TEXAS PENAL CODE

A Proposed Revision

by the

State Bar Committee on
Revision of the Penal Code

Final Draft

October 1970

Printed and Distributed as a Public Service

by

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Publisher of Vernon's Texas Statutes and Codes Annotated

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Comment, criticism, and suggestion on the proposed code are welcome, and should be addressed to: Staff Director, State Bar Committee on Revision of the Penal Code, 2500 Red River, Austin, Texas 78705

COMMITTEE FOREWORD

The Texas Legislature is represented by Senator Charles F. Herring of Austin, who serves as vice chairman of the bar committee, and by Representative Jim Nugent of Kerrville.

The main committee's two advisory committees, on corrections and law enforcement, include among others Dr. George Beto, director of the Department of Corrections, and Mr. C. Glenn Conner, formerly an inspector with the Department of Public Safety and now a member of the Criminal Justice Council.

Several members of the project also serve on the State Bar Committee for Study of the Code of Criminal Procedure. Judges Woodley and Onion, Hume Cofer, and Earl Smith have already been mentioned. In addition, Luther Jones of Corpus Christi and Phil Burleson of Dallas serve both the project and the criminal procedure committee.

All project members are identified at the end of this foreword.

Objectives of the Revised Penal Code

The major objectives of the proposed Revised Penal Code, broadly stated, are: (1) Consolidate, simplify, and clarify the substantive law of crimes. (2) Modernize a Penal Code designed for the preindustrialized, rural, and underpopulated Texas society of a century ago. (3) Identify and proscribe, with as much precision as possible, all significantly harmful criminal conduct. (4) Rationally grade offenses, according to the harm they cause or threaten, and sensibly apportion the sentencing authority between the judiciary and correctional system. (5) Codify the general principles of the penal law. (6) Collect in a single code all significant penal law, transferring to more appropriate locations in the statutes regulatory and similar laws that merely employ a penal sanction.

Defects in the Present Law

The past 114 years, following enactment of the Texas Penal Code, have witnessed significant changes in our society—the transformation from an agricultural to an industrialized economy, the move of three-fourths of all Texans from rural to urban communities, a civil war and two world wars, an increasing crime rate, to mention only a few—but our penal law has not kept pace. Space does not permit an exhaustive list of defects in the present code, but some examples of them by category will serve to outline the scope of the revision project in terms of the reform objectives listed above.

Duplication and Complexity

Partly because of its age, partly because of the nature of our legislative process, and partly because of the recent and increasing

popularity of the criminal sanction, the Texas Penal Code abounds with duplication. Essentially the same criminal conduct is made the subject of many different offenses, depending on the identity of the offender, the identity of the victim, or the nature of the interest harm. Theft, for example, rates 60 articles in the Penal Code, and official misconduct 57. The draft code consolidates and restates the theft offense in 10 sections typed on 8 pages. Three sections in the draft code deal with official misconduct on the theory that each type of public official doesn't require a separate statute. Malicious mischief rated 37 articles in the Penal Code until 1969 when the legislature added a 38th; the draft code deals with the problem in a single section. Bribery, which requires 35 articles now, is consolidated in a single section. Escape presently requires 27 articles, which depend for their application on the location escaped from and the identity of the escapee, but the draft code defines escape in two sections. Additional examples of duplication are numerous, but those given demonstrate the great reduction in the sheer bulk of our penal law accomplished by the draft code.

Consolidation also clarifies and simplifies the law. The consolidated theft offense, for example, abolishes the ancient common-law distinctions, mostly based on the method of acquiring property, that have plagued Texas for more than a century. The present separate offenses of theft, theft by false pretext, conversion by bailee, theft from the person, shoplifting, acquisition by theft, swindling, embezzlement, extortion, receiving or concealing embezzled property, and receiving or concealing stolen property—all of these separate offenses of the present law are combined and restated as a single offense: theft.

Another plague of the common-law eradicated by the draft code is the cobweb of distinctions dealing with the responsibility of parties to crime. The label presently pasted on a party—principal, accomplice, accessory—makes a critical difference, and so far as the committee can determine, Texas is the only jurisdiction in which it still makes so much difference. Of course it shouldn't: if a defendant intends to promote or assist in the commission of an offense and solicits, directs, aids, or attempts to aid another in committing the offense, he ought to be criminally responsible for the offense—and he will be under the draft code—irrespective of whether he was present when the offense was committed, etc. He will be charged as a party—he won't have to be labeled—and if the evidence shows him less blameworthy than other parties, the sentencing and correctional authorities can take this into account.

Overcriminalization

Attempting to solve social problems with the criminal sanction, and making a crime out of everything we don't like, are fairly recent

explained what the statute did and why it changed Texas law, if it did. Reports usually required six to nine months to prepare, and before a report was submitted to the committee it was reviewed first by the staff and then by the reporters as a group. Thus, when the committee received a report, policy issues were sharply focused, alternative solutions and their consequences clearly set out, and statutory language painstakingly refined.

Committee meetings convened to consider reports, of which there have been 20 to date, lasted at least a day and a half, and sometimes two days; at the meetings committee members subjected the reports and reporters to a grueling review that often resulted in substantial revision of the draft statutes proposed. Meeting discussions were tape-recorded and minutes of the meeting prepared summarizing the discussion and setting out the revisions directed by the committee. Finally, detailed explanatory comments were prepared for each approved section of the draft code.

Finances

The state, the State Bar of Texas, and many private foundations have contributed generously to finance this law reform project.

The Texas Legislature appropriated $226,988 to the Texas Legislative Council to staff the project, and the Texas Criminal Justice Council granted $23,000 for general support.

The State Bar of Texas allocated $41,582 to the State Bar Committee on Revision of the Penal Code.

And the following private foundations donated $74,000 to finance the necessary research for the project:

Brown Foundation
James R. Dougherty, Jr. Foundation
Fair Foundation
William Stamps Parish Fund
Fondren Foundation
Haas Foundation
Hogg Foundation for Mental Health
Houston Endowment
Moody Foundation
Sears Foundation
Strake Foundation
Texas Instruments Foundation

Finally, West Publishing Company, compiler of the Texas statutes, donated a substantial sum in the form of law books used by the project staff, and has published and distributed the draft code as a public service.

Without all of this financial assistance a law reform project of this magnitude would not have been possible, and all connected with the project are deeply grateful to the contributors.

Conclusion

The State Bar Committee on Revision of the Penal Code does not offer this draft as a panacea for the criminal law crisis now plaguing our nation and state. The penal law is but one of several important tools necessary to govern society, and its reform, although essential, is by no means sufficient. The draft code is offered, however, as the logical beginning of what we hope will be a continuing law reform effort.

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ABBREVIATIONS

As amended	As amended or enacted by the Revised Penal Code act
ABA Appellate Review Standards	American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Approved Draft 1968)
ABA Sentencing Standards	American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968)
Annals	The Annals of the American Academy of Political and Social Science (Philadelphia)
Cal.Prop.Pen.Code	California Joint Legislative Committee for Revision of the Penal Code (Tentative Draft Nos. 1, 2, 3, 1967, 1968, 1969)
C.C.P.	Vernon's Texas Code of Criminal Procedure Annotated.
Crim. L.Q.	Criminal Law Quarterly (Toronto, Canada: Canada Law Book, Ltd.)
Fed.Prop.Crim.Code	National Commission on Reform of Federal Criminal Laws, Federal Criminal Code (Study Draft 1970)
Hawaii Prop.Pen.Code	Judicial Council of Hawaii, Penal Law Revision Project, Hawaii Penal Code (Proposed Draft 1970)
Mich.Prop.Pen.Code	Michigan State Bar Committee for the Revision of the Criminal Code, Revised Criminal Code (Final Draft 1967)
Model P.C.	American Law Institute, Model Penal Code (Proposed Official Draft 1962)
Model Prearraignment Code	American Law Institute, A Model Code of Prearraignment Procedure (Tentative Draft No. 2, 1969)
Model Sentencing Act	National Council on Crime and Delinquency, Model Sentencing Act (1963)

ABBREVIATIONS

N.H.Prop.Crim.Code	New Hampshire Commission to Recommend Codification of Criminal Laws, Proposed Criminal Code (1969)
N.Y.Prop.Crim.Proc.Law	New York Temporary Commission on Revision of the Penal Law and Criminal Code, Proposed Criminal Procedure Law (1967)
Pa.Prop.Crim.Code	Pennsylvania Joint State Government Commission, Proposed Crimes Code (1967)
Penal Code	Vernon's Texas Penal Code Annotated
R.C.P.	Vernon's Texas Rules of Civil Procedure Annotated
R.C.S.	Vernon's Texas Revised Civil Statutes Annotated
R.P.C.	Texas Revised Penal Code (Final Draft 1970)
Transfer	To be relocated outside the Penal Code

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TEXAS PENAL CODE

TITLE 1. INTRODUCTORY PROVISIONS

Chapter
1. General Provisions.
2. Burden of Proof.
3. Multiple Prosecutions and Double Jeopardy.

[Chapters 4 and 5 reserved for expansion]

TITLE 2. GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

6. Culpability Generally.
7. Criminal Responsibility for Conduct of Another.
8. General Defenses to Criminal Responsibility.
9. Justification Excluding Criminal Responsibility.

[Chapters 10 and 11 reserved for expansion]

TITLE 3. PUNISHMENTS

12. Punishments.

[Chapters 13 and 14 reserved for expansion]

TITLE 4. INCHOATE OFFENSES

15. Preparatory Offenses.
16. Criminal Instruments.

[Chapters 17 and 18 reserved for expansion]

TITLE 5. OFFENSES AGAINST THE PERSON

19. Criminal Homicide.
20. Kidnapping and False Imprisonment.
21. Sexual Offenses.
22. Assaultive Offenses.

[Chapters 23 and 24 reserved for expansion]

TITLE 6. OFFENSES AGAINST THE FAMILY

25. Offenses Against the Family.

[Chapters 26 and 27 reserved for expansion]

TITLE 7. OFFENSES AGAINST PROPERTY

28. Arson and Other Property Damage or Destruction.

29. Robbery.

30. Burglary and Criminal Trespass.

31. Theft.

32. Fraud.

[Chapters 33–35 reserved for expansion]

TITLE 8. OFFENSES AGAINST THE STATE AND PUBLIC ADMINISTRATION

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43. Public Indecency.

[Chapters 44 and 45 reserved for expansion]

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TITLE 1. INTRODUCTORY PROVISIONS

CHAPTER 1. GENERAL PROVISIONS

Section
1.01. Short Title.
1.02. Objectives of Code.
1.03. Effect of Code.
1.04. Territorial Jurisdiction.
1.05. Construction of Code.
1.06. Computation of Age.
1.07. Code Definitions.

Section 1.01. Short Title

This code shall be known and may be cited as "Penal Code."

Historical Note

Derivation:
C.C.P. art. 1.01

Cross References

Effective date of code, see § — of code act.

Committee Comment

Although the present Penal Code does not have a short title article, it was labeled "Penal Code" in the 1925 recodification act and that title has been used ever since. This section preserves the customary title and, since every article of the present Penal Code is either repealed or transferred elsewhere by this act, there will be only one "Penal Code," i. e., the Revised Penal Code.

§ 1.02. Objectives of Code

The general objectives of this code are:

(1) to proscribe and prevent conduct that unjustifiably and inexcusably causes or threatens harm to individual, property, or public interests for which protection through the criminal law is appropriate;

(2) to give fair warning of what conduct is prohibited, and to guide and limit the exercise of official discretion in law enforcement, by adequately defining the act and culpable mental state that constitute an offense;

(3) to give fair warning of the consequences of violation, and to guide and limit the exercise of official discretion in punishment, by grading of offenses;

(4) to prescribe penalties that are proportionate to the seriousness of offenses, but that permit recognition of differences in rehabilitation possibilities among individual offenders;

(5) to safeguard conduct that is without guilt from condemnation as criminal;

(6) to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 1.05
Fed.Prop.Crim.Code § 102

Cross References

"Conduct" defined, see § 1.07.
Construction of code, see § 1.05.

Committee Comment

This section replaces and elaborates Penal Code arts. 1 and 2; it expresses the legislative philosophy on which the Revised Penal Code is founded in the form of a statement of generally recognized objectives of the substantive criminal law. See generally Wechsler, Codification of Criminal Law in the United States: The Model Penal Code, 68 Colum.L.Rev. 1425 (1968). Accordingly, the section provides an overall focus or sense of direction for those who administer and interpret the code.

In Subdivision (1) attention is specifically directed to the basic goal of the penal law, the prevention of harm, without fixing any priority among the means of prevention, which include deterrence of potential criminals and reinforcement of normal instincts to refrain from harmful behavior, incapacitation of persons who are dangerously disposed to engage in criminal conduct, and correction and rehabilitation of those who have such disposition. Subdivisions (2)–(6), while related to the prevention goal, also reflect fundamental considerations of justice and fairness inherent in a society that values individual liberty.

§ 1.03. Effect of Code

(a) Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute.

(b) The provisions of Titles 1–3 (general principles of penal law) of this code apply to offenses defined by other laws unless this code provides otherwise.

(c) This code does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil suit for conduct this code defines as an offense, and the civil injury is not merged in the offense.

Historical Note

Derivation:

Subsec. (a): Penal Code art. 3
Subsec. (b): N.Y.Rev.Pen.Law § 5.05(2); Model P.C. § 1.05(2)
Subsec. (c): Ill.Stat.Ann. ch. 38, §§ 1-3, 1-4

Cross References

"Conduct" defined, see § 1.07.
Effective date of code, see § —— of code act.
General principles of penal law:
- Burden of proof, see ch. 2.
- Criminal responsibility for conduct of another, see ch. 7.
- Culpability generally, see ch. 6.
- General defenses, see ch. 8.
- Justification, see ch. 9.
- Multiple prosecutions and double jeopardy, see ch. 3.
- Punishments, see ch. 12.

Justification, effect on civil liability, see § 9.05.
"Law" defined, see § 1.07.
Preemption by code:
- Arrest, see C.C.P. art. 14.07, as amended.
- Arson, see § 28.07.
- Burglary, see § 30.04.
- Criminal instruments, see § 16.02.
- Criminal mischief, see § 28.07.
- Disorderly conduct, see § 42.12.
- Drugs, see § 48.16.
- Family offenses, see § 25.08.
- Gambling, see § 47.08.
- Obstructing governmental operation, see § 38.13.
- Prostitution, see § 43.31.
- Obscenity, see § 43.31.
- Sexual offenses, see § 21.13.
- Stop and frisk, see C.C.P. art. 14.07, as amended.
- Theft, see § 31.11.
- Trespass, see § 30.04.

Punishments, other remedies preserved, see § 12.05.
"Rule" includes regulation, see § 1.07.
Saving provisions, see § —— of code act.

Committee Comment

Principle of Legality

Subsection (a) refines the present law's prohibition against "unwritten" penal law, Penal Code art. 3, to codify the principle of legality. The subsection recognizes that governmental bodies other than the legislature possess authority to define offenses—penal or-

dinances and offenses created by state regulatory agencies are examples—and that when not preempted by this code and otherwise valid these offenses are fully enforceable.

General Principles

The general principles of penal law, for the first time comprehensively treated and codified in this state, are designed to provide a framework for the interpretation and application of every law now in effect or later enacted that employs a penal sanction, whether or not it is located in this code. The proviso to Subsection (b), excepting application of the general principles when this code so provides, accommodates provisions like Section 12.05 (sentencing combinations), which authorizes penalties such as license revocation and injunction in addition to the punishments provided in Chapter 12.

Civil Remedies

Subsection (c) codifies Texas case law originating in 1883 and still consistently followed, see, e. g., State v. Benavide, 365 S.W.2d 638 (Tex.1963); Shook v. Peters, 59 Tex. 393 (1883).

Preemption

Governmental bodies other than the legislature are authorized to create penal offenses. For example, Tex.Const. art. XI, § 5, vests home rule cities with general legislative authority, and R.C.S. art. 1015 specifically authorizes these cities to enact penal ordinances. Counties possess a more limited authority to create offenses, e. g., Tex.Const. art. IX, § 1-A; R.C.S. art. 5415d, § 8, as do some state regulatory agencies, e. g., Penal Code arts. 666—17, 666—41 (Alcoholic Beverages Commission); R.C.S. art. 7621d—1, § 4.01 (Water Quality Board). Many laws employing a penal sanction enacted by governmental subdivisions and agencies, especially those enacted by municipalities, overlap, duplicate, and conflict with state penal law. This code, however, creates a comprehensive law of crimes and punishments, uniformly applicable statewide, and preemption sections in certain chapters (see the cross references column) prohibit enforcement of existing, as well as enactment of new, ordinances, orders, and regulations that affect conduct covered (either by inclusion or omission) in this code.

Home rule cities may not adopt ordinances "inconsistent with" the constitution or general laws of the state, Tex.Const. art. XI, § 5. Thus, an El Paso ordinance punishing failure to yield right-of-way was invalidated because its penalty conflicted with that prescribed by the statewide traffic law, El Paso Electric Co. v. Collings, 23 S.W.2d 295 (Tex.Comm'n App.1930, jdgmt. adopted); see also City of Beaumont v. Fall, 291 S.W. 202 (Tex.1927); Ex parte Seals, 255 S.W.2d 215 (Tex.Crim.App.1952).

When both a local ordinance and general state law deal with the same area, there is often the question of whether both may coexist although the ordinance does not conflict with the general law. Oc-

casionally a general law expressly prohibits local legislation in the area it regulates, e. g., R.C.S. arts. 6701d, § 169 (speed law); 7078 (occupation taxes). Usually, however, the courts must decide whether a particular ordinance is "inconsistent with" state law in this sense, and they have used the preemption doctrine to decide. See generally Ruud, Legislative Jurisdiction of Texas Home Rule Cities, 37 Texas L.Rev. 682 (1959).

In Jere Dairy, Inc. v. City of Mt. Pleasant, 417 S.W.2d 872 (Tex.Civ.App.—Texarkana 1967, writ ref'd n. r. e.), for example, an ordinance requiring three milk deliveries a week was invalidated because it constituted an unconstitutional "entry into the field occupied exclusively by the state statutes and regulations pertaining to Grade A pasteurized milk" although the statutes did not deal with deliveries. On the other hand, in Janus Films, Inc. v. City of Fort Worth, 354 S.W.2d 597 (Tex.Civ.App.—Fort Worth 1962, writ ref'd n. r. e.), a different court of civil appeals sustained a motion picture antiobscenity licensing ordinance in the face of a state statute exempting from the obscenity ban all films legally in interstate commerce or imported. These and similar cases evidence no consistent rationale for determining when state law preempts local legislation, and it is thus essential for this code to specify when governmental subdivisions and agencies may and may not regulate conduct by penal sanction.

Not every chapter in this code contains a preemption section. Its absence from some chapters, e. g., 8 (general defenses), 9 (justification), 19 (criminal homicide), recognizes that governmental subdivisions and agencies have no legitimate interest in legislating on the general principles of penal law or the serious crimes. On the other hand, its absence from other chapters, e. g., 46 (weapons), 32 (fraud), recognizes that municipalities in particular have a legitimate role to play in regulating firearms and deceptive business practices, for example, which they are free to do so long as the regulation does not conflict with any provision of this code.

§ 1.04. Territorial Jurisdiction

(a) This state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which he is criminally responsible if:

(1) either the conduct or a result that is an element of the offense occurs within this state; or

(2) the conduct outside this state constitutes an attempt to commit an offense within this state; or

(3) the conduct outside this state constitutes a conspiracy to commit a felony within this state, and an act in furtherance of the conspiracy occurs within this state; or

(4) the conduct within this state constitutes an attempt, solicitation, or conspiracy to commit, or establishes criminal responsibility for the commission of, an offense in another jurisdiction that is also an offense under the law of this state.

(b) If the offense is criminal homicide, a "result" is either the physical impact causing death or the death itself. If the body of a criminal homicide victim is found in this state, it is presumed that the death occurred in this state. If death alone is the basis for jurisdiction, it is a defense to the exercise of jurisdiction by this state that the conduct that constitutes the offense is not made criminal in the jurisdiction where the conduct occurred.

(c) An offense based on an omission to perform a duty imposed on an actor by a statute of this state is committed within this state regardless of the location of the actor at the time of the offense.

(d) This state includes the land and water (and the air space above the land and water) over which this state has power to define offenses.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 1-5

Cross References

"Act" defined, see § 1.07.
Attempt, see § 15.01.
Complicity, see ch. 7, subch. A.
"Conduct" defined, see § 1.07.
Conspiracy, see § 15.02.
Criminal homicide, see ch. 19.
Criminal responsibility of corporation or association, see ch. 7, subch. B.
Criminal responsibility for omission, see § 6.03.
Defense explained, see § 2.03.
Double jeopardy, see ch. 3.
"Element of offense" defined, see § 1.07.
Extradition of fugitive, see C.C.P. art. 51.13; 18 U.S.C.A. § 3182.
"Law" defined, see § 1.07.
"Omission" defined, see § 1.07.
Presumption explained, see § 2.05.
Solicitation, see § 15.03.
Venue, see C.C.P. ch. 13, as amended.

Committee Comment

Section 1.04 departs from present law, which limits jurisdictional provisions to specific offenses, by establishing a broad jurisdictional base for the prosecution in Texas of offenses involving persons, property, and public interests in this state. See generally George, Extraterritorial Application of Penal Legislation, 64 Mich.L.Rev. 609 (1966). The section includes all jurisdictional provisions in present law and in some instances (e. g., prosecution for homicide when the body is found in the state) broadens that

jurisdiction. The primary policy considerations underlying this section are (1) the state seeking to prosecute for an offense should have a substantial interest in or connection with the criminal event, and (2) law enforcement should be facilitated by plugging gaps in the existing law when a course of conduct goes beyond the boundaries of a single state. A basic tenet of Section 1.04 is that an actor's location within or without the state when the offense is committed and his legal relation to the offense (perpetrator, non-perpetrating party, or facilitator) are immaterial for jurisdictional purposes if the formal requisites of the statute are met. The section's statement of jurisdiction is constitutionally sound, given a substantial state interest and no conflict with federal law, see Skiriotes v. Florida, 61 S.Ct. 924, 313 U.S. 69 (1941); Strassheim v. Daily, 31 S.Ct. 558, 221 U.S. 280 (1911).

Subsection (a)(1) combines subjective and objective territorial principles presently embodied in specific statutes scattered throughout the Penal Code and Code of Criminal Procedure, e. g., Penal Code arts. 1009, 1628–1629; C.C.P. arts. 13.06–13.08. Jurisdiction is conferred over offenses commenced within the state but completed without (subjective) and for offenses commenced without the state but consummated within (objective).

Subsection (a)(2) makes clear that this state has jurisdiction when an actor initiates conduct elsewhere with the intention of achieving an objective in Texas, which is an offense under Texas law, but fails for reasons beyond his control. No existing statute covers out-of-state attempts, although C.C.P. art. 13.01 may be capable of construction to cover them.

Subsection (a)(3) alters existing law, Penal Code art. 1629, only slightly by requiring an act (which includes speech) in furtherance of the conspiracy to occur within the state before jurisdiction over an out-of-state conspiracy is conferred on Texas courts. The act requirement is included to ensure that there be some actual connection, however minimal, with the forum state of Texas, because conspiracy, as distinguished from attempt, normally involves a less immediate threat and may be formed far from the place of the intended crime.

Subsection (a)(4) is designed to discourage persons desiring to violate the law of another jurisdiction from seeking a privileged haven in this state. It broadens the scope of existing law, Penal Code art. 1628, by extending application to attempt, solicitation, and complicity ("criminal responsibility for the commission of") as well as to conspiracy—the only offense mentioned in art. 1628. Furthermore, Subdivision (4), unlike art. 1628, applies to any offense and not just to a felony, and it adds to the present law the requirement that the offense in the other jurisdiction also constitute an offense in this state.

Subsection (b) accords special treatment to the offense of criminal homicide, which would otherwise be controlled by Subsection

(a)(1), because of the serious nature of the crime, the difficulty of detection, and the fact that the act causing the death and death itself may occur far apart geographically. Present law, C.C.P. arts. 13.06–13.08, does not confer jurisdiction on this state when the injury is inflicted out of state by a person without the state and the victim dies within this state. To close the jurisdictional gap that sometimes arises, Subsection (b) provides that Texas can assume the responsibility for prosecuting a multijurisdictional homicide if the death or injury causing death occurs in Texas. Thus, when Texas is known to be the place of death but the location of the fatal conduct cannot be determined, the offense can be prosecuted by this state. When death within the state is the sole basis for jurisdiction, a constitutional problem might arise if the conduct causing death was not unlawful in the state where it transpired. For example, M shoots and mortally wounds his wife's paramour in State X under circumstances justifying the homicide; the victim dies in a hospital in a neighboring state which asserts jurisdiction on the basis of the death alone and convicts M of manslaughter. To obviate constitutional objection and prevent this undesirable result, Subsection (b) requires that the fatal conduct be criminal in the state where it occurred if jurisdiction is asserted on the basis of death alone. Formulated as a defense, this limitation requires the defendant to introduce evidence to support an ouster of jurisdiction, thereby relieving the state of the almost insuperable burden of proof in cases in which only the defendant knows where the fatal conduct took place. The statutory presumption created by Subsection (b) also relieves the state of the heavy burden of establishing place of death when there is no affirmative proof of that fact and the victim's body is found in Texas. The presumption is of course rebuttable, see Section 2.05, and appears to satisfy the constitutional requirement of a "rational connection" between the fact proved and the fact presumed, Tot v. United States, 63 S.Ct. 1241, 319 U.S. 463, 467 (1943); see also Leary v. United States, 89 S.Ct. 1532, 395 U.S. 6 (1969).

The usual application of Subsection (c) will probably be in the field of domestic relations (e. g., nonsupport), but it is not so limited. Present law provides specifically that the offense of wife and child desertion or nonsupport is deemed committed in the county of the wife's residence, Penal Code art. 603; see Noodleman v. State, 170 S.W. 710 (Tex.Crim.App.1914); see also C.C.P. art. 13.-17, as amended (venue for criminal nonsupport).

Subsection (d) is a precautionary restatement of the concept of territory used in applying the territorial principle of criminal jurisdiction.

§ 1.05. Construction of Code

(a) The rule that a penal statute is to be strictly construed does not apply to this code. The provisions of this code shall be construed

according to the fair import of their terms, to promote justice and effect the objectives of the code.

(b) Unless a different construction is required by the context, Sections 2.01, 2.02, 2.04, 2.05, and 3.01–3.12 of the Code Construction Act (Article 5429b—2, Vernon's Texas Civil Statutes) apply to the construction of this code.

Historical Note

Derivation:
Subsec. (a): N.Y.Rev.Pen.Law § 5.00
Subsec. (b): New

Cross References

Code Construction Act, see R.C.S. art. 5429b-2:
- Captions, see § 3.04.
- Computation of time, see § 2.04.
- Conflicts, see § 3.05.
- Enrolled bill, see § 3.09.
- Gender, see § 2.02.
- Legislative intent, see §§ 3.01, 3.03.
- Number, see § 2.02.
- Prospective operation, see § 3.02.
- References, see § 3.07.
- Repeals, see § 3.10.
- Saving provisions, see § 3.11.
- Series, see § 2.05.
- Severability, see § 3.12.
- Special provisions, see § 3.06.
- Tense, see § 2.02.
- Uniform acts, see § 3.08.
- Word usage, see § 2.01.

Code definitions, see § 1.07.
Computation of age, see § 1.06.
Effect of code, see § 1.03.
Objectives of code, see § 1.02.

Committee Comment

Texas has required that penal laws be construed "according to the plain import" of their terms, "without regard to the distinction usually made between the construction of penal laws and laws upon other subjects," since 1856, see Penal Code art. 7, but has never expressly abolished the common law rule that penal laws be construed strictly. Subsection (a) restates present art. 7 and expressly abolishes the rule of strict construction, a rule seldom cited and then only to support a decision already reached on other grounds.

Subsection (b) applies to the Revised Penal Code relevant provisions of the Code Construction Act. The construction act, which derives from the Uniform Statutory Construction Act promulgated by the National Conference of Commissioners on Uniform State Laws, was enacted in 1967 to guide the drafting and interpretation

of codes prepared as part of the state's statute recodification program. The Revised Penal Code was drafted in light of the construction act sections adopted by Subsection (b).

The committee comments throughout the code explain the objectives sought and sometimes the competing policy issues considered by the committee in drafting the code provisions. As the comments will accompany the code through the legislature, they supply persuasive evidence of legislative intent as to those provisions unchanged during legislative consideration.

§ 1.06. Computation of Age

A person attains a specified age on the day of the anniversary of his birthdate.

Historical Note

Derivation:
New

Cross References

Age:
Compelling prostitution, see § 43.06.
Death penalty, see § 12.46.
Drugs, see ch. 48.
False imprisonment, see § 20.02.
Firearm sale, see § 46.04.
Juvenile jurisdiction, see § 8.06.
Kidnapping, see § 20.01.
Obscenity, see § 43.24.
Sexual offenses, see ch. 21.

Committee Comment

The victim's age sometimes determines the severity of punishment under this code, and occasionally criminal responsibility itself, so this section prescribes the method for determining a given age. Under this section, for example, a female born July 10, 1954 is legally capable of consenting to sexual intercourse (see Section 21.09) on July 10, 1970, the date she attains her 16th year. Similarly, a male born July 15, 1952, who commits murder on July 14, 1970, is not subject to capital punishment under Section 12.46 since he was younger than 18 years when he committed the murder.

§ 1.07. Code Definitions

(a) In this code, unless the context requires a different definition:

(1) "Act" means a bodily movement, whether voluntary or involuntary, and includes speech.

(2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.

(3) "Agency" includes authority, board, bureau, commission, committee, council, department, district, division, and office.

(4) "Another" means a person other than the actor.

(5) "Association" means a government or governmental subdivision or agency, trust, partnership, or two or more persons having a joint or common economic interest.

(6) "Benefit" means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested.

(7) "Bodily injury" means physical pain, illness, or any impairment of physical condition.

(8) "Conduct" means an act or omission and its accompanying mental state.

(9) "Consent" means assent in fact, whether express or apparent.

(10) "Conviction" means a final adjudication by a court of competent jurisdiction that a defendant committed an offense, although the imposition or execution of sentence was suspended, if the judgment has not been reversed or set aside, the time for appealing the judgment has expired, and the defendant has not been pardoned on the ground of innocence. There is deemed to be no conviction if imposition of defendant's sentence was probated and he successfully complied with the conditions and period of probation. Judgments of guilt of offenses arising out of the same criminal episode obtained in a single criminal action are deemed to constitute a single conviction.

(11) "Criminal negligence" is defined in Section 6.05 (culpable mental states).

(12) "Deadly weapon" means:

(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or

(B) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

(13) "Effective consent" includes consent by any person legally authorized to act for the person whose consent is in issue. Consent is not effective if:

(A) induced by force, threat, or fraud; or

(B) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable decisions; or

(C) given solely to detect the commission of an offense.

(14) "Element of offense" means:

(A) the conduct, circumstances surrounding the conduct, or result of the conduct described in the definition of the offense; and

(B) the culpable mental state required; and

(C) an exception to the offense; and

(D) a defense as to which supporting evidence has been admitted.

(15) "Felony" means an offense so designated by law or punishable by death or imprisonment in a penitentiary for more than one year.

(16) "Firearm" means any device designed, made, or adapted to expel a projectile by the action of springs or expanding gas, or any device readily convertible to that use.

(17) "Government" means the state; a county, municipality, or political subdivision of the state; or any branch or agency of the state, a county, municipality, or political subdivision.

(18) "Harm" means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested.

(19) "Individual" means a human being who has been born and is alive.

(20) "Intentional" is defined in Section 6.05 (culpable mental states).

(21) "Knowing" is defined in Section 6.05 (culpable mental states).

(22) "Law" means the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute.

(23) "Misdemeanor" means an offense so designated by law or punishable by fine, by imprisonment in jail, or by both fine and imprisonment in jail.

(24) "Oath" includes affirmation.

(25) "Omission" means failure to act.

(26) "Peace officer" means a public servant who has a duty imposed by statute:

(A) to maintain public order; or

(B) to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses; or

(C) to investigate the commission or suspected commission of offenses.

(27) "Penal institution" means a place designated by law for confinement of persons arrested for, charged with, or convicted of an offense.

(28) "Person" means an individual, corporation, or association.

(29) "Possess" means to exercise actual care, control, and management over a thing.

(30) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following even if he has not yet qualified for office or assumed his duties:

(A) an officer, employee, or agent of government; or

(B) a juror or grand juror; or

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; or

(D) an attorney at law or notary public when he is participating in performing a governmental function; or

(E) a candidate for nomination or election to public office; or

(F) a person who is performing a governmental function under claim of right although he is not legally qualified to do so.

(31) "Reasonable belief" means a belief not formed recklessly or with criminal negligence.

(32) "Reckless" is defined in Section 6.05 (culpable mental states).

(33) "Rule" includes regulation.

(34) "Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

(35) "Swear" includes affirm.

(36) "Unlawful" means criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege.

(b) The definition of a term in Subsection (a) applies to each grammatical variation of the term.

Committee Comment

The terms defined in Subsection (a) are used throughout the Revised Penal Code and each use is cross-referenced to this section.

Although most of the terms are discussed in the comment to the sections in which they are used, a few general comments about some of them are here desirable.

Act is defined to include speech because several offenses in the code punish certain types of speech, e. g., Sections 22.01 (threat), 42.01 (disorderly conduct), 42.06 (false alarm or report).

Actor is used instead of defendant in defining offenses because a person is not technically a defendant until charged.

The definition of *conviction* tracks that of present law with one exception: a successfully probated sentence is excluded from the definition, whether or not its underlying judgment of guilt was set aside, although present law appears to treat it as a conviction, C. C.P. art. 42.12, § 6; cf. art. 37.07, § 3; Valley v. State, 448 S.W.2d 474 (Tex.Crim.App.1969).

The definition of *association* determines the outer reach of the application of criminal sanctions to organizations; it derives from Business & Commerce Code § 1.201(28) and N.Y.Rev.Pen.Law § 10.00(7). An association is criminally responsible only if the statute defining the offense clearly so provides and the association's agent commits the criminal conduct on behalf of the association and within the scope of his office or employment. See Section 7.23 and comment.

A "government or governmental subdivision or agency" is included within the definition of association because of the possibility that it may be necessary to impose a criminal stigma to persuade the responsible officials to prevent the commission of wrongful acts. An example is the persistent pollution of a stream by an irrigation district or small city. It is contemplated that criminal prosecution of a government or governmental subdivision or agency will be used only as a last resort to ensure compliance with applicable law. Both New York and Illinois include governmental agencies within the definition of "person" in their revised penal codes, and some courts have held that local governmental units may be held criminally responsible, e. g., City of Ludlow v. Commonwealth, 247 Ky. 166, 56 S.W.2d 958 (1933). Some offenses in the present Texas Penal Code specifically contemplate holding governmental agencies criminally responsible, e. g., art. 696a.

A "joint or common economic interest" includes relations such as investment clubs, which may not precisely fit into any other legal categories. Organizations purportedly formed to raise money for some specified charities may also fall into this category.

An estate is not included within the definition, even though a trust is included, on the ground that the creation of a trust is voluntary and a trust may be used to conduct a business in lieu of a corporation or a partnership.

An entirely objective definition of *deadly weapon*, such as "anything readily capable of causing death or serious bodily injury," is

undesirable because it would be too broad for fair application. The definition adopted represents an amalgamation of subjective and objective standards. An objective standard is posited in Subdivision (A) to determine whether a thing is a "weapon" in the ordinary sense, and *firearms* are made deadly weapons per se. Subdivision (B) applies a more subjective standard to determine the character of things not designed as weapons but possibly lethal when used in a particular manner (e. g., a carving knife). Such an instrument, to be classed as a deadly weapon, must "in the manner of its use or intended use" be capable of inflicting serious bodily harm.

This definition is similar to that presently applied under Penal Code art. 1147(7), which makes use of a deadly weapon aggravated assault: a deadly weapon is "one which, from the manner used, is calculated or likely to produce death or serious bodily injury," Harris v. State, 162 S.W. 1150, 1151 (Tex.Crim.App.1914), and a pistol, for example, is a deadly weapon per se, Lofton v. State, 128 S. W. 384 (Tex.Crim.App.1910). However, present law further distinguishes between "dangerous" and "prohibited" weapons; under Penal Code art. 1141 use of a dangerous weapon may be assault, but assault with a prohibited weapon is made a felony by Penal Code art. 1151. The new definition simplifies present law by eliminating these confusing and unnecessary distinctions.

Element of offense is a shorthand expression for the issues relevant to guilt or innocence the state must prove to convict. The term does not include every issue as to which the state or defendant has a proof burden—e. g., jurisdiction, affirmative defense—because only those listed in the definition are material to the term's use in the code. Thus, although the state must prove the defendant had the required culpable mental state with respect to the proscribed act, it is not required to prove he knew the trial court would have jurisdiction over his offense—although jurisdiction is of course part of the state's burden of proof in every case, see Section 2.01.

Unlike present law, *peace officer* is defined functionally, in terms of employment as a *public servant* and statutory duty to maintain law and order. The general law presently enumerates certain office holders as peace officers, e. g., sheriff, city policeman, constable, city arson investigator, C.C.P. art. 2.12, and other scattered statutes list specific public servants as peace officers, e. g., Penal Code art. 978f—5c (parks and wildlife); R.C.S. art. 7652a, subsec. 3 (water improvement district). The new definition avoids the problems of enumeration and focuses instead on the nature and function of the office. Thus, park rangers are peace officers because Penal Code art. 978f—5c authorizes their commissioning and requires them to enforce the law on property administered by the Parks and Wildlife Department, but private citizens specially commissioned by a police chief are not peace officers because not public servants and not obligated by statute to enforce the law.

C.C.P. art. 2.12 is amended, incidentally, to track this code's definition of peace officer.

The term *person* plays a variety of roles throughout the code. As in the present law, Penal Code art. 22, it describes whose bodily, property, and other interests are protected. Beyond that, it serves as a general descriptor for operation of the code, identifying, for example, the beneficiary of a defense and subject of an exception. However, one or more of the terms "individual," "corporation," or "association" is used in the accusatory language of offenses in the code, rather than the shorthand "person," to make clear that unincorporated associations, for example, are or are not covered by the definition of the offense.

"Corporation" includes profit and nonprofit corporations, professional associations, and joint stock companies.

The definition of *possess* comes from Penal Code art. 1415 (theft) because it is most often applied by Texas courts, even to offenses other than theft, e. g., Cuellar v. State, 336 S.W.2d 159 (Tex.Crim.App.1960) (narcotics); Alston v. State, 226 S.W.2d 443 (Tex.Crim.App.1950) (beer).

A person's *reasonable belief* in the existence of defensive facts exonerates from criminal responsibility under this code even though the facts do not exist. Thus, a reasonable belief in the necessity for using force in self-defense justifies the force under Section 9.31, and a reasonable belief that a female is older than 16 is a defense to a charge of statutory rape under Section 21.12. Because this is a penal code, however, the reasonableness of belief is not determined according to the tort law's simple negligence standard, cf. Penal Code art. 41, but in terms of recklessness and criminal negligence, two of the four culpable mental states (see Section 6.05) used throughout this code to define offenses. A belief is reasonable, therefore, unless the actor in forming it consciously disregarded (recklessness) or ought to have been aware of (criminal negligence) a substantial and unjustifiable risk that the bases for the belief did not exist, and his disregard of or failure to perceive the risk constituted a gross deviation from the standard of care an ordinary person would have exercised under all the circumstances as viewed from the actor's standpoint.

The definition of *unlawful* includes conduct not criminal or actionable in tort because of a defense (e. g., lack of mental capacity, duress) if the defense does not amount to justification or privilege. Without this inclusion, for example, the use of force in self-defense against a mental incompetent would not be justified because the incompetent's attack would not be unlawful, i. e., criminal or actionable.

Subsection (b) ensures that the definitions set out in Subsection (a) apply to nonsubstantive variations of the defined terms. Thus, the definition of possess applies to "possession," that of knowing applies to "knows," that of act applies to "action," and that of reasonable belief applies to "reasonably believes."

CHAPTER 2. BURDEN OF PROOF

Section

2.01. Proof Beyond a Reasonable Doubt.
2.02. Exception.
2.03. Defense.
2.04. Affirmative Defense.
2.05. Presumption.

Section 2.01. Proof Beyond a Reasonable Doubt

(a) No person may be convicted of an offense unless each of the following is proved beyond a reasonable doubt:

(1) the conduct, circumstances surrounding the conduct, or result of the conduct described in the definition of the offense; and

(2) the culpable mental state required; and

(3) the negation of any exception to an offense defined in this code; and

(4) the negation of any defense to an offense defined in this code if evidence is admitted supporting the defense; and

(5) venue (if the issue is raised); and

(6) jurisdiction; and

(7) the commission of the offense within the time period specified in Code of Criminal Procedure Chapter 12.

(b) In the absence of the proof required by Subsection (a), the innocence of the defendant is presumed.

Historical Note

Derivation:
Hawaii Prop.Pen.Code § 114
Model P.C. §§ 1.12, 1.13

Cross References

Culpable mental states defined, see § 6.05.
Defense explained, see § 2.03.
Exception explained, see § 2.02.
Presumption of innocence, see C.C.P. art. 38.03.
Venue, see C.C.P. ch. 13, as amended.

Committee Comment

This section, which continues the traditional principle that a person accused of crime is presumed innocent until the state proves his guilt beyond a reasonable doubt, restates and clarifies

the prosecutor's burden of proof by specifying the various issues to which it applies.

Under present law and this section, a defendant is entitled to a jury charge on the presumption of innocence, Sessums v. State, 237 S.W.2d 629 (Tex.Crim.App.1951), and the reasonable doubt doctrine, McCracken v. State, 330 S.W.2d 613 (Tex.Crim.App.1960).

The inclusion of the issues of venue, jurisdiction, and limitations continues the present practice of charging the jury on all elements of the state's case by reference to a single proof standard—i. e., beyond a reasonable doubt. See 2 Willson, Texas Criminal Forms §§ 3452, 3605 (7th ed. 1966). But, this section is not intended to change the present law with respect to the requirement of raising these issues. The state need not prove venue unless the defendant raises the issue at the trial; otherwise venue is presumed on appeal, see C.C.P. art. 44.24.

The treatment of an exception and defense as elements of the state's case is discussed in the comment to Sections 2.02 and 2.03.

§ 2.02. Exception

(a) An exception to an offense in this code is so labeled by the phrase: "It is an exception to the application of . . . . ."

(b) The prosecuting attorney must negate the existence of an exception in the accusation charging commission of the offense and prove beyond a reasonable doubt that the defendant or defendant's conduct does not fall within the exception.

Historical Note

Derivation:
New

Cross References

Affirmative defense explained, see § 2.04.
"Conduct" defined, see § 1.07.
Defense explained, see § 2.03.

Committee Comment

This section, in conjunction with Section 2.01(a)(3), specifies the procedural and evidentiary consequences of an exception to an offense in this code. Section 2.02(a) specifies exactly the form of an exception. This labeling device, along with a similar device for defenses, will avoid the difficulty that Texas courts have frequently faced—determining whether a ground of defense must be raised by the defendant or negated in the accusation and disproved in the state's case in chief, e. g., McNeil v. State, 239 S.W. 954 (Tex. Crim.App.1922); Brown v. State, 168 S.W. 861 (Tex.Crim.App. 1914); Summerlin v. State, 3 Tex.Ct.App. 444 (1878).

When it is appropriate to require the state to allege and prove that the defendant or defendant's conduct does not fall within the scope of an exception to the offense, the code labels the identity or conduct an exception, and Section 2.02(b) provides that an exception has these pleading and burden of proof consequences. On the other hand, if it is appropriate to place a production or proof burden on the defendant to establish a certain ground of defense, the device of a "defense" or "affirmative defense" is employed. Most important is the fact that burden of proof consequences are considered in the drafting process; the decision of which procedural device is appropriate is explicitly made rather than leaving the issue for a later and unpredictable determination by the courts.

Prosecutors have often found the burden of alleging and proving the nonexistence of exceptive facts too onerous. This difficulty most frequently arises with penal statutes that regulate conduct rather than generally prohibit conduct. Since most regulatory statutes are omitted from this code, the device of an exception is used very sparingly and only after careful consideration of the nature of the proof burden involved. The committee decided, for example, that a gift to a public servant (prohibited by Section 36.08) should clearly not apply to a fee prescribed by law. Rather than rely on a defense that would require a public servant to produce evidence that the benefit received was a fee, the device of an exception is employed to require the prosecution to allege and prove that the benefit received was not a fee to make a prima facie case.

§ 2.03. Defense

(a) A defense to prosecution for an offense in this code is so labeled by the phrase: "It is a defense to prosecution under . . . that . . . ."

(b) The prosecuting attorney is not required to negate the existence of a defense in the accusation charging commission of the offense.

(c) The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of a defense is submitted to the jury, the court shall charge that any reasonable doubt on the issue requires that the defendant be acquitted.

(e) A ground of defense in a penal law, other than one negating an element of the offense, that is not plainly labeled in accordance with this chapter has the procedural and evidentiary consequences of a defense.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 3-2
Model P.C. § 1.12

Cross References

Affirmative defense explained, see § 2.04.
Exception explained, see § 2.02.
"Law" defined, see § 1.07.

Committee Comment

Defenses place upon the defendant a burden of proof on an exculpatory issue—usually of excuse or justification—involving facts peculiarly within the knowledge of the defendant. This section provides for labeling this type of defense and specifies its procedural and evidentiary consequences. Penal Code art. 46 recognizes in general terms the principle of allocating a burden of proof to a defendant for certain defenses; however, the problems of designating those defenses to which Article 46 applies and specifying the nature of the burden—whether a burden of producing evidence or persuasion—have been left to the courts. This code resolves those problems at the drafting stage.

Section 2.03(d) outlines the content of a jury charge on a defense, codifying present case law, Lynch v. State, 200 S.W.2d 189 (Tex.Crim.App.1947); Regittano v. State, 257 S.W. 906 (Tex. Crim.App.1922). The effect of Subsection (d) is to require the state to disprove a defense beyond a reasonable doubt after the issue has been properly raised by the evidence. In other words, the defendant has the burden of producing evidence to raise a defense, but the prosecution has the final burden of persuasion to disprove it.

Subsection (e) is included to cover a ground of defense not plainly labeled by the draftsmen. In deciding where to place the burden of proof for a defensive issue, there are three possibilities: to treat it as an exception, placing the entire burden on the state; to treat it as a defense, with the burden of producing evidence on the defendant and burden of persuasion on the state; or to treat it as an affirmative defense that the defendant must prove by a preponderance of evidence, i. e., carry the entire burden of proof. For a defensive issue not clearly labeled, the middle ground is specified—it is a defense.

§ 2.04. Affirmative Defense

(a) An affirmative defense in this code is so labeled by the phrase: "It is an affirmative defense to prosecution under . . . , which the actor must prove by a preponderance of evidence, that . . . ."

(b) The prosecuting attorney is not required to negate the existence of an affirmative defense in the accusation charging commission of the offense.

(c) The issue of the existence of an affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense.

(d) If the issue of the existence of an affirmative defense is submitted to the jury, the court shall charge that the defendant has the burden of establishing the defense by a preponderance of the evidence.

Historical Note

Derivation:
N.Y.Rev.Pen.Law § 25.00
Model P.C. § 1.12

Cross References

Defense explained, see § 2.03.
Exception explained, see § 2.02.

Committee Comment

This section prescribes the form and procedural and evidentiary consequences of an affirmative defense for which the defendant carries a burden of persuasion. Present Texas law authorizes the imposition of such a burden when the defendant relies on some matter which is separate from or independant of the criminal conduct with which he is charged—for example, insanity, nonage, former jeopardy, and former conviction.

Although there are constitutional due process limitations on the imposition of a burden of proof on a criminal defendant, Morrison v. California, 54 S.Ct. 281, 291 U.S. 82 (1934), the imposition is justified in a few situations, e. g., Leland v. Oregon, 72 S.Ct. 1002, 343 U.S. 790 (1952). Some of these are situations where the defense does not obtain at all under existing law and this code seeks to ameliorate the law—for example, the defense of renunciation of participation in a criminal conspiracy, Section 15.04. Especially if there is something to be said against allowing the defense at all, it is certainly permissible to place the burden of persuasion on the defendant.

Two of the procedural and evidentiary consequences of an affirmative defense are the same as those of a defense: the state need not negate the defense in the accusation, Subsection (b), and there must be evidence in the case to warrant submitting the defense to the jury, Subsection (c). However, the jury charge on an affirmative defense specifies that the burden of proof by a preponderance of the evidence is on the defendant, Subsection (d).

§ 2.05. Presumption

When this code or another penal law establishes a presumption with respect to any fact that is an element of an offense, it has the following consequences:

(1) if there is sufficient 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 whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and

(2) if the issue of the existence of the presumed fact is submitted to the jury, the court shall charge that although the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the facts giving rise to the presumption are some evidence of the presumed fact.

Historical Note

Derivation:

Fed.Prop.Crim.Code § 103
Model P.C. § 1.12

Cross References

"Element of offense" defined, see § 1.07.
"Law" defined, see § 1.07.

Committee Comment

A presumption in a criminal statute must pass the test announced by the U. S. Supreme Court in Leary v. United States, 89 S.Ct. 1532, 395 U. S. 6 (1969): a criminal statutory presumption violates due process because of irrationality or arbitrariness unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. The presumptions in this code satisfy this due process requirement, and the purpose of this section is to specify the procedural consequences of a presumption to satisfy other constitutional strictures.

This section continues present Texas law by authorizing a charge to the jury on a statutory presumption, see Brown v. State, 23 Tex. 195 (1859); C.C.P. art. 38.04. The introductory clause applies the section not only to presumptions so labeled in this code, but to presumptions, prima facie evidence provisions, and any other language in a penal law that gives some special significance to certain facts as evidence of an element of an offense.

Section 2.05(1) provides that the prosecutor can get an issue to the jury by presenting evidence of the facts that give rise to the presumption. The court may, however, withhold the case from the jury, thus preserving the defendant's constitutional right to judicial responsibility for the integrity of the jury trial, see United States v. Gainey, 85 S.Ct. 754, 380 U.S. 63 (1965), and should do so when the evidence as a whole makes it impossible for a rational jury to find the presumed fact beyond a reasonable doubt.

Subdivision (2) provides the prosecution with the "bonus" of a court instruction on the relevance of the presumptive facts to the presumed fact. It also outlines the content of a proper charge, avoiding language that implies the defendant has a burden of pro-

ducing evidence in rebuttal or alludes to a failure of the defendant to testify or explain away the facts that give rise to the presumption.

It should be noted that a proper charge to the jury under this section makes no explicit reference to the statute that creates the presumption. This was deemed the "better practice" by the Supreme Court in the Gainey case, supra. The present practice in Texas is to instruct the jury that certain facts are prima facie evidence of an element of an offense and then instruct on the meaning of "prima facie evidence," Spencer v. State, 227 S.W.2d 552 (Tex.Crim.App.1950); or when the statute employs the word "presume," to instruct that a certain fact is "presumed" unless rebutted by the defendant, Yates v. State, 152 S.W. 1064 (Tex.Crim. App.1913). A proper charge under this section simplifies the jury instruction by avoiding any mention of the technical terms "presumption" or "prima facie" and thereby avoids the necessity for a court definition of these terms.

CHAPTER 3. MULTIPLE PROSECUTIONS AND DOUBLE JEOPARDY

Section

3.01. Chapter Definition.
3.02. Compulsory Joinder of Prosecutions for Offenses Arising out of Same Criminal Episode.
3.03 Multiple Sentences Prohibited Following Convictions for Offenses Arising out of Same Criminal Episode.
3.04. When Prosecution Barred by Former Prosecution for Offense Arising out of Same Criminal Episode.
3.05. When Prosecution Barred by Former Prosecution in Another Jurisdiction.
3.06. When Prosecution not Barred by Former Prosecution.

Section 3.01. Chapter Definition

In this chapter, unless the context requires a different definition, "criminal episode" means all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective, even though the harm is directed toward or inflicted upon more than one person.

Historical Note

Derivation:
N.Y.Prop.Crim.Proc.Law § 20.10

Cross References

Attempt, see § 15.01.
"Conduct" defined, see § 1.07.
Conspiracy, see § 15.02.
Solicitation, see § 15.03.

Committee Comment

The definition of "criminal episode," which replaces the "transaction" concept of present law, must be read in context with the compulsory joinder of prosecutions requirement, Section 3.02. The purpose of the definition is to identify the conduct of a person for which, ordinarily, he may be prosecuted and punished but once, even though he has committed several separately defined offenses. Thus, the person will be tried and punished only once for his single criminal effort. The state, however, will be able to charge and try the person for all offenses which he may have committed in the criminal episode in the one criminal action.

