 (1969), holding the fifth amendment double jeopardy clause applicable to the states, and the Court's recent decisions interpreting that clause, the Code provisions are generally consistent with and in a number of instances now mandated by the Court's rulings. Several Justices have urged adoption of the Code formulation—"based on the same conduct or arising from the same criminal episode"—as the definition of "same offense" in the fifth amendment double jeopardy clause. In only one matter has the Supreme Court ruled clearly contrary to the Code provision: the point at which jeopardy attaches in a jury trial. *See Crist v. Bretz*, 437 U.S. 28 (1978).

For detailed Comments, *see* MPC Part I Commentaries, vol. 1, at 104 (Section 1.07), 138 (Section 1.08), 156 (Section 1.09), 168 (Section 1.10), 179 (Section 1.11).

Section 1.08. When Prosecution Barred by Former Prosecution for the Same Offense.

When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances:

(1) 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 a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside.

(2) 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 of the offense.

(3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction that has not been reversed or vacated, a verdict of guilty that has not been set aside and that is capable of supporting a judgment, or a plea of guilty accepted by the Court. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant.

(4) The former prosecution was improperly terminated. Except as provided in this Subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(a) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.

(b) The trial court finds that the termination is necessary because:

(i) it is physically impossible to proceed with the trial in conformity with law; or

(ii) there is a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the State; or

(iv) the jury is unable to agree upon a verdict; or

(v) false statements of a juror on voir dire prevent a fair trial.

Explanatory Note for Sections 1.07–1.11 appears after Section 1.07. For detailed Comment to Section 1.08, *see* MPC Part I Commentaries, vol. 1, at 138.

Seetion 1.09. When Prosecution Barred by Former Prosecution for Different Offense.

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by sueh former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is for:

(a) any offense of which the defendant could have been convicted on tbe first prosecution; or

(b) any offense for which the defendant should have been tried on the first prosecution under Section 1.07, unless the Court ordered a separate trial of tbe charge of such offense; or

(c) 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 such offenses is intended to prevent a substantially different harm or evil, or (ii) the second offense was not consummated when the former trial began.

(2) 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 which acquittal, final order or judgment necessarily required a determination inconsistent with a fact tbat must be established for conviction of the second offense.

(3) Tbe former prosecution was improperly terminated, as improper termination is defined in Section 1.08, and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

Explanatory Note for Sections 1.07–1.11 appears after Section 1.07. For detailed Comment to Section 1.09, *see* MPC Part I Commentaries, vol. 1, at 156.

Section 1.10. Former Prosecution in Another Jurisdiction: When a Bar.

When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:

(1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is based on the same conduct, unless

(a) 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 such offenses is intended to prevent a substantially different harm or evil or

(b) the second offense was not consummated when the former trial began; or

(2) 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 which acquittal, final order or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the offense for which the defendant is subsequently prosecuted.

Explanatory Note for Sections 1.07–1.11 appears after Section 1.07. For detailed Comment to Section 1.10, *see* MPC Part I Commentaries, vol. 1, at 168.

Section 1.11. Former Prosecution Before Court Lacking Jurisdiction or When Fraudulently Procured by the Defendant.

A prosecution is not a bar within the meaning of Sections 1.08, 1.09 and 1.10 under any of the following circumstances:

(1) The former prosecution was before a court that lacked jurisdiction over the defendant or the offense; or

(2) The former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence that might otherwise be imposed; or

(3) The former prosecution resultcd in a judgment of conviction that was held invalid in a suhsequent proceeding on a writ of habeas corpus, coram nobis or similar process.

Explanatory Note for Sections 1.07–1.11 appears after Section 1.07. For detailed Comment to Section 1.11, *see* MPC Part I Commentaries, vol 1, at 179.

Section 1.12. Proof Beyond a Reasonable Doubt; Affirmative Defenses; Burden of Proving Fact When Not an Element of an Offense; Presumptions.

(1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.

(2) Subsection (1) of this Section does not:

(a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or

(b) apply to any defense tbat the Code or another statute plainly rcquires the defendant to prove by a prepondcranee of evidence.

(3) A ground of defcnse is affirmative, within the meaning of Subsection (2)(a) of this Section, when:

(a) it arises under a section of tbe Code that so provides; or

(b) it relates to an offense defined by a statute other than the Code and such statute so provides; or

(c) it involves a matter of excuse or justification peculiarly within the knowledge of tbe defendant on which he can fairly be rec|uired to adduce supporting evidence.

(4) When the application of thc Code depcnds upon thc finding of a fact that is not an element of an offcnse, unless the Code othcrwise provides:

(a) the burden of proving the faet is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made; and

(b) the fact must bc proved to the satisfaction of the Court or jury, as the case may be.

(5) When the Code establishes a presumption with respect to any fact that is an element of an offense, it has the following consequences:

(a) when tberc is evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the Court is satisfied that the evidence as a wbole clearly negatives the presumed fact; and

(b) when the issue of the existence of the presumed fact is submitted to the jury, the Court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact.

(6) A presumption not established by the Code or inconsistent with it has the consequences otherwise accorded it by law.

Explanatory Note

This section deals with burden of proof. It sets forth the criteria for determining the circumstances under which the state and the defendant, respectively, should bear the burden of coming forward with evidence and the burden of persuasion. Its basic premise, stated in Subsection (1), is that the state must establish every element of the offense—as that term is broadly defined in Section 1.13—beyond a reasonable doubt. This requirement is now consititutionally mandated, though the Supreme Court's definition of "element," which is still evolving, appears to be substantially narrower than that of the Code.

Subsections (2) and (3) provide that for some defenses, denominated affirmative by the Code or another statute, or involving a matter of justification "peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence," the state's burden does not arise unless there is some evidence supporting the defense. Subsection (2)(b) recognizes that there may be defenses that the Code or another statute requires the defendant to prove by a preponderance of evidence but such a requirement must "plainly" appear. Recent decisions of the Supreme Court hold that such a persuasive burden may not constitutionally be imposed on a defendant with respect to an "element" of the offense, but the criterion for judging what constitutes an "element" for this purpose as distinguished from a matter of defense or mitigation thus far remains unclear.

Subsection (4) provides that when application of the Code depends on a finding that is not an element of the offense, the burden of persuasion is on the prosecution or the defendant, depending on whose interest will be furthered by establishing the fact. Subsection (5) defines presumption so as to permit, but not require, the jury to find the presumed fact from evidence of facts giving rise to the presumption. It requires, however, that the jury be instructed that the presumed fact must, on all the evidence, be proved beyond a reasonable doubt.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 188.

Section 1.13. General Definitions.

In this Code, unless a different meaning plainly is required:

(1) "statute" includes the Constitution and a local law or ordinance of a political subdivision of the State;

(2) "act" or "action" means a bodily movement whether voluntary or involuntary;

(3) "voluntary" has the meaning specified in Section 2.01;

(4) "omission" means a failure to act;

(5) "conduct" means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions;

(6) "actor" includes, where relevant, a person guilty of an omission;

(7) "acted" includes, where relevant, "omitted to act";

(8) "person," "he" and "actor" include any natural person and, where relevant, a corporation or an unincorporated association;

(9) "element of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

(a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an excuse or justification for such conduct; or

(d) negatives a defense under the statute of limitations; or

(e) establishes jurisdiction or venue;

(10) "material element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue, or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct;

(11) "purposely" has the meaning specified in Section 2.02 and equivalent terms such as "with purpose," "designed" or "with design" have the same meaning;

(12) "intentionally" or "with intent" means purposely;

(13) "knowingly" has the meaning specified in Section 2.02 and equivalent terms such as "knowing" or "with knowledge" have the same meaning;

(14) "recklessly" has the meaning specified in Section 2.02 and equivalent terms such as "recklessness" or "with recklessness" have the same meaning;

(15) "negligently" has the meaning specified in Section 2.02 and equivalent terms such as "negligence" or "with negligence" have the same meaning;

(16) "reasonably believes" or "reasonable belief" designates a belief that the actor is not reckless or negligent in holding.

Explanatory Note

This section contains definitions of general applicability in the Code. The significance of the definitions is explained in the Comments to the Sections for which they are particularly relevant. The definition of "material element" is intended to cover those elements of a criminal offense to which culpability requirements should apply.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 210.

ARTICLE 2. GENERAL PRINCIPLES OF LIABILITY

Section 2.01. Requirement of Voluntary Act; Omission as Basis of Liability; Possession as an Act.

(1) A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of tbis Section:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion;

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

(3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:

(a) the omission is expressly made sufficient by the law defining the offense; or

(b) a duty to perform the omitted act is otherwise imposed by law.

(4) Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

Explanatory Note

Subsection (1) states the fundamental predicate for all criminal liability, that the guilt of the defendant be based upon conduct, and that the conduct include a voluntary act or an omission to perform an act of which the defendant was physically capable. Under the Code, liability cannot be based upon mere thoughts, upon physical conditions, or upon involuntary movements. It is, however, required only that the actor's conduct include a voluntary act, and thus unconsciousness preceded by voluntary action may lead to liability based upon the earlier conduct.

Subsection (2) elaborates the concept of "voluntary." Three specific conditions are excluded, as is any other bodily movement that is not a product of the effort or determination of the actor, either conscious or habitual.

Subsection (3) indicates the circumstances under which an omission will suffice for liability. There are some cases where an omission is expressly made sufficient by the law defining the offense, as in the failure to file an income tax return. An omission will also suffice in cases where a duty to perform the omitted act is otherwise imposed by law. Laws defining the obligation of parents toward infant children provide an illustration.

Subsection (4) describes the conditions under which possession can be an act within the meaning of Subsection (1). One of two conditions will suffice: if the actor knowingly procured or received the thing possessed, his conduct will have included a voluntary act and liability can be imposed consistently with Subsection (1); similarly, if the actor was aware of his control for a sufficient period to have been able to terminate his possession, his conduct will have included an omission to perform an act of which he was physically capable. Since a law making possession a crime implies a duty to relinquish possession as soon as one is aware of it, liability imposed in the latter instance is consistent with the principles of Subsections (1) and (3)(b).

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 214.

Section 2.02. General Requirements of Culpability.

(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of Culpability Defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree

that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient o establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

(4) Prescribed Culpability Requirement Applies to All Material Elements. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(5) Substitutes for Negligence, Recklessness and Knowledge. When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

(6) Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented hy the law defining the offense.

(7) Requirement of Knowledge Satisfied hy Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probahility of its existence, unless he actually believes that it does not exist.

(8) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(9) Culpability as to Illegality of Conduct. Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

(10) Culpability as Determinant of Grade of Offense. **When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.**

Explanatory Note

Subsection (1) articulates the Code's insistence that an element of culpability is requisite for any valid criminal conviction and that the concepts of purpose, knowledge, recklessness and negligence suffice to delineate the kinds of culpability that may be called for in the definition of specific crimes. The only exception to this general requirement is the narrow allowance for offenses of strict liability in Section 2.05, limited to cases where no severer sentence than a fine may be imposed.

The requirement of culpability applies to each "material element" of the crime. The term "material element" is defined in Section 1.13(10) to encompass only matters relating to the harm or evil sought to be prevented by the law defining an offense or to the existence of a justification or excuse for the actor's conduct. Facts that relate to other matters, such as jurisdiction, venue or limitations are not "material" within this definition.

Which of the four kinds of culpability suffices to establish a particular material element of a particular offense is determined either by the definition of the offense or by the other provisions of this section.

Subsection (2) defines each of the four kinds of culpability—purpose, knowledge, recklessness and negligence.

Subsection (3) is included as an aid to drafting the definitions of specific crimes. When it is intended that purpose, knowledge or recklessness suffice for the establishment of culpability for a particular offense, tho draftsmen need make no provision for culpability; it will be supplied by this subsection. There is a rough correspondence between this provision and the common law requirement of "general intent."

Subsection (4) is addressed to a pervasive ambiguity in definitions of offenses that include a culpability requirement, namely, that it is often difficult to determine how many of the elements of the offense the requirement is meant to modify. Subsection (4) provides that if the definition is not explicit on the point, as by prescribing different kinds of culpability for different elements, the culpability statement will apply to all the elements, unless a contrary purpose plainly appears.

Subsection (5) makes it unnecessary to state in the definition of an offense that the defendant can be convicted if it is proved that he was *more* culpable than the definition of the offense requires. Thus, if the crime can be committed recklessly, it is no less committed if the actor acted purposely.

Subsection (6) is in accord with present law in that it declines to give defensive import to the fact that the actor's purpose was conditional unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

Subsection (7) elaborates on the definition of "knowledge" when the issue is whether the defendant knew of the existence of a particular fact. It is enough that the actor is aware of a high probability of its existence, unless he actually believes that the fact does not exist.

Subsection (8) defines the term "wilfully" to mean "knowingly," in the absence of a legislative purpose to impose further requirements. Though the term "wilfully" is not used in the definitions of crimes contained in the Code, its currency and its existence in offenses outside the criminal code suggest the desirability of clarification. It is unusually ambiguous standing alone.

Subsection (9) establishes the basic proposition that knowledge of the law defining the offense is not itself an element of the offense. This is the sense in which the maxim "ignorance of the law is no excuse" is accurate and should be applied. Subsection (9) provides the foundation, it should be noted, for the further provisions on mistake and ignorance of law in Section 2.04.

Subsection (10) applies when the grade or degree of an offense depends on the culpability with which the offense is committed. It states the important principle reaffirmed in the context of justification defenses by Section 3.09(2), that the defendant's level of culpability should be measured by an examination of his mental state with respect to all elements of the offense. Thus, if the defendant purposely kills but does so in the negligent belief that it is necessary in order to save his own life, his degree of liability should be measured by assimilating him to one who is negligent rather than to one who acts purposely. The grade of his offense thus should be measured by the lowest type of culpability established with respect to any material element of the offense.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 229.

Section 2.03. Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result.

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is 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.

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as the probable result and is 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.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

Explanatory Note

Subsection (1) states the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing

a particular result; the actor's conduct must be an antecedent but for which the result would not have occurred. It also provides that additional causal requirements may be imposed by the Code or by the law defining the offense. This is not to say, however, that but-for causation is sufficient by itself; the later subsections impose additional requirements or limitations that may preclude a finding of liability with respect to consequences of which the actor's conduct is a but-for cause.

Subsection (2) is concerned with offenses in which causing a result purposely or knowingly is an element. If the actual result is within the purpose or contemplation of the actor (i.e., events transpire as the actor intended or knew that they would), the case presents no difficulty. Problems arise only if there is a divergence between the actual and contemplated result. If the divergence is only that a different person or property is affected, or that the contemplated harm would have been more serious, the difference is declared to be legally immaterial. If, however, there are other differences, the causality element is established only if the actual result involves the same kind of injury as the contemplated result and the actual result is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or the gravity of his offense. The traditional language of proximate causation is replaced by language that focuses on the relationship between the purpose or contemplation of the actor and the actual result of his conduct. This is a fresh approach, justifying legislative treatment of an issue traditionally left to the courts.

Subsection (3) performs the same function for offenses in which recklessness or negligence is an element. Liability is predicated on but-for causation, subject to limitations based on the relationship between the risks created by the actor's conduct that support a finding of recklessness or negligence and the consequences that in fact ensued.

Subsection (4) is addressed to strict liability offenses. It provides that the causal element is not established unless the actual result is a probable consequence of the actor's conduct, a minimal protection against the limitless extrapolation of liability without fault.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 255.

Section 2.04. Ignorance or Mistake.

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or

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

(2) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

(3) A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

(a) the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

(4) The defendant must prove a defense arising under Subsection (3) of this Section by a preponderance of evidence.

Explanatory Note

Subsection (1) states the general principle governing whether and when ignorance or mistake of fact or law will afford a defense to a criminal charge. The matter is conceived as a function of the culpability otherwise required for commission of the offense. Such ignorance or mistake is a defense to the extent that it negatives a required level of culpability or establishes a state of mind that the law provides is a defense. The effect of this section therefore turns upon the culpability level for each element of the offense, established according to its definition and the general principles set forth in Section 2.02.

Subsection (2) deals with a special kind of case, one where the actor raises a particular belief as a defense to the offense with which he is charged, but where he would be guilty of another

offense had the situation been as he supposed. In this event, the defense that would otherwise be available under Subsection (1) is denied. The defendant, however, cannot be convicted of a grade or degree of offense higher than the offense of which he could have been convicted had the situation been as he supposed.

Subsection (3) establishes a limited exception to the principle of Section 2.02(9) that culpability is not generally required as to the illegality of the actor's conduct. Under the circumstances outlined in Subsection (3), the actor may raise his belief in the legality of his conduct as a defense to a criminal charge. The instances in which this is permitted are narrowly drawn so as to induce fair results without undue risk of spurious litigation.

Subsection (4) places the burden of persuasion on the defendant to establish a defense under Subsection (3) by a preponderance of the evidence.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 269.

Section 2.05. When Culpability Requirements Are Inapplicable to Violations and to Offenses Defined by Other Statutes; Effect of Absolute Liability in Reducing Grade of Offense to Violation.

(1) The requirements of culpability prescribed by Sections 2.01 and 2.02 do not apply to:

(a) offenses that constitute violations, unless the requirement involved is included in the definition of the offense or the Court determines that its application is consistent with effective enforcement of the law defining the offense; or

(b) offenses defined by statutes other than the Code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.

(2) Notwithstanding any other provision of existing law and unless a subsequent statute otherwise provides:

(a) when absolute liability is imposed with respect to any material element of an offense defined by a statute other than the Code and a conviction is based upon such liability, the offense constitutes a violation; and

(b) although absolute liability is imposed by law with respect to one or more of the material elements of an offense defined by a statute other than the Code, the culpable commission of the offense may be charged and proved, in which event negligence with respect to such elements constitutes sufficient culpability

and the classification of the offense and the sentence that may be imposed therefor upon conviction are determined by Section 1.04 and Article 6 of the Code.

Explanatory Note

Subsection (1) provides that the culpability requirements of Sections 2.01 and 2.02 are not applicable to violations, unless the definition of the offense specifically provides otherwise or the court determines that its application is consistent with effective enforcement of the law defining the offense. Violations are not, however, crimes under Section 1.04(5) and cannot result in a sentence of probation or imprisonment under Section 6.02(4). The theory of the Code is that noncriminal offenses, subject to no severer sanction than a fine, may be employed for regulatory purposes upon the basis of strict liability because the condemnatory aspect of a criminal conviction or of a correctional sentence is explicitly precluded.

Subsection (1) also speaks to offenses defined by statutes other than those in the criminal code, and provides that strict liability may be applied only if a legislative purpose to that effect plainly appears. In that event, however, Subsection (2)(a) makes the grade of the offense a violation irrespective of the penal provisions contained in the statute itself, unless the statute is passed after adoption of the Code and makes contrary provision. The penalties authorized for violations by Sections 6.02 and 6.03 are thus superimposed upon statutes outside the Code. This result is qualified by Subsection (2)(b) which provides that the culpable commission of any such offense may nevertheless be charged and proved, in which case negligence constitutes sufficient culpability, the offense is criminal, and the restrictions as to sentence are removed.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 282.

Section 2.06. Liability for Conduct of Another; Complicity.

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.

(2) A person is legally accountahle for tbe conduct of another person when:

(a) acting with the kind of culpahility tbat is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or

(b) he is made accountable for the conduct of such other person by the Code or hy the law defining the offense; or

(c) he is an accomplice of such other person in the commission of the offense.

(3) A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he

(i) solicits such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

(4) When causing a particular result is an element of an offense, an accomplice in tbe conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, witb respect to that result that is sufficient for the commission of the offense.

(5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

(a) he is a victim of that offense; or

(b) the offense is so defined that his conduct is inevitably incident to its commission; or

(c) he terminates his complicity prior to the commission of the offense and

(i) wholly deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

(7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or

convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

Explanatory Note

Subsection (1) provides that one is liable for his own conduct, for the conduct of another person for which he is legally accountable, or for a combination of both.

Subsection (2) specifies the instances in which one is legally accountable for the conduct of another. The first is when the actor causes an innocent or irresponsible person to engage in the conduct, acting with the kind of culpability that would be sufficient were he committing the offense himself. The second is when some special provision of the Code or of the law defining the offense makes him accountable for the conduct of another. The third is when he is an accomplice of another in the commission of an offense.

Subsection (3) indicates the instances in which one can be an accomplice of another. Paragraph (a) requires that the actor have the purpose of promoting or facilitating the commission of the offense, and that one of three other conditions be satisfied. It is sufficient if he solicits another to commit the offense. It is likewise sufficient if he aids the other in planning or committing the offense, or if he agrees or attempts to aid the other in such planning or commission. It is also sufficient if, having a legal duty to prevent the commission of the offense, the actor fails to make a proper effort to do so. Finally, Paragraph (b) provides that one can also be an accomplice if his conduct is expressly declared by law to establish his complicity.

Subsection (4) deals with a special case that arises when the actor is an accomplice in conduct within the meaning of Subsection (3), and when a criminal result—anticipated or unanticipated—flows from that conduct. In that event, the actor is made liable for the criminal result to the extent that his own culpability with respect to the result was sufficient for the commission of the offense.

Subsection (5) also deals with a special case, namely where the actor is legally incapable of committing the substantive offense himself but where he encourages another, who has the requisite capacity, to do so. In accordance with present law, the actor is liable in that situation unless his liability is for some reason inconsistent with the purpose of the provision that establishes his incapacity.

Subsection (6) establishes three special defenses to a charge that one is an accomplice. The first is when the actor is himself a victim of the offense. The second is when the offense is so defined that the actor's conduct is inevitably incident to the commission of the offense. And the third relates to a termination of the actor's complicity prior to the commission of the offense. Termination requires that the actor wholly deprive his conduct of its effectiveness in the commission of the offense or that he give timely warning to law enforcement authorities or otherwise make a proper effort to prevent the commission of the offense.

Subsection (7) speaks to the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense. In accordance with modern developments, this subsection provides that the accomplice can be prosecuted even though the other person has not been prosecuted or convicted, has been convicted of a different crime or degree of crime, has an immunity to prosecution or conviction, or has been acquitted.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 298.

Section 2.07. Liability of Corporations, Unincorporated Associations and Persons Acting, or Under a Duty to Act, in Their Behalf.

(1) A corporation may be convicted of the commission of an offense if:

(a) the offense is a violation or the offense is defined hy a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates tbe agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in bebalf of the corporation within the scope of his office or employment.

(2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.

(3) An unincorporated association may be convicted of the commission of an offense if:

(a) the offense is defined by a statute other than the Code that expressly provides for the liability of such an association and the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the association is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.

(4) As used in this Section:

(a) "corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) "agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

(5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1)(a) or Subsection (3)(a) of this Section, other than an offense for which absolute liability has heen imposed, it shall be a defense if the defendant proves by a preponderanee of evidence that the high managerial agent having supervisory responsibility over the suhject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

(6) (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

Explanatory Note

Subsection (1) provides for three situations in which a corporation will be amenable to the criminal process. The broadest base of liability, incurred as a consequence of conduct by an agent of the corporation acting on behalf of the corporation and within the scope of his employment, is limited to violations and to offenses defined by statutes outside the criminal code that plainly evidence a legislative purpose to impose liability on a corporation. It is also provided that if such a law designates the agents for whose conduct the corporation is accountable, that law will control. The second base of corporate liability is invoked when the offense consists of an omission to discharge a specific duty of affirmative performance that is imposed on corporations by law. The third base of liability includes all situations where the board of directors or a high managerial agent acting in the course of his employment on behalf of the corporation is responsible for the commission of the crime. In contrast to Subsection (2), misdemeanors and felonies can be prosecuted under this subsection.

Subsection (2) provides that strict liability statutes should be construed to apply to corporations unless a contrary legislative purpose plainly appears. Section 2.05, of course, would be fully applicable in such situations.

Subsection (3) defines the situations in which criminal liability can be imposed on unincorporated associations. Liability is limited to the commission of offenses defined outside of the criminal code where the conduct is performed by an agent acting in behalf of the association within the scope of his office or employment. If the law defining the offense specifically indicates the agents for whose conduct the association is accountable or the circumstances of accountability, such provisions control. An association is also liable when the offense is an omission to perform a specific duty imposed on it by law.

Subsection (4) contains definitions that are applicable to terms used in this section. "Corporation" is defined to exclude governmental entities. "Agent" and "high managerial agent" are also defined.

Subsection (5) provides a "due diligence" defense to the corporation, based upon proof by the corporation by a preponderance of the evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense exercised due diligence to prevent its commission. The defense does not apply in situations where it would be plainly inconsistent with the legislative purpose underlying the offense involved.

Subsection (6) speaks to the liability of individuals for conduct on behalf of the corporation, and thus in a sense is an extension of Section 2.06. Paragraph (a) provides, in effect, that a person is individually liable for conduct he performs on behalf of a corporation to the same extent as though it were performed on his own behalf. Paragraph (b) speaks to cases where a corporate agent having primary responsibility for the discharge of a duty imposed on the corporation fails to discharge the duty. If his omission was reckless, he is individually liable for the failure to the same extent as he would be if the duty were imposed upon him. Paragraph (c) speaks to the sanction that is available in cases of individual liability under these provisions, assimilating the offense in such cases to the sentence that is authorized by law when a natural person is convicted of an offense of the grade and degree involved.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 332.

Section 2.08. **Intoxication.**

(1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.

(2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

(3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.

(4) Intoxication that (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

(5) Definitions. In this Section unless a different meaning plainly is required:

(a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(b) "self-induced intoxication" means intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

(c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

Explanatory Note

Subsection (1) declares the basic proposition that intoxication is not as such an excuse for criminal conduct. For the actor's intoxication to have any defensive efficacy it must negative an element of the offense (other than awareness of the risk in recklessness) or, if the intoxication was involuntary or pathological, establish irresponsibility.

Subsection (2) establishes the special rule with respect to awareness of the risk in recklessness, qualifying the general requirement of Section 2.02(2)(c). If the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, his unawareness is declared to be immaterial.

Subsection (3) provides that intoxication does not as such constitute a mental disease within the meaning of the defense of insanity set forth in Section 4.01. This is not, of course, to say that intoxication can never cause or accompany insanity.

Subsection (4) qualifies the previous provisions with respect to intoxication that is not self-induced or is pathological, as those terms are defined in Subsection (5). In such cases, the actor is accorded an affirmative defense coextensive with the defense of irresponsibility by reason of mental disease or defect defined by Section 4.01, i.e., if by reason of such intoxication the actor lacks substantial capacity to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

Subsection (5) defines the major terms employed in this section. "Intoxication" is defined broadly to mean a disturbance of mental

or physical capacities resulting from the introduction of substances into the body. It is not limited to the effects of alcohol or narcotics. Intoxication is "self-induced" when it is caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he either knows or ought to know. Exceptions are made, however, for cases where the use of the substance is pursuant to medical advice, or where the use is under circumstances, such as duress or choice of evils, that would afford a defense if the use of the substance were charged as a crime. "Pathological intoxication" alludes to cases where the actor suffers a reaction to the substance that is grossly excessive in degree and the actor did not know of his special susceptibility.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 350.

Section 2.09. Duress.

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

(3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. [The presumption that a woman acting in the presence of her husband is coerced is abolished.]

(4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.

Explanatory Note

Subsection (1) establishes the affirmative defense of duress, which is applicable if the actor engaged in criminal conduct because he was coerced to do so by the use or threat of unlawful force against himself or another, that a person of reasonable firmness in his situation would have been unable to resist. The standard is thus partially objective; the defense is not established simply by the fact that the defendant was coerced; he must have

been coerced in circumstances under which a person of reasonable firmness in his situation would likewise have been unable to resist.

Subsection (2) deprives the actor of his defense if he recklessly placed himself in a situation in which it was probable that he would be subjected to duress. Thus, an actor reckless in this respect can be liable for offenses that carry a higher culpability standard than recklessness. In the case of negligent exposure to the possibility of duress, however, Subsection (2) only permits an offense to be charged for which negligence is sufficient to establish culpability.

Subsection (3) abolishes special rules that still obtained in some jurisdictions concerning the effect of marriage as an automatic basis for claims of coercion. The bracketed sentence is included for those jurisdictions where silence on the point might be construed as continuing present law.

Subsection (4) assures that this section will not be construed to narrow the effect of the choice of evils defense afforded by Section 3.02. This intention is that the defenses of duress and choice of evils will be independently considered, and that the fact that a defense is unavailable under one section will not be relevant to its availability under the other.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 368.

Section 2.10. Military Orders.

It is an affirmative defense that the actor, in engaging in the conduct charged to constitute an offense, does no more than execute an order of his superior in the armed services that he does not know to be unlawful.

Explanatory Note

Section 2.10 establishes the affirmative defense of obedience to superior orders. The actor must do no more than execute an order of his superior in the armed services. In addition, he must not know the order to be unlawful.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 388.

Section 2.11. Consent.

(1) In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such

consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

(2) Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:

(a) the bodily injury consented to or threatened by the conduct consented to is not serious; or

(b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or

(c) the consent establishes a justification for the conduct under Article 3 of the Code.

(3) Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:

(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 disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) it is 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.

Explanatory Note

Subsection (1) establishes the general defense of consent, available if it negatives an element of the offense or if it precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

Subsection (2) deals with the difficult issue of when consent should be sufficient in offenses that cause or threaten bodily injury. The consent will have defensive significance in this context if one of three conditions obtains: (a) the injury is not serious; (b) the injury is a reasonably foreseeable hazard of a lawful contest or competitive sport or other concerted lawful activity; or (c) the consent establishes a justification under Article 3 of the Code, primarily Section 3.08(4).

Subsection (3) speaks to those situations where consent is deprived of effectiveness. Consent is ineffective if (a) it is given by a person who is not competent to authorize the conduct in question; or (b) it is given by someone who is unable to make a reasonable judgment as to the nature of the conduct consented to; or (c) it is given by a person whose consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 394.

Section 2.12. De Minimis Infractions.

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

(1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or

(2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

(3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.

Explanatory Note

Section 2.12 authorizes courts to exercise a power inherent in other agencies of criminal justice to ignore merely technical violations of law. It directs the court to dismiss a prosecution if one of three conditions obtains: (1) the defendant's conduct was within a customary license or tolerance; or (2) the defendant's conduct neither caused nor threatened the harm sought to be prevented by the law defining the offense, or did so only to a trivial degree; or (3) the defendant's conduct presents such other extenuations that it cannot reasonably be regarded as within the legislative prohibition. The latter case authorizes the court to make exceptions that it believes the legislature would have made if it had had the case before it; in this instance it is deemed

appropriate for the court to file a written statement of its reasons for so believing.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 400.

Section 2.13. Entrapment.

(1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:

(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

(b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.

(3) The defense afforded by this Section is unavailable 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.

Explanatory Note

Subsection (1) states two ways in which a public law enforcement official or a person acting in cooperation with such an official can perpetrate an entrapment. The first is by making representations known to be false for the purpose of inducing a belief that the conduct is not prohibited by law. The second is by employing methods of persuasion that create a substantial risk that such an offense would be committed by persons other than those who are ready to commit it. In neither instance does application of the standard turn on the character of the particular defendant.

Subsection (2) provides both that the burden of persuasion is on the defendant to establish an entrapment by a preponderance of the evidence and that the issue is to be tried to the court and not the jury.

Subsection (3) denies the defense in situations where the defendant causes or threatens bodily injury to someone other than the person perpetrating the entrapment.

For detailed Comment, *see* MPC Part I Commentaries, vol. 1, at 406.

ARTICLE 3. GENERAL PRINCIPLES OF JUSTIFICATION

Section 3.01. Justification an Affirmative Defense; Civil Remedies Unaffected.

(1) In any prosecution based on conduct that is justifiable under this Article, justification is an affirmative defense.

(2) The fact that conduct is justifiable under this Article does not abolish or impair any remedy for such conduct that is available in any civil action.

Explanatory Note

Subsection (1) provides that any claim of justification under Article 3 is an affirmative defense, the procedural consequences of which are set forth in Section 1.12(2). The prosecution need not negative a justification defense until there is evidence supporting the defense, but it must disprove the defense beyond a reasonable doubt if evidence of the defense is introduced.

Subsection (2) makes explicit that justification for the purpose of criminal liability does not preclude civil liability if the law otherwise provides a remedy for the conduct involved.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 5.

Section 3.02. Justification Generaily: Choice of Evils.

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himseif or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

(2) When the actor 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

Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Explanatory Note

Subsection (1) states a general principle of choice of evils, with limitations on its availability designed to confine its use to appropriate cases. The evil sought to be avoided must be greater than that sought to be prevented by the law defining the offense. The legislature must not have previously foreclosed the choice that was made by resolving the conflict of values at stake.

Subsection (2) applies in this context the general provision of Section 3.09(2). As provided in Subsection (1), the actor's belief in the necessity of his conduct to avoid the contemplated harm is a sufficient basis for his assertion of the defense. Under Subsection (2), however, if the defendant was reckless or negligent in appraising the necessity for his conduct, the justification provided by this section is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability. The same provision is made for cases in which the defendant recklessly or negligently brings about the situation requiring the choice of evils.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 9.

Section 3.03. Execution of Public Duty.

(1) Except as provided in Subsection (2) of this Section, conduct is justifiable when it is required or authorized by:

(a) the law defining the duties or functions of a public officer or the assistance to be rendered to such officer in the performance of his duties; or

(b) the law governing the execution of legal process; or

(c) the judgment or order of a competent court or tribunal; or

(d) the law governing the armed services or the lawful conduct of war; or

(e) any other provision of law imposing a public duty.

(2) The other sections of this Article apply to:

(a) the use of force upon or toward the person of another for any of the purposes dealt with in such sections; and

(b) the use of deadly force for any purpose, unless the use of such force is otherwise expressly authorized by law or occurs in the lawful conduct of war.

(3) The justification afforded by Subsection (1) of this Section applies:

(a) when the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process; and

(b) when the actor believes his conduct to be required or authorized to assist a public officer in the performance of his duties, notwithstanding that the officer exceeded his legal authority.

Explanatory Note

Subsection (1) provides the general justification for conduct required or authorized by public or official duty. The law that defines such duty is to be looked to for the justification of the conduct.

Subsection (2) qualifies Subsection (1) by providing that the other sections of Article 3 control the situations to which they specifically refer and that the use of deadly force is never authorized except when specifically authorized by law, as by the succeeding sections, or when it occurs in the lawful conduct of war.

Subsection (3) prescribes two situations in which the actor's mistaken belief in his legal authority will supply a justification. The lack of jurisdiction of a court or a defect in legal process will not undercut the justification if the actor believes his conduct to be required or authorized by the judgment or direction of a competent court or tribunal or by valid legal process. Also, the justification is not undercut when the actor believes that his conduct is required or authorized to assist a public officer in the performance of his duties, even though the officer is in fact acting in excess of his authority.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 23.

Section 3.04. Use of Force in Self-Protection.

(1) Use of Force Justifiable for Protection of the Person. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(2) Limitations on Justifying Necessity for Use of Force.

(a) The use of force is not justifiable under this Section:

(i) to resist an arrest that the actor knows is being made by a peace officer, although tbe arrest is unlawful; or

(ii) to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

(A) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or

(B) the actor has been unlawfully dispossessed of the property and is making a re-entry or recaption justified by Section 3.06; or

(C) the actor believes that such force is necessary to protect himself against death or serious bodily injury.

(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiahle if:

(i) the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take, except that:

(A) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

(B) a publie officer justified in using force in the performance of his duties or a person justified in using force in his assistance or a person justified in using force in making an arrest or preventing an escape is not ohliged to desist from efforts to perform such duty, effect such arrest or prevent such escape because of resistance or threatened resistance by or on behalf of the person against whom such action is directed.

(c) Except as required by paragraphs (a) and (b) of this Subsection, a person employing protective force may estimate the

necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act that he has no legal duty to do or abstaining from any lawful action.

(3) Use of Confinement as Protective Force. The justification afforded by this Section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

Explanatory Note

Subsection (1) states the basic principle that is to govern the use of force in self-protection. The actor is justified in using force toward another person when he believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by the other person on the present occasion. Under this subsection, the actor's actual belief is sufficient to support the defense; if his belief is mistaken and is recklessly or negligently formed, he may then be prosecuted for an offense of recklessness or negligence under Section 3.09. In other words, if an actor makes a negligent mistake in assessing the need for self-defensive action, he cannot be prosecuted for an offense that requires purpose to establish culpability.

Subsection (2) provides a series of additional limitations on the use of self-defensive force. Three situations are dealt with.

First, the actor is not privileged to use force for the purpose of resisting an arrest that he knows is being made by a peace officer, irrespective of the legality of the arrest.

Second, the actor is not privileged to use force for the purpose of resisting force used by one who is the occupant or possessor of property, where the actor knows that the person using the force is doing so under a claim of right to protect the property. This limitation, however, is not applicable in any of three situations: when the actor is a public officer acting in the performance of his duties, or a person lawfully assisting him; when the actor has been unlawfully dispossessed of the property and is making a re-entry or recaption that is itself justified by Section 3.06; or when the actor believes that his use of force is necessary to protect himself against death or serious bodily injury.

The third limitation on the use of self-defensive force relates to the occasions when deadly force may be used. Deadly force is not justified unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat.

Deadly force is also not justified if the actor provoked the use of force in the same encounter, with the purpose of causing death or serious bodily injury. Finally, deadly force is not justified if the actor can avoid the necessity of using such force with complete safety by taking certain alternative steps: by retreating, by surrendering possession of a thing to a person asserting a claim of right thereto, or by complying with a demand that he abstain from action that he has no duty to take. The requirement that one of these alternatives be pursued does not apply, however, in two very narrow circumstances: an actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or the attack is at the actor's place of work and is by another person whose place of work the actor knows it to be; and public officers seeking to effect an arrest or prevent an escape are not obliged to desist from such efforts because of resistance by the person against whom such action is directed. Finally, Subsection (2)(c) clarifies the point that retreat, the surrender of possession, etc., are not required except when specifically contemplated by Paragraphs (ii)(A) and (ii)(B) of Subsection (2)(b). Where there is no such requirement, the actor may estimate the necessity of his self-defensive force under the circumstances as he believes them to be when the force is used. Mistakes, as noted, are governed by Section 3.09.

Subsection (3) speaks to the use of confinement as self-defensive force. Confinement may be used only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he may safely do so, unless the confinement is in the form of an arrest. In the latter case, the processes of the law will determine the point at which release should occur.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 33.

Section 3.05. Use of Force for the Protection of Other Persons.

(1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:

(a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and

(b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and

(c) the actor believes that his intervention is necessary for the protection of such other person.

(2) Notwithstanding Subsection (1) of this Section:

(a) when the actor would be obliged under Section 3.04 to retreat, to surrender the possession of a thing or to comply with a demand before using force in self-protection, he is not obliged to do so before using force for the protection of another person, unless he knows that he can thereby secure the complete safety of such other person; and

(b) when the person whom the actor seeks to protect would be obliged under Section 3.04 to retreat, to surrender the possession of a thing or to comply with a demand if he knew that he could obtain complete safety by so doing, the actor is obliged to try to cause him to do so before using force in his protection if the actor knows that he can obtain complete safety in that way; and

(c) neither the actor nor the person whom he seeks to protect is obliged to retreat when in the other's dwelling or place of work to any greater extent than in his own.

Explanatory Note

Subsection (1) states the basic rule of justification for the use of force to protect other persons. In sum, the rules are the same as those that govern self-defense. There are three basic conditions to be met: force is justified if (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the other person; (b) under the circumstances as the actor believes them to be, the other person would be justified in using protective force; and (c) the actor believes that his intervention is necessary for the protection of the other person.

Subsection (2) assimilates the rules of Section 3.04 regarding retreat, surrender of possession, and compliance with demands to situations in which the actor is seeking to protect another person. Retreat, surrender of possession and compliance with demands are not required of the actor unless he knows that he can thereby secure the complete safety of the other person. When retreat, etc. would be required of the person the actor seeks to protect, the actor is obliged to try to cause the other person to do so if he knows that complete safety can be achieved in that manner. And neither the actor nor the other person is obliged to retreat when in the other's dwelling or place of work to any greater extent than when in his own.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 63.

Section 3.06. Use of Force for Protection of Property.

(1) Use of Force Justifiable for Protection of Property. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

(a) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property, provided that such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; or

(b) to effect an entry or re-entry upon land or to retake tangible movable property, provided that the actor believes that he or the person by whose authority he acts or a person from whom he or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession, and provided, further, that:

(i) the force is used immediately or on fresh pursuit after such dispossession; or

(ii) the actor believes that the person against whom he uses force has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or re-entry until a court order is obtained.

(2) Meaning of Possession. For the purposes of Subsection (1) of this Section:

(a) a person who has parted with the custody of property to another who refuses to restore it to him is no longer in possession, unless the property is movable and was and still is located on land in his possession;

(b) a person who has been dispossessed of land does not regain possession thereof merely by setting foot thereon;

(c) a person who has a license to use or occupy real property is deemed to be in possession thereof except against the licensor acting under claim of right.

(3) Limitations on Justifiable Use of Force.

(a) Request to Desist. The use of force is justifiable under this Section only if the actor first requests the person against whom such force is used to desist from his interference with the property, unless the actor believes that:

(i) such request would be useless; or

(ii) it would he dangerous to himself or another person to make the request; or

(iii) substantial harm will be done to tbe physical condition of tbe property that is sougbt to be protected before the request can effectively be made.

(h) Exclusion of Trespasser. The use of force to prevent or terminate a trespass is not justifiable under this Section if the actor knows that the exclusion of the trespasser will expose him to substantial danger of serious bodily injury.

(c) Resistance of Lawful Re-entry or Recaption. The use of force to prevent an entry or re-entry upon land or the recaption of movable property is not justifiable under tbis Section, although the actor believes that such re-entry or recaption is unlawful, if:

(i) the re-entry or recaption is made by or on behalf of a person who was actually dispossessed of tbe property; and

(ii) it is otherwise justifiable under Subsection (1)(b) of this Section.

(d) Use of Deadly Force. The use of deadly force is not justifiable under this Section unless the actor believes that:

(i) the person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(ii) the person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or otber felonious theft or property destruction and eitber:

(A) bas employed or threatened deadly force against or in the presence of tbe actor; or

(B) the use of force other than deadly force to prevent tbe commission or tbe consummation of tbe crime would expose the actor or another in his presence to substantial danger of serious bodily injury.

(4) Use of Confinemcnt as Protective Force. The justification afforded by tbis Section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he can do so witb safety to the property, unless tbe person confined has been arrested on a charge of crime.

(5) Use of Device to Protect Property. Tbe justification afforded by this Section extends to the use of a device for tbe purpose of protecting property only if:

(a) the device is not designed to cause or known to create a substantial risk of causing death or serious bodily injury; and

(b) the use of the particuiar device to protect the property from entry or trespass is reasonable under the circumstances, as the actor believes them to he; and

(c) the device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.

(6) Use of Force to Pass Wrongful Obstructor. The use of force to pass a person whom the actor believes to be purposely or knowingly and unjustifiably obstructing the actor from going to a place to which he may iawfully go is justifiable, provided that:

(a) the actor believes tbat the person against whom he uses force has no claim of right to obstruct the actor; and

(b) the actor is not being ohstructed from entry or movement on land tbat he knows to be in the possession or custody of the person ohstructing him, or in the possession or custody of another person by whose authority the obstructor acts, unless tbe circumstances, as the actor believes them to be, are of such urgency that it would not be reasonahle to postpone the entry or movement on such land until a court order is obtained; and

(c) the force used is not greater than would be justifiable if the person ohstructing the actor were using force against him to prevent his passage.

Explanatory Note

Subsection (1) states the basic rules governing justification for the use of force to protect property. Two situations are dealt with separately: the case where the actor is in possession of the property and uses force to prevent an interference with that possession; and the case where the actor attempts to retake property that has been unlawfully taken from him. In the first situation, the use of force is justifiable if the actor believes that it is immediately necessary to protect property that is, or is believed to be, in his possession or in the possession of another for whom he acts. The action may be taken to prevent or terminate an unlawful entry or other trespass upon land, or to prevent a trespass against or an unlawful carrying away of tangible property. In the second situation, the actor may use force to re-enter upon land or to retake personal property if he believes that he, or one who has authorized him, or one from whom he or the person authorizing him has derived title, was unlawfully dispossessed and is entitled to possession. In addition, one of two other conditions

must be met: the force must be used immediately or on fresh pursuit after such dispossession; or the actor must believe that the person against whom the force is used has no claim of right to possession of the property and, in the case of land, that the circumstances are of such urgency that it would be an exceptional hardship to postpone the entry until a court order is obtained. It should be noted, as it was in connection with Section 3.04, that mistaken belief is governed by Section 3.09.

Subsection (2) sets forth three principles that govern the meaning of the term "possession" as used in Subsection (1). One who parts with the custody of property to another who then refuses to restore it to him is no longer in possession, unless the property is movable and is located on land in his possession. One who has been dispossessed of land does not regain possession, and thus the right to defend as a possessor, merely by setting foot on the land. And one who has a license to use or occupy real property is deemed to be in possession, except as against his licensor acting under a claim of right.

Subsection (3) sets forth a series of limitations on the use of force authorized in Subsection (1). First, a request to desist must be made, unless the actor believes that the request would be useless, that it would expose himself or another to danger, or that the property would be harmed before the request could effectively be made. Second, the use of force to prevent or terminate a trespass is not justifiable under this section if the actor knows that the result will be to expose the trespasser to serious bodily injury. Third, no right is given to prevent a re-entry or recaption that is justified under Subsection (1)(b). And fourth, the right to use deadly force in the defense of property is curtailed. Deadly force may be used only if the actor believes that one of two situations exists: the person against whom the force is to be used is attempting to dispossess him of his dwelling otherwise than under a claim of right; or the person against whom the force is to be used is attempting to commit or consummate certain named crimes and either has used or threatened deadly force against or in the presence of the actor, or has put the actor in a position where the use of force other than deadly force to prevent the commission or consummation of the crime would expose the actor or another in his presence to serious bodily injury.

Subsection (4) deals with the use of confinement as protective force in this context, in the same terms as does Section 3.04(3) in the context of self-defense. The actor may use confinement so long as he takes all reasonable measures to terminate the con-

finement as soon as he knows he can do so with safety to the property, except in the case of arrests on a charge of crime.

Subsection (5) states three conditions that must be met before the use of a device for the purpose of protecting property will be justified: the device must not be one that creates a substantial risk of serious bodily injury; the use of the device must be reasonable under all of the circumstances as the actor believes them to be; and the device must be one that is customarily used for the purpose or must be used under circumstances where reasonable care is taken to make known to probable intruders that it is being used.

Subsection (6) deals with situations where the actor is being obstructed from going to a place where he may lawfully go. He may use force to pass a person if three conditions are met: the actor must believe that the obstructor has no claim of right to obstruct him; the obstruction must not be to prevent entry upon land that the actor knows to be in the possession of the obstructor, unless the circumstances are believed to be of such urgency that it would not be reasonable to postpone entry until a court order is obtained; and the force used must not be greater than would be justifiable if the obstructor were using force to prevent the passage.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 72.

Section 3.07. Use of Force in Law Enforcement.

(1) Use of Force Justifiable to Effect an Arrest. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

(2) Limitations on the Use of Force.

(a) The use of force is not justifiable under this Section unless:

(i) the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and

(ii) when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

(b) The use of deadly force is not justifiable under this Section unless:

(i) the arrest is for a felony; and

(ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and

(iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and

(iv) the actor believes that:

(A) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or

(B) there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.

(3) Use of Force to Prevent Escape from Custody. The use of force to prevent the escape of an arrested person from custody is justifiable when the force could justifiably have been employed to effect the arrest under which the person is in custody, except that a guard or other person authorized to act as a peace officer is justified in using any force, including deadly force, that he believes to be immediately necessary to prevent the escape of a person from a jail, prison, or other institution for the detention of persons charged with or convicted of a crime.

(4) Use of Force by Private Person Assisting an Unlawful Arrest.

(a) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force that he would be justified in using if the arrest were lawful, provided that he does not believe the arrest is unlawful.

(b) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force that he would be justified in using if the arrest were lawful, provided that (i) he believes the arrest is lawful, and (ii) the arrest would be lawful if the facts were as he believes them to be.

(5) Use of Force to Prevent Suicide or the Commission of a Crime.

(a) The use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary to prevent such other person from committing suicide, inflicting serious bodily injury upon himself, committing or consummating the commission of a crime involving or threatening bodily injury, damage to or loss of property or a breach of the peace, except that:

(i) any limitations imposed by the other provisions of this Article on the justifiable use of force in self-protection, for the protection of others, the protection of property, the effectuation of an arrest or the prevention of an escape from custody shall apply notwithstanding the criminality of the conduct against which such force is used; and

(ii) the use of deadly force is not in any event justifiable under this Subsection unless:

(A) the actor believes that there is a substantial risk that the person whom he seeks to prevent from committing a crime will cause death or serious bodily injury to another unless the commission or the consummation of the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons; or

(B) the actor believes that the use of such force is necessary to suppress a riot or mutiny after the rioters or mutineers have been ordered to disperse and warned, in any particular manner that the law may require, that such force will be used if they do not obey.

(b) The justification afforded by this Subsection extends to the use of confinement as preventive force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he safely can, unless the person confined has been arrested on a charge of crime.

Explanatory Note

Subsection (1) states the basic principle governing justification for the use of force to effect an arrest. Subject to the qualifications stated in this section and the treatment of mistakes under Section 3.09, the actor must believe that the degree of force that he uses is immediately necessary to effect a lawful arrest.

Subsection (2) states a number of limitations on the authority to use force. If the arrest is under a warrant, the warrant must be valid or believed by the actor to be valid. The actor must make known the purpose of the arrest, unless he believes that the purpose is already known or cannot reasonably be made known. The use of deadly force is restricted to occasions when four conditions are met: the arrest must be for a felony; the actor must be a peace officer or must be assisting one he believes to be authorized to act as a peace officer; the actor must believe that no substantial risk of harm to innocent people will be caused by the force employed; and the actor must believe that the crime for which the arrest is made involved the use or threatened use of deadly force or that a delay in apprehension will create a sub-

stantial risk that the person to be arrested will cause death or serious bodily injury.

Subsection (3) deals with the analogous problem of the use of force to prevent escape from custody. Force is justified in this context whenever it would have been justified to effect the arrest under which the custody is maintained, except that the justification for the use of deadly force is broadened in some circumstances. Deadly force may be used in this context by a person authorized to act as a peace officer or by a guard if it is believed to be immediately necessary to prevent an escape from a jail, prison or other institution that is used for the detention of persons charged with or convicted of crime.

Subsection (4) states two special rules relating to the use of force by a private person who assists a peace officer in making an arrest that later turns out to be unlawful. If the actor is summoned by the peace officer for help and if he does not believe the arrest to be unlawful, then he is justified in using any force that would be justified if the arrest were lawful. The operation of Section 3.09(1) is thus modified in this context. If the actor is not summoned by the peace officer or if he assists another private person, then he is justified in using any force that would be justified if the arrest were lawful, provided that he believes the arrest to be lawful and that the arrest would be lawful if the facts were as he believed them to be.

Subsection (5) deals with the related subject of the use of force to prevent suicides or to prevent the commission of crime. The actor may use force when immediately necessary for these purposes, with two exceptions. First, any limitations on the use of force for the specific purposes dealt with by other provisions in this article apply notwithstanding the criminality of the conduct against which the force is being used, e.g., self-defense. Second, deadly force is not justifiable for crime prevention unless the actor believes that there is a substantial risk that the person he uses force against will cause death or serious bodily injury unless the crime is prevented and that the use of such force presents no substantial risk of injury to innocent persons. Deadly force is also justifiable if the actor believes such force necessary to suppress a riot or a mutiny, after warning that such force may be used has been given.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 106.

Section 3.08. Use of Force by Persons with Special Responsibility for Care, Discipline or Safety of Others.