The criminal episode concept is not new to Texas law. The Texas courts have interpreted the statutes, currently C.C.P. art. 1.10, and constitution, Tex.Const. art. I, § 14, which speak in terms of the "same offense," as meaning the same "criminal transaction," which may involve the breach of several criminal statutes, see, e. g., Hirshfield v. State, 11 Tex.Ct.App. 207 (1881). And "criminal transaction" in turn has been interpreted to mean, generally, the "same act, acts, or omissions" rather than the same offense eo nomine, e. g., Hirshfield v. State, supra; Quitzow v. State, 1 Tex.Ct.App. 47 (1876). Unfortunately, the courts have not been consistent in applying this definition, but at various times have defined it to mean (1) all acts committed at the same time and place, Seamster v. State, 283 S.W.2d 243 (Tex.Crim.App.1955); Ratcliff v. State, 38 S.W.2d 326 (Tex.Crim.App.1931); (2) one act, Eproson v. State, 122 S.W.2d 643 (Tex.Crim.App.1938); Coon v. State, 263 S.W. 914 (Tex.Crim.App.1924); (3) one act and one volition, Aven v. State, 253 S.W. 521 (Tex.Crim.App.1923); (4) one continuous transaction, Flynn v. State, 83 S.W. 206 (Tex. Crim.App.1904); and (5) all offenses involving the same evidence, facts, and elements, Thompson v. State, 244 S.W.2d 832 (Tex.Crim.App.1952); Paxton v. State, 207 S.W.2d 876 (Tex. Crim.App.1948). Perhaps the best evidence of confusion in present law is found in the concurring opinion in Staples v. State, 175 S.W. 1056, 1060 (Tex.Crim.App.1915), in which the judge said "and both transactions are based on the same transaction. . . ."

It is difficult to state precisely how the "criminal episode" concept will change Texas law since it is impossible to find a uniform definition of the term "transaction" in the cases. However, the concept of "criminal episode" is probably broader than the "transaction" concept since it includes preparatory offenses such as solicitation and conspiracy and extends beyond "one act," or "all acts committed at the same time and place," or "one act and one volition," to all conduct directed at a single criminal objective.

§ 3.02. Compulsory Joinder of Prosecutions for Offenses Arising out of same Criminal Episode

(a) A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

(b) The state must join in a single criminal action all offenses arising out of the same criminal episode unless:

(1) the court severs one or more of the offenses under Code of Criminal Procedure Article 36.09; or

(2) evidence to establish probable guilt of the offense for which a subsequent prosecution is sought was not known to the state at the time the former prosecution commenced; or

(3) the offenses are not within the jurisdiction of a single court and the former prosecution did not originate in a county-level or district court.

(c) If a judgment of guilt is reversed, set aside, or vacated, and new trial ordered, the state may not join in the new trial any offense required to be but not joined in the former prosecution unless evidence to establish probable guilt of that offense was not known to the state at the time the first prosecution commenced.

Historical Note

Derivation:

Fed.R.Crim.Proc. 14
N.Y.Prop.Crim.Proc.Law § 20.20
Ill.Stat.Ann. ch. 38, § 3-3

Cross References

Admission of unadjudicated offenses, see § 12.48.
Aggregation of amounts in multiple thefts, see § 31.05.
"Conviction" defined, see § 1.07.
Counts, see C.C.P. art. 21.24, as amended.
"Criminal episode" defined, see § 3.01.
Defendant severance, see C.C.P. art. 36.09, as amended.
Offense severance, see C.C.P. art. 36.09, as amended.
Separate verdict for each count, see C.C.P. art. 37.07, as amended.

Committee Comment

This section requires a single prosecution for all offenses arising out of the same criminal episode. The state may join in a single criminal action as many such offenses as it chooses, stating each offense in a separate count of the accusation, see C.C.P. art. 21.24, as amended, but it cannot later prosecute for other offenses arising out of the same criminal episode unless one of the exceptions set out in Subsection (b) applies.

Section 3.02 significantly changes Texas law. The problem now is one not of compulsory joinder but of permissive joinder, see, e.

g., Fears v. State, 178 S.W.2d 530, (Tex.Crim.App.1944); Jackson v. State, 98 S.W.2d 193 (Tex.Crim.App.1936). At present the state may charge the defendant in a single criminal action with multiple offenses arising out of the same relatively narrow "transaction," but the state must elect a single theory of prosecution before going to the jury, e. g., Beyer v. State, 356 S.W.2d 436 (Tex. Crim.App.1962) (dictum); Crawford v. State, 19 S.W. 766 (Tex. Crim.App.1892). Section 3.02, together with the expanded concept of "criminal episode," permits the state to prosecute a defendant for all related offenses in a single trial without the election requirement, and at the same time protects the defendant from the harassment of separate prosecutions.

The "criminal episode" concept and this section change the present rules that allow separate prosecutions for conspiracy, Bailey v. State, 59 S.W. 900 (Tex.Crim.App.1900); Whitford v. State, 6 S.W. 537 (Tex.Ct.App.1887), attempt, cf. Russell v. State, 255 S. W.2d 881 (Tex.Crim.App.1953); Byas v. State, 51 S.W. 923 (Tex. Crim.App.1899), and the completed offense; and for a lesser included offense following conviction of the greater offense, e. g., Chandler v. State, 231 S.W. 108 (Tex.Crim.App.1921) (conviction for unlawful sale of intoxicating liquor no bar to prosecution for unlawful possession of same liquor); Young v. State, 222 S.W. 1103 (Tex.Crim.App.1920) (conviction of assault with pistol no bar to prosecution for unlawfully carrying same pistol).

The exceptions to the compulsory joinder requirement of Subsection (b) recognize that under certain circumstances joinder is unjust or impossible.

Subsection (b)(1) which derives from Federal Rules of Criminal Procedure 14, permits offense severance just as present law permits defendant severance, see C.C.P. art. 36.09, as amended. Hopefully, however, the Court of Criminal Appeals will construe Section 3.02(b)(1) and C.C.P. art. 36.09, § 2, as amended, more liberally in the defendant's favor than the federal courts have construed Rule 14.

Subsection (b)(2) is new and recognizes the necessity for an exception to the compulsory joinder rule when the state is unaware of or cannot prove one or more offenses arising from the same criminal episode. The term "state" is purposefully broad and covers, for example, a peace officer, probation or parole officer, magistrate, and investigator employed by a prosecutor as well as the prosecutor himself.

Subsection (b)(3) prevents a defendant from escaping prosecution for a more serious offense by securing prosecution at an early date for a less serious one; it restates without significant change C.C.P. art. 28.13. However, Subdivision (3) does not except from compulsory joinder offenses arising out of the same criminal episode committed in different counties: If a former prosecution for one or more of these offenses originated in a county-level or dis-

trict court, subsequent prosecution for nonjoined offenses committed in different counties is barred.

Subsection (c) reinforces the compulsory joinder requirement by prohibiting the addition at a retrial of offenses arising out of the same criminal episode not joined in the original trial. It is analogous to the prohibition against increasing the severity of a sentence following reconviction, C.C.P. art. 42.08, as amended; cf. Robinson v. Beto, 426 F.2d 797 (5th Cir. 1970), and has the same rationale, to prevent discouragement of appeals.

§ 3.03. Multiple Sentences Prohibited Following Convictions for Offenses Arising out of Same Criminal Episode

If a defendant is adjudged guilty of more than one offense arising out of the same criminal episode, he may not be sentenced for more than one offense unless:

(1) one or more of the offenses was severed from the former prosecution under Code of Criminal Procedure Article 36.09; or

(2) evidence to establish probable guilt of the offense for which a separate sentence is sought was not known to the state at the time the former prosecution commenced; or

(3) the offenses are not within the jurisdiction of a single court and the former prosecution did not originate in a county-level or district court; or

(4) the defendant is adjudged guilty of murder, aggravated rape, or aggravated sexual abuse, in which event his conduct toward each victim may be treated as a separate offense for sentencing purposes.

Historical Note

Derivation:
New
Cf. N.Y.Rev.Pen.Law § 80.15

Cross References

Aggravated rape, see § 21.03.
Aggravated sexual abuse, see § 21.05.
Compulsory joinder of offenses, see § 3.02.
Concurrent and consecutive terms of imprisonment, see § 12.45.
"Conviction" defined, see § 1.07.
"Criminal episode" defined, see § 3.01.
Lesser included offenses, see C.C.P. art. 37.09, as amended.
Murder, see § 19.02.
Offense severance, see C.C.P. art. 36.09, § 2, as amended.

Committee Comment

The compulsory joinder requirement, Section 3.02, contemplates disposing of all offenses arising out of the same criminal episode

in a single trial; this requirement will expedite criminal trial dockets and protect the defendant from multiple prosecutions. If the state secures multiple convictions this section requires with four exceptions a single sentence, presumably for the most serious offense of which defendant was convicted, because the committee believes a defendant should be sentenced but once for what is a single course of criminal conduct. This requirement is analogous to present case law, which treats as a single conviction for habitual criminal purposes multiple judgments of guilt obtained at the same trial, Ex parte Atkinson, 288 S.W.2d 89 (Tex.Crim.App.1956), or arising out of the same transaction, Ellis v. State, 115 S.W.2d 660 (Tex.Crim.App.1938).

The first three exceptions to the multiple convictions—single sentence requirement, Subdivisions (1)-(3), track the exceptions to the compulsory joinder requirement of Section 3.02. The fourth exception, Subdivision (4), recognizes that certain offenses are so serious that a separate sentence is justified for each; this exception is reflected in present law, which excepts from the one transaction equals one conviction rule offenses involving different victims, except insofar as Spannell v. State, 203 S.W. 357 (Tex.Crim. App.1918), appears to equate one act and volition with a single offense.

§ 3.04. When Prosecution Barred by Former Prosecution for Offense Arising out of Same Criminal Episode

(a) If a defendant has been prosecuted for one or more offenses arising out of a criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(1) the subsequent prosecution is for an offense that was or should have been tried under Section 3.02 in the former prosecution; and

(2) the former prosecution:

(A) resulted in acquittal; or

(B) resulted in conviction; or

(C) was improperly terminated; or

(D) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

(b) There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence to warrant conviction. Notwithstanding Section

3.06(3), a finding of guilty of a lesser included offense is an acquittal of the greater offense even though the conviction for the lesser included offense is subsequently reversed, set aside, or vacated.

(c) There is a conviction if the prosecution resulted in a judgment of guilt that has not been reversed, set aside, or vacated; a verdict of guilty that has not been reversed, set aside, or vacated and that is capable of supporting a judgment; or a plea of guilty or nolo contendere accepted by the court.

(d) There is an improper termination of prosecution if the termination takes place before the verdict, is for reasons not amounting to an acquittal, and takes place after a jury has been impaneled and sworn to try the defendant or, if jury trial is waived, after the first witness is sworn. However, termination of prosecution is not improper if:

(1) the defendant consents to the termination; or

(2) the defendant waives his right to object to the termination; or

(3) the court finds and states for the record that the termination is necessary because:

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

(B) there is a legal defect in the proceeding, not attributable to the state, that would make any judgment entered upon a verdict reversible as a matter of law; or

(C) prejudicial conduct in or out of the courtroom, not attributable to the state, makes it impossible to proceed with the trial without injustice to the defendant or state; or

(D) the jury is unable to agree upon a verdict, or upon probation or a sentence in a capital case; or

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

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 3-4
N.Y.Prop.Crim.Proc.Law §§ 20.20, 20.30

Cross References

"Criminal episode" defined, see § 3.01.
Compulsory joinder of offenses, see § 3.02.
Former prosecution no bar to subsequent prosecution, see § 3.06.
Jeopardy plea, see C.C.P. arts. 27.05 and 45.32, as amended.
"Law" defined, see § 1.07.
Lesser included offenses, see C.C.P. art. 37.09, as amended.
Offense severance, see C.C.P. art. 36.09, § 2, as amended.

Committee Comment

This section enforces the compulsory joinder requirement of Section 3.02 by barring subsequent prosecution of an offense that was or should have been joined in a former prosecution. The section also describes what constitutes a former prosecution, and three of the four concepts used to describe it, which are labeled "acquittal," "conviction," and "improper termination of prosecution," are nothing new to Texas law.

Former Acquittal

The concept of acquittal in Subsection (b) is somewhat broader than that in present law, which distinguishes between acquittal and conviction for jeopardy purposes, because this chapter's concept of "criminal episode" is broader than the present law's "same evidence" concept. Under present law a former acquittal bars prosecution for a related offense only if the same evidence necessary to convict at the first trial is necessary to convict at the second, e. g., Vasquez v. State, 288 S.W.2d 100 (Tex.Crim.App.1956); Lytle v. State, 95 S.W.2d 391 (Tex.Crim.App.1936). Moreover, it is unclear under the present statutes, C.C.P. arts. 1.11 and 27.05, whether an acquittal not on the merits bars subsequent prosecution, although some cases indicate it does not, e. g., Spicer v. State, 179 S.W. 712 (Tex.Crim.App.1915); Reynolds v. State, 124 S.W. 931 (Tex.Crim.App.1910).

This section abolishes the distinction between former acquittal and former conviction, and Subsection (b) makes clear that only a former acquittal on the merits is material for jeopardy purposes. The second sentence of Subsection (b) restates C.C.P. art. 37.14 to comply with Price v. Georgia, 90 S.Ct. 1757, 398 U.S. 323 (1970).

Former Conviction

Subsection (c) defines "conviction" for jeopardy purposes. The concept is broader than that in present law, again because this chapter's concept of "criminal episode" is broader than the present law's "transaction" concept, and unlike present law the concept of "criminal episode" is the same whether it is an acquittal or conviction in question.

Under present law a defendant may not be convicted of more than one offense arising out of the same "transaction," Whitten v. State, 250 S.W. 165 (Tex.Crim.App.1923), and this one conviction—one transaction restriction is generally referred to as the "carving" doctrine, see, e. g., Vick v. State, 397 S.W.2d 229 (Tex.Crim. App.1966); Nichols v. State, 386 S.W.2d 795 (Tex.Crim.App. 1965). The carving doctrine was early explained by the Court of Criminal Appeals:

> When one transaction is presented to the government, which may include distinct criminal offenses by different names, the

> government can carve but once. It can take the greater, and prosecute for that; or it can take the lesser offense, and prosecute for that; and a prosecution and conviction for either will equally be a bar to another subsequent prosecution for the other offense, which involve the same transaction.

Herera v. State, 34 S.W. 944, 945 (Tex.Crim.App.1896).

Improper Termination of Prosecution

Subsection (d) prescribes when jeopardy attaches short of an acquittal or conviction. It does not significantly change present case law, which recognizes the plea of former jeopardy although it is not mentioned in the constitution, Tex.Const. art. I, § 14, or applicable statutes, C.C.P. arts. 1.10, 1.11, 27.05, 28.13; see, e. g., McAfee v. State, 363 S.W.2d 941 (Tex.Crim.App.1963); Gibson v. State, 83 S.W. 1119 (Tex.Crim.App.1904).

Subsection (d) provides that jeopardy attaches when the jury is impaneled and sworn or, if jury trial is waived, when the first witness is sworn for the state. Under present law, jeopardy attaches in a jury trial only after the defendant's plea is heard, Rameriz v. State, 352 S.W.2d 131 (Tex.Crim.App.1961); Seale v. State, 256 S.W.2d 86 (Tex.Crim.App.1953). Federal law is consistent with Subsection (d), however, Downum v. United States, 83 S.Ct. 1033, 372 U.S. 734 (1963), and it is thus probably constitutionally required.

The exceptions listed in Subdivisions (1)–(3), which specify when termination of a prosecution does not constitute jeopardy, generally conform to Texas law although the latter is not nearly so specific or precise. For example, C.C.P. art. 29.02 provides that a criminal action may be continued with consent of both parties in open court, DeYong v. State, 274 S.W.2d 406 (Tex.Crim.App. 1944); Chamberlain v. State, 174 S.W.2d 604 (Tex.Crim.App. 1943), but a defendant's mere silence or the consent of his counsel does not constitute consent to termination, compare, e. g., Davis v. State, 164 S.W. 686 (Tex.Crim.App.1942) and Hippel v. State, 191 S.W. 1150 (Tex.Crim.App.1917) with McIntyre v. State, 360 S.W. 2d 875 (Tex.Crim.App.), cert. denied, 83 S.Ct. 130, 371 U.S. 867 (1962). C.C.P. art. 36.29 authorizes discharging the jury if a juror becomes too sick to continue, and art. 36.31 permits discharging a hung jury. See, e. g., Lindsey v. State, 393 S.W.2d 906 (Tex.Crim. App.1965); Villarreal v. State, 355 S.W.2d 516 (Tex.Crim.App.), cert. denied, 83 S.Ct. 127, 371 U.S. 867 (1962); Strickland v. State, 336 S.W.2d 185 (Tex.Crim.App.1960).

A recurring concept in Subdivision (3) is that if the state causes a defect or difficulty that necessitates termination of the trial, the termination is improper. This appears to be required by the fifth amendment as recently applied to the states by Benton v. Maryland, 89 S.Ct. 2056, 395 U.S. 784 (1969).

Collateral Estoppel

This doctrine, seldom applied in the criminal law, was recently accorded constitutional status in Ashe v. Swenson, 90 S.Ct. 1189, 397 U.S. 436 (1970). Subsection (a) (2) (D) codifies the collateral estoppel doctrine, which is not recognized in present law, Spannell v. State, 203 S.W. 357 (Tex.Crim.App.1918). Because of our general verdict practice, the doctrine will probably have limited application, but it could prevent the trial of a nonjoined or severed offense, see Section 3.02, when a fact necessary to prove that offense was found against the state in the earlier trial of a related offense.

§ 3.05. When Prosecution Barred by Former Prosecution in Another Jurisdiction

If a defendant's conduct may establish the commission of one or more offenses within the concurrent jurisdiction of this state and of another jurisdiction, federal or state, a prosecution in the other jurisdiction is a bar to subsequent prosecution in this state if either:

(1) the former prosecution resulted in acquittal, conviction, or improper termination of prosecution, as those terms are defined in Section 3.04, and the subsequent prosecution is for an offense arising out of the same criminal episode unless evidence to establish probable guilt of the offense for which subsequent prosecution is sought was not known to this state at the time the first prosecution commenced; or

(2) the former prosecution was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established for conviction in the subsequent prosecution.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 3-4(c)
N.Y.Prop.Crim.Proc.Law § 20.30

Cross References

"Conduct" defined, see § 1.07.
"Criminal episode" defined, see § 3.01.
Former prosecution no bar to subsequent prosecution, see § 3.06.
Jeopardy plea, see C.C.P. arts. 27.05 and 45.32, as amended.

Committee Comment

This section parallels Section 3.04 but applies to former prosecutions in another jurisdiction. Present law is similar as to former prosecution in another state, C.C.P. art. 13.23, but because this chapter's concept of "criminal episode" is broader than the present

law's "same evidence" and "transaction" concepts, Section 3.05 expands the protection afforded a defendant prosecuted in another state.

With regard to former federal prosecutions, the recent Texas cases of Hill v. State, 398 S.W.2d 944 (Tex.Crim.App.1966) and Garrett v. State, 387 S.W.2d 53 (Tex.Crim.App.1965), followed the Supreme Court's decision in Bartkus v. Illinois, 79 S.Ct. 676, 359 U.S. 121 (1958), which permitted a state prosecution for bank robbery following an acquittal in federal court for the same robbery on the ground that the fifth amendment's jeopardy provisions did not apply against the states. Benton v. Maryland, 89 S.Ct. 2056, 395 U.S. 784 (1969), of course, applied these provisions against the states and, although Benton did not expressly overrule Bartkus or its sire, United States v. Lanza, 43 S.Ct. 141, 260 U.S. 377 (1922), both are no longer viable and Section 3.05 accordingly steers the safer course by forbidding more than one prosecution for offenses arising out of the same criminal episode regardless of how many jurisdictions the conduct offends.

§ 3.06. When Prosecution not Barred by Former Prosecution

Except as provided in Section 3.04(b), a prosecution is not barred under Section 3.04 or 3.05 if:

(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 prosecuting attorney bringing the subsequent prosecution and with intent to avoid the sentence that might otherwise be imposed; or

(3) the former prosecution resulted in a judgment of guilt held invalid in a subsequent proceeding on writ of habeas corpus, coram nobis, or similar collateral attack.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 3-4(d)
Model P.C. § 1.11

Cross References

Compulsory joinder of offenses, see § 3.02.
Former prosecution, see § 3.04.
Former prosecution in another jurisdiction, see § 3.05.
Lesser included offenses, see C.C.P. art. 37.09, as amended.

Committee Comment

This section preserves traditional law in Texas and elsewhere that permits subsequent prosecution if the court before which the former prosecution was conducted lacked jurisdiction, C.C.P. arts.

1.11, 27.05, 28.13; McAfee v. State, 363 S.W.2d 941 (Tex.Crim. App.1963); the former prosecution was fraudulently procured by defendant, Richardson v. State, 5 S.W.2d 141 (Tex.Crim.App.1928); or the former conviction was set aside on collateral attack, Ex parte Longoria, 280 S.W.2d 743 (Tex.Crim.App.1955); Marshall v. State, 166 S.W. 722 (Tex.Crim.App.1914).

The exception to the application of this section, which prohibits prosecution for the greater offense following conviction for the lesser included offense even though the conviction was nullified, is necessitated by the decision in Price v. Georgia, 90 S.Ct. 1757, 398 U.S. 323 (1970), and is explained in the comment to Section 3.04.

TITLE 2. GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

CHAPTER 6. CULPABILITY GENERALLY

Section

6.01. Requirement of Voluntary Act or Omission.
6.02. Possession as Voluntary Act.
6.03. Criminal Responsibility for Omission.
6.04. Requirement of Culpable Mental State.
6.05. Definitions of Culpable Mental States.
6.06. Application of Culpable Mental States.
6.07. Causation: Criminal Responsibility for Causing a Result.

Section 6.01. Requirement of Voluntary Act or Omission

(a) A person does not commit an offense unless his criminal responsibility is based on conduct that includes either a voluntary act or a conscious omission to perform a voluntary act when he is physically capable of performing it.

(b) A voluntary act is a bodily movement performed consciously as a result of effort or determination.

Historical Note

Derivation:
N.Y.Rev.Pen.Law §§ 15.00, 15.10

Cross References

"Act" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Criminal responsibility for omission, see § 6.03.
"Omission" defined, see § 1.07.
Possession as act, see § 6.02.

Committee Comment

"In all criminal prosecutions the rule is elementary that to sustain a conviction two things must be established: (1) A criminal act; and (2) defendant's agency in the production of such act. . . ." Willard v. State, 11 S.W. 453 (Tex.Ct.App.1889). Section 6.01 codifies the first part of this elementary rule requiring a voluntary act or omission as a predicate to criminal responsibility. This rule may now have constitutional status, see Robinson v. California, 82 S.Ct. 1417, 370 U.S. 660 (1962), but in any event it has long been part of Texas criminal law.

Note that (a course of) conduct need only *include* a voluntary act or omission to sustain criminal responsibility. If a drunk operates a motor vehicle, for example, he may not successfully defend

against a criminal homicide charge, on the ground he did not perform a voluntary act, by proving he was unconscious when he ran down the victim.

Subsection (b) defines "voluntary" and thus excludes involuntary and unconscious conduct such as convulsion, reflex, and coma, see Bradley v. State, 277 S.W. 147 (Tex.Crim.App.1925) (sleepwalking).

§ 6.02. Possession as Voluntary Act

Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

Historical Note

Derivation:
N.Y.Rev.Pen.Law § 15.00

Cross References

"Act" defined, see § 1.07.
"Possess" defined, see § 1.07.

Committee Comment

Although possession is often treated in the criminal law as the equivalent of an act, it is not strictly speaking a bodily movement so this section is necessary to treat it as such.

The section does not determine whether an actor must know the nature of the thing possessed or just know that he possesses a thing; this issue is determined by the definition of the specific (possessory) offense involved, e. g., Rodriguez v. State, 372 S.W.2d 541 (Tex.Crim.App.1963) (must know capsule possessed contained barbiturate).

§ 6.03. Criminal Responsibility for Omission

A person does not commit an offense if his criminal responsibility is based solely on an omission to perform a voluntary act unless:

(1) the law defining the offense imposes criminal responsibility for the omission; or

(2) a duty to perform the omitted voluntary act is imposed by statute.

Historical Note

Derivation:
Fed.Prop.Crim.Code § 301
N.Y.Rev.Pen.Law §§ 15.00(3), 15.10

Cross References

Causation, see § 6.07.
"Law" defined, see § 1.07.
"Omission" defined, see § 1.07.

Committee Comment

This section codifies the criminal law's traditional reluctance to punish failure to act absent a clear imposition of duty to act on the actor, see Anderson v. State, 11 S.W. 33 (Tex.Ct.App.1889).

Many offenses, of course, proscribe omissions to act, and when they do Subdivision (1) permits imposition of criminal responsibility for the omission. Examples of such offenses include Sections 25.03 (interference with child custody), 25.07 (criminal nonsupport), 38.08 (permitting or facilitating escape), and 39.01 (official misconduct).

If the offense itself does not penalize an omission, "there must be a violation of some duty [to perform the omitted act] imposed by law, directly or impliedly, and with which duty the defendant is especially charged. . . ." Anderson v. State, supra, 11 S. W. at 34. Subdivision (2) codifies this common-law rule, but narrows it to encompass only duties imposed by *statute*. Thus, a husband who fails to feed his wife who is too ill to care for herself, or a mother who fails to feed her infant, may be convicted of criminal homicide (Chapter 19), if the failure causes the death of the wife or infant, because Family Code § 4.02 imposes a duty of support on the spouse and parent. On the other hand, a niece's failure to feed her invalid aunt, who starves to death as a result, is not guilty of criminal homicide because the niece has no statutory duty of support. Contractual duties, and those arising from a special relationship or fact situation, are thus excluded and will not support the imposition of criminal responsibility.

§ 6.04. Requirement of Culpable Mental State

(a) Except as provided in Subsection (b), a person does not commit an offense unless he acts intentionally, knowingly, recklessly, or with criminal negligence, as the definition of the offense requires, with respect to each element of the offense.

(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

(c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.

Historical Note

Derivation:

N.Y.Rev.Pen.Law §§ 15.10, 15.15(2)
Cal.Prop.Pen.Code §§ 403, 406, 407

Cross References

"Element of offense" defined, see § 1.07.

Committee Comment

Subsection (a), in restating Penal Code art. 39, preserves for the new code the traditional mens rea requirement of the criminal law. Moreover, Subsection (b) imbues this requirement with the force of a presumption because, as the Court of Criminal Appeals aptly phrased it, "The punishment of one for an offense when he is able to show that the act was done without guilty knowledge or intent is contrary to the general principles of criminal law. . . ." Vaughn v. State, 219 S.W. 206, 208 (Tex.Crim.App. 1919); cf. Lambert v. California, 78 S.Ct. 240, 355 U.S. 225 (1957); Morissette v. United States, 342 U.S. 246 (1952). Despite Subsection (b), of course, the legislature is free to dispense with the requirement of a culpable mental state—as it has done in creating the so-called strict liability offenses, e. g., Neill v. State, 225 S.W.2d 829 (Tex.Crim.App.1949) (adulterated food); Goodwin v. State, 138 S.W. 399 (Tex.Crim.App.1911) (speeding)—but its intent to eliminate mens rea must be manifest. See Stalling v. State, 234 S.W. 914 (Tex.Crim.App.1921); cf. Bloom v. Texas State Bd. of Pharmacy, 390 S.W.2d 252 (Tex.1965).

If the definition of an offense is silent about whether a culpable mental state is an element of the offense, Subsection (b) presumes that one is and Subsection (c) requires that it amount at least to recklessness. The better reasoned cases from other jurisdictions have reached this result in interpreting the common-law authorities, see, e. g., People v. Angelo, 246 N.Y. 451, 159 N.E. 394 (1927), although, as Professor Perkins points out, the majority of courts have not distinguished between criminal negligence (inadvertent risk creation), and recklessness (conscious risk creation). R. Perkins, Criminal Law 760–761 (2d ed. 1969). The distinction is made explicit by Section 6.05, however, and, because of our traditional reluctance to brand even grossly negligent conduct as criminal, the new code refuses to imply an intent to do so when the definition of an offense is silent about the requirement of a culpable mental state.

§ 6.05. Definitions of Culpable Mental States

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is practically certain to cause the result.

(c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Historical Note

Derivation:
N.Y.Rev.Pen.Law § 15.05
Cal.Prop.Pen.Code § 404

Cross References

"Conduct" defined, see § 1.07.
Pleading recklessness and criminal negligence, see C.C.P. art. 21.15, as amended.

Committee Comment

Surely a major achievement of the Model Penal Code is its analysis of the traditional mens rea concept and translation of that concept into four carefully defined terms. All of the recent penal code revisions, both proposed and enacted, have used this analysis and, with slight modification, the very terminology of the Model Penal Code.

The terms defined in this section replace a welter of ambiguous and sometimes contradictory terms in the present Texas Penal Code. The committee identified 67 different terms used in the present law; these range from the traditional "intentionally," "willfully," and "maliciously;" to the redundant "knowingly and willfully," "purpose and intent," "negligence and carelessness," "willfully and wantonly," and "willful intent;" to the self-contradictory "willfully neglect" and "knowingly neglect." Moreover, Texas penal statutes seldom attempt a comprehensive and precise definition of the mens rea terms used, leaving the courts to struggle with the problem of definition in specific cases with varying degrees of success, see, e. g., Cockrell v. State, 117 S.W.2d 1105 (Tex.Crim.App.1938) (malice equated with recklessness); Bowers v. State, 7 S.W. 247 (Tex.Ct.App.1888) ("A *willful* act is one com-

mitted with an evil intent, with legal malice, without reasonable grounds for believing the act to be lawful, and without legal justification. A *malicious* act is one committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act intentionally done, without legal justification or excuse."); Ex parte Cowden, 168 S.W. 539 (Tex.Crim. App.1914) (knowingly distinguished from willfully); Von Brown v. State, 322 S.W.2d 626 (Tex.Crim.App.1959) (willfully).

The terms chosen to represent the four culpable mental states used to define offenses in the new code are of course familiar to Texas practitioners. Rather than introduce novel concepts, therefore, this section analytically dissects the culpable mental states traditionally used in the criminal law and distinguishes them one from the other; consolidates the 67 different terms currently in use to describe these culpable mental states; and precisely and parsimoniously defines the resulting four terms used consistently throughout the new code to describe the mental element of each offense.

One additional aid to analysis incorporated in the new code should be mentioned before discussing the definitions of the culpable mental states set out in this section. The code distinguishes three types of offense elements: the nature of conduct, the circumstances surrounding the conduct, and the result of the conduct. Although the definitions of most offenses prescribe the same culpable mental state for each type of element, some do not, and it is necessary to distinguish the types of elements to avoid confusing the proof requirements for these offenses. For example, Section 30.03 defines criminal trespass as entering another's property *knowing* the entry is without the owner's consent (circumstances surrounding conduct) and *reckless* about whether the entry will frighten another (result of conduct). Another example is false imprisonment, Section 20.02: an *intentional* or *knowing* (nature of conduct) detention becomes a felony if it *recklessly* exposes the victim to a substantial risk of serious bodily injury or death (result of conduct).

Section 6.05(a) and (b) create a narrow distinction between acting intentionally and knowingly with respect to the nature of conduct or the result of conduct. For example, the owner who burns down his apartment building to collect the insurance doesn't desire the death of his tenants, but he is practically certain it will occur. The distinction is immaterial for many offenses—murder, kidnapping, and arson may all be committed either intentionally or knowingly—but certain offenses have traditionally required proof of a specific intent and the new code preserves this requirement.

Recklessness, as defined in Subsection (c), differs markedly from knowingly. Recklessness is conscious risk creation; there is no desire that the risk occur nor an awareness that it is practically certain to occur. Thus the distinction, with respect to circum-

stances surrounding the conduct, is between awareness (knowledge) of the existence of those circumstances and indifference (recklessness) as to whether they exist or not; and with respect to the result of conduct, the distinction is between practical certainty that the result will occur and indifference as to whether it will occur or not.

Whereas recklessness requires an awareness of risk, criminal negligence, defined in Subsection (d), does not require awareness, but instead inquires of the fact-finder whether the actor *ought* to have been aware of the risk. Criminal negligence is the least defensible basis for the imposition of criminal responsibility, and the commentators have debated for years the desirability of including it in a penal code. See, e. g., Hall, Negligent Behavior Should be Excluded from Penal Liability, 63 Colum.L.Rev. 632 (1963). The Model Penal Code and every other jurisdiction recently revising its penal law includes criminal negligence, however, and homicide caused by *simple* negligence has been an offense in Texas since 1856.

Subsection (d) does not preserve the definition of (simple) negligence now found in Penal Code art. 1233 (negligent homicide). Rather, before a person may be branded either reckless or criminally negligent under the new code, the state must prove that (1) the risk he perceived or ought to have perceived was both substantial and unjustifiable, and (2) his disregard of the risk or failure to perceive it constituted a gross deviation from the ordinary standard of care. Under these definitions, for example, a surgeon would not be either reckless or criminally negligent in attempting a life-saving operation during the course of which the patient died even though the chance of success was far less than 50 percent; the risk, although substantial, was not unjustifiable. Nor would a motorist's striking another automobile suddenly entering a freeway from an access road constitute criminal negligence: his failure to perceive the risk of the other car's presence was not a gross deviation from the ordinary standard of care.

The adjectives "substantial," "unjustifiable," and "gross" in the definitions of recklessness and criminal negligence are admittedly vague and intended only to focus on the judgmental factors the fact-finder must weigh in deciding whether a person's disregard of or failure to perceive a risk was serious enough to merit the condemnation of the criminal law. As forthrightly stated by the Model Penal Code reporter,

> Some principle must be articulated, however, to indicate what final judgment is demanded after everything is weighed. There is no way to state this value-judgement that does not beg the question in the last analysis; the point is that the jury must evaluate the conduct and determine whether it should be condemned. . . . This formulation is designed to avoid the difficulty inherent in defining culpability

> in terms of culpability, but the accomplishment seems hardly more than verbal; it does not really avoid the tautology or beg the question less. . . .
>
> . . . The jury must find fault and find it was substantial; that is all that either formulation says or, we believe, that can be said in legislative terms. . . .

Model P.C. § 2.02, Comment at 125–26 (Tent. Draft No. 4, 1955).

The standard formulated to assist in making this value judgment, "the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint," is both objective and subjective and is quite similar to art. 1233's "a man of ordinary prudence . . . under like circumstances."

§ 6.06. Application of Culpable Mental States

If the definition of an offense prescribes a culpable mental state but does not specify the conduct, circumstances surrounding the conduct, or result of the conduct to which it applies, the culpable mental state applies to each element of the offense.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 15.15
Cal.Prop.Pen.Code § 405

Cross References

"Element of offense" defined, see § 1.07.

Committee Comment

This section resolves the ambiguity, frequently encountered in criminal statutes, as to which elements of an offense the culpable mental state applies. For example, Penal Code art. 1350, proscribing malicious mischief, provides that "[i]t shall be unlawful for any person to willfully injure or destroy, or attempt to injure or destroy, any property . . . without the consent of the owner. . . ." Does the culpable mental state "willfully" modify only "injure or destroy" in this statute, or does it modify "without the consent of the owner" as well so the state to convict must prove the actor knew he didn't have the owner's consent? Section 6.06 answers this question, when the term describing the culpable mental state does not syntactically modify the conduct, circumstances surrounding the conduct, or result of the conduct in the definition of the offense, by providing that the culpable mental state applies to each of these types of elements of the offense.

§ 6.07. Causation: Criminal Responsibility for Causing a Result

(a) Subject to the additional requirements in Subsections (b) and (c), an element of an offense requiring that an actor cause a result is

established if the result would not have occurred as it did but for the actor's conduct.

(b) If the offense requires that the actor intentionally or knowingly cause a result, he is criminally responsible for the result if the result that actually occurred:

(1) was desired or contemplated, whether the desire or contemplation extended to natural events or the conduct of another; or

(2) was desired or contemplated and occurred in a manner not too accidental, or by a means not too dependent on another's volitional act, to have a just bearing on the actor's criminal responsibility or the gravity of his offense.

(c) If the offense requires that the actor recklessly or with criminal negligence cause a result, he is criminally responsible for the result if the result that actually occurred:

(1) was within the risk perceived or that which should have been perceived, whether the risk extended to natural events or the conduct of another; or

(2) was within the risk perceived or that which should have been perceived and occurred in a manner not too accidental, or by a means not too dependent on another's volitional act, to have a just bearing on the actor's criminal responsibility or the gravity of his offense.

(d) An actor is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different person or property was injured, harmed, or otherwise affected.

Historical Note

Derivation:

Cal.Prop.Pen.Code § 408
Hawaii Prop.Pen.Code §§ 214–217
Model P.C. § 2.03

Cross References

"Act" defined, see § 1.07.
Aiding suicide, see § 22.05.
Attempt, see § 15.01.
Complicity, see ch. 7, subch. A.
"Conduct" defined, see § 1.07.
Culpable mental states defined, see § 6.05.
Felony murder, see § 19.02.
Party to felony murder, see § 19.02.

Committee Comment

The causal connection between criminal conduct and a proscribed result (usually some harm to person or property) is clear in the

great mine-run of cases. When the actor points a pistol at the victim, pulls the trigger, and the victim falls dead, there is no question of causal connection and the trial court does not charge on the causal issue.

When some agency in addition to the actor contributes to the proscribed result—for example, when the actor shoots X with intent to kill him, but wounds him instead, and X then dies in a traffic collision on the way to the hospital—a causal relation issue is sometimes presented. A few current statutes, Penal Code arts. 1199, 1202, 1203, 1260, attempt to resolve some of these issues, but for the most part Texas courts have been forced to decide cause questions in terms of the tort doctrine of proximate causation, see, e. g., Anderson v. State, 252 S.W.2d 189 (Tex.Crim.App.1952); Criswell v. State, 208 S.W.2d 896 (Tex.Crim.App.1948); Taylor v. State, 55 S.W. 961 (Tex.Crim.App.1900). The objective of Section 6.07 is "to free the [penal] law from the encrusted precedents on 'proximate causation,' offering a principle that will permit both courts and juries to begin afresh in facing problems of this kind." M.P.C. § 2.03, Comment at 135 (Tent. Draft No. 4, 1955).

Cause in Fact

Section 6.07(a) states the requirement of cause in fact in terms of the universally applied "but for" test, see R. Perkins, Criminal Law 687-90 (2d ed. 1969). One rarely need look beyond Subsection (a) to find the required causal relationship; in fact, common sense assumes the existence of a causal connection, because of the unbroken sequence of criminal conduct and resulting harm, in the great majority of criminal cases. In the statistically few fact situations in which the result occurs in a manner or by a means not intended, contemplated, or risked, Subsections (b) and (c) focus on the judgmental factors the trier of facts must consider to determine whether the actor is criminally responsible (and the degree of his responsibility) for the result as it actually occurred. In this connection, it should be noted that the first clauses of Subsections (b)(1) and (c)(1) state the obvious—if the actor desires, contemplates, or risks a specific result, and the result occurs, naturally he is criminally responsible for the result—but the clauses are necessary for a complete statement of the principle and serve as a predicate for Subsections (b)(2) and (c)(2), which deal with the variance problem.

Motivational Cause

The second clauses of Subsections (b)(1) and (c)(1), although also perhaps unnecessary in light of the complicity provisions of this code, are included to make clear that one does not escape criminal responsibility for a result merely because he uses another person or some natural force to accomplish the result. The actor who uses a child unknowingly to administer poison to the actor's victim is criminally responsible under the traditional complicity theory codified in Section 7.02. Likewise is the actor who sets a spring

gun along a path frequented by his victim, intending to kill him, or who imprisons his victim in a storm sewer during a heavy thundershower: the actor causes the death of his victim, by gunshot and drowning, and is criminally responsible for murder in each case.

Motivational cause problems have arisen most often in Texas in the context of the felony murder doctrine, e. g., Taylor v. State, 55 S.W. 961 (Tex.Crim.App.1900); Buckley v. State, 181 S.W. 729 (Tex.Crim.App.1915), but in two cases the Court of Criminal Appeals was required to decide whether aiding another to commit suicide made the aider a party to the suicide, i. e., guilty of criminal homicide; the court found no criminal responsibility in each case, Grace v. State, 69 S.W. 529 (Tex.Crim.App.1902); Sanders v. State, 112 S.W. 68 (Tex.Crim.App.1908). This code deals explicitly with these two narrow but recurring causal relation problems in Sections 19.02 (felony murder and complicity in felony murder) and 22.05 (aiding suicide).

Variance Between Manner or Means Desired, Contemplated, or Risked and Result as it Actually Occurred

A particular result (e. g., death, destruction of property, a false statement) is a material element of most offenses in this code. To convict of such an offense, therefore, requires the state to prove beyond a reasonable doubt that (1) the result actually occurred and that (2) the defendant intentionally, knowingly, recklessly, or with criminal negligence—depending on the culpable mental state required for the offense—caused the result. In Criswell v. State, 208 S.W.2d 896 (Tex.Crim.App.1948), for example, defendant was prosecuted for murder, but convicted of aggravated assault, when he slapped the victim in an auto repair garage and the latter staggered back into a parked car, fell to the floor, and fractured his hip, dying seven days later from complications resulting from the fracture. The Court of Criminal Appeals properly reversed the aggravated assault conviction, holding that the fractured hip was not a proximate result of defendant's slap. A sounder analysis, and the one the court hopefully will use under this code, is that the state failed to prove that defendant desired, contemplated, or risked causing serious bodily injury (the fractured hip), and thus was not guilty of aggravated assault.

If an actor has the requisite culpable mental state with regard to a proscribed result, but because of an additional cause the result occurs in a manner or by a means different from what he desired, contemplated, or risked, Subsections (b)(2) and (c)(2) set out the factors the trier of facts must consider in determining whether to hold the actor criminally responsible for the result as it actually occurred. Presently, the four articles of the Penal Code dealing purely with causal connection single out for resolution only a few causal problems. Articles 1202 and 1203 specify that the victim's or a physician's gross neglect cuts the causal chain between a non-

mortal wound and the victim's subsequent death, see, e. g., Noble v. State, 113 S.W. 281 (Tex.Crim.App.1908); Lerma v. State, 200 S. W.2d 635 (Tex.Crim.App.1947). Article 1199 requires that death result within a year from poisoning to constitute murder, and art. 1260 provides that death occurring more than three months after infliction of the wound in a duel is not murder. Section 6.07 rejects these special cause rules, and does not, for example, impose any purely temporal limitation on the length of the causal chain. Rather, the section asks the trier of facts whether it is just to hold the actor criminally responsible for the proscribed result even though, because of an additional cause, it occurred in a manner or by a means he did not desire, contemplate, or risk. The standards for determining justness are whether the manner of occurrence was too accidental or the means of occurrence too dependent on another's conduct. The few Texas cases discovered that have considered possible breaks in the causal chain have all turned on the presence or absence of an intervening human agent, e. g., Anderson v. State, 252 S.W.2d 189 (Tex.Crim.App.1952) (negligent motorist); Lerma v. State, supra (medical malpractice); Edge v. State, 164 S.W.2d 677 (Tex.Crim.App.1942) (victim's drug addiction and defendant's poison), but the reference to intervention by accidental or natural forces is desirable for a complete statement of the governing principles.

It should be noted that if an actor intentionally engages in conduct, but the proscribed result comes about in a manner or by a means he did not desire or contemplate, he will nevertheless be guilty of a lesser included offense, usually a criminal attempt under Section 15.01. The phrase "gravity of his offense" in Subsections (b)(2) and (c)(2) emphasizes this point and makes clear, for example, that an actor who shoots another with intent to kill, but inflicts a nonmortal wound, whereupon the other dies a week later in the hospital when it is burned to the ground by a maniac —that although the actor is not guilty of murder, he is guilty of attempted murder.

Transferred Intent

Subsection (d) preserves a narrow version of the transferred intent doctrine now applied, although from a different statutory base, by the better-reasoned Texas cases, e. g., Hayes v. State, 353 S.W.2d 25 (Tex.Crim.App.1962); Covert v. State, 113 S.W.2d 556 (Tex.Crim.App.1938). If an actor shoots with intent to kill X, but misses and unintentionally kills Y, he is guilty of murder under Subsection (d)—as he would be under the law of every American jurisdiction.

Penal Code arts. 42–44 codify the common-law doctrine of constructive or implied malice, a doctrine for the most part emphatically rejected by this code. The only features of the doctrine retained are the felony murder rule, Section 19.02, and the rule of transferred intent, this Section 6.07(d).

CHAPTER 7. CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

SUBCHAPTER A. COMPLICITY

Section
7.01. Parties to Offenses.
7.02. Criminal Responsibility for Conduct of Another.
7.03. Criminal Responsibility for Facilitation of Felony.
7.04. Defenses Excluded.
7.05. Defenses Available.

SUBCHAPTER B. CORPORATIONS AND ASSOCIATIONS

7.21. Subchapter Definitions.
7.22. Criminal Responsibility of Corporation.
7.23. Criminal Responsibility of Association.
7.24. Defense to Criminal Responsibility of Corporation or Association.
7.25. Criminal Responsibility of Person for Conduct in Behalf of Corporation or Association.

SUBCHAPTER A. COMPLICITY

Section 7.01. Parties to Offenses

(a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

(b) Each party to an offense may be charged with commission of the offense.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 5-1
Model P.C. § 2.06(1)

Cross References

Complicity, see § 7.02.
Criminal responsibility of corporation and association, see subch. B.
Facilitation of felony, see § 7.03.
Hindering apprehension or prosecution, see § 38.05.

Committee Comment

This section abolishes the distinction between "principals" and "accomplices." The reason for the distinction at common law was probably to mitigate the extraordinary severity of penalties with respect to nonperpetrating parties to crime. However, this distinction proved elusive and was abolished in England in 1848, and has

been repeatedly criticized in Texas, see Carlisle v. State, 21 S.W. 358 (Tex.Crim.App.1893); McClelland v. State, 373 S.W.2d 674 (Tex.Crim.App.1963). Since Penal Code art. 72 provides the same punishment for principals and accomplices, the distinction is virtually without significance and creates unnecessary burdens of pleading and proof for the prosecution.

This code does not employ the terms "principal" or "accomplice;" rather, Section 7.01 provides that one may be charged as a party to the commission of an offense if he is criminally responsible for the conduct of another who perpetrates the offense. Sections 7.02 and 7.03 then provide the standards for determining this vicarious responsibility.

It should be noted that "accessories" are not included as parties. Accessorial criminal conduct is considered interference with the administration of justice and dealt with as a separate offense in Section 38.05 (hindering apprehension or prosecution).

§ 7.02. Criminal Responsibility for Conduct of Another

(a) A person is criminally responsible for an offense committed by the conduct of another if:

(1) acting with the kind of culpability required for the offense, he causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense; or

(2) acting with intent to promote or assist the commission of the offense, he solicits, directs, aids, or attempts to aid the other person to commit the offense; or

(3) having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

(b) A coconspirator is not a party to an offense committed by the conduct of another unless he is criminally responsible for the offense under Subsection (a).

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 5-2

Cross References

Causation, see § 6.07.
Conspiracy, see § 15.02.
Criminal responsibility of corporation and association, see subch. B.
Facilitation of felony, see § 7.03.
Felony murder, see § 19.02.

Committee Comment

This section establishes three tests under which a person may be convicted of an offense committed by another because of complicity in the commission of the offense.

Subsection (a)(1) is a codification and clarification of present law regarding complicity in an offense committed by an innocent or irresponsible agent, see Penal Code art. 68. It is a specific application of one of the several general principles of causation set out in Section 6.07, and is included here to provide a broader range of culpability than that provided, in Subsections (a)(2) and (a)(3), when responsible persons are involved in the commission of the offense. Thus, when an offense may be committed recklessly or with criminal negligence, one who acts recklessly or with criminal negligence through the agency of an innocent or irresponsible person is criminally responsible for that person's conduct. See Brewer v. State, 143 S.W.2d 599 (Tex.Crim.App.1940) (murder conviction apparently based on defendant's recklessness in allowing drunken companion to drive car).

Subsection (a)(2) sets out the basic test of complicity and replaces Penal Code arts. 65, 66, 67, 69, and 70, which designate perpetrators and nonperpetrators either "principals" or "accomplices." It does not substantially change the present complicity test; rather, it specifies that complicitous conduct must be accompanied by "intent to promote or assist the commission of the offense," whereas the present articles enumerate a few circumstances and situations from which it is reasonable to infer such an intent.

Subsection (a)(3) makes one a party who aids the commission of the offense by inaction. Thus, a night watchman or policeman can be a party to an offense by purposely neglecting his duty, if he does so with intent to assist the perpetrating party.

Subsection (b) is included to distinguish clearly between complicity as a basis of criminal responsibility and the inchoate offense of criminal conspiracy. The present Texas law is usually stated to be:

> Each conspirator is responsible for everything done by his coconspirators which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was a collateral act or was not intended as a part of the original or common plan . . . .

2 Branch, Tex.Pen.Code Ann. § 719, at 7 (Supp.1968).

In other words, membership in a conspiracy has been invoked as the theoretical basis of criminal responsibility for the conduct of another, even if the other's offense was not the object of the conspiracy.

In this code criminal conspiracy is defined as an inchoate offense and is punishable as one grade less than the object felony of

the conspiracy—e. g., conspiracy to commit a first degree felony is a second degree felony; see Section 15.02. However, if the conspiracy results in a completed offense, the criminal responsibility of nonperpetrators for the completed offense must be determined according to the complicity test of this section. Mere membership in a conspiracy is not the basis of responsibility for all substantive offenses committed pursuant to the conspiracy, although a member's conduct pursuant to the conspiracy may in many cases satisfy the requirements of this section.

A cofelon's criminal responsibility for felony murder is specially dealt with in the murder section, 19.02, and explained in the comment to that section.

§ 7.03. Criminal Responsibility for Facilitation of Felony

(a) An individual, corporation, or association is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, he knowingly furnishes substantial assistance in the commission of the felony.

(b) The facilitation of the commission of a capital felony is a felony of the first degree. The facilitation of the commission of a felony of the first degree is a felony of the second degree. The facilitation of a felony of the second or third degree is a Class A misdemeanor.

Historical Note

Derivation:
N.Y.Rev.Pen.Law §§ 115.00, 115.05

Cross References

"Association" defined, see § 1.07.
Complicity, see § 7.02.
Criminal responsibility of corporation and association, see subch. B.
Lesser included offenses, see C.C.P. art. 37.09, as amended

Committee Comment

This section recognizes a lesser degree of criminal responsibility than that of a party under Section 7.02. Although formulated as a substantive offense, the section states a theory of vicarious responsibility because it applies to a person who facilitates criminal conduct of another by knowingly furnishing substantial assistance to the perpetrator of a felony, but who lacks the intent to promote or assist in the felony's commission. The section is new to Texas law.

Lacking a lesser degree of complicity, juries and courts have had to choose between full responsibility or none at all. For example, in Rives v. State, 77 S.W.2d 1049 (Tex.Crim.App.1935) and McLendon v. State, 124 S.W. 637 (Tex.Crim.App.1910), convictions were reversed even though the facts established that substantial

assistance was rendered by defendants. On the other hand, in Perez v. State, 398 S.W.2d 130 (Tex.Crim.App.1965) and Jackson v. State, 298 S.W.2d 837 (Tex.Crim.App.1957), convictions as principals were affirmed even though defendants lacked the degree of culpability ordinarily required of principals or accomplices.

In practice a facilitator will probably be charged as a party, but his conviction as a facilitator will be authorized by C.C.P. art. 37.-08, as amended, if his degree of complicity is insufficient to warrant conviction as a party.

The stepped down penalties for facilitation reflect the lesser culpability of the facilitator as compared with that of a full-fledged party.

§ 7.04. Defenses Excluded

In a prosecution in which an actor's criminal responsibility is based on the conduct of another, the actor may be convicted on proof of commission of the offense and that he was a party to or facilitated its commission, and it is no defense:

(1) that the actor belongs to a class of persons who by definition of the offense is legally incapable of committing the offense in an individual capacity; or

(2) that the person for whose conduct the actor is criminally responsible has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 20.05(2), (3)

Cross References

Complicity, see § 7.02.
Criminal responsibility of corporation and association, see subch. B.
Facilitation of felony, see § 7.03.

Committee Comment

Subdivision (1) of this section restates well-established Texas law. A person may be guilty of an offense he could not commit personally if he procures, aids, or facilitates another to commit it. Thus, a woman was convicted of rape when she assisted a man to commit it, Heitman v. State, 180 S.W. 701 (Tex.Crim.App.1915), and a man was convicted of rape of his own wife when he procured another to commit the offense, Kitchen v. State, 276 S.W. 252 (Tex.Crim.App.1925). A private individual was convicted under a statute making it an offense for a public officer to misapply public money when he acted with the officer in committing the offense, Quillin v. State, 187 S.W. 199 (Tex.Crim.App.1916).