The use of force upon or toward the person of another is justifiable if:

(1) the actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation; or

(2) the actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:

(a) the actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor; and

(b) the degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under Subsection (1)(b) of this Section; or

(3) the actor is the guardian or other person similarly responsible for the general care and supervision of an incompetent person and:

(a) the force is used for the purpose of safeguarding or promoting the welfare of the incompetent person, including the prevention of his misconduct, or, when such incompetent person is in a hospital or other institution for his care and custody, for the maintenance of reasonable discipline in such institution; and

(b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme or unnecessary pain, mental distress, or humiliation; or

(4) the actor is a doctor or other therapist or a person assisting him at his direction and:

(a) the force is used for the purpose of administering a recognized form of treatment that the actor believes to be

adapted to promoting the physical or mental health of the patient; and

(b) the treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent or guardian or other person legally competent to consent in his behalf, or the treatment is administered in an emergency when the actor 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; or

(5) the actor is a warden or other authorized official of a correctional institution and:

(a) he believes that the force used is necessary for the purpose of enforcing the lawful rules or procedures of the institution, unless his belief in the lawfulness of the rule or procedure sought to be enforced is erroneous and his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the administration of the institution; and

(b) the nature or degree of force used is not forbidden by Article 303 or 304 of the Code; and

(c) if deadly force is used, its use is otherwise justifiable under this Article; or

(6) the actor is a person responsible for the safety of a vessel or an aircraft or a person acting at his direction and:

(a) he believes that the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of the execution of a lawful order, unless his belief in the lawfulness of the order is erroneous and his error is due to ignorance or mistake as to the law defining his authority; and

(b) if deadly force is used, its use is otherwise justifiable under this Article; or

(7) the actor is a person who is authorized or required by law to maintain order or decorum in a vehicle, train or other carrier or in a place where others are assembled, and:

(a) he believes that the force used is necessary for such purpose; and

(h) the force used is not designed to cause or known to create a substantial risk of causing death, bodily injury, or extreme mental distress.

Explanatory Note

Section 3.08 deals with the justifiable use of force in situations where the person using force is vested with particular responsibility for the care, discipline, or safety of others. In each instance the use of force must be founded upon the actor's belief in the necessity of his use of force, subject to the provision of Section 3.09(2) when the belief is recklessly or negligently held. The use of deadly force is never justifiable under this section; but deadly force may, of course, be employed to the extent authorized by other sections in this Article in situations where such sections become applicable.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 138.

Section 3.09. Mistake of Law as to Unlawfulness of Force or Legality of Arrest; Reckless or Negligent Use of Otherwise Justifiable Force; Reckless or Negligent Injury or Risk of Injury to Innocent Persons.

(1) The justification afforded by Sections 3.04 to 3.07, inclusive, is unavailable when:

(a) the actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest that he endeavors to effect by force is erroneous; and

(b) his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of an arrest or search.

(2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

(3) When the actor is justified under Sections 3.03 to 3.08 in using force upon or toward the person of another but he recklessly

or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

Explanatory Note

Subsection (1) provides that the justifications of Sections 3.04 to 3.07 are unavailable when the actor's belief in the unlawfulness of the conduct against which he acts is based on ignorance or mistake concerning the criminal law or the law governing arrests and searches.

Subsection (2) provides that where the applicability of the justifications under Sections 3.04 to 3.08 turns on the actor's belief, liability for offenses of recklessness or negligence is not barred where the belief is held recklessly or negligently.

Subsection (3) states that the existence of justification for the use of force against a person under Sections 3.03 to 3.08 does not preclude liability for offenses of recklessness or negligence against innocent third parties.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 147.

Section 3.10. Justification in Property Crimes.

Conduct involving the appropriation, seizure or destruction of, damage to, intrusion on or interference with property is justifiable under circumstances that would establish a defense of privilege in a civil action based thereon, unless:

(1) the Code or the law defining the offense deals with the specific situation involved; or

(2) a legislative purpose to exclude the justification claimed otherwise plainly appears.

Explanatory Note

Section 3.10 deals with the use of force against property by incorporating justifications that would be available in a civil action based thereon, unless the criminal law deals specifically with the situation involved or a legislative purpose to exclude the justification otherwise plainly appears.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 156.

Section 3.11. Definitions.

In this Article, unless a different meaning plainly is required:

(1) "unlawful force" means force, including confinement, that is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use the force. Assent constitutes consent, within the meaning of this Section, whether or not it otherwise is legally effective, except assent to the infliction of death or serious bodily injury.

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

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

Explanatory Note

Section 3.11 supplies the definitions of three terms — "unlawful force," "deadly force," and "dwelling" — as used in Article 3.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 157.

ARTICLE 4. RESPONSIBILITY

Section 4.01. Mental Disease or Defect Excluding Responsibility.

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Explanatory Note

Subsection (1) contains the basic standard for determining when an individual is not responsible for conduct that would otherwise be criminal because he was suffering from a mental disease or defect. Apart from the caveat in Subsection (2), the section does not define mental disease or mental defect, those terms being left open to accommodate developing medical understanding.

To be held irresponsible, the individual must, as a result of a mental disease or defect, either lack substantial capacity to appreciate the criminality [wrongfulness] of his conduct or lack substantial capacity to conform his conduct to legal requirements. The standard does not require a total lack of capacity, only that capacity be insubstantial. An individual's failure to appreciate the criminality of his conduct may consist in a lack of awareness of what he is doing or a misapprehension of material circumstances, or a failure to apprehend the significance of his actions in some deeper sense. Wrongfulness is suggested as a possible alternative to criminality, though it is recognized that few cases are likely to arise in which the variation will be determinative. An individual is also not responsible if a mental disease or defect causes him to lack substantial capacity to conform his conduct to the requirements of the law. This part of the standard explicitly reaches volitional incapacities.

Subsection (2) excludes from the terms "mental disease" and "mental defect" abnormalities manifested only by repeated criminal or otherwise antisocial conduct. This subsection rejects the position that, for purposes of determining criminal responsibility, repeated wrongful conduct suffices in itself to establish mental disease or defect. It does not, however, bar application of the terms "mental disease" or "mental defect" to an actor's mental condition so long as the condition is manifested by indicia other than repeated antisocial behavior.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 164.

Section 4.02. Evidence of Mental Disease or Defect Admissible When Relevant to Element of the Offense [; Mental Disease or Defect Impairing Capacity as Ground for Mitigation of Punishment in Capital Cases].

(1) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the

defendant did or did not have a state of mind that is an element of the offense.

[(2) Whenever the jury or the Court is authorized to determine or to recommend whether or not the defendant shall he sentenced to death or imprisonment upon conviction, evidence that the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect is admissible in favor of sentence of imprisonment.]

Explanatory Note

Subsection (1) indicates explicitly that evidence about mental disease or defect may be introduced to show that a defendant did or did not have the state of mind required for a particular offense.

Subsection (2), which is bracketed, is relevant for jurisdictions that retain the death penalty. It deals with impairments of capacity to appreciate criminality [wrongfulness] or to conform one's conduct to legal requirements that are less severe than would be necessary for a successful invocation of the defense of Section 4.01. If there is evidence that a mental disease or defect has caused such a lesser impairment of capacity, it is admissible in favor of a sentence of imprisonment rather than death.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 217.

Section 4.03. Mental Disease or Defect Excluding Responsibility Is Affirmative Defense; Requirement of Notice; Form of Verdict and Judgment When Finding of Irresponsibility Is Made.

(1) Mental disease or defect excluding responsibility is an affirmative defense.

(2) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within ten days thereafter or at such later time as the Court may for good cause permit, files a written notice of his purpose to rely on such defense.

(3) When the defendant is acquitted on the ground of mental disease or defeet excluding responsibility, the verdict and the judgment shall so state.

Explanatory Note

Subsection (1) makes mental disease or defect excluding reponsibility an affirmative defense. Under the Model Code (*see*

Section 1.12) this means that the prosecution need not disprove the defense until evidence supporting it is introduced, but, once such evidence is introduced, the prosecution must negative the existence of the defense beyond a reasonable doubt.

Subsection (2) states that a defendant wishing to rely on the defense must ordinarily give written notice to that effect when he pleads not guilty or within ten days thereafter. Later written notice may be made upon a showing of good cause. This subsection bars consideration of the defense upon prosecutorial initiative or upon the court's own motion.

Subsection (3) requires that when an acquittal is made on the ground of this defense, the verdict and judgment so indicate.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 223.

Section 4.04. Mental Disease or Defect Excluding Fitness to Proceed.

No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.

Explanatory Note

This section provides that a person shall not be tried in a criminal case if, as a consequence of mental disease or defect, he lacks capacity to understand the proceedings or to assist in his own defense. This is the generally accepted formulation of the criterion of fitness to proceed.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 230.

Section 4.05. Psychiatric Examination of Defendant with Respect to Mental Disease or Defect.

(1) Whenever the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause, the Court shall appoint at least one qualified psychiatrist or shall request the Superintendent of the Hospital to designate at least one qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The Court may order the defendant to be committed to a hospital or other

suitable facility for tbe purpose of the examination for a period of not exceeding sixty days or such longer period as the Court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in tbe examination.

(2) In such examination any method may be employed that is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(3) The report of tbe examination shall include the following: (a) a description of the nature of the examination; (b) a diagnosis of the mental condition of the defendant; (c) if the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against bim and to assist in bis own defense; (d) when a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the extent, if any, to which tbe capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired at the time of tbe criminal conduct charged; and (e) when directed by the Court, an opinion as to the capacity of the defendant to have a particular state of mind that is an element of the offense cbarged.

If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to wbether such unwillingness of the defendant was the result of mental disease or defect.

The report of the examination shall be filed [in triplicate] with tbe clerk of the Court, who shall cause copies to be delivered to the district attorney and to counsel for the defendant.

Explanatory Note

This section sets out the procedures for psychiatric examination of defendants who have filed a notice of intention to raise the defense of mental disease or defect excluding responsibility or whose fitness to proceed is doubted.

Subsection (1) provides that in such cases the court shall appoint at least one qualified psychiatrist or request the superintendent of a hospital to do so. The court may order the defendant committed for sixty days or longer for purposes of examination. It may also direct that a psychiatrist for the defendant be permitted to witness and participate in the examination.

Subsection (2) permits the examination to take place by any method accepted by the medical profession.

Subsection (3) indicates what matters the report of the examination should discuss, the aim being to assure that the report presents information that is relevant to fitness to proceed and to the defense of mental disease or defect excluding responsibility. If the defendant refuses to submit to examination, the report is to state that fact, together with an opinion, if possible, as to whether mental disease or defect caused such refusal.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 234.

Section 4.06. Determination of Fitness to Proceed; Effect of Finding of Unfitness; Proceedings if Fitness Is Regained [; Post-Commitment Hearing].

(1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the Court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed pursuant to Section 4.05, the Court may make the determination on the basis of such report. If the finding is contested, the Court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have the right to summon and to cross-examine the psychiatrists who joined in the report and to offer evidence upon the issue.

(2) If the Court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in Subsection (3) [Subsections (3) and (4)] of this Section, and the Court shall commit him to the custody of the Commissioner of Mental Hygiene [Public Health or Correction] to be placed in an appropriate institution of the Department of Mental Hygiene [Public Health or Correction] for so long as such unfitness shall endure. When the Court, on its own motion or upon the application of the Commissioner of Mental Hygiene [Public Health or Correction] or the prosecuting attorney, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding shall he resumed. If, however, the Court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceeding, the Court may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant to be committed to an appropriate institution of the Department of Mental Hygiene [Public Health].

(3) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution that is susceptible of

fair determination prior to trial and without the personal participation of the defendant.

[Alternative: (3) At any time within ninety days after commitment as provided in Subsection (2) of this Section, or at any later time with permission of the Court granted for good cause, the defendant or his counsel or the Commissioner of Mental Hygiene [Public Health or Correction] may apply for a special post-commitment hearing. If the application is made by or on behalf of a defendant not represented hy counsel, he shall be afforded a reasonable opportunity to obtain counsel, and if he lacks funds to do so, counsel shall be assigned by the Court. The application sball be granted only if counsel for the defendant satisfies the Court by affidavit or otberwisc that as an attorney he has reasonable grounds for a good faith belief that his client has, on tbe facts and tbe law, a defense to the charge otber than mental disease or defect excluding responsibility.

[(4) If the motion for a special post-commitment bearing is granted, the hearing shall he by the Court witbout a jury. No evidence shall be offered at tbe hearing by eitber party on the issue of mental disease or defect as a defense to, or in mitigation of, the crime charged. After hearing, the Court may in an appropriate case quasb the indictment or other charge, or find it to be defective or insufficient, or determine that it is not proved beyond a reasonable doubt by the evidence, or otherwise terminate the proceedings on the evidence or the law. In any such case, unless all defects in the proceedings are promptly cured. tbe Court sball terminate the commitment ordered under Subsection (2) of this Section and order tbe defendant to be discharged or, subject to tbe law governing the civil commitment of persons suffering from mental disease or defect, order tbe defendant to be committed to an appropriate institution of the Department of Mental Hygiene [Public Healtb].]

Explanatory Note

This section concerns the manner in which determinations of fitness are to be made and the consequences of those determinations.

Subsection (1) provides that the defendant's fitness to proceed is to be determined by the court, not by a jury. If the report resulting from the psychiatric examination under Section 4.05 is uncontested, the court may make a determination on the basis of the report alone. If a party contests the report, there is a hearing at which that party may summon and cross-examine psychiatrists who joined in the report, and offer independent evidence.

Subsection (2) provides that a defendant unfit to proceed is to be committed to a mental health facility so long as the unfitness endures, while the proceedings against him are suspended for that period. The proceedings against the defendant can be resumed if the court determines that fitness has been regained. The court may, however, dismiss the charge if it believes that it would be unjust to resume the criminal proceedings because so much time has lapsed since the original commitment.

Jackson v. Indiana, 406 U.S. 715 (1972), decided a decade after approval of the Model Code, indicates that a defendant deemed unfit for trial cannot consitutionally be held indefinitely on the basis of pending charges and his own unfitness. Insofar as Subsection (2) permits indefinite commitment without the necessity for the sort of finding that would be required for someone to be civilly committed, it does not meet the constitutional requirements prescribed by *Jackson* and other Supreme Court decisions.

Subsection (3) provides that legal objections to the prosecution may be raised and determined despite defendant's unfitness. The alternative Subsections (3) and (4) permit those representing defendant to have factual matters concerning the charge, as well as legal questions, determined at a post-commitment hearing.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 241.

Section 4.07. Determination of Irresponsibility on Basis of Report; Access to Defendant by Psychiatrist of His Own Choice; Form of Expert Testimony When Issue of Responsibility Is Tried.

(1) If the report filed pursuant to Section 4.05 finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect that substantially impaired his capacity to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law, and the Court, after a hearing if a hearing is requested by the prosecuting attorney or the defendant, is satisfied that such impairment was sufficient to exclude responsibility, the Court on motion of the defendant shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

(2) When, notwithstanding the report filed pursuant to Section 4.05, the defendant wishes to be examined by a qualified psychiatrist or other expert of his own choice, such examiner shall be permitted to have reasonable access to the defendant for the purposes of such examination.

(3) Upon the trial, the psychiatrists who reported pursuant to Section 4.05 may be called as witnesses by the prosecution, the defendant or the Court. If the issue is being tried hefore a jury, tbe jury may be informed that the psychiatrists were designated by the Court or by the Superintendent of the Hospital at the request of tbe Court, as the case may be. If called hy the Court, the witness shall he subject to cross-examination by the prosecution and by the defendant. Both the prosecution and the defendant may summon any other qualified psychiatrist or other expert to testify, but no one who has not examined the defendant shall be competent to testify to an expert opinion with respect to the mental condition or responsihility of the defendant, as distinguished from the validity of the procedure followed by, or the general scientific propositions stated by, another witness.

(4) When a psychiatrist or other expert who has examined the defendant testifies concerning his mental condition, he shall be permitted to make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant at tbe time of tbe commission of the offense charged and his opinion as to the extent, if any, to wbich the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law or to have a particular state of mind that is an element of tbe offense charged was impaired as a result of mental disease or defect at that time. He shall be permitted to make any explanation reasonahly serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diaguosis or opinion.

Explanatory Note

Subsection (1) permits the court on the basis of the report and after a hearing, if one is requested by the prosecutor or defendant, to enter a judgment of acquittal on the ground of mental disease or defect excluding responsibility.

Subsection (2) guarantees that an expert representing the defense have reasonable access to the defendant in order to examine him.

Subsection (3) allows either party or the court to summon as witnesses the psychiatrists who have reported under Section 4.05. Both the defense and prosecution may call other expert witnesses, but only those who have actually examined the defendant may testify about his mental condition.

Subsection (4), which indicates the sort of testimony experts may give, is meant to eliminate artificial constraints on psychi-

atric testimony by allowing the experts to testify fully in terms comprehensible to the jury about their conclusions and the basis for those conclusions.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 251.

Section 4.08. Legal Effcct of Acquittal on the Ground of Mental Disease or Defect Excluding Responsibility; Commitment; Release or Discharge.

(1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commissioner of Mental Hygiene [Public Health] to be placed in an appropriate institution for custody, care and treatment.

(2) If the Commissioner of Mental Hygiene [Public Health] is of the view that a person committed to his custody, pursuant to Subsection (1) of this Section, may be discharged or released on condition without danger to himself or to others, he shall make application for the discharge or release of such person in a report to the Court by which such person was committed and shall transmit a copy of such application and report to the prosecuting attorney of the county [parisb] from which the defendant was committed. The Court shall thereupon appoint at least two qualified psycbiatrists to examine such person and to report within sixty days, or such longer period as the Court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the Court may cause such person to be confined in any institution located near the place where the Court sits, which may hereafter be designated by the Commissioner of Mental Hygiene [Public Health] as suitable for the temporary detention of irresponsible persons.

(3) If the Court is satisfied by the report filed pursuant to Subsection (2) of this Section and such testimony of the reporting psychiatrists as the Court deems necessary that the committed person may he discharged or released on condition without danger to himself or otbers, the Court shall order his discharge or his release on such conditions as the Court determines to be necessary. If the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and tbe burden shall be upon the committed person to prove that he may safely be discharged or released. According to the determination of the Court upon the hearing, the committed person shall thereupon be discharged or released on such conditions as the Court

determines to be necessary, or shall be recommitted to the custody of the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure preseribed above for a first hearing.

(4) If, within [five] years after the conditional release of a committed person, the Court shall determine, after hearing evidence, that the conditions of release have not been fulfilled and that for the safety of such person or for the safety of others his conditional release should be revoked, the Court shall forthwith order him to be recommitted to the Commissioner of Mental Hygiene [Public Health], subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

(5) A committed person may make application for his discharge or release to the Court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the Commissioner of Mental Hygiene [Public Health]. However, no such application by a committed person need be considered until he has been confined for a period of not less than [six months] from the date of the order of commitment, and if the determination of the Court be adverse to the application, such person shall not be permitted to file a further application until [one year] has elapsed from the date of any preceding hearing on an application for his release or discharge.

Explanatory Note

Subsection (1) provides mandatory commitment for defendants who are acquitted on the ground of mental disease or defect excluding responsibility. Such defendants are committed to the custody of the Commissioner of Mental Hygiene to be placed in an appropriate institution for custody, care and treatment.

Subsections (2)–(5) set out the criteria and procedures for discharge or conditional release of persons committed under this section. The decision on discharge is made by the court that has ordered the original commitment. Its consideration of the possibility of discharge may be initiated by the Commissioner of Mental Hygiene (Subsection (2)) or by the committed person (Subsection (5)), although the committed person's application need not be considered within six months of commitment, and he may not make a further application within a year of any preceding hearing on discharge.

The court may discharge the person committed or grant him conditional release if he is not a danger to himself or others (Subsection (2)). If the Commissioner of Mental Hygiene recom-

mends discharge, he transmits a report to that effect to the court, sending a copy to the prosecuting attorney. Whether the application comes from the Commissioner or the person committed, the court appoints two psychiatrists to examine the person and report on his condition. If the court is satisfied by the Commissioner's report or by the examining psychiatrists or by both that discharge or release is warranted, it may so order (Subsection (3)). If the court is not satisfied, it holds a hearing on the issue, at which the committed person bears the burden of establishing that he is not dangerous. The court may then decide upon discharge or release, or may recommit the person. Under Subsection (4), if conditional release is granted, the court may, within five years, revoke such a release and order recommitment upon hearing evidence that the conditions of release have not been fulfilled.

Decisions by the Supreme Court on related issues place in doubt the consitutionality of mandatory commitment and some lower courts have held it to be unconstitutional. In addition, it is now questionable whether a state may use the single criterion of dangerousness to grant discharge if it employs a different standard for release of persons civilly committed.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 256.

Section 4.09. Statements for Purposes of Examination or Treatment Inadmissible Except on Issue of Mental Condition.

A statement made by a person subjected to psychiatric examination or treatment pursuant to Sections 4.05, 4.06 or 4.08 for the purpose of such examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue otber than that of his mental condition but it shall be admissible upon that issue, whether or not it would otherwise be deemed a privileged communieation [, unless such statement constitutes an admission of guilt of tbe crime charged].

Explanatory Note

This section concerns statements made by defendants in the course of either psychiatric examinations authorized by preceding sections of treatment provided during commitment under those sections. Such statements generally are admissible in evidence as to defendant's mental condition but are not admissible against the defendant in a criminal proceeding as to any other issue. The

bracketed portion would render inadmissible for all purposes any such statement that is an admission of guilt of the crime charged.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 266.

Section 4.10. Immaturity Excluding Criminal Conviction; Transfer of Proceedings to Juvenile Court.

(1) A person shall not be tried for or convicted of an offense if:

(a) at the time of the conduct charged to constitute the offense he was less than sixteen years of age [, in which case the Juvenile Court shall have exclusive jurisdiction*]; or

(b) at the time of the conduct charged to constitute the offense he was sixteen or seventeen years of age, unless:

(i) the Juvenile Court has no jurisdiction over him, or

(ii) the Juvenile Court has entered an order waiving jurisdiction and consenting to the institution of criminal proceedings against him.

(2) No court shall have jurisdiction to try or convict a person of an offense if criminal proceedings against him are barred by Subsection (1) of this Section. When it appears that a person charged with the commission of an offense may he of such an age that criminal proceedings may hc harred under Subsection (1) of this Section, the Court shall hold a hearing thereon, and the burden shall be on the prosecution to establish to the satisfaction of the Court that the criminal proceeding is not barred upon such grounds. If the Court determines that the proceeding is barred, custody of the person charged shall be surrendered to the Juvenile Court, and the case, including all papers and processes relating thereto, shall be transferred.

Explanatory Note

This section provides that no one less than sixteen years old at the time of conduct charged to constitute an offense can be tried for or convicted of the offense, exclusive jurisdiction in such cases residing in the Juvenile Court. If a person was sixteen or over but under eighteen at the time of the offense, he can be tried for the offense only if the Juvenile Court lacks jurisdiction, or upon waiver by the Juvenile Court. If it appears that a person charged may be of an age to which these provisions apply, the

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* The bracketed words are unnecessary if tbe Juvenile Court Act so provides or is amended accordingly.

prosecution must establish to the satisfaction of the Court that criminal proceedings are not barred.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 271.

ARTICLE 5. INCHOATE CRIMES

Section 5.01. Criminal Attempt.

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or

(h) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct That May Be Held Suhstantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of tbe actor's criminal purpose. 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:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) cnticing 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;

(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, that are specially designed for such unlawful use or tbat 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, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) Conduct Designed to Aid Anotber in Commission of a Crime. A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(h) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The estahlishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

Explanatory Note

Subsection (1) sets forth the general requirements for an attempt. For analytical clarity, it divides the cases into three types: those where the actor's conduct would constitute the crime if the circumstances were as he believed them to be; those where the actor has completed conduct that he expects to cause a proscribed result; and those where the actor has not yet completed his own conduct, and the problem is to distinguish between acts of preparation and a criminal attempt. In this instance, liability depends upon the actor having taken a "substantial step" in a course of conduct planned to culminate in commission of a crime. In all three situations the mens rea is purpose, with two exceptions: with respect to the circumstances under which

a crime must be committed, the culpability otherwise required for commission of the crime is also applicable to the attempt; and with respect to offenses where causing a result is an element, a belief that the result will occur without further conduct on the actor's part will suffice. The impossibility defense is rejected, liability being focused upon the circumstances as the actor believes them to be rather than as they actually exist.

Subsection (2) elaborates on the preparation-attempt problem by indicating what is meant by the concept of "substantial step" contained in Subsection (1)(c). Conduct cannot be held to be a substantial step unless it is strongly corroborative of the actor's criminal purpose. A list of kinds of conduct that corresponds with patterns found in common law cases is also provided, with the requirement that the issue of guilt be submitted to the jury if one or more of them occurs and strongly corroborates the actor's criminal purpose.

Subsection (3) fills what would otherwise be a gap in complicity liability. Section 2.06 covers accomplice liability in situations where the principal actor actually commits the offense. In cases where the principal actor does not commit an offense, however, it is provided here that the accomplice will be liable if he engaged in conduct that would have established his complicity had the crime been committed.

Subsection (4) develops the defense of renunciation, which can be claimed if the actor abandoned or otherwise prevented the commission of the offense, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The meaning of "complete and voluntary" is elucidated in the second paragraph of the provision. The defense is an affirmative defense, which under Section 1.12 means that the defendant has the burden of raising the issue and the prosecution has the burden of persuasion.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 298.

Section 5.02. Criminal Solicitation.

(1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

(2) Uncommunicated Solicitation. It is immaterial under Subsection (1) of this Section that the actor fails to communicate with

the person he solicits to commit a crime if his conduct was designed to effect such communication.

(3) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Explanatory Note

Subsection (1) provides the general definition of the offense of solicitation. A purpose to promote or facilitate the commission of a crime is required, together with a command, encouragement or request to another person that he engage in specific conduct that would constitute the crime or an attempt to commit the crime or would establish complicity in its commission or attempted commission.

Subsection (2) makes it immaterial that the actor failed to communicate his solicitation if his conduct was designed to effect such communication.

Subsection (3) provides a renunciation defense for solicitation similar to the defense provided in the case of attempt and conspiracy.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 365.

Section 5.03. Criminal Conspiracy.

(1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or

(b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(2) Scope of Conspiratorial Relationship. If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

(3) Conspiracy with Multiple Criminal Objectives. If a person conspires to commit a number of crimes, he is guilty of only one

conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

(4) Joinder and Venue in Conspiracy Prosecutions.

(a) Subject to the provisions of paragraph (b) of this Subsection, two or more persons charged with criminal conspiracy may be prosecuted jointly if:

(i) they are charged with conspiring with one another; or

(ii) the conspiracies alleged, whether they have the same or different parties, are so related that they constitute different aspects of a scheme of organized criminal conduct.

(b) In any joint prosecution under paragraph (a) of this Subsection:

(i) no defendant shall be charged with a conspiracy in any county [parish or district] other than one in which he entered into such conspiracy or in which an overt act pursuant to such conspiracy was done by him or by a person with whom he conspired; and

(ii) neither the liability of any defendant nor the admissibility against him of evidence of acts or declarations of another shall be enlarged by such joinder; and

(iii) the Court shall order a severance or take a special verdict as to any defendant who so requests, if it deems it necessary or appropriate to promote the fair determination of his guilt or innocence, and shall take any other proper measures to protect the fairness of the trial.

(5) Overt Act. No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

(6) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(7) Duration of Conspiracy. For purposes of Section 1.06(4):

(a) conspiracy is a continuing course of conduct that terminates when the crime or crimes that are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired; and

(b) such abandonment is presumed if neither the defendant nor anyone with whom he conspired does any overt act in pur-

suance of the conspiracy during the applicable period of limitation; and

(c) if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation therein.

Explanatory Note

Subsection (1) establishes the definition of conspiracy. Guilt as a conspirator is measured by the situation as the actor views it; he must have the purpose of promoting or facilitating a criminal offense, and with that purpose must agree (or believe that he is agreeing) with another that they will engage in the criminal offense or in solicitation to commit it. It also is sufficient if the agreement is to aid another in the planning or commission of the offense, or of an attempt or solicitation to commit it. The purpose requirement is meant to extend to result and conduct elements of the offense that is the object of the conspiracy, but whether or how far it also extends to circumstance elements of that offense is meant to be left open to interpretation by the courts. The mens rea does not include, however, a corrupt motive or an awareness of the illegality of the criminal objective.

Subsection (2) addresses the difficult question of the scope of the conspiratorial relationship. It focuses upon the specific crime or crimes that that actor has conspired to commit and provides that if he knows that his co-conspirator also conspires with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity.

Subsection (3) addresses the question of whether one who has conspired to commit a number of crimes is guilty of one or several conspiracies. Only one conspiracy can be found so long as the crimes are the object of the same agreement or continuous conspiratorial relationship.

Subsection (4) permits joint prosecution if the defendants are charged with conspiring with one another or if the conspiracies alleged are so related that they constitute different aspects of a scheme of organized criminal conduct. The court is empowered to order a severance or to take other appropriate measures, however, whenever fairness so requires. It is also provided that the liability of the defendant, as well as the admissibility of evidence against him, shall not be enlarged by a joinder. It is provided finally that the venue of a conspiracy charge against a defendant

must lie in a district where the agreement was formed, or where an overt act was performed either by him or by someone with whom he conspired.

Subsection (5) requires the proof of an overt act by the defendant or by a person with whom he conspired as a necessary part of a conspiracy prosecution, unless the criminal objective includes a felony of the first or second degree.

Subsection (6) establishes the affirmative defense of renunciation in cases where the defendant, after entering into a conspiracy. thwarts its success under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The meaning of the terms "complete" and "voluntary" is elaborated in Section 5.01(4).

Subsection (7) relates to the duration of a conspiracy for purposes of applying the statute of limitations set forth in Section 1.06. A conspiracy is a continuing course of conduct, as to which the statute of limitations will begin to run either when its objectives have been accomplished or when the agreement is abandoned. Such abandonment is presumed if no overt act in furtherance of the conspiracy is performed during the applicable period of limitation by either the defendant or anyone with whom he conspired. It is also provided that an individual can abandon the agreement, and thus start the running of the statute as to him even though others continue to pursue the objectives of the conspiracy. Such abandonment occurs when the individual advises those with whom he has conspired of his abandonment or when he informs law enforcement authorities of the existence of the conspiracy and of his participation in it.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 386.

Seetion 5.04. Incapacity, Irresponsibility or Immunity of Party to Solicitation or Conspiracy.

(1) Except as provided in Subsection (2) of this Section, it is immaterial to the liability of a person who solicits or conspires witb another to commit a crime that:

(a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic that is an element of such crime, if he believes tbat one of them does; or

(b) the person whom he solicits or witb whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

(2) It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under Section 2.06(5) or 2.06(6)(a) or (6)(b).

Explanatory Note

Subsection (1) provides for two contingencies that are made immaterial to liability for solicitation or conspiracy. Paragraph (a) deals with offenses that can be committed only by a person who occupies a particular position or has a particular characteristic. The failure of the actor or the person whom he solicits or with whom he conspires to occupy the position or have the characteristic is immaterial if he believes that one of them does and that the offense will thereby be committed. Paragraph (b) provides a similar result in cases where the person solicited or the person with whom the actor conspires has a defense of irresponsibility or immunity that he can assert. Consistent with the Code approach to conspiracy and solicitation, the actor's liability is not affected by these factors, which are extraneous to his culpability.

Subsection (2) is added, however, to make the scope of liability for conspiracy and solicitation congruent with the provisions of Section 2.06 on the liability of accessories. In cases where the actor would not be guilty of the substantive offense as an accessory because of some special policy of the criminal law, it is clear that he should also not be liable for solicitation of or conspiracy to commit the same offense.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 476.

Section 5.05. Grading of Criminal Attempt, Solicitation and Conspiracy; Mitigation in Cases of Lesser Danger; Multiple Convictions Barred.

(1) Grading. Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense that is attempted or solicited or is an object of the conspiracy. An attempt, solicitation or conspiracy to commit a [capital crime or a] felony of the first degree is a felony of the second degree.

(2) Mitigation. If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.12 to enter judgment and

impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.

(3) Multiple Convictions. A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime.

Explanatory Note

Subsection (1) establishes the general principle that attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious substantive offense that is their object. An exception is made for the most serious category of crime, where the inchoate offense is graded as a felony of the second degree.

Subsection (2) explicitly recognizes the power of the court to enter judgment and impose sentence for a crime of lower grade or degree than would otherwise be mandated by Subsection (1), or in extreme cases to dismiss the prosecution altogether. The occasions for the exercise of this authority are those in which the actor's conduct is so inherently unlikely to result or culminate in the commission of the crime that neither the conduct nor the actor presents a public danger sufficient to justify the normal application of Subsection (1).

Subsection (3) provides that a person may not be convicted of more than one inchoate offense for conduct designed to culminate in the commission of the same crime. *See also* Section 1.07(1)(b), which prohibits conviction of both the inchoate offense and the substantive offense that is its object. On the other hand, conduct that has multiple objectives, only some of which have been achieved, can be prosecuted under the appropriate section of Article 5. That is, a person may be convicted for one substantive offense and for attempt, solicitation or conspiracy in relation to a different offense.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 485.

Section 5.06. Possessing Instruments of Crime; Weapons.

(1) Criminal Instruments Generally. A person commits a misdemeanor if he possesses any instrument of crime with purpose to employ it criminally. "Instrument of crime" means:

(a) anything specially made or specially adapted for criminal use; or

(b) anything commonly used for criminal purposes and possessed by the actor under circumstances that do not negative unlawful purpose.

(2) Presumption of Criminal Purpose from Possession of Weapon. If a person possesses a firearm or other weapon on or about his person, in a vehicle occupied by him, or otherwise readily available for use, it is presumed that he had the purpose to employ it criminally, unless:

(a) the weapon is possessed in the actor's home or place of business;

(b) the actor is licensed or otherwise authorized by law to possess such weapon; or

(c) the weapon is of a type commonly used in lawful sport.

"Weapon" means anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses it may have; the term includes a firearm that is not loaded or lacks a clip or other component to render it immediately operable, and components that can readily be assembled into a weapon.

(3) Presumptions as to Possession of Criminal Instruments in Automobiles. If a weapon or other instrument of crime is found in an automobile, it is presumed to be in the possession of the occupant if there is but one. If there is more than one occupant, it is presumed to be in the possession of all, except under the following circumstances:

(a) it is found upon the person of one of the occupants;

(b) the automobile is not a stolen one and the weapon or instrument is found out of view in a glove compartment, car trunk, or other enclosed customary depository, in which case it is presumed to be in the possession of the occupant or occupants who own or have authority to operate the automobile;

(c) in the case of a taxicab, a weapon or instrument found in the passengers' portion of the vehicle is presumed to be in the possession of all the passengers, if there are any, and, if not, in the possession of the driver.

Explanatory Note

Subsection (1) provides that it is a misdemeanor to possess instruments of crime with the purpose of employing them criminally. Intervention by law enforcement authorities to prevent such possession can be justified on much the same basis as that which underlies the general attempt, solicitation and conspiracy provisions dealt with elsewhere in Article 5. Paragraphs (a) and (b) define "instrument of crime."

Subsection (2) establishes a presumption of criminal purpose from the fact of possession of a weapon in certain circumstances,

further delineated by Paragraphs (a), (b) and (c) and in the definition of "weapon."

Subsection (3) also creates a presumption, in this instance permitting the inference of possession from occupancy of an automobile in which an instrument of crime is found, subject to the exceptions delineated in Paragraphs (a), (b) and (c).

Serious constitutional questions are raised by the presumptions in Subsections (2) and (3). They are discussed in the Comment.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 494.

Section 5.07. Prohibited Offensive Weapons.

A person commits a misdemeanor if, except as authorized by law, he makes, repairs, sells, or otherwise deals in, uses, or possesses any offensive weapon. "Offensive weapon" means any bomb, machine gun, sawed-off shotgun, firearm specially made or specially adapted for concealment or silent discharge, any blackjack, sandbag, metal knuckles, dagger, or other implement for the infliction of serious bodily injury that serves no common lawful purpose. It is a defense under this Section for the defendant to prove by a preponderance of evidence that he possessed or dealt with the weapon solely as a curio or in a dramatic performance, or that he possessed it briefly in consequence of having found it or taken it from an aggressor, or under circumstances similarly negativing any purpose or likelihood that the weapon would be used unlawfully. The presumptions provided in Section 5.06(3) are applicable to prosecutions under this Section.

Explanatory Note

This section is a corollary to Section 5.06, which deals generally with the possession of an instrument of crime with a purpose to employ it criminally. Section 5.07 prohibits outright the possession of, as well as the making, repairing, selling of, or otherwise dealing in, certain other kinds of criminal instrumentalities, defined as "offensive weapons." The actor is given a defense if he can establish by a preponderance of the evidence that his possession or dealing occurred under circumstances negating unlawful purpose. It is also provided that the presumptions of Section 5.06(3) are applicable to prosecutions under this section.

For detailed Comment, *see* MPC Part I Commentaries, vol. 2, at 504.

ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

Section 6.01. Degrees of Felonies.

(1) Felonies defined by this Code are classified, for the purpose of sentence, into three degrees, as follows.

(a) felonies of the first degree,

(b) felonies of the second degree;

(c) felonies of the third degree.

A felony is of the first or second degree when it is so designated by the Code. A crime declared to be a felony, without specification of degree, is of the third degree.

(2) Notwithstanding any other provision of law, a felony defined by any statute of this State other than this Code shall constitute, for the purpose of sentence, a felony of the third degree.

Explanatory Note

Subsection (1) effects one of the most important rationalizing principles of the Model Code. As a remedy for the anarchical penalty variations characteristic of antecedent criminal legislation in the United States, felonies are classified for purpose of sentencing into three degrees. Each felony as it is then defined in the Code is graded into one of these three classifications. The available sentences are then determinable according to the provisions of Articles 6 and 7 relating to that class.

Subsection (2) superimposes the sentencing structure of the penal code on felonies that are defined by a statute other than the code, classifying all such offenses as felonies of the third degree. The counterpart for misdemeanors is contained in Section 1.04(4).

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 32.

Section 6.02. Sentence in Accordance with Code; Authorized Dispositions.

(1) No person convicted of an offense shall be sentenced otherwise than in accordance with this Article.

[(2) The Court shall sentence a person who has been convicted of murder to death or imprisonment, in accordance with Section 210.6.]

(3) Except as provided in Subsection (2) of this Section and subject to the applicable provisions of the Code, the Court may suspend

the imposition of sentence on a person who has been convicted of a crime, may order him to be committed in lieu of sentence, in accordance with Section 6.13, or may sentence him as follows:

(a) to pay a fine authorized by Section 6.03; or

(b) to be placed on probation [, and, in the case of a person convicted of a felony or misdemeanor to imprisonment for a term fixed by the Court not exceeding thirty days to be served as a condition of probation]; or

(c) to imprisonment for a term authorized by Section 6.05, 6.06, 6.07, 6.08, 6.09, or 7.06; or

(d) to fine and probation or fine and imprisonment, but not to probation and imprisonment [, except as authorized in paragraph (b) of this Subsection].

(4) The Court may suspend the imposition of sentence on a person who has been convicted of a violation or may sentence him to pay a fine authorized by Section 6.03.

(5) This Article 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. Such a judgment or order may be included in the sentence.

Explanatory Note

Subsection (1) makes it clear that sentencing for criminal offenses is to be controlled by the provisions of Article 6 of the Model Code. The meaning of the term "offense" is provided by Sections 1.04 and 1.05. In sum, the purpose of Section 6.02(1) is to collect all authorized sentencing dispositions in one place in order to facilitate the development of a rational and consistent penal policy.

Subsection (2) is the place where the special sentencing alternatives for murder, if there are to be such, would be set forth. The Institute took no position as between abolition of capital punishment or its retention subject to the limitations and procedures prescribed in Section 210.6. *See* MPC Part II Commentaries, vol. 1, at 107. If capital punishment is retained, however, bracketed Section 6.02(2) or some similar provision would be included. Subsection (2) as drafted also would preclude in sentencing for murder a suspended sentence, a sentence of probation, or a fine. As the brackets indicate, the Institute neither approved nor disapproved this formulation.

Subject to the possible exception in Subsection (2), Subsection (3) lists the sentences that are available upon conviction of a crime,

ranging from imprisonment to fine, probation or suspension of the imposition of sentence, and including various combinations of fine, probation, and imprisonment.

Suspension of the execution of sentence, as opposed to suspension of the imposition of sentence, is not contemplated, on the ground that the court should not predetermine its response to a violation of conditions by limiting its available options upon resentencing. Probation is viewed as an alternative to the suspension of the imposition of sentence, depending upon the court's determination as to the need for supervision by a probation officer; both sentences are conditional releases, as provided in Section 7.01.

Subsection (3)(b) authorizes, in brackets, the combination of imprisonment and probation, known in the federal practice as a "split sentence." Subsection (3)(c) incorporates other parts of Article 6 for the limitations on the sentences to which they refer. Subsection (3) is thus a complete catalogue of the sentencing alternatives available upon conviction of a crime.

Subsection (4) is a statement of the alternatives that are available upon conviction of a violation. In accordance with the policy of Section 1.04, the sanctions are limited to a suspension of the imposition of sentence or a fine.

Subsection (5) assures that the Code does not preclude the imposition of civil penalties, such as suspension of a license or removal from office, that may be authorized upon the conviction of particular crimes. The availability of such sanctions is to be controlled by the law outside the penal code. A judgment required or authorized by such a law may be included in the sentence.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 46.

Section 6.03. Fines.

A person who has been convicted of an offense may be sentenced to pay a fine not exceeding:

(1) $10,000, when the conviction is of a felony of the first or second degree;

(2) $5,000, wben the conviction is of a felony of the third degree;

(3) $1,000, when the conviction is of a misdemeanor;

(4) $500, when the conviction is of a petty misdemeanor or a violation;

(5) any higher amount equal to double the pecuniary gain derived from the offense by the offender;

(6) any higher amount specifically authorized by statute.

Explanatory Note

Section 6.03 sets forth the fines that may be imposed upon conviction of the various classes of offenses established by the Model Code. Subsection (5) goes beyond the traditional provision of an absolute ceiling on the amount of an authorized fine. It permits a fine equal to double the pecuniary gain derived from the offense.

Criteria for the use of fines are set forth in Section 7.02.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 58.

Section 6.04. Penalties Against Corporations and Unincorporated Associations; Forfeiture of Corporate Charter or Revocation of Certificate Authorizing Foreign Corporation to Do Business in the State.

(1) The Court may suspend the sentence of a corporation or an unincorporated association that bas been convicted of an offense or may sentence it to pay a fine authorized by Section 6.03.

(2) (a) The [prosecuting attorney] is authorized to institute civil proceedings in the appropriate court of general jurisdiction to forfeit the charter of a corporation organized under the laws of this State or to revoke the certificate authorizing a foreign corporation to conduct business in this State. The Court may order the charter forfeited or the certificate revoked upon finding

(i) that the board of directors or a higb managerial agent acting in behalf of the corporation has, in conducting the corporation's affairs, purposely engaged in a persistent course of criminal conduct and

(ii) that for the prevention of future criminal conduct of the same character, the public interest requires the charter of the corporation to be forfeited and the corporation to be dissolved or the certificate to be revoked.

(b) When a corporation is convicted of a crime or a high managerial agent of a corporation, as defined in Section 2.07, is convicted of a crime committed in the conduct of tbe affairs of the corporation, the Court, in sentencing the corporation or the agent, may direct tbe [prosecuting attorney] to institute proceedings authorized by paragraph (a) of tbis Subsection.

(c) The proceedings authorized by paragraph (a) of this Subsection shall be conducted in accordance with the procedures authorized by law for the involuntary dissolution of a corporation or the revocation of the certificate authorizing a foreign corporation to conduct business in this State. Such proceedings shall be deemed additional to any other proceedings authorized by law for the purpose of forfeiting the charter of a corporation or revoking the certificate of a foreign corporation.

Explanatory Note

Subsection (1) states the sentencing alternatives that are available upon the criminal conviction of a corporation or an unincorporated association. Suspension of sentence upon appropriate conditions is one sanction. A fine authorized by Section 6.03 is another. The principles controlling liability of corporations and unincorporated associations are set forth in Section 2.07.

Subsection (2) authorizes the additional sanction of forfeiture of the right to do business. Two criteria must be satisfied prior to invocation of this sanction: (i) the board of directors or a high managerial agent acting in behalf of the corporation must have purposely engaged in a persistent course of criminal conduct in conducting the corporation's affairs; and (ii) for the prevention of future criminal conduct of the same character, the public interest must be viewed as requiring the forfeiture.

The appropriate prosecuting authority is authorized by Subsection (2)(a) to institute forfeiture proceedings, and the court, under Subsection (2)(b), is authorized as part of its sentence to direct that such proceedings be instituted. Subsection (2)(c) provides that the procedures for forfeiture shall conform to the procedures authorized for the involuntary dissolution of a corporation or the revocation of a certificate of a foreign corporation to do business in the state. It also provides that proceedings under this section shall be in addition to any other proceedings authorized by law for similar purposes.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 64.

Section 6.05. Young Adult Offenders.

(1) Specialized Correctional Treatment. A young adult offender is a person convicted of a crime who, at the time of sentencing, is sixteen but less than twenty-two years of age. A young adult offender who is sentenced to a term of imprisonment that may exceed thirty days [alternatives: (1) ninety days; (2) one year] shall be committed to the custody of the Division of Young Adult

Correction of the Department of Correction, and shall receive, as far as practicable, such special and individualized correctional and rehabilitative treatment as may be appropriate to his needs.

(2) Special Term. A young adult offender convicted of a felony may, in lieu of any other sentence of imprisonment authorized by this Article, be sentenced to a special term of imprisonment without a minimum and with a maximum of four years, regardless of the degree of the felony involved, if the Court is of the opinion that such special term is adequate for his correction and rehabilitation and will not jeopardize the protection of the public.

[(3) Removal of Disabilities; Vacation of Conviction.

(a) In sentencing a young adult offender to the special term provided by this Section or to any sentence other than one of imprisonment, the Court may order that so long as he is not convicted of another felony, the judgment shall not constitute a conviction for the purposes of any disqualification or disability imposed by law upon conviction of a crime.

(b) When any young adult offender is unconditionally discharged from probation or parole before the expiration of the maximum term thereof, the Court may enter an order vacating the judgment of conviction.]

[(4) Commitment for Observation. If, after presentence investigation, the Court desires additional information concerning a young adult offender before imposing sentence, it may order that he be committed, for a period not exceeding ninety days, to the custody of the Division of Young Adult Correction of the Department of Correction for observation and study at an appropriate reception or classification center. Such Division of the Department of Correction and the [Young Adult Division of the] Board of Parole shall advise the Court of their findings and recommendations on or before the expiration of such ninety-day period.]

Explanatory Note

Subsection (1) defines a young adult offender as one who is between the ages of sixteen and twenty-two at the time of sentencing, sixteen being the age below which prosecution would occur in Juvenile Court under Section 4.10(1).

Subsection (1) provides that a young adult offender who is sentenced to imprisonment in excess of a specified term must be committed to a special division of the correctional apparatus that specializes in programs for such offenders. Other sanctions, such as suspension, probation, or a fine, would be imposed by the court on young adults in the normal manner.

Subsection (2) provides a special ameliorative prison term which may be imposed by the court upon conviction of a felony in lieu of the term otherwise provided by law. Unlike the sentences otherwise available under Section 6.06, no minimum term is provided. The maximum is four years, irrespective of the category of offense. It will be noted that, unlike some adult provisions, the sentence under this section cannot be longer than is otherwise available for commission of the offense in question.

Subsection (3) provides that the court may enter an order vacating the conviction under specified circumstances. The provision is bracketed because it will be unnecessary if Section 306.6 authorizes such action in the case of all offenders.

Subsection (4) authorizes a diagnostic commitment for a young adult offender in cases where the court desires a more substantial informational base upon which to make its sentencing judgment. Brackets are used because the provision will be unnecessary if the general authority to make such commitments proposed in Section 7.08(1) is enacted.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 73.

Section 6.06. Sentence of Imprisonment for Felony; Ordinary Terms.

A person who has been convicted of a felony may be sentenced to imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than ten years, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall he fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be ten years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than two years, and the maximum of which shall be five years.

Alternative Section 6.06. Sentence of Imprisonment for Felony; Ordinary Terms.

A person who has heen convicted of a felony may be sentenced to imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than

one year nor more than ten years, and the maximum at not more than twenty years or at life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum at not more than ten years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than two years, and the maximum at not more than five years.

No sentence shall be imposed under this Section of which the minimum is longer than one half the maximum, or, when the maximum is life imprisonment, longer than ten years.

Explanatory Note

Section 6.06 prescribes the ordinary limits for felony sentences of imprisonment, following the classification of felonies into three degrees by Section 6.01.

In order fully to appreciate the sentencing structure of the Model Code, Section 6.06 must be read together with a number of other provisions. As noted, Section 6.01 classifies felonies into degrees and Section 6.02 provides the alternatives in addition to imprisonment that will be available upon conviction. Section 6.07 permits the extension of each of the maximum and minimum limits of Section 6.06 in the case of certain offenders, identified by criteria set forth in Section 7.03. Section 6.10 provides that the first release of all offenders will be on parole for a specified term. If parole occurs at the end of an offender's term of imprisonment, as it will for a few of the very worst offenders, the parole term will be served in addition to the sentence already served. With regard to the mandatory one year minimum in all sentences of imprisonment, Section 7.08(2) provides that every sentence to imprisonment is to be deemed tentative for one year, thus permitting amelioration of the mandatory feature of the sentence under Section 7.08(3) to (7) in unusual cases. It should also be noted that Section 6.12 permits the reduction of a conviction to a lesser degree on the court's conclusion that it would be unduly harsh to sentence the offender in accordance with the normally available alternatives. Under the initial formulation of Section 6.06, if the court imposes a sentence of imprisonment, its maximum length would be governed by the grade of the felony for which the sentence is passed. Thus, for a second degree felony the court must sentence the offender to a term with a maximum of ten years if a sentence of imprisonment is imposed, i.e.,

unless one of the alternative sanctions under Section 6.02 is selected. On the other hand, the minimum term, i.e., the length of time during which parole eligibility is to be postponed, is within the control of the court to the extent provided for each class of felony. For example, the court may impose a minimum term for a second degree felony at any point between one and three years. It will be noted that a minimum of one year is included in every felony sentence of imprisonment.

Alternative Section 6.06 differs from Section 6.06 in authorizing the court in cases of imprisonment to impose a maximum term shorter than the statutory maximum for the grade of offense involved. Thus, if the offender is to be imprisoned for a second degree felony, the court may select a maximum term of any period up to ten years, leaving to the parole authorities the discretion to release between the minimum term imposed and the maximum term selected by the court. To assure that such control of the maximum term is not employed to eliminate a substantial range of indeterminacy in the sentence, Alternative Section 6.06 provides that the minimum cannot be longer than one half of the maximum imposed.

The Institute was too closely divided in support of the initial and the alternative formulations of Section 6.06 to express a preference for either.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 108.

Section 6.07. Sentence of Imprisonment for Felony; Extended Terms.

In the cases designated in Section 7.03, a person who has been convicted of a felony may be sentenced to an extended term of imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than five years nor more than ten years, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall he fixed by the Court at not less than one year nor more than five years, and the maximum of which shall he fixed by the Court at not less than ten years nor more than twenty years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which

shall be fixed by the Court at not less than five years nor more than ten years.

Explanatory Note

Section 6.07 provides for a sentence of imprisonment for an extended term for each of the classes of felonies designated by Section 6.01. Such a sentence may be imposed by the court only in accordance with the criteria set forth in Section 7.03. The ordinary terms are established by Section 6.06.

The structure of the extended term is the same as that set forth in Alternative Section 6.06. The court has control over the maximum from the point at which the ordinary term stops up to a prescribed maximum limit. The minimum is also fixed by the court within a prescribed range. Unlike many habitual offender laws and other laws that provide for an enhanced sentence, the enhancement is not mandated by the statute, and the authorized maximum of the extended term varies with and is determined by the class of offense for which the offender is being sentenced.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 171.

Section 6.08. Sentence of Imprisonment for Misdemeanors and Petty Misdemeanors; Ordinary Terms.

A person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to imprisonment for a definite term which shall be fixed by the Court and shall not exceed one year in the case of a misdemeanor or thirty days in the case of a petty misdemeanor.

Explanatory Note

Section 6.08 establishes the authorized sentences of imprisonment for the two classes of misdemeanors employed by the Code. The term is definite with no provision for parole and is to be fixed by the court at any point up to the stated maximum limit. A form of parole is permissible, it should be noted, under Section 6.02(3)(b) if the bracketed language is included. It should also be noted that misdemeanors that are contained in statutes outside the Code are reclassified for sentencing purposes as petty misdemeanors by Section 1.04(4).

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 178.

Section 6.09. Sentence of Imprisonment for Misdemeanors and Petty Misdemeanors; Extended Terms.