Subdivision (2) likewise continues present law. In Martindale v. State, 254 S.W.2d 132 (Tex.Crim.App.1953), for example, the court held that coprincipals could be indicted and prosecuted either jointly or separately and the acquittal of one was no bar to the trial and conviction of another. Penal Code art. 80 provides the same rule in regard to accomplices.

§ 7.05. Defenses Available

(a) Unless otherwise provided by law, it is a defense to a prosecution in which an actor's criminal responsibility is based on the conduct of another:

(1) that the actor is a victim of the offense; or

(2) that the offense is so defined that the actor's conduct is inevitably incident to its commission.

(b) It is an affirmative defense to a prosecution in which the actor's criminal responsibility is based on the conduct of another, which the actor must prove by a preponderance of evidence, that, under circumstances manifesting a voluntary and complete renunciation of his criminal objective, the actor withdrew from participation in the offense before its commission and made a substantial effort to prevent its commission.

(c) For purposes of Subsection (b), renunciation is not voluntary and complete if it is motivated in whole or part:

(1) 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 objective; or

(2) by a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another but similar objective or victim

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 5-2(c)

Cross References

Affirmative defense explained, see § 2.04.
Complicity, see § 7.02.
Criminal responsibility of corporation and association, see subch. B.
Defense explained, see § 2.03.
Facilitation of felony, see § 7.03.
"Law" defined, see § 1.07.

Committee Comment

Section 7.05(a)(1) limits certain applications of the complicity principles set out in Sections 7.02 and 7.03. The consenting female

in statutory rape, a business man who yields to the extortion of a racketeer, and the parent who pays ransom to a kidnapper either promote or facilitate the commission of the offense, but their status as victims, even though they be "willing" victims, should bar application of the complicity principles.

For other offenses which necessarily require the conduct of at least two parties, this code occasionally makes distinctions between the criminal responsibility of the complicitous parties. Thus the conduct of prostitutes is inevitably incident to the offenses of pandering and managing a whorehouse, but the promotion of prostitution offenses in this code, Sections 43.03–43.05, do not contemplate holding the prostitute criminally responsible for those offenses. Similarly, the responsibility of a purchaser of narcotics for the unlawful sale, of the previously unmarried party to a bigamous marriage, and of the woman who has an abortion, is dealt with in the provisions treating those offenses. Subsection (a)(2) simply renders the general complicity provisions inapplicable to those offenses which by definition require more than one person to commit them.

Present Texas law usually reaches the same result for such offenses. For example, in Willingham v. State, 25 S.W. 424 (Tex. Crim.App.1894), the court refused to impose criminal responsibility on the female subject of an abortion. And prior to the 1943 amendments to the vagrancy articles, the court exempted patrons of prostitutes from criminal responsibility for prostitution, Lingenfelter v. State, 163 S.W. 981 (Tex.Crim.App.1913).

Subsections (b) and (c) provide the defense of renunciation of complicity. This is a new concept in Texas law, although it has undoubtedly been a factor considered by prosecutors and grand juries in deciding whether to prosecute.

The object of the defense is to extend the deterrent effect of the law beyond the point where the defendant's conduct has already established his complicity. If the defendant withdraws from the criminal enterprise and acts to prevent the commission of the offense, the offense may be prevented. Furthermore, if the defendant experiences a change of heart because of repentance, timidity, or a reappraisal of the consequences of completing the offense, and acts to prevent its commission, he evidences a lack of criminality which should be acknowledged.

Actual prevention of the offense is not an absolute requisite to establishing the defense; rather, efforts to prevent the offense should be viewed as objective evidence of the actor's renunciation. Giving timely notice to law enforcement authorities or to the victim may suffice to establish renunciation.

Subsection (c) limits the renunciation defense to those changes in the actor's purpose which evidence repentance or change of heart. The subsection also enumerates common factors which destroy a renunciation defense.

SUBCHAPTER B. CORPORATIONS AND ASSOCIATIONS

Section 7.21. Subchapter Definitions

In this subchapter, unless the context requires a different definition:

(1) "Agent" means a director, officer, employee, or other person authorized to act in behalf of a corporation or association.

(2) "High managerial agent" means:

(A) a partner in a partnership;

(B) an officer of a corporation or association;

(C) an agent of a corporation or association who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation or association.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 20.20
Ill.Stat.Ann. ch. 38, § 5-4(c)

Cross References

"Association" defined, see § 1.07.
Criminal responsibility of agent or high managerial agent for his own act, see § 7.25.
Criminal responsibility of corporation or association for act of agent or high managerial agent, see § 7.22.
Defense of due care by high managerial agent in criminal prosecution of corporation, see § 7.24.

Committee Comment

The definitions of "agent" and "high managerial agent" describe the persons for whose conduct a corporation or association may be held criminally responsible.

The definition of "high managerial agent" must necessarily be general in nature because of the infinite variations in the organizational schemes of corporations and associations. Under this definition a corporate president or general manager would be a high managerial agent, but a foreman in a large plant or an insignificant branch manager would not.

§ 7.22. Criminal Responsibility of Corporation

(a) If conduct constituting an offense is performed by an agent acting in behalf of a corporation and within the scope of his office or employment, the corporation is criminally responsible for:

(1) an offense graded as a Class C misdemeanor; or

(2) an offense defined by law other than this code in which a legislative purpose to impose criminal responsibility on corporations plainly appears; or

(3) an offense defined by law other than this code for which strict liability is imposed, unless a legislative purpose not to impose criminal responsibility on corporations plainly appears.

(b) A corporation is criminally responsible for offenses other than those described in Subsection (a) only if its commission was authorized, requested, commanded, performed, or recklessly tolerated by:

(1) a majority of the board of directors acting in behalf of the corporation; or

(2) a high managerial agent acting in behalf of the corporation and within the scope of his office or employment.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 5-4(a)

Cross References

"Agent" defined, see § 7.21.
"High managerial agent" defined, see § 7.21.
"Law" defined, see § 1.07.
Procedure for prosecuting corporation, see C.C.P. ch. 17A, as amended.
Punishment authorized for corporation, see § 12.51.

Committee Comment

Under current Texas law, corporate criminal responsibility is recognized only to a very limited extent. See Hamilton, Corporate Criminal Liability in Texas, 47 Texas L.Rev. 60 (1968). The definition of "person" in Penal Code art. 22 does not include corporations, at least when "person" is used in the accusatory portion of the statute. Although many articles of the Penal Code specifically refer to corporations, it has not been practical to prosecute corporations under these articles because there is no procedure by which corporations may be prosecuted. See Thompson v. Stauffer Chemical Company, 348 S.W.2d 274 (Tex.Civ.App.—Waco 1961, writ ref'd n.r.e.). However, in 1969 the Texas Legislature created two new pollution offenses for which corporations were specifically made responsible, and at the same time provided a special code of criminal procedure for corporations applicable only to these two offenses. See Penal Code arts. 698c, 698d. Criminal prosecutions of corporations appear to be impossible in Texas except in connection with these two offenses.

Every state except Texas recognizes the general principle of corporate criminal responsibility. The changes proposed by the Revised Penal Code simply bring the law of Texas into conformity with the law of every other state and the federal government. The

recognition of corporate criminal responsibility will improve the weapons available to law enforcement to fight economic crimes, including pollution, securities fraud, tax fraud, and antitrust violations.

Section 7.22 sets forth the basic rules determining the extent of corporate criminal responsibility. Obviously, a corporation can act only through agents, and this section defines the extent to which a corporation is criminally responsible for the acts of its agents. There are two tests for determining this responsibility.

Subsection (a)

In connection with (1) Class C misdemeanors, (2) offenses defined by other laws in which corporate criminal responsibility is clearly contemplated, and (3) offenses for which no culpable mental state is required, the corporation is responsible for the conduct of every agent acting (A) in behalf of the corporation, *and* (B) within the scope of his office or employment. The test of whether an agent is acting within the scope of his office or employment is the same test that is applied in tort law to determine a master's civil liability for the acts of his servant.

The phrase "acting in behalf of the corporation" is intended to define the required agency relationship, not to require that the act be performed with the intention of benefiting the corporation. An act by an agent may be in behalf of the corporation even if the act could only harm the corporation and was performed for personal profit.

Under Section 7.24 the corporation may defend against a criminal prosecution on the ground that the high managerial agent with supervisory duties over the agent in question exercised due diligence to prevent the commission of the offense.

Undoubtedly, the great bulk of offenses for which a corporation is likely to be prosecuted fall within Section 7.22(a).

Subsection (b)

For all other offenses in the Revised Penal Code, a corporation may be held criminally responsible only if the act was authorized, requested, commanded, performed, or recklessly tolerated by either a majority of the board of directors or by a high managerial agent. Under accepted principles of complicity and conspiracy law, a corporation may be held criminally responsible for virtually every type of offense, including such personal crimes as rape or murder. This subsection limits the extent to which corporations may be held responsible for noneconomic crimes, since only direct involvement in the criminal conduct by either the board of directors or a high managerial agent will result in corporate criminal responsibility. Examples include an officer sending an employee to deliver goods by motor vehicle knowing that the employee is under the influence of drugs or alcohol, or a mine superintendent order-

ing employees into an unsafe mine with reckless disregard for their safety.

§ 7.23. Criminal Responsibility of Association

(a) Except as qualified by Subsection (b), an association is criminally responsible for an offense if the law defining the offense clearly provides for criminal responsibility of the association and the conduct constituting the offense is performed by an agent acting in behalf of the association and within the scope of his office or employment.

(b) The law defining the offense controls over Subsection (a) to the extent:

(1) that it designates the agents for whose conduct the association is criminally responsible; or

(2) that it describes the circumstances under which the association is criminally responsible.

Historical Note

Derivation:
Model P.C. § 2.07(3)

Cross References

"Agent" defined, see § 7.21.
"Association" defined, see § 1.07.
"Law" defined, see § 1.07.
Procedure for prosecuting association, see C.C.P. ch. 17A, as amended.
Punishment authorized for association, see § 12.51.

Committee Comment

Unincorporated associations exist in bewildering variety. Examples include partnerships, limited partnerships, joint stock associations, social clubs, churches, fraternal organizations, and labor unions. Many of these associations are not operated for profit, and in some there may be individual liability for association debts and obligations, while in others members may not be so liable. Thus, although some types of unincorporated associations bear a reasonably close analogy to the corporation, many do not, and any general treatment of criminal responsibility of these associations which fails to distinguish between the various types of associations is undesirable. For this reason, the section is narrowly drafted and ordinarily will be invoked only to prosecute under legislation that regulates specific kinds of economic activity entered into for profit.

Unincorporated associations are criminally responsible under Section 7.23(a) only when the law creating an offense clearly provides; their responsibility is thus considerably narrower than that of corporations. Throughout this code the term "association" appears in the definition of the offense (e. g., "An individual, corpo-

ration, or association commits an offense") when the legislature intends to impose criminal responsibility on associations. The courts must decide, in construing penal laws outside this code, if criminal responsibility of associations is "clearly provided."

Once this initial test is satisfied, and unless the particular statute speaks comprehensively to responsibility—see Subsection (b) —association criminal responsibility for the conduct of its agent is determined according to the same test as corporate responsibility: was the agent acting in behalf of the association and within the scope of his office or employment?

Although several Texas statutes purport to impose criminal responsibility on associations, no Texas case deciding the issue or discussing the extent of responsibility was found. Other jurisdictions recognize that partnerships and other forms of unincorporated associations may be criminally responsible, e. g., United States v. A & P Trucking Co., 79 S.Ct. 203, 358 U.S. 121 (1958) (partnership); United States v. Union Mine Workers, 67 S.Ct. 677, 330 U.S. 258 (1947) (labor union); Western Laundry v. United States, 424 F.2d 441 (9th Cir. 1970) (partnership); City of Ludlow v. Commonwealth, 247 Ky. 166, 56 S.W.2d 958 (1933) (local government). However, there is dicta in a few early Texas decisions that associations generally and partnerships in particular lack the entity characteristics necessary to permit direct criminal prosecution, Peterson & Fitch v. State, 32 Tex. 477 (1870); Overt v. State, 260 S.W. 856 (Tex.Crim.App.1924). Nothing in these cases suggests a constitutional objection to association criminal responsibility, but the attorney general in 1969 relied heavily on these cases to rule unconstitutional proposed legislation subjecting associations to criminal prosecution for pollution. Tex.Atty.Gen.Op. No. M-348 (1969). The attorney general did not refer to cases in other jurisdictions, some of which are cited above, which have affirmed criminal convictions of associations, nor did he refer to modern statutes such as the Texas Uniform Partnership Act, R.C.S. art. 6138b, which provides that a partnership is an entity for most purposes. Despite the attorney general's opinion, therefore, the committee is unaware of a valid legal objection to the legislature imposing criminal responsibility on unincorporated associations in appropriate situations and is confident the Court of Criminal Appeals would so hold.

Section 7.23 does not deal with the question whether members of a convicted association, who did not themselves commit the criminal conduct, may be personally liable for criminal fines.

§ 7.24. Defense to Criminal Responsibility of Corporation or Association

(a) It is a defense to prosecution of a corporation or association under Section 7.22(a)(1) or (a)(2) or 7.23 that the high manageri-

al agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.

(b) Subsection (a) does not apply if it is plainly inconsistent with the legislative purpose expressed in the law defining the particular offense.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 5–4(b)

Cross References

Defense explained, see § 2.03.
"High managerial agent" defined, see § 7.21.
"Law" defined, see § 1.07.

Committee Comment

This section provides for a defense of "due diligence" in many situations. The offenses for which criminal responsibility is contemplated by Sections 7.22 and 7.23 largely involve economic regulation. The major purpose of these sections in imposing criminal responsibility on corporations or unincorporated associations is to encourage due diligence on the part of managerial personnel to prevent criminal conduct by employees. It is therefore appropriate to permit a corporation or unincorporated association to defend by proof that the criminal conduct occurred despite the exercise of due diligence on the part of supervisory personnel.

A due diligence defense is not available to prosecution under Section 7.22(b) because the direct involvement of a majority of the board of directors or a high managerial agent is sufficient to impose criminal responsibility even though other high managerial agents may have exercised due diligence.

§ 7.25. Criminal Responsibility of Person for Conduct in Behalf of Corporation or Association

(a) A person is criminally responsible for conduct that he performs in the name of or in behalf of a corporation or association to the same extent as if the conduct were performed in his own name or behalf.

(b) An agent having primary responsibility for the discharge of a duty to act imposed by law on a corporation or association is criminally responsible for omission to discharge the duty to the same extent as if the duty were imposed by law directly on him.

(c) If an individual is convicted of conduct constituting an offense performed in the name of or in behalf of a corporation or association, he is subject to the sentence authorized by law for an individual con-

victed of the offense without regard to the sentence authorized by law for the corporation or association.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 20.25

Cross References

"Agent" defined, see § 7.21.
"Association" defined, see § 1.07.
"Individual" defined, see § 1.07.
"Law" defined, see § 1.07.
Omission, see § 6.03.
"Person" defined, see § 1.07.
Punishment authorized for corporation and association, see § 12.51.

Committee Comment

This section makes clear that an individual or legal entity acting for a corporation or unincorporated association is fully responsible for his or its own criminal acts and is punishable accordingly without regard to the penalties provided for corporations or associations committing the same acts. It is thus permissible to prosecute either the agent or the corporation or association or both simultaneously.

Because of the absence of general corporate criminal responsibility in Texas, there are few cases in which the individuals committing criminal acts on behalf of corporations or associations have been prosecuted. In McCollum v. State, 308 S.W.2d 612 (Tex. Crim.App.1957) and Myers v. State, 184 S.W.2d 924 (Tex.Crim. App.1945), high corporate officers were held not criminally responsible for violations of an antipollution statute because it was not shown that they actually committed an act of pollution or that they were reckless in failing to prevent the pollution. The same results would have been reached on the facts of those cases under this code, see Chapter 6 (culpability generally).

CHAPTER 8. GENERAL DEFENSES TO CRIMINAL RESPONSIBILITY

Section

8.01. Insanity.
8.02. Ignorance or Mistake of Fact or Law.
8.03. Intoxication.
8.04. Duress.
8.05. Entrapment.
8.06. Age Affecting Criminal Court Jurisdiction.

Section 8.01. Insanity

A person is not criminally responsible for what otherwise would be an offense if at the time of the conduct charged to constitute the offense, as a result of mental disease or defect, he lacked capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

Historical Note

Derivation:

Ill.Stat.Ann. Ch. 38, § 6-2(a)
Conn.Gen.Stat. § 53-13
Prop.Fed.Crim.Code § 503
Cal.Prop.Pen.Code § 530
Model P.C. § 4.01

Cross References

Admissibility of evidence, see C.C.P. art. 46.02, §§ 2.01(c), 2.02(c), 3.03, as amended.
Burden of proof, see C.C.P. art. 46.02, § 2.03(a), as amended.
"Conduct" defined, see § 1.07.
Incompetency to be tried, see C.C.P. art. 46.02, pt. A, as amended.
"Law" defined, see § 1.07.
Notice and pleading, see C.C.P. arts. 27.02, 45.31, and 46.02, § 2.01, as amended.
Psychiatric examination, see C.C.P. art. 46.02, pt. C, as amended.
Trial of insanity issue, see C.C.P. art. 46.02, §§ 2.02, 2.03, as amended.

Committee Comment

Presently, the test for determining mental responsibility for crime in Texas is the ancient M'Naghten Rules:

> . . . [A]t the time of committing the act the party accused was laboring under such defect of reason, from disease of mind, as not to know the nature and quality and consequence of the act he was doing; or if he did know, that he did not know he was doing wrong, that is, that he did not know the difference between the right and the wrong as to the particular act charged against him. . . .

Freeman v. State, 317 S.W.2d 726, 730 (Tex.Crim.App.1958).

Section 8.01, in adopting a variation on the Model Penal Code formulation of the test, represents a basic change in Texas law for

determining mental responsibility. It is the test, however, that will be applied by federal courts in Texas since the Fifth Circuit recently adopted it, see Blake v. United States, 407 F.2d 908 (5th Cir. 1969). Indeed, the Model Penal Code test and its variations are leading the trend away from M'Naghten in legislatures and state and federal courts. See, e. g., Conn.Gen.Stat. § 53–13; Ill.Stat.Ann. ch. 38, § 6–2; Md.Ann.Code art. 59, § 9(a); Mo.Stat.Ann. §§ 552.010, 552.030; Mont.Laws 1967, ch. 196, § 95–501; Minn.Stat.Ann. § 609.07; Vt.Stat.Ann. §§ 4801, 4802; United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); United States v. Currens, 290 F.2d 751 (3d Cir. 1961); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Terry v. Commonwealth, 371 S.W.2d 862 (Ky.1963); Commonwealth v. McHoul, 226 N.E.2d 556 (Mass.1967).

The major function to be performed by a test of mental responsibility for crime is the identification, with reasonable precision and flexibility, of those persons accused of crime who suffer from such a grossly disordered mental condition that the criminal law is incapable of influencing their behavior. The mental responsibility decision admittedly is an undifferentiated blend of medical, legal, and social considerations. However, it is the law and its processes that are entrusted with the obligation to reflect the existing state of medical and psychological knowledge and social norms. The legal policy involved is capable of being stated in many ways—and in many words—but at bottom it appears to be a policy against the imposition of criminal sanctions on those persons who, because of mental disease or defect, are unable to regulate and control their behavior in accordance with legal norms. The articulations of this legal policy, and the accommodation of the existing state of medical and psychological knowledge as well as social norms, is the task of a rule of mental responsibility for crime, i. e., insanity.

Section 8.01 identifies the disorder, mental disease or defect, and then requires the trier of facts to determine if the disorder is present and whether as a result the person lacked capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. This test permits the expert to testify in terms of the "whole man" and frees him from the necessity of making moral judgments. It focuses squarely and honestly on what the committee believes is the appropriate legal policy.

The M'Naghten Rules, on the other hand, have been extravagantly and caustically criticized for years. The most cogent criticism of the rules is that they fail to aid in the identification of many persons accused of crime who suffer from serious mental disorders. For example, the rules exclude mental defectives altogether and focus on but one of the major aspects of the personality, the cognitive or intellectual faculty.

Other valid criticisms of the M'Naghten Rules are: (1) the concept of "right and wrong" is essentially an ethical or moral concept which forces the witnesses and decision-maker to make moral, rather than medical, social, and legal judgments; (2) the rules evolved at a time when "faculty psychology" held sway, and today no one seriously believes that the mind is neatly compartmentalized; and (3) the rules may well have been intended to apply only to one type of illness, that characterized by delusions. For a complete listing of the various criticisms see The Mentally Disabled and the Law 336 (Lindman & McIntyre ed. 1961).

§ 8.02. Ignorance or Mistake of Fact or Law

(a) It is a defense to prosecution that the actor was honestly ignorant or mistaken about a matter of fact or law if his ignorance or mistake negated the intent, knowledge, recklessness, or criminal negligence required to establish an element of the offense charged.

(b) Except as provided in Subsection (a), ignorance or mistake about the existence or meaning of a penal law is no defense. However, an actor's ignorance or mistake about the existence or meaning of the law under which he is being prosecuted is a defense to the prosecution if:

(1) because of his ignorance or mistake the actor reasonably believed his conduct did not constitute an offense; and

(2) his ignorance or mistake resulted from the actor's reasonable reliance on:

(A) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

(B) a written interpretation of the law contained in an opinion of a court of record or made by a public servant charged by law with responsibility for interpreting the law in question.

(c) Although an actor's ignorance or mistake of fact or law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the fact or law were as he believed.

Historical Note

Derivation:

Ill.Stat.Ann. Ch. 38, §§ 4-8(a), (b)(4), (c)
Kan.Stat.Ann. § 21-3203(1), (3)

Cross References

"Agency" defined, see § 1.07.
Causation, see § 6.07.

Claim of right defense to theft, see § 31.10.
"Conduct" defined, see § 1.07.
Defense explained, see § 2.03.
"Element of offense" defined, see § 1.07.
Ignorance or mistake about age, see §§ 21.12, 43.24.
"Law" defined, see § 1.07.
Lesser included offense, see C.C.P. art. 36.09, as amended.
"Public servant" defined, see § 1.07.
"Reasonable belief" defined, see § 1.07.

Committee Comment

Since, with few exceptions, the commission of an offense requires a culpable mental state as well as a proscribed act or omission, ignorance or mistake of any fact that negates the mental element would require acquittal without this section. Subsection (a) is included, however, to treat ignorance or mistake as a defense, for which a defendant has the burden of producing evidence and which the prosecution does not have to negate unless raised.

Present law states unequivocally that ignorance or mistake of *law* is no excuse, Penal Code arts. 12, 40, but in fact the Court of Criminal Appeals has occasionally recognized it as a defense when the ignorance or mistake negated an element of the offense, e. g., Green v. State, 221 S.W.2d 612 (Tex.Crim.App.1949) (ownership of hogs in theft prosecution); compare Lewis v. State, 64 S.W.2d 972 (Tex.Crim.App.1933) (mistake about fee entitlement no defense) with Burns v. State, 61 S.W.2d 512 (Tex.Crim.App.1933) (mistake about fee entitlement a defense). Subsections (a) and (b) clarify when ignorance or mistake of law, whether a penal law or some other, is and is not a defense: it is in those rare instances in which the ignorance or mistake negates a required culpable mental state; otherwise, except as provided in Subsections (b)(1) and (b)(2), ignorance or mistake about the existence or meaning of a *penal* law is no defense.

Under the narrow exception of Subsections (b)(1) and (b)(2), a cafe owner prosecuted for selling beer for off-premises consumption could defend on the basis of a grant of permission from the Alcoholic Beverage Commission; and a business could defend against an antitrust prosecution on the basis of a court opinion declaring that the practice in question did not constitute a monopoly. The defense is narrowly circumscribed to avoid the potential for abuse, however. The actor's ignorance or mistake must actually result from reliance on an official statement or opinion, and the reliance must be reasonable. Thus, one cannot ordinarily rely on old interpretative opinions, opinions that conflict with others, or on overruled opinions. The author of the statement or interpretation must be an official or agency charged with interpreting the law, not simply enforcing or administering it. Finally, the reliance must give the actor reasonable ground to believe his conduct is legal.

Mistake, and presumably ignorance, of *fact* are presently defenses, Penal Code art. 41, and Subsection (a) retains the concept while clarifying the purpose of the defense. Mistake or ignorance of fact constitutes a defense only if it negates the culpable mental state. Thus, Subsection (a) overturns the line of cases recognizing mistake of fact as a defense to public welfare offenses that impose strict liability, e. g., Neill v. State, 225 S.W.2d 829 (Tex.Crim. App.1949); Keeton v. State, 151 S.W.2d 819 (Tex.Crim.App.1941).

Present art. 41 purports to deny the defense for mistakes that result "from a want of proper care," which in effect makes negligence the culpable mental state. Subsection (a) requires only honest ignorance or mistake.

Subsection (c) makes clear that an actor whose defense of ignorance or mistake is successful may nevertheless be convicted of a lesser included offense that he would have committed had the facts or law been as he believed. If, however, he would have committed an offense other than one included in the offense charged, he must be charged and tried again.

§ 8.03. Intoxication

(a) Except as provided in Subsection (c), intoxication itself is not a defense to prosecution for an offense. However, intoxication, whether voluntary or involuntary, is admissible in evidence if it is relevant to negate an element of the offense.

(b) If recklessness establishes an element of an offense and the actor is unaware of a risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense.

(c) Intoxication itself does not constitute mental disease or defect within the meaning of Section 8.01. However, involuntary intoxication is a defense to prosecution if as a result of the involuntary intoxication the actor lacked capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

(d) For purposes of this section:

(1) "Intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance into the body.

(2) "Involuntary intoxication" means intoxication that is not voluntary.

(3) "Voluntary intoxication" means intoxication caused by a substance that the actor knowingly introduced into his body, the tendency of which to cause intoxication he knew or ought to have known, unless he introduced the substance under circumstances affording a defense to prosecution.

Historical Note

Derivation:

Fed.Prop.Crim.Code § 502
Hawaii Prop.Pen.Code § 230
Model P.C. § 2.08

Cross References

"Conduct" defined, see § 1.07.
Defense explained, see § 2.03.
Duress, see § 8.04.
"Element of offense" defined, see § 1.07.
Ignorance or mistake of fact or law, see § 8.02.
Insanity, see § 8.01.
"Law" defined, see § 1.07.
Public intoxication, see § 42.08.

Committee Comment

Penal Code art. 36 provides that "[n]either intoxication nor temporary insanity of mind produced by the voluntary recent use of ardent spirits, intoxicating liquor, narcotics, or dangerous drugs, or a combination thereof, shall constitute any excuse for the commission of crime," but that evidence of "temporary insanity" produced by intoxicants may be introduced to mitigate the penalty. It was enacted in 1881, apparently to restrict the defense of "temporary insanity" produced by intoxicants, since its enactment swiftly followed a notorious trial in which a motiveless killer was allegedly acquitted on the defense of "temporary insanity" produced by intoxication, see Evers v. State, 20 S.W. 744, 745 (Tex. Crim.App.1892).

For 11 years following its enactment, Texas courts refused to admit that art. 36 altered the common-law rule that evidence of intoxication is relevant to establish the defendant's state of mind, see Lyles v. State, 19 S.W. 903 (Tex.Ct.App.1892); Reagan v. State, 12 S.W. 601 (Tex.Ct.App.1889). But in Evers v. State, 20 S.W. 744 (Tex.Crim.App.1892), a case that did not involve the effect of intoxication on defendant's state of mind, the court expressly overruled earlier constructions of art. 36 and held that evidence of intoxication is admissible only to establish temporary insanity, and then only to mitigate punishment. Although it has occasionally expressed dissatisfaction with this construction, see Stoudenmire v. State, 125 S.W. 399, 400 (Tex.Crim.App.1910) ("We think it ought to be the law that, where the offense charged is made to depend upon the peculiar condition and state of mind of the accused at the time, evidence of drunkenness as a fact affecting the mind should be received, and the court should instruct the jury that . . . they should look at all the evidence, including that relating to drunkenness . . . as to his ability for forming a criminal intent"), the Court of Criminal Appeals has consistently adhered to the Evers ruling ever since.

The Evers construction, which appears peculiar to Texas, is a perversion of the common-law rule that intoxication is no defense to crime. It is undisputed that the fact of intoxication does not excuse crime—present art. 36 so provides and Section 8.03 retains this rule—but because the commission of a crime requires both an act and a culpable mental state and because the fact of intoxication is relevant to whether or not an accused acted with the requisite mental state (for example, whether he intended the act or the result), the jury should be able to consider evidence of the accused's intoxication in determining whether he committed a crime. Otherwise, one accused of theft, for example, could be convicted even though at the time of the taking he was so drunk that he could not possibly have been aware of his act and the surrounding circumstances, cf. Stoudenmire v. State, 125 S.W. 399 (Tex.Crim.App. 1910). This is the precise result of the Evers construction of art. 36, however: intoxication is substituted for the intent or knowledge required by the definition of an offense, e. g., Cohron v. State, 413 S.W.2d 112 (Tex.Crim.App.1967) (burglary); Fernandez v. State, 116 S.W.2d 1067 (Tex.Crim.App.1938) (murder with malice).

Section 8.03(a) restores the common-law rule disallowing intoxication as a defense but treating it as material when relevant to the determination of whether an offense was committed. Intoxication may negate any element of an offense, including the act, see Morris v. State, 206 S.W. 82 (Tex.Crim.App.1918), as well as the mental state. Voluntary intoxication, however, cannot negate awareness of a risk, if recklessness is sufficient to establish the offense, Subsection (b), and since criminal negligence is an objective standard, see Section 6.05(d), intoxication cannot negate criminal negligence.

Involuntary intoxication, a subject overlooked by present law, is treated differently. Like voluntary intoxication, the fact of involuntary intoxication is no excuse for crime, but because the actor is not responsible for his intoxicated condition, it may be introduced not only for any purpose for which voluntary intoxication is admissible, but also to negate recklessness and, under Subsection (c), to establish a mental incapacity that would, if the result of mental disease or defect, constitute insanity under Section 8.01.

Intoxication is involuntary under Subsections (d)(2) and (d)(3) if the actor is unaware that he is introducing an intoxicating substance, is unaware (and ought not be aware) that the substance he is introducing has intoxicating tendencies, or introduces the substance under circumstances affording a defense—by mistake or under duress, for example.

Subsection (d)(1) defines intoxication to include any mental or physical imbalance induced by the introduction of any substance into the body. The trier of facts will, of course, consider the degree of imbalance in determining its effect on the conduct; ob-

viously one who drinks to screw up his courage before committing a crime, for example, cannot avail the intoxication defense. The substances that may cause intoxication are not limited, as in present law, to alcohol and drugs, so that future discoveries of substances that alter the personality or otherwise affect conduct will be covered without the need for amendment.

§ 8.04. Duress

(a) It is a defense to prosecution that the actor engaged in the conduct charged to constitute an offense because he reasonably believed he was compelled to do so by the threat or use of unlawful force against his person or the person of another, which threat or use of unlawful force a person of ordinary firmness in the actor's situation would not have resisted.

(b) The defense provided by this section is unavailable if the actor intentionally, knowingly, or recklessly placed himself in a situation in which it was probable that he would be subjected to compulsion.

(c) It is no defense that a woman acted at the command or persuasion of her husband, unless she acted under compulsion that would establish a defense under this section.

(d) If the actor's conduct is otherwise justifiable under Section 9.-21 (necessity), this section does not preclude that justification.

Historical Note

Derivation:

N.Y.Rev.Pen.Code § 35.35
Ill.Stat.Ann. ch. 38, § 7-11(b)
Cal.Prop.Pen.Code § 520
Model P.C. § 2.09

Cross References

Complicity, see ch. 7, subch. A.
"Conduct" defined, see § 1.07.
Defense explained, see § 2.03.
Necessity, see § 9.21.
"Reasonable belief" defined, see § 1.07.
"Unlawful" defined, see § 1.07.

Committee Comment

Subsection (a) restates the substance of the present duress defense, Penal Code art. 38, labeling it a defense, which clarifies the procedural and evidentiary consequences of the issue. As in present law, duress is limited to compulsion resulting from another's threat or use of unlawful force against the person, whether the actor or another, but the danger must be of such severity that "a person of ordinary firmness" would not resist. Also as in present law, duress may constitute a defense to any offense. As the Model Penal Code draftsmen stated:

> [W]e perceive no valid reason for demanding that the threat be one of death or even of great bodily harm, that the imperiled victim be the actor rather than another, or that the injury portended be immediate in point of time. . . . We think it obvious that even homicide may sometimes be the product of coercion that is truly irresistible, that danger to a loved one may have greater impact on a man of reasonable firmness than a danger to himself, and, finally, that long and wasting pressure may break down resistance more effectively than a threat of immediate destruction. . . .

Model Penal Code § 2.09, Comment at 7–8 (Tent. Draft No. 10, 1960).

Under this section the trier of fact weighs the severity of the threatened harm, the identity of the imperiled victim, and the seriousness of the offense together with the other circumstances in determining whether a person of ordinary firmness would have been compelled to commit the offense.

Because the mistake defense, Section 8.02, operates only to negate a culpable mental state, Subsection (a) includes in duress instances where the actor mistakenly, but reasonably, believes he is compelled. This accords with present law, Penal Code art. 41, although the test of reasonableness differs, see Section 1.07 comment.

Duress is a favorite defense of one of two or more parties to crime, see, e. g., Leviness v. State, 247 S.W.2d 115 (Tex.Crim.App. 1952). Subsection (b) resolves the complicity problem by denying the duress defense to one who recklessly subjected himself to compulsion. The prosecution can thus negate duress by proving that the actor recklessly put himself in a situation where compulsion was probable.

Although Texas has repudiated the doctrinal underpinning of the common-law presumption that a wife acting in the presence of her husband is coerced, Marks v. State, 164 S.W.2d 690 (Tex. Crim.App.1942), Subsection (c) makes clear that married women are to be treated no differently than anyone else. There is no presumption of duress; the defense is available only when the husband uses or threatens sufficient force to overcome the resistance of a person of ordinary firmness in the wife's situation.

The defense of necessity, Section 9.21, will overlap with duress in some cases. Subsection (d), which provides that the availability of the duress defense does not preclude the necessity defense, is necessary because Section 9.21 provides that necessity cannot be raised when another defense is available unless specifically authorized.

§ 8.05. Entrapment

(a) It is a defense to prosecution that a peace officer, or a person directed by a peace officer, induced the commission of an offense, in

order to obtain evidence of the commission for prosecution, by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. However, there is no defense under this section if the peace officer, or person directed by him, merely afforded the actor an opportunity to commit the offense.

(b) The defense provided by this section is available even though the actor denies commission of the conduct charged to constitute the offense.

(c) On written motion of the defendant, the court shall determine as a matter of fact and law, after a hearing without the jury, whether the defendant was entrapped to commit the offense. The defendant shall file the motion with the court at least 10 days before the trial begins, or if the court sets a pretrial hearing, the defendant shall file the motion during the hearing. However, the court for good cause shown may permit filing the motion at a later time determined by the court.

(d) If the court determines the defendant was entrapped to commit the offense, it shall acquit him if the state has concluded its case, or dismiss the offense with prejudice if the state has not concluded its case. If the court determines the defendant was not entrapped, but believes reasonable minds could differ over the issue, the court shall submit the entrapment defense to the jury.

Historical Note

Derivation:
Subsec. (a):
N.Y.Rev.Pen.Law § 35.40
Fed.Prop.Crim.Code § 702
Cal.Prop.Pen.Code § 550
Mich.Prop.Crim.Code § 640
N.H.Prop.Crim.Code § 571:5
Subsec. (b): New
Subsec. (c): New
Subsec. (d): C.C.P. art. 38.22, § 2

Cross References

"Conduct" defined, see § 1.07.
Defense explained, see § 2.03.
"Peace officer" defined, see § 1.07.
Pretrial hearing, see C.C.P. art. 28.01.

Committee Comment

With few exceptions, police methods of detecting crime are invisible, unconfined, unstructured, and unchecked. Some crime detection involves the encouragement or promotion of criminal conduct, occasionally by methods calculated to induce even the innocent to commit a crime. Texas courts long ago recognized that some overly zealous police encouragement might constitute a ground of defense, O'Brien v. State, 6 Tex.Ct.App. 665 (1879), and although the Court of Criminal Appeals did not formally recognize the entrapment defense until recently, see Cooper v. State, 288 S.W.2d 762 (Tex.Crim.App.1956), it reached a similar, although

more limited, result under the accomplice witness doctrine, e. g., Stevens v. State, 110 S.W.2d 906 (Tex.Crim.App.1937).

This section codifies the recently recognized entrapment defense and clarifies the criteria for determining its application and the procedural consequences of its assertion. Subsection (a), which defines the scope of the defense, establishes two standards for determining the boundaries of permissible police encouragement practices. First, as in present law, the police conduct must "induce" the commission of a crime; as the second sentence of Subsection (a) emphasizes, one who merely takes advantage of an opportunity provided by the police is not entrapped. For example, the entrapment defense would not avail a mugger who attacks an apparently helpless woman who turns out to be a disguised policeman. In addition, the inducement must be for the purpose of obtaining evidence for prosecution; if a police officer is subject to prosecution as a party to the defendant's crime, for example, the defense is not available.

If the causation or inducement element is decided in defendant's favor, Subsection (a) focuses on the nature of the inducement methods. This second standard changes the focus of the entrapment defense, as presently recognized, which looks at the defendant's criminal proclivities. The defendant's predisposition to commit the crime and, for purposes of the entrapment defense his prior criminal record, are immaterial and thus inadmissible. Rather, Section 8.05 focuses on whether, objectively considered, the inducement methods used created a substantial risk of inducing one with innocent intentions to commit the crime. If the inducement attained that intensity, a determination of whether the defendant would have committed the crime with less or no encouragement ordinarily involves unsatisfactory and highly prejudicial (to the defendant) evidence, and is thus rejected as an element of entrapment by this section.

Subsection (a) proscribes entrapping methods by persons directed by a peace officer as well as by the peace officer himself. Although this changes present law, see Byerly v. State, 417 S.W.2d 407 (Tex.Crim.App.1967), it is necessary to conform to the rationale of entrapment. The promotion of crime by anyone for the purpose of enforcing the law is questionable, and it certainly should not be permitted by agents over whom the police have control. Thus the police should, at the very least, apprise their agents of methods not to be used.

Subsection (b) overrules Byerly v. State, supra, and similar decisions denying the entrapment defense when the defendant denied committing the conduct charged. Although the two defenses are ordinarily inconsistent, they are not always. For example, a defendant accused of a possessory offense might assert that he didn't possess because the object was planted on him and also that he was entrapped. Moreover, other defenses that are logically inconsistent

with a denial of guilt, such as insanity, duress, and justification, are permitted, see Stalling v. State, 234 S.W. 914 (Tex.Crim.App. 1921); cf. C.C.P. art. 27.17.

Subsections (c) and (d) provide procedures, similar to those required for determining the voluntariness of confessions, for the assertion and determination of the entrapment defense. The defendant ordinarily must give notice of the defense prior to trial; the exception permits a late assertion of the defense when, for example, defense counsel is unaware that it is an issue until the prosecuting witness testifies. Entrapment initially is an issue for the court, whose resolution will aid in the development of standards to guide law enforcement, but the issue may be submitted to the jury if the court determines that defendant was not entrapped, unless it determines no entrapment as a matter of law.

§ 8.06. Age Affecting Criminal Court Jurisdiction

(a) A person may not be prosecuted or convicted for any offense that he committed when younger than 15 years, except:

(1) aggravated perjury, when it appears by proof that he had sufficient discretion to understand the nature and obligation of an oath; or

(2) a violation of a penal statute cognizable under Chapter 302, Acts of the 55th Legislature, Regular Session, 1957, as amended; or

(3) a violation of a motor vehicle traffic ordinance of an incorporated city or town in this state.

(b) Unless the juvenile court waives jurisdiction and certifies the individual for criminal prosecution, a person may not be prosecuted or convicted for any offense committed when younger than 17 years, except:

(1) aggravated perjury, when it appears by proof that he had sufficient discretion to understand the nature and obligation of an oath; or

(2) a violation of a penal statute cognizable under Chapter 302, Acts of the 55th Legislature, Regular Session, 1957, as amended; or

(3) a violation of a motor vehicle traffic ordinance of an incorporated city or town in this state.

(c) A person who has been alleged in a petition for an adjudicatory hearing to have engaged in delinquent conduct or conduct indicating a need for supervision may not be prosecuted or convicted for any offense alleged in the juvenile court petition or any offense within the knowledge of the juvenile court judge as evidenced by anything in the record of the juvenile court proceedings.

Historical Note

Derivation:
Penal Code art. 30

Cross References

Aggravated perjury, see § 37.03.
Certification of juvenile for criminal prosecution, see Family Code § 24.02.
Computation of age, see § 1.06.
Juvenile adjudication, see Family Code ch. 24.
Juvenile jurisdiction, see Family Code §§ 21.02, 21.04.

Committee Comment

With slight alteration in wording this section preserves art. 30 of the Penal Code, as amended in 1967, see R.C.S. art. 2338–1, §§ 6, 12, 13. The critical age is changed to 17, the age adopted for the Family Code revision.

Section 8.06 does not provide a defense to criminal responsibility —unlike insanity or duress, for example, it does not negate blameworthiness—but its inclusion in the Revised Penal Code is probably necessary to fully shield juveniles from criminal prosecution and the section's location in this chapter is as logical as anywhere else.

Juvenile's Responsibility for Crime

Since 1967 the Penal Code has not dealt with a child's criminal responsibility. Before the juvenile laws amendment of that year, however, Texas law since 1856 declared children under a certain age incapable of crime. The Court of Criminal Appeals consistently held, in construing the pre-1967 art. 30, that after a defendant offered evidence of his incapacity based on age, the state was required to prove his capacity beyond a reasonable doubt, e. g., Scott v. State, 158 S.W. 814 (Tex.Crim.App.1913); Binkley v. State, 100 S.W. 780 (Tex.Crim.App.1907).

The incapacity concept has produced some unfortunate decisions by our courts. For example, the Court of Criminal Appeals in 1904 held a seven-year-old incompetent to testify as a result of its reading Tex.Const. art. I, § 5, together with art. 34 of the 1895 Penal Code, Freasier v. State, 84 S.W. 360 (Tex.Crim.App.1904). Section 5 provides in part that all oaths "shall be taken subject to the pains and penalties of perjury" whereas art. 34 provided that "no person shall in any case be convicted of any offense committed before he was of the age of nine years." The court reasoned that criminal responsibility for perjury was a prerequisite of competency and since a seven-year-old was not responsible for perjury, she was not a competent witness. Forty years later the court in Santillian v. State, 182 S.W.2d 812 (Tex.Crim.App.1944), was confronted with essentially the same objection to a 15-year-old's competency in light of the language in Section 13 of the 1943 Juvenile

Delinquency Act: "nor shall any child be charged with or convicted of a crime in any court. . . ." The court first sustained the witness's competency on the ground that an adjudication of delinquency was a penalty within the meaning of the Texas Constitution. However, on rehearing the court invalidated the language quoted from Section 13 because (the court reasoned) it denied children equal protection of the law since, as they were not responsible for perjury, they could not testify in any court. Because of these and similar decisions, e. g., Slusser v. State, 232 S.W.2d 727 (Tex. Crim.App.1950), Section 8.06 continues the perjury exception of present law.

Juvenile Jurisdiction

Texas law since 1887 has provided a variety of different procedures for dealing with children accused of crime. The current juvenile delinquency act, R.C.S. art. 2338-1, deals comprehensively with males between 10 and 17, and females between 10 and 18, in that category. Generally, the act grants the juvenile court exclusive jurisdiction over this age group, permitting the court to waive its jurisdiction, however, and transfer the juvenile to a criminal court, if he committed a felony on or after his 15th birthday, see art. 2338-1, §§ 6, 13.

As noted earlier, Family Code § 21.02 changes the critical age to 17 for both sexes, and makes the age when the offense was committed, rather than age at time of trial as under present law, Dendy v. Wilson, 179 S.W.2d 269 (Tex.Crim.App.1944); Dearing v. State, 204 S.W.2d 983 (Tex.Crim.App.1947), determine the juvenile court's jurisdiction. Section 8.06(a) and (b) conform to these changes. Subsection (c) restates Penal Code art. 30, § 3.

CHAPTER 9. JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY

SUBCHAPTER A. GENERAL PROVISIONS

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SUBCHAPTER F. SPECIAL RELATIONSHIPS

9.61 Parent—Child.
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SUBCHAPTER A. GENERAL PROVISIONS

Section 9.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Custody" means under arrest by a peace officer, or under restraint by a public servant pursuant to an order of a court.

(2) "Escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a spe-

cific purpose or limited period, but does not include a violation of conditions of probation or parole.

(3) "Deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

§ 9.02. Justification a Defense

Justification is a defense to prosecution for conduct that is justified under this chapter.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 7-14

Cross References

"Conduct" defined, see § 1.07.
Defense explained, see § 2.03.

Committee Comment

By making justification a defense, this section obviates the need for the state to negate in the accusation the existence of justification and places the burden on the defendant to produce some evidence of the justification claimed (if it was not produced as part of the state's case) to raise the issue and merit a charge. Once some evidence is produced, however, the state must disprove the existence of the claimed justification beyond a reasonable doubt. See § 2.03 and comment.

Section 9.02 is probably consistent with present law, although language in one case, Parkman v. State, 191 S.W.2d 943 (Tex. Crim.App.1945), appears to the contrary. See, e. g., Lyons v. State, 159 S.W. 1070 (Tex.Crim.App.1913) (self-defense); cf. Hathcock v. State, 281 S.W. 859 (Tex.Crim.App.1926) (alibi); Stafford v. State, 284 S.W. 581 (Tex.Crim.App.1926) (duress); Dean v. State, 433 S.W.2d 173 (Tex.Crim.App.1968) (exemption from securities regulation).

§ 9.03. Confinement as Justifiable Force

Confinement is justified when force is justified by this chapter if the actor takes reasonable measures to terminate the confinement as soon as he knows he safely can unless the person confined has been arrested for an offense.

Historical Note

Derivation:
Penal Code art. 1173

Cross References

Arrest, see § 9.51; C.C.P. chs. 14, as amended, 15.

Committee Comment

Penal Code art. 1173 excepts from the definition of the offense of false imprisonment "detain[ing] one for the objects mentioned in Article 1142 as justifying the use of force, but when it is claimed as a justification that such circumstances existed it must be shown also that the detention was necessary to effect any such object." Section 9.03 preserves this justification, making confinement as variety of justifiable force, and plugs it into every provision justifying the use of force in this chapter.

Restrictions on the use of force imposed elsewhere in the chapter also apply to the use of confinement. For example, confinement in response to verbal provocation alone is not justified because Section 9.31 so provides. Because confinement may be a continuing status, Section 9.03 conditions the justification on the actor's terminating the confinement as soon as he knows he safely can—he may not throw away the key. However, if the person confined is arrested he may test the legality of this confinement by habeas corpus so the last clause of Section 9.03 excepts the termination requirement in the arrest situation.

§ 9.04. Reckless Injury of Innocent Third Person

Even though an actor is justified under this chapter in threatening or using force or deadly force against another, if in doing so he also recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in a prosecution for the reckless injury or killing of the innocent third person.

Historical Note

Derivation:
Wis.Stat.Ann. § 939.48(3)

Cross References

"Deadly force" defined, see § 9.01.
"Reckless" defined, see § 6.05.

Committee Comment

In Caraway v. State, 263 S.W. 1063 (Tex.Crim.App.1924), defendant shot at Will Jackson in self-defense, his bullet killed Marvin Jackson, and he was convicted of manslaughter. The Court of Criminal Appeals, in reversing the conviction for errors in the charge, summarized the self-defense and unintended killing issues as follows:

> In shooting at Will Jackson [defendant] unintentionally killed Marvin Leo Jackson. His guilt or innocence [of that killing] depends on whether the act of firing at Will Jackson was culpable or justifiable. . . . If [defendant], in fir-

ing at Will Jackson, was justifiable under the laws of self-defense, the fact that the shot intended for Will Jackson killed the deceased, constituted no offense. . . .

Id. at 1064. Accord: Plummer v. State, 4 Tex.Ct.App. 310 (1878); Spannell v. State, 203 S.W. 357 (Tex.Crim.App.1918).

Section 9.04 alters Texas law, represented by the Caraway case, by measuring the actor's culpability independently as to each of his victims, whether intended or unintended. Under the facts of Caraway, for example, conceding defendant was justified in shooting at his assailant, if in doing so he acted recklessly vis-a-vis the innocent victim, Section 9.04 authorizes his conviction for manslaughter. As a practical matter, however, someone in Caraway's dilemma would probably be completely exonerated; this is because a finding that one is acting in self-defense is strong evidence that the risk he created toward an innocent third person was not highly unreasonable and thus not reckless. Nevertheless, there are situations in which the risk to third persons outweighs the risk to one's self or another—for example, shooting at a fleeing robber on a crowded street—and in these situations Section 9.04 will hopefully deter the creation of highly unreasonable risks to third persons.

Section 9.04 is probably consistent with Texas tort law, Helms v. Harris, 281 S.W.2d 770 (Tex.Civ.App.—Fort Worth 1955, writ ref'd n. r. e.); cf. Restatement (Second) of Torts § 75 (1965).

§ 9.05. Civil Remedies Unaffected

The fact that conduct is justified under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit.

Historical Note

Derivation:
Model P.C. § 3.01(2)

Cross References

Civil penalty in sentence, see § 12.05.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.

Committee Comment

This section ensures that Chapter 9 will not create privileges in the law of torts. For example, Section 9.63 justifies the use of necessary force against a mental incompetent although the actor was negligent in appraising the existence of necessity or in employing excessive force. Section 18 of the Mental Health Code, R. C.S. art. 5547-18, as amended, on the other hand, makes privileged only the nonnegligent use of necessary force against a mental incompetent. Thus the same actor, acquitted one week in an assault

prosecution based on injuring a mental incompetent, could the next week be forced to pay damages in a civil suit for the same injury. This is because Section 9.05 prohibits the court in a civil suit from expanding the scope of privilege to equal the scope of justification created by, in the example, Section 9.63.

Section 9.05 does not, however, speak to the converse—that is, the question of whether, if the justification created in Chapter 9 is narrower than current tort privilege, a court may or ought to contract the privilege and thus create liability for conduct heretofore privileged but made unjustifiable by this code. An example of this converse situation is the use of deadly force against a trespasser to land. Although Section 9.41 makes this use unjustifiable, current Texas tort law makes it privileged, e. g., Redmon v. Caple, 159 S. W.2d 210 (Tex.Civ.App.—Texarkana 1942, writ ref'd w. o. m.). By its silence on this issue, Section 9.05 permits a court to reexamine the scope of privilege in a tort suit and, if appropriate in terms of policy, contract the privilege to the scope of the justification provided in this chapter.

Although the Penal Code is silent on the relationship between the justification it creates and privilege in tort law, Texas courts in tort suits have equated privilege with justification practically across the board. This has been done without discussing the differences between the two concepts and in fact no case was discovered in which the court did other than state the equation as a conclusion. See, e. g., Fambrough v. Wagley, 169 S.W.2d 478 (Tex. 1943); March v. Walker, 48 Tex. 372 (1887). In addition to defense of property, privilege has been equated with justification in the areas of defense of another, Rhoden v. Boothe, 344 S.W.2d 481 (Tex.Civ.App.—Dallas 1961, writ ref'd n. r. e.), public duty, Modesette v. Emmons, 292 S.W. 855 (Tex.Comm'n App.1927, holding approved), and special relationships, Prendergrast v. Masterson, 196 S.W. 246 (Tex.Civ.App.—Texarkana 1917, no writ).

One of the basic policy decisions embodied in this chapter—that simple (tort) negligence in appraising necessity for using force exculpates the actor because he does not possess sufficient mens rea for criminal condemnation—does not speak to the issue of whether the same force should support an award of damages based on the same negligence. Nor does the chapter speak to the issue of who should bear the injury (monetary loss) resulting from the use of force against person or property. In light of these and other differences between tort law and criminal law, Section 9.05 permits Texas courts on a case-by-case basis to incorporate into the common law of torts those principles of justification found in this chapter that comport with the general principles of tort law. The absence of Section 9.05, on the other hand, would leave the law of privilege as is and could result in retention in tort law of the very principles of justification the committee rejected in revising the penal law.

SUBCHAPTER B. JUSTIFICATION GENERALLY

Section 9.21. Necessity

Conduct is justified if:

(1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm; and

(2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and

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

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 7-13
N.Y.Rev.Pen.Law § 35.05(2)
Model P.C. § 3.02

Cross References

"Conduct" defined, see § 1.07.
Duress defense, see § 8.04.
"Reasonable belief" defined, see § 1.07.