(1) In the cases designated in Section 7.04, a person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to an extended term of imprisonment, as follows:

(a) in the case of a misdemeanor, for a term the minimum of which shall be fixed by the Court at not more than one year and the maximum of which shall be three years;

(b) in the case of a petty misdemeanor, for a term the minimum of which shall be fixed by the Court at not more than six months and the maximum of which shall be two years.

(2) No such sentence for an extended term shall be imposed unless:

(a) the Director of Correction has certified that there is an institution in the Department of Correction, or in a county or city [or other appropriate political subdivision of the State] that is appropriate for the detention and correctional treatment of such misdemeanants or petty misdemeanants, and that such institution is available to receive such commitments; and

(b) the [Board of Parole] [Parole Administrator] has certified that the Board of Parole is able to visit such institution and to assume responsibility for the release of such prisoners on parole and for their parole supervision.

Explanatory Note

Section 6.09 authorizes extended terms for misdemeanors, upon satisfaction of the criteria established by Section 7.04. Section 6.08 establishes the ordinary terms.

The structure of the misdemeanor extended term follows that of Section 6.06. The court is not authorized to reduce the maximum authorized by Section 6.09. Minimum terms, on the other hand, are within the control of the court within the limits specified. It is also provided that no extended terms shall be imposed unless appropriate facilities are available and unless the board of parole is able to assume jurisdiction.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 189.

Section 6.10. First Release of All Offenders on Parole; Sentence of Imprisonment Includes Separate Parole Term; Length of Parole Term; Length of Recommitment and Reparole After Revocation of Parole; Final Unconditional Release.

(1) First Release of All Offenders on Parole. An offender sentenced to an indefinite term of imprisonment in excess of one year

under Section 6.05, 6.06, 6.07, 6.09 or 7.06 shall be released conditionally on parole at or before the expiration of the maximum of such term, in accordance with Article 305.

(2) Sentence of Imprisonment Includes Separate Parole Term; Length of Parole Term. A sentence to an indefinite term of imprisonment in excess of one year under Section 6.05, 6.06, 6.07, 6.09 or 7.06 includes as a separate portion of the sentence a term of parole or of recommitment for violation of the conditions of parole which governs the duration of parole or recommitment after the offender's first conditional release on parole. The minimum of such term is one year and the maximum is five years, unless the sentence was imposed under Section 6.05(2) or Section 6.09, in which case the maximum is two years.

(3) Length of Recommitment and Reparole After Revocation of Parole. If an offender is recommitted upon revocation of his parole, the term of further imprisonment upon such recommitment and of any subsequent reparole or recommitment under the same sentence shall be fixed by the Board of Parole but shall not exceed in aggregate length the unserved balance of the maximum parole term provided by Subsection (2) of this Section.

(4) Final Unconditional Release. When the maximum of his parole term has expired or he has been sooner discharged from parole under Section 305.12, an offender shall be deemed to have served his sentence and shall be released unconditionally.

Explanatory Note

Subsection (1) provides that the first release of all offenders serving an indefinite term of imprisonment in excess of one year shall be on parole. Parole can occur, of course, prior to the expiration of the offender's maximum sentence once his minimum term has expired. If the offender is not released on parole prior to the expiration of his maximum sentence, however, he is then required by this section to be placed on parole. Many of the incidents of the parole are governed by Article 305.

Subsection (2) establishes a separate parole term as a part of every indefinite sentence in excess of one year. This means that once first release has occurred, the original prison sentence is no longer of any consequence and the parole term thereafter determines the extent to which the offender is subject to restraint. Thus, an offender who is released for the first time on parole after service of seven years of a ten year sentence will serve a parole term of one to five years. Under Subsection (1), he would have the same one to five year parole term whether he was released at the end of the three years or the end of the ten.

Subsection (3), consistent with Section 305.17(1), provides that the length of any recommitment and reparole is to be governed by the time remaining on the offender's parole term. Thus, if parole were revoked after two years in any of the above illustrations, the offender could be recommitted for no longer than three years, again irrespective of the point in his original sentence at which he was paroled.

Subsection (4) provides that the offender is entitled to his unconditional discharge upon the expiration of his parole term, assuming no earlier discharge under the provisions of Section 305.12. Thus, in the illustrations given above, the offender would be entitled to his unconditional discharge upon the expiration of five years from the date of first release, again at whatever point in the service of his original sentence the first release occurred.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 193.

Section 6.11. Place of Imprisonment.

(1) When a person is sentenced to imprisonment for an indefinite term with a maximum in excess of one year, the Court shall commit him to the custody of the Department of Correction [or other single department or agency] for the term of his sentence and until released in accordance with law.

(2) When a person is sentenced to imprisonment for a definite term, the Court shall designate the institution or agency to which he is committed for the term of his sentence and until released in accordance with law.

Explanatory Note

Subsection (1) provides that any commitment for an indefinite term in excess of one year shall be to a unified department of correction. While it is desirable that the entire correctional system be unified, even with regard to terms of less than one year, this goal was not viewed as presently practical. Subsection (2) therefore provides that the commitment for definite terms should be to an institution or agency designated by the court.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 209.

Section 6.12. Reduction of Conviction by Court to Lesser Degree of Felony or to Misdemeanor.

If, when a person has heen convicted of a felony, the Court, having regard to the nature and circumstances of the crime and to

the history and character of the defendant, is of the view that it would be unduly harsh to sentence the offender in accordance with the Code, the Court may enter judgment of conviction for a lesser degree of felony or for a misdemeanor and impose sentence accordingly.

Explanatory Note

Section 6.12 permits the court to reduce the gravity of a conviction when the sentence for which the original conviction is rendered would be "unduly harsh." Undue harshness is to be determined with regard to the circumstances of the crime and the history and character of the defendant. The court may reduce a felony conviction to a lesser grade of felony or a misdemeanor. (No similar power is given in respect to misdemeanor convictions because the court already has available any sentencing option possible for a petty misdemeanor conviction.) Once the court has entered conviction for a lesser category of offense, it will impose sentence according to the alternatives normally available for that category.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 212.

Section 6.13. Civil Commitment in Lieu of Prosecution or of Sentence.

(1) When a person prosecuted for a [felony of the third degree,] misdemeanor or petty misdemeanor is a chronic alcoholic, narcotic addict [, prostitute] or person suffering from mental abnormality and the Court is authorized by law to order the civil commitment of such person to a hospital or other institution for medical, psychiatric or other rehabilitative treatment, the Court may order such commitment and dismiss the prosecution. The order of commitment may be made after conviction, in which event the Court may set aside the verdict or judgment of conviction and dismiss the prosecution.

(2) The Court shall not make an order under Subsection (1) of this Section unless it is of the view that it will substantially further the rehabilitation of the defendant and will not jeopardize the protection of the public.

Explanatory Note

Section 6.13 authorizes the use of civil commitment powers already conferred on the sentencing court by other provisions of law to be used in lieu of criminal prosecution when the criteria

of Subsection (2) are met. The section does not provide independent authorization for such action but rather presupposes that authority for the commitment is otherwise granted. Its thrust is to provide authority in such cases to dismiss the prosecution.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 216.

ARTICLE 7. AUTHORITY OF COURT IN SENTENCING

Section 7.01. Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation.

(1) The Court shall deal with a person who has been convicted of a crime without imposing sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

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

(b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or

(c) a lesser sentence will depreciate the seriousness of the defendant's crime.

(2) The following grounds, while not controlling the discretion of the Court, shall be accorded weight in favor of withholding sentence of imprisonment:

(a) the defendant's criminal conduct neither caused nor threatened serious harm;

(b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(c) the defendant acted under a strong provocation;

(d) there were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establisb a defense;

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

(f) the defendant has compensated or will compensate tbe victim of his criminal conduct for the damage or injury that he sustained;

(g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;

(h) the defendant's criminal conduct was the result of circumstances unlikely to recur;

(i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(j) the defendant is particularly likely to respond affirmatively to probationary treatment;

(k) the imprisonment of the defendant would entail excessive hardship to himself or his dependents.

(3) When a person who has been convicted of a crime is not sentenced to imprisonment, the Court shall place him on probation if he is in need of the supervision, guidance, assistance or direction that the probation service can provide.

Explanatory Note

Subsection (1) provides in effect that the sentencing court should begin its deliberations by according priority to a disposition not involving incarceration, and should decide to impose imprisonment only upon a finding of one of three factors indicating a need for that disposition in order to protect the public. The three factors represent an incapacitative rationale for a sentence of imprisonment, a rehabilitative rationale and a deterrent rationale.

Subsection (2) sets forth eleven factors that should be accorded weight in favor of withholding a sentence of imprisonment. The list is not exclusive and the presence or absence of any of the factors is not meant to conclude the matter.

Subsection (3) articulates the view that the court should have a choice between probation and a conditional release, depending upon the desirability in the particular case of probationary supervision or guidance.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 223.

Section 7.02. Criteria for Imposing Fines.

(1) The Court shall not sentence a defendant only to pay a fine, when any other disposition is authorized by law, unless having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that the fine alone suffices for protection of the public.

(2) The Court shall not sentence a defendant to pay a fine in

addition to a sentence of imprisonment or probation unless:

(a) the defendant has derived a pecuniary gain from the crime; or

(b) the Court is of opinion that a fine is specially adapted to deterrence of the crime involved or to the correction of the offender.

(3) The Court shall not sentence a defendant to pay a fine unless:

(a) the defendant is or will be able to pay the fine; and

(b) the fine will not prevent the defendant from making restitution or reparation to the victim of the crime.

(4) 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.

Explanatory Note

Subsection (1) proceeds on the premise that a fine alone should be a sanction to which the court turns only for affirmative reasons, that generally other sanctions are likely to be more effective. It accordingly provides that a fine alone should be employed only when it alone will suffice for protection of the public. Subsection (1) does not apply to violations, nor to offenses where a corporation is the defendant.

Subsection (2) articulates criteria for those occasions when the court is considering a fine in addition to a sentence of imprisonment or probation. The premise again is that the routine imposition of fines is to be discouraged, and that affirmative reasons should underlie the imposition of fines in this context.

Subsection (3) provides that a fine shall not be imposed unless the defendant is adjudged capable of paying it, either at once or in the future. Article 302 elaborates on methods of payment and the problem of nonpayment, Section 302.2 providing in particular that nonpayment can result in a jail sentence only when, in effect, the defendant is in contempt of the court order, i.e., only when he could have paid the fine but did not.

Subsection (3)(b) states a second criterion for the imposition of fines, namely that a fine should not be employed when it would interfere with the defendant's opportunity to make restitution or reparation to the victim of the crime.

Subsection (4) directs the court to consider the defendant's resources and ability to pay in determining the amount and method of payment of a fine.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 237.

Section 7.03. Criteria for Sentence of Extended Term of Imprisonment; Felonies.

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two mlsdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of tbe crime show that the defendant has knowingly devoted bimself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to he derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has been suhjected to a psychiatric examination resulting in the conclusions that:

(a) his mental condition is gravely ahnormal;

(b) his criminal conduct has heen characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive hehavior with beedless indifference to consequences; and

(c) such condition makes him a serious danger to others.

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

(a) the defendant is being sentenced for two or more felonies, or is already under sentence of imprisonment for felony, and the sentences of imprisonment involved will run concurrently under Section 7.06; or

(b) the defendant admits in open court the commission of one or more other felonies and asks that they be taken into account when he is sentenced; and

(c) the longest sentences of imprisonment authorized for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively would exceed in length the minimum and maximum of the extended term imposed.

Explanatory Note

Section 7.03 provides criteria for the application of the extended term authorized by Section 6.07. Four grounds for such a sentence are set forth.

Subsection (1), which deals with the persistent offender, is applicable only if the court finds that the defendant is a persistent offender whose commitment for an extended term is necessary for the protection of the public. The court may not make such a finding unless (a) the defendant is over twenty-one, (b) the defendant has previously been convicted of two felonies or one felony and two misdemeanors, and (c) the prior offenses were all committed at different times when the defendant was over the juvenile court age. If these factors are present, the court may make the ultimate finding and impose an extended term, but it is not required to do so.

Subsection (2) deals with the professional criminal. The provision is aimed at the offender who engages in criminal conduct as a major source of livelihood, whether by himself or in conspiracy with others. The sentence is applicable in such a case only if the court finds that commitment for an extended term is necessary for the protection of the public, and also finds the existence of specific factors in support of that judgment. These factors are that the defendant is over twenty-one and either that the circumstances of the crime show that he has knowingly devoted himself to criminal activity as a major source of livelihood or that he has substantial income or resources not explained to be derived from a source other than criminal activity.

Subsection (3) deals with the dangerous, mentally abnormal offender. The court must find the extended term necessary for

the protection of the public and in support of that conclusion make specific findings, based upon a psychiatric examination, to the effect that the defendant's mental condition is gravely abnormal, that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences, and that his condition makes him a serious danger to others.

Subsection (4) concerns the multiple offender, i.e., the offender who is to be sentenced for more than one felony, or who has been previously sentenced for one felony and is now to be sentenced for another, or who has admitted the commission of other felonies and asks that they be taken into account in the sentence. The court must conclude that the defendant's criminality was so extensive that a sentence of imprisonment for an extended term is warranted. It must also be the case that the longest sentences authorized for each of the defendant's crimes, if made to run consecutively, would exceed the length of the extended term.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 245.

Section 7.04. Criteria for Sentence of Extended Term of Imprisonment; Misdemeanors and Petty Misdemeanors.

The Court may sentence a person who has been convicted of a misdemeanor or petty misdemeanor to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has previously been convicted of two crimes, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for proteetion of tbe public.

The Court shall not make such a finding unless:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a chronic alcoholic, narcotic addict, prostitute or person of abnormal mental condition who requires rehabilitative treatment for a substantial period of time.

The Court shall not make such a finding unless, with respect to the particular category to which the defendant helongs, the Director of Correction has certified that there is a specialized institution or facility that is satisfactory for the rehabilitative treatment of such persons and that otherwise meets the requirements of Section 6.09(2).

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

(a) the defendant is being sentenced for a number of misdemeanors or petty misdemeanors or is already under sentence of imprisonment for crimes of such grades, or admits in open court the commission of one or more such crimes and asks that they be taken into account when he is sentenced; and

(b) maximum fixed sentences of imprisonment for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively, would exceed in length the maximum period of the extended term imposed.

Explanatory Note

Section 7.04 provides criteria for implementation of the extended terms for misdemeanors authorized by Section 6.07. In structure, the section is the same as Section 7.03. There are four categories of offenders who can be sentenced to an extended term, and in each instance the court is required to come to an overall judgment supported by a determination that specified criteria are satisfied. Extended terms for misdemeanors are premised on the availability of adequate treatment facilities and parole supervision as part of the state correctional system.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 259.

Section 7.05. Former Conviction in Another Jurisdiction; Definition and Proof of Conviction; Sentence Taking into Account Admitted Crimes Bars Subsequent Conviction for Such Crimes.

(1) For purposes of paragraph (1) of Section 7.03 or 7.04, a conviction of the commission of a crime in another jurisdiction shall constitute a previous conviction. Such conviction shall be deemed

to have been of a felony if sentence of death or of imprisonment in excess of one year was authorized under the law of such other jurisdiction, of a misdemeanor if sentence of imprisonment in excess of thirty days but not in excess of a year was authorized and of a petty misdemeanor if sentence of imprisonment for not more than thirty days was authorized.

(2) An adjudication by a court of competent jurisdiction that the defendant committed a crime constitutes a conviction for purposes of Sections 7.03 to 7.05 inclusive, although sentence or the execution thereof was suspended, provided that the time to appeal has expired and that the defendant was not pardoned on the ground of innocence.

(3) Prior conviction may be proved by any evidence, including fingerprint records made in connection with arrest, conviction or imprisonment, that reasonably satisfies the Court that the defendant was convicted.

(4) When the defendant has asked that other crimes admitted in open court be taken into account when he is sentenced and the Court has not rejected such request, the sentence shall bar the prosecution or conviction of the defendant in this State for any such admitted crime.

Explanatory Note

Section 7.05 elaborates on the prior offenses that may be considered for the purposes of applying the extended term criteria in Sections 7.03 and 7.04, as well as on how such offenses may be proved.

Subsection (1) authorizes the consideration of prior offenses that were committed in another jurisdiction, and classifies them according to the authorized penalty in the jurisdiction where they were committed.

Subsection (2) permits the consideration of prior convictions irrespective of the sentence that was actually imposed and even though sentence was suspended. It provides, however, that the time for appeal must have expired in order for a prior offense to be counted, and that the defendant must not have been pardoned on the ground of innocence.

Subsection (3) provides the method by which prior convictions may be proved.

Subsection (4) deals with the consideration in sentencing of other offenses for which the defendant has not been prosecuted or convicted, as authorized by Sections 7.03(4)(b) and 7.04(4)(a). If the court does not reject the defendant's request to consider

such offenses, the imposed sentence will bar prosecution or conviction for any admitted offense.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 262.

Section 7.06. Multiple Sentences; Concurrent and Consecutive Terms.

(1) Sentences of Imprisonment for More Than One Crime. When multiple sentences of imprisonment are imposed on a defendant for more than one crime, including a crime for which a previous suspended sentence or sentence of probation has been revoked, such multiple sentences shall run concurrently or consecutively as the Court determines at the time of sentence, except that:

(a) a definite and an indefinite term shall run concurrently and both sentences shall be satisfied by service of the indefinite term; and

(b) the aggregate of consecutive definite terms shall not exceed one year; and

(c) the aggregate of consecutive indefinite terms shall not exceed in minimum or maximum length the longest extended term authorized for the highest grade and degree of crime for which any of the sentences was imposed; and

(d) not more than one sentence for an extended term shall be imposed.

(2) Sentences of Imprisonment Imposed at Different Times. When a defendant who has previously been sentenced to imprisonment is subsequently sentenced to another term for a crime committed prior to the former sentence, other than a crime committed while in custody:

(a) the multiple sentences imposed shall so far as possible conform to Subsection (1) of this Section; and

(b) whether the Court determines that the terms shall run concurrently or consecutively, the defendant shall be credited with time served in imprisonment on the prior sentence in determining the permissible aggregate length of the term or terms remaining to be served; and

(c) when a new sentence is imposed on a prisoner who is on parole, the balance of the parole term on the former sentence shall be deemed to run during the period of the new imprisonment.

(3) Sentence of Imprisonment for Crime Committed While on Parole. When a defendant is sentenced to imprisonment for a

crime committed while on parole in this State, such term of imprisonment and any period of reimprisonment that the Board of Parole may require the defendant to serve upon the revocation of his parole shall run concurrently, unless the Court orders them to run consecutively.

(4) Multiple Sentences of Imprisonment in Other Cases. Except as otherwise provided in this Section, multiple terms of imprisonment shall run concurrently or consecutively as the Court determines when the second or subsequent sentence is imposed.

(5) Calculation of Concurrent and Consecutive Terms of Imprisonment.

(a) When indefinite terms run concurrently, the shorter minimum terms merge in and are satisfied by serving the longest minimum term and the shorter maximum terms merge in and are satisfied by discharge of the longest maximum term.

(b) When indefinite terms run consecutively, the minimum terms are added to arrive at an aggregate minimum to be served equal to the sum of all minimum terms and the maximum terms are added to arrive at an aggregate maximum equal to the sum of all maximum terms.

(c) When a definite and an indefinite term run consecutively, the period of the definite term is added to both the minimum and maximum of the indefinite term and both sentences are satisfied by serving the indefinite term.

(6) Suspension of Sentence or Probation and Imprisonment; Multiple Terms of Suspension and Probation. When a defendant is sentenced for more than one offense or a defendant already under sentence is sentenced for another offense committed prior to the former sentence:

(a) the Court shall not sentence to probation a defendant who is under sentence of imprisonment [with more than thirty days to run] or impose a sentence of probation and a sentence of imprisonment [, except as authorized by Section 6.02(3)(b)]; and

(b) multiple periods of suspension or probation shall run concurrently from the date of the first such disposition; and

(c) when a sentence of imprisonment is imposed for an indefinite term, the service of such sentence shall satisfy a suspended sentence on another count or a prior suspended sentence or sentence to probation; and

(d) when a sentence of imprisonment is imposed for a definite term, the period of a suspended sentence on another count or a prior suspended sentence or sentence to probation shall run during the period of such imprisonment.

(7) Offense Committed While Under Suspension of Sentence or Probation. When a defendant is convicted of an offense committed while under suspension of sentence or on probation and such suspension or probation is not revoked:

(a) if the defendant is sentenced to imprisonment for an indefinite term, the service of such sentence shall satisfy the prior suspended sentence or sentence to probation; and

(b) if the defendant is sentenced to imprisonment for a definite term, the period of the suspension or prohation shall not run during the period of such imprisonment; and

(c) if sentence is suspended or the defendant is sentenced to probation, the period of such suspension or probation shall run concurrently with or consecutively to the remainder of the prior periods, as the Court determines at the time of sentence.

Explanatory Note

Section 7.06 deals generally with the many facets of multiple sentences for different offenses. It reflects two basic principles: that the choice between consecutive and concurrent sentences is one that should be left to the court, and that a reasonable limit should be set on the extent to which multiple sentences can be cumulated.

Subsection (1) implements these principles by providing, in the case of multiple felony convictions, that the extended term for the most serious offense for which the defendant is to be sentenced is the longest term to which he can be sentenced, but that sentences can be cumulated within that limitation. The premise is that the extended term limit, designed for the persistent offender, the professional criminal and the dangerous, mentally abnormal offender, is also an appropriate gauge for the multiple offender. Subsection (1) also provides that a definite and an indefinite term shall run concurrently, with the sentences satisfied by service of the indefinite term. It also restricts the aggregate of consecutive definite sentences to a period of one year, which was viewed as the outside limitation on any sentence to a local facility that does not provide a meaningful correctional program and parole opportunities.

Subsection (2) is grounded on the principle that the timing of trials or the number of trials for different offenses should not affect the limitations established by Subsection (1). Thus, if a defendant has committed two offenses, the sentencing limitations established by this section will apply if he is tried separately for the two crimes as well as if he is tried for both offenses at the same time. Subsection (2) also sets forth other principles to con-

trol the situation in which the defendant is being sentenced for an offense that was committed prior to the imposition of another sentence.

Subsection (3) deals with the case where the defendant is being sentenced for a crime that was committed while he was on parole from another offense. In such a case the old offense should not act as a limitation on the sentence that can be imposed for the new offense, and accordingly the question of consecutive or concurrent sentences is left to the court.

Subsection (4) is a catch-all provision designed to cover other cases, such as conviction for an escape committed during service of a sentence for another crime. It too relies on judicial discretion as the governing principle.

Subsection (5) provides the rules by which multiple sentences of imprisonment shall be calculated. In effect the defendant is to be viewed as though he were serving one sentence. In the case of concurrent sentences, his term is fixed by the longest minimum term and the longest maximum term to which he is subject. In the case of consecutive sentences, the minimum terms are aggregated and the maximum terms are aggregated, thus producing a single term which is measured by these limits. When definite and indefinite terms run consecutively, the definite term is added to both the minimum and the maximum of the indefinite term.

Subsection (6) concerns the extent to which the defendant can be sentenced to imprisonment for one offense and probation for another and the effect of multiple sentences of probation or suspension. With respect to imprisonment and probation, the court is precluded from imposing a sentence of imprisonment and a sentence of probation at the same time, except to the extent that such sentences are contemplated by the split sentence alternative set forth in Section 6.02(3)(b). When imprisonment is imposed on an offender who is already under a sentence of probation or a suspended sentence, service of an indefinite term will satisfy the former sentence, while the probation or suspension period will continue to run during the service of a definite sentence. The reason for the difference is that parole will follow an indefinite sentence, and it does not make sense for the defendant to be subject simultaneously to two supervisory regimes. With respect to multiple sentences of probation or multiple suspensions, the Code provides that they shall run concurrently.

Subsection (7) deals with the case where the defendant commits a new offense while on probation or under a suspended sentence. One alternative, of course, is to revoke the probation or the sus-

pension, and to sentence the defendant to consecutive or concurrent terms under Subsection (4). If the probation or the suspension is not revoked, on the other hand, service of an indefinite term will discharge the prior sentence, again because the defendant should be subject to only one correctional regime. If the new sentence is for a definite term, the period of suspension or probation shall not run during the service of the sentence in order to avoid the routine revocation of the prior sentence as well as to provide the defendant with a supervisory regime following service of the definite term. If a new sentence to probation or a new suspension is imposed, the two periods of suspension or probation will run concurrently or consecutively as the court determines.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 272.

Section 7.07. Procedure on Sentence; Presentence Investigation and Report; Remand for Psychiatric Examination; Transmission of Records to Department of Correction.

(1) The Court shall not impose sentence without first ordering a presentence investigation of the defendant and according due consideration to a written report of such investigation where:

(a) the defendant has been convicted of a felony; or

(b) the defendant is less than twenty-two years of age and has been convicted of a crime; or

(c) the defendant will be [placed on probation or] sentenced to imprisonment for an extended term.

(2) The Court may order a presentence investigation in any other case.

(3) The presentence investigation shall include an analysis of the circumstances attending the commission of the crime, the defendant's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation and personal habits and any other matters that the probation officer deems relevant or the Court directs to be included.

(4) Before imposing sentence, the Court may order the defendant to submit to psychiatric observation and examination for a period of not exceeding sixty days or such longer period as the Court determines to be necessary for the purpose. The defendant may be remanded for this purpose to any available clinic or mental hospital or the Court may appoint a qualified psychiatrist to make

the examination. The report of the examination shall he submitted to tbe Court.

(5) Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if tbe defendant so requests, to controvert them. The sources of confidential information nced not, however, be disclosed.

(6) The Court shall not impose a sentence of imprisonment for an extended term unless the ground therefor has been established at a bearing after the conviction of the defendant and on written notice to him of the ground proposed. Subject to the limitation of Subsection (5) of this Section, the defendant shall have the right to hear and controvert tbe evidence against him and to offer evidence upon the issue.

(7) If the defendant is sentenced to imprisonment, a copy of the report of any presentence investigation or psychiatric examination shall be transmitted fortbwith to the Department of Correction [or other state department or agency] or, when the defendant is committed to the custody of a specific institution, to such institution.

Explanatory Note

Subsection (1) requires the court to obtain a presentence report in three types of cases: when the defendant has been convicted of a felony; when the defendant is less than twenty-two; and when the defendant is to be sentenced to an extended term. These are viewed as the minimum occasions when a presentence report should be obtained. Subsection (2) authorizes the court to obtain a presentence report in any other case for which it is believed desirable.