Committee Comment

This section enunciates a general principle of necessity justifying conduct that would otherwise be criminal. Necessity is a traditional common-law defense, R. Perkins, Criminal Law 956–61 (2d ed. 1969), and most of the recently enacted penal law revisions have codified it. Although Section 9.21 derives generally from the Illinois, New York, and Model Penal Code provisions, it also departs from them in significant detail, especially phraseology, and hopefully represents an improvement in those codes' statement of the principle.

There is no Texas statute recognizing a general principle of necessity, but a few articles in the Penal Code affirm the principle (although not by name) in application to specific fact situations: arts. 791 (exceptions to speed law for fire trucks, police patrols, ambulances, etc.); 1196 (abortions to save mother's life); 1310 (house destroyed to save another house from fire).

The Court of Criminal Appeals in two recent cases refused to recognize a general principle of necessity. In Butterfield v. State, 317 S.W.2d 943 (Tex.Crim.App.1958), defendant after becoming intoxicated received a serious head injury. Not having a telephone in his apartment, the only way he could secure medical aid was by driving. Reviewing his conviction for driving while intoxicated,

the Court of Criminal Appeals upheld the trial court's refusal to charge as a defense the theory that defendant drove his car upon a public highway because of necessity for the purpose of seeking medical treatment, the court remarking, "We are aware of no such defense." The court followed Butterfield in the 1965 case of Sansom v. State, 390 S.W.2d 279 (Tex.Crim.App.1965), but neither Butterfield nor Sansom cited an earlier case, Woods v. State, 121 S.W.2d 604 (Tex.Crim.App.1938), which recognized, although not by name, a general principle of necessity. In codifying this principle Section 9.21 firmly establishes its existence and spells out the details of its application.

Subdivisions (1) and (2) contemplate a balancing between the harm caused by the conduct constituting an offense and the harm the actor sought to avoid by the conduct. If the harm sought to be avoided was clearly greater than the harm actually caused (that is, the offense), the actor's conduct causing the offense is justified and he is exonerated.

The harm-balancing concept is vague, but necessarily so. Necessity is a general principle, and as a practical matter it would be impossible to describe and rank the myriad variety of harms to avoid which a person is justified in committing an offense. Likewise, what is "harm" and what "harms" are greater than others are questions purposefully left for case-by-case determination. Again, this is inevitable in stating a general principle, for who can specify with certainty, and in advance, that running a red light will never cause a greater harm than failing to arrest a suspected criminal, or that burglarizing a neighbor's shed for a fire extinguisher is a greater harm than permitting a brush fire to get out of control, or even that colliding head-on with an occupied automobile stalled on a twisting, narrow mountain road is a greater harm than driving a loaded school bus into the side of the mountain to avoid the collision.

It is not the actor's personal moral code or ethical standards that determine whether his choosing one harm over another is justified. Rather, Subdivision (2) requires the trier of facts to measure his choice according to "ordinary standards of reasonableness." Moreover, Subdivision (3) makes the necessity defense unavailable if a legislative purpose to exclude it is expressed elsewhere in the law. Thus, homicide committed by a private citizen to effect an arrest is not justified because Section 9.51 so provides.

§ 9.22. Public Duty

(a) Except as qualified by Subsections (b) and (c), conduct is justified if the actor reasonably believes the conduct is required or authorized by law, by the judgment or order of a competent court or other tribunal, or in the execution of legal process.

(b) The other sections of this chapter control when force is threatened or used against a person to protect persons (Sections 9.31–9.34), to protect property (Sections 9.41–9.43), for law enforcement (Sections 9.51–9.54), or by virtue of a special relationship (Sections 9.-61–9.63).

(c) The threat or use of deadly force is not justified under this section unless the actor reasonably believes the deadly force is specifically required by statute or unless it occurs in the lawful conduct of war. If deadly force is so justified, there is no duty to retreat before threatening or using it.

(d) The justification afforded by this section is available if:

(1) the actor reasonably believes the court or tribunal has jurisdiction or the process is lawful, even though the court or tribunal lacks jurisdiction or the process is unlawful;

(2) the actor reasonably believes his conduct is required or authorized to assist a public servant in the performance of his official duty, even though the servant exceeds his lawful authority.

Historical Note

Derivation:

Minn.Stat.Ann. § 609.06(1)(b)-(d)

Cross References

"Conduct" defined, see § 1.07.
"Deadly force" defined, see § 9.01.
"Law" defined, see § 1.07.
Official misconduct, see § 39.01.
Official oppression, see § 39.02.
"Public servant" defined, see § 1.07.
"Reasonable belief" defined see § 1.07.
Retreat duty:
Crime prevention, see § 9.54.
Law enforcement, see §§ 9.51, 9.53.
Self-defense, see § 9.32.

Committee Comment

Present law justifies in general terms the use of both nondeadly and deadly force when necessary to carry out a public duty, Penal Code arts. 37, 1210. Moreover, specific justification is provided for killing a public enemy, art. 1208, executing a convict pursuant to the judgment of a court, art. 1209, and breaking down a door to execute a search warrant, C.C.P. art. 18.18. Section 9.22 restates and clarifies present law by justifying conduct that is required or authorized by law or by the judgment of order of a competent court or other tribunal.

"Law" is defined in Section 1.07 (code definitions) to mean "the constitution or a statute of this state or of the United States, a

written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute." As stated by Herbert Wechsler, chief reporter for the Model Penal Code, "The law is simply full of public duties of various sorts imposed on officers ranging from game wardens to executioners, and one cannot articulate this law [in a penal code]; therefore, one must accept it."—a statement as true of Texas jurisprudence as any other.

Subsection (a) is formulated in terms of conduct, rather than force against the person, because many laws require or authorize damage to, seizure, or destruction of property, e. g., R.C.P. 637–643 (levy of execution); C.C.P. art. 18.18 (break down door); Penal Code art. 1310 (destroy house). "Tribunal" is included in addition to "court" to justify acting pursuant to the order or judgment of, for example, an arbitration commission or other official adjudicatory body.

Subsection (d) requires a reasonable belief that the conduct is required or authorized by law; the reasonable belief standard is of course used throughout this chapter. Present law now protects the server of defective process, Tierney v. Frazier, 57 Tex. 437 (1882); Rainey v. State, 20 Tex.Ct.App. 455 (1886), and may even justify homicide to execute the judgment or order of a court lacking jurisdiction, compare Penal Code art. 1211 with art. 1212(1). On the other hand, a public servant who knowingly disregards the law or exceeds his authority forfeits his justification under both present law, cf. Alford v. State, 8 Tex.Ct.App. 545 (1880), and this section and can be prosecuted for official misconduct or oppression under Chapter 39 of this code.

A public servant who is not de jure is nevertheless protected under Subsection (a) so long as he operates under a reasonable belief in the lawfulness of his office and authority. This is probably the present law, although the Penal Code appears to distinguish between the de facto public servant's use of nondeadly and deadly force, compare art. 1212(4) with Weatherford v. State, 21 S.W. 251 (Tex.Crim.App.1893), and clearly the sounder rule is to protect de facto as well as de jure public servants. Finally, Subsection (d)(2) gives the private citizen aiding a public servant in performing his duty the same justification afforded the public servant; this is consistent with present law, Penal Code art. 1216; Weatherford v. State, supra.

The remainder of Chapter 9 deals specifically with problems concerning the use of force and deadly force against a person to protect persons, to protect property, for law enforcement, and in special relationships. Section 9.22(b) therefore refers to these other provisions for controlling effect even though the conduct in question may also involve performance of a public duty. For example, before using force against a person to effect an arrest, a peace officer must comply with the identification requirements of Section 9.51.

Section 9.22 does not by itself justify the threat or use of deadly force. Rather, as Subsection (c) makes clear, deadly force must be specifically authorized by statute or occur in the lawful conduct of war. Thus, the executioner may justifiably kill a convict sentenced to death in reliance on C.C.P. art. 43.14, but before a peace officer may justifiably kill to effect an arrest he must comply with Section 9.51.

SUBCHAPTER C. PROTECTION OF PERSONS

Section 9.31. Self-Defense

(a) Except as provided in Subsection (b), a person is justified in threatening or using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

(b) The threat or use of force against another is not justified:

(1) in response to verbal provocation alone; or

(2) to resist an arrest, search, stop or frisk, or halt at a roadblock that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest, search, stop or frisk, or halt is unlawful, unless the resistance is justified under Subsection (c); or

(3) if the actor consented to the exact force used or attempted by the other; or

(4) if the actor provoked the other's use or attempted use of unlawful force, unless:

(A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and

(B) the other nevertheless continues or attempts to use unlawful force against the actor.

(c) The threat or use of force to resist an arrest, search, stop or frisk, or halt at a roadblock is justified:

(1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest, search, stop or frisk, or halt; and

(2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary.

Historical Note

Derivation:
Penal Code art. 1142
Ill.Stat.Ann. ch. 38, §§ 7-1, 7-4, 7-7
N.Y.Rev.Pen.Law §§ 35.15(1), 35.27

Cross References

Arrest, see § 9.51; C.C.P. chs. 14, as amended, 15.
Consent as defense to assaultive conduct, see § 22.04.
Deadly force in self-defense, see § 9.32.
Halt at roadblock, see § 9.52; C.C.P. art. 14.02, as amended.
Identification by peace officer, see §§ 9.51, 9.52.
"Peace officer" defined, see § 1.07.
"Reasonable belief" defined, see § 1.07.
Resisting stop, frisk, halt, arrest, or search, see § 38.03.
Search and seizure, see C.C.P. ch. 18.
Stop and frisk, see § 9.52; C.C.P. art. 14.01, as amended.
"Unlawful" defined, see § 1.07.

Committee Comment

This section sets out the basic rules justifying the use of force in self-defense. The formulation employed, which is used throughout the chapter to describe the test of justification, focuses on the existence of necessity, the occasion on which force was used, the degree of force used, and the nature of the conduct to which the force responded. The formulation contemplates a sliding scale of necessity, justifying instant and severe retaliation at the higher end, but only hesitant and mild response at the lower end. Penal Code art. 1142(7), justifying "only that degree of [nondeadly] force . . . necessary," envisions the same sliding scale, but Section 9.31 tightens existing law by adding the immediacy requirement to emphasize that the necessity for using force must be exigent.

"Threatening" is included within the terms of the section's justification because many threats constitute offenses. "Unlawful" is defined in Section 1.07 to cover, generally, conduct that is either criminal or tortious or both.

Present law apparently does not require resort to other means before using nondeadly force in self-defense, Dunlavely v. State, 232 S.W.2d 714 (Tex.Crim.App.1950). Under Section 9.31, however, if other reasonable means are available, the use of force would not be immediately necessary for protection and thus not justifiable. Retreat has never been required as a prerequisite to the use of nondeadly force, however, and this section does not require it.

Existence of Necessity

This section justifies the use of force, and the degree of force used, when the actor reasonably believes it is immediately neces-

sary. "Reasonable belief" is defined in Section 1.07 as a belief not formed recklessly or with criminal negligence; and these standards, which include the requirement of viewing the circumstances from the actor's standpoint, are discussed in the comment to Section 1.07. Although never defining the terms used, Texas courts have consistently applied the reasonable belief standard to the use of both nondeadly, Savage v. State, 244 S.W. 1002 (Tex.Crim.App. 1922); Harrison v. State, 85 S.W. 1058 (Tex.Crim.App.1905), and deadly force, Penal Code arts. 1222(1), 1226; Howard v. State, 357 S.W.2d 403 (Tex.Crim.App.1962); Bertrand v. State, 234 S. W.2d 244 (Tex.Crim.App.1950).

Restrictions on Self-Defense

Like present law, Section 9.31(b)(1) denies justification to the use of force in response to verbal provocation. See Penal Code art. 1143; Hudley v. State, 194 S.W. 160 (Tex.Crim.App.1917); Polk v. State, 18 S.W. 466 (Tex.Ct.App.1892).

Subsection (b)(2) works a radical change in present law under which a person illegally restrained "has the right to use such force as appears to him to be reasonably necessary to prevent the illegal arrest or to free himself." Grafft v. State, 113 S.W.2d 546, 548 (Tex.Crim.App.1938). Deadly force may even be justified under present law, solely to resist an illegal arrest, Grafft v. State, supra; Mitchell v. State, 117 S.W.2d 443 (Tex.Crim.App.1938), although language in an earlier case appears to the contrary, Condron v. State, 155 S.W. 253 (Tex.Crim.App.1913). Nevertheless, it is clear that a defendant is entitled to separate charges on his rights in self-defense and to resist unlawful arrest, Barnes v. State, 356 S.W.2d 679 (Tex.Crim.App.1961); Grafft v. State, supra.

The committee believes that the street is not the proper forum for determining the legality of arrest. If the suspect knows it is a peace officer who is trying to arrest him—and Sections 9.51 and 9.52 complement this section by requiring the peace office to identify himself and manifest his purpose to arrest or stop and frisk —respect for the rule of law requires the suspect to submit to apparent authority. Should a peace officer, before any resistance is offered, use greater force than necessary to arrest, the suspect's self-defense justification is restored by Subsection (c) and he may use that degree of force against the peace officer which is immediately necessary to protect himself. A citizen acting in the presence and at the direction of a peace officer is treated the same as a peace officer, and search, stop and frisk, and halt at a roadblock are equated with arrest so that their illegality is also immaterial.

Subsection (b)(3) codifies the doctrine of mutual combat now recognized in Texas, see, e. g., Lujan v. State, 430 S.W.2d 513 (Tex.Crim.App.1968); Carson v. State, 230 S.W. 997 (Tex.Crim. App.1921). If a person consents to the exact force used against

him, obviously he cannot be justified in forcibly responding to that which he consented to.

One who provokes a difficulty, intending then to injure his opponent when the latter responds to the provocation, is not justified in using force against his opponent when the latter responds. This is the common law, long recognized in Texas, and it is codified in Subsection (b)(4), Muckleroy v. State, 310 S.W.2d 315 (Tex. Crim.App.1957). To restore his self-defense justification, the provoker must abandon the difficulty, or if he reasonably believes he cannot safely do so, he must clearly communicate to his opponent his intent to abandon. Subsections (b)(4)(A) and (b)(4)(B) are also the present law, although the latter is not so precisely stated. See, e. g., Burris v. State, 30 S.W. 785 (Tex.Crim.App. 1895); Brazzil v. State, 13 S.W. 1006 (Tex.Ct.App.1890); Roach v. State, 21 Tex.Ct.App. 249 (1886). The provocation doctrine, also called the doctrine of imperfect self-defense, has primarily developed in the justifiable homicide setting and is accordingly discussed in more detail in the comment to Section 9.32.

§ 9.32. Deadly Force

A person is justified in threatening or using deadly force against another:

(1) if he would be justified in threatening or using force against the other under Section 9.31; and

(2) if an ordinary person in the actor's situation would not have retreated; and

(3) when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force.

Historical Note

Derivation:
Wis.Stat.Ann. § 939.48(1)
La.Rev.Stat. § 14:20(1)

Cross References

"Deadly force" defined, see § 9.01.
Deadly force justified:
Law enforcement, see §§ 9.51–9.54.
Public duty, see § 9.22.
"Reasonable belief" defined, see § 1.07.
Retreat not required:
Law enforcement, see §§ 9.51–9.54.
Public duty, see § 9.22.
"Serious bodily injury" defined, see § 1.07.
"Unlawful" defined, see § 1.07.

Committee Comment

Justification for threatening or using deadly force is treated separately because of the many problems peculiar to it. Nevertheless, the initial determination of whether deadly force is justified is made in terms of whether the use of nondeadly force would have been justified under Section 9.31. For example, a person is not justified in using deadly force to resist an illegal arrest unless, under the terms of Section 9.31(c), the peace officer used unnecessary deadly force in attempting the arrest. Again, the provoker is not justified in using deadly force, except in the abandonment situation, because Section 9.31(b)(4) denies him justification for using nondeadly force.

Deadly Force

Section 1.07 (code definitions) defines "deadly force" both subjectively and objectively. Thus, force intended to cause death or serious bodily injury is deadly force, as is force, although not so intended, that is nevertheless capable of causing death or serious bodily injury. An example of the latter variety of deadly force is shooting into an occupied automobile, see Davis v. State, 292 S.W. 220 (Tex.Crim.App.1927); cf. Ill.Stat.Ann. ch. 38, § 7-8(a)(2). Note also that "deadly force" is not synonymous with death; as at least one of our justifiable homicide provisions now recognizes, Penal Code art. 1226, force causing serious bodily injury is also deadly force.

Section 9.32 employs the same sliding-scale-of-force formulation found throughout this chapter: only that degree of deadly force immediately necessary to protect is justified. Article 1224 of the Penal Code, justifying deadly force in self-defense, suggests this same scale—other, nondeadly means must first be used, killing must occur while the aggressor is in the very act of using unlawful deadly force—but the Court of Criminal Appeals has interpreted the other justifiable homicide article, 1222, as not requiring resort to other means before using deadly force, Williams v. State, 4 S.W. 64 (Tex.Ct.App.1886); Foster v. State, 11 Tex.Ct.App. 105 (1881). Moreover, when art. 1222 justifies the use of deadly force, the degree of deadly force used is immaterial, e. g., Vasquez v. State, 371 S.W.2d 389 (Tex.Crim.App.1963); Mayhew v. State, 144 S.W. 229, 230 (Tex.Crim.App.1912) ("When the state's case is an unprovoked attack, and the defendant's case is perfect self-defense, and where defendant had the right of self-defense at all, the question of excessive force is not involved.")

Section 9.32(3) restores the issue of excessive deadly force to Texas law: if the actor can protect himself short of killing, he must do so on penalty of forfeiting his justification for the unnecessary portion of the deadly force used.

Imperfect Self-Defense

> The law is well settled in this state that a person who intentionally provokes a difficulty in order to have a pretext to kill or injure thereby forfeits his right of self-defense, and cannot justify the killing of his adversary on this ground, though it was necessary to save his own life. . . .

Muckleroy v. State, 310 S.W.2d 315, 317 (Tex.Crim.App.1957).

> . . . As we understand the law relative to the right of imperfect self-defense, it arises where the accused provokes a difficulty, not with an intent to kill, but merely to make an assault to whip the assaulted party, but that by reason of his own acts and conduct was driven to resort to extreme measures in killing the party he had provoked into a difficulty in order to protect himself from death or serious bodily injury. . . .

Jones v. State, 192 S.W.2d 155, 157 (Tex.Crim.App.1946).

As earlier discussed, the doctrine of provoking the difficulty is codified in Section 9.31(b)(4) and restricts the justifiable use of deadly force by virtue of Section 9.32(1). The Texas law of imperfect self-defense is intricate, however, and the Court of Criminal Appeals, in scrutinizing jury charges on the doctrine, has sometimes lost sight of its underlying rationale: a person may not take advantage of a necessity he has brought upon himself.

Cases hold that an actor is not deprived of "perfect" self-defense unless he not only provoked the difficulty but also intended to do so, e. g., Mason v. State, 228 S.W. 952 (Tex.Crim.App.1921); Thornton v. State, 65 S.W. 1105 (Tex.Crim.App.1901). There is also a line of cases holding that the mere fact that the actor seeks a meeting to provoke a difficulty is not enough to deprive him of self-defense: he must commit the provocative acts as well, Mozee v. State, 51 S.W. 50 (Tex.Crim.App.1899); Airhart v. State, 51 S.W. 14 (Tex.Crim.App.1899). If the actor seeks out his antagonist intending to assault him, but before provoking him the other assaults the actor, the actor's self-defense justification is not forfeited, Airhart v. State, supra. Although it is uncertain exactly what kind of provocative conduct is required to forfeit self-defense justification, Harper v. State, 162 S.W.2d 971 (Tex.Crim.App.1942), the court in earlier decisions has said that if the actor engages in the commission of a felony and kills in apprehension of death or serious bodily injury provoked by the felony, "the law would impute the original wrong to the homicide and make it murder." Reed v. State, 11 Tex.Ct.App. 509, 519 (1882); see also Carter v. State, 17 S.W. 1102 (Tex.Crim.App.1891). Moreover, if the actor is engaged in committing one of the felonies listed in Penal Code art. 1222, which justifies killing to prevent enumerated felonies, the actor has no self-defense justification against the victim of the felony, Williams v. State, 48 S.W.2d 304 (Tex.Crim.App.1932) (burglary); McKee v. State, 42 S.W.2d 77 (1931) (robbery). Fi-

nally, the Jones case, supra, 192 S.W.2d at 158, holds that a person may have a perfect right of self-defense without being entirely free from blame in the matter if his wrongful act was not intended or reasonably calculated to produce the "very difficulty in question."

When an actor provokes a difficulty and then threatens or uses deadly force, Section 9.32 contemplates that the fact-finder will weigh the respective fault of the parties—the nature of the actor's provocation against the nature of the victim's reaction and the actor's response to that reaction—and resolve the justification issue in terms of the culpable mental state required for the offense allegedly committed by the actor. For example, if a person provokes a difficulty with intent to kill his opponent, and does so, he would be guilty of murder under Section 19.02 of this code. On the other hand, if his provocative conduct does not evidence an intent to kill, or even if it does if the victim reacts with the excessive use of deadly force, the actor may be guilty of manslaughter, aggravated or simple assault, or acquitted, depending on the actor's culpability, if any, in the encounter.

Retreat

Section 9.32(2) breaks sharply with Texas legal tradition by requiring a person to retreat before using deadly force if an ordinary person in the actor's situation would have done so. Retreat is not required before killing to prevent one of the felonies enumerated in Penal Code art. 1222, Williams v. State, 4 S.W. 64 (Tex.Ct.App.1886); Foster v. State, 11 Tex.Ct.App. 105 (1881), and art. 1225 expressly negates a duty to retreat before killing to protect against the milder attack described in art. 1224. Some cases have gone farther than merely allowing the person attacked to stand his ground: he is justified in pursuing his assailant and killing him so long as it appears he faces danger, Thompson v. State, 276 S.W. 699 (Tex.Crim.App.1925); Taylor v. State, 213 S. W. 985 (1919); but see Lake v. State, 184 S.W. 213 (Tex.Crim. App.1916).

Retreat is but one of many factors relevant to deciding whether an actor used more force than was justified under the circumstances, cf. Brown v. United States, 256 U.S. 335 (1921) (Holmes, J.). The committee firmly believes a person ought to retreat, if he can do so safely, before taking human life; and because Texas law has never imposed this duty, it is set out in Section 9.32(2). By measuring the existence and extent of the retreat obligation in terms of the ordinary person in the actor's situation, the committee contemplates that the fact-finder will make a moral judgment on whether a defendant in a specific case ought to have retreated before threatening or using deadly force. Some new penal codes have dealt expressly with failure to retreat when required; for example, Ill.Stat.Ann. ch. 38, § 9–2, provides that a person who kills is guilty of manslaughter if the fact-finder determines he should

have retreated but did not. Because retreat is but one of many factors involved, however, the committee rejects the Illinois approach and intends for the fact-finder to include in its assessment of defendant's culpability his failure to retreat when he should have.

§ 9.33. Defense of Third Person

A person is justified in threatening or using force or deadly force against another to protect a third person if:

(1) under the circumstances as the actor reasonably believes them to be the actor would be justified under Section 9.31 or 9.32 in threatening or using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

(2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.

Historical Note

Derivation:
La.Rev.Stat. § 14.22
Wis.Stat.Ann. § 939.48(4)

Cross References

"Deadly force" defined, see § 9.01.
Deadly force in self-defense, see § 9.32.
"Reasonable belief" defined, see § 1.07.
Retreat, see § 9.32.
Self-defense, see §§ 9.31, 9.32.
"Unlawful" defined, see § 1.07.

Committee Comment

This section assimilates the law of defense of another to that of self-defense. Subdivision (1) refers the fact-finder to Sections 9.31 and 9.32 for the initial determination of whether the actor would have been justified in using force or deadly force to protect *himself*. If he would have been, and if he reasonably believed his intervention was immediately necessary to protect the third person, he is exonerated.

There are at present a variety of statutory provisions on defense of another. Penal Code art. 1142(6) provides that violence "in defense of another against unlawful violence offered to his person or property" is no assault. As art. 1222 is framed in terms of preventing commission of enumerated felonies rather than self-defense, its provisions also apply to defense of another. Penal Code art. 1224, justifying homicide in defense against milder attack, applies to defense of another, Lopez v. State, 287 S.W.2d 946 (Tex.

Crim.App.1956), except that a person is justified in killing in defense of another, under the peculiar wording of the statute, only when the other's life or person is imperiled by reason of an attack upon the other's property. C.C.P. art. 5.07 provides that the same rules applicable to self-defense are applicable to defense of another, and the Court of Criminal Appeals has held that the justification of the person intervening is measured by his own reasonable belief in the existence of the necessity, not by the right of the other person to defend himself, Wellborn v. State, 179 S.W. 1179 (Tex. Crim.App.1915); Mayhew v. State, 144 S.W. 229 (Tex.Crim.App. 1912).

§ 9.34. Protection of Life or Health

(a) A person is justified in threatening or using force, but not deadly force, against another when and to the degree he reasonably believes the force is immediately necessary to prevent the other from committing suicide or inflicting serious bodily injury on himself.

(b) A person is justified in threatening or using both force and deadly force against another when and to the degree he reasonably believes the force or deadly force is immediately necessary to preserve the other's life in an emergency.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 35.10(4)
Wis.Stat.Ann. § 939.48(5)

Cross References

Aiding suicide, see § 22.05.
Civil remedies, effect of chapter on, see §§ 1.03, 9.05.
"Deadly force" defined, see § 9.01.
Good samaritan privilege, see R.C.S. art. 1b.
Guardian—incompetent, see 9.63.
"Serious bodily injury" defined, see § 1.07.

Committee Comment

This section is essentially new to Texas law, although one of its applications finds a corollary in C.C.P. art. 6.06, which requires a peace officer to use force if necessary to prevent a person from injuring himself.

Obviously deadly force should not be used to prevent suicide or self-inflicted injury, and Subsection (a) rules it out. On the other hand, Subsection (b)'s justification for saving a life in an emergency includes deadly force to cover, for example, a necessary tracheotomy or amputation.

What is an "emergency," and what degree of force is necessary to preserve life, are questions for case-by-case decision, cf. Gravis

v. Physicians & Surgeons Hospital of Alice, 427 S.W.2d 310 (Tex. 1968); Moss v. Rishworth, 222 S.W. 225 (Tex.Comm'n App.1920, judgmt. adopted).

SUBCHAPTER D. PROTECTION OF PROPERTY

Section 9.41. Protection of Own Property

(a) A person in lawful possession of land or tangible, moveable property is justified in threatening or using force, but not deadly force, against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

(b) A person unlawfully dispossessed of land or tangible, moveable property by another is justified in threatening or using force, but not deadly force, against the other when and to the degree the actor reasonably believes the force is immediately necessary to reenter the land or recover the property if the actor threatens or uses the force immediately or in fresh pursuit after the dispossession; and either:

(1) the actor reasonably believes the other had no claim of right when he dispossessed the actor; or

(2) the other accomplished the dispossession by using force, threat, or fraud against the actor.

Committee Comment

See Committee Comment following Section 9.42.

§ 9.42. Protection of Third Person's Property

A person is justified in threatening or using force, but not deadly force, against another to protect land or tangible, moveable property of a third person if:

(1) under the circumstances as he reasonably believes them to be the actor would be justified under Section 9.41 in threatening or using force to protect his own land or property; and

(2) the actor reasonably believes:

(A) the third person has requested his protection; or

(B) he has a legal duty to protect the third person's land or property; or

(C) the third person is the actor's spouse, parent, or child, resides with the actor, or is under the actor's care.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 7-3

Cross References

Crime prevention, see § 9.54.
"Deadly force" defined, see § 9.01.
Force privileged to prevent consequences of theft, see R.C.S. art. 1d, as amended.
"Reasonable belief" defined, see § 1.07.
"Unlawful" defined, see § 1.07.

Committee Comment

Section 9.41(a) covers defense of one's own possession and Subsection (b) reentry or repossession after unlawful dispossession. Section 9.42 justifies force to protect property belonging to specified third persons in certain circumstances. Both sections employ the standard sliding-scale-of-force formulation—only that degree of force reasonably believed to be immediately necessary to protect possession is justified—and both make clear that deadly force is *not* justified.

Who May Protect Property

Under Section 9.41(a) a person may use force against another to protect his own property if it is in his "lawful possession." Penal Code arts. 1142(4), justifying the use of nondeadly force to protect property, and 1227(2), relating to deadly force, use the identical phrase. Thus one dispossessed of land by a court order could not forcibly defend it, Fifer v. State, 141 S.W. 989 (Tex. Crim.App.1911), but one leasing land from lawful claimants to the title could forcibly bar a trespasser, Circle v. State, 22 S.W. 603 (Tex.Crim.App.1893).

A person is justified in using force against another to protect a third person's property, under Section 9.42, if under the circumstances he would be justified in using the force to protect his own property under Section 9.41 and he has a legal duty to protect the property, the third person requested his protection, or the third person is a family member. Clearly a person acting for the owner should be justified in using force to protect the owner's property, and Texas law so provides, Penal Code art. 1227(2); Sims v. State, 36 S.W. 256 (Tex.Crim.App.1896). Beyond a legal relationship creating a duty to protect property, however, Texas law does not clearly delimit the category of third persons whose property another is justified in using force to protect. One case, Gay v. State, 125 S.W. 896 (Tex.Crim.App.1909), arguably justified the use of force to protect *anyone's* property, but the committee rejects this invitation to self-help in favor of the three categories of third persons described in Section 9.42(2).

Nature of Interference and Type of Property

It is to prevent or terminate a "trespass on the land or unlawful interference with the property" that a person is justified in using force under Sections 9.41(a) and 9.42. Penal Code art. 1142(4)

and (6) use the terms "intrusion" and "unlawful violence" to describe the nature of the interference; art. 1224 justifies killing to prevent an "unlawful and violent attack" against property. These terms have not been much litigated in Texas, but it is clear that a patron's interference with other customers in a store doesn't justify the store-owner's ejecting the patron, Williams v. State, 279 S. W.2d 335 (Tex.Crim.App.1955), and that an attack on a person that incidentally happens to be made in a building doesn't entitle the person attacked to a charge on defense of property, Ross v. State, 177 S.W. 305 (Tex.Crim.App.1914).

The term "trespass" used in Section 9.41(a) is not synonymous with, but considerably broader than, the offense of criminal trespass defined in Section 30.03.

By using the terms "land" and "tangible, moveable property," Sections 9.41 and 9.42 follow present law, which applies to both real and corporeal personal property, Penal Code arts. 1142(4), (6), 1224, 1227(1); Crawford v. State, 71 S.W.2d 277 (Tex.Crim. App.1934) (house); Weaver v. State, 76 S.W. 564 (Tex.Crim.App. 1903) (dog); Lloyd v. State, 204 S.W.2d 633 (Tex.Crim.App.1947) (use of road).

Reentry and Recapture

> . . . If force is allowed to defend possession, it is only a small extension to allow similar force to be used to regain possession immediately after its loss. The ordinary citizen would regard a rule as unjust which attached legal consequences to a momentary advantage obtained by a thief or other wrongful taker. Moreover, it is an ancient principle of common law, commended by common sense, that when property is retaken on fresh pursuit it is deemed to be taken at the beginning of the pursuit. The retaking is not any the less immediate because the fresh pursuit turns out to be a protracted chase.

M.P.C. § 3.06, Comment at 44 (Tent. Draft No. 8, 1958).

Despite these common-law and common-sense precedents, Texas law forbids with one exception the use of force to recover possession once lost, e. g., Burton v. State, 148 S.W. 805 (Tex.Crim.App. 1912); Hartfield v. State, 134 S.W. 1180 (Tex.Crim.App.1910); cf. Penal Code art. 1227(3). The exception is C.C.P. art. 18.22, which justifies force to recover stolen property, and which article is amended by this code to provide a privilege from tort liability and reenacted as R.C.S. art. 1d..

It is not always clear under present law when possession is lost, one decision, Weaver v. State, 76 S.W. 564 (Tex.Crim.App.1903), finding no dispossession of a dog even though the complainant took the dog off the defendant's property, but the question of who had possession is for the fact-finder, Schultz v. State, 273 S.W.2d 886 (Tex.Crim.App.1954).

Rejecting this limitation of the present law, Section 9.41(a) justifies the use of force to reenter or recover property if the possessor was unlawfully dispossessed of it. The dispossession requirement prevents a chattel mortgagee from forcibly repossessing the chattel from the mortgagor on the latter's default, even though the mortgage so provides, because the mortgagee was not *dispossessed* of the property; this limitation is consistent with present law, Lockland v. State, 73 S.W. 1054 (Tex.Crim.App.1903). In addition, to justify the use of force to reenter or recover property under Section 9.41(b), the force must be used "immediately or in fresh pursuit after the dispossession." This restriction will encourage resort to legal process to recover property except when the immediacy of the dispossession makes resort to self-help likely anyway.

§ 9.43. Use of Device to Protect Property

The justification afforded by Sections 9.41 and 9.42 applies to the use of a device to protect land or tangible, moveable property if use of the device is reasonable under all the circumstances as the actor reasonably believes them to be when he installs the device.

Historical Note

Derivation:
Model P.C. § 3.06(5)

Cross References

"Deadly force" defined, see § 9.01.
"Reasonable belief" defined, see § 1.07.

Committee Comment

This section is new to Texas penal law, although its provisions are substantially consistent with the common-law tort rule, see Marquis v. Benfer, 289 S.W.2d 601 (Tex.Civ.App.—San Antonio 1956, writ ref'd n. r. e.); Grant v. Hass, 75 S.W. 342 (Tex.Civ. App.1903, no writ). The section contemplates devices such as spike fences and barbed wire whose use may evidence a conditional intent to injure a trespasser and thus without the section constitute an offense.

Note that Section 9.43 incorporates the restrictions on the use of force to protect property set out in Sections 9.41 and 9.42. For example, use of a spring gun or mantrap is *not* justified, because each threatens deadly force, and one is not justified in installing a device on a third person's property unless the third person occupies one of the categories specified in Section 9.42(2).

Section 9.43 measures the reasonableness of the use of a device in terms of circumstances apparent at the time of installation. This is contrary to the tort rule—reasonableness is determined ac-

cording to circumstances extant at the time of injury, Marquis v. Benfer, supra—which the committee, however, rejects.

SUBCHAPTER E. LAW ENFORCEMENT

Section 9.51. Arrest and Search

(a) A peace officer, or a person acting in a peace officer's presence and at his direction, is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest, if:

(1) the actor reasonably believes the arrest or search is lawful or, if the arrest is made under a warrant, he reasonably believes the warrant is valid; and

(2) before threatening or using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be arrested.

(b) A person other than a peace officer (or one acting at his direction) is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making a lawful arrest, or to prevent or assist in preventing escape after lawful arrest if, before threatening or using force, the actor manifests his purpose to and the reason for the arrest or reasonably believes his purpose and the reason are already known by or cannot reasonably be made known to the person to be arrested.

(c) Only a peace officer is justified in threatening or using deadly force against another when and to the degree the peace officer reasonably believes the deadly force is immediately necessary to make an arrest, or to prevent escape after arrest, if:

(1) the threat or use of force would have been justified under Subsection (a); and

(2) the actor reasonably believes the conduct for which arrest is authorized included the use or attempted use of deadly force; and

(3) the actor reasonably believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury to another if the arrest is delayed.

(d) There is no duty to retreat before threatening or using deadly force justified by Subsection (c).

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, §§ 7-5, 7-6, 7-9(a)

Cross References

Arrest, see C.C.P. chs. 14, as amended, 15.
"Deadly force" defined, see § 9.01.
Escape from custody, see § 38.07.
Evading arrest, see § 38.04.
Justification to resist arrest or search, see §§ 9.31-9.33.
"Law" defined, see § 1.07.
"Peace officer" defined, see § 1.07.
"Reasonable belief" defined, see § 1.07.
Reckless injury of innocent third person, see § 9.04.
Resisting arrest or search, see § 38.03.
Search and seizure, see C.C.P. ch. 18.
"Serious bodily injury" defined, see § 1.07.

Committee Comment

Whether one is justified in using force to effect an arrest or search turns, in the first instance, on whether he is authorized to make the arrest or search. The law of arrest and search determines who may arrest and search and under what circumstances. Section 9.51 does not of course set out the law of arrest or search, but presumes a lawful arrest or search (whether with or without warrant) or, in the case of a peace officer, one reasonably believed to be lawful.

The section employs the standard sliding-scale-of-force formulation, under which only that degree of force reasonably believed to be immediately necessary to arrest, search, or prevent escape is justified, and this formulation is consistent in substance with present law, Penal Code art. 1142(5), (7); C.C.P. art. 15.24.

Subsection (a) clarifies existing law on whether force is justified on the basis of a peace officer's reasonable belief in the legality of an arrest or search. Penal Code art. 1142(5) requires by its terms a lawful arrest (on warrant) to justify nondeadly force; C. C.P. art. 18.17 appears to make the legality of a search immaterial. Peace officers ought not to have to determine the legality of an arrest or search at their peril, however, since courts often disagree about legality years after the event.

A private citizen (not acting at a peace officer's direction), on the other hand, determines legality at his peril. The committee would frankly discourage citizen arrests, and Subsection (b) requires an arrest lawful in fact and in law before a private citizen is justified in using force to effect it. Note also that the subsection does not mention searches, thus forbidding a private citizen to use force to effect a search.

Both subsections require one about to use force to identify himself, and Subsection (b) requires the private citizen to inform the suspect of the reason for the arrest. Present law imposes identical requirements, C.C.P. arts. 15.25, 15.26 (arrest with warrant); Montgomery v. State, 65 S.W. 537 (Tex.Crim.App.1901) (arrest without warrant); C.C.P. art. 18.16 (search warrant). However, if the purpose to arrest or search and the actor's identity are already known to the suspect, Tiner v. State, 44 Tex. 128 (1875); Cortez v. State, 66 S.W. 453 (Tex.Crim.App.1902), or if making them known would endanger the actor, Bates v. State, 275 S.W. 1064 (Tex.Crim.App.1925), neither is required under present law or under Subsection (a) or (b).

Present law does not justify deadly force solely to effect arrest (or, by implication, a search), Penal Code arts. 1210, 1212(9), 1215; Caldwell v. State, 41 Tex. 86 (1874); McDonald v. State, 22 S.W.2d 670 (Tex.Crim.App.1929). Subsection (c) changes this rule, affording peace officers (but not private citizens, not even those acting at the direction of a peace officer) a narrow justification to use deadly force to arrest or prevent the escape of highly dangerous suspects whose remaining at large create a substantial risk of death or serious bodily injury to another. The justification of this subsection does not extend to searches, and Subsection (c)(1) applies the prerequisites of Subsection (a) to the use of deadly force: the peace officer must reasonably believe in the legality of the arrest and, before threatening or using deadly force, he must manifest his purpose and identify himself as a peace officer unless his purpose and identity are already known or cannot reasonably be made known.

Subsection (d) makes clear a peace officer need not retreat before threatening or using deadly force under Subsection (c).

§ 9.52. Stop and Frisk, Halt at Roadblock

A peace officer is justified in threatening or using force, but not deadly force, against another when and to the degree the actor reasonably believes the force is immediately necessary to make a stop or frisk or halt at a roadblock, or to prevent escape after stop or halt, if:

(1) the actor reasonably believes the stop, frisk, or halt is lawful; and

(2) before threatening or using force, the actor manifests his purpose to stop, frisk, or halt and identifies himself as a peace officer, unless he reasonably believes his purpose and identity are already known by or cannot reasonably be made known to the person to be stopped or halted.

Historical Note

Derivation:
New

Cross References

Halt at roadblock, see C.C.P. art. 14.02, as amended.
Justification to resist stop, frisk, or halt, see §§ 9.31-9.33.
"Law" defined, see § 1.07.
"Peace officer" defined, see § 1.07.
"Reasonable belief" defined, see § 1.07.
Reckless injury of innocent third person, see § 9.04.
Resisting stop, frisk, or halt, see § 38.03.
Stop and frisk, see C.C.P. art. 14.01, as amended.

Committee Comment

This section parallels Section 9.51 and affords peace officers justification to use force to effect a stop and frisk or halt at a roadblock authorized by C.C.P. arts. 14.01 and 14.02, as amended. The section has no counterpart in present law, which does not authorize a stop and frisk or halt as such.

The prerequisites for using force under this section are the same as under Section 9.51: the peace officer must reasonably believe the stop and frisk or halt is lawful and he must manifest his purpose and identity before using force. The standard sliding-scale-of-force formulation is also employed, but note that the justification of this section is restricted to peace officers and does not authorize deadly force.

§ 9.53. Prevention of Escape From Penal Institution

(a) A peace officer, or guard employed by a penal institution, is justified in threatening or using force against a person in the custody of a penal institution when and to the degree the actor reasonably believes the force is immediately necessary to prevent the person's imminent escape from the penal institution or while being transported to or from the penal institution.

(b) A peace officer, or guard employed by a penal institution, is justified in threatening or using deadly force against a felon in the custody of a penal institution when and to the degree the actor reasonably believes the deadly force is immediately necessary to prevent the felon's imminent escape from the penal institution or while being transported to or from the penal institution. There is no duty to retreat before threatening or using deadly force justified by this subsection.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 7-9(b)
N.Y.Rev.Pen.Law § 35.30(5)

Cross References

"Custody" defined, see § 9.01.
"Deadly force" defined, see § 9.01.

"Escape" defined, see § 9.01.
"Peace officer" defined, see § 1.07.
"Penal institution" defined, see § 1.07.
"Reasonable belief" defined, see § 1.07.
Reckless injury of innocent third person, see § 9.04.

Committee Comment

This section justifies both force and deadly force to prevent escape from a penal institution; it complements Section 9.51, which deals with escapes from arrest, and both sections dovetail with Section 38.07, which creates the offense of escape from custody.

Only peace officers and guards employed by penal institutions are covered by Section 9.53, the committee believing it unlikely that private citizens will attempt to prevent escapes from penal institutions, and undesirable for them to do so in any event. "Penal institution" is defined in Section 1.07 (code definitions) as "a place designated by law for the confinement of persons arrested for, charged with, or convicted of an offense;" "custody" is defined in similar terms in Section 9.01, both definitions thus excluding juveniles, mental patients, and others confined pursuant to noncriminal proceedings. The legality of the custody is immaterial, cf. Section 38.09, and "escape" is defined to exclude violation of probation or parole conditions.

This section basically preserves present law, although the latter deals with the problem in fragmentary fashion, see Penal Code art. 1142(5); C.C.P. art. 16.21. Penal Code art. 1212(10) justifies deadly force to prevent a *felon's* escape from the penitentiary. The justification does not survive the actual escape, however, Wright v. State, 44 Tex. 645 (1866), and Section 9.53(b)'s requirements of imminency and immediate necessity for the deadly force preserve this feature of present law. Covering a convict in transit to or from a penal institution may broaden present law, although the Court of Criminal Appeals assumed without deciding such coverage in Ex parte Russell, 160 S.W. 75 (Tex.Crim.App.1913). The no-retreat provision in Subsection (b) is also probably consistent with present law.

§ 9.54. Crime Prevention

(a) A person is justified in threatening or using both force and deadly force against another when and to the degree he reasonably believes the force or deadly force is immediately necessary to prevent the other's imminent commission of arson, burglary, kidnapping, rape or aggravated rape, or aggravated robbery.

(b) There is no duty to retreat before threatening or using deadly force justified by Subsection (a).

Historical Note

Derivation:

New

Cf. Penal Code art. 1222; Ill.Stat.Ann. ch. 38, § 7-1; La.Rev.Stat. § 14:20(1)

Cross References

Aggravated rape, see § 21.03.
Aggravated robbery, see § 29.03.
Arrest, see § 9.51.
Arson, see § 28.02.
Burglary, see § 30.02.
"Deadly force" defined, see § 9.01.
Defense of another, see § 9.33.
Escape, see §§ 9.51, 9.53.
Kidnapping, see § 20.01.
"Reasonable belief" defined, see § 1.07.
Self-defense, see §§ 9.31-9.32.

Committee Comment

Penal Code art. 1222 presently justifies homicide to prevent murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night, and trespass by an armed and disguised individual at night. Article 1220 justifies a husband's killing his wife's paramour when taken in the act of adultery. Except for murder (which of course invokes self-defense and defense of another justification), the commission of all these offenses may or may not involve a risk of death or serious bodily injury; adultery never does; theft at night and trespass may well threaten either, but not as a matter of course. Section 9.54 accordingly contracts the felony enumeration of present law to focus on those crimes whose potential for serious violence to the person, although perhaps not sufficiently immediate to invoke self-defense and defense of another justification, nevertheless poses a great enough risk to justify a deadly response.

Further desirable contractions of present law are achieved by the sliding-scale-of-force formulation used in this section and of course throughout the chapter. Under Penal Code art. 1222 a person need not resort to other means before killing to prevent one of the enumerated felonies, e. g., Teague v. State, 206 S.W. 193 (Tex. Crim.App.1918); Slack v. State, 149 S.W. 107 (Tex.Crim.App. 1912). Section 9.54, on the other hand, justifies only that degree of force immediately necessary to prevent arson, burglary, kidnapping, rape, or robbery; for example, if it is reasonable under the circumstances first to club a robber or threaten a burglar with a pistol, shooting first is *not* justified.

Present law also justifies, for example, killing the arsonist while fleeing and the burglar or thief by night while "within reach of gunshot from such place or building," Penal Code art. 1222(7),

(8). On the other hand, Section 9.54 justifies deadly force only when immediately necessary to prevent the imminent commission of one of the listed felonies.

Like present law, Section 9.54(b) expressly negates any duty to retreat before threatening or using deadly force justified under Subsection (a), see, e. g., Williams v. State, 4 S.W. 64 (Tex.Ct. App.1886); Foster v. State, 11 Tex.Ct.App. 105 (1881).

SUBCHAPTER F. SPECIAL RELATIONSHIPS

Section 9.61. Parent—Child

The threat or use of force, but not deadly force, against a child younger than 18 years is justified:

(1) if the actor is the child's parent or someone acting in loco parentis to the child; and

(2) when and to the degree the actor reasonably believes the force is necessary to discipline the child or to safeguard or promote his welfare.

Historical Note

Derivation:

Ga.Stat.Ann. § 26-901(c)
Wis.Stat.Ann. § 939.45(5)

Cross References

Computation of age, see § 1.06.
Custody rights in minor children, see R.C.S. art. 4639a; Probate Code § 109(a).
"Deadly force" defined, see § 9.01.
"Reasonable belief" defined, see § 1.07.

Committee Comment

Penal Code art. 1142(1) justifies a parent's use of force against his child "[i]n the exercise of the right of moderate restraint or correction. . . ." Section 9.61 preserves this traditional parental right and terminates it when the parent's custody rights in the child terminate—ordinarily at age 18, R.C.S. art. 4639a—although if the support duty continues beyond that age under art. 4639a-1 because of dependency, Section 9.63 (guardian—incompetent) will probably apply. Cases construing Penal Code art. 1142(1) have extended its justification to one acting in loco parentis to a child, e. g., Snowden v. State, 12 Tex.Ct.App. 105 (1882); Turner v. State, 33 S.W. 972 (Tex.Crim.App.1896), and Section 9.61 does likewise. The term "in loco parentis" is well-understood in law, both by Texas courts and the courts of other jurisdictions, see, e. g., Schrimpf v. Settegast, 36 Tex. 296 (1871); Eitel v. State, 182 S.W. 318 (Tex.Crim.App.1916); 67 C.J.S. Parent and Child §§ 71-77 (1950).

This section, and the others in this subchapter, employ the standard sliding-scale-of-force formulation—with one exception. "Immediately" is not included to modify necessity because the use of force (punishment) often follows by some time, especially in the parent—child relationship, creation of the necessity for its use. In any event, under this section as well as under present law the issues of necessity, degree of force, and purpose of the force are questions of fact:

> It is true that the law has not laid down any fixed measure of moderation in a lawful correction of a child, nor is it practicable to do so. Whether it is moderate or excessive must necessarily depend on the age, sex, condition, and disposition of the child, with all the attending and surrounding circumstances, to be judged by the jury, under the directions of the court after the law of the case.

Stanfield v. State, 43 Tex. 167, 168 (1875).

Deadly force obviously is not justified in the parent—child situation, either under this section or the present law, Penal Code art. 1229.

§ 9.62. Teacher—Student

The threat or use of force, but not deadly force, against a person is justified:

(1) if the actor is entrusted with the care or supervision of the person for a special purpose; and

(2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.

Historical Note

Derivation:
Model P.C. § 3.08(2)

Cross References

"Deadly force" defined, see § 9.01.
"Reasonable belief" defined, see § 1.07.

Committee Comment

Although present law lumps together the parent—child and teacher—student justification, Penal Code art. 1142(1), separate treatment is necessary, and accorded by this Section 9.62, because of the different roles played by the parent and one caring for or supervising another for a special purpose. As stated by the Model Penal Code reporter:

> The variation [between the parent and teacher formulations] is designed to make clear the distinction between the

position of the person charged with the general care of a minor and that of one performing a more limited protective function. The distinction is especially important in the case of teachers who may or may not have a general responsibility with respect to the child and its moral and material welfare but who are likely to have independent duties of maintaining discipline within the class or school. . . .

M.P.C. § 3.08, Comment at 72–73 (Tent. Draft No. 8, 1958).

Unlike Section 9.61, Section 9.62 sets no age limit for the student because a university instructor with a class of 25-year-old graduate students may need the justification as much as the elementary school teacher with a class of 7-year-olds. Likewise, although the section caption uses the traditional label for the relationship, "Teacher—Student," the section defines the actor and the object of his force in terms of the actual relationship between them. Thus, a camp counselor, dormitory manager, study hall prefect, and baby-sitter are all included within the terms of the relationship defined by this section. This inclusiveness is probably inconsistent with present law, which appears to require a formal teacher—student relationship, Prendergast v. Masterson, 196 S.W. 246 (Tex.Civ.App.—Texarkana 1917, no writ) (superintendent of school system not a teacher).

§ 9.63. Guardian—Incompetent

The threat or use of force, but not deadly force, against a mental incompetent is justified:

(1) if the actor is the incompetent's guardian or someone similarly responsible for the general care and supervision of the incompetent; and

(2) when and to the degree the actor reasonably believes the force is necessary:

(A) to safeguard and promote the incompetent's welfare; or

(B) if the incompetent is in an institution for his care and custody, to maintain discipline in the institution.

Historical Note

Derivation:

Minn.Stat.Ann. § 609.06(8)

Cross References

"Deadly force" defined, see § 9.01.

Guardianship of mental incompetent, see Probate Code ch. IX.

"Mental incompetency" defined, see R.C.S. art. 5547—4(*l*).

Privileged use of force against mental incompetent, see R.C.S. art. 5547—18, as amended.

Committee Comment

This section recognizes that force is sometimes necessary to restrain or protect a mental incompetent or, if he is confined in an institution, to force his compliance with its rules. The Penal Code does not deal with this problem outside the formal guardian—ward relationship, art. 1142(1).

The justification provided in this section may overlap to some extent that provided in Section 9.34 (protection of life or health). For example, forcibly disarming an incompetent during his suicide attempt as well as strait-jacketing and confining him in a padded cell during a fit will be justified under Section 9.34 as well as under this Section 9.63. And note finally that this section does not speak to protecting one's self or another from harm threatened by the mental incompetent; this justification is afforded by Subchapter C (protection of persons).

TITLE 3. PUNISHMENTS

CHAPTER 12. PUNISHMENTS

SUBCHAPTER A. GENERAL PROVISIONS

Section

12.01. Sentence in Accordance with Code.
12.02. Types of Offenses.
12.03. Classification of Felonies.
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SUBCHAPTER B. FINES

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12.41. Fine Based on Gain.
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12.46. Death Penalty for Capital Felony.
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12.48. Admission of Unadjudicated Offense.

SUBCHAPTER E. CORPORATIONS AND ASSOCIATIONS

12.51. Authorized Punishments for Corporation and Association.

Committee Comment

The Revised Penal Code creates a new sentencing structure for Texas. The new structure for the first time rationally allocates sentencing authority between the legislature, which grades an offense's seriousness; the court, which fits the punishment to the individual offender and facts of his offense; and the correctional authorities, which measure and act on the convict's dangerousness and rehabilitative potential. Unlike present law, which includes a specific penalty with the definition of each offense, the new structure allots all offenses into one of four categories of felony or into one of three categories of misdemeanor. All authorized punish-

ments, and the standards to guide their imposition, are then collected in a single place, Chapter 12.

The felony categories authorize a minimum and maximum term of imprisonment, with parole eligibility tied to completion of the minimum term. And the new structure for the first time distinguishes clearly between the ordinary offender, for whom long-term imprisonment is unnecessary and self-defeating, and the dangerous offender, for whom extended imprisonment is often essential to protect society.