Subsection (3) describes the content of the presentence report. In addition to the specified matters, the court may call for additional areas of investigation. The probation officer is of course free to include additional items he deems relevant.

Subsection (4) authorizes the court to obtain a psychiatric evaluation in cases where it would be of assistance to a proper sentencing determination. Commitments for up to sixty days for this purpose are authorized.

Subsection (5) deals with the sensitive question of disclosure of the presentence report, and adopts a middle course. The defendant is required to be apprised of the factual contents and conclusions of the presentence investigation or a psychiatric examination and to be afforded a reasonable opportunity to contro-

vert them. The sources of confidential information, on the other hand, need not be disclosed.

Subsection (6) prescribes the type of hearing that is required before the imposition of an extended term. The defendant must be given notice of the ground on which such a sentence might be imposed, and be afforded the right to hear and to controvert the evidence against him and to offer evidence of his own.

Subsection (7) provides that a copy of any presentence report based on investigation or psychiatric examination should be transmitted to the custodial authorities when the defendant is institutionalized. The information that such reports contain is of obvious value to the correctional function.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 287.

Section 7.08. Commitment for Observation; Sentence of Imprisonment for Felony Deemed Tentative for Period of One Year; Resentence on Petition of Commissioner of Correction.

(1) If, after presentence investigation, the Court desires additional information concerning an offender convicted of a felony or misdemeanor before imposing sentence, it may order that he be committed, for a period not exceeding ninety days, to the custody of the Department of Correction, or, in the case of a young adult offender, to the custody of the Division of Young Adult Correction, for observation and study at an appropriate reception or classification center. The Department and the Board of Parole, or the Young Adult Divisions thereof, shall advise the Court of their findings and recommendations on or before the expiration of such ninety-day period. If the offender is thereafter sentenced to imprisonment, the period of such commitment for observation shall be deducted from the maximum term and from the minimum, if any, of such sentence.

(2) When a person has been sentenced to imprisonment upon conviction of a felony, whether for an ordinary or extended term, the sentence shall be deemed tentative, to the extent provided in this Section, for the period of one year following the date when the offender is received in custody by the Department of Correction [or other state department or agency].

(3) If, as a result of the examination and classification by the Department of Correction [or other state department or agency] of a person under sentence of imprisonment upon conviction of a felony, the Commissioner of Correction [or other department head] is satisfied that the sentence of the Court may have been based

upon a misapprehension as to the history, character or physical or mental condition of the offender, the Commissioner, during the period when the offender's sentence is deemed tentative under Subsection (2) of this Section shall file in the sentencing Court a petition to resentence the offender. The petition shall set forth the information as to the offender that is deemed to warrant his resentence and may include a recommendation as to the sentence to be imposed.

(4) The Court may dismiss a petition filed under Subsection (3) of this Section without a hearing if it deems the information set forth insufficient to warrant reconsideration of the sentence. If the Court is of the view that the petition warrants such reconsideration, a copy of the petition shall be served on the offender, who shall have the right to he heard on the issue and to be represented by counsel.

(5) When the Court grants a petition filed under Subsection (3) of this Section, it shall resentence the offender and may impose any sentence that might have been imposed originally for the felony of which the defendant was convicted. The period of his imprisonment prior to resentence and any reduction for good behavior to which he is entitled shall be applied in satisfaction of the final sentence.

(6) For all purposes other than this Section, a sentence of imprisonment has the same finality when it is imposed that it would have if this Section were not in force.

(7) Nothing in this Section shall alter the remedies provided by law for vacating or correcting an illegal sentence.

Explanatory Note

Subsection (1) authorizes the court to secure additional information about the offender following the presentence report by a commitment, for not more than ninety days, for study by the Department of Correction. The Department will then report its findings to the court, after which sentencing will occur. The defendant is entitled to credit for the time of commitment if he is then sentenced to imprisonment.

Subsection (2) provides that every sentence for a felony shall be deemed tentative for one year. Subsections (3) through (7) are an elaboration of the scheme meant to be instituted by this provision.

Under Subsection (3) the Commissioner of Correction may petition the court for resentencing of the offender during the period for which the sentence is tentative, if he is satisfied that the

original sentence may have been based upon a misapprehension as to the history, character or physical or mental condition of the offender. The petition will set forth the basis for this conclusion and may recommend an appropriate disposition as well. Sentence may be increased or decreased, so long as it remains within the original sentencing alternatives that were available for the offense in question.

Subsection (4) guarantees the offender a hearing on the resentencing question, if the court deems the Commissioner's petition to have prima facie merit. Subsection (5) states the powers of the court upon resentence, and also provides that the defendant is entitled to credit against the new sentence for time already served under the old one, as well as any good time credit he has earned.

Subsection (6) preserves the finality of the conviction for other purposes, such as the taking of an appeal. Subsection (7) adds that this procedure is supplemental to any other procedures provided by law for the correction or vacation of an illegal sentence.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 301.

Section 7.09. Credit for Time of Detention Prior to Sentence; Credit for Imprisonment Under Earlier Sentence for Same Crime.

(1) When a defendant who is sentenced to imprisonment has previously been detained in any state or local correctional or other institution following his [conviction of] [arrest for] the crime for which such sentence is imposed, such period of detention following his [conviction] [arrest] shall be deducted from the maximum term, and from the minimum, if any, of such sentence. The officer having custody of the defendant shall furnish a certificate to the Court at the time of sentence, showing the length of such detention of the defendant prior to sentence in any state or local correctional or other institution, and the certificate shall be annexed to the official records of the defendant's commitment.

(2) When a judgment of conviction is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the maximum term, and from the minimum, if any, of the new sentence. The officer having custody of the defendant shall furnish a certificate to the Court at the time of sentence, showing the period of imprisonment served under the original sen-

tence, and the certificate shall be annexed to the official records of the defendant's new commitment.

Explanatory Note

Subsection (1) establishes the defendant's right to credit against his ultimate sentence for time served prior to the imposition of the sentence as a result of the same criminal charge. A certificate is required to be furnished to the court and to the correctional officials showing the length of any such detention.

Subsection (2) covers the case where the defendant's original conviction or sentence has been vacated, and where a new trial has resulted in a second conviction for an offense based upon the same conduct. In such a case the defendant is entitled to credit against his new sentence for time served on the previous sentence, against both the minimum and the maximum of his new term. Again, a certificate procedure is established to assure that the credit is awarded.

For detailed Comment, *see* MPC Part I Commentaries, vol. 3, at 307.

PART II. DEFINITION OF SPECIFIC CRIMES

OFFENSES INVOLVING DANGER TO THE PERSON

ARTICLE 210. CRIMINAL HOMICIDE

Explanatory Note for Sections 210.0–210.6

Article 210 undertakes a major restructuring of the law of homicide. It abandons the degree structure that has dominated American murder provisions since the Pennsylvania reform of 1794 and classifies all criminal homicides into the three basic categories of murder, manslaughter, and negligent homicide. Article 210 does not rely on the common law vocabulary to distinguish among these offenses but substitutes the culpability concepts developed in Section 2.02 as the basis for making the appropriate distinctions among criminal homicides.

Section 210.1 provides that a person is guilty of criminal homicide if he purposely, knowingly, recklessly, or negligently "causes the death of another human being." Section 210.0(1) defines "human being" in a way that excludes abortion from the law of homicide. Abortion is dealt with separately in Section 230.3, although it should be noted that intervening constitutional developments have made the Model Code approach to this subject obsolete. The language of Section 210.1 also excludes suicide from the coverage of the basic homicide offenses. Section 210.5 speaks specially to the question of when conduct related to suicide should be punished as criminal.

Murder is defined in Section 210.2 to include cases where a criminal homicide is committed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. For reasons that are further developed in the detailed commentary to that provision, these concepts provide a more satisfactory means of stating the culpability required for murder than did the older language of "malice aforethought" and its derivatives. As is also elaborated in the commentary to

Section 210.2, murder is not divided into degrees. The original purpose of the degree structure for murder was primarily to isolate those cases for which the capital sanction might be appropriate. This function is better performed by dealing with capital punishment separately from the basic definition of the offense, as is done in Section 210.6. The final innovation of Section 210.2 is its departure from the traditional rule of felony murder. Section 210.2(1)(b) establishes a presumption that the requisite recklessness and indifference to the value of human life exist when a homicide is committed during the course of certain enumerated felonies. This presumption has the effect of abandoning the strict liability aspects of the traditional felony-murder doctrine but at the same time recognizing the probative significance of the concurrence of homicide and a violent felony.

Section 210.3 defines the offense of manslaughter to include both reckless homicide and homicide that would otherwise be murder but for the presence of "extreme emotional disturbance for which there is a reasonable explanation or excuse." As with murder, this formulation represents a departure from the traditional common law statement of the crime and from the prevailing pattern of statutory definition at the time the Model Code was drafted. Not only is the basic requirement of recklessness defined with greater precision, but the rule of provocation is also revised. The traditional requirement of a sudden heat of passion based on adequate provocation is broadened by the Model Code, though the new version still retains both objective and subjective components. Finally, the misdemeanor-manslaughter variant of the felony-murder rule is abandoned completely, although again it should be recognized that the concurrence of homicide and a misdemeanor may have evidentiary significance in establishing the culpability required for manslaughter.

Section 210.4 seeks primarily to rationalize the concept of negligence that may serve as an appropriate basis for punishing inadvertent homicide. The provision is designed to replace specialized statutes, primarily those dealing with vehicular homicide, and to reduce all inadvertent homicides below the grade of manslaughter. At the same time, Section 210.4 recognizes that penal sanctions are appropriate in some cases of inadvertent homicide.

Section 210.5 speaks to those occasions when conduct related to suicide should be punished as criminal. Neither suicide itself nor attempted suicide is a crime, but some occasions of causing or aiding another to commit suicide are punished. Subsection (1) of Section 210.5 does not state an independent offense but instead limits the applicability of the other homicide offenses to

conduct that causes another to commit suicide. Specifically, this provision confines criminal sanctions to the case where the actor "purposely causes such suicide by force, duress, or deception." Subsection (2) of the provision extends criminal liability to one who aids or solicits the suicide of another.

Finally, Section 210.6 deals with capital punishment for murder. The Institute takes no position on the question whether the death penalty should be retained or abolished. In recognition, however, of the fact that it will be continued in any event in at least some jurisdictions, the Model Code does express a view on the crimes for which it should be used and the procedures that should govern its imposition. Under Section 210.6, the capital sanction is limited to murder and excluded for all other offenses. Even in murder cases, Section 210.6 requires a noncapital sentence if certain conditions are present. In other cases, the provision contemplates a bifurcated procedure that premises use of the capital sanction on the presence of one or more aggravating factors *and* the absence of specified mitigating factors "sufficiently substantial to call for leniency." The question whether the jury should have a role in capital sentencing is dealt with in alternative versions of Section 210.6(2) and is discussed in detail in the commentary to that provision. Lastly, it should be noted that Section 210.6 appears to state a model for drafting a death penalty procedure that will be upheld in light of recent constitutional decisions governing the use of that sanction.

Section 210.0. Definitions.

In Articles 210–213, unless a different meaning plainly is required:

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

(2) "bodily injury" means physical pain, illness or any impairment of physical condition;

(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

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

Explanatory Note for Sections 210.0–210.6 appears before Section 210.0. For Comment to 210.0, *see* MPC Part II Commentaries, vol. 1, at 4.

Section 210.1. Criminal Homicide.

(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

(2) Criminal homicide is murder, manslaughter or negligent homicide.

Explanatory Note for Sections 210.0–210.6 appears before Section 210.0. For detailed Comment to 210.1, *see* MPC Part II Commentaries, vol. 1, at 5.

Section 210.2. Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

(2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6].

Explanatory Note for Sections 210.0–210.6 appears before Section 210.0. For detailed Comment to 210.2, *see* MPC Part II Commentaries, vol. 1, at 13.

Section 210.3. Manslaughter.

(1) Criminal homicide constitutes manslaughter when:

(a) it is committed recklessly; or

(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

(2) Manslaughter is a felony of the second degree.

Explanatory Note for Sections 210.0–210.6 appears before Section 210.0. For detailed Comment to 210.3, *see* MPC Part II Commentaries, vol. 1, at 44.

Section 210.4. Negligent Homicide.

(1) Criminal homicide constitutes negligent homicide when it is committed negligently.

(2) Negligent homicide is a felony of the third degree.

Explanatory Note for Sections 210.0–210.6 appears before Section 210.0. For detailed Comment to 210.4, *see* MPC Part II Commentaries, vol. 1, at 80.

Section 210.5. Causing or Aiding Suicide.

(1) Causing Suicide as Criminal Homicide. A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.

(2) Aiding or Soliciting Suicide as an Independent Offense. A person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor.

Explanatory Note for Sections 210.0–210.6 appears before Section 210.0. For detailed Comment to 210.5, *see* MPC Part II Commentaries, vol. 1, at 91.

[Section 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(2) Determination by Court or by Court and Jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it

shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and furtber finds that there are no mitigating circumstances sufficiently substantial to call for leniency. Wben tbe issue is submitted to tbe jury, tbe Court sball so instruct and also shall inform the jury of the nature of tbe sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

Alternative formulation of Subsection (2):

(2) Determination by Court. Unless the Court imposes sentence under Subsection (1) of tbis Section, it shall conduet a separate proceeding to determine wbether tbe defendant should be sentenced for a felony of the fi.st degree or sentenced to deatb. In the proceeding, tbe Court, in accordance with Section 7.07, shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of sucb examination. In addition, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of tbe crime, the defendant's cbaracter, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have prohative force, may be received, regardless of its admissihility under the exculsionary rules of evidence, provided that tbe defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whetber sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of deatb unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that tbere are no mitigating circumstances sufficiently substantial to call for leniency.

(3) Aggravating Circumstances.

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of anotber murder or of a felony involving tbe use or tbreat of violence to the person.

(c) At the time the murder was committed tbe defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating Circumstances.

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.]

Explanatory Note for Sections 210.0–210.6 appears before Section 210.0. For detailed Comment to 210.6, *see* MPC Part II Commentaries, vol. 1, at 110.

ARTICLE 211. ASSAULT; RECKLESS ENDANGERING; THREATS

Explanatory Note for Sections 211.1–211.3

The offenses in this article deal with bodily injury short of homicide and with certain other situations where such injury is attempted, threatened, or risked. The offenses are graded on a scale of seriousness ranging from a petty misdemeanor to a felony of the second degree.

Section 211.1 effects a consolidation of the common law crimes of mayhem, battery, and assault and also consolidates into a single offense what the antecedent statutes in this country normally treated as a series of aggravated assaults or batteries. Crimes such as assault with intent to rape or assault with intent to murder are discontinued on the ground that they really amount to no more than an attempt to commit the object offense. Under Section 5.05(1) of the Model Code, an attempt to commit a first degree felony is graded as a second degree felony, and any other attempt is graded at the same level as the completed offense. The result is that all attempts have been graded more seriously under the Model Code than under prevailing law at the time the Code was drafted and the object of such "assault-with-intent-to" offenses has already been accomplished by that means.

It is nevertheless necessary for the Model Code to deal separately with conduct ranging from the simple assault to the infliction of serious, permanent injury. Section 211.1 accomplishes this result by treating as a second degree felon one who attempts to cause serious bodily injury or one who causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. One who attempts to cause or who purposely or knowingly causes bodily injury to another with a deadly weapon is punished as a third degree felon. Assault is treated as a misdemeanor in three circumstances: where the actor attempts to cause or purposely, knowingly, or recklessly causes bodily injury; where he negligently causes bodily injury with a deadly weapon; and where he attempts by physical menace to put another in fear of imminent serious bodily harm. The third of these circumstances incorporates the civil notion of assault into the criminal law, as had been done in a majority of jurisdictions at the time the Model Code was drafted. Finally, assault is treated as a petty misdemeanor in the case of a fight or a scuffle entered into by mutual consent.

The remaining two offenses in Article 211 generalize principles found in antecedent statutes addressed only to ad hoc situations, such as reckless driving of a motor vehicle or reckless use of firearms. Section 211.2 deals with reckless endangerment by any means, i.e., situations where the actor's conduct recklessly places or may place another person in danger of death or serious bodily injury. Section 211.3 deals with terroristic threats, i.e., situations where the actor threatens to commit a crime of violence with purpose to terrorize another person or a group of persons.

Section 211.0. Definitions.

In this Article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.

Section 211.1. Assault.

(1) Simple Assault. A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a deadly weapon; or

(c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(2) Aggravated Assault. A person is guilty of aggravated assault if he:

(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

Explanatory Note for Sections 211.1–211.3 appears before Section 211.0. For detailed Comment to 211.1, *see* MPC Part II Commentaries, vol. 1, at 174.

Section 211.2. Recklessly Endangering Another Person.

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of

death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearem at or in the direction of another, whether or not the actor believed the firearm to be loaded.

Explanatory Note for Sections 211.1–211.3 appears before Section 211.0. For detailed Comment to 211.2, *see* MPC Part II Commentaries, vol. 1, at 194.

Section 211.3. Terroristic Threats.

A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing sucb terror or inconvenience.

Explanatory Note for Sections 211.1–211.3 appears before Section 211.0. For detailed Comment to 211.3, *see* MPC Part II Commentaries, vol. 1, at 205.

ARTICLE 212. KIDNAPPING AND RELATED OFFENSES; COERCION

Explanatory Note for Sections 212.1–212.5

Article 212 is primarily designed to effect a major restructuring of the law of kidnapping as it existed at the time the Model Code was drafted. Many prior kidnapping statutes combined severe sanctions with extraordinarily broad coverage, to the effect that relatively trivial restraints carried authorized sanctions of death or life imprisonment. Sections 212.1, 212.2, and 212.3 not only narrow the definition of the most serious forms of unlawful restraint but propose an integrated grading structure designed to remove this anomaly from the law.

Section 212.1 confines the most serious offenses to instances of substantial removal or confinement for a series of specified purposes, such as to hold for ransom or reward or to interfere with the performance of a governmental function. The removal or confinement must be accomplished by force, threat, or deception, or in the case of underage children or incompetents, without the consent of a parent or other appropriate person. The offense is graded as a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial. Otherwise, it is a felony of the second degree.

Sections 212.2 and 212.3 state the lesser included offenses of felonious restraint and false imprisonment. The former offense includes unlawful restraint in circumstances exposing the victim to risk of serious bodily injury and holding another in a condition of involuntary servitude. The latter offense covers one who restrains another unlawfully so as to interfere substantially with his liberty. Both offenses require knowledge of the unlawful nature of the restraint. Felonious restraint is a felony of the third degree, while false imprisonment is a misdemeanor.

Section 212.4 defines the offense of interference with custody, extending to situations where the actor takes or entices a child under 18 from the custody of its parent, guardian, or other lawful custodian and where the actor engages in similar conduct with a person committed to the custody of another person or institution. Section 212.4 is both a lesser included offense to kidnapping in cases where the custodial relationship is infringed but the kidnapping purposes cannot be shown and an independent protection of the custodial relationship from unwarranted interference by persons who have no legal privilege to do so. It is designed in part to restrain the criminal law from undue intrusion into child custody disputes but at the same time to permit criminal intervention in appropriate cases.

Finally, Section 212.5 defines the offense of criminal coercion. This is designed as a residual offense, punishing threats to take specified action with a purpose unlawfully to restrict the freedom of action of another person to his detriment. An affirmative defense is provided in order to assure that the offense does not intrude upon legitimate bargaining and other situations where one is privileged to assume a posture that could be characterized as a threat. The offense is graded as a misdemeanor, unless the threat is to commit a felony or the actor's purpose is to accomplish a result that would constitute the commission of a felony. The grading scheme is designed to integrate this offense with other situations where the Model Code punishes threatening behavior, such as physical menacing of another or threats designed to extort property from another.

Section 212.0. Definitions.

In this Article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.

Section 212.1. Kidnapping.

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance

from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:

(a) to hold for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function.

Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree. A removal or confinement is unlawful within the meaning of this Section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.

Explanatory Note for Sections 212.1–212.5 appears before Section 212.0. For detailed Comment to 212.1, *see* MPC Part II Commentaries, vol. 1, at 210.

Section 212.2. Felonious Restraint.

A person commits a felony of the third degree if he knowingly:

(a) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or

(b) holds another in a condition of involuntary servitude.

Explanatory Note for Sections 212.1–212.5 appears before Section 212.0. For detailed Comment to 212.2, *see* MPC Part II Commentaries, vol. 1, at 237.

Section 212.3. False Imprisonment.

A person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.

Explanatory Note for Sections 212.1–212.5 appears before Section 212.0. For detailed Comment to 212.3, *see* MPC Part II Commentaries, vol. 1, at 245.

Section 212.4. Interference with Custody.

(1) Custody of Children. A person commits an offense if he knowingly or recklessly takes or entices any child under the age

of 18 from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so. It is an affirmative defense that:

(a) the actor believed that his action was necessary to preserve the child from danger to its welfare; or

(b) the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child.

Proof that the child was below the critical age gives rise to a presumption that the actor knew the child's age or acted in reckless disregard thereof. The offense is a misdemeanor unless the actor, not being a parent or person in equivalent relation to the child, acted with knowledge that his conduct would cause serious alarm for the child's safety, or in reckless disregard of a likelihood of causing such alarm, in which case the offense is a felony of the third degree.

(2) Custody of Committed Persons. A person is guilty of a misdemeanor if he knowingly or recklessly takes or entices any committed person away from lawful custody when he is not privileged to do so. "Committed person" means, in addition to anyone committed under judicial warrant, any orphan, neglected or delinquent child, mentally defective or insane person, or other dependent or incompetent person entrusted to another's custody by or through a recognized social agency or otherwise by authority of law.

Explanatory Note for Sections 212.1–212.5 appears before Section 212.0. For detailed Comment to 212.4, *see* MPC Part II Commentaries, vol. 1, at 249.

Section 212.5. Criminal Coercion.

(1) Offense Defined. A person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to his detriment, he threatens to:

(a) commit any criminal offense; or

(b) accuse anyone of a criminal offense; or

(c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or

(d) take or withhold action as an official, or cause an official to take or withhold action.

It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the actor believed the accusation or secret to be

true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.

(2) Grading. Criminal coercion is a misdemeanor unless the threat is to commit a felony or the actor's purpose is felonious, in which cases the offense is a felony of the third degree.

Explanatory Note for Sections 212.1–212.5 appears before Section 212.0. For detailed Comment to 212.5, *see* MPC Part II Commentaries, vol. 1, at 263.

ARTICLE 213. SEXUAL OFFENSES

Section 213.0. Definitions.

In this Article, unless a different meaning plainly is required:

(1) the definitions given in Section 210.0 apply;

(2) "Sexual intercourse" includes intercourse per os or per anum, with some penetration however slight; emission is not required;

(3) "Deviate sexual intercourse" means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

Explanatory Note

Section 213.0 prescribes the definitions for Article 213. Of principal importance are the definitions of "sexual intercourse" and "deviate sexual intercourse." The former phrase identifies the act that may constitute rape or a related offense under Section 213.1 and is discussed in the commentary to that provision. The latter phrase describes the act that may be punished under Section 213.2 and is discussed in the commentary to that provision. The definitions of "sexual intercourse" and "deviate sexual intercourse" are also applicable to the less serious offense of corruption of minors under Section 213.3.

Additionally, Section 213.0 applies to Article 213 the definitions stated in Section 210.0. Most important among them is "serious bodily injury," which Section 210.0(3) defines to mean "bodily injury which creates a substantial risk of death or which causes

serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." Section 213.1 uses this concept by escalating the penalty for rape to a felony of the first degree where the actor causes serious bodily injury in the course of committing the crime.

Section 213.1. Rape and Related Offenses.

(1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the female is unconscious; or

(d) the female is less than 10 years old.

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

(2) Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or

(b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or

(c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.

Explanatory Note for Sections 213.1–213.6

Article 213 contains the provisions of the Model Code on the complex and controversial subject of rape and related sex offenses. With respect to the crime of rape itself, the Model Code seeks to introduce a rational grading scheme by dividing the offense into three felony levels, reserving the most serious category

for those instances of aggression resulting in serious bodily injury or for certain cases of imposition where there is no voluntary social and sexual relationship between the parties. The remaining sex offenses are classed as second or third degree felonies, and in some cases as misdemeanors.

Section 213.1(1) retains the traditional limitation of rape to the case of male aggression against a female who is not his wife. It departs from prior law, however, by incorporating the Section 213.0 definition of sexual act to include within the crime of rape intercourse per os or per anum. The most serious forms of the offense include cases where the actor compels the victim to submit by force or by certain specified threats, where the actor has impaired the victim's capacity to control or appraise her conduct by administering drugs or other intoxicants, where the victim is unconscious, or where the victim is less than 10 years old. Conduct of this description is at least a second degree felony and is elevated to the first degree level in the cases noted above—i.e., where the actor inflicts serious bodily injury upon the victim or another, or where the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties.

Section 213.1(2) defines the lesser offense of gross sexual imposition, encompassing as a third degree felony several categories of conduct that were punished as rape at common law. Compulsion by lesser threats, defined as threats that would prevent resistance by a woman of ordinary resolution, are included in this offense, as are instances where the victim is suffering from mental disease or defect that the actor knows to render her incapable of appraising the nature of her conduct and instances where the victim is under a known misapprehension as to the nature of the act or the existence of a marital relationship between the parties.

Section 213.2 reaches conduct previously punished as sodomy or a related offense. Deviate sexual intercourse is defined in Section 213.0 as intercourse per os or per anum between human beings who are not husband and wife, as well as any form of sexual intercourse with an animal. The proscribed conduct is defined in language that parallels the provisions of Section 213.1, the major difference being that Section 213.2 contains no offense graded at the first degree felony level.

Section 213.3 punishes as a third degree felony cases of consensual intercourse, other than between husband and wife, where the victim is less than 16 years old and the actor is at least 4 years older than the victim. The offense of statutory rape is thus graded as a lesser felony in cases where the victim is between the ages

of 10 and 16, and as either a first or a second degree felony in cases where the victim is under 10. Section 213.3 also punishes as a misdemeanor cases of consensual intercourse where the victim is under 21 and the actor is a guardian or other person responsible for the victim's welfare; where the victim is in a custodial institution and the actor has supervisory or disciplinary authority over him; and where the victim is a female who is induced to participate by a promise of marriage that the actor does not mean to perform.