Except when the jury recommends probation, and in capital cases in which the state seeks the death penalty, the new structure vests the trial court with exclusive initial sentencing authority. Before sentencing, the court must conduct a separate, trial-type sentencing hearing, at which the state and defendant are entitled to appear with counsel, offer evidence, and argue on an appropriate sentence, and before sentencing a defendant to the penitentiary the court must consider a presentence report prepared by a probation officer. Finally, the court must state for the record its reasons for assessing the sentence it did.

The new structure, again for the first time in Texas, sets out detailed standards to guide the sentencing court in the exercise of its discretion. And to ensure that the standards are followed and sentences assessed evenhandedly throughout the state, the Court of Criminal Appeals is authorized to review the appropriateness and procedural and informational bases, as well as the legality, of sentences.

SUBCHAPTER A. GENERAL PROVISIONS

Section 12.01. Sentence in Accordance with Code

(a) A person adjudged guilty of an offense under this code shall be sentenced in accordance with this chapter.

(b) Penal laws enacted after the effective date of this code shall be classified for sentencing purposes in accordance with this chapter.

(c) A felony defined by law outside this code, the sentence for which exceeds the sentence authorized in this chapter for a felony of the third degree, constitutes for sentencing purposes a felony of the third degree. A person adjudged guilty under that law is deemed to be convicted of a felony of the third degree and shall be sentenced for a felony of the third degree in accordance with this chapter.

(d) A misdemeanor defined by law outside this code, the sentence for which exceeds the sentence authorized in this chapter for a Class A misdemeanor, constitutes for sentencing purposes a Class A misdemeanor. A person adjudged guilty under that law is deemed to be

convicted of a Class A misdemeanor and shall be sentenced for a Class A misdemeanor in accordance with this chapter.

Historical Note

Derivation:

N.Y.Rev.Pen.Law §§ 55.10(1), (2), 60.00(1)
Fed.Prop.Crim.Code § 3007

Cross References

Effect of code, see § 1.03.
"Felony" defined, see §§ 1.07, 12.02.
Felony punishments, see §§ 12.22, 12.31.
"Law" defined, see § 1.07.
"Misdemeanor" defined, see §§ 1.07, 12.02.
Misdemeanor punishments, see §§ 12.23, 12.32.

Committee Comment

Chapter 12 contains all of the authorized punishments and the standards for their imposition, and Section 12.01(a) directs the court and counsel to this chapter for the sentencing law.

Although purely hortatory, Subsection (b) hopefully will guide future legislatures in grading newly-created offenses. One important object of this code's sentencing provisions is the creation of a permanent, rational sentencing structure into which new offenses may be fitted as they are created.

Subsections (c) and (d) conform the penalty provisions of the many regulatory laws transferred from the Penal Code to the sentencing structure of this code. Subsection (c) reflects the committee's judgment that an offense authorizing punishment more severe than that authorized for a third-degree felony should be in this code. Thus, although this code does not increase any punishment authorized by present law, it does reduce some.

§ 12.02. Types of Offenses

(a) Offenses are designated as felonies or misdemeanors.

(b) An offense is a felony if it is so designated by law or if a person adjudged guilty of the offense may be sentenced to death or to the custody of the Texas Department of Corrections.

(c) An offense is a misdemeanor if it is so designated by law or if a person adjudged guilty of the offense may be sentenced to imprisonment in a county jail for not more than one year or fined not more than $1,000 or both imprisoned and fined.

Committee Comment

See Committee Comment following Section 12.04.

§ 12.03. Classification of Felonies

(a) Felonies are classified according to the relative seriousness of the offense into four categories:

(1) capital felonies;
(2) felonies of the first degree;
(3) felonies of the second degree;
(4) felonies of the third degree.

(b) An offense designated a felony, either in this code or in another law, without specification as to category is a felony of the third degree.

Committee Comment

See Committee Comment following Section 12.04.

§ 12.04. Classification of Misdemeanors

(a) Misdemeanors are classified according to the relative seriousness of the offense into three categories:

(1) Class A misdemeanors;
(2) Class B misdemeanors;
(3) Class C misdemeanors.

(b) An offense designated a misdemeanor, either in this code or in another law, without specification as to punishment or category is a Class C misdemeanor.

(c) Conviction of a Class C misdemeanor does not impose any legal disability or disadvantage.

Historical Note

Derivation:

§ 12.02: Penal Code art. 47
§§ 12.03, 12.04(a), (b): N.Y.Rev.Pen.Law §§ 55.05, 55.10
Fed.Prop.Crim.Code § 3003
§ 12.04(c): Penal Code art. 52

Cross References

"Conviction" defined, see § 1.07.
Exceptional sentences, see subch. D.
"Felony" defined, see §§ 1.07, 12.02.
Felony punishments, see §§ 12.22, 12.31.
"Misdemeanor" defined, see §§ 1.07, 12.02.
Misdemeanor punishments, see §§ 12.23, 12.32.

Committee Comment

Section 12.02 preserves the felony-misdemeanor distinction and definition of present law, Penal Code art. 47; Ex parte Wynn, 259 S.W.2d 191 (Tex.Crim.App.1953); Campbell v. State, 2 S.W. 825 (Tex.Ct.App.1886).

Each offense in the code is labeled a felony or misdemeanor and, within those classifications, is further labeled, to reflect the offense's seriousness, one of three categories of misdemeanor or four categories of felony. Sections 12.03(a) and 12.04(a) break sharply with present law, which affixes a specific penalty to each offense in the article defining the offense itself, to produce a rational grading structure for the code and, hopefully, for offenses added by future legislatures.

Sections 12.03(b) and 12.04(b) speak primarily to offenses outside this code and parallel Section 12.01(c) and (d).

Section 12.04(c) ensures that conviction of a Class C (justice court) misdemeanor does not deprive the defendant of his rights to vote, hold public office, serve on a jury, or other rights of citizenship; cf. Penal Code arts. 48(5), 52. On the other hand, conviction of a Class C misdemeanor is included in the definition of "conviction" for enhancement purposes, see Section 1.07 (code definitions), and can trigger, for example, extended term imprisonment as an habitual petty thief under Section 12.44.

§ 12.05. Sentencing Combinations

(a) Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentencing combinations:

(1) to pay a fine; or

(2) to probation; or

(3) to pay a fine and to probation; or

(4) to pay a fine and to imprisonment in a county jail not to exceed 30 days, the imprisonment either contemporaneous with or followed by probation; or

(5) to imprisonment; or

(6) to pay a fine and to imprisonment; or

(7) to death following recommendation of the death penalty by a jury.

(b) This chapter does not deprive a court of authority conferred by law to forfeit property, dissolve a corporation, suspend or cancel a license or permit, remove a person from office, cite for contempt, or impose any other civil penalty. The civil penalty may be included in the sentence.

Historical Note

Derivation:

Penal Code art. 48
Fed.Prop.Crim.Code § 3001

Cross References

Civil commitment, see R.C.S. arts. 5547—40, 5561c, 5561c—1.
Corporations and associations, see subch. E.
Death penalty, see § 12.46.
Dissolution of corporation, see Business Corporation Act arts. 7.01, 8.16, as amended; R.C.S. arts. 1396—7.01, 1396—8.15, as amended.
Effect of code, see § 1.03.
Exceptional sentences, see subch. D.
Fines, see subch. B.
Forfeiture of office, see Tex. Const. art. XVI, § 41.
Imprisonment, see subch. C.
Probation, see C.C.P. art. 42.12, as amended.
Work-release, see C.C.P. art. 42.12, § 4, as amended.

Committee Comment

Subsection (a) sets out an exhaustive list of penal sanctions the sentencing authority may invoke following an adjudication of guilt; in doing so it restates and expands Penal Code art. 48. The section does not, however, impinge on a court's civil remedies; Subsection (b) makes clear that, either in addition to or together with the criminal sanction, a court may cancel a liquor license, enjoin the operation of a house of prostitution, or order destruction of gambling paraphernalia—to mention but a few examples.

§ 12.06. General Principles of Sentencing

(a) A court in sentencing a defendant shall impose the minimum amount of custody or confinement that is consistent with the protection of the public, the prevention of offenses, the gravity of the offense, and the rehabilitative needs of the defendant.

(b) Total confinement in a penal institution is the least preferred sentence, and if the court determines to impose total confinement, it shall fashion the minimum and maximum terms in light of the criteria set out in Subsection (a).

(c) A court in sentencing shall grant a defendant probation unless, considering the criteria set out in Subsection (a), it determines:

(1) there is a great risk the defendant will not make a good faith effort to comply with the conditions of probation or will commit another offense while on probation; or

(2) the defendant needs correctional treatment most effectively afforded in a penal institution; or

(3) that granting probation will significantly depreciate the gravity of defendant's offense.

Historical Note

Derivation:
Model Sentencing Act § 1
ABA Sentencing Standards §§ 2.2, 2.3
Model P.C. § 7.01(1)

Cross References

Appellate review of sentence, see C.C.P. arts. 4.03 and 44.25, as amended.
Credit against sentence, see C.C.P. art. 42.03, as amended
Fine guidelines, see § 12.21.
Parole guidelines, see C.C.P. art. 42.12, § 15, as amended.
"Penal institution" defined, see § 1.07.
Probation, see C.C.P. art. 42.12, as amended.
Resentencing, see C.C.P. art. 42.08, as amended.
Work-release, see C.C.P. art. 42.12, § 4, as amended.

Committee Comment

This section, which has no counterpart in present law, provides some guidelines for exercising sentencing discretion. It has three primary objectives: furnishing the sentencing court with at least a sense of direction; bringing consistency to the wildly variant sentences now imposed across the state; and, perhaps most importantly, providing the Court of Criminal Appeals with a foundation for fashioning standards to review the appropriateness of sentences.

The section also furnishes the defense and prosecution with a set of perimeters for the proper performance of their roles.

Finally, the section makes clear that the trial court is to approach the sentencing decision from the standpoint of first considering probation, and only if there is good reason not to grant probation is the court to work from the point of least deprivation of liberty to the point of maximum deprivation.

SUBCHAPTER B. FINES

Section 12.21. Criteria and Methods for Imposing Fines

(a) In determining the amount and method of paying a fine, a court shall consider:

(1) a defendant's ability to pay the amount of the fine; and

(2) a defendant's ability to pay the fine at the time and by the method directed; and

(3) the hardship likely to be imposed on a defendant's dependents by the amount of the fine and the time and method of paying it; and

(4) the impact the amount of the fine and the time and method of paying it will have on a defendant's ability to make reparation or restitution to the victim; and

(5) the amount of a defendant's gain, if any, derived from commission of the offense.

(b) When imposing a fine a court may direct a defendant:

(1) to pay the entire fine when sentence is pronounced; or

(2) to pay the entire fine at some later date; or

(3) to pay a specified portion of the fine at designated periodic intervals.

Historical Note

Derivation:

Subsec. (a):
Fed.Prop.Crim.Code § 3302(1)
Model P.C. § 7.02

Subsec. (b): N.Y.Prop Crim.Proc.Law § 215.10(1)

Cross References

Corporations and associations, see subch. E.
Fine for felony, see § 12.22.
Fine for misdemeanor, see § 12.23.
Gain fine, see § 12.41.
Pay or jail, see C.C.P. arts. 43.03 and 45.50, as amended, 45.53.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.

Committee Comment

Because criminal fines are sometimes counterproductive—for example, a fine sometimes harms the defendant's dependents more than the defendant, and it sometimes prevents restitution—Subsection (a) lists these and other relevant factors for the court's consideration in determining whether and how much to fine a defendant. There is nothing comparable in present law.

Once a court decides to fine a defendant, Subsection (b) authorizes a variety of payment method alternatives, thus introducing additional flexibility into the sentencing decision. Under present law the defendant must pay at once or go to jail, C.C.P. arts. 42.15, 43.03, 43.04, 45.50, 45.53, and there have been instances of defendants jailed overnight because the court would not accept their personal checks in satisfaction of the fine.

§ 12.22. Ordinary Fine for Felony

A court may sentence a defendant adjudged guilty of any category of felony to pay a fine, in an amount fixed by the court, not to exceed $5,000.

Committee Comment

See Committee Comment following Section 12.23.

§ 12.23. Ordinary Fine for Misdemeanor

(a) A court may sentence a defendant adjudged guilty of a Class A misdemeanor to pay a fine, in an amount fixed by the court, not to exceed $1,000.

(b) A court may sentence a defendant adjudged guilty of a Class B misdemeanor to pay a fine, in an amount fixed by the court, not to exceed $500.

(c) A court may sentence a defendant adjudged guilty of a Class C misdemeanor to pay a fine, in an amount fixed by the court, not to exceed $200.

(d) If a law outside this code defines a misdemeanor and specifies the amount of fine, a court shall fix the amount of fine in accordance with that law, except as provided in Section 12.01(d) (sentence in accordance with code).

Historical Note

Derivation:

Fed.Prop.Crim.Code § 3001(1)

Cross References

"Felony" defined, see §§ 1.07, 12.02.
Felony outside code, see §§ 12.01, 12.03.
Gain fine, see § 12.41.
"Law" defined, see § 1.07.
"Misdemeanor" defined, see §§ 1.07, 12.02.
Misdemeanor outside code, see §§ 12.01, 12.04.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.
Table of punishments, see Appendix B.

Committee Comment

Except for the Class C misdemeanor, the maximum fines authorized by these sections for felonies and misdemeanors are essentially arbitrary but do not differ significantly from the fines authorized by present law. The $200 fine authorized for a Class C misdemeanor conforms to the justice and corporation court constitutional jurisdiction.

Section 12.23(d) speaks to the hundreds of laws outside the code that provide a (misdemeanor) fine penalty; its treatment of these laws is consistent with that prescribed by Section 12.01.

SUBCHAPTER C. IMPRISONMENT

Section 12.31. Ordinary Term Imprisonment for Felony

(a) A court may sentence a defendant adjudged guilty of a felony of the first degree:

(1) to life imprisonment; or

(2) to a term of imprisonment the minimum of which the court shall fix at not less than 1 year nor more than 12 years and the maximum at not more than life imprisonment; or

(3) to a term of imprisonment the minimum of which the court shall fix at not less than 1 year nor more than 10 years and the maximum at not more than 30 years.

(b) A court may sentence a defendant adjudged guilty of a felony of the second degree to a term of imprisonment the minimum of which the court shall fix at not less than 1 year nor more than 4 years and the maximum at not more than 12 years.

(c) A court may sentence a defendant adjudged guilty of a felony of the third degree to a term of imprisonment the minimum of which the court shall fix at not less than 1 year nor more than 2 years and the maximum at not more than 6 years.

(d) Except as provided in Subsection (e), no sentence may be imposed under this section in which the minimum term is longer than one-third of the maximum term.

(e) Subsection (d) does not apply when this section authorizes a sentence to life imprisonment. Subsection (d) does not prohibit a court from sentencing a defendant adjudged guilty of a felony of the third degree to a term of imprisonment the minimum of which equals one year and the maximum of which equals two years.

Historical Note

Derivation:

N.Y.Rev.Pen.Code § 70.00
Model P.C. § 6.07

Cross References

Concurrent or consecutive term of imprisonment, see § 12.45.
Credit against sentence, see C.C.P. art. 42.03, as amended.
Death penalty, see § 12.46.
Extended term imprisonment for felony, see §§ 12.42, 12.43.
"Felony" defined, see §§ 1.07, 12.02.
Good time credit, see R.C.S. art. 6184*l*.
Parole eligibility, see C.C.P. art. 42.12, § 15, as amended.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.
Table of punishments, see Appendix B.

Committee Comment

The minimum-maximum term combination authorized by this section is new to Texas law and for the first time makes a rational allocation of sentencing authority between the legislature, which grades the offense's seriousness; the judiciary, which fits the punishment to the individual defendant and facts of his offense; and the correctional authorities, which measure and act on the convict's dangerousness and rehabilitative potential. Section 12.31 provides a variety of authorized prison terms for felony offenses, thus furnishing the sentencing court with a flexible response to the offender and his particular offense. Because parole eligibility is tied to service of the minimum term, C.C.P. art. 42.12, § 15, as amended, the trial court is given a means to reflect the community's condemnation of a particular offense and offender, and it is anticipated that high minimums will be reserved for the more aggravated offenses. Subsection (d) prohibits the trial court's encroaching on the correctional authority's discretion by preventing, for example, assessing a minimum of 4 years and a maximum of 5 years for a second-degree felony. Subsection (e) excepts from this prohibition the life sentence and a special minimum punishment for the lowest felony.

The one-year mandatory minimum serves the need of the Department of Corrections for a minimum period in which to process, classify, and perhaps begin rehabilitating a convict. Once the minimum term assessed is served, however, the Board of Pardons and Paroles determines whether the convict is sufficiently rehabilitated to justify release on parole.

Section 12.31 effects a significant reduction in maximum punishments authorized for the *ordinary* felony offender. In doing so it follows the recommendation of the American Law Institute's Model Penal Code, the American Bar Association, and the National Council on Crime and Delinquency. Complementing this reduction for the ordinary offender, this chapter identifies the dangerous offender and authorizes substantial confinement to isolate him from society.

Present law does not distinguish between the ordinary and dangerous offender. In addition to the incredible variety of sentencing combinations available, present law offers a similar variety of maximum punishments: life, any number of years, 25 years, 20 years, 15 years, 12 years, 10 years, 7 years—to mention fewer than half. But, when it is noted that the *average* length of time spent in prison by all inmates discharged from the Department of Corrections in 1969 was two years and nine months, this chapter's distinction between ordinary and dangerous offenders is much closer than present law to the reality of our penocorrectional system.

§ 12.32. Imprisonment for Misdemeanor

(a) A court may sentence a defendant adjudged guilty of a Class A misdemeanor to imprisonment in a county jail for a term not to exceed one year.

(b) A court may sentence a defendant adjudged guilty of a Class B misdemeanor to imprisonment in a county jail for a term not to exceed three months.

Historical Note

Derivation:
N.Y.Rev.Pen.Law § 70.15(1), (2)

Cross References

Credit against sentence, see C.C.P. art. 42.03, as amended.
Extended term imprisonment for habitual petty thief, see § 12.44.
Good time credit, see R.C.S. art. 5118a.
"Misdemeanor" defined, see §§ 1.07, 12.02.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.
Table of punishments, see Appendix B.

Committee Comment

Although again essentially arbitrary, the maximum jail terms for Class A and B misdemeanors prescribed by this section are similar to those in the present law, which often prescribes a year or six months. No imprisonment is authorized for the Class C misdemeanor, of course, because justice and corporation courts have no jurisdiction to imprison.

SUBCHAPTER D. EXCEPTIONAL SENTENCES

Section 12.41. Fine Based on Gain

(a) If a defendant has gained money or property by committing any category of felony, a court may sentence the defendant to pay a fine, in an amount fixed by the court, not to exceed double the amount of the defendant's gain from committing the felony.

(b) If a defendant has gained money or property by committing a Class A or Class B misdemeanor, a court may sentence the defendant to pay a fine, in an amount fixed by the court, not to exceed double the amount of the defendant's gain from committing the misdemeanor.

(c) For purposes of this section, "gain" means the amount of money or value of property derived from the commission of an offense, less the amount of money or value of property returned to the victim or seized by or surrendered to lawful authority before the sentencing hearing begins.

Historical Note

Derivation:
N.Y.Rev.Pen.Law § 80.00

Cross References

Corporations, and associations, see § 12.51.
Notice of exceptional sentence, see C.C.P. art. 42.02, § 6, as amended.
Ordinary fines, see subch. B.
Restitution, see C.C.P. art. 42.12, § 4, as amended.

Committee Comment

A fine based on the defendant's gain from committing an offense is a novelty in Texas law, but should prove useful in requiring those who have profited from their offenses to disgorge. The definition of "gain" in Subsection (c) encourages the return of money or property to the victim. The gain fine is not an authorized disposition for the justice or corporation court because its jurisdiction is constitutionally limited to a $200 fine.

§ 12.42. Extended Term Imprisonment for Habitual Offender

(a) A court may sentence a defendant adjudged guilty of a felony of the second or third degree to an extended term of imprisonment if the court determines under Subsection (c) that the defendant is an habitual offender.

(b) The extended term of imprisonment for an habitual offender consists of:

(1) a minimum term the court shall fix at not less than 1 year nor more than 12 years and a maximum at not more than 30 years, if defendant stands adjudged guilty of a felony of the second degree;

(2) a minimum term the court shall fix at not less than 1 year nor more than 6 years and a maximum at not more than 30 years, if defendant stands adjudged guilty of a felony of the third degree.

(c) To determine that a defendant is an habitual offender, the court must find:

(1) that the defendant has been convicted two or more times before of any category of felony; and

(2) that extended term imprisonment is necessary to protect the public.

Historical Note

Derivation:
Penal Code arts. 62–64
N.Y.Rev.Pen.Law § 70.10

Cross References

"Conviction" defined, see § 1.07.
"Felony" defined, see §§ 1.07, 12.02.
First degree felony punishment, see §§ 12.22, 12.31.
Habitual petty thief, see § 12.44.
Notice of exceptional sentence, see C.C.P. art. 42.02, § 6, as amended.
Ordinary felony imprisonment, see § 12.31.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.

Committee Comment

This section preserves the present habitual offender law, Penal Code arts. 62–64, with four important changes: (1) A reasonable variety of punishments is authorized and the court is afforded wide discretion in tailoring the punishment to the individual habitual offender and his pattern of conduct. (2) A prediction of dangerousness is required. (3) Section 12.42 does not apply to the repeater misdemeanant, whose most irritating manifestation, the habitual petty thief, is instead treated separately under Section 12.44. (4) Section 12.42 eliminates some of the technicalities of present law, e. g., art. 62's requirement that the instant offense be of the "same nature" as the prior offense.

The first degree felony is not included as a "trigger" offense in this section because it authorizes a sentence of life imprisonment in every case.

§ 12.43. Extended Term Imprisonment for Organized Criminal Offender

(a) A court may sentence a defendant adjudged guilty of a felony of the second or third degree to an extended term of imprisonment if the court determines under Subsection (c) that the defendant is an organized criminal offender.

(b) The extended term of imprisonment for an organized criminal offender consists of:

(1) a minimum term the court shall fix at not less than 1 year nor more than 12 years and a maximum at not more than 30 years, if defendant stands adjudged guilty of a felony of the second degree;

(2) a minimum term the court shall fix at not less than 1 year nor more than 6 years and a maximum at not more than 30 years, if the defendant stands adjudged guilty of a felony of the third degree.

(c) To determine that a defendant is an organized criminal offender, the court must find:

(1) that the defendant stands adjudged guilty of a felony under Section 19.02 (murder); Section 20.01 (kidnapping); Section 28.02 (arson); Chapter 31 (theft); Chapter 32 (fraud); Section 36.02 (bribery) or 36.05 (tampering with witness); Section 37.03 (aggravated perjury); Section 43.04 (aggravated promotion of prostitution) or 43.05 (compelling prostitution); Chapter 46 (weapons); Section 47.04 (gambling promotion); or Chapter 48 (drugs); and

(2) that the felony of which the defendant stands adjudged guilty is part of a pattern of conduct:

(A) constituting one or more offenses under the law of this state or another jurisdiction; and

(B) continuing over a protracted period of time; and

(C) carried on in concert by the defendant and 10 or more other persons; and

(3) that extended term imprisonment is necessary to protect the public.

Historical Note

Derivation:

Fed.Prop.Crim.Code § 3203

Cross References

First degree felony punishment, see §§ 12.22, 12.31.
Gain fine, see § 12.41.
"Law" defined, see § 1.07.
Notice of exceptional sentence, see C.C.P. art. 42.02, § 6, as amended.
Ordinary felony imprisonment, see § 12.31.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.

Committee Comment

In attempting to identify the participant in organized crime, this section employs the three definitional elements generally believed to evidence such participation: selected offenses committed in concert with others as part of a criminal enterprise continuing over a long period of time. This section tracks the proposed Federal Organized Crime Control Act of 1969, S. 30, 91st Cong., 2d Sess., § 1001, as well as a similar provision in the Proposed Federal Criminal Code.

§ 12.44. Extended Term Imprisonment for Habitual Petty Thief

(a) A court may sentence a defendant adjudged guilty of misdemeanor theft under Chapter 31 to an extended term of imprisonment if the court determines under Subsection (c) that the defendant is an habitual petty thief.

(b) The extended term of imprisonment for an habitual petty thief consists of a minimum the court shall fix at not less than one year nor more than two years and a maximum at not more than six years.

(c) To determine that a defendant is an habitual petty thief, the court must find:

(1) that defendant has been convicted two or more times before of misdemeanor theft; and

(2) that extended term imprisonment is necessary to protect the public.

Historical Note

Derivation:
Conn.Gen Stat. § 53-42(a)

Cross References

"Conviction" defined, see § 1.07.
Gain fine, see, § 12.41.
"Misdemeanor" defined, see §§ 1.07, 12.02.
Notice of exceptional sentence, see C.C.P. art. 42.02, § 6, as amended.
Ordinary misdemeanor imprisonment, see § 12.32.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.
Theft, see ch. 31

Committee Comment

This section elevates to third-degree felony level for punishment purposes the third misdemeanor theft conviction. It is aimed primarily at the misdemeanor bad check writer and shoplifter, but of course applies to all theft offenses.

§ 12.45. Concurrent and Consecutive Terms of Imprisonment for Felony

(a) Subject to the limitation in Subsections (b)–(e), a court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. Sentences are deemed to run concurrently unless the court states in the sentence that they run consecutively.

(b) A court shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

(c) A court may not impose consecutive sentences for offenses arising out of a single criminal episode.

(d) If a court lawfully determines to impose consecutive sentences, the aggregate minimum of all sentences imposed may not exceed 12 years' imprisonment and the aggregate maximum of all sentences im-

posed may not exceed 30 years' imprisonment. However, this limitation does not apply if an offense for which defendant is sentenced authorizes the death penalty or life imprisonment.

(e) The limitation in Subsection (d) applies:

(1) if a defendant is sentenced at the same time for more than one offense;

(2) if a defendant is sentenced at different times for one or more offenses all of which were committed prior to imposition of sentence for any one or more of them;

(3) if a defendant has already been sentenced by a court of this state, other than the present sentencing court, or by a court of another state or federal jurisdiction.

(f) For purposes of this section, "criminal episode" means all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective, even though the harm is directed toward or inflicted upon more than one person.

Historical Note

Derivation:
Fed.Prop.Crim.Code § 3206

Cross References

Joinder of multiple offenses in single criminal action, see ch. 3.
Multiple sentences prohibited following multiple convictions, see ch. 3.
Notice of exceptional sentence, see C.C.P. art. 42.02, § 6, as amended.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.

Committee Comment

C.C.P. art. 42.08 presently vests the trial court with discretion to decide whether or not to cumulate sentences when a defendant is adjudged guilty of two or more offenses. This discretion is unconfined and unstructured, and the Court of Criminal Appeals has been content to review its exercise according to the abuse-of-discretion standard that, of course, nearly always results in upholding the trial court, see, e. g., Morales v. State, 416 S.W.2d 403 (Tex. Crim.App.1967).

The rationale for authorizing consecutive sentences is that the multiple offender, like the habitual offender, may be dangerous and require long-term imprisonment for the protection of society. This rationale is but dimly recognized in present law, which appears to sentence offenses rather than offenders, and Section 12.45 revises this law to accomplish the proper objectives of the consecutive sentence authorization.

Subsection (a) continues the present law's authorization for consecutive sentences, and Subsection (b) provides standards to guide

the trial court in deciding when to impose consecutive rather than concurrent terms. The second sentence of Subsection (a), incidentally, codifies a line of decisions by the Court of Criminal Appeals, sec, e. g., Ex parte Davis, 160 S.W. 459 (Tex.Crim.App.1913).

Subsection (c) conforms to the compulsory joinder—multiple convictions—single sentence policy of Chapter 3 (multiple prosecutions and double jeopardy); offenses arising out of a single criminal episode are treated as one unit throughout this code and consecutive sentences are thus inappropriate for them. The definition of "criminal episode" in Subsection (f) is discussed in the comment to Section 3.01.

Subsection (d) limits the aggregate of all consecutive terms lawfully imposed to that already prescribed for the most dangerous offenders—Sections 12.42 (habitual offender) and 12.43 (organized criminal offender)—with exceptions, of course, for the capital and first-degree felon.

The application of the aggregate term limitation in Subsection (d) is spelled out in the three subdivisions of Subsection (e). The defendant convicted of multiple offenses in a single trial is the most common occasion for choosing between concurrent or consecutive terms, and is described by Subdivision (1). Subdivision (2) contemplates a defendant who is sentenced for offenses A and B after he has committed undiscovered offenses X and Y. When he is later sentenced for offenses X and Y, the total term for those offenses, when added to the already imposed term for offenses A and B, may not exceed the minimum 12—maximum 30 limitation of Subsection (d); and Subsection (d) applies whether, at the time defendant is sentenced for offenses X and Y, he is serving his sentence for offenses A and B or has completed serving that sentence. On the other hand, if defendant commits a new offense *after* being sentenced, either for offenses A and B or X and Y—for example, while on bail or probation or parole or in the penitentiary—the limitation of Subsection (d) does not apply and defendant may be sentenced to the maximum term authorized for the new offense.

Subdivision (3) describes the final application of the limitations in Subsection (d) and covers, for example, a defendant already serving a sentence imposed in one county who is subsequently convicted and sentenced in another county: The court in the second county must add the first county term to whatever term it assesses and the sum may not exceed the minimum 12—maximum 30 limitation.

§ 12.46. Death Penalty for Capital Felony

A defendant adjudged guilty of a capital felony may not be sentenced to death if he was younger than 18 years at the time he committed the felony. Rather, a court shall sentence him for a felony of the first degree.

Historical Note

Derivation:
Penal Code art. 31

Cross References

Computation of age, see § 1.06.
Death penalty sentencing procedure, see C.C.P. art. 42.02, § 7, as amended.
First degree felony punishments, see §§ 12.22, 12.31.
Notice of intent to seek death penalty, see C.C.P. art. 1.14.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.

Committee Comment

This section preserves Penal Code art. 31, but raises the critical age one year in line with other recent penal law revisions, e. g., N. Y.Rev.Pen.Law § 125.30(1).

The committee's efforts to articulate standards to guide the jury in deciding the life-death issue proved unsuccessful. A few recent revisions have made the attempt, e. g., M.P.C. § 210.6(3), (4); Fed.Prop.Crim.Code § 3605, but the committee found these attempts unsuccessful as well. Present Texas law gives the jury no guidance, perhaps recognizing that the life-death decision is essentially an emotional one and thus not susceptible to rational guidance, and the absence of standards in this section continues present law.

§ 12.47. Reduction of Third Degree Felony to Misdemeanor

A court may set aside a judgment of guilt of a felony of the third degree, and enter a judgment of guilt and sentence a defendant for any class of misdemeanor, if the court finds, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, that it would be unduly harsh to sentence the defendant for the felony of which he was adjudged guilty.

Historical Note

Derivation:
Fed.Prop.Crim.Code § 3004

Cross References

Misdemeanor punishments, see §§ 12.23, 12.32.
Notice of exceptional sentence, see C.C.P. art. 42.02, § 6, as amended.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.
Third degree felony punishments, see §§ 12.22, 12.31.

Committee Comment

This novel provision broadens the trial court's discretion to deal appropriately with, for example, a first offender who does not

merit even a year in the penitentiary. Reduction to misdemeanor also avoids the collateral consequences of a felony conviction—e. g., loss of voting rights, a serious criminal record.

§ 12.48. Admission of Unadjudicated Offense

(a) A defendant may admit during the sentencing hearing his guilt of one or more unadjudicated offenses and request the court to take each into account in determining sentence for the offense or offenses of which he stands adjudged guilty. The court may not take into account an admitted offense of a higher category than any of the offenses of which defendant stands adjudged guilty.

(b) Before a court may take into account an admitted offense over which exclusive venue lies in another county or district, the court must obtain permission from the prosecuting attorney with jurisdiction and venue over the offense.

(c) If a court lawfully takes into account an admitted offense, prosecution is barred for that offense.

Historical Note

Derivation:

Hawaii Prop.Pen.Code § 607
Model P.C. § 7.05(4)

Cross References

Detainers, see R.C.S. art. 6184d.
Notice of exceptional sentence, see C.C.P. art. 42.02, § 6, as amended.
Offense categories, see § 12.03.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.

Committee Comment

Section 12.48, also novel, permits a defendant, if the trial court agrees, to "clean the slate" of uncharged offenses by having the court take them into account in assessing a sentence for the instant offense of which the defendant stands convicted. The appropriate application of this section will help prison morale and encourage rehabilitative efforts by removing the threat of future prosecution and restrict to some extent the current widespread use of detainers. It will also improve law enforcement's clearance rate and permit the prosecution to dispose of many offenses in a single criminal action. Some Texas trial courts already accomplish these objectives by granting motions to change venue to consolidate all offenses in a single court.

The type of offense a defendant may successfully admit is limited—for example, he may not in a theft case admit murder and bar subsequent prosecution for that offense—and Subsection (b) prevents one court from wiping out charges before another court without first obtaining the prosecutor's permission.

SUBCHAPTER E. CORPORATIONS AND ASSOCIATIONS

Section 12.51. Authorized Punishments for Corporation and Association

(a) If a corporation or association is adjudged guilty of an offense that provides a penalty consisting of a fine only, a court may sentence the corporation or association to pay a fine, in an amount fixed by the court, not to exceed the fine provided by the offense.

(b) If a corporation or association is adjudged guilty of an offense that provides a penalty including imprisonment, or that provides no specific penalty, a court may sentence the corporation or association to pay a fine, in an amount fixed by the court, not to exceed:

(1) $10,000 if the offense is a felony of any category; or

(2) $2,000 if the offense is a Class A or Class B misdemeanor; or

(3) $200 if the offense is a Class C misdemeanor.

(c) In lieu of the fines authorized by Subsections (a) and (b)(1) and (b)(2), if a court finds that the corporation or association gained money or property through the commission of a felony or Class A or Class B misdemeanor, the court may sentence the corporation or association to pay a fine, in an amount fixed by the court, not to exceed double the amount gained, in accordance with the criteria set out in Section 12.41.

Historical Note

Derivation:
N.Y.Rev.Pen.Law §§ 60.25, 80.10

Cross References

"Association" defined, see § 1.07.
Criminal responsibility of corporation and association, see ch. 7, subch. B.
Criminal responsibility of agent for own act, see § 7.25.
Criteria for imposing fines, see § 12.21.
Dissolution of corporation, see Business Corporation Act art. 7.01, as amended; R.C.S. art. 1396—7.01, as amended.
"Felony" defined, see §§ 1.07, 12.02.
"Gain" defined, see § 12.41.
Probation, see C.C.P. art. 17A.08, as amended.
Revocation of certificate of authority, see Business Corporation Act art. 8.16, as amended; R.C.S. art. 1396—8.15, as amended.
Sentencing proceedings, see C.C.P. art. 42.02, as amended.

Committee Comment

All authorized punishments for a corporation or association convicted of an offense (whether under this code or another law) are

set out in this section. If the offense itself (outside this code) prescribes the fine, the amount prescribed controls under Subsection (a). If the offense authorizes imprisonment, either exclusively or in combination with a fine, or if it contains no penalty, Subsection (b) lists the authorized punishments based on the classification of the offense. Offenses contemplated by Subsection (b) may be located either in or out of this code.

Subsection (c) authorizes the gain fine alternative for all but justice court offenses; see the comment to Section 12.41.

TITLE 4. INCHOATE OFFENSES

CHAPTER 15. PREPARATORY OFFENSES

Section
15.01. Criminal Attempt.
15.02. Criminal Conspiracy.
15.03. Criminal Solicitation.
15.04. Renunciation Defense.
15.05. No Offense.

Section 15.01. Criminal Attempt

(a) An individual, corporation, or association commits criminal attempt if, acting with the kind of culpability otherwise required for the offense:

(1) he intentionally engages in action or causes a result that would constitute the offense if the circumstances surrounding his conduct were as he believes them to be; or

(2) he acts with intent to cause a result that is an element of the offense, and he believes his conduct will cause the result without further conduct on his part; or

(3) he acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding his conduct as he believes them to be, and his conduct constitutes a substantial step toward commission of the offense.

(b) Conduct does not constitute a substantial step under Subsection (a)(3) unless the actor's entire course of action is strongly corroborative of his intent to commit the offense.

(c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

(d) Criminal attempt to commit a capital felony is a felony of the first degree. Criminal attempt to commit a felony of the first degree is a felony of the second degree. Criminal attempt to commit a felony of the second degree is a felony of the third degree. Criminal attempt to commit a felony of the third degree is a Class A misdemeanor. Criminal attempt to commit a Class A misdemeanor is a Class B misdemeanor. Criminal attempt to commit a Class B or C misdemeanor is a Class C misdemeanor.

Historical Note

Derivation:
Model P.C. § 5.01

Cross References

"Act" defined, see § 1.07.
"Association" defined, see § 1.07.
Attempt as lesser included offense, see C.C.P. art. 37.09, as amended.
"Conduct" defined, see § 1.07.
"Element of offense" defined, see § 1.07.
Facilitation, see § 7.03.
Multiple sentences for inchoate and object offenses prohibited, see § 3.03.
Renunciation defense, see § 15.04.

Committee Comment

Before an attempt to commit an offense can be punished, the attempt itself must be defined as an offense, Blanchette v. State, 125 S.W. 26 (Tex.Crim.App.1910), and present law contains numerous statutes that define attempt and related crimes in terms of a specific object offense. For example, Penal Code art. 1190 defines the offense of "attempt to rape," and "assault with intent to rape" is made a crime by Penal Code art. 1162. Section 15.01, on the other hand, is a general attempt statute that represents a new approach to the law of attempt in Texas: the offense of criminal attempt, as defined in Section 15.01, is broadened to apply in conjunction with *all* of the offenses defined in the Revised Penal Code. Furthermore, under this general statute the elements necessary to establish criminal attempt, and the penalties for its commission, are uniform, whereas under present law the elements of and penalties for an attempt vary depending upon the particular offense attempted. See generally M.P.C. § 5.01, Comment at 24–75 (Tent.Draft No. 10, 1960).

Criminal attempt is an inchoate offense directed at the single actor whose intent is to commit an offense, but whose actions, while strongly corroborative of his criminal intent, fail to achieve the criminal objective intended. Accordingly, the offense is basically one of criminal intent coupled with acts that clearly demonstrate the actor's proclivity toward criminality.

Subsection (a) defines three varieties of the offense of criminal attempt; all three varieties retain the traditional requirement of specific intent to commit an offense. Thus, an actor must either intentionally engage in criminal acts or intend to accomplish a criminal result, and this requirement is consistent with present law, see Young v. State, 384 S.W.2d 710 (Tex.Crim.App.1964) and Ammann v. State, 165 S.W.2d 744 (Tex.Crim.App.1942), in which the court noted that a specific intent to kill was essential to the crime of assault with intent to murder (attempted murder in this code).

Subdivisions (1)–(3) are not intended to define mutually exclusive kinds of criminal attempt, however. Rather, these three subdivisions set out alternative statutory tests for determining if a

course of conduct that does not produce a proscribed harm can be classified as an attempt to commit an offense. Subdivision (1) is directed at a completed course of conduct, while Subdivisions (2) and (3) focus on conduct that is incomplete in the sense that it is cut short at some point in time before accomplishment of the intended criminal objective. Thus, a completed course of conduct constituting a criminal attempt under Subdivision (1) could also include conduct sufficient to establish attempt responsibility under Subdivisions (2) and (3).

In addition to the elements required by Subdivision (1), (2), or (3), to be convicted of criminal attempt the actor must act "with the kind of culpability otherwise required" for the object offense. Usually this culpability element will apply to circumstances surrounding conduct that are included as an element in the definition of the object offense. To illustrate, assume the object offense is sale of a firearm to an intoxicated person, Section 46.04, for which recklessness with respect to the intoxication of the buyer (a circumstance surrounding conduct) suffices to establish guilt. An actor could be convicted of attempted sale of a firearm to an intoxicated person if he was reckless about whether the buyer were intoxicated (culpability otherwise required for the offense) and intentionally offered to sell the firearm in a manner constituting a "substantial step" toward committing the offense.

One objective of Section 15.01 is to eliminate what are commonly labeled the legal and physical or factual impossibility defenses from the law of attempt. The distinction sometimes made by courts between legal and physical impossibility is nebulous, and in applying Section 15.01 the difference is immaterial. The present law in this regard is complex and confusing, and no doubt this section criminalizes some conduct that would not be an offense under existing law. In this connection it should be recalled that there must be an object offense before there can be a criminal attempt —an actor's belief that his conduct is criminal when there is no such offense cannot constitute a criminal attempt.

Subsection (a)(1) prevents exoneration of a person who intentionally engages in a course of conduct that, under the surrounding circumstances as perceived by the actor, would constitute a completed offense but does not because the actual circumstances make commission of the offense impossible. Thus under Subsection (a)(1) an actor could be convicted of criminal attempt to receive stolen property under Section 31.03 (theft) if he accepted goods he *believed* to have been stolen, intending to deprive the owner of their value, which were not actually stolen goods. Similarly, there would be an attempt to commit incest under Section 25.02 if an actor intentionally engaged in sexual intercourse with a person he mistakenly believed to be his sister.

Subsection (a)(2) is a codification of the generally accepted "last proximate act" doctrine as a basis for imposing attempt re-

sponsibility. If an offense is defined in terms of causing a certain result, an actor commits an attempt at the point when he has done everything he believes is necessary to accomplish the intended criminal result. For example, a wife commits attempted murder under Section 19.02 when she replaces her husband's nightly sleeping pill with a cyanide tablet, intending to cause his death and believing he will take the tablet and die as a result. The fact that the husband does not take the tablet, or that he does not die following its ingestion, does not alter the wife's responsibility for attempted murder, since she believed her conduct would cause her husband's death without further conduct on her part.

Subsection (a)(3) formulates a general standard to determine at what point acts performed in the course of a criminal enterprise become punishable as a criminal attempt. This is the most difficult task in defining attempt responsibility, and, although courts use various tests to resolve the question, the basic element traditionally required is that the actor's conduct must proceed beyond "mere preparation," see, e. g., Penal Code art. 1402, which defines attempted burglary as "an endeavor to accomplish the crime of burglary carried beyond mere preparation." Subsection (a)(3) provides that the point of attempt responsibility, beyond mere preparation but short of the completed offense, is reached when an actor's intentional acts constitute a "substantial step toward the commission of the offense." Some attempt statutes in present law set out specific fact situations that constitute an attempt, e. g., Penal Code art. 1316 (attempted arson committed by placing or spreading inflammable material). But because of the infinite variety of factual situations that can arise, Subsection (a)(3) leaves the issue of what constitutes a substantial step for determination in each particular case. As in Subsection (a)(1), the phrase "under the circumstances as he believes them to be" is included to prevent impossibility from being raised as a defense.

In addition to the substantial step requirement of Subsection (a)(3), Subsection (b) prescribes an additional element to distinguish attempt from preparation: the actor's "entire course of action" must be "strongly corroborative" of his intent to complete the offense. The substantial step approach, which focuses on what has already been done rather than on what remains to be done, will probably expand attempt responsibility by drawing the line of criminality farther back from the completed offense. To exclude innocent acts, therefore, Subsection (b) requires proof of acts strongly corroborative of criminal intent, and if an act standing alone appears innocuous or ambiguous, there is no attempt responsibility regardless of how close to completing an offense the actor had come.

Subsection (c) expressly eliminates a defense that is raised, though rarely successfully, in attempt cases. In Rodriguez v. State, 398 S.W.2d 124 (Tex.Crim.App.1966), the defendant's con-

tention that there could be no conviction for an attempted burglary when a burglary had been proved by the evidence was apparently accepted by the court, which in affirming the conviction suggested that the completed crime had not been proved. However, in Neilson v. State, 437 S.W.2d 862 (Tex.Crim.App.1969), a case involving attempted rape, the court said that a conviction for an attempt was proper notwithstanding proof that the object offense was committed. Whatever the present rule, there is no justification for retention of such a defense.

Subsection (d) standardizes the punishments authorized for all attempt offenses, punishing criminal attempt at the next lower grade than the object offense attempted.

§ 15.02. Criminal Conspiracy

(a) An individual, corporation, or association commits criminal conspiracy if, with intent that a felony be committed:

(1) he agrees with one or more persons that they or one or more of them engage in conduct that, under circumstances surrounding his conduct as the actor believes them to be, would constitute the felony; and

(2) he or one or more of them performs an overt act in pursuance of the agreement.

(b) A coconspirator's criminal responsibility for the felony committed in furtherance of the conspiracy is determined under Chapter 7, Subchapter A (complicity).

(c) It is no defense to prosecution for criminal conspiracy:

(1) that one or more of the coconspirators is not criminally responsible for the object felony; or

(2) that one or more of the coconspirators has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution; or

(3) that the agreement of a purported coconspirator was feigned; or

(4) that the actor belongs to a class of persons who by definition of the object felony is legally incapable of committing the felony in an individual capacity; or

(5) that the object felony was actually committed.

(d) Unless otherwise provided by law, it is a defense to prosecution for criminal conspiracy:

(1) that the actor is the victim of the object felony; or

(2) that the object felony is so defined that the actor's conduct is inevitably incident to its commission.

(e) Criminal conspiracy to commit a capital felony is a felony of the first degree. Criminal conspiracy to commit a felony of the first degree is a felony of the second degree. Criminal conspiracy to commit a felony of the second degree is a felony of the third degree. Criminal conspiracy to commit a felony of the third degree is a Class A misdemeanor.

Historical Note

Derivation:
Penal Code arts. 1622-1629
Model P.C. §§ 5.03(1), 5.04(1)

Cross References

Accomplice witness, see C.C.P. art. 38.14.
"Act" defined, see § 1.07.
"Association" defined, see § 1.07.
Complicity, see ch. 7, subch. A.
"Conduct" defined, see § 1.07.
Defense explained, see § 2.03.
Facilitation, see § 7.03.
Jurisdiction over out-of-state conspiracy, see § 1.04.
Multiple sentences for inchoate and object offenses prohibited, see § 3.03.
Renunciation defense, see § 15.04.

Committee Comment

Criminal conspiracy, a common-law crime, has become firmly established as an offense that serves dual roles in modern criminal jurisprudence. Functioning as an inchoate offense, criminal conspiracy fixes the point of legal intervention at agreement to commit a crime coupled with an overt act. Thus, it reaches further back into preparatory conduct than criminal attempt, Section 15.-01, but not as far back as criminal solicitation, Section 15.03. In its second role criminal conspiracy provides a means of striking against the special danger incident to group criminal activity and facilitates prosecution of the group by providing extraordinary evidentiary and procedural advantages. Section 15.02 is essentially a clarification of the present Texas law of conspiracy, Penal Code arts. 1622–1629, emphasizing the inchoate aspect of the offense without interfering with the procedural and evidentiary advantages of the group prosecution aspect of the offense.

The present definition of conspiracy is cast in terms of "two or more persons" agreeing to commit a felony, Penal Code art. 1622, reflecting the common-law notion of conspiracy as a multilateral relationship. Section 15.02 adopts a unilateral approach, directing the inquiry to each individual's culpability by formulating the offense in terms of conduct sufficient to establish the responsibility of a given actor rather than the conduct of a group. The major consequence of the unilateral approach is that the disposition of persons with whom an actor allegedly conspired will not necessarily

determine the actor's responsibility for criminal conspiracy. For example, although present law requires two or more persons to be named in the indictment, Dever v. State, 30 S.W. 1071 (Tex.Crim. App.1895), under Section 15.02 a single actor can be indicted, tried, and convicted alone.

Subsection (a) prescribes the elements of criminal conspiracy in terms that clarify present law without substantial alteration. The mens rea required, "intent that a felony be committed," makes explicit present law, which specifies that the agreement must be "positive" and that neither "contemplation" of an agreement nor a "joint threat" constitutes a conspiracy, Penal Code arts. 1624–1625. The present law requirement that the conspiratorial objective be a felony, Penal Code art. 1622, is also retained.

Subsection (a)(1) requires that the actor agree with another to engage in conduct that would constitute the felony "under the circumstances surrounding his conduct as the actor believes them to be." This language parallels that used in criminal attempt to foreclose raising impossibility as a defense.

In addition to the agreement required by Subdivision (1), to establish conspiracy the actor or another coconspirator must perform "an overt act in pursuance of the agreement" under Subdivision (2). The express overt act requirement is new to Texas law, although under the holding in Donald v. State, 306 S.W.2d 360 (Tex.Crim.App.1957), in some cases the state is required to allege that an overt act occurred within the limitation period. The overt act element is included to require proof beyond the bare agreement that a socially dangerous combination exists. With the inclusion of Subdivision (2), the distinction drawn in Penal Code art. 1624 between a "positive agreement" and an agreement only "contemplated by the parties" is unnecessary.

Subsection (b) is a precautionary statement to make clear that criminal conspiracy is an inchoate offense and not a theory of complicity. In the Revised Penal Code the complicity provisions are the exclusive method of determining criminal responsibility for the conduct of others. Present law is sometimes ambiguous on this point, and the determination of complicity responsibility often has been couched in terms of conspiracy, e. g., Berry v. Golden Light Coffee Co., 327 S.W.2d 436 (Tex.1959); Garcia v. State, 210 S.W. 2d 574 (Tex.Crim.App.1948).

Subsection (c) expressly rejects certain defenses often raised in conspiracy prosecutions. Subdivisions (1)–(3) emphasize the section's unilateral approach to criminal conspiracy, providing that an actor's responsibility for criminal conspiracy does not depend upon the responsibility of his coconspirators. Accordingly, under Subdivision (1), a coconspirator's insanity or juvenile status, for example, will not affect the actor's responsibility for criminal conspiracy. Likewise, under Subdivisions (2) and (3) the acquittal or insincerity of a coconspirator is not a defense; this changes

present law, under which the acquittal of one of two conspirators *necessarily* requires acquittal of the other, Hustead v. State, 251 S.W. 1074 (Tex.Crim.App.1923), and the feigning of one conspirator negates the element of a positive agreement necessary for the offense, Weathered v. State, 81 S.W.2d 91 (Tex.Crim.App.1935); Woodworth v. State, 20 Tex.Ct.App. 375 (1886). On the other hand, the fact that one of two conspirators secured immunity from prosecution by becoming a prosecution witness does not bar conviction of the other, see Echols v. State, 109 S.W.2d 190 (Tex.Crim. App.1937), and this policy is preserved in Subdivision (2). Subdivision (4) tracks Section 7.04 (complicity) to ensure the same responsibility for coconspirators that is shared by parties to crime, see, e. g., Quillin v. State, 187 S.W. 199 (Tex.Crim.App.1916) (private citizen convicted as party to offense of misapplication of public money by public servant). Subdivision (5) parallels Section 15.01(c) (criminal attempt).

Subsection (d) is identical with Section 7.05 (complicity) and exonerates an actor from responsibility for criminal conspiracy when the legislature has excluded the actor from responsibility for the object felony.

Penal Code art. 1626 punishes conspiracy to commit murder at 2 to 10 years and all other conspiracies at 2 to 5 years. Under Section 15.02(e), criminal conspiracy is graded one degree less severe than the object felony.

§ 15.03. Criminal Solicitation

(a) An individual, corporation, or association commits criminal solicitation if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

(b) An individual, corporation, or association may not be convicted of criminal solicitation:

(1) upon the uncorroborated testimony of the person allegedly solicited; and

(2) unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act upon the solicitation.

(c) It is no defense to prosecution for criminal solicitation:

(1) that the person solicited is not criminally responsible for the felony solicited; or

(2) that the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense

or of a different type or class of offense, or is immune from prosecution; or

(3) that the actor belongs to a class of persons who by definition of the felony solicited is legally incapable of committing the offense in an individual capacity; or

(4) that the felony solicited was actually committed.

(d) Criminal solicitation of a capital felony is a felony of the first degree. Criminal solicitation of a felony of the first degree is a felony of the second degree.

Historical Note

Derivation:

New

Cross References

Accomplice witness, see C.C.P. art. 38.14.
"Association" defined, see § 1.07.
Complicity, see ch. 7, subch. A.
"Conduct" defined, see § 1.07.
Facilitation, see § 7.03.
Multiple sentences for inchoate and object offenses prohibited, see § 3.03.
Renunciation defense, see § 15.04.

Committee Comment

Section 15.03 introduces a new offense to Texas penal law, punishing a person who solicits another to commit a capital or first degree felony. The conduct proscribed by Section 15.03 would not establish the actor's responsibility as a party to an offense, under Sections 7.01–7.02, because a completed offense is required for complicity responsibility. Nor would the actor be amenable to punishment as a conspirator since the offense of criminal conspiracy, Section 15.02, requires an agreement and overt act. Although in some cases the solicitous conduct might constitute a criminal attempt under Section 15.01, the usual solicitation would not. Hence criminal solicitation applies to a narrow area of conduct very close to the beginning of a criminal enterprise and may be thought of as an "attempted" conspiracy.