Section 213.4 defines the offense of sexual assault, which is graded as a misdemeanor. Sexual contact is defined as any touching of the sexual or intimate parts of another person for the purpose of arousing or gratifying the sexual desire of either party. The proscribed conduct reaches one who subjects another not his spouse to sexual contact where he knows such contact is offensive to the other person or in seven other prescribed circumstances drafted in general to parallel the prohibitions contained in Sections 213.1–213.3.

The final offense contained in Article 213 is indecent exposure, which is graded as a misdemeanor by Section 213.5. The offense occurs if the actor exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm and with the purpose of arousing or gratifying the sexual desire of himself or any person other than his spouse.

Section 213.6 contains five general provisions that are related to the offenses defined in the preceding provisions of Article 213. Subsection (1) retains the strict-liability feature of prior law with respect to cases where the victim is less than 10 years old and the prosecution is on that basis. In cases where the age of consent is set higher than 10, Subsection (1) effects a compromise between the strict liability of former law and normal culpability requirements by permitting a defense if it can be shown by a preponderance of the evidence that the actor reasonably believed the victim to be above the critical age. The remaining subsections define what is meant by the spousal exclusion, extend accomplice liability to persons who may themselves be incapable of committing the offense, establish a defense of sexual promiscuity in certain cases where consensual intercourse is punished, impose a prompt-complaint requirement that is an innovation in the law, and continue the traditional corroboration requirement, although in a much relaxed form.

Finally, it should be noted that the Model Code does not criminalize consensual sexual conduct between adults. The rationale for excluding crimes of fornication and adultery is set forth

in the Note that follows the Comment to Section 213.6 (*see* MPC Part II Commentaries, vol. 1, at 430). The Code similarly does not punish homosexual behavior between consenting adults, for reasons that are set forth in the Comment to Section 213.2.

For detailed Comment to Section 213.1, *see* MPC Part II Commentaries, vol. 1, at 275.

Section 213.2. Deviate Sexual Intercourse by Force or Imposition.

(1) By Force or Its Equivalent. A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the second degree if:

(a) he compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the other person is unconscious; or

(d) the other person is less than 10 years old.

(2) By Other Imposition. A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree if:

(a) he compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(b) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(c) he knows that the other person submits because he is unaware that a sexual act is being committed upon him.

Explanatory Note for Sections 213.1–213.6 appears after Section 213.1. For detailed Comment to 213.2, *see* MPC Part II Commentaries, vol. 1, at 357.

Section 213.3. Corruption of Minors and Seduction.

(1) Offense Defined. A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual

intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if:

(a) the other person is less than [16] years old and the actor is at least [four] years older than the other person; or

(b) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(c) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or

(d) the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.

(2) Grading. An offense under paragraph (a) of Subsection (1) is a felony of the third degree. Otherwise an offense under this section is a misdemeanor.

Explanatory Note for Sections 213.1–213.6 appears after Section 213.1. For detailed Comment to 213.3, *see* MPC Part II Commentaries, vol. 1, at 377.

Section 213.4. Sexual Assault.

A person who has sexual contact with another not his spouse, or causes such other to have sexual conduct with him, is guilty of sexual assault, a misdemeanor, if:

(1) he knows that the contact is offensive to the other person; or

(2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct; or

(3) he knows that the other person is unaware that a sexual act is being committed; or

(4) the other person is less than 10 years old; or

(5) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(6) the other person is less than [16] years old and the actor is at least [four] years older than the other person; or

(7) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(8) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Sexual contact is any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.

Explanatory Note for Sections 213.1–213.6 appears after Section 213.1. For detailed Comment to 213.4, *see* MPC Part II Commentaries, vol. 1, at 398.

Section 213.5. Indecent Exposure.

A person commits a misdemeanor if, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.

Explanatory Note for Sections 213.1–213.6 appears after Section 213.1. For detailed Comment to 213.5, *see* MPC Part II Commentaries, vol. 1, at 406.

Section 213.6. Provisions Generally Applicable to Article 213.

(1) Mistake as to Age. Whenever in this Article the criminality of conduct depends on a child's being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age.

(2) Spouse Relationships. Whenever in this Article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse or conduct by a woman, this shall not preclude conviction of a spouse or woman as accomplice in a sexual act which he or she causes another person, not within the exclusion, to perform.

(3) Sexually Promiscuous Complainants. It is a defense to prosecution under Section 213.3 and paragraphs (6), (7) and (8) of Section 213.4 for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.

(4) Prompt Complaint. No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

(5) Testimony of Complainants. No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

Explanatory Note for Sections 213.1–213.6 appears after Section 213.1. For detailed Comment to 213.6, *see* MPC Part II Commentaries, vol. 1, at 412.

OFFENSES AGAINST PROPERTY

ARTICLE 220. ARSON, CRIMINAL MISCHIEF, AND OTHER PROPERTY DESTRUCTION

Explanatory Note for Sections 220.1–220.3

Article 220 consists of three offenses relating to destruction of property. The first and most important of these is arson. While arson is defined to cover destruction of property, the principal reason for the severe punishment historically associated with this offense is the attendant risk to human life. Section 220.1 follows that rationale by reserving felony sanctions to conduct productive of that risk. Setting fire to personal property under circumstances not likely to endanger human life is relegated to the offense of criminal mischief as defined in Section 220.3.

Within the range of conduct covered as arson, the greatest challenge is to achieve a rational system of grading. The Model Code provision grades the offense according to the probability of danger to persons, the type of property destroyed or imperiled, and the actor's culpability with respect to those factors. Specifically, Section 220.1(1) proscribes as a second degree felony

causing a fire or explosion with intent to destroy another's building or an occupied structure, as that term is specially defined, or with intent to destroy or damage any property in order to defraud an insurer. In the latter case, however, a defense is provided when the actor does not recklessly endanger a building, an occupied structure, or another person. One who, by fire or explosion, does recklessly endanger a building, an occupied structure, or another person is guilty of a third degree felony under Subsection (2). Finally, Subsection (3) enforces a limited duty to take reasonable measures to control a fire for which the actor is in some sense responsible. A more general obligation to report or control a dangerous fire was rejected by the Institute as inappropriate for penal legislation.

Section 220.2 of the Model Code is an innovation in American law. It defines a series of offenses relating to causing or risking catastrophe. Specifically, Subsection (1) authorizes felony sanctions for one who purposely or recklessly causes a catastrophe. Subsection (2) authorizes misdemeanor penalties for one who recklessly creates a risk of catastrophe. Subsection (3) supplements these provisions by creating a limited duty to take reasonable measures to prevent or mitigate a catastrophe and by penalizing the knowing or reckless failure to do so as a misdemeanor.

The last offense in this article is criminal mischief, defined in Section 220.3. This provision consolidates the common law crime of malicious mischief and a plethora of derivative statutes into a single generic offense covering destruction of property. Subsection (1)(a) reaches purposeful or reckless damage to the tangible property of another, as well as negligent damage caused by specified dangerous instrumentalities. Subsection (1)(b) proscribes tampering with tangible property so as to endanger it or the safety of a person. Neither of these provisions extends to the broad concept of "property" protected against theft by Article 223. As is explained in detail in the Comment, the limitation of Section 220.3 to "tangible property" is necessary to avoid criminalizing business competition, breach of contract, and other economic practices that should be regulated, if at all, by civil remedies. Finally, these provisions are supplemented by the Subsection (1)(c) prohibition of causing another to suffer pecuniary loss by means of threat or deception. This offense is directed against spiteful pranks and the like. Its scope is adequately limited by the restriction to losses induced by threat or deception. Violation of Section 220.3 is a felony of the third degree where the actor purposely causes major financial loss or

occasions substantial interference with a public service. Less serious forms of the offense are graded according to the amount of damage caused and the actor's culpability with respect thereto.

Section 220.1. Arson and Related Offenses.

(1) Arson. A person is guilty of arson, a felony of the second degree, if he starts a fire or causes an explosion with the purpose of:

(a) destroying a building or occupied structure of another; or

(b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss. It shall be an affirmative defense to prosecution under this paragraph that the actor's conduct did not recklessly endanger any building or occupied structure of another or place any other person in danger of death or bodily injury.

(2) Reckless Burning or Exploding. A person commits a felony of the third degree if he purposely starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly:

(a) places another person in danger of death or bodily injury; or

(b) places a building or occupied structure of another in danger of damage or destruction.

(3) Failure to Control or Report Dangerous Fire. 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.

(4) Definitions. "Occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present. Property is that of another, for the purposes of this section, if anyone other than the actor has a possessory or proprietary interest therein. If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an occupied structure of another.

Explanatory Note for Sections 220.1–220.3 appears before Section 220.1. For detailed Comment to 220.1, *see* MPC Part II Commentaries, vol. 2, at 4.

Section 220.2. Causing or Risking Catastrophe.

(1) Causing Catastrophe. A person who causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material or other harmful or destructive force or substance, or by any other means of causing potentially widespread injury or damage, commits a felony of the second degree if he does so purposely or knowingly, or a felony of the third degree if he does so recklessly.

(2) Risking Catastrophe. A person is guilty of a misdemeanor if he recklessly creates a risk of catastrophe in the employment of fire, explosives or other dangerous means listed in Subsection (1).

(3) Failure to Prevent Catastrophe. A person who knowingly or recklessly fails to take reasonable measures to prevent or mitigate a catastrophe commits a misdemeanor if:

(a) he knows that he is under an official, contractual or other legal duty to take such measures; or

(b) he did or assented to the act causing or threatening the catastrophe.

Explanatory Note for Sections 220.1–220.3 appears before Section 220.1. For detailed Comment to 220.2, *see* MPC Part II Commentaries, vol. 2, at 35.

Section 220.3. Criminal Mischief.

(1) Offense Defined. A person is guilty of criminal mischief if he:

(a) damages tangible property of another purposely, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means listed in Section 220.2(1); or

(b) purposely or recklessly tampers with tangible property of another so as to endanger person or property; or

(c) purposely or recklessly causes another to suffer pecuniary loss by deception or threat.

(2) Grading. Criminal mischief is a felony of the third degree if the actor purposely causes pecuniary loss in excess of $5,000, or a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service. It is a misdemeanor if the actor purposely causes pecuniary

loss in excess of $100, or a petty misdemeanor if he purposely or recklessly causes pecuniary loss in excess of $25. Otherwise criminal mischief is a violation.

Explanatory Note for Sections 220.1–220.3 appears before Section 220.1. For detailed Comment to 220.3, *see* MPC Part II Commentaries, vol. 2, at 41.

ARTICLE 221. BURGLARY AND OTHER CRIMINAL INTRUSION

Section 221.0. Definitions.

In this Article, unless a different meaning plainly is required:

(1) "occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present.

(2) "night" means the period between thirty minutes past sunset and thirty minutes before sunrise.

Explanatory Note

This section contains the definitions of "occupied structure" and "night" that are used in the Article 221 offenses. Their meaning is elaborated in the commentary to the specific offenses.

Section 221.1. Burglary.

(1) Burglary Defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

(2) Grading. Burglary is a felony of the second degree if it is perpetrated in the dwelling of another at night, or if, in the course of committing the offense, the actor:

(a) purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone; or

(b) is armed with explosives or a deadly weapon.

Otherwise, burglary is a felony of the third degree. An act shall be deemed "in the course of committing" an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

(3) Multiple Convictions. A person may not be convicted botb for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.

Explanatory Note for Sections 221.1 and 221.2

Article 221 deals with burglary and other criminal intrusion. Specifically, Section 221.1 proscribes as burglary an unprivileged entry into a building or occupied structure with intent to commit a crime therein. Section 221.2 defines the lesser offense of criminal trespass. That provision covers one who enters without privilege, or remains surreptitiously within, a building or occupied structure, as well as one who enters or remains in any place as to which notice against trespass is given.

The critical issues to be confronted in the law of burglary are whether the crime has any place in a modern penal code and, if so, how it should be graded. The first question arises because of the development of the law of attempt. Traditionally, an independent substantive offense of burglary has been used to circumvent unwarranted limitations on liability for attempt. Under the Model Code, however, these defects have been corrected. It would be possible, therefore, to eliminate burglary as a separate offense and to treat the covered conduct as an attempt to commit the intended crime plus an offense of criminal trespass. Section 221.1 nevertheless continues burglary as an independent substantive offense carrying felony sanctions. In part, this solution reflects a deference to the momentum of historical tradition. More importantly, however, the maintenance of a crime of burglary reflects a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to terrorize occupants. In accord with this rationale, burglary is a felony of the second degree only if it is directed against the dwelling of another at night or if it involves an attempt to inflict bodily injury or the use of explosives or a deadly weapon. Otherwise, burglary is a felony of the third degree. Finally, as the Comment to Section 221.1 explains in detail, more serious sanctions may be imposed in appropriate cases by aggregating penalties for the burglary and the underlying offense that the actor intended to commit.

For detailed Comment to Section 221.1, *see* MPC Part II Commentaries, vol. 2, at 61.

Section 221.2. Criminal Trespass.

(1) Buildings and Occupied Structures. A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof. An offense under this Subsection is a misdemeanor if it is committed in a dwelling at night. Otherwise it is a petty misdemeanor.

(2) Defiant Trespasser. A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

(a) actual communication to the actor; or

(b) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or

(c) fencing or other enclosure manifestly designed to exclude intruders.

An offense under this Subsection constitutes a petty misdemeanor if the offender defies an order to leave personally communicated to him hy the owner of the premises or other authorized person. Otherwise it is a violation.

(3) Defenses. It is an affirmative defense to prosecution under this Section tbat:

(a) a building or occupied structure involved in an offense under Subsection (1) was ahandoned; or

(b) the premises were at the time open to memhers of the puhlic and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or

(c) the actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would bave licensed him to enter or remain.

Explanatory Note for Sections 221.1 and 221.2 appears after Section 221.1. For detailed Comment to 221.2, *see* MPC Part II Commentaries, vol. 2, at 85.

ARTICLE 222. ROBBERY

Section 222.1. Rohbery.

(1) Robhery Defined. A person is guilty of robbery if, in the course of committing a theft, he:

(a) inflicts serious bodily injury upon another; or

(b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or

(c) commits or threatens immediately to commit any felony of the first or second degree.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

(2) Grading. Robbery is a felony of the second degree, except that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury.

Explanatory Note

Article 222 contains the single offense of robbery, defined to include specified aggravated behavior occurring "in the course of committing a theft." Robbery is appropriately defined as a separate and serious offense because of the special elements of danger commonly associated with forcible theft from the person.

The elements of robbery must focus upon three factors: the nature of the special circumstances that serve to distinguish the offense from ordinary theft; the time span during which these circumstances must occur; and the culpability with which the actor must engage in the specified conduct. The first factor is elaborated in Paragraphs (a), (b), and (c) of Subsection (1). They extend to the infliction of serious bodily injury upon another, the threat of serious bodily injury or purposely placing the victim in fear of receiving such an injury, and the commission or threat immediately to commit a felony of the first or the second degree. Robbery is distinguished from ordinary larceny by the presence of the victim and the use or threat of violence; it is distinguished from extortion by the immediacy and seriousness of the threat. The Model Code requirement of "serious" bodily injury is a departure from the law in many states, but is justified by the concern to differentiate the offense from conduct that should be treated less severely as theft from the person under Article 223.

The quoted phrase "in the course of committing a theft" describes the time span during which the offense must occur. This language is in turn defined to include conduct occurring during an attempt to commit a theft or in flight after its attempt or commission. This represents a broader conception of the offense than previously existed in many states. Culpability for the offense can be satisfied by proof of purposeful behavior with respect to some elements and recklessness with respect to others, as elaborated in detail in the Comment to this section.

Robbery is graded as a felony of the first degree if the actor attempts to kill another or if he purposely inflicts or attempts to

inflict serious bodily injury. The offense is a felony of the second degree in the remaining cases.

For detailed Comment, *see* MPC Part II Commentaries, vol. 2, at 96.

ARTICLE 223. THEFT AND RELATED OFFENSES

Section 223.0. Definitions.

In this Article, unless a different meaning plainly is required:

(1) "deprive" means: (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it.

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

(3) "government" means the United States, any State, county, municipality, or other political unit, or any department, agency or suhdivision of any of the foregoing, or any corporation or other association carrying out the functions of government.

(4) "movable property" means property the location of which can be changed, including things growing on, affixed to, or found in land, and documents although the rights represented thereby have no physical location; "immovable property" is all other property.

(5) "obtain" means: (a) in relation to property, to bring about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another; or (b) in relation to labor or service, to secure performance thereof.

(6) "property" means anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.

(7) "property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also

has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not he 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.

Explanatory Note

This section gives the definitions for a number of terms that are used in the theft provisions contained in the succeeding sections of Article 223 as well as in the forgery and fraudulent practices provisions of Article 224. Their meaning is elaborated in the commentary to the specific offenses.

Section 223.1. Consolidation of Theft Offenses; Grading; Provisions Applicable to Theft Generally.

(1) Consolidation of Theft Offenses. Conduct denominated theft in this Article constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced hy lack of fair notice or hy surprise.

(2) Grading of Theft Offenses.

(a) Theft constitutes a felony of the third degree if the amount involved exceeds $500, or if the property stolen is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in tbe business of buying or selling stolen property.

(b) Theft not within the preceding paragraph constitutes a misdemeanor, except that if the property was not taken from the person or by threat, or in breach of a fiduciary ohligation, and the actor proves hy a preponderance of the evidence that the amount involved was less than $50, the offense constitutes a petty misdemeanor.

(c) The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

(3) Claim of Right. It is an affirmative defense to prosecution for theft that the actor:

(a) was unaware that the property or service was that of another; or

(b) acted under an honest claim of right to the property or service involved or that he had a right to acquire or dispose of it as he did; or

(c) took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.

(4) Theft from Spouse. It is no defense that theft was from the actor's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together.

Explanatory Note for Sections 223.1–223.9

The most important innovation reflected in Article 223 is the consolidation of traditional acquisitive offenses into the single offense called "theft." This is accomplished by Section 223.1(1) and by the separate definition of different forms of the offense in Sections 223.2 through 223.8. Section 223.1(1) provides that an accusation of theft may be supported by evidence that it was committed in any manner that would be theft under Article 223, subject to appropriate relief in the case of lack of fair notice or surprise. The offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like, as well as the technical distinctions among them, are thereby replaced with a unitary offense.

Section 223.1 also states several other points of general applicability to the separate provisions defining theft. Subsection (2) creates a unitary grading scheme, with distinctions drawn according to the method by which the theft was accomplished, the subject of the theft, the amount of the theft, and, in case of receiving, whether the actor was in the business of buying or selling stolen property. Subsection (3) creates a claim of right defense applicable to all forms of theft, and Subsection (4) abolishes the defense of interspousal immunity except in certain narrowly specified circumstances.

Consolidation of theft into a single offense does not eliminate the need to specify with care the various forms of conduct meant to be included. Sections 223.2 through 223.4 accomplish this objective for the most common instances of theft. Section 223.2

deals with conduct of the larceny-embezzlement type but distinguishes between the theft of movable and immovable property. Movable property is stolen if one unlawfully takes or exercises unlawful control over the property of another with purpose to deprive him thereof. Immovable property, principally real estate, is stolen if one unlawfully transfers the property of another, or an interest therein, with purpose to benefit himself or another not entitled thereto. The major purpose of the distinction is to avoid theft liability for such conduct as trespass or occupying real property beyond the terms of a lease. Section 223.3 deals with obtaining property by deception, specifying in some detail the forms of deception that may constitute the offense. Section 223.4 similarly specifies the forms of threat that may constitute theft by extortion.

The remaining offenses deal with other specific contexts in which a theft can occur. Section 223.5 departs from most prior law by creating a general offense with respect to property that has been lost, mislaid, or delivered by mistake and by abandoning traditional distinctions based upon the owner's intent. Section 223.6 consolidates the traditional crime of receiving stolen property into the unitary theft offense. The offense is limited to movable property and requires that the actor know the property to have been stolen or believe that it has probably been stolen. The requisite knowledge is presumed in specified circumstances. Section 223.7 also departs from most prior law by creating a general theft of services offense. The concept of "services" is defined broadly and, unlike some pre-existing statutes, the offense is graded according to the same criteria that govern the other forms of theft. Finally, Section 223.8 introduces a new form of the offense governing theft by failure to make required disposition of funds received for a specific purpose.

Section 223.9 relates to the lesser included conduct of unauthorized use of property. It is limited to automobiles and other specified vehicles and is graded as a misdemeanor in all circumstances.

For detailed Comment to Section 223.1, *see* MPC Part II Commentaries, vol. 2, at 126.

Section 223.2. Theft by Unlawful Taking or Disposition.

(1) Movable Property. A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof.

(2) Immovable Property. A person is guilty of theft if he unlawfully transfers immovable property of another or any interest

therein with purpose to benefit himself or another not entitled thereto.

Explanatory Note for Sections 223.1–223.9 appears after Section 223.1. For detailed Comment to 223.2, *see* MPC Part II Commentaries, vol. 2, at 163.

Section 223.3. Theft by Deception.

A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:

(1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise; or

(2) prevents another from acquiring information which would affect his judgment of a transaction; or

(3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

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

The term "deceive" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

Explanatory Note for Sections 223.1–223.9 appears after Section 223.1. For detailed Comment to 223.3, *see* MPC Part II Commentaries, vol. 2, at 180.

Section 223.4. Theft by Extortion.

A person is guilty of theft if he purposely obtains property of another by threatening to:

(1) inflict bodily injury on anyone or commit any other criminal offense; or

(2) accuse anyone of a criminal offense; or

(3) expose any secret tending to subject any person to batred, contempt or ridicule, or to impair his credit or business repute; or

(4) take or withhold action as an official, or cause an official to take or withhold action; or

(5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or

(6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(7) inflict any other harm which would not benefit the actor.

It is an affirmative defense to prosecution based on paragraphs (2), (3) or (4) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.

Explanatory Note for Sections 223.1–223.9 appears after Section 223.1. For detailed Comment to 223.4, *see* MPC Part II Commentaries, vol. 2, at 201.

Section 223.5. Theft of Property Lost, Mislaid, or Delivered by Mistake.

A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of theft if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.

Explanatory Note for Sections 223.1–223.9 appears after Section 223.1. For detailed Comment to 223.5, *see* MPC Part II Commentaries, vol. 2, at 224.

Section 223.6. Receiving Stolen Property.

(1) Receiving. A person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with purpose to restore it to the owner. "Receiving" means acquiring possession, control or title, or lending on the security of the property.

(2) Presumption of Knowledge. The requisite knowledge or belief is 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) has received stolen property in another transaction within the year preceding the transaction charged; or

(c) being a dealer in property of the sort received, acquires it for a consideration which he knows is far below its reasonable value.

"Dealer" means a person in the business of buying or selling goods including a pawnbroker.

Explanatory Note for Sections 223.1–223.9 appears after Section 223.1. For detailed Comment to 223.6, *see* MPC Part II Commentaries, vol. 2, at 231.

Section 223.7. Theft of Services.

(1) A person is guilty of theft if he purposely obtains services which he knows are available only for compensation, by deception or threat, or by false token or other means to avoid payment for the service. "Services" includes labor, professional service, transportation, telephone or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, use of vehicles or other movable property. Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay.

(2) A person commits theft if, having control over the disposition of services of others, to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto.

Explanatory Note for Sections 223.1–223.9 appears after Section 223.1. For detailed Comment to 223.7, *see* MPC Part II Commentaries, vol. 2, at 250.

Section 223.8. Theft by Failure to Make Required Disposition of Funds Received.

A person who purposely obtains property upon agreement, or subject to a known legal obligation, to make specified payment or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing ap-

plies notwithstanding that it may he impossible to identify particular property as belonging to the victim at the time of the actor's failure to make the required payment or disposition. An officer or employee of the government or of a financial institution is presumed: (i) to know any legal obligation relevant to his criminal liability under this Section, and (ii) to have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts.

Explanatory Note for Sections 223.1–223.9 appears after Section 223.1. For detailed Comment to 223.8, *see* MPC Part II Commentaries, vol. 2, at 255.

Section 223.9. Unauthorized Use of Automobiles and Other Vehicles.

A person commits a misdemeanor if he operates another's automohile, airplane, motorcycle, motorboat, or other motor-propelled vehicle without consent of the owner. It is an affirmative defense to prosecution under this Section that the actor reasonably helieved that the owner would have consented to the operation had he known of it.

Explanatory Note for Sections 223.1–223.9 appears after Section 223.1. For detailed Comment to 223.9, *see* MPC Part II Commentaries, vol. 2, at 270.

ARTICLE 224. FORGERY AND FRAUDULENT PRACTICES

Section 224.0. Definitions.

In this Article, the definitions given in Section 223.0 apply unless a different meaning plainly is required.

Explanatory Note

This section incorporates for the Article 224 offenses the definition of terms contained in Section 223.0. The use of defined terms is noted in the Comment to each offense and reference to the specific definition is made.

Section 224.1. Forgery.

(1) Definition. A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:

(a) alters any writing of another without his authority; or

(b) makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed; or

(c) utters any writing which he knows to be forged in a manner specified in paragraphs (a) or (b).

"Writing" includes printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege, or identification.

(2) Grading. Forgery is a felony of the second degree if the writing is or purports to be part of an issue of money, securities, postage or revenue stamps, or other instruments issued by the government, or part of an issue of stock, bonds or other instruments representing interests in or claims against any property or enterprise. Forgery is a felony of the third degree if the writing is or purports to be a will, deed, contract, release, commercial instrument, or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations. Otherwise forgery is a misdemeanor.

Explanatory Note for Sections 224.1–224.14

Article 224 contains the basic forgery offense and also collects a series of provisions relating to different forms of fraudulent behavior. These offenses are closely related to the consolidated theft offense created in Article 223 and in many cases are designed to complement the coverage of theft.

The most important offense is forgery, defined in Section 224.1. A separate forgery offense is needed in order to recognize the special effectiveness of forgery as a means of undermining public confidence in important symbols of commerce and as a means of perpetrating widespread fraud. As drafted in the Model Code, the offense also extends to documents that do not have legal or commercial significance. Thus, for example, forgery of a college diploma or a medical license is covered, in addition to the usual range of items such as a deed, a check, or a will. The term "writing" is also defined to include money, stamps, and other documents traditionally treated under the separate offense of counterfeiting. The prohibited conduct is drafted so as to focus the offense upon falsity as to genuineness or authenticity, rather than upon the falsity of any statement contained in a legitimate

document. The offense is graded as a felony of the second degree in the case of certain listed documents which require special expertise to execute, which can readily be the means of perpetrating widespread fraud, and the forgery of which can undermine confidence in widely circulating instruments representing wealth. Forgery of documents affecting legal relations is a felony of the third degree, while forgery of other documents is a misdemeanor.