The nature and scope of Section 15.03 may be illustrated by a case in which A solicits B to kill C. If B agrees to do so, and either A or B acts in furtherance of the agreement, both A and B are guilty of conspiracy. If A shoots at C but misses, both A and B are guilty of attempted murder. If, however, B refuses to undertake the homicidal project, the conduct of A is not criminal under existing law, but A is guilty of criminal solicitation under Section 15.03.

Present law contains several offenses punishing specified types of solicitation, e. g., Penal Code arts. 158–178 (bribery), 315–316

(subornation of perjury), 573–574 (fraudulent solicitation of insurance). Some of the solicitation-type offenses in present law are outside the scope of this code, e. g., Penal Code arts. 773 (solicitation of medical patients), while others, such as bribery, are covered in the definition of the object offense, e. g., Section 36.02, which punishes an offer to bribe. Thus, when considered appropriate because of the nature of the object offense, solicitation of offenses lower than first degree felony is included in the definition of the offense, whereas under Section 15.03 the solicitation of *any* capital or first degree felony is an offense.

The general solicitation offense of Section 15.03 applies only to the most serious crimes because it reaches so far back into preparatory conduct. The acts prohibited by Subsection (a) are of an active, positive nature, and the culpable mental state required is specific intent. Moreover, the solicitation must be of specific conduct thus excluding, for example, a political speech, however inflammatory.

As in criminal attempt, the phrase "under the circumstances surrounding his conduct as the actor believes them to be" precludes impossibility as a defense. The last phrase of Subsection (a), "or would make the other party to its commission," ensures that a person who requests another to engage in complicitous conduct, rather than perpetrate the offense, can be convicted of criminal solicitation.

Subsection (b) reflects the same considerations that underlie the corroboration requirement for the general attempt offense, Section 15.01. Since solicitation criminalizes a communication that is likely to occur under circumstances of low visibility, Subsection (b) requires more evidence than just the testimony of the person allegedly solicited. Furthermore, there must be circumstances corroborating both the making of the solicitation and that its making was in earnest.

Subsection (c) is the counterpart to Sections 7.04 (complicity), 15.01(c) (criminal attempt), and 15.02(c) (criminal conspiracy), and rules out possible technical defenses immaterial to a solicitor's blameworthiness. Since criminal solicitation is limited to capital and first degree felonies, Subsection (c)(3) will apply primarily to Chapter 21 (sexual offenses)—for example, to a man who solicits another to commit aggravated rape of his wife. The husband is a party to the consummated rape, both under Section 7.02 (complicity) and present law, Kitchen v. State, 276 S.W. 252 (Tex. Crim.App.1925), and Subdivision (3) ensures that he is responsible for the solicitation as well.

§ 15.04. Renunciation Defense

(a) It is an affirmative defense to prosecution under Section 15.01(a)(2) and (a)(3) (criminal attempt), which the actor must

prove by a preponderance of the evidence, that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor avoided commission of the offense attempted by abandoning his criminal conduct or, if abandonment was insufficient to avoid commission of the offense, by taking further, affirmative action that prevented the commission.

(b) It is an affirmative defense to prosecution under Sections 15.-02 (criminal conspiracy) and 15.03 (criminal solicitation), which the actor must prove by a preponderance of the evidence, that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor countermanded his solicitation or withdrew from the conspiracy before commission of the object offense and made a substantial effort to prevent commission of the object offense.

(c) Renunciation is not voluntary and complete if it is motivated in whole or part:

(1) 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 objective; or

(2) by a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another but similar objective or victim.

Historical Note

Derivation:

Model P.C. §§ 5.01(4), 5.02(3), 5.03(6)

Cross References

Affirmative defense explained, see § 2.04.
Attempt, see § 15.01.
Conspiracy, see § 15.02.
Solicitation, see § 15.03.

Committee Comment

Section 15.04 changes present law by providing a defense to inchoate criminal responsibility analogous to the renunciation defense to party responsibility provided in Section 7.05 (complicity). The defense is a limited one, requiring a "voluntary and complete renunciation," and the burden of persuasion is placed on the defendant.

Subsection (a) applies to "last proximate act," Section 15.01(a)(2), and "substantial step," Section 15.01(a)(3), varieties of criminal attempt, and somewhat offsets this code's extension of attempt responsibility. To avail himself of the renunciation defense, Subsection (a) requires the actor to actually avoid commission of the offense attempted. Renunciation is apparently not recognized

as a defense to attempt in present law, e. g., Harvel v. State, 72 S. W.2d 604 (Tex.Crim.App.1934) (attempted arson); Harkey v. State, 234 S.W. 221 (Tex.Crim.App.1921) (assault with intent to murder).

Subsection (b) applies to criminal solicitation and conspiracy and, as in Section 7.05 (complicity), requires a "substantial effort to prevent" the object offense rather than actual prevention. Subsection (b) changes the traditional rule followed by Texas courts that the offense of conspiracy is completed with the agreement and no subsequent action can exonerate the conspirator, Dill v. State, 33 S.W. 126 (Tex.Crim.App.1895).

Subsection (c) is identical with Section 7.05(c) (complicity).

§ 15.05. No Offense

Attempt or conspiracy to commit, or solicitation of, a preparatory offense defined in this chapter is not an offense.

Historical Note

Derivation:
New

Cross References

Attempt, see § 15.01.
Conspiracy, see § 15.02.
Multiple sentences for inchoate and object offenses prohibited, see § 3.03.
Solicitation, see § 15.03.

Committee Comment

Section 15.05 states the traditional policy barring the use of an inchoate offense as the object offense, e. g., prosecuting for an attempted attempt to commit an offense. There appears to be no present law on this issue, which admittedly will seldom arise.

CHAPTER 16. CRIMINAL INSTRUMENTS

Section

16.01. Unlawful Use of Criminal Instrument.
16.02. Preemption.

Section 16.01. Unlawful Use of Criminal Instrument

(a) An individual, corporation, or association commits an offense if:

(1) he possesses a criminal instrument with intent to employ it in the commission of an offense; or

(2) he intentionally or knowingly manufactures or sells a criminal instrument.

(b) For purposes of this section, "criminal instrument" means anything, the possession, manufacture, or sale of which is not otherwise an offense, that is specially designed, made, or adapted for use in the commission of an offense.

(c) An offense under Subsection (a)(1) is a Class B misdemeanor; an offense under Subsection (a)(2) is a felony of the third degree.

Historical Note

Derivation:
New

Cross References

"Association" defined, see § 1.07.
Disposition of criminal instruments, see C.C.P. art. 18.31, as amended.
Distributing abortifacients, see § 25.06.
Possession as voluntary act, see § 6.02.
"Possess" defined, see § 1.07.
Possession of forged instrument, see § 32.21.
Possession of gambling paraphernalia, see §§ 47.05, 47.06.
Possession of incomplete credit cards, see § 32.31.
Possession of narcotics paraphernalia, see § 48.12.
Possession and sale of weapons, see ch. 46.
Search warrants for criminal instruments, see C.C.P. ch. 18.

Committee Comment

Section 16.01 aims at terminating incipient criminal activity, the existence of which is indicated by conduct involving a "criminal instrument." The mere possession of things specially designed for the purpose of accomplishing a criminal objective is strong evidence of criminal intent and constitutes sufficient basis for intervention by law enforcement. On the other hand, things frequently used in crime, but which have common, lawful uses, are excluded from the purview of Section 16.01 because possession of such things, alone, is conduct too ambiguous for imposition of the criminal sanction. In addition, the section requires proof of specific intent to use the instrument possessed in committing an offense.

Subsection (b) defines criminal instrument functionally without regard to the object offense, whereas present law proscribes possession in terms of a particular offense in which the instrument is used, e. g., Penal Code arts. 997 (instruments for forging), 1014 (counterfeiting instruments), 1402(b) (burglary tools). The phrase "the possession, manufacture, or sale of which is not otherwise an offense" excludes things that are specifically treated elsewhere in the code, such as gambling and narcotics paraphernalia, abortifacients, and forged instruments.

§ 16.02. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Municipal ordinances presently conflict with and overlap state law in the area of possession of criminal instruments. The Houston City Code (1968), for example, has an ordinance proscribing possession of burglary tools, § 11-30. Such ordinances exist even though state law clearly covers possession of burglary tools, Penal Code art. 1402b. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, Section 16.02 makes clear the state intends to preempt the area of possession of criminal instruments and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

The more common criminal instruments are specifically dealt with in the chapters defining offenses in the commission of which they are commonly used, e. g., Sections 47.05 (gambling device or record), 48.12 (drug paraphernalia). This chapter is a catchall, and together with the specific criminal instrument possessory offenses deals comprehensively with the area, thus preempting enforcement or enactment of laws by governmental subdivisions and agencies, for example, that proscribe possession of a specific criminal instrument, as well as laws that conflict with any provisions of this chapter, e. g., impose strict liability for possession.

TITLE 5. OFFENSES AGAINST THE PERSON

CHAPTER 19. CRIMINAL HOMICIDE

Section

19.01. Types of Criminal Homicide.
19.02. Murder.
19.03. Manslaughter.
19.04. Criminally Negligent Homicide.

Section 19.01. Types of Criminal Homicide

(a) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of another.

(b) Criminal homicide is murder, manslaughter, or criminally negligent homicide.

Historical Note

Derivation:

Cal.Prop.Pen.Code § 1410
Model P.C. § 210.1

Cross References

Causation, see § 6.07.
Culpable mental states, see § 6.05.
Criminally negligent homicide, see § 19.04.
General defenses, see ch. 8.
Justification, see ch. 9.
Lesser included offenses, see C.C.P. art. 37.09, as amended.
Manslaughter, see § 19.03.
Murder, see § 19.02.

Committee Comment

Homicide under present law is criminal or noncriminal. Homicide is criminal unless excusable or justifiable. Putting aside death caused by abortion, poisoning a well, lynching, etc., criminal homicide is murder, with or without malice, or negligent homicide. See Penal Code tit. 15, chs. 11–16.

This chapter defines only criminal homicide. The present law's excusable homicide is a killing under this chapter by an actor who does not possess the requisite culpable mental state, e. g., an accidental killing. This code's analogue to the present law's justifiable homicide is a killing for which the actor was justified (Chapter 9) or had a general defense (Chapter 8).

The four culpable mental states defined in Section 6.05—intentional, knowing, reckless, criminal negligence—are the key to this chapter's much simplified definition of the types of criminal homi-

cide. After a homicide is determined to be criminal, it is the actor's culpable mental state that determines whether it is murder, manslaughter, or criminally negligent homicide.

§ 19.02. Murder

(a) Except as provided in Section 19.03(a)(2) (killing on legal provocation), an individual or corporation commits murder if:

(1) he intentionally or knowingly causes the death of another; or

(2) he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of another; or

(3) he commits or attempts to commit a felony, other than manslaughter or criminally negligent homicide, and in the course of and in furtherance of the felony, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of another; or

(4) he is a party to a felony and another party to the felony commits murder as defined in Subdivision (3), and the actor:

(A) solicits, directs, aids, or attempts to aid the homicidal act; or

(B) is armed with a deadly weapon; or

(C) is reckless with regard to whether the other party is armed with a deadly weapon; or

(D) is reckless with regard to whether the other party intends to commit an act clearly dangerous to human life.

(b) Murder is a capital felony.

Historical Note

Derivation:

Subsec. (a)(1), (2): Ill.Stat.Ann. ch. 38, § 9-1

Subsec. (a)(3), (4): N.Y.Rev.Pen.Law § 125.25(3)

Subsec. (b): New

Cross References

Attempt, see § 15.01.
Causation, see § 6.07.
Criminally negligent homicide, see § 19.04.
"Deadly weapon" defined, see § 1.07.
Death penalty, see § 12.46: C.C.P. art. 42.02, § 7, as amended.
"Felony" defined, see § 1.07.
General defenses, see ch. 8.
Justification, see ch. 9.
Manslaughter, see § 19.03.
Party to offense, see ch. 7, subch. A.

Committee Comment

Penal Code art. 1256 defines murder as the voluntary killing of an individual under circumstances that do not excuse or justify the killing or reduce it to negligent homicide. A voluntary killing is an intentional killing, Baylor v. State, 208 S.W.2d 558 (Tex.Crim. App.1948); Miller v. State, 13 S.W.2d 865 (Tex.Crim.App. 1929), but the term "voluntary" need not be alleged in the indictment if malice aforethought is alleged, e. g., Sanders v. State, 402 S.W.2d 735 (Tex.Crim.App.1966). Although malice aforethought is not mentioned in art. 1256—its presence or absence in a killing determines punishment under arts. 1257b and 1257c—it must be alleged in the indictment for punishment to exceed five years, e. g., Swilley v. State, 25 S.W.2d 1098 (Tex.Crim.App.1929). "Malice" is defined as "that condition of mind which shows a heart regardless of social duty and fatally bent on mischief," Gonzales v. State, 397 S.W.2d 440, 441 (Tex.Crim.App.1965).

The existence of both malice and intent to kill may be inferred from the circumstances of the killing, e. g., Harris v. State, 370 S. W.2d 886 (Tex.Crim.App.1963), the use of a deadly weapon, e. g., Baylor v. State, 208 S.W.2d 558 (Tex.Crim.App.1948), and the actor's engaging in the attempt or commission of a felony, Penal Code art. 42; e. g., Smith v. State, 225 S.W.2d 846 (Tex.Crim. App.1949). If a weapon deadly per se is used to kill, malice and intent to kill are "presumed," e. g., Bell v. State, 398 S.W.2d 133 (Tex.Crim.App.1965) (malice); Beasley v. State, 346 S.W.2d 123 (Tex.Crim.App.1961) (intent to kill); Penal Code art. 45. There is also language in some cases to the effect that the Court of Criminal Appeals equates recklessness with intent to kill, e. g., Lopez v. State, 286 S.W.2d 424 (Tex.Crim.App.1956); Banks v. State, 211 S.W. 217 (Tex.Crim.App.1919); Davis v. State, 292 S.W. 220 (1927).

If a killing is under legal provocation—"the immediate influence of a sudden passion arising from an adequate cause," Penal Code art. 1257c—it is murder without malice and punishable by no more than five years' imprisonment, art. 1257b. Murder without malice resembles common-law voluntary manslaughter, but one scholar has argued that the legislature in the 1927 Murder Act, which created the present law, did not intend to equate murder without malice with voluntary manslaughter, see Stumberg, Criminal Homicide in Texas, 16 Texas L.Rev. 305, 319 (1938).

Because of Penal Code art. 42, the felony murder doctrine of present law is broader than its common-law sire, but its exact breadth is uncertain. For example, language in some cases indicates that engaging in the attempt or commission of *any* felony supplies the malice element for murder with malice, e. g., Smith v. State, 225 S.W.2d 846 (Tex.Crim.App.1949) (armed robbery); Johnson v. State, 336 S.W.2d 175 (Tex.Crim.App.1960) (forcible

sodomy). However, all cases found of this type involved violent felonies, and the Court of Criminal Appeals has been reluctant to imply malice from the commission of felonies from which death ensues that other statutes label murder, e. g., Greiner v. State, 249 S.W.2d 601 (Tex.Crim.App.1952) (art. 802c, driving while intoxicated); Ward v. State, 109 S.W.2d 207 (Tex.Crim.App.1937) (art. 1325, arson); Vick v. State, 292 S.W. 889 (Tex.Crim.App.1927) (art. 1194, abortion).

Section 19.02 considerably simplifies the definition of murder. Together with Section 19.03 (manslaughter), it clearly distinguishes between the unprovoked intentional or knowing killing, which has traditionally been treated as murder, and the reckless killing, which the common law designated involuntary manslaughter. The concept of malice, which is virtually meaningless, is deleted, and Section 19.02(a)(1) instead uses two carefully defined terms (see Section 6.05), "intentional" and "knowing," to describe the culpable mental state necessary to establish murder. As under present law, intent or knowledge may be inferred from the nature of the killing, the actor's conduct, and the weapon used, for example, but statutory "presumptions" such as Penal Code art. 45 are not retained in this code.

The general defenses and justification, which may exculpate one charged with murder, apply to the entire code and are thus located elsewhere—in Chapters 8 and 9, respectively. Finally, the present law's requirement that one must be born and alive to be a victim of criminal homicide, Penal Code art. 1205, is preserved in the definition of "another"—a person other than the actor—which includes "individual," i. e., a human being who is born and alive, see Section 1.07 (code definitions).

Section 19.02(a)(2) may expand present murder law, to reach a theoretically unintended killing, although the various "presumptions" of intent and malice currently applied probably produce this result in practice.

Although it may contract the scope of the art. 42 felony murder doctrine, the chief aim of Section 19.02(a)(3) is clarification. Under it the mere attempt or commission of a felony no longer suffices to imply intent or knowledge: the actor must kill while attempting or committing an act clearly dangerous to human life in the course or furtherance of the felony or in immediate flight therefrom. As most felony murder prosecutions today involve killings committed while the felon is engaged in highly dangerous conduct, however, Section 19.02(a)(3)'s restatement of the doctrine will probably effect little change in practice.

Section 19.02(a)(4) is a special theory of complicity under which one felon is held criminally responsible for felony murder committed by his cofelon. The general complicity test, Section 7.-02, would not impose responsibility on the nonperpetrating felon unless he acted with intent to promote or assist the killing. But

the effect of the felony murder rule in Subsection (a)(3) is to impose responsibility for murder despite the absence of the felon's intent to kill, and Subsection (a)(4) extends this responsibility to all parties to the underlying felony if one or more of the factors enumerated in Subdivisions (4)(A)–(4)(D) is present.

Present law reaches the same result for killings occurring in the course of a felony, see, e. g., Lopez v. State, 339 S.W.2d 906 (Tex. Crim.App.1960); Garcia v. State, 210 S.W.2d 574 (Tex.Crim.App. 1948). Murder convictions in these and similar cases were affirmed on a theory of complicity to the effect that all parties to a felony are responsible for conduct that was or *ought* to have been foreseen by the parties as a probable consequence of the intended felony. This simple negligence standard for vicarious responsibility was rejected generally in the complicity provisions and is rejected in the felony murder context as well.

To hold a nonperpetrating cofelon for felony murder, Subdivisions (4)(A)–(4)(D) require the state to prove either that he aided, etc., in the homicide (i. e., was a party to it) or that he was conscious of the risk that homicide might result but disregarded it (i. e., acted recklessly). Singling out homicides caused in the course of committing violent felonies as an occasion for broadening (although not as far as present law) the general test of vicarious responsibility, and equating recklessness with being armed with a deadly weapon, appear justified to the committee because of the great danger accompanying most violent felony commissions and the absence of social utility in this type of conduct.

§ 19.03. Manslaughter

(a) An individual or corporation commits manslaughter if:

(1) he recklessly causes the death of another; or

(2) he causes the death of another under circumstances that would constitute murder under Section 19.02 except that he causes the death under the influence of extreme emotional disturbance, which disturbance is not the result of his own intentional, knowing, reckless, or criminally negligent act, and for which disturbance there is an adequate explanation.

(b) For purposes of Subsection (a) (2), the adequacy of the explanation for the disturbance shall be determined from the viewpoint of an ordinary person in the actor's situation under the circumstances as the actor reasonably believes them to be.

(c) Manslaughter is a felony of the second degree.

Historical Note

Derivation:

Fed.Prop.Pen.Code § 1602

Cross References

Causation see § 6.07.
Criminally negligent homicide, see § 19.04.
General defenses, see ch. 8.
Justification, see ch. 9.
Murder, see § 19.02.
Pleading recklessness, see C.C.P. art. 21.15, as amended.
"Reasonable belief" defined, see § 1.07.

Committee Comment

This section restores manslaughter to the Texas criminal homicide lexicon. Before 1927 Penal Code arts. 1244–1255 defined manslaughter substantially in terms of the common law's voluntary manslaughter, i. e., an unlawful, willful killing on legal provocation. Common-law involuntary manslaughter, an unlawful negligent killing, was preserved in substance in arts. 1230–1243 (negligent homicide). The 1927 Murder Act repealed arts. 1244–1255, replacing voluntary manslaughter with the concept of murder without malice, art. 1257c, but the negligent homicide articles, 1230–1243, were expressly saved from repeal.

Section 19.03(a)(1) narrows and refines the common-law concept of involuntary manslaughter. Death caused by commission of an unlawful act, the common-law misdemeanor-manslaughter doctrine, see Reed v. State, 11 Tex.Ct.App. 509 (1882), is not manslaughter under Subsection (a)(1). Nor is a negligent, even a criminally or grossly negligent, killing manslaughter. The actor must cause death recklessly, as that term is defined in Section 6.-05, to constitute manslaughter under Subsection (a)(1). Criminally negligent killings are covered by Section 19.04).

The analogue to common-law voluntary manslaughter—killing on legal provocation—is contained in Subsection (a)(2). The definition of legal provocation differs considerably from the common law, however, and from the present law's concept of murder without malice, Penal Code art. 1257c, as well.

"Extreme emotional disturbance" replaces the archaic "sudden passion" of art. 1257c (the common-law's "heat of passion"), and the modifier "immediate" is deleted in recognition of the fact that brooding may intensify rather than cool off. The disturbance must influence the killing of course—the traditional cause and effect requirement is preserved—but the legal provocation concept of Subsection (a)(2) recognizes better than either the common law or art. 1257c the infinite variations in personalities that produce the infinite variety of responses to provocation.

Following art. 1257c, Subsections (a)(2) and (b) avoid the common-law's rigidity in listing factors that as a matter of law do or do not constitute legal provocation. The disturbance must be adequately explained, but what is adequate depends (with a single

exception) on all the circumstances of the particular case. The single exception is a disturbance produced by the actor's own culpable act; such is inadequate as a matter of law.

The test of adequacy set out in Subsection (b) is both objective and subjective: it views the situation from the actor's standpoint but according to the value system of the ordinary person. Article 1257c formulates a similar (but incompletely stated) test, as do this code's definitions of recklessness and criminal negligence, Section 6.05 ("an ordinary person . . . under all the circumstances as viewed from the actor's standpoint").

§ 19.04. Criminally Negligent Homicide

(a) An individual or corporation commits criminally negligent homicide if he causes the death of another by criminal negligence.

(b) Criminally negligent homicide is a felony of the third degree.

Historical Note

Derivation:

Fed.Prop.Crim.Code § 1603
N.Y.Rev.Pen.Law § 125.10

Cross References

Assault, see §§ 22.01, 22.02.
Causation, see § 6.07.
General defenses, see ch. 8.
Justification, see ch. 9.
Manslaughter, see § 19.03.
Murder, see § 19.02.
Pleading criminal negligence, see C.C.P. art. 21.15, as amended.
Traffic offenses, see R.C.S. art. 6701d.

Committee Comment

Section 19.04 both simplifies and narrows the present law of negligent homicide.

Penal Code arts. 1230–1243 distinguish between negligent homicide caused while performing a lawful act (first degree) and that caused while performing an unlawful act (second degree). Article 1231 defines lawful as nonpenal and not giving "just occasion for a civil action." Second degree negligent homicide is punished more severely than first degree, see arts. 1237, 1242, 1243.

Article 1233 defines negligence as "the degree of care and caution . . . a man of ordinary prudence would use under like circumstances;" in addition, to constitute negligent homicide, the danger of causing death must be "apparent," art. 1232. This definition of negligence is approximately the same as that of simple negligence in tort law.

Section 19.04 abolishes the distinction between first and second degree negligent homicide, a distinction analytically suspect and

consequently most difficult to apply in a given course of action, see, e. g., DeMary v. State, 423 S.W.2d 331 (Tex.Crim.App.1968). If death is caused by criminal negligence, as that term is defined in Section 6.05, it is criminally negligent homicide under Section 19.04 without regard to whether the actor's homicidal conduct violated a traffic law, for example.

Criminal negligence requires more culpability than the present law's (simple) negligence. It is akin to the gross negligence of tort law, and requires a substantial and unjustifiable risk of death the failure to perceive which constitutes a gross deviation from the standard of care an ordinary person would exercise. The fact-finder must view the circumstances from the actor's standpoint, but the standard of care is objective, that of the ordinary man, and this element of the definition of criminal negligence is similar to art. 1233's definition of negligence. The risk of death must be both substantial *and* unjustifiable to constitute criminal negligence, however, not merely "apparent," i. e., obvious *or* realizable in the exercise of ordinary care, as under present law, art. 1232; Espinoza v. State, 272 S.W.2d 728 (Tex.Crim.App.1954).

CHAPTER 20. KIDNAPPING AND FALSE IMPRISONMENT

Section

20.01. Kidnapping.
20.02. False Imprisonment.

Section 20.01. Kidnapping

(a) An individual or corporation commits kidnapping if by force, threat, or fraud he intentionally or knowingly detains another for a substantial period, or intentionally or knowingly moves another a substantial distance from the vicinity where he is found, with intent:

(1) to hold the other for ransom or reward or as a shield or hostage; or

(2) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(3) to inflict serious bodily injury or death on the victim or another; or

(4) to terrorize the victim or another.

(b) A detention or moving is deemed to be the result of force, threat, or fraud if the victim is mentally incompetent or younger than 14 years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(c) Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place before arraignment, in which event kidnapping is a felony of the second degree.

Historical Note

Derivation:
Minn.Stat.Ann. § 609.25

Cross References

Computation of age, see § 1.06.
"Effective consent" defined, see § 1.07.
False imprisonment, see § 20.02.
Federal kidnapping offenses, see 18 U.S.C.A. §§ 1201–1202.
"Felony" defined, see § 1.07.
Interference with child custody, see § 25.03.

Committee Comment

As in present law, Penal Code arts. 1177 (kidnapping) and 1177a (kidnapping for extortion), Section 20.01 defines kidnapping essentially as false imprisonment coupled with a specific criminal intent. See generally M.P.C. § 212.1, Comment at 11–20 (Tent. Draft No. 11, 1960). The scope of the offense is expanded, however, by covering cases in which the actor's conduct is accompanied by the specific intent described in Subsection (a) (2)–(4). The traditional ransom and hostage cases are covered by Subsection (a)(1), which substantially restates Penal Code art. 1177a.

This section does not require an intent to remove the victim from the state, as does Penal Code art. 1177. (If the victim is moved across a state line, however, the federal kidnapping act, 18 U.S.C.A. § 1201, applies). Instead, the victim either must be moved a "substantial distance" or "detained for a substantial period." The substantial period of detention requirement excludes from this offense, for example, a bank robbery in which the actor orders those in the bank to line up against the wall. Such conduct is not kidnapping, although it does constitute false imprisonment under Section 20.02.

"Detention" has been defined as " 'the keeping back'; 'confinement'; 'restraint' . . . [and] may well be said to mean 'to keep in possession for some period of time,' " Hardie v. State, 144 S.W.2d 571, 575 (Tex.Crim.App.1940).

That part of Penal Code art. 1177 dealing with false imprisonment of children is treated as an aggravated form of false imprisonment under Section 20.02(c)(1).

Section 20.01(b) corresponds to a similar provision in Penal Code art. 1177.

Reflecting a primary concern for the victim's safety, Subsection (c) provides an incentive for the kidnapper to voluntarily return the victim alive.

§ 20.02. False Imprisonment

(a) An individual or corporation commits false imprisonment if by force, threat, or fraud he intentionally or knowingly detains another or intentionally or knowingly moves another a substantial distance from the vicinity where he is found.

(b) A detention or moving is deemed to be the result of force, threat, or fraud if the victim is mentally incompetent or younger than 14 years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(c) Except as provided in Subdivisions (1)–(3), false imprisonment is a Class B misdemeanor. False imprisonment is a felony of the third degree if:

(1) the victim is younger than 14 years; or

(2) the actor recklessly exposes the victim to a substantial risk of serious bodily injury or death.

Historical Note

Derivation:
Model P.C. §§ 212.2, 212.3

Cross References

Assault, see §§ 22.01, 22.02.
Computation of age, see § 1.06.
"Effective consent" defined, see § 1.07.
Interference with child custody, see § 25.03.
Kidnapping, see § 20.01.
Reckless conduct, see § 22.03.

Committee Comment

Section 20.02 basically clarifies and simplifies present law, Penal Code arts. 1169–1176. Under art. 1169 false imprisonment is the "willful [and unlawful] detention of another against his consent . . . effected by assault, violence to the person, threats, or any other means . . .." Section 20.01(a) includes the forcible detention aspect and expressly covers the forced movement of a person as well.

The meaning of "detain" is furnished by judicial construction in Hardie v. State, 144 S.W.2d 571, 575 (Tex.Crim.App.1940), which defined "detention" as "'the keeping back'; 'confinement'; 'restraint'" but not mere seizure (which means to put in possession) and "may well be said to mean 'to keep in possession for some period of time.'"

Subsection (b) recognizes that certain persons are legally incapable of giving consent. Fourteen is the age used in the incapable-of-consent sexual offenses, see Chapter 21.

The aggravating circumstances in Subsection (c) provide an intermediate step between false imprisonment and kidnapping. Subsection (c)(1), dealing specifically with children, replaces an analogous provision presently located in Penal Code art. 1177 (kidnapping).

CHAPTER 21. SEXUAL OFFENSES

Section

21.01. Chapter Definitions.
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21.03. Aggravated Rape.
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21.05. Aggravated Sexual Abuse.
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Section 21.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Criminal episode" means all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective, even though the harm is directed toward or inflicted upon more than one person.

(2) "Deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person.

(3) "Sexual contact" means any touching of the anus or any part of the genitals of another person, or the breast of a female 10 years or older, with intent to arouse or gratify the sexual desire of any person.

(4) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 130.00
Cal.Prop.Pen.Code § 1600

Cross References

Attempt, see § 15.01.
Computation of age, see § 1.06.
Conspiracy, see § 15.02.
Solicitation, see § 15.03.

Committee Comment

"Criminal episode" is used in the aggravated rape and sexual abuse offenses, Sections 21.03 and 21.05, to require a reasonably close connection between one of the aggravating factors and the rape or sexual abuse. The concept of criminal episode, which resembles the "transaction" concept of present law, was devised primarily for use in the joinder and severance provisions (Chapter 3) and is explained in the comment to Section 3.01.

The definition of "deviate sexual intercourse" must be read with the sections proscribing sexual abuse (Sections 21.04, 21.05, 21.10), which replace Penal Code art. 524. The only change the definition makes in present law is to omit bestiality, which, however, is covered by Section 21.07 (public lewdness).

At one time in Texas there was a question about whether the use of the mouth on another for carnal copulation was sodomy, but that was clarified when art. 524 was amended in 1943 to its present form, Furstonburg v. State, 190 S.W.2d 362 (Tex.Crim. App.1945); Munoz v. State, 281 S.W. 857 (Tex.Crim.App.1926).

It should be noted that "deviate sexual intercourse" requires only "any contact" and not penetration. This is consistent with present law, Sinclair v. State, 311 S.W.2d 824 (Tex.Crim.App. 1959).

Subdivision (3) defines "sexual contact," a term used in Sections 21.07 and 21.11, dealing with public lewdness and fondling. "Sexual contact" is limited to touching of the anus or genitals of any person, or the breast of a female 10 years of age or older. Present Texas law prohibits fondling of the "sexual parts" of a male or female and the breast of a female under 14 years, Penal Code art. 535d. Hence the new definition extends coverage to the anus, but eliminates the "breast" of a female under 10.

The definition of "sexual intercourse" contained in Subdivision (4) does not change Texas law, but retains, for example, the requirement of penetration, however slight, Penal Code art. 1187; e. g., Flannery v. State, 117 S.W.2d 111 (Tex.Crim.App.1938).

§ 21.02. Rape

(a) A male commits rape if he has sexual intercourse with a female not his wife without the female's consent.

(b) The intercourse is without the female's consent under one or more of the following circumstances only:

(1) he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

(2) he compels her to submit or participate by any threat that would prevent resistance by a woman of ordinary resolution; or

(3) she has not consented and he knows she is unconscious or physically unable to resist; or

(4) he knows that as a result of mental disease or defect she is at the time of the intercourse incapable either of appraising the nature of the act or of resisting it; or

(5) she has not consented and he knows that she is unaware that sexual intercourse is occurring; or

(6) he knows that she submits or participates because she erroneously believes that he is her husband; or

(7) he has intentionally impaired her power to appraise or control her conduct by administering any substance without her knowledge.

(c) Rape is a felony of the second degree.

Historical Note

Derivation:

La.Rev.Stat. § 14:43
Cal.Prop.Pen.Code § 1602

Cross References

Cohabitation, see § 21.12.
"Consent" defined, see § 1.07.
Corroboration, see § 21.12.
Rape of child, see § 21.09.
"Sexual intercourse" defined, see § 21.01.

Committee Comment

Subsection (a) is substantially similar to present law, Penal Code art. 1183, which defines rape as carnal knowledge of a woman without her consent. Texas courts have interpreted carnal knowledge to mean sexual intercourse, Calhoun v. State, 115 S.W.2d 965 (Tex.Crim.App.1938).

Subsection (b) is an exclusive enumeration of the circumstances under which sexual intercourse between male and female is without the female's consent. The enumeration does not significantly alter present law, but for the most part codifies case decisions defining nonconsent.

Subsection (b)(1), in defining force that negates consent, is substantially similar to Penal Code art. 1184. At one time Texas required that the female exert the utmost resistance of which she was capable, Perez v. State, 94 S.W. 1036 (Tex.Crim.App.1906), but later cases require only that the resistance be sufficient under the circumstances. The circumstances include the array of force, the relative strength of the parties, and the nature of the threat, see Lewis v. State, 226 S.W.2d 861 (Tex.Crim.App.1950), and even fear that a "scene" would psychologically damage children present, Tobert v. State, 313 S.W.2d 303 (Tex.Crim.App.1958). Under present law and Subsection (b)(1), therefore, the amount of force necessary to negate consent is a relative matter to be judged under all the circumstances the most important of which is the resistance of the female.

Subsection (b)(2) deals with threats and basically preserves Penal Code art. 1185, which provides that "the threat must be such as might reasonably create a just fear of death or of great bodily harm, in view of the relative condition of the parties as to health, strength and other circumstances of the case." Although this article speaks of fear of death or great bodily harm, it has not been so applied. In recent cases, fear for the safety and mental health of the victim's children has been deemed a sufficient threat, e. g., Most v. State, 386 S.W.2d 537 (Tex.Crim.App.1965). Moreover, the wording of art. 1185 does not indicate whether the threat must be against the female or some third person, but the court in Tobert v. State, 313 S.W.2d 303 (Tex.Crim.App.1958), held that threats against the victim's children were included. Subsection (b)(2) focuses on the effect of the threat, thus avoiding these difficulties in present law.

Subsection (b)(3) covers the female unable to resist because asleep or physically disabled. This is presently covered, if at all, by Penal Code art. 1186, which seems to require the male to administer some substance producing unnatural sexual desire or such stupor as prevents or weakens resistance. One old case held that penetration of a sleeping woman is rape, Payne v. State, 49 S.W. 604 (Tex.Crim.App.1899), although an earlier case held to the contrary, King v. State, 3 S.W. 343 (Tex.Ct.App.1887).

Subsection (b)(4) slightly changes the present law. Penal Code art. 1183 provides that the female must be so mentally diseased as "to have no will to oppose the act of carnal knowledge, the person having carnal knowledge knowing her to be so mentally diseased. . . ." Interpreting this language, the court in Williams v. State, 69 S.W.2d 418 (Tex.Crim.App.1934), said mere mental deficiency was insufficient: the female must be so mentally deranged as to have no will power to assent or dissent. Subsection (b)(4) thus broadens the law's protection to cover mental defectives and focuses the test on the cognitive and physical elements to determine if the female consented.

Subsection (b)(5) is new to Texas law and contemplates intercourse performed under the pretense of making a medical examination or performing an operation.

A recurring problem involves the female who submits or participates because she erroneously believes that the male is her husband. This can result either from a "sham" marriage ceremony arranged by the male, or by the male's entering the female's bedroom in the dark and pretending to be her husband. Penal Code art. 1186 presently speaks to this variety of fraud and covers the sham marriage situation, e. g., Wilkerson v. State, 131 S.W. 1108 (Tex.Crim.App.1910), and the male's impersonation of the female's husband, e. g., Huffman v. State, 80 S.W. 625 (Tex.Crim.App. 1904), and Subsection (b)(6) preserves this law.

Penal Code art. 1186 designates as "fraud" administering "some substance producing unnatural sexual desire or such stupor as prevents or weakens resistance and committing the offense while she is under the influence of such substance." Subsection (b)(7) restates and broadens this provision by focusing on the effect of the substance, whatever it may be.

§ 21.03. Aggravated Rape

(a) A male commits aggravated rape if he commits rape as defined in Section 21.02 or rape of a child as defined in Section 21.09, and:

(1) he causes serious bodily injury or death to another in the course of the same criminal episode; or

(2) he compels submission to the rape by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone; or

(3) the female is an inmate in a hospital licensed by the State Department of Health and he knows that as a result of mental disease or defect she is at the time of the intercourse incapable either of appraising the nature of the act or of resisting it.

(b) Aggravated rape is a felony of the first degree.

Historical Note

Derivation:

Minn.Stat.Ann. § 609.29
Cal.Prop.Pen.Code § 1601

Cross References

Corroboration, see § 21.12.
"Criminal episode" defined, see § 21.01.
Kidnapping, see § 20.01.
"Serious bodily injury" defined, see § 1.07.

Committee Comment

Rape becomes aggravated rape and a felony of the first degree if committed under any of the three circumstances enumerated in this section. This concept significantly differs from present law, which has only one degree of rape. The aggravating circumstances included in this section, however, are all covered by present law, Penal Code arts. 1183–1186.

Note that the threatened harm of Subsection (a)(2) must be "imminent;" hence a threat to harm someone at an indeterminate time in the future does not aggravate. Whether or not the threat is "imminent" is of course a fact question.

§ 21.04. Sexual Abuse

(a) An individual commits sexual abuse if, without the other person's consent and with intent to arouse or gratify the sexual desire of any person:

(1) the actor engages in deviate sexual intercourse with the other person, not his spouse, whether the other person is of the same or opposite sex; or

(2) the actor compels the other person to engage in sexual intercourse or deviate sexual intercourse with a third person, whether the other person is of the same sex as or opposite sex from the third person.

(b) The intercourse is without the other person's consent under one or more of the following circumstances only:

(1) the actor compels the other person to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances; or

(2) the actor compels the other person to submit or participate by any threat that would prevent resistance by a person of ordinary resolution; or

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist; or

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the deviate sexual intercourse incapable either of appraising the nature of the act or of resisting it; or

(5) the other person has not consented and the actor knows the other person is unaware that deviate sexual intercourse is occurring; or

(6) the actor knows that the other person submits or participates because of the erroneous belief that he is the other person's spouse; or

(7) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge.

(c) Sexual abuse is a felony of the second degree.

Committee Comment

See Committee Comment following Section 21.05.

§ 21.05. Aggravated Sexual Abuse

(a) An individual commits aggravated sexual abuse if he commits sexual abuse as defined in Section 21.04 or sexual abuse of a child as defined in Section 21.10, and:

(1) he causes serious bodily injury or death to another in the course of the same criminal episode; or

(2) he compels submission to the sexual abuse by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone; or

(3) the other person is an inmate of a hospital licensed by the State Department of Health and the actor knows that as a result of mental disease or defect the other person is at the time of the sexual intercourse or deviate sexual intercourse incapable either of appraising the nature of the act or of resisting it.

(b) Aggravated sexual abuse is a felony of the first degree.

Historical Note

Derivation:
Cal.Prop.Pen.Code § 1064

Cross References

Cohabitation, see § 21.12.
"Consent" defined, see § 1.07.
Corroboration, see § 21.12.
"Criminal episode" defined, see § 21.01.
"Deviate sexual intercourse" defined, see § 21.01.
Kidnapping, see § 20.01.
Sexual abuse of child, see § 21.10.
"Serious bodily injury" defined, see § 1.07.
"Sexual intercourse" defined, see § 21.01.

Committee Comment

The form of Section 21.04 follows that of Section 21.02 (rape). However, the acts can be heterosexual or homosexual. Section 21.-

04(a)(1) covers an individual who compels another (not his spouse) to perform or submit to an act of deviate sexual intercourse; Subsection (a)(2) covers one who compels two other people, one of whom may be his spouse, to engage in an act of sexual intercourse or deviate sexual intercourse. Subsection (b) repeats the list of facts negating consent set out in Section 21.02 (rape).

Section 21.04 makes some changes in present law, which is contained in Penal Code art. 524, recently held unconstitutional for overbreadth in Buchanan v. Batchelor, 308 F.Supp. 729 (N.D.Tex. 1970). Under art. 524 all public and private, consensual and nonconsensual acts of oral and anal intercourse were prohibited, whether homosexual, e. g., Sartin v. State, 335 S.W.2d 762 (Tex. Crim.App.1960); Sinclair v. State, 311 S.W.2d 824 (Tex.Crim. App.1958); Slusser v. State, 232 S.W.2d 727 (Tex.Crim.App.1950), or heterosexual, e. g., Adams v. State, 86 S.W. 334 (Tex.Crim.App. 1905); Lewis v. State, 35 S.W. 371 (Tex.Crim.App.1896). This presumably included deviate acts between married persons, and it was apparently on this ground that the article was held unconstitutional as an invasion of privacy, Buchanan v. Batchelor, supra.

This chapter punishes public acts of sexual intercourse, bestiality, and deviate sexual intercourse in Section 21.07 (public lewdness); homosexual acts, whether public or private, are punished in Section 21.06 (homosexuality). Thus the only consensual acts included in art. 524 but excluded from this chapter are acts of bestiality and heterosexual deviate sexual intercourse in private.

Section 21.05 (aggravated sexual abuse) tracks the factors aggravating rape in Section 21.03.

§ 21.06. Homosexual Conduct

(a) An individual commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
New

Cross References

Corroboration, see § 21.12.
"Deviate sexual intercourse" defined, see § 21.01.

Committee Comment

Contact between the genitals of one person and mouth or anus of another person, if both are of the same sex, is proscribed by Penal Code art. 524, and Section 21.06 continues this proscription. Note that this section covers consensual conduct in private; if there is no consent, consent is immaterial because of age, or the conduct oc-

curs in public, it is punishable under Sections 21.04 (sexual abuse), 21.10 (sexual abuse of a child), or 21.07 (public lewdness).

§ 21.07. Public Lewdness

(a) An individual commits public lewdness if he engages in any of the following acts and he is reckless about whether another is present who will be offended or alarmed by his act:

(1) an act of sexual intercourse;

(2) an act of deviate sexual intercourse;

(3) an act of sexual contact;

(4) any act involving contact between the person's mouth or genitals and the genitals or anus of an animal or fowl.

(b) Public lewdness is a Class A misdemeanor.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 11-09

Cross References

Assault, see § 22.01.
Corroboration, see § 21.12.
"Deviate sexual intercourse" defined, see § 21.01.
Disorderly conduct, see § 42.01.
Homosexuality, see § 21.06.
"Sexual contact" defined, see § 21.01.
"Sexual intercourse" defined, see § 21.01.

Committee Comment

Like Penal Code arts. 474, 524, and 535c, this section punishes lewd or indecent acts performed in public, but the concept of "publicness" in Section 21.07, which depends on the nature of the audience rather than the location, differs somewhat from present law.

The present definitions of "public place" are found in Penal Code arts. 454b and 475; art. 526, repealed in 1969, also defined this term. Articles 454b and 475 take a combined approach, listing certain locations that are always considered public, but also designating as public all places in which people are assembled or to which they commonly resort. When these articles refer to specific places, the emphasis is on location rather than audience, and the Texas courts have tended so to interpret them, e. g., Peter v. State, 188 S.W. 178 (Tex.Crim.App.1945); Bodystyn v. State, 213 S.W.2d 825 (Tex.Crim.App.1948). On the other hand, a place to which people commonly may resort for purposes of pleasure is public only if people are present, the emphasis being on the existence of an audience, e. g., Austin v. State, 124 S.W. 639 (Tex.Crim.App.1910).

Section 21.07 defines "publicness" in terms of the perceived likelihood of another person being present who will be offended or alarmed by the lewd act. Under this definition a public park could be a private place, and excluded from Section 21.07, at 3 a. m., but a private residence may have people present whom the actor perceives are likely to be offended or alarmed, thus coming within the terms of Section 21.07, cf. Campbell v. State, 338 S.W.2d 255 (Tex.Crim.App.), cert. denied, 81 S.Ct. 356, 364 U.S. 927 (1960).

§ 21.08. Indecent Exposure

(a) An individual commits indecent exposure if he exposes his anus or any part of his genitals, with intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another is present who will be offended or alarmed by his act.

(b) Indecent exposure is a Class C misdemeanor.

Historical Note

Derivation:

Cal.Prop.Pen.Code § 1609
Mich.Prop.Pen.Code § 2325

Cross References

Corroboration, see § 21.12.
Disorderly conduct, see § 42.01.
Homosexuality, see § 21.06.
Public lewdness, see § 21.07.

Committee Comment

The object of this section is to provide fair notice of what parts of the body may and may not be exposed under circumstances likely to offend or alarm another. (The concept of "publicness" here employed is identical to that in Section 21.07, public lewdness.) There is no fair notice in present law, the only consistent guidance coming from an oft-cited 1890 decision construing the predecessor to Penal Code art. 526:

> . . . By the terms "obscene and indecent exhibition" . . . is meant, we think, an exposure of those parts of the person which are commonly considered private, and which custom and decency require should be covered, and concealed from public sight. . . .

Tucker v. State, 13 S.W. 1004 (Tex.Crim.App.1890).

Section 21.08 does not proscribe exposure of the buttocks or female breast, two areas of the anatomy not traditionally included within the term "genitals," see Pendell v. State, 253 S.W.2d 426 (Tex.Crim.App.1953); but cf. Davis v. State, 430 S.W.2d 217 (Tex.Crim.App.1968) (exposure of female breast obscene within meaning of city ordinance), because to do so would criminalize half

those present at any time at a public swimming pool. In any event, most prosecutions under existing law have involved either total nudity or exposure of the male genital organ, conduct clearly covered by Section 21.08.

Before 1969 Penal Code arts. 474 and 526 proscribed indecent exposure, art. 474 prohibiting an individual from "exposing his or her person to another person of the age of 16 years or over," and art. 526 making it illegal for any person to "designedly make any obscene and indecent exhibition of his own or the person of another in public." Article 474 was extensively rewritten by the legislature in 1969 and now covers only "indecent . . . conduct under circumstances in which such conduct tends to cause or provoke a disturbance." Article 526 was repealed as part of an extensive revision of the obscenity law, art. 527, so at present an exposure of the genitals or anus may be indecent, but it does not appear to be illegal, even in public, in all situations.

§ 21.09. Rape of a Child

(a) A male commits rape of a child if he has sexual intercourse with a female not his wife, and:

(1) she is younger than 16 years and he is at least 2 years older than she; or

(2) she is younger than 14 years.

(b) It is a defense to prosecution under this section that the female was at the time of the alleged offense 14 years or older and had, prior to the time of the alleged offense, engaged promiscuously in sexual intercourse or deviate sexual intercourse.

(c) Rape of a child under Subsection (a)(1) is a felony of the third degree; rape of a child under Subsection (a)(2) is a felony of the first degree.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 11-4
La.Rev.Stat. §§ 14:42, 14:80

Cross References

Aggravated rape, see § 21.03.
Computation of age, see § 1.06.
Defense explained, see § 2.03.
"Deviate sexual intercourse" defined, see § 21.01.
Ignorance or mistake of age, see § 21.12.
Prompt complaint, see § 21.12.
Rape, see § 21.02.
"Sexual intercourse" defined, see § 21.01.

Committee Comment

The female legally incapable of consenting to sexual intercourse is the subject of the offense created by this section, which is often called statutory rape. Rape by force, threat, or fraud, it should be noted, is proscribed by Sections 21.02 (rape) and 21.03 (aggravated rape), so this Section 21.09 deals only with consensual (in fact) sexual intercourse.

Age of Consent

Determining the age below which the victim is legally incapable of consent is the most difficult problem encountered in defining sexual offenses involving children. The difficulty is mirrored by the present law, which employs a variety of ages in defining these offenses, none of which bears any rational relation to the other. For example, Penal Code art. 535c prohibits indecent exposure to a female younger than 16, but under arts. 535b and 535d age 14 is the cutoff for fondling or enticing for immoral purposes. Article 535a forbids selling or bartering a female younger than 15, age 18 is the age of consent for statutory rape under art. 1183, age 21 the critical age for tattooing under art. 1167a, and age 25 the cutoff for seduction of a female on promise of marriage under art. 505. There are more examples of irrationality, both in Texas law and that of other jurisdictions, but the examples above suffice to illustrate the difficulty of picking a meaningful and uniform age or series of ages below which a child must be protected from indiscretion and imposition.

Sections 21.09–21.11, which define sexual offenses involving minors, consistently employ ages 14 and 16 to mark out the age of consent. Moreover, these sections include a two-year age differential designed to exclude from the talons of the criminal law children in the same age bracket; this differential, pioneered by the Model Penal Code and included in the recent penal law revisions of most other jurisdictions, reinforces the objective of the incapable-of-consent offense, which is to prevent imposition by the older and presumably more experienced.

Under Sections 21.09–21.11 there is no defense to rape, sexual abuse, or indecency involving a child younger than 14. Between 14 and 16, however, reasonable ignorance or mistake of age is a defense under Section 21.12(a), and the actor must be at least two years older than the "victim" (e. g., a 16-year-old boy does not commit an offense if he has consensual sexual intercourse with a 14-year-old girl in private).

Despite the consistent employment of these ages and the age differential, however, the committee readily concedes that they are essentially arbitrary—as is any attempt to prescribe a uniform age for coming of sexual and emotional maturity. At the same time, the committee believes age 16 is a more realistic measure of matu-

rity today than the 18, 21, and 25 of present law, and that the 2-year differential better focuses these offenses on the true offender, he who takes advantage of a child's immaturity.

Promiscuity Defense

Present law denies protection to a female over 15 who is of "unchaste character," Penal Code art. 1183. Such character may be demonstrated by proof of a single prior act of sexual intercourse, even with the defendant in the instant prosecution, Edworth v. State, 371 S.W.2d 563 (Tex.Crim.App.1963); Cloninger v. State, 327 S.W. 288 (Tex.Crim.App.1921). Although the rationale of this law is sound—sexually experienced females can knowingly consent and thus do not need the criminal law's protection—it is harsh in application, for example, to the young female who makes a single mistake.

Section 21.09(b) revises the unchastity defense of present law to better identify those least in need of its protection, the sexually promiscuous female. "Promiscuity" connotes a variety of consensual sexual conduct with a variety of partners, and clearly excludes, for example, a single prior act of sexual intercourse.

§ 21.10. Sexual Abuse of a Child

(a) An individual commits sexual abuse of a child if, with intent to arouse or gratify the sexual desire of any person, he engages in deviate sexual intercourse with a child, not his spouse, whether the child is of the same or opposite sex, and:

(1) the child is younger than 16 years and the actor is at least 2 years older than the child; or

(2) the child is younger than 14 years.

(b) It is a defense to prosecution under this section that the child was at the time of the alleged offense 14 years or older and had, prior to the time of the alleged offense, engaged promiscuously in sexual intercourse or deviate sexual intercourse.

(c) Sexual abuse of a child under Subsection (a) (1) is a felony of the third degree; sexual abuse of a child under Subsection (a) (2) is a felony of the first degree.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 11-4

Cross References

Aggravated sexual abuse, see § 21.05.
Computation of age, see § 1.06.
Defense explained, see § 2.03.
"Deviate sexual intercourse" defined, see § 21.01.

Ignorance or mistake of age, see § 21.12.
Prompt complaint, see § 21.12.
Sexual abuse, see § 21.04.
"Sexual contact" defined, see § 21.01.
"Sexual intercourse" defined, see § 21.01.

Committee Comment

This section tracks Section 21.04 (sexual abuse), but applies to victims legally incapable of consent. Present law does not treat this conduct separately, Penal Code art. 524 proscribing all sodomy, whether performed on an adult or child.

The ages of consent, age differential, and promiscuity defense are the same as in Section 21.09 (rape of a child) and are explained in the comment to that section.

§ 21.11. Indecency with a Child

(a) An individual commits indecency with a child if the child is not his spouse and, without the child's consent:

(1) the actor engages in sexual contact with the child; or

(2) the actor exposes his anus or any part of his genitals, knowing the child is present, with intent to arouse or gratify the sexual desire of any person.

(b) The sexual contact or exposure is without the child's consent if:

(1) the child is younger than 16 years and the actor is at least 2 years older than the child; or

(2) the child is younger than 14 years.

(c) It is a defense to prosecution under this section that the child was at the time of the alleged offense 14 years or older and had, prior to the time of the alleged offense, engaged promiscuously in:

(1) sexual intercourse;

(2) deviate sexual intercourse;

(3) sexual contact;

(4) indecent exposure as defined in Subsection (a)(2).

(d) Indecency with a child is a felony of the third degree.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, §§ 11-4, 11-5

Cross References

Assault, see § 22.01.
Computation of age, see § 1.06.
Defense explained, see § 2.03.

"Deviate sexual intercourse" defined, see § 21.01.
Ignorance or mistake of age, see § 21.12.
Indecent exposure, see § 21.08.
Prompt complaint, see § 21.12.
Public lewdness, see § 21.07.
"Sexual contact" defined, see § 21.01.

Committee Comment

Penal Code arts. 535c and 535d prohibit indecent exposure to a child younger than 16 and fondling a child younger than 14; this section, and Sections 21.09 and 21.10, substitute uniform ages of consent for the variety of ages in the present articles punishing sexual offenses involving children, and introduce a two-year age differential to exclude consenting partners in the same age group. See the comment to Section 21.09.

Section 21.11 expands the definition of indecency to include the anus, the terms "private parts or genital organs" in Penal Code art. 536c having been construed in Pendell v. State, 253 S.W.2d 426 (Tex.Crim.App.1953), to cover only the external procreative organs. Knowledge of the child's presence is included as an element of the indecency portion of Section 21.11(a)(2) because with children there is always danger they will appear unannounced and in this situation an unwitting exposure should not be criminal.

"Sexual contact" is defined in Section 21.01 as "any touching" of the enumerated sexual parts with the requisite intent. This definition avoids a possible problem with the present fondling statute, Penal Code art. 535d, in construing which some courts have defined "fondling" as to "handle tenderly," compare Almaguer v. State, 237 S.W.2d 631 (Tex.Crim.App.1951) with Baladez v. State, 310 S.W.2d 113 (Tex.Crim.App.1958). The culpable mental state required in this section, "with intent to arouse or gratify the sexual desire of any person," is also an improvement over the "lascivious intent" language of art. 535d, which one court construed to mean incitement of sexual desire in the child, Slusser v. State, 232 S.W.2d 727 (Tex.Crim.App.1950); but cf. Jones v. State, 238 S.W. 2d 529 (Tex.Crim.App.1951).

The promiscuity defense set out in Section 21.11(c) is explained in the comment to Section 21.09 (rape of a child).

§ 21.12. General Provisions

(a) If the criminality of conduct defined in this chapter to constitute an offense depends on a child's being younger than 16 years, it is a defense to prosecution for the conduct that the actor reasonably believed the child to be 16 years or older. However, if criminality depends on the child's being younger than 14 years, it is no defense that the actor did not know the child to be younger than 14 years, or reasonably believed the child to be 14 years or older.

(b) The exclusion of conduct with a spouse from the definitions of offenses in Sections 21.02–21.05 (rape, aggravated rape, sexual abuse, aggravated sexual abuse) extends to the conduct of persons while cohabiting, regardless of the legal status of their relationship and of whether they hold themselves out as husband and wife.

(c) No prosecution may be instituted or maintained under this chapter unless the alleged offense was reported to or discovered by a peace officer:

(1) within 1 month after its occurrence; or

(2) within 1 month after a parent, guardian, or other competent person specially interested in the victim and who is not a a party to or facilitator of the offense learns of it, if the alleged victim was younger than 16 years, incompetent, or unable to make complaint.

(d) A person may not be convicted of an offense under Sections 21.02–21.08 (rape, aggravated rape, sexual abuse, aggravated sexual abuse, homosexuality, public lewdness, indecent exposure) upon the uncorroborated testimony of the alleged victim unless the victim made an outcry at the first reasonable opportunity. Corroboration may be circumstantial.

Historical Note

Derivation:

Conn.Gen.Stat. §§ 53-70—53-72

Cross References

Accomplice witness, see C.C.P. art. 38.14.
Bigamy, see § 25.01.
Complicity, see ch. 7, subch. A.
Computation of age, see § 1.06.
Defense explained, see § 2.03.
Facilitation, see § 7.03.
Ignorance or mistake generally, see § 8.02.
"Peace officer" defined, see § 1.07.
"Reasonable belief" defined, see § 1.07.

Committee Comment

Ignorance or Mistake of Age

Section 21.12(a) changes Texas law by providing a defense for reasonable ignorance or mistake about the age of the child between 14 and 16 in a prosecution under Section 21.09 (rape of a child), 21.10 (sexual abuse of a child), or 21.11 (indecency with a child). As pointed out in the comment to Section 21.09, however, ignorance or mistake about the age of a child younger than 14 is no defense.

Although ignorance or mistake of fact is universally recognized as a general defense to criminal responsibility, when the fact is

age in sexual offenses involving children Texas and most American jurisdictions have denied the defense, e. g., Farrell v. State, 215 S. W.2d 625 (Tex.Crim.App.1948); Edens v. State, 43 S.W. 89 (Tex. Crim.App.1897); but cf. Harris v. State, 28 S.W.2d 813 (Tex. Crim.App.1930); see generally People v. Hernandez, 61 Cal.2d 529, 393 P.2d 673 (1964).

There is no distinction in principle between ignorance or mistake of age and ignorance or mistake about, say, whether an adult female consented to sexual intercourse, the existence of necessity justifying homicide in self-defense, or whether a capsule contained heroin—ignorance or mistake about each of which is a defense in present law and under this code. More importantly, the reasonably mistaken or ignorant actor lacks the culpability this code posits as a prerequisite to criminal responsibility and punishment, and this lack is especially significant, the committee believes, in the context of consensual sexual conduct.

Spousal Relationship

Adults cohabiting may terminate their relationship if one dislikes the other's sexual conduct, and there is no justification for the criminal law's intrusion into the relationship. Section 21.-12(b) restates and expands the present law's recognition of this common-sense notion, which is reflected in Penal Code art. 1183's definition of rape to exclude sexual intercourse between husband and wife.

Prompt Complaint

This doctrine derives from the common law, under which the absence of a prompt complaint created a presumption that no offense had, in fact, occurred, see Greenfield, Prompt Complaint: A Developing Rule of Evidence, 9 Crim.L.Q. 286 (1967). This is especially true for sexual offenses in which, for example, "pregnancy might change a willing participant in the sex act into a vindictive complainant . . . ." Model P.C. § 213.6, Comment at 265 (Tent. Draft No. 4, 1955).

Section 21.12(c) requires that an offense under this chapter be reported to or discovered by a peace officer within one month after its occurrence as a prerequisite to its prosecution. However, if a child is the victim, the month does not begin to run until a parent or some other competent and uninvolved person learns of the offense. The notice need not be written or in any particular form; clearly a sworn complaint is not required. These requirements make little change in present law except to make it more certain.

Present law makes the existence or absence of prompt complaint admissible on the consent issue in both rape and sodomy prosecutions, e. g., Ex parte Merrill, 201 S.W.2d 232 (Tex.Crim.App.1947) (rape); Gage v. State, 263 S.W.2d 553 (Tex.Crim.App.1954) (rape); Press v. State, 322 S.W.2d 525 (Tex.Crim.App.1959) (sodomy). Moreover, the state is allowed to prove prompt complaint to

corroborate the child-victim's testimony in statutory rape, e. g., Lewis v. State, 226 S.W.2d 861 (Tex.Crim.App.1950). Finally, when the complaint must be made depends on the circumstances. For example, in one case of statutory rape a delay of 6 months was accepted because the girl was 13 and the defendant was her father and he had threatened her, Tomlinson v. State, 132 S.W.2d 413 (Tex.Crim.App.1939). Yet in another case 23 days was held too long for a 25-year-old female to wait when she was in the safety of her own family immediately after the alleged offense, Armstrong v. State, 125 S.W.2d 578 (Tex.Crim.App.1939).

Corroboration

The truth and logic of Lord Hale's dictum, equally applicable to all sex offenses, that accusations of rape are "easily made, hard to be proved, and still harder to be disproved by one ever so innocent" justifies the corroboration requirement of Section 21.12(d). Texas courts have long recognized these dangers, but in their attempt to guard against them have set forth a bewildering maze of evidentiary rules and counter rules.

Present law requires corroboration if the alleged victim consented to the sexual act, thus becoming an accomplice, C.C.P. art. 38.-14; e. g., Press v. State, 322 S.W.2d 525 (Tex.Crim.App.1959) (sodomy with adult); Slusser v. State, 232 S.W.2d 727 (Tex.Crim. App.1950) (sodomy with child); Gottschilk v. State, 261 S.W.2d 838 (Tex.Crim.App.1953) (fondling), if there was no prompt complaint of rape, Ex parte Merrill, 201 S.W.2d 232 (Tex.Crim.App. 1947); Lacy v. State, 412 S.W.2d 56 (Tex.Crim.App.1967), if the prosecutrix is friendly with the defendant after the alleged offense, e. g., Anderson v. State, 272 S.W. 173 (Tex.Crim.App.1925); Terry v. State, 266 S.W. 511 (Tex.Crim.App.1925), or is pregnant at the time of outcry, e. g., Goodwell v. State, 49 S.W.2d 808 (Tex. Crim.App.1932).

On the other hand, if the evidence is undisputed that the complainant did not consent, a conviction may be affirmed on her uncorroborated testimony, e. g., In re Pickenpaugh, 387 S.W.2d 671 (Tex.Crim.App.1965); Press v. State, 322 S.W.2d 525 (Tex.Crim. App.1959), but in these cases there is usually some corroborating evidence that the act occurred and there was no consent—for example, a prompt outcry, e. g., Campos v. State, 356 S.W.2d 317 (Tex.Crim.App.1962), or a reasonably prompt medical examination, e. g., Sirros v. State, 399 S.W.2d 547 (Tex.Crim.App.1966). Too, the Court of Criminal Appeals closely scrutinizes uncorroborated testimony in this type of prosecution, and reverses the conviction if the testimony is inherently improbable or incredible, e. g., Raifsnider v. State, 176 S.W.2d 952 (Tex.Crim.App.1944); Stevens v. State, 50 S.W.2d 284 (Tex.Crim.App.1932).

By identifying the sexual offenses to which the corroboration requirement applies, and specifying the elements and application of the requirement, Section 21.12(d) brings certainty to the hereto-

fore confusing and sometimes contradictory evidentiary rules in this area.

§ 21.13. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Municipal ordinances presently conflict with and overlap state law in the area of sexual offenses. The Austin Municipal Code (1967), for example, prohibits fornication, § 23-19, entering a building for purpose of fornication, § 23-20, and false registration as husband and wife, § 23-21. The Dallas City Code (1967) prohibits fornication between males over 14 and females over 18, and meeting for the purpose of fornication, §§ 31-43, 31-44. And Section 11-64 of the Houston City Code (1968) prohibits appearing in public either nude or in the dress of the other sex. These ordinances exist despite the exhaustive regulation of sexual morality in present law, Penal Code tits. 10, 15, chs. 8, 9. To eliminate the conflict and confusion between state and local law, and to prevent future conflict and confusion, Section 21.13 makes clear the state intends to preempt the area of sexual conduct and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Chapter 21 purposely excludes from the penal law several forms of sexual conduct proscribed by present law. Fornication, seduction on promise of marriage, abduction for purpose of marriage, adultery (other than bigamy, see Section 25.01), bestiality in private, and consensual heterosexual deviate conduct in private are no longer offenses, and Section 21.13 ensures that no governmental subdivision or agency may punish or otherwise regulate this or any other sexual conduct not proscribed by this or some other chapter of the code. In addition, of course, conflicting local laws,

e. g., redefining the public place concept or parts of the anatomy that may not be exposed, changing the incapable-of-consent age or the age differential, are prohibited.

CHAPTER 22. ASSAULTIVE OFFENSES

Section

22.01. Assault.
22.02. Aggravated Assault.
22.03. Reckless Conduct.
22.04. Consent as Defense to Assaultive Conduct.
22.05. Aiding Suicide.
22.06. Terroristic Threat.

Section 22.01. Assault

(a) An individual or corporation commits assault if:

(1) he intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) he intentionally or knowingly causes another to fear imminent bodily injury; or

(3) he intentionally or knowingly causes physical contact with another and he knows the other will regard the contact as offensive or provocative.

(b) Assault is a Class B misdemeanor unless the offense is committed under Subsection (a)(3), in which event assault is a Class C misdemeanor.

Committee Comment

See Committee Comment following Section 22.02.

§ 22.02. Aggravated Assault

(a) An individual or corporation commits aggravated assault if he commits assault as defined in Section 22.01, and:

(1) he causes serious bodily injury to another; or

(2) he causes bodily injury to a person he knows is a peace officer in the lawful discharge of official duty; or

(3) he uses a deadly weapon.

(b) Aggravated assault is a felony of the third degree.

Historical Note

Derivation:

§ 22.01: Ill.Stat.Ann. ch. 38, §§ 12-1, 12-3
§ 22.02: Ill.Stat.Ann. ch. 38, §§ 12-2, 12-4

Cross References

Attempt, see § 15.01.
"Bodily injury" defined, see § 1.07.
Consent as defense to assaultive conduct, see § 22.04.
Criminal homicide, see ch. 19.
"Deadly weapon" defined, see § 1.07.
Justification for use of force, see ch. 9.
"Peace officer" defined, see § 1.07.
Reckless conduct, see § 22.03.
Resisting arrest or search, see § 38.03.
"Serious bodily injury" defined, see § 1.07.
Sexual offenses, see ch. 21.
Terroristic threat, see § 22.06.

Committee Comment

Sections 22.01 and 22.02 change the focus of criminal assault from the use, attempted use, or threat to use violence with intent to injure another, Penal Code art. 1138, to the causing of the harms the assault offenses seek to prevent. Although this change in focus identifies the same conduct as present law, it does change the application of assault in a few instances. Thus violence is not necessary, and there is no requirement of intent to injure. It is sufficient for conviction that bodily injury is recklessly inflicted, that fear is knowingly induced, or that the offensive nature of physical contact is known.

The penalty structure for assault grades the offenses according to the severity of the harm caused. Offensive or provocative contacts that do not cause fear are relatively minor offenses, but causing fear or injury is a more serious offense. Moreover, if the bodily injury is serious, a peace officer is the victim, or the assault is committed with a deadly weapon, it is aggravated to a third degree felony. This eliminates some of the present law's aggravating factors, such as identity of the victim and situs of the assault, see Penal Code art. 1147, that are not relevant in determining the degree of the actor's culpability.

Present law excludes some violence as "lawful," Penal Code art. 1142. This provision is replaced by the comprehensive chapter on justification for the use of force, Chapter 9. The assault-with-intent offenses of present law are abolished; that conduct is encompassed by the general attempt provision, Section 15.01.

§ 22.03. Reckless Conduct

(a) An individual or corporation commits an offense if he acts recklessly and places another in imminent danger of death or serious bodily injury.

(b) An offense under this section is a Class B misdemeanor.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 12-5
Model P.C. § 211.2

Cross References

Aggravated assault, see § 22.02.
Assault, see § 22.01.
Reckless driving, see R.C.S. art. 6701d, § 51.
"Serious bodily injury" defined, see § 1.07.

Committee Comment

Sections 22.01 and 22.02 provide that reckless acts that cause bodily injury constitute assault, but reckless acts that fall short of injuring another are excluded. This section covers those reckless acts that, although no harm results, are highly dangerous, i. e., create a substantial risk of death or serious bodily injury.

§ 22.04. Consent as Defense to Assaultive Conduct

The victim's effective consent, or the actor's reasonable belief that the victim consented, to the actor's conduct is a defense to prosecution under Section 22.01 (assault), 22.02 (aggravated assault), or 22.-03 (reckless conduct) if:

(1) the conduct did not threaten or inflict serious bodily injury; or

(2) the victim knew the conduct was a risk of:

(A) his occupation; or

(B) recognized medical treatment; or

(C) a scientific experiment conducted by recognized methods.

Historical Note

Derivation:
Fed.Prop.Crim.Code § 1619

Cross References

"Conduct" defined, see § 1.07.
Defense explained, see § 2.03.
"Effective consent" defined, see § 1.07.
"Reasonable belief" defined, see § 1.07.
"Serious bodily injury" defined, see § 1.07.

Committee Comment

This section repudiates the dictum in Cromeans v. State, 129 S. W. 1129 (Tex.Crim.App.1909), that the victim's consent is no defense to assault. Football players, boxers, medical doctors, and

many others commit assaultive-type offenses regularly, but these consensual "injuries" are not properly a concern of the criminal law. Thus the victim's consent is made a defense, but only to assault, aggravated assault, and reckless conduct and only (with three exceptions) if the harm is petty. Consent is a defense to serious harm if the victim knew it was a risk of medical treatment, scientific experiment, or an occupation.

Reasonable belief in consent establishes the defense just as reasonable mistake of fact exonerates under general principles, see Section 8.02. Special provision must here be made for mistake because consent is not an element of the assaultive offenses and Section 8.02 applies only to mistake about an element.

§ 22.05. Aiding Suicide

(a) An individual or corporation commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide.

(b) An offense under this section is a Class C misdemeanor unless the actor's conduct causes suicide, or attempted suicide resulting in serious bodily injury, in which event the offense is a felony of the third degree.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 120.30

Cross References

Criminal homicide, see ch. 19.
"Serious bodily injury" defined, see § 1.07.

Committee Comment

Although at common law and in many jurisdictions today suicide is an offense, it has never been so in Texas, and the Court of Criminal Appeals has held that since suicide is no offense there is no basis for invoking the law of principals against one who aids another to commit suicide, Grace v. State, 69 S.W. 529 (Tex.Crim. App.1902). Thus Section 22.05 expands Texas law into a new area, but it is narrowly drawn to cover only those who act intentionally.

Although it is aiding or attempting to aid the potential suicide which is criminalized, a distinction for punishment purposes is drawn between aiding and attempting generally and those cases in which the suicide is successful or nearly so.

This section is designed to punish the aiding of *voluntary* suicide. One who with the requisite culpable mental state causes another to commit suicide is guilty of criminal homicide, see, e. g., Sanders v. State, 112 S.W. 68 (Tex.Crim.App.1908) (murder).

§ 22.06. Terroristic Threat

(a) An individual or corporation commits terroristic threat if he threatens to commit any offense involving violence with intent:

(1) to cause action of any sort by an official or volunteer agency organized to deal with emergencies; or

(2) to place a person in fear of imminent serious bodily injury; or

(3) to prevent or interrupt the occupation of a building; room; place of assembly; place to which the public has access; or aircraft, automobile, or other form of conveyance.

(b) Terroristic threat is a Class B misdemeanor unless the actor's intent is to prevent or interrupt the occupation of a building, a place to which the public has access, or a facility of public transportation operated by a common carrier, in which event terroristic threat is a Class A misdemeanor.

Historical Note

Derivation:
Fed.Prop.Crim.Code § 1614
Model P.C. § 211.3

Cross References

"Agency" defined, see § 1.07.
Assault, see §§ 22.01, 22.02.
Coercion of public servant, see § 36.03.
Disrupting meeting or procession, see § 42.05.
False alarm, see § 42.06.
Harassment, see § 42.07.
"Serious bodily injury" defined, see § 1.07.
Threats to obtain property, see § 31.03.

Committee Comment

This section is directed toward those who seek to cause terror or public inconvenience by threatening to commit crimes of violence. It is a new offense covering conduct now covered only haphazardly in present law, see, e. g., Penal Code arts. 476, 1265. The conduct resembles that proscribed by Section 42.06 (false alarm or report), except that the actor does not necessarily know his threat is false; indeed, he may intend to carry it out.

The section is broad enough to cover threats to commit any crime of violence if the actor's intent is to cause fear, emergency action, or substantial inconvenience. It also covers both threats against an individual that may not constitute assault and threats that cause public terror or inconvenience.

Threats that affect the public, being more serious because their effect is widespread, are punished more severely.

TITLE 6. OFFENSES AGAINST THE FAMILY

CHAPTER 25. OFFENSES AGAINST THE FAMILY

Section

25.01. Bigamy.
25.02. Incest.
25.03. Interference with Child Custody.
25.04. Criminal Abortion.
25.05. Aiding Self-Abortion.
25.06. Distributing Abortifacients.
25.07. Criminal Nonsupport.
25.08. Preemption.

Section 25.01. Bigamy

(a) An individual commits bigamy if:

(1) he is married; and

(A) he purports to marry a person other than his spouse in this state under circumstances that would, but for the actor's prior marriage, constitute a marriage; or

(B) he lives with a person other than his spouse in this state under the appearance of being married; or

(2) he knows that a married person other than his spouse is married; and

(A) he purports to marry that person in this state under circumstances that would, but for that person's prior marriage, constitute a marriage; or

(B) he lives with that person in this state under the appearance of being married.

(b) It is a defense to prosecution under Subsection (a)(1) that the actor reasonably believed that his marriage was void or had been dissolved by death, divorce, or annulment.

(c) Bigamy is a Class A misdemeanor.

Historical Note

Derivation:
New

Cross References

Defense explained, see § 2.03.
Husband or wife as witness, see C.C.P. art. 38.11, as amended.
Rape by fraud, see § 21.02.
"Reasonable belief" defined, see § 1.07.

Committee Comment

Subsection (a)(1)(A) restates the traditional bigamy offense now contained in Penal Code art. 490. The state must prove a valid, subsisting marriage, Oxford v. State, 296 S.W. 535 (Tex.Crim. App.1927); McCombs v. State, 99 S.W. 1017 (Tex.Crim.App.1906), but either a ceremonial or common-law marriage will suffice, Ahlberg v. State, 225 S.W. 253 (Tex.Crim.App.1920).

A single person marrying another he knows is already married is dealt with under the present law of principals, Burgess v. State, 225 S.W. 182 (Tex.Crim.App.1920). However, Section 7.05 of this code exempts from complicity responsibility a person whose conduct is inevitably incident to the commission of an offense, and Section 25.01(a)(2)(A) is therefore necessary to preserve the unmarried party's responsibility for bigamy.

Subsections (a)(1)(B) and (a)(2)(B) reach the bigamous cohabitation now proscribed in Penal Code art. 490a as well as the more flagrant variety of adultery now proscribed in art. 499. These subsections are broader than art. 490a, however, because the state need not prove a subsequent out-of-state marriage nor, for that matter, any subsequent marriage, ceremonial or common-law: living together in this state "under the appearance of being married" is sufficient.

Subsection (b) creates a special category of mistake defense and is thus similar to present art. 491. The general defense of ignorance or mistake, Section 8.02 of this code, is not relied on for bigamy because the general defense distinguishes between mistakes of law and fact in some contexts, a distinction now generally ignored, and by this code rejected, in the bigamy area. See, e. g., Hilton v. State, 191 S.W.2d 875 (Tex.Crim.App.1945); Adams v. State, 7 S. W.2d 528 (Tex.Crim.App.1928).

Subsection (b) does not continue the five-year absence defense of art. 491, and it also changes the present law's belief standard. Instead of a lack of ordinary care, the state to negate a defense under Subsection (b) must prove that the defendant's belief in divorce, for example, was formed recklessly or with criminal negligence.

§ 25.02. Incest

(a) An individual commits incest if he engages in sexual intercourse or deviate sexual intercourse with a person he knows to be, without regard to legitimacy:

(1) his ancestor or descendant by blood or adoption; or

(2) his stepchild or stepparent, while the marriage creating that relationship exists; or

(3) his parent's brother or sister of the whole or half-blood; or

(4) his brother or sister of the whole or half-blood or by adoption.

(b) For purposes of this section:

(1) "Deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person with intent to arouse or gratify the sexual desire of any person.

(2) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(c) Incest is a felony of the third degree unless it is committed in violation of Subsection (a)(4), in which event it is a Class A misdemeanor.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 11-11
N.Y.Rev.Pen.Law § 255.25

Cross References

Corroboration of accomplice witness, see C.C.P. art. 38.14.
Void marriages, see Family Code §§ 2.21, 2.22.

Committee Comment

This section adopts a new rationale for the incest offense: protection of family solidarity by preventing harmful interference with relations between family members. This rationale significantly contracts the proscribed relationships of the present law, while at the same time broadening the types of prohibited conduct. The relationships defined in Section 25.02(a) are the same relationships prohibited from marrying by Sections 2.21 and 2.22 of the Family Code, both codes like the present law thus prohibiting both marriage and intercourse between the prohibited relationships. Also as in the present law, Section 25.02 declares the legitimacy of one within the prohibited relationship immaterial. See Clark v. State, 45 S.W. 576 (Tex.Crim.App.1898); Wadkins v. State, 124 S.W. 959 (Tex.Crim.App.1910).

Present law forbids only "carnal knowledge" (sexual intercourse) between the prohibited relationships. The new section includes deviate sexual intercourse that, although without genetic significance, is if anything more disruptive of family solidarity than sexual intercourse.

Subsection (c) treats incest between a brother and sister more leniently than that between the other prohibited relationships. Sexual exploration between brothers and sisters, although not con-

doned, nevertheless does not merit felony treatment in the committee's judgment.

Several new penal codes include a corroboration requirement for the incest offense. Texas law, however, has long recognized that the consenting partner to incest is an accomplice witness whose uncorroborated testimony is insufficient to convict, e. g., Wilson v. State, 184 S.W.2d 141 (Tex.Crim.App.1944); Moss v. State, 147 S.W.2d 1085 (Tex.Crim.App.1941).

§ 25.03. Interference with Child Custody

(a) An individual or corporation commits an offense if he takes or retains a child younger than 18 years out of this state when:

(1) he knows that his taking or retention violates a temporary or permanent judgment or order disposing of the child's custody; or

(2) he has not been awarded custody of the child by a court of competent jurisdiction and knows that a suit for divorce, or a civil suit or application for habeas corpus to dispose of the child's custody, has been filed.

(b) It is a defense to prosecution under Subsection (a)(2) that the actor returned the child to this state within seven days from the date of the commission of the offense.

(c) An offense under this section is a felony of the third degree.

Historical Note

Derivation:
Wis.Stat.Ann. § 946.71

Cross References

Computation of age, see § 1.06.
Custody rights in minor children, see R.C.S. art. 4639a; Probate Code § 109(a).
Defense explained, see § 2.03.
Extradition of fugitive, see C.C.P. art. 51.13; 18 U.S.C.A. § 3182.
False imprisonment, see § 20.02.
Husband or wife as witness, see C.C.P. art. 38.11, as amended.
Unlawful flight to avoid prosecution, see 18 U.S.C.A. § 1073.

Committee Comment

This section adds a new offense to Texas criminal jurisprudence, one designed primarily to deal with the parental kidnapper but formulated broadly enough to cover anyone knowingly interfering with a court's custodial jurisdiction over children. Section 25.03 replaces a variety of offenses in the present law, all aimed at least in part at preventing interference with a custodial relationship, but none adequate, in the committee's opinion, to deal with the parental kidnapper. See, e. g., Penal Code arts. 1177 (kidnapping

from parent or guardian), 331 (luring child from home for dependent and neglected children), 535 (enticing minor from parent or guardian), 1180 (abduction of female younger than 14); see generally Ratner, Child Custody in a Federal System, 62 Mich.L. Rev. 795 (1964); Note, A Rationale of the Law of Kidnapping, 53 Colum.L.Rev. 540 (1953).

Section 25.03 prohibits both taking and retaining a child outside the state either in violation of a custody award, Subsection (a)(1), or to defeat the court's jurisdiction in a custody case, Subsection (a)(2). The custody award need not originate with a Texas court to come within the section; if suit is filed in this state to enforce a California custody judgment, for example, the noncustodial parent's taking the child out of Texas violates Subsection (a)(2) if the parent knows the suit has been filed. Age 18 is used for the offense because under Texas law parental custody rights in a child terminate at that age.

Subsection (b) highlights the chief objective of this offense: to encourage the child's return to the jurisdiction of the Texas court whose contempt power can then be used to enforce its custody award.

The committee reluctantly graded this offense a felony to assist in invocation of the extradition and federal fugitive felon provisions.

§ 25.04. Criminal Abortion

(a) An individual, corporation, or association commits an offense if he intentionally terminates another's pregnancy otherwise than by live birth of a viable fetus.

(b) It is an exception to the application of this section that the pregnancy is terminated by a practitioner of medicine, licensed by the State Board of Medical Examiners, with the written consent of:

(1) the pregnant woman; or

(2) a custodial parent or guardian, if the pregnant woman is unmarried and younger than 16 years; or

(3) the pregnant woman and a custodial parent or guardian, if the pregnant woman is unmarried and 16 years or older but younger than 18 years; or

(4) a custodial parent or guardian, or her husband, if the pregnant woman is mentally incompetent.

(c) It is a defense to prosecution under this section that pregnancy was terminated by a practitioner of medicine, licensed by the State Board of Medical Examiners, who reasonably believed the woman's life was in imminent danger and the termination was necessary to save her life.

(d) An offense under this section is a felony of the second degree.

Historical Note

Derivation:
New

Cross References

Aiding self-abortion, see § 25.05.
"Association" defined, see § 1.07.
Computation of age, see § 1.06.
Defense explained, see § 2.03.
Distributing abortifacients, see § 25.06.
Exception explained, see § 2.02.
Medical Practice Act, see R.C.S. arts. 4495–4512.
"Mental incompetency" defined, see R.C.S. art. 5547—4(*l*).
"Reasonable belief" defined, see § 1.07.

Committee Comment

Section 25.04 substantially alters the present criminal abortion offense, Penal Code art. 1191. The new offense reflects both recent developments in constitutional law and enlightened concern for women and physicians who often suffer extreme hardship because of the archaic rigidity of present law.

Recent federal decisions indicate that restrictive abortion laws cannot be reconciled with constitutional guarantees of due process and the right to privacy. The Texas statutes, Penal Code arts. 1191–1196, were declared void for overbreadth (violation of privacy) and vagueness in Roe v. Wade, Civ.Action Nos. 3–3690–B and 3–3691–C (N.D.Tex., June 17, 1970). Babbitz v. McCann, 310 F. Supp. 293 (E.D.Wis.1970), held that the mother's fundamental right to refuse to bear a child outweighs the rights of an unquickened (usually four months or less) embryo. See also United States v. Vuitch, 305 F.Supp. 1032 (D.D.C.1969), cert. granted, 90 S.Ct. 1497, 2235, 397 U.S. 1061 (1970); People v. Belous, —— Cal.2d ——, 458 P.2d 194 (1969), cert. denied, 90 S.Ct. 920, 397 U.S. 915 (1970).

Aside from constitutional infirmity, the increasingly publicized consequences of the present restrictive law are harmful and often tragic. Both the married and unmarried woman burdened with an unwanted pregnancy are forced to seek out an illicit, often incompetent, abortionist or abort themselves. Licensed medical practitioners are reluctant to render the professional help the woman needs because of the threat of criminal prosecution. Furthermore, present law operates most inequitably against the poor, who often need, but cannot afford, an illegal abortion.

Following the lead of New York and Hawaii, which have recently revised their criminal abortion laws by eliminating restrictions unrelated to ensuring the safety of the pregnant female, Section 25.04 leaves the decision of whether to terminate pregnancy to the woman and the sound medical judgment of her physician. However, if the female's life is in imminent danger and a termination

of pregnancy is necessary to save her life, Subsection (c), like present law, treats the situation as a medical emergency, dispensing, for example, with the consent requirement, see Penal Code art. 1196; Veevers v. State, 354 S.W.2d 161 (Tex.Crim.App.1962).

Section 25.04 prescribes no time period for a legal abortion, thus rejecting the New York approach, N.Y.Laws ch. 127 (1970), amending, N.Y.Rev.Pen.Law § 125.05. The committee is persuaded that this factor, which is but one of many relevant to the safety and desirability of performing an abortion, should not be singled out, but is better left to sound medical judgment in each particular case. The Revised Penal Code does not of course define medical malpractice, and regulation of abortion as well as other medical practice is left to the medical profession and tort law.

Section 25.04 continues the present law that self-abortion is not an offense, the Court of Criminal Appeals finding the woman abortee neither an accomplice, Willingham v. State, 25 S.W. 424 (Tex.Crim.App.1894), nor a principal, Moore v. State, 40 S.W. 287 (Tex.Crim.App.1897), to abortion.

§ 25.05. Aiding Self-Abortion

(a) An individual, corporation, or association commits an offense if in return for anything of value he knowingly aids a woman to use any means to intentionally terminate her own pregnancy otherwise than by live birth of a viable fetus.

(b) It is an exception to the application of this section that the termination of pregnancy is aided by a practitioner of medicine, licensed by the State Board of Medical Examiners, with the written consent of:

(1) the pregnant woman; or

(2) a custodial parent or guardian, if the pregnant woman is unmarried and younger than 16 years; or

(3) the pregnant woman and a custodial parent or guardian, if the pregnant woman is unmarried and 16 years or older but younger than 18 years; or

(4) a custodial parent or guardian, or her husband, if the pregnant woman is mentally incompetent.

(c) It is a defense to prosecution under this section that the termination of pregnancy was performed by a practitioner of medicine, licensed by the State Board of Medical Examiners, who reasonably believed the woman's life was in imminent danger and the termination was necessary to save her life.

(d) An offense under this section is a felony of the second degree.

Historical Note

Derivation:

New

Cross References

Abortion, see § 25.04.
"Association" defined, see § 1.07.
Computation of age, see § 1.06.
Defense explained, see § 2.03.
Distributing abortifacients, see § 25.06.
Exception explained, see § 2.02.
Medical Practice Act, see R.C.S. arts. 4495–4512.
"Mental incompetency" defined, see R.C.S. art. 5547–4(*l*).
"Reasonable belief" defined, see § 1.07.

Committee Comment

As stated in the comment to Section 25.04 (criminal abortion), self-abortion is not a crime under present law, so it is necessary, again to deter the criminal abortionist, to prevent aiding a woman to abort herself. The concept of aiding in producing an abortion is broader, however, than present Penal Code art. 1192 since it covers, for example, assisting the woman abortee who supplies for herself the means used.

The phrase "in return for anything of value" in Subsection (a) aims at the professional criminal abortionist and is designed to exclude nonprofessionals such as the sympathetic roommate or frightened boyfriend.

Subsections (b) and (c) parallel Section 25.04(b) and (c) (criminal abortion).

§ 25.06. Distributing Abortifacients

(a) An individual, corporation, or association commits an offense if he sells, possesses with intent to sell, advertises, or displays for sale anything that he knows is specially designed to terminate a pregnancy or that he holds out as useful for that purpose.

(b) It is a defense to prosecution under this section:

(1) that the sale or display was to a hospital, a physician or pharmacist, or to an intermediary in a chain of distribution to hospitals, physicians, or pharmacists; or

(2) that the sale was made upon prescription or order of a physician; or

(3) that the possession was with intent to sell as authorized by Subdivision (1) or (2); or

(4) that the advertising was addressed to persons named in Subdivision (1) and was confined to trade or professional channels.

(c) For purposes of this section:

(1) "Hospital" means a hospital licensed by the State Department of Health or operated by this state or the federal government.

(2) "Pharmacist" means a person licensed by the State Board of Pharmacy to practice pharmacy.

(3) "Physician" means a practitioner of medicine licensed by the State Board of Medical Examiners.

(d) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
Model P.C. § 230.3(6)

Cross References

"Association" defined, see § 1.07.
Defense explained, see § 2.03.
"Possess" defined, see § 1.07.

Committee Comment

Section 25.05 plugs a gap in the present law, which is only partly filled by the enumeration of Ergot and Cotton Root, two home-remedy abortifacients, as dangerous drugs in Penal Code art. 726d. Section 25.05(a) formulates a functional definition of abortifacient, thus avoiding the inherent difficulties of enumeration, to embrace anything specially designed or held out as an abortifacient, whether chemical, mechanical, or something not yet invented.

The defense for physicians, hospitals, and pharmacists is a standard feature of this type of offense in other jurisdictions.

§ 25.07. Criminal Nonsupport

(a) An individual commits criminal nonsupport if he intentionally or knowingly fails to provide support that he can provide and that he knows he is legally obligated to provide to his spouse who is in needy circumstances or to his child younger than 18 years.

(b) Except as provided in Subsection (c), criminal nonsupport is a Class A misdemeanor.

(c) Criminal nonsupport is a felony of the third degree if:

(1) the actor has been convicted one or more times before under this section; or

(2) the actor committed the offense while residing in another state.

(d) For purposes of this section, "child" includes a child born out of wedlock whose paternity has been admitted by the actor or has been established in a civil suit.

Historical Note

Derivation:
Penal Code arts. 602, 602-A

Cross References

Aid from Department of Public Welfare to locate parent and enforce support order, see 42 U.S.C.A. § 602(a) (17) and (a) (18).

Civil remedies:
Support of dependent or neglected child, see R.C.S. art. 2337.
Suit against parent failing to support child, see R.C.S. arts. 4639b, 4639c.
Reciprocal enforcement of support, see R.C.S. art. 2328b—4.
Enforcement of child support, contempt, see R.C.P. 308–A.
"Conviction" defined, see § 1.07.
Extradition, see C.C.P. art. 51.13; 18 U.S.C.A. § 3182.
Husband or wife as witness, see C.C.P. art. 38.11, as amended.
Paternity suit, see Family Code ch. 13.
Proof of informal marriage, see Family Code § 1.91.
Venue, see C.C.P. art. 13.27, as amended.

Committee Comment

This section provides the deserted spouse and children with the services of a public prosecutor and law enforcement personnel to enforce the husband's (or wife's) duty to support his family.

Subsection (a) defines the elements of the offense in terms derived from existing Texas law; however, desertion or neglect alone is no longer an offense. The culpable mental state required by Section 25.07—intentional or knowing failure to fulfill a known legal duty of support—can usually be established by a threatening letter from a prosecutor.

As under present law, if the prosecution is for nonsupport of a spouse, the state has the burden of proving her needy circumstances, Wallace v. State, 210 S.W. 206 (Tex.Crim.App.1919); Windham v. State, 192 S.W. 248 (Tex.Crim.App.1917). But if the prosecution is for nonsupport of a child, the state does not have to prove his needy circumstances, Turner v. State, 97 S.W.2d 959 (Tex. Crim.App.1936). The state must continue to prove that the defendant is able to provide support, Martinez v. State, 378 S.W.2d 845 (Tex.Crim.App.1964); Marshall v. State, 317 S.W.2d 209 (Tex.Crim.App.1958).

Grading criminal nonsupport a Class A misdemeanor recognizes the serious societal interest in coercing compliance with the duty of support and gives the judge a wide range of sentencing discretion. Long-term imprisonment is clearly unwarranted, however, since it is usually far more effective to place a convicted spouse on probation under orders to support his family, see C.C.P. art. 42.12, § 4, as amended. The felony grade for the offense of nonsupport by a spouse who is out of state facilitates extradition and continues present law. The felony grade for a subsequent offense also continues present law.

A prosecution under this section should not be the vehicle for litigating a contested paternity; however, if the defendant has admitted by statements or deeds that the child is his, or the defendant's paternity has been established in a civil suit, he can be prosecuted under this section for failure to support. This is contrary to present law, which does not cover the illegitimate child, Beaver v. State, 256 S.W. 929 (Tex.Crim.App.1923).

§ 25.08. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Although governmental subdivisions and agencies have not legislated widely in the area of family offenses, municipalities have enacted ordinances in the overlapping area of sexual conduct and prostitution. The Austin Municipal Code (1967), for example, prohibits false registration as husband and wife, § 23–21, solicitation of prostitution and transportation of persons to "houses of ill repute" by taxicab drivers, §§ 34–41, 34–42, and solicitation of prostitution, § 23–18. Most of this conduct is an offense under present state law, e. g., Penal Code arts. 503–504, 510–523, 525, 607, and that not proscribed was no doubt intentionally omitted. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, Section 25.08 makes clear the state intends to preempt the area of offenses against the family and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Chapter 25 purposely excludes from the penal law some conduct heretofore proscribed as a sexual offense and offense against the family. Seduction on promise of marriage, abduction for purpose of marriage, adultery (other than bigamy, see Section 25.01), and contributing to the delinquency of a minor are no longer offenses, and Section 25.08 prohibits a governmental subdivision or agency from punishing or otherwise regulating this type of conduct. In addition, of course, conflicting local laws, e. g., expanding or contracting the prohibited relationships for incest, imposing a residency or different age of consent requirement for abortion, are prohibited.

TITLE 7. OFFENSES AGAINST PROPERTY

CHAPTER 28. ARSON AND OTHER PROPERTY DAMAGE OR DESTRUCTION

Section

28.01. Chapter Definitions.
28.02. Arson.
28.03. Criminal Mischief.
28.04. Reckless Damage or Destruction.
28.05. Actor's Interest in Property.
28.06. Amount of Pecuniary Loss
28.07. Preemption.

Committee Comment

The present law on damage or destruction of property consists of 4 separate chapters and more than 40 separate offenses. Penal Code arts. 1304–1388b. Some of the existing statutes are general, e. g., Penal Code art. 1350 (damaging another's personal property), but most are incredibly specific—directed at damage of a particular type of property or at damage by a specific method, e. g., Penal Code arts. 1320 (bridge burning); 1359 (introducing Johnson Grass or Russian Thistle). Most of these offenses are redundant, contradictory, or obsolete, e. g., Penal Code arts. 1318 (burning "any pile of boards, lumber, or wood"), 1379 (cutting down or destroying merchantable timber), 1321 (burning woodland), 1321a (burning woods or forest), 1383 (destroying or damaging walnut trees), 1384 (destroying or damaging pecan trees). They require a bewildering array of culpable mental states, e. g., Penal Code arts. 1331 (wilfully), 1334 (intentionally), 1338 (maliciously, carelessly, recklessly), 1348 (knowingly), 1357 (wrongfully or purposely), and they contain irrational penalty variations, e. g., Penal Code arts. 1384 (maximum confinement of three months for destroying or damaging pecan trees), 1379 (up to five years for damaging or destroying merchantable timber), 1350 (up to 20 years for damaging or destroying "any property . . . of any kind").

Chapter 28 replaces this plethora of offenses with four general property damage offenses. These four offenses proscribe all property damage, however it is inflicted and whatever the property damaged, except damage inflicted negligently, a state of mind the committee feels can be handled more efficiently and more appropriately by civil law than by penal sanctions. The penalty structure, which parallels the theft penalties in Chapter 31, ties the punishment for destructive conduct, and thus the blameworthiness of the actor, to the actor's state of mind and to the extent of the harm his conduct threatens or causes.

Section 28.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Habitation" means a structure or vehicle that is adapted for the overnight accommodation of persons, and includes:

(A) each separately secured or occupied portion of the structure or vehicle; and

(B) each structure appurtenant to or connected with the structure or vehicle.

(2) "Owner" means a person other than the actor who has possession of property, or any interest other than a mortgage, deed of trust, or security interest in property, even if the possession or interest is unlawful.

(3) "Property" means:

(A) real property; or

(B) tangible or intangible personal property including anything severed from land; or

(C) a document, including money, that represents or embodies anything of value.

§ 28.02. Arson

(a) An individual, corporation, or association commits arson if he starts a fire or causes an explosion:

(1) without the effective consent of the owner and with intent to destroy or damage the owner's building or habitation; or

(2) with intent to destroy or damage any building or habitation to collect insurance for the damage or destruction.

(b) Arson is a felony of the second degree.

Historical Note

Derivation:
Pa.Prop.Crim.Code § 1301(a)

Cross References

Actor's interest in property, see § 28.05.
"Association" defined, see § 1.07.
Criminal mischief, see § 28.03.
"Effective consent" defined, see § 1.07.
"Habitation" defined, see § 28.01.
Hindering secured creditors, see § 32.33.
Necessity to destroy property, see § 9.21.
"Owner" defined, see § 28.01.
"Property" defined, see § 28.01.

Committee Comment

Section 28.02 retains the substance of the present Texas law on arson, but it includes several alterations which are designed to clarify the offense. First, Section 28.02 retains the present limitation of the offense to the use of fire or explosives, Penal Code arts. 1304, 1307. Although there are other methods of destruction, they apparently either are employed so infrequently that they are inconsequential or lack the rapidity, and thus the danger to the person, that accompanies fires and explosions.

Second, Section 28.02 clarifies the point at which the offense becomes complete. Under present law, although the structure need not be destroyed or seriously damaged, Penal Code art. 1306, it must be burned, and it is not arson if the structure is only scorched or smoked, Honey v. State, 17 S.W.2d 50 (Tex.Crim.App. 1929); Woolsey v. State, 17 S.W. 546 (Tex.Crim.App.1891). Under Section 28.02, however, the offense is complete whenever the actor starts a fire or causes an explosion with the requisite intent, whether or not damage of any kind actually ensues.

The mental element required under Section 28.02 is intent: the actor must act intentionally and must desire a particular result. This changes the nomenclature of present law, which requires a "wilful" state of mind, Penal Code art. 1304, but probably retains the substance, cf. Brown v. State, 322 S.W.2d 626, 627–28 (Tex. Crim.App.1959); but see Rankin v. State, 139 S.W.2d 811, 812 (Tex.Crim.App.1940). The result intended may be damage as well as destruction, which also is apparently the existing law, Hinkley v. State, 389 S.W.2d 667 (Tex.Crim.App.1965); Wishnow v. State, 316 S.W.2d 412 (Tex.Crim.App.1958). Under Subsection (a)(2), the actor must also intend to collect insurance for the damage or destruction.

Subsection (a)(1) is a statement of the traditional arson offense. It applies only to a "building or habitation," which represents little change from present law. Presently, arson requires the burning of a "house," which is defined as "any building, edifice, or structure inclosed with walls and covered," Penal Code arts. 1304, 1305. "Buildings" will include some structures that are not "houses," such as a stadium or a pavilion, and "habitation," which Section 28.01 defines as structures and vehicles adapted for the overnight accommodation of persons, and the adjacent buildings, will include some enclosures, such as boats, railroad cars, and tents, that are probably not "houses."

The criminal responsibility of an owner for arson is slightly modified. Subsection (a)(1) requires a firing of another's building, but Section 28.01 defines "owner" as anyone other than the actor who has possession of or any other interest in the property, and Section 28.05 provides that an actor who is an owner may be guilty of arson if there are other owners with interests he is not

entitled to infringe. This retains present law, which provides that a part owner commits arson if he burns, Penal Code art. 1313; that a tenant commits arson if another is the owner, Banks v. State, 157 S.W.2d 360 (Tex.Crim.App.1941); and that an owner commits arson if another is the tenant, Tuller v. State, 8 Tex.Ct. App. 501 (1880). Holders of nonpossessory security interests, who may be owners under present law, see Adamson v. State, 21 S.W.2d 675 (Tex.Crim.App.1929), are clearly excluded from the definition of "owner" by Section 28.01(2). Another section of the code, specifically designed for the debtor—secured creditor relationship, governs the destruction of secured property, see Section 32.33 (hindering secured creditors). If no one else has an interest, however, the owner is not responsible under Subsection (a)(1); instead, his responsibility if any is determined by Subsection (a)(2).

The effect of an owner's consent to the burning is uncertain in present law. Logically, the responsibility of one who burns with the owner's consent should be determined under general complicity principles in terms of the owner's responsibility, and Penal Code arts. 1312 and 1313 so provide in specific instances. In Caddell v. State, 97 S.W. 705 (Tex.Crim.App.1906), however, the court held that want of the owner's consent to the burning is not an element of arson. Whether this means that one who burns with the owner's consent commits arson even in circumstances in which the owner would not be guilty has never been determined, but Subsection (a)(1) makes it clear that one who burns with the owner's "effective consent" is guilty only in circumstances in which the owner is guilty.

Subsection (a)(2) makes it arson to start a fire or cause an explosion with intent to collect insurance for the resulting damage or destruction. In requiring intent to defraud the insurer, this changes present law, which requires only that the house be insured, Penal Code art. 1312. As in present law, Penal Code art. 1312, burning insured property is arson only if the property is the kind that would make the burning arson if it belonged to another. The burning of other insured property with intent to collect insurance, presently covered by Penal Code art. 1322, poses less danger to persons, and consequently is not included in arson. It does constitute theft or attempted theft under Section 31.03, however, as does any other destruction of property to defraud insurers.

Section 28.02 eliminates the provision in present law for aggravation of the offense if bodily injury or death results. Arson is graded a second degree felony, a serious offense, primarily because of the danger to the person. Otherwise, the use of fire or explosives does not make assault, manslaughter, or attempted murder more reprehensible than other methods of committing those offenses, and if murder was the intent and result the actor may be prosecuted for the more serious offense.

§ 28.03. Criminal Mischief

(a) An individual, corporation, or association commits criminal mischief if, without the effective consent of the owner:

(1) he intentionally or knowingly damages or destroys the tangible property of the owner; or

(2) he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person.

(b) Criminal mischief is:

(1) a Class C misdemeanor if:

(A) the amount of pecuniary loss was $50 or less; or

(B) except as provided in Subdivision (3)(B), it caused substantial inconvenience to others; or

(2) a Class A misdemeanor if the amount of pecuniary loss was more than $50 but less than $250; or

(3) a felony of the third degree if:

(A) the amount of pecuniary loss was $250 or more; or

(B) regardless of the amount of pecuniary loss, the actor caused impairment or interruption of public communications, public transportation, public water, gas, or power supply, or other public service for a substantial number of persons.

Historical Note

Derivation:

Penal Code art. 1350
N.Y.Rev.Pen.Law §§ 145.00, 145.05

Cross References

Actor's interest in property, see § 28.05.
Amount of pecuniary loss, see § 28.06.
"Association" defined, see § 1.07.
Destruction of records, see §§ 32.47, 37.10.
"Effective consent" defined, see § 1.07.
Fraud in insolvency, see § 32.34.
Fraudulent destruction of insured property, see § 31.03 (theft).
Fraudulent destruction, removal, or concealment of writing, see § 32.47.
Hindering secured creditors, see § 32.33.
"Owner" defined, see § 28.01.
"Property" defined, see § 28.01.

Committee Comment

Section 28.03 is the central offense in this chapter and replaces the bulk of the present property damage offenses. It is, essentially, a restatement of Penal Code art. 1350, the general property

damage offense in present law, with some clarifications and expansions.

Article 1350 and most other property damage offenses in present law proscribe destructive conduct only if it is committed without the owner's consent. This section proscribes conduct committed without the owner's "effective consent," a concept that clarifies the type of consent required by negating consent given because of coercion or deception, given by one whom the actor knows lacks authority or capacity, or given for the detection of the commission of an offense. See Section 1.07 (code definitions). As in present law, the actor is not guilty of criminal mischief if he has the owner's effective consent, although both might be guilty as parties to some other offense, such as destroying secured property with intent to defraud creditors, Section 32.33.

Subsection (a)(1) prohibits conduct that destroys or damages property; Subsection (a)(2) expands present law to include "tampering" with property, conduct that falls short of damaging the property but nevertheless interferes with the owner's proprietary rights or abuses the property in a way that diminishes its value. This provides a general proscription of conduct now covered by a few specific statutes, e. g., Penal Code arts. 1137f (tampering with aircraft), 1343 (tampering with starter switch of motor vehicle), 1335 (tampering with railroad switch), 1334 (obstructing telephone transmission).

To come within the purview of Section 28.03, the damage or destruction, or the tampering and resulting harm, must be done knowingly or intentionally. Recklessly destructive conduct, because it is less reprehensible, is treated less severely in Section 28.-04.

The owner of property is defined in Section 28.01 to include anyone other than the actor who has possession of the property or an interest other than a security interest in the property. Thus, an actor can commit criminal mischief upon his own property if others also own the property, see Section 28.05. A holder of a security interest, however, is not an owner as against the debtor, even if he has legal title pursuant to a conditional sales contract or other security agreement, because relationships between debtors and creditors present unique problems which are separately treated in Chapter 32 (fraud).

Property is defined broadly in Section 28.01. This section and Section 28.04 exclude intangible property; otherwise, they include anything that, if damaged, destroyed, or tampered with, might cause pecuniary loss or inconvenience.

The grading scheme for criminal mischief parallels that for theft. Minor mischief—pecuniary loss of $50 or less or substantial inconvenience without loss when tampering is involved—is a Class C misdemeanor so that the cases may be handled more expeditiously in corporation and justice of the peace courts. It is a Class A

misdemeanor if the pecuniary loss is greater than $50 and less than $250, and a third degree felony if the pecuniary loss is substantial ($250 or greater), or if the actor impairs or interrupts a public service for a substantial number of persons. Mischief against public services is a felony regardless of pecuniary loss if it causes widespread damage because the amount of damage to the public ordinarily will exceed $250, but being widespread, it may be difficult to prove. The impairment must affect a "substantial" number of persons. This is intended to preclude felony treatment of one whose conduct affects only one home or a small neighborhood and clearly does not cause great harm. If the impairment is not widespread, the offense is a Class C misdemeanor unless the state proves pecuniary loss greater than $50 or $250.

§ 28.04. Reckless Damage or Destruction

(a) An individual, corporation, or association commits an offense if, without the effective consent of the owner, he recklessly damages or destroys tangible property of the owner.

(b) An offense under this section is a Class C misdemeanor.

Historical Note

Derivation:

Penal Code art. 1350
N.Y.Rev.Pen.Law §§ 145.00, 145.05

Cross References

"Association" defined, see § 1.07.
Criminal mischief, see § 28.03.
"Effective consent" defined, see § 1.07.
"Owner" defined, see § 28.01.
"Property" defined, see § 28.01.

Committee Comment

Section 28.04 expands present law to cover destructive conduct that is committed recklessly. Presently, except for two statutes proscribing negligent burning, Penal Code arts. 1321, 1321b, the property damage offenses require a "wilful" act or some similar mental state implying at least a "knowing" act as defined in Section 6.05(b). The committee concluded that, although penal sanctions are generally inappropriate where conduct is negligent, they are a helpful method of controlling reckless damage or destruction, and this section expands Texas law to proscribe that conduct.

This section applies only when damage or destruction is inflicted recklessly; otherwise, its elements and the scope of its application are identical to those of criminal mischief, Section 28.03. Because the mental state accompanying the conduct is less reprehensible, however, the committee made this offense a Class C misdemeanor regardless of the amount of loss.

§ 28.05. Actor's Interest in Property

It is no defense to prosecution under this chapter that the actor has an interest in the property damaged or destroyed if another person also has an interest that the actor is not entitled to infringe.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 16-4
Cal.Prop.Pen.Code § 2900(5)
Model P.C. § 223.0(7)

Cross References

Hindering secured creditors, see § 32.33.
"Owner" defined, see § 28.01.
"Property" defined, see § 28.01.
"Security agreement," see Business & Commerce Code § 9.105.

Committee Comment

Under the definition of "owner," Section 28.01(2), the person who inflicts damage under this chapter frequently will be an owner. If others are also "owners," however, Section 28.05 provides that the actor is still subject to conviction under this chapter. Presently, this concept clearly applies to arson, see Penal Code art. 1313 and the comment to Section 28.02, but its applicability to other property damage offenses in present law is uncertain. Section 28.06(e), however, operates to limit the pecuniary loss a part owner causes to other's interests.

§ 28.06. Amount of Pecuniary Loss

(a) The amount of pecuniary loss under this chapter, if the property is destroyed, is:

(1) the market value of the property at the time and place of the destruction; or

(2) if the market value cannot be ascertained, the cost of replacing the property within a reasonable time after the destruction.

(b) The amount of pecuniary loss under this chapter, if the property is damaged, is the cost of repairing or restoring the damaged property within a reasonable time after the damage occurred.

(c) The amount of pecuniary loss under this chapter for documents, other than those having a readily ascertainable market value, is:

(1) the amount due and collectible at maturity less any part that has been satisfied, if the document constitutes evidence of a debt; or

(2) the greatest amount of economic loss that the owner might reasonably suffer by virtue of the destruction or damage, if the document is other than evidence of a debt.

(d) If the amount of pecuniary loss cannot be ascertained by the criteria set forth in Subsections (a)–(c), the amount of loss is deemed to be greater than $50 but less than $250.

(e) To determine the amount of pecuniary loss if the actor has a legal interest in the property involved, the value of the interest shall be:

(1) deducted from the amount of pecuniary loss, if the property is destroyed; or

(2) deducted from the amount of pecuniary loss to the extent of an amount equal to the ratio the value of the interest bears to the total value of the property, if the property is damaged.

Historical Note

Derivation:

Subsecs. (a)–(d): N.Y.Rev.Pen.Law § 155.20

Subsec. (e): Wis.Stat.Ann. § 943.20(2)(c)

Cross References

Actor's interest in property, see § 28.05.
"Property" defined, see § 28.01.
Value of stolen property, see § 31.07.

Committee Comment

This section establishes standards for valuing loss caused by conduct proscribed by this chapter; it tracks a similar provision in the theft chapter, Section 31.07. Section 28.06(a) adopts market value or, if market value cannot be determined, replacement cost for destroyed property, but if the property is only damaged and can be repaired, Subsection (b) requires determination of repair cost. Subsection (c) provides valuation standards for documents that have no easily determined market value, and Subsection (d) ensures some penal sanction in the rare instances where the amount of loss cannot be determined, but limits it to misdemeanor level. Subsection (e) provides for crediting the actor with the value of his own interest in property he damages or destroys. Under Subsection (e)(2), for example, if the actor has a $500 equity in a car worth $1,000, and he intentionally damages it requiring repairs costing $250, the pecuniary loss resulting from his criminal mischief is $125—the repair cost, $250, less an amount equalling the ratio his equity bears to the value of the car ($500:$1,000 or 1:2; $250–$125=$125)—and the actor is guilty of a Class A misdemeanor under Section 28.03.

§ 28.07. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Municipal ordinances presently conflict with and overlap state law in the area of criminal mischief and reckless damage to or destruction of property. For example, the Dallas City Code (1967) prohibits obstructing sewers, discharging "foul and nauseous" liquids onto another's property, willfully destroying or interfering with another's property, and injuring trees, shrubs, grass, fences, etc. in a public place, §§ 31–29, 31–31, 31–40, 32–3. Section 31–10 of the Austin Municipal Code (1967) forbids damaging another's property while moving a building, and the Houston City Code (1968) punishes injuring, defacing, or destroying sidewalks, buildings, and paved streets, §§ 11–68 through 11–71. All of the conduct covered by these ordinances is made criminal by present law, e. g., Penal Code arts. 859–862, 1350, 1352, 1388a, and to eliminate the present conflict and confusion, and prevent future conflict and confusion between state and local law, Section 28.07 makes clear the state intends to preempt the area of arson and other property damage or destruction and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

In light of this section governmental subdivisions and agencies may not enact or enforce laws punishing destruction of particular kinds of property (e. g., flowers, fountains), for example, or laws proscribing a particular type of damage or destruction (e. g., flooding, explosion). And of course an ordinance punishing negligent burning is prohibited because in conflict with the minimum culpable mental state required by this chapter, recklessness. On the other hand, requiring a permit before burning scrap, for example, or prohibiting littering, are permissible laws because neither regulates conduct punished by this chapter.

CHAPTER 29. ROBBERY

Section

29.01. Chapter Definitions.
29.02. Robbery.
29.03. Aggravated Robbery.

Section 29.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.

(2) "Property" means:

(A) tangible or intangible personal property including anything severed from land; or

(B) a document, including money, that represents or embodies anything of value.

Committee Comment

See Committee Comment following Section 29.03.

§ 29.02. Robbery

(a) An individual or corporation commits robbery if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property:

(1) he intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) Robbery is a felony of the second degree.

Committee Comment

See Committee Comment following Section 29.03.

§ 29.03. Aggravated Robbery

(a) An individual or corporation commits aggravated robbery if he commits robbery as defined in Section 29.02, and:

(1) he causes serious bodily injury to another; or

(2) he uses a deadly weapon.

(b) Aggravated robbery is a felony of the first degree.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 160.00
Wis.Stat.Ann. § 943.32

Cross References

Assault, see §§ 22.01, 22.02.
"Bodily injury" defined, see § 1.07.
Claim of right, see § 31.10.
"Deadly weapon" defined, see § 1.07.
Extortion, see § 31.03.
"Property" defined, see § 29.01.
"Serious bodily injury" defined, see § 1.07.
Theft, see ch. 31.
Theft by threat, see § 31.03.
Theft from person, see § 31.03.

Committee Comment

Presently, robbery consists of an assault, violence, or causing fear of life or bodily injury for the purpose of completing a theft from the presence of another, Penal Code art. 1408. Section 29.02 restates the art. 1408 elements with some expansion. Robbery may be committed by causing bodily injury, even if it is only recklessly inflicted, Subsection (a)(1), or by knowingly or intentionally threatening or otherwise causing fear of bodily injury, Subsection (a)(2). As in present law, the violence used or threatened must be for the purpose of compelling acquiescence to the theft or of preventing or overcoming resistance to the theft. Violence used or threatened for some purpose unrelated to the theft is a separate offense against the person, e. g., assault under Sections 22.01, 22.-02.

Section 29.02 is broader in scope than the present robbery offense, however, because it applies to violence used or threatened "in the course of committing theft," which is defined in Section 29.01 to include not only violent conduct antecedent to a completed theft, but also violence accompanying an unsuccessful attempted theft and violence accompanying an escape immediately subsequent to a completed or attempted theft. This factor adds two new methods of committing robbery. The first—use or threat of violence in an attempted theft—simply combines into the robbery offense the present separate offense of assault with intent to rob, Penal Code art. 1163. The practical effect is to provide an identical penalty range, which the committee feels is justified because the conduct is equally dangerous whether or not the theft is completed and it is usually fortuitous that the theft falls short of completion. The second—use or threat of force in escaping—broadens the scope of robbery. Here, too, the conduct is as dangerous as force or threats antecedent to the theft. Thus the conduct in Polk v. State, 246 S.W.2d 879 (Tex.Crim.App.1952), for example, would

be robbery rather than simply theft from the person. The expansion is limited to assaults to effect an immediate escape so that a thief who uses force to resist apprehension a week after the theft does not commit robbery, but an assaultive-type offense.

Unlike present law, Section 29.02 does not limit robbery to the taking of property from "the person or possession of another." The requirement of an assault, Subsections (a) (1)–(2), however, implies presence of the victim and thus limits the scope of this expansion. It will apply, for example, when an offender threatens a victim "in order to compel him to telephone directions for the disposition of property located elsewhere." Model P.C. § 222.1, Comment at 70 (Tent.Draft No. 11, 1960).

The claim of right defense to theft, Section 31.10, is applicable to robbery also. Thus one who forcibly acquires property he believes he has a right to acquire does not commit robbery. The committee feels he is less reprehensible than the person who acquires property he knows he has no right to acquire, and that he can be handled satisfactorily under the assault offenses in Chapter 22, to which the claim of right defense is inapplicable.

Section 29.03 aggravates robbery defined in Section 29.02 to a more serious offense if the bodily injury the offender inflicts under Section 29.02(a)(1) is "serious," or if the offender threatens or otherwise causes fear of imminent bodily injury or death under Section 29.02(a)(2) by using a deadly weapon. Here, too, the injury must be inflicted or the weapon used for the purpose of effecting the theft; otherwise, it is an offense against the person and not robbery.

CHAPTER 30. BURGLARY AND CRIMINAL TRESPASS

Section

30.01. Chapter Definitions.
30.02. Burglary.
30.03. Criminal Trespass.
30.04. Preemption.

Section 30.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Habitation" means a structure or vehicle that is adapted for the overnight accommodation of persons, and includes:

(A) each separately secured or occupied portion of the structure or vehicle; and

(B) each structure appurtenant to or connected with the structure or vehicle.

(2) "Owner" means the occupant or, if unoccupied, a person in lawful possession of property.

Committee Comment

See Committee Comment following Section 30.02.

§ 30.02. Burglary

(a) An individual or corporation commits burglary if, without the effective consent of the property owner:

(1) he enters a habitation, or a building (or any portion of a building) not open to the public, with intent to commit a felony or theft; or

(2) he remains concealed, with intent to commit a felony or theft, in a building or habitation; or

(3) he enters a building or habitation and commits or attempts to commit a felony or theft.

(b) For purposes of this section, "enter" means:

(1) intrusion of any part of the body; or

(2) intrusion of any physical object connected with the body.

(c) Burglary is a felony of the second degree unless it was committed in a habitation, in which event it is a felony of the first degree.

Historical Note

Derivation:

§ 30.01(1):
Minn.Stat.Ann. § 609.58, subd. 1(2)
Model P.C. § 221.0(1)
N.H.Prop.Crim.Code § 580:1(III)

§ 30.01(2): New

§ 30.02(a)(1),(2):
Wis.Stat.Ann. § 943.10
Minn.Stat.Ann. § 609.58, subd. 2
Penal Code arts. 1389, 1391

§ 30.02(a)(3): New

§ 30.02(b): Penal Code art. 1393

§ 30.02(c): New

Cross References

Attempt, see § 15.01.
Claim of right, see § 31.10.
Criminal trespass, see § 30.03.
Damage or destruction of property, see §§ 28.03–28.04.
"Effective consent" defined, see § 1.07.
Possession of burglary tools, see § 16.01.
Theft, see ch. 31.

Committee Comment

With this code's addition of a general criminal trespass offense, Section 30.03, and a general attempt offense, Section 15.01, all conduct covered by the various burglary offenses in present law is

punishable as a trespass, as an attempt if the offense intended is not completed, or as the intended, completed offense. Thus burglary as a separate offense could be eliminated without eliminating penal sanctions for any conduct now criminal. A separate burglary offense, however, does perform an important criminological function in addition to its trespassory and attempt functions; it protects against intrusion in places where people, because of the special nature of the place, expect to be free from intrusion. The provision of this protection is the rationale underlying Section 30.-02.

The central elements of the offense continue to be entry or concealment in a building with intent to commit a felony or theft. As in present law, intrusion with intent to commit misdemeanor theft is included in burglary because of the practical impossibility of proving that a trespasser intended to steal property of sufficient value to constitute felony theft. Also as in present law, intrusions with intent to commit a misdemeanor other than theft is not burglary, but unlike present law, those intrusions are now punishable as attempts or trespasses if the intended offense is not completed.

The types of intrusions made burglarious by Section 30.02 are more varied than in present law. As in Penal Code arts. 1389, 1391, a burglarious intrusion may consist either of a prohibited "entry" or of a concealment subsequent to a legal entry. The definition of entry, Section 30.02(b), restates present art. 1393 with two changes. First, it is expanded to cover clearly the introduction of instruments to clear the way for further entry, thus disapproving the holding in Russell v. State, 255 S.W.2d 881 (Tex. Crim.App.1952). Second, the discharge of firearms or other dangerous missiles into a building with intent to injure an occupant, which can be more appropriately treated as an offense or attempted offense against the person under Title 5, is excluded from the definition of enter. Otherwise, the concept of entry is unchanged: the intrusion of any part of the body or of an instrument held by the actor constitutes an entry.

More significant, however, in expanding the scope of burglarious intrusions is the change in the manner and time an intrusion must be made to be a burglary. Presently, a daytime entry may be burglarious only if it is accomplished by a breaking, Penal Code art. 1390, which requires "actual force," art. 1394, while a nocturnal burglary requires entry at night or remaining concealed until night "by force, threats or fraud," arts. 1389, 1391. Section 30.02 eliminates the day—night distinctions; the types of intrusions proscribed are the same, whether made in daylight or at night. The requirement of a breaking, Penal Code art. 1390, or of force, threats, or fraud, arts. 1389, 1391, is also discarded. All intrusions made without the owner's effective consent are burglarious if accompanied by the requisite intent.

The concept of effective consent makes burglarious not only intrusions without consent but also those made with apparent con-

sent if given because of force, threat, or fraud, if given by one whom the actor knows lacks capacity to consent, or if given to detect the commission of an offense, see Section 1.07 (code definitions). This concept broadens burglary to cover, for example, one who enters through an open door, held not a burglarious entry in Milton v. State, 6 S.W. 303 (Tex.Ct.App.1887), or one who enters with consent of the owner or law enforcement officers given to detect an offense, held not burglary in Speiden v. State, 3 Tex.Ct. App. 156 (1877). As in present law, however, one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother-in-law, commits no burglary and can be prosecuted only for the commission or attempted commission of the offense he intended, unless he remains concealed after consent to his presence has terminated. Private offices and other portions of a building not open to the public are covered, however; one who enters a storeroom closed to the public in a store otherwise open to the public (with the requisite intent) commits burglary.

The concealment feature, Section 30.02(a)(2), is derived from present law, Penal Code arts. 1389, 1391, and covers, for example, one who, with the requisite intent, enters a business while it is open to the public and hides until it closes. Section 30.02(a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts a felony or theft. This provision dispenses with the need to prove intent at the time of entry when the actor is caught in the act.

The types of enclosures that, if entered without effective consent and with the requisite intent, may be the subject of burglary differ somewhat from those described in present law. Under Section 30.02 a burglary may occur only in a "building or habitation." "Habitation" is broader than "building" in that it includes vehicles and structures other than buildings, such as house trailers, that are "adapted for the overnight accommodation of persons," Section 30.01 (1). "Habitation" also includes garages and other outbuildings, Section 30.01(1)(B), and "separately secured and occupied portions" of a habitation, to cover those who, while legally in an apartment building or hotel, for example, enter another's room, Section 30.01(1) (A). Entries into vessels, steamboats, railroad cars, Penal Code arts. 1403, 1404, and vehicles, art. 1404b, if they are not adapted for the overnight accommodation of persons, are excluded from burglary; also excluded are coin-operated machines, art. 1402a. Although presently labeled "burglary," entries with the requisite intent into vessels, steamboats, railroad cars, vehicles, and coin-operated machines are treated differently from traditional burglary; the above articles provide different elements and different penalties and are, in reality, different offenses. This code also treats them as separate offenses, but it changes the labels. For example, presently one who "burglarizes" a coin-operated machine may be

punished either as a misdemeanant or as a felon (with a maximum of five years' imprisonment). Under this code the identical conduct may be punished as theft, Section 31.03, or as criminal mischief, Section 28.02, and the actor may be punished as either a misdemeanant or a felon (with a maximum imprisonment of six years), depending on the value of the property stolen or the extent of the damage done to the property. Similarly, intrusions into vehicles, vessels, steamboats, railroad cars, and other structures not adapted for overnight accommodation of persons may be punished as criminal mischief if property is damaged, as a trespass, or for commission or attempted commission of the intended offense, with penalties more appropriate to the harm and more in line with present penalties.

If the actor's intent is the acquisition of property, the claim of right defense to theft, Section 31.10, will also be a defense to burglary. The committee feels that one who believes he has a right to the property deserves less serious penalties and should be prosecuted as a trespasser under Section 30.03.

Because the need for security is most exigent in a "habitation," the committee graded burglary of habitation a first degree felony. Other burglaries are second degree felonies. Other aggravating factors in the present law, such as use of explosives, Penal Code art. 1398, are excluded on the ground that the penalty structure is flexible enough to permit the sentencing authority to weigh all aggravating and mitigating factors in assessing a proper penalty.

Whether a defendant may be punished for both burglary and for offenses committed subsequent to entry, which is presently dealt with in Penal Code arts. 1399, 1405, is determined under Chapter 3 (multiple prosecutions and double jeopardy).

§ 30.03. Criminal Trespass

(a) An individual or corporation commits criminal trespass if:

(1) he enters or remains on property when:

(A) he knows that he does not have the property owner's effective consent to do so; and

(B) he intends, knows, or is reckless about whether his presence will cause fear for the safety of another; or

(2) knowing he does not have the owner's effective consent to do so, he enters or remains on property as to which notice against entering is given by:

(A) personal communication to the actor by the owner or by someone with apparent authority to act for the owner; or

(B) fencing or other enclosure obviously designed to exclude intruders; or

(C) posting reasonably likely to come to the attention of intruders.

(b) It is a defense to prosecution under this section:

(1) that the property was open to the public when the actor entered or remained; and

(2) that the actor's conduct did not substantially interfere with the owner's use of the property.

(c) For purposes of this section, "enter" means intrusion of the entire body.

(b) Criminal trespass is a Class C misdemeanor unless it was committed in a habitation, in which event it is a Class B misdemeanor.

Historical Note

Derivation:
New

Cross References

"Conduct" defined, see § 1.07.
Defense explained, see § 2.03.
"Effective consent" defined, see § 1.07.
"Habitation" defined, see § 30.01.
"Owner" defined, see § 30.01.

Committee Comment

The present Penal Code contains no general trespass offense, although most cities have adopted trespass ordinances. Although the committee believes that most intrusions are more appropriately dealt with by civil law, criminal sanctions are desirable for two particularly offensive types of intrusions: those causing fear for the safety of persons and those threatening the normal serenity of premises.

Subsection (a)(1) supplements the burglary offense. It is based on the belief that an intrusion is rendered no less frightening when the intruder has no felonious intent. If fright is the likely consequence of an intrusion, it should be punished even though the intruder did not intend to commit a felony or theft. Subsection (a)(1) is broader than the burglary offense in that its coverage begins with an intrusion on property rather than into a building. It is narrower than burglary, however, in that the intruder must be reckless about whether his intrusion will cause fear. Because of the latter element, Subsection (a) (1) ordinarily will apply only to trespassers near a habitation, particularly nocturnal trespassers.

Subsection (a)(2) covers the more typical trespass—that which is annoying or offensive, but not necessarily frightening. Subsections (a)(2)(A)–(a)(2)(C) establish the methods of giving notice, one of which the owner must utilize before criminal sanctions apply.

Subsection (b) seeks to eliminate two abuses of the trespass offense that have occurred in other jurisdictions: (1) use of the offense to enforce a private policy of discrimination in public places, cf. Bell v. Maryland, 84 S.Ct. 1814, 378 U.S. 226 (1964); and (2) use of the offense to stifle free expression, cf. Amalgamated Food Employees v. Logan Valley Plaza, 88 S.Ct. 1601, 391 U.S. 308 (1968).

Subsection (c) is designed to distinguish a trespassory entry from a burglarious entry. "Entry" for purposes of the burglary offense applies to buildings and habitations, but a trespassory entry applies to all property and ordinarily will occur well before the actor nears a building. Thus, entry is more narrowly defined to exclude from trespass one who reaches through a fence to retrieve his hat, for example.

Like burglary, the most serious and frightening trespassory intrusions are those that occur in a home. For this reason, trespass is treated more harshly if it occurs in a habitation.

§ 30.04. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Because the Penal Code does not now contain a general trespass offense, municipalities have enacted ordinances prohibiting it and various forms of suspicious loitering, e. g., Dallas City Code §§ 31–39, 31–61 (1967). Section 30.03 (criminal trespass) makes these ordinances unnecessary, and Section 30.04 makes clear the state intends to preempt the area of burglary and trespass and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

The committee purposely excluded loitering-type offenses from the Revised Penal Code, and Section 30.04 ensures that loitering-type conduct may no longer be punished. In addition, of course, the section prohibits local laws conflicting with this chapter, e. g., punishing theft from coin-operated machines, railroad cars, or vehicles; proscribing trespass on particular types of property.

CHAPTER 31. THEFT

Section

31.01. Chapter Definitions.
31.02. Consolidation of Theft Offenses.
31.03. Theft.
31.04. Theft of Service.
31.05. Presumption for Theft by Check.
31.06. Unauthorized Use of Automobile or Other Vehicle.
31.07. Value.
31.08. Aggregation of Amounts Involved in Theft.
31.09. Actor's Interest in Property.
31.10. Claim of Right.
31.11. Preemption.

Section 31.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Coercion" means a threat, however communicated:

(A) to commit any offense; or

(B) to inflict bodily injury in the future on the person threatened or another; or

(C) to accuse any person of any offense; or

(D) to expose any person to hatred, contempt, or ridicule; or

(E) to harm the credit or business repute of any person; or

(F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

(2) "Deception" means:

(A) creating or confirming by words or conduct an impression of law or fact that is likely to affect the judgment of another in the transaction, that is false, and that the actor does not believe to be true; or

(B) failing to correct a false impression of law or fact that is likely to affect the judgment of another in the trans-

action, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true; or

(C) preventing another from acquiring information likely to affect his judgment in the transaction; or

(D) selling or otherwise transferring or encumbering property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid, or is or is not a matter of official record; or

(E) promising performance that is likely to affect the judgment of another in the transaction and that the actor does not intend to perform or knows will not be performed, except that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

(3) "Deprive" means:

(A) to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner; or

(B) to restore property only upon payment of reward or other compensation; or

(C) to dispose of property in a manner that makes recovery of the property by the owner unlikely.

(4) "Effective consent" includes consent by any person legally authorized to act for the owner. Consent is not effective if:

(A) induced by deception or coercion; or

(B) given by a person the actor knows is not legally authorized to act for the owner; or

(C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; or

(D) given solely to detect the commission of an offense.

(5) "Obtain" means to bring about a transfer or purported transfer of a nonpossessory interest in property, whether to the actor or another.

(6) "Owner" means a person other than the actor who has possession of property, or any interest other than a mortgage, deed of trust, or security interest in property, even if the possession or interest is unlawful.

(7) "Property" means:

(A) real property; or

(B) tangible or intangible personal property including anything severed from land; or

(C) a document, including money, that represents or embodies anything of value.

(8) "Service" includes:

(A) labor and professional service; and

(B) telecommunication, public utility, and transportation service; and

(C) lodging, restaurant service, and entertainment; and

(D) the supply of a motor vehicle or other property for use.

(9) "Steal" means to acquire property or service by theft.

Historical Note

Derivation:

Subd. (1):
Ill.Stat.Ann. ch. 38, § 15-5
Cal.Prop.Pen.Code § 2904
Subd. (2):
Ill.Stat.Ann. ch. 38, §§ 15-3, 15-4
Cal.Prop.Pen.Code § 2903
Subd. (3): New
Subd. (4): M.P.C. § 206.1(5) (Tent.Draft No. 1, 1953)
Subd. (5):
N.Y.Rev.Pen.Law § 155.00(2)
Cal.Prop.Pen.Code § 2900(3)
Subd. (6): Ill.Stat.Ann. ch. 38, § 15-2
Subd. (7): New
Subd. (8): N.Y.Rev.Pen.Law § 165.10(1)
Subd. (9): New

Cross References

"Bodily injury" defined, see § 1.07.
"Consent" defined, see § 1.07.
"Harm" defined, see § 1.07.
"Law" defined, see § 1.07.
"Public servant" defined, see § 1.07.
Security agreement, see Business & Commerce Code § 9.105.

Committee Comment

This section contains definitions of terms used throughout the theft chapter. For a discussion of Subdivisions (1)-(7), see the comment to Section 31.03. For a discussion of Subdivision (8), see the comment to Section 31.04.

§ 31.02. Consolidation of Theft Offenses

Theft as defined in Section 31.03 constitutes a single offense superseding the separate offenses previously known as theft, theft by false pretext, conversion by a bailee, theft from the person, shoplifting, acquisition of property by threat, swindling, embezzlement, extor-

tion, receiving or concealing embezzled property, and receiving or concealing stolen property.

Historical Note

Derivation:
Model P.C. § 223.1(1)

Cross References

Actor's interest in property, see § 31.09.
Claim of right, see § 31.10.
Presumption for theft by check, see § 31.05.
Theft, see § 31.03.
Theft of service, see § 31.04.
Unauthorized use of motor vehicle, see § 31.06.

Committee Comment

No part of the Penal Code has produced more confusion, more appellate litigation, and more reversals on technicalities unrelated to the actor's guilt or innocence than the multitude of offenses proscribing criminal acquisitions of another's property. Although the theft offenses attempt to separate guilty from innocent acquisitions, they do so clumsily, and their effect all too often is to embroil the courts in nice questions about the appropriateness of conviction under one offense label as opposed to another. The present distinctions between the various offenses are unnecessary for establishing the point at which acquisitive conduct becomes criminal —that can be done generally—and they provide no rational basis for penalty determinations or for the provision of defenses; they do, however, place unnecessary obstacles before the conviction of the guilty.

For this reason the committee decided to consolidate most of the theft offenses into a single, comprehensive offense aimed at the harm that accompanies the acquisitive conduct, however the acquisition is accomplished. Section 31.02 serves merely to explain and emphasize the intent of the theft section: theft is a single offense with a uniform culpable mental state, a uniform result, uniform penalties, and uniform defenses, all of which focus on culpability rather than, as under present law, whether the state is pursuing the defendant under the appropriate offense label.

Theft of service, still a novelty in the criminal law, is for this reason treated separately in Section 31.04. Driving a motor vehicle without the owner's consent, Section 31.06, is also treated separately because it covers conduct that does not constitute theft.

§ 31.03. Theft

(a) An individual, corporation, or association commits theft if, with intent to deprive the owner of property:

(1) he obtains the property unlawfully; or

(2) he exercises control over the property, other than real property, unlawfully.

(b) Obtaining or exercising control over property is unlawful if:

(1) the actor obtains or exercises control over the property without the property owner's effective consent; or

(2) the property is stolen and the actor obtains or exercises control over the property knowing it was stolen by another.

(c) Theft is:

(1) a Class C misdemeanor if the value of the property stolen was $50 or less;

(2) a Class A misdemeanor if the value of the property stolen was more than $50 but less than $250;

(3) a felony of the third degree if:

(A) the value of the property stolen was $250 or more but less than $10,000; or

(B) regardless of value, the property was stolen from the person of another;

(4) a felony of the second degree if the value of the property stolen was $10,000 or more.

Historical Note

Derivation:

Model P.C. § 206.1 (Tent. Draft No. 1, 1953)

Cross References

Actor's interest in property, see § 31.09.
Aggregation of amounts stolen, see § 31.08.
Attempt, see § 15.01.
Claim of right, see § 31.10.
Credit card abuse, see § 32.31.
Criminal simulation, see § 32.22.
Deceptive business practices, see § 32.42.
"Deprive" defined, see § 31.01.
"Effective consent" defined, see § 31.01.
False statement to obtain property or credit, see § 32.32.
Forgery, see § 32.21.
Fraud in insolvency, see § 32.34.
Fraudulent destruction, removal, or concealment of writing, see § 32.47.
Hindering secured creditors, see § 32.33.
Misapplication of fiduciary property, see § 32.45.
"Obtain" defined, see § 31.01.
Official misconduct, see § 39.01.
"Owner" defined, see § 31.01.
Presumption for theft by check, see § 31.05.
Privilege to investigate theft, see R.C.S. art. 1d, as amended.
"Property" defined, see § 31.01.

Robbery, see §§ 29.02, 29.03.
Securing execution of document by deception, see § 32.46.
"Steal" defined, see § 31.01.
Theft of service, see § 31.04.
Unauthorized use of motor vehicle, see § 31.06.
Value, see § 31.07.

Committee Comment

This section creates a new offense, which, in general terms, encompasses all acquisitive conduct presently made unlawful in several separate offenses. The offense is denominated "theft" primarily because that label is so embedded in our criminal jurisprudence that a new label might confuse and mislead and, secondarily, because it is more descriptive of the proscribed conduct than the other traditional labels.

The new theft offense consists of the following elements: (1) with intent to deprive (2) the owner (3) of property, the actor (4) obtains the property or exercises control over the property (other than real property) (5) unlawfully.

Intent to Deprive

To constitute theft, the actor, at the time he acquires the property, must intend to deprive the owner of the property. The definition of deprive is broad enough to encompass all the dispositional motives recognized in present law. It is not necessary, for example, that the actor intend to benefit himself or another; the only motive necessary is to withhold the benefits from the owner, whether or not the actor or another benefits.

"Deprive" is defined in Section 31.01 to include either a permanent withholding or a prolonged withholding. This changes present law, which requires an intent to withhold permanently, see Ainsworth v. State, 30 S.W.2d 310 (Tex.Crim.App.1930). If the property is still in existence and in the actor's possession, a burden on the state to prove intent never to return it may be too onerous, particularly since the harm to the owner is similar if the benefits of ownership are lost for a substantial period. The length of time necessary to deprive of a "major portion of the value or enjoyment" will, of course, vary according to the property—its useful life and the nature of its usefulness. The meaning of this clause is best left to case-by-case adjudication, but a temporary withholding that does not seriously harm ownership rights will not support a theft conviction.

The definition of "deprive" includes loss of "enjoyment" as well as "value" to cover the situations where the value of the property increases while in the thief's possession and where the value is personal to the owner.

"Deprive" also includes a withholding of property "with intent to restore it only upon payment of reward or other compensation." This restates present law, Dunn v. State, 30 S.W. 227 (Tex.Crim.

App.1895). Present law excludes finders of lost property who expect a reward for its return if they do not intend to withhold it if no reward is given, Martin v. State, 72 S.W. 386 (Tex.Crim.App. 1903), and the definition of "deprive" in Subdivision (3)(B) incorporates this exception by requiring intent to restore *only* upon receipt of a reward.

The definition of "deprive" includes a disposal in a manner that makes the owner's recovery of the property unlikely. This provision relieves the state of the burden of proving that the actor knew the owner would not recover the property—for example, if abandoned. The likelihood of recovery will, of course, depend upon the type of property and the manner of its disposal. An automobile abandoned across the state might present a strong likelihood of recovery, but a sack of money abandoned across town might not.

Owner

Section 31.01 defines "owner" broadly so that the new theft offense protects a deprivation of another's "interest" in the property, whether or not that interest is possessory. This changes present law, which, except for offenses involving conversion, is directed primarily toward interference with rights to possession, Penal Code arts. 1410, 1415. As in art. 1415, an owner may be one whose interest is unlawful; a thief is no less culpable because he stole from another thief. The definition of "owner," however, does not preclude justification to use force to retake one's own property, see Chapter 9 (justification) and Section 31.10 (claim of right defense).

Penal Code arts. 1416 and 1417 now restrict theft by an owner or part owner of his own property to instances where another has a right to possession at the time of the acquisition. The new theft offense, by requiring deprivation from the "owner," and defining owner broadly, will expand the theft responsibility of joint owners and others with part interests in property, see Section 31.09 (actor's interest in property) and comment.

The definition of owner excludes, however, those who have a security interest in property in possession of the debtor, even if legal title is in the secured creditor pursuant to a conditional sales contract or other security agreement. Because a debtor or vendee of secured property usually regards himself as the owner subject only to the obligation to pay the debt, even when the security agreement makes the creditor the owner for civil law purposes, the behavior of debtors and vendees of secured property is not readily amenable to control by theft. Their conduct with respect to secured property and the concomitant protection of secured creditors is accordingly governed by the fraud chapter, e. g., Section 32.33 (hindering secured creditors).

Property

The property subject to theft is defined generally in Section 31.-01 to encompass all the specific items now listed as subject to

being stolen in Penal Code arts. 1418, 1419, 1544, 1546, and 1547. It includes anything capable of being possessed or owned, whether tangible or intangible, and whether inherently valuable or merely representative of something of value.

The only significant change in present law is that property subject to theft under Section 31.03 is expanded to include real property. Because realty is immobile and indestructible, present law does not cover its theft, although fixtures and other things severed from land may be stolen. But see Penal Code art. 1545 (swindling applies to, among other things, "any . . . thing of value," which arguably includes realty). Section 31.03, however, limits the theft of realty to conduct that involves the transfer of title or other interest in land; possession or other exercise of control over land is not theft. The committee believes that unauthorized use, occupation, or other control of realty is not so compelling a problem that the civil remedies cannot adequately handle it. When a trustee or guardian controls another's realty or when an actor acquires an interest by deception or intimidation, however, disposition to a good faith transferee defeats the victim's civil remedies and the actor is no less culpable because he chose to deal in land instead of personalty.

The definition of "property" defines personal property to include both tangible and intangible property and "anything severed from land." Thus fixtures and other things severable but still attached to the land are subject to theft only to the extent the land itself may be stolen, but if they are severed, they become personal property subject to theft in either possessory or nonpossessory transactions. Thus, it is not theft if the actor alters boundary markers to include another's building on his land, but it is if he hauls off a truckload of gravel from another's gravel pit.

Finally, "property" includes money, checks, credit cards, promissory notes, wills, and other documents or writings representing or embodying something of value.

Obtain or Exercise Control

Consolidation of the theft offenses renders too narrow most of the common-law and legislative terms that describe the nature of the acquisition necessary to constitute the various theft offenses. Section 31.03 therefore adopts the terms "obtain" and "exercise control," which, together, are broad enough to embrace all the present terms—"take," "receive," "misapply," "embezzle," or "convert"—although their application is not limited to conduct described by the present terms.

"Obtain," as defined in Section 31.01, is directed at transactions in any legally recognized interest other than possessory interests in property. Although an actor may have possession, he need never actually control the property to commit theft if he causes a transfer or purported transfer of an interest in the property, whether to himself or another. Thus a guardian or trustee commits theft if he transfers or encumbers property he controls for a

beneficiary "with intent to deprive" the beneficiary and in violation of his authority, i. e., without the beneficiary's "effective consent." It is also theft if an actor induces another to transfer or encumber his property by deception or intimidation, although he may never exert control over it.

"Exercising control," on the other hand, is directed primarily at those thefts that involve possession. Thus it covers not only purse snatching, shoplifting, and other thefts by strangers, but also receiving or concealing stolen property and the conduct of persons who possess another's property with consent but exercise their possessory rights in a manner that deprives the owner of the property. A tenant who sells topsoil, for example, exerts control, as does an employee who takes or a bailee who converts, whoever benefits by the bailment. "Exercising control," however, also encompasses conduct that does not involve possession. A shipping clerk who reroutes a package to a friend by substituting a new address label might not have possession, but his conduct constitutes an exercise of control. Anyone who is in a position to take some action that deprives the owner of property is in a position to exercise control.

The distinction between "obtaining" and "exercising control" is imprecise and some thefts will involve both. It is necessary to make the distinction, however, to ensure that transactions involving title and other nonpossessory interests, in addition to possessory transactions, will constitute theft. It also operates to exclude from theft those transactions involving the possession of real estate, such as adverse possession or the tenant who remains after the lease expires but does not pay the rent, transactions that are minutely regulated by civil law.

Unlawfully

Few property transactions do not involve the acquisition of another's property with intent to deprive him of it. Therefore, the central element of the theft offense, the element that separates lawful acquisitive conduct from theft, is the requirement that the acquisition be "unlawful." Section 31.03(b) covers this element.

1. *Effective Consent*

An actor who obtains or exercises control over the property of another with intent to deprive does so unlawfully if he acts without the owner's "effective consent." The concept of "effective consent" is the most farreaching change in present law; it is the concept that unifies the conduct presently covered in several separate offenses. Several theft offenses presently require the absence of the owner's consent, e. g., Penal Code arts. 1410, 1429, 1534, but "effective consent," which is defined in Section 31.01(4), operates to negate consent in some transactions now considered consensual.

a. Deception

The definition of "effective consent" in Section 31.01(4) provides that the victim's consent is vitiated if it is "induced by de-

ception," a term defined in Section 31.01(2). As in the present law of swindling and theft by false pretext, the victim's consent must result from his reliance on the deception when he would not have consented if he knew the truth, cf. Thornton v. State, 352 S.W.2d 742 (Tex.Crim.App.1962); Nickson v. State, 180 S.W.2d 161 (Tex.Crim.App.1944). Thus it is not theft if the victim knows the truth and knows the actor is lying, for example, but nevertheless agrees to the transaction. Moreover, the deception must be intentional and for the purpose of inducing consent, see Section 6.06 (application of culpable mental state).

Conduct that constitutes deception and therefore vitiates consent is defined broadly in Section 31.01(2), because, if the actor intentionally deceives with intent to induce consent, any successful method should be covered. Despite the breadth of the conduct defined as deceptive, however, the definition, with one narrow exception, requires a material deception—one "likely to affect the judgment of another in the transaction"—and imposes no affirmative duty to disclose. Ordinarily, an actor may take advantage of another's misimpression if he did nothing to create or reinforce it. The one exception requires disclosure of liens, security interests, adverse claims, and other legal impediments to enjoyment before transferring or encumbering property, whether or not their existence may affect the other's judgment. Otherwise, an actor deceives only if he takes some affirmative action that conveys a material false impression.

The definition focuses on the most frequent form of deception, a false "impression" intentionally created, rather than any particular misrepresentation. Thus an actor may deceive by disclosing selected truths and omitting others, without a single lie; he may also deceive by his conduct as well as by words, and by reinforcing preexisting misconceptions as well as by creating them. Moreover, the actor need not know that the impression he conveys is false; it is sufficient if he believes it to be untrue, and he cannot escape conviction by refusing to verify the falsity of information he believes to be false.

The definition is limited, however, to false impressions "of law or fact," although it is immaterial whether the law or fact is past, present, or future. Communications of opinion are excluded to avoid criminalizing the common sales practice of "puffing," a practice the public generally expects and discounts. One cannot escape, however, by misrepresenting known facts in opinion form, conduct that is, in reality, a misstatement of fact.

The remaining subdivisions of the definition of "deception" are more specific. Subdivision (B) provides that it is deception when an actor, having created or confirmed a false impression in good faith, subsequently acquires information that leads him to believe the impression false and fails to inform the victim. Although this creates an affirmative duty to disclose, it applies only when the actor previously created or confirmed the victim's misimpression.

Subdivision (C) covers affirmative action to prevent the victim from acquiring relevant knowledge.

Subdivision (D) creates a special disclosure rule for transactions involving the transfer or encumbrance of property. If the actor is aware of a lien, security interest, adverse claim, or other legal impediment to enjoyment, whether valid or not and whether a matter of official record or not, he deceives if he fails to disclose it with intent to induce consent.

The final subdivision creates a special rule for false promises. It is deception to induce consent to a transaction by promising performance the actor does not intend to perform or knows will not be performed. A special evidentiary rule, designed to prevent abuse of this rule in everyday contractual relations, provides that failure to perform the promise in question, without other evidence of intent not to perform, will not support a conviction for theft.

b. Coercion

Section 31.01(4) also provides that consent "induced by . . . coercion" is ineffective. As in the case of deception, consent must result because of the coercion, and the coercive conduct must be intentional and with intent to induce the victim to surrender property. An owner who is not frightened and consents to a transaction for other reasons is not a victim of theft; nor is a person who is frightened by an unintended threat. On the other hand, the definition of "coercion," Section 31.01(1), does not require a material threat, so that an actor cannot avoid conviction by selecting victims who, because of particular sensibilities, are frightened when most people would not be.

The provision that coercion negates consent replaces present Penal Code art. 1409 (acquisition of property by threats), malicious prosecution, and related extortion-type offenses, Penal Code arts. 1268, 1268a, 1298–1301. It is considerably broader than art. 1409, however, in that the threat clearly need not be explicit, but may be implied or communicated in any other effective manner; the harm threatened need not be against the victim, but may be against anyone if it is intended to induce consent; and the threatened harm need not be unlawful—the actor may even have a duty to inflict the harm, but if he threatens it to obtain property he commits theft. The new theft offense is also broader than malicious prosecution and other extortion offenses in that it covers several threatened harms and any means of communicating them. Unlike the new offense, however, the present extortion offenses are complete when the threat is made and the property does not necessarily have to be delivered. A threat that is intended to induce a transfer of property that does not occur, however, will constitute attempted theft under Section 15.01 (criminal attempt).

The types of harm that, if threatened, constitute coercion as defined in Section 31.01(1) cover a broad range of conduct. The first subdivision, (A), provides that it is coercion to threaten com-

mission of "any offense." This, of course, overlaps with robbery, Sections 29.02, 29.03, but it is broader—a threat to commit an offense not involving violence is not robbery. If robbery is applicable, however, the state can elect to prosecute for either robbery or theft, see Vick v. State, 397 S.W.2d 229 (Tex.Crim.App.1965). Subdivision (B) applies to threats to inflict bodily injury "in the future," to distinguish it from robbery. It overlaps the preceding subdivision, but covers conduct that may not be an offense, such as a threat to expose another to a communicable disease.

Subdivision (C) covers the traditional "blackmail" situation, but indicates clearly that the victim's guilt or innocence is irrelevant if the actor's purpose is to compel a transfer of property. Subdivisions (D) and (E) cover threats to defame or to harm business or credit reputation, whether truthful or not, and Subdivision (F) applies to threats by a public official to take or withhold action or threats to cause an official to take or withhold action, such as refusal to grant a qualified person a license. Subdivision (F), to the extent it applies to threats by public servants, overlaps official misconduct, Section 39.02, and bribery, Section 36.02, but if the threat is made for the purpose of acquiring property, the state can elect to prosecute under either offense. If, for example, an official demands $20,000 before acting, the theft penalties may be more appropriate.

The claim of right defense, Section 31.10, excludes some coercive but acceptable conduct, such as a merchant who threatens to report a defaulting debtor to the credit bureau if he refuses to pay his debt.

c. Lack of authority or capacity

Section 31.01(4)(B) provides that consent is ineffective if the person giving it lacked authority to do so and the actor knew it. Similarly, Section 31.01(4)(C) negates consent by drunks who are so intoxicated that their ability to make reasonable decisions is impaired, or by children and incompetents, if the actor knows of the incapacity.

d. Detecting the commission of offense

Section 31.01(4)(D) preserves present law, which provides that an owner who takes steps to encourage a thief for the purpose of detecting the offense does not consent, e. g., Jarrott v. State, 1 S.W.2d 619 (Tex.Crim.App.1927); Crowder v. State, 96 S.W. 934 (Tex.Crim.App.1906). The entrapment defense, Section 8.05, is a more appropriate device for resolving problems that may arise from this type of crime detection.

2. *Receiving Stolen Property*

Section 31.03(b)(2) provides that it is "unlawful" to obtain or exercise control over property the owner knows is stolen; thus the receiver is guilty of theft under Section 31.03. "Receiving" is included out of an abundance of caution rather than out of necessity, because one who obtains or exercises control over property he

knows is stolen does so without the owner's effective consent as clearly as when he physically steals the property himself.

Penalties for Theft

The grading scheme for theft is governed primarily by the value of property. The greater the value of property a thief acquires, the greater degree of disrespect for property rights he evidences. Petty thefts—less than $50—are graded a Class C misdemeanor so they can be handled expeditiously by corporation or justice courts. A special sentencing provision, however, authorizes more serious penalties for the habitual petty thief, see Section 12.44, and Section 31.08 provides for aggregating amounts stolen, under certain circumstances that constitute separate thefts under present law, so that felony penalties are available.

The grading structure departs from the value standard in one situation. Theft from the person, as presently described in Penal Code arts. 1437 and 1438, involves risk of injury to the person and is therefore a third degree felony regardless of the amount stolen.

§ 31.04. Theft of Service

(a) An individual, corporation, or association commits an offense if, with intent to avoid payment for service he knows is provided only for compensation:

(1) he secures performance of the service; or

(2) having control over the disposition of services of others to which he is not entitled, he diverts their services to his own benefit or to the benefit of another not entitled to them.

(b) For purposes of this section, intent to avoid payment is presumed if the actor absconds without paying for the service in circumstances where payment is ordinarily made immediately upon rendering of the service.

(c) An offense under this section is:

(1) a Class C misdemeanor if the value of the service stolen was $50 or less;

(2) a Class A misdemeanor if the value of the service stolen was more than $50 but less than $250;

(3) a felony of the third degree if the value of the service stolen was $250 or more but less than $10,000;

(4) a felony of the second degree if the value of the service stolen was $10,000 or more.

Historical Note

Derivation:

Cal.Prop.Pen.Code § 2907
Model P.C. § 223.7

Cross References

"Association" defined, see § 1.07.
Credit card abuse, see § 32.31.
Presumption explained, see § 2.05.
Presumption for theft by check, see § 31.05.
"Service" defined, see § 31.01.
Theft, see § 31.03.
Value, see § 31.07.

Committee Comment

This section replaces that portion of the present swindling offense, Penal Code art. 1545, that proscribes the acquisition of "services" by fraudulent representation as well as scattered offenses covering specific services, e. g., arts. 1137e, 1137e—1 (telecommunications services), 1137g (using slugs in vending machines), 1551, 1553a (board or lodging), 978o (public official who diverts public labor or services to his own use). "Service" is defined broadly in Section 31.01 to include almost anything that is ordinarily provided for compensation but that was traditionally excluded from theft because it is not classified as "property." Thus, in addition to the services presently protected, such as the provision of food, lodging, entertainment, transportation, communications, and public utilities, the definition includes the provision of labor and professional services and the rental of property.

Section 31.04(a)(1) contemplates the normal theft of services situation where the actor "walks" the bill at a restaurant, uses a slug in a pay telephone, or leaves a rented trailer where it will be found but fails to pay for its rental. Subsection (a)(2) covers a rarer situation, similar to but broader than present art. 978o (use of public property, labor, or service for private profit), where a construction foreman, for example, uses employees under him to build a fence around his home on his employer's time.

Subsection (b) creates a presumption of intent not to pay if the actor leaves without paying for a service that is ordinarily paid for immediately, such as hotel or restaurant services.

§ 31.05. Presumption for Theft by Check

(a) If the actor obtains property or secures performance of service by issuing or passing a check or similar sight order for the payment of money, when the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders then outstanding, his intent to deprive the owner of property under Section 31.03 (theft) or to avoid payment for service under Section 31.04 (theft of service) is presumed (except in the case of a post-dated check or order) if:

(1) he has no account with the bank or other drawee at the time he issues the check or order; or

(2) payment is refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer fails to make good within 10 days after receiving notice of that refusal.

(b) For purposes of Subsection (a)(2), notice may be in writing, sent by registered mail with return receipt requested or by telegram, and addressed to the issuer at his address shown:

(1) on the check or order; or

(2) on the records of the bank or other drawee; or

(3) on the records of the person to whom the check or order has been issued or passed.

(c) If notice is given in accordance with Subsection (b), it is presumed that the notice was received no later than five days after it was sent.

(d) Nothing in this section prevents the state from establishing the requisite intent by direct evidence.

Historical Note

Derivation:
Penal Code art. 567b

Cross References

"Deprive" defined, see § 31.01.
Forgery, see § 32.21.
Issuance of bad check, see § 32.41.
"Obtain" defined, see § 31.01.
Presumption explained, see § 2.05.
"Property" defined, see § 31.01.
"Service" defined, see § 31.01.
Theft, see § 31.03.
Theft of service, see § 31.04.

Committee Comment

This section creates a presumption of intent when theft is accomplished by passing a worthless check, rather than creating a separate offense as in present law, Penal Code art. 567b, to preserve the policy underlying theft consolidation, see Section 31.02 and comment. As in present art. 567b, the presumption arises when payment of the check is refused by the drawee for insufficient funds and, after receiving notice, the actor fails to make the check good. A presumption is added to cover the cases where the actor has no account, in which case notice is not necessary to invoke the presumption.

Unlike present law, the notice of dishonor necessary to invoke the presumption need not be by registered mail or telegram; it

may also be by telephone, regular mail, or personal communication. However, receipt of notice, which must be established to invoke the presumption, will be presumed under Subsection (c) only if notice is sent by registered mail or telegram.

The presumption created by Section 31.05 applies only when a worthless check is used to commit theft. A separate, less serious offense, see Section 32.41 (issuance of bad check), covers other instances of passing worthless checks.

§ 31.06. Unauthorized Use of Automobile or Other Vehicle

(a) An individual, corporation, or association commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
N.Y.Rev.Pen.Law § 165.05(1)
Cal.Prop.Pen.Code § 2909

Cross References

"Association" defined, see § 1.07.
Claim of right, see § 31.10.
"Effective consent" defined, see § 31.01.
"Owner" defined, see § 31.01.
Theft of automobile, see § 31.03.

Committee Comment

Section 31.06 combines and restates present Penal Code arts. 1333 (using boat without consent), 1341 (driving vehicle without consent), and 1342 (unlawful use of state's vehicle) and adds airplanes, which may soon become a problem. It proscribes the use of property without the owner's consent when the actor has no intent to deprive and thus is not guilty of theft.

Boats and airplanes are included, in addition to motor vehicles in general, to cover sailboats and gliders, for example, which do not depend upon a motor for propulsion.

§ 31.07. Value

(a) Subject to the additional criteria of Subsections (b)–(d), value under this chapter is:

(1) the market value of the property or service at the time and place of the offense; or

(2) if the market value of property cannot be ascertained, the cost of replacing the property within a reasonable time after the theft.

(b) The value of documents, other than those having a readily ascertainable market value, is:

(1) the amount due and collectible at maturity less any part that has been satisfied, if the document constitutes evidence of a debt; or

(2) the greatest amount of economic loss that the owner might reasonably suffer by virtue of loss of the document, if the document is other than evidence of a debt.

(c) If property or service has value that cannot be ascertained by the criteria set forth in Subsections (a) and (b), the property or service is deemed to have a value of more than $50 but less than $250.

(d) If the actor gave consideration for or had a legal interest in the property or service stolen, the amount of the consideration or value of the interest shall be deducted from the value of the property or service ascertained under Subsection (a), (b), or (c) to determine value for purposes of this chapter.

Historical Note

Derivation:

Subsecs. (a)-(c): N.Y.Rev.Pen.Law § 155.20

Subsec. (d): Wis.Stat.Ann. § 943.20(2)(c)

Cross References

"Owner" defined, see § 31.01.
"Property" defined, see § 31.01.
"Service" defined, see § 31.01.
"Steal" defined, see § 31.01.

Committee Comment

The present Penal Code contains no standards for determining the value of stolen property or services. The case law, however, has utilized market value and if there is no market value, replacement cost. De La O v. State, 373 S.W.2d 501 (Tex.Crim.App. 1963); Senters v. State, 291 S.W.2d 739 (Tex.Crim.App.1956); Taylor v. State, 272 S.W.2d 893 (Tex.Crim.App.1954). Subsection (a) restates these court-established criteria for valuation.

A recent case, however, has demonstrated the practical impossibility of utilizing market value or cost of replacement to establish satisfactorily a value for some written instruments, see Hancock v. State, 402 S.W.2d 906 (Tex.Crim.App.1966) (computer program). To remedy this inadequacy, Subsection (b)(1) applies to documents evidencing a debt, such as checks, drafts, and promissory notes, and Subsection (b)(2) applies to other valuable documents, such as maps, computer programs, and other industrial or commercial information.

Subsection (c) is also new to Texas penal law. It is designed to ensure some criminal sanction in the rare case in which a victim obviously is deprived of value, but it is impossible to set a satisfactory valuation. The committee determined, however, that if the value cannot be determined the thief should not be branded a felon. Thus, the value is deemed to be less than $250.

Subsection (d) changes the present law as enunciated in La Moyne v. State, 111 S.W. 950 (Tex.Crim.App.1908), which denied credit, in determining the grade of theft