Section 224.2 was originally included in the forgery offense but was moved into a separate provision to facilitate drafting. It creates the related offense of simulating objects so as to misrepresent their antiquity, rarity, source, or authorship. The offense is graded as a misdemeanor, although use of such a forgery in a scheme to defraud may well be treated as a felony under Section 223.3 where significant amounts of money are involved. Sale of a forged painting purporting to be made by a respected artist, for example, can thus be graded according to amount, as in other instances of theft by deception.

Sections 224.3 and 224.4 relate to different forms of fraudulent conduct with respect to records or other documents. Section 224.3 deals with the destruction, removal, or concealment of any recordable instrument, such as a deed or a will, with intent to deceive or injure another. Since such conduct can have effects similar to those from forgery, the offense is graded as a third degree felony. Section 223.4 relates to the falsification, destruction, removal, or concealment of a record or other writing for the purpose of deceiving or injuring another or in order to conceal wrongdoing. In a sense, this section extends to private parties the protection afforded the government under Section 241.8 against tampering with records.

Sections 224.5 and 224.6 deal with two particular instances of fraudulent behavior designed to supplement the general theft offense. Section 224.5 relates to bad checks, where a separate provision is justified by the desirability of certain presumptions to facilitate prosecution, by the propriety of upgrading the penalties that would otherwise be available for petty theft, and by the need for coverage in cases where property is not directly obtained from the person to whom the check is presented. Section 224.6 covers credit card fraud. In this instance, a separate offense is necessitated by the possibility that the legal arrangements surrounding the use of credit cards may not make it possible to prosecute offenders for theft by deception. As in the case of bad checks, moreover, it is also desirable that certain special provisions be addressed to this specific behavior.

The remaining offenses in Article 224 relate to a variety of other contexts in which fraud can be perpetrated. Section 224.7 consolidates into a single offense a range of behavior involving deceptive business practices. Section 224.8 creates two offenses, the first dealing with commercial bribery and the second with breach of a duty to act disinterestedly. The former offense is addressed to breaches of a duty of fidelity owed by employees, agents, trustees, lawyers, physicians, and other similarly situated persons. The latter covers a person who holds himself out to the public as one who makes disinterested appraisal or criticism but who accepts remuneration to influence his behavior. Section 224.9 applies to rigging athletic contests and other events that purportedly are conducted as contests with established rules. The proscribed conduct includes bribery, threats of injury, and tampering with persons, animals, or equipment.

Sections 224.10, 224.11, and 224.12 relate to fraudulent conduct in financial dealings. Section 224.10 fills a gap in the law of theft by extending criminal penalties to one who transfers property subject to a security interest with purpose to hinder enforcement of that interest, and extends as well to other types of behavior that may jeopardize enforcement of a security interest held by another. Section 224.11 covers a variety of fraudulent behavior by one who knows that insolvency proceedings are about to be instituted or that some other arrangement for the benefit of creditors is imminent. Section 224.12 relates to managerial personnel in a failing financial institution who receive deposits or other investments knowing that operations are about to be suspended and that the person making the deposit or payment is unaware of the condition of the institution.

Section 224.13 is in effect a lesser included offense to embezzlement. It applies misdemeanor or petty misdemeanor sanctions, depending on amount, to one who applies or disposes of entrusted property in a manner known to be unlawful and to involve substantial risk of loss or detriment to the beneficiary. The offense is limited to fiduciaries, and the term is specifically defined. Section 224.14 is also in effect a lesser included offense, in this case to theft by deception. It applies to one who, by deception, causes another to execute an instrument that may affect the pecuniary interest of another person, and it is graded as a misdemeanor.

For detailed Comment to Section 224.1, *see* MPC Part II Commentaries, vol. 2, at 282.

Section 224.2. Simulating Objects of Antiquity, Rarity, Etc.

A person commits a misdemeanor if, with purpose to defraud anyone or with knowledge that be is facilitating a fraud to be perpetrated by anyone, he makes, alters or utters any object so that it appears to bave value because of antiquity, rarity, source, or authorship which it does not possess.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.2, *see* MPC Part II Commentaries, vol. 2, at 306.

Section 224.3. Fraudulent Destruction, Removal or Concealment of Recordable Instruments.

A person commits a felony of the third degree if, with purpose to deceive or injure anyone, he destroys, removes or conceals any will, deed, mortgage, security instrument or other writing for which the law provides public recording.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.3, *see* MPC Part II Commentaries, vol. 2, at 309.

Section 224.4. Tampering with Records.

A person commits a misdemeanor if, knowing tbat he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, with purpose to deceive or injure anyone or to conceal any wrongdoing.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.4, *see* MPC Part II Commentaries, vol. 2, at 311.

Section 224.5. Bad Checks.

A person who issues or passes a check or similar sight order for the payment of money, knowing tbat it will not be bonored by the drawee, commits a misdemeanor. For the purpose of this Section as well as in any prosecution for theft committed by means of a bad check, an issuer is presumed to know that tbe check or order (other than a post-dated check or order) would not be paid, if:

(1) the issuer had no account witb the drawee at the time tbe check or order was issued; or

(2) payment was refused by the drawee for lack of funds, upon presentation within 30 days after issue, and the issuer failed to make good within 10 days after receiving notice of that refusal.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.5, *see* MPC Part II Commentaries, vol. 2, at 315.

Section 224.6. Credit Cards.

A person commits an offense if he uses a credit card for the purpose of obtaining property or services with knowledge that:

(1) the card is stolen or forged; or

(2) the card has been revoked or cancelled; or

(3) for any other reason his use of the card is unauthorized by the issuer.

It is an affirmative defense to prosecution under paragraph (3) if the actor proves by a preponderance of the evidence that he had the purpose and ability to meet all obligations to the issuer arising out of his use of the card. "Credit card" means a writing or other evidence of an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer. An offense under this Section is a felony of the third degree if the value of the property or services secured or sought to be secured by means of the credit card exceeds $500; otherwise it is a misdemeanor.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.6, *see* MPC Part II Commentaries, vol. 2, at 320.

Section 224.7. Deceptive Business Practices.

A person commits a misdemeanor if in the course of business he:

(1) uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or

(2) sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service; or

(3) takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure; or

(4) sells, offers or exposes for sale adulterated or mislabeled commodities. "Adulterated" means varying from the standard of composition or quality prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage. "Mislabeled" means varying from the standard of truth or disclosure in labeling prescribed by or pur-

suant to any statute providing criminal penalties for such variance, or set by established commercial usage; or

(5) makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services; or

(6) makes a false or misleading written statement for the purpose of obtaining property or credit; or

(7) makes a false or misleading written statement for the purpose of promoting the sale of securities, or omits information required by law to be disclosed in written documents relating to securities.

It is an affirmative defense to prosecution under this Section if the defendant proves by a preponderance of the evidence that his conduct was not knowingly or recklessly deceptive.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.7, *see* MPC Part II Commentaries, vol. 2, at 324.

Section 224.8. Commercial Bribery and Breach of Duty to Act Disinterestedly.

(1) A person commits a misdemeanor if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:

(a) partner, agent, or employee of another;

(b) trustee, guardian, or other fiduciary;

(c) lawyer, physician, accountant, appraiser, or other professional adviser or informant;

(d) officer, director, manager or other participant in the direction of the affairs of an incorporated or unincorporated association; or

(e) arbitrator or other purportedly disinterested adjudicator or referee.

(2) A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services commits a misdemeanor if he solicits, accepts or agrees to accept any benefit to influence his selection, appraisal or criticism.

(3) A person commits a misdemeanor if he confers, or offers or agrees to confer, any benefit the acceptance of which would be criminal under this Section.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.8, *see* MPC Part II Commentaries, vol. 2, at 333.

Section 224.9. Rigging Publicly Exhibited Contest.

(1) A person commits a misdemeanor if, with purpose to prevent a publicly exhibited contest from being conducted in accordance with the rules and usages purporting to govern it, he:

(a) confers or offers or agrees to confer any benefit upon, or threatens any injury to a participant, official or other person associated with the contest or exhibition; or

(b) tampers with any person, animal or thing.

(2) Soliciting or Accepting Benefit for Rigging. A person commits a misdemeanor if he knowingly solicits, accepts or agrees to accept any benefit the giving of which would be criminal under Subsection (1).

(3) Participation in Rigged Contest. A person commits a misdemeanor if he knowingly engages in, sponsors, produces, judges, or otherwise participates in a publicly exhibited contest knowing that the contest is not being conducted in compliance with the rules and usages purporting to govern it, by reason of conduct which would be criminal under this Section.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.9, *see* MPC Part II Commentaries, vol. 2, at 338.

Section 224.10. Defrauding Secured Creditors.

A person commits a misdemeanor if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with purpose to hinder enforcement of that interest.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.10, *see* MPC Part II Commentaries, vol. 2, at 343.

Section 224.11. Fraud in Insolvency.

A person commits a misdemeanor if, knowing that proceedings have been or are about to be instituted for the appointment of a receiver or other person entitled to administer property for the benefit of creditors, or that any other composition or liquidation for the benefit of creditors has been or is about to be made, he:

(1) destroys, removes, conceals, encumbers, transfers, or otherwise deals with any property with purpose to defeat or obstruct the claim of any creditor, or otherwise to obstruct the operation of any law relating to administration of property for the benefit of creditors; or

(2) knowingly falsifies any writing or record relating to the property; or

(3) knowingly misrepresents or refuses to disclose to a receiver or other person entitled to administer property for the benefit of creditors, the existence, amount or location of the property, or any other information which the actor could be legally required to furnish in relation to such administration.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.11, *see* MPC Part II Commentaries, vol. 2, at 349.

Section 224.12. Receiving Deposits in a Failing Financial Institution.

An officer, manager or other person directing or participating in the direction of a financial institution commits a misdemeanor if he receives or permits the receipt of a deposit, premium payment or other investment in the institution knowing that:

(1) due to financial difficulties the institution is about to suspend operations or go into receivership or reorganization; and

(2) the person making the deposit or other payment is unaware of the precarious situation of the institution.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.12, *see* MPC Part II Commentaries, vol. 2, at 354.

Section 224.13. Misapplication of Entrusted Property and Property of Government or Financial Institution.

A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted. The offense is a misdemeanor if the amount involved exceeds $50; otherwise it is a petty misdemeanor. "Fiduciary" includes trustee, guardian, executor, administrator, receiver and any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.13, *see* MPC Part II Commentaries, vol. 2, at 358.

Section 224.14. Securing Execution of Documents by Deception.

A person commits a misdemeanor if by deception he causes another to execute any instrument affecting, purporting to affect, or likely to affect the pecuniary interest of any person.

Explanatory Note for Sections 224.1–224.14 appears after Section 224.1. For detailed Comment to 224.14, *see* MPC Part II Commentaries, vol. 2, at 364.

OFFENSES AGAINST THE FAMILY

ARTICLE 230. OFFENSES AGAINST THE FAMILY

Explanatory Note for Sections 230.1–230.5

Article 230 contains five offenses against the family. The crimes of bigamy, incest, and abortion are derived from offenses carrying those names that were included in all criminal codes at the time the Model Penal Code was drafted and that have been continued in all recent revisions. The crimes of endangering the welfare of children and persistent nonsupport represent substantial modification and consolidation of offenses that were variously treated in prior law and that have also received widely differing treatment in recent revisions.

Section 230.1 introduces two major innovations to the law of bigamy. The first, which has received widespread acceptance in recent law, is the rejection of the tradition of strict liability with respect to mistakes about the validity or dissolution of a former marriage. Culpability levels are established for each element of the offense and, in accordance with the general policy of the Model Code, mistakes that negate the required culpability are given defensive significance. The second innovation, which has not been followed in recent legislative revisions, is the division of plural marriage into the separate crimes of bigamy and polygamy. The former offense classifies the contracting of a second marriage while a prior marriage is still in effect as a misdemeanor; the latter treats as a felony the open defiance of marital conventions by one who marries or cohabits in purported exercise of the

right of plural marriage. In both instances, the other party to the second marriage is guilty of an offense of the same degree as the primary actor if he knows that the actor is committing an offense under this section.

Section 230.2 confines the crime of incest to consanguineous relationships, with the exception that the relation of parent and child by adoption is added. It also limits the prohibition to ancestors, descendants, brothers, and sisters. Uncles, aunts, nieces, and nephews are included in brackets to reflect uncertainty as to whether they should be added to the categories of persons who may be liable for incest. The prohibition extends to marriage, cohabitation, and sexual intercourse. The major policy to be effected by a law of incest is the protection of the integrity of the family unit, and it is primarily for this reason that the prohibition includes marriage and cohabitation and is extended to adopted children. Affinal relations are excluded, principally because there are situations where marriage between persons who are not related by blood should be permitted.

Section 230.3 defines the crime of abortion. Prior to the drafting of the Model Code, existing statutes were virtually unanimous in limiting the occasions when an abortion would be permitted to those cases where it was necessary in order to save the life of the mother. There were only a few states that went further and recognized preservation of the mother's health as a justification for abortion. The Model Code introduced a major expansion of prior law by permitting abortion where there was substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. Numerous states expanded their laws in a similar fashion in the years that intervened between the publication of the Model Code and the constitutionalization of abortion law in 1973.

The remaining offenses in Article 230 reflect a major contraction of the role of the criminal law in family affairs. Section 230.4 is designed to replace vague and uncertain laws dealing with contributing to the delinquency of a minor, child neglect, and corrupting the morals of a minor. It limits the reach of the criminal law to situations where a parent, guardian, or other person supervising the welfare of a child under 18 knowingly endangers the child's welfare by violating a duty of care, protection, or support. Section 230.5 restricts the criminal law of nonsupport to occasions where the actor persistently fails to provide support that he is able to provide and that he knows he is legally obligated

to provide. The requirement of persistent failure serves the function of calling for nonpenal measures as a first resort in the effort to resolve problems of family disintegration. The requirement that the actor know of his legal obligations serves the same function, as well as that of leaving the complex questions concerning the scope of the actor's support obligation to resolution by the civil law.

Section 230.1. Bigamy and Polygamy.

(1) Bigamy. A married person is guilty of bigamy, a misdemeanor, if he contracts or purports to contract another marriage, unless at the time of the subsequent marriage:

(a) the actor believes that the prior spouse is dead; or

(b) the actor and the prior spouse have been living apart for five consecutive years throughout which the prior spouse was not known by the actor to be alive; or

(c) a Court has entered a judgment purporting to terminate or annul any prior disqualifying marriage, and the actor does not know that judgment to be invalid; or

(d) the actor reasonably believes that he is legally eligible to remarry.

(2) Polygamy. A person is guilty of polygamy, a felony of the third degree, if he marries or cohabits with more than one spouse at a time in purported exercise of the right of plural marriage. The offense is a continuing one until all cohabitation and claim of marriage with more than one spouse terminates. This section does not apply to parties to a polygamous marriage, lawful in the country of which they are residents or nationals, while they are in transit through or temporarily visiting this State.

(3) Other Party to Bigamous or Polygamous Marriage. A person is guilty of bigamy or polygamy, as the case may be, if he contracts or purports to contract marriage with another knowing that the other is thereby committing bigamy or polygamy.

Explanatory Note for Sections 230.1–230.5 appears before Section 230.1. For detailed Comment to 230.1 *see* MPC Part II Commentaries, vol. 2, at 370.

Section 230.2. Incest.

A person is guilty of incest, a felony of the third degree, if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood].

"Cohabit" means to live together under the representation or appearance of being married. The relationships referred to herein include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.

Explanatory Note for Sections 230.1–230.5 appears before Section 230.1. For detailed Comment to 230.2, *see* MPC Part II Commentaries, vol. 2, at 397.

Section 230.3. Abortion.

(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may he incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption tbat the abortion was unjustifed.

(4) Self-Ahortion. A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise tban by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified

under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) Pretended Abortion. A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) Distribution of Abortifacients. A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) Section Inapplicable to Prevention of Pregnancy. Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

Explanatory Note for Sections 230.1–230.5 appears before Section 230.1. For detailed Comment to 230.3, *see* MPC Part II Commentaries, vol. 2, at 426.

Section 230.4. Endangering Welfare of Children.

A parent, guardian, or other person supervising the welfare of a child under 18 commits a misdemeanor if he knowingly endangers the child's welfare by violating a duty of care, protection or support.

Explanatory Note for Sections 230.1–230.5 appears before Section 230.1. For detailed Comment to 230.4, *see* MPC Part II Commentaries, vol. 2, at 444.

Section 230.5. Persistent Nonsupport.

A person commits a misdemeanor if he persistently fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child or other dependent.

Explanatory Note for Sections 230.1–230.5 appears before Section 230.1. For detailed Comment to 230.5, *see* MPC Part II Commentaries, vol. 2, at 454.

OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE 240. BRIBERY AND CORRUPT INFLUENCE

Section 240.0. Definitions.

In Articles 240–243, unless a different meaning plainly is required:

(1) "benefit" means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose;

(2) "government" includes any branch, subdivision or agency of the government of the State or any locality within it;

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

(4) "official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding;

(5) "party official" means a person who holds an elective or appointive post in a political party in the United States by virtue

of which he directs or conducts, or participates in directing or conducting party affairs at any level of responsibility;

(6) "pecuniary benefit" is benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain;

(7) "public servant" means any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function; but the term does not include witnesses;

(8) "administrative proceeding" means any proceeding, other than a judicial proceeding, the outcome of which is required to be based on a record or documentation prescribed by law, or in which law or regulation is particularized in application to individuals.

Explanatory Note

This section contains the definitions of a number of terms that are used in Article 240 and in Articles 241–243. Their meaning is elaborated in the commentary to the specific offenses.

Section 240.1. Bribery in Official and Political Matters.

A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(2) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or

(3) any benefit as consideration for a violation of a known legal duty as public servant or party official.

It is no defense to prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

Explanatory Note for Sections 240.1–240.7

Article 240 consists of a series of offenses designed to reach various means by which the integrity of government can be undermined. The most serious offense is bribery (Section 240.1),

which performs the traditional function of punishing both the bribe giver and the bribe receiver in cases where the future performance of official functions is sought to be influenced by the offer of money or other benefits.

The bribery offense abandons the usual focus upon "corrupt" agreements or a "corrupt" intent and instead spells out with more particularity the kinds of arrangements that are prohibited. It is made clear, for example, that compromise in the legislative process is not prohibited, whereas payments in order to meet competition or to respond to extortionate threats by public officials are within the prohibition. The offense is defined so as not to require proof of an actual agreement or mutual understanding. It thus reaches the inchoate behavior of either party accompanied by a purpose to achieve the prohibited understanding.

Several of the remaining offenses are in effect lesser included offenses to bribery. Section 240.3 reaches the acceptance of compensation for completed official conduct and thus covers cases where it can be proved that benefits were conferred but it cannot be proved that there was a prior arrangement or agreement. Even if no prior arrangement existed, such conduct should be punished as a lesser offense to bribery on a rationale that payments for completed official action imply the availability of similar payments in the future and pressure others to pay in order not to be at a competitive disadvantage.

Section 240.5 covers gifts to certain categories of public servants. Like Section 240.3, this section reaches conduct that should be prohibited because of its implications for undermining sound government. It also performs the function of permitting prosecution in cases where the intent to reach an agreement to influence conduct cannot be proved. Section 240.6 adds coverage of a similar situation, where a public official is privately employed to render advice or assistance on a matter that will come before him for official action.

Article 240 does not include comprehensive coverage of such matters as conflict of interest or lobbying, both of which in certain situations may compromise the proper functioning of government. These issues are regarded as beyond the scope of the Model Code because they are more appropriately treated in detailed regulatory measures that carry primarily civil sanctions. Criminal sanctions may be proper with respect to some such conduct but cannot be drafted without the regulatory details in mind.

The article, however, does deal with several other matters related to improper pressure on government. Section 240.2 deals

with threats that are designed to accomplish the purposes of bribery and with certain types of ex parte communication in judicial and administrative proceedings. Section 240.4 relates to situations where harm is actually inflicted upon a public official in retaliation for official conduct. Finally, Section 240.7 covers cases where the actor is in a position to influence official action and where money or other pecuniary benefit is offered or solicited in order to purchase such influence.

For detailed Comment to Section 240.1, *see* MPC Part II Commentaries, vol. 3, at 5.

Section 240.2. Threats and Other Improper Influence in Official and Political Matters.

(1) Offenses Defined. A person commits an offense if he:

(a) threatens unlawful harm to any person with purpose to influence his decision, opinion, recommendation, vote, or other exercise of discretion as a puhlic servant, party official or voter; or

(b) threatens harm to any public servant with purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding; or

(c) threatens harm to any public servant or party official with purpose to influence him to violate his known legal duty; or

(d) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication with purpose to influence the outcome on the basis of considerations other than those authorized by law.

It is no defense to prosecution under this Section that a person whom the actor sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

(2) Grading. An offense under this Section is a misdemeanor unless the actor threatened to eommit a crime or made a threat with purpose to influence a judicial or administrative proceeding, in which cases the offense is a felony of the third degree.

Explanatory Note for Sections 240.1–240.7 appears after Section 240.1. For detailed Comment to 240.2, *see* MPC Part II Commentaries, vol. 3, at 49.

Section 240.3. Compensation for Past Official Action.

A person commits a misdemeanor if he solicits, accepts or agrees to accept any pecuniary benefit as compensation for having, as public servant, given a decision, opinion, recommendation or vote favorable to another, or for having otherwise exercised a discretion in his favor, or for having violated his duty. A person commits a misdemeanor if he offers, confers or agrees to confer compensation acceptance of which is prohibited by this Section.

Explanatory Note for Sections 240.1–240.7 appears after Section 240.1. For detailed Comment to 240.3, *see* MPC Part II Commentaries vol. 3, at 60.

Section 240.4. Retaliation for Past Official Action.

A person commits a misdemeanor if he harms another by any unlawful act in retaliation for anything lawfully done by the latter in the capacity of public servant.

Explanatory Note for Sections 240.1–240.7 appears after Section 240.1. For detailed Comment to 240.4, *see* MPC Part II Commentaries, vol. 3, at 68.

Section 240.5. Gifts to Public Servants by Persons Subject to Their Jurisdiction.

(1) Regulatory and Law Enforcement Officials. No public servant in any department or agency exercising regulatory functions, or conducting inspections or investigations, or carrying on civil or criminal litigation on behalf of the government, or having custody of prisoners, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated.

(2) Officials Concerned with Government Contracts and Pecuniary Transactions. No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(3) Judicial and Administrative Officials. No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority, or participating in the enforcement of its decisions, shall solicit, accept or agree to accept any pecuniary benefit from a person known

to be interested in or likely to become interested in any matter before such public servant or a tribunal with which he is associated.

(4) Legislative Officials. No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in a bill, transaction or proceeding, pending or contemplated, before the legislature or any committee or agency thereof.

(5) Exceptions. This Section shall not apply to:

(a) fees prescribed by law to be received by a public servant, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise legally entitled; or

(b) gifts or other benefits conferred on account of kinship or other personal, professional or business relationship independent of the official status of the receiver; or

(c) trivial benefits incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

(6) Offering Benefits Prohibited. No person shall knowingly confer, or offer to agree to confer, any benefit prohibited by the foregoing Subsections.

(7) Grade of Offense. An offense under this Section is a misdemeanor.

Explanatory Note for Sections 240.1–240.7 appears after Section 240.1. For detailed Comment to 240.5, *see* MPC Part II Commentaries, vol. 3, at 73.

Section 240.6. Compensating Public Servant for Assisting Private Interests in Relation to Matters Before Him.

(1) Receiving Compensation. A public servant commits a misdemeanor if he solicits, accepts or agrees to accept compensation for advice or other assistance in preparing or promoting a bill, contract, claim, or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise.

(2) Paying Compensation. A person commits a misdemeanor if he pays or offers or agrees to pay compensation to a public servant with knowledge that acceptance by the public servant is unlawful.

Explanatory Note for Sections 240.1–240.7 appears after Section 240.1. For detailed Comment to 240.6, *see* MPC Part II Commentaries, vol. 3, at 76.

Section 240.7. Selling Political Endorsement; Special Influence.

(1) Selling Political Endorsement. A person commits a misdemeanor if he solicits, receives, agrees to receive, or agrees that any political party or other person shall receive, any pecuniary benefit as consideration for approval or disapproval of an appointment or advancement in public service, or for approval or disapproval of any person or transaction for any benefit conferred by an official or agency of government. "Approval" includes recommendation, failure to disapprove, or any other manifestation of favor or acquiescence. "Disapproval" includes failure to approve, or any other manifestation of disfavor or nonacquiescence.

(2) Other Trading in Special Influence. A person commits a misdemeanor if he solicits, receives or agrees to receive any pecuniary benefit as consideration for exerting special influence upon a public servant or procuring another to do so. "Special influence" means power to influence through kinship, friendship or other relationship, apart from the merits of the transaction.

(3) Paying for Endorsement or Special Influence. A person commits a misdemeanor if he offers, confers or agrees to confer any pecuniary benefit receipt of which is prohibited by this Section.

Explanatory Note for Sections 240.1–240.7 appears after Section 240.1. For detailed Comment to 240.7, *see* MPC Part II Commentaries, vol. 3, at 81.

ARTICLE 241. PERJURY AND OTHER FALSIFICATION IN OFFICIAL MATTERS

Explanatory Note for Sections 241.0–241.9

Article 241 defines perjury and a series of related offenses dealing with falsification in official matters. A considerable range of conduct is included. The article covers false statements in three separate offenses, and also speaks to the falsification of documents; false alarms; false reports to law enforcement authorities; tampering with witnesses, informants, physical evidence, and public records; and impersonating a public servant.

The basic false statement offense is perjury, defined in Section 241.1(1). Perjury is graded as a felony of the third degree and is limited to material false statements made under oath or equivalent affirmation in an official proceeding, as that term is defined in Section 240.0(4). The prescribed culpability towards falsity is that the actor not hold an affirmative belief in the truth of the statements made, i.e., it is sufficient if the actor believes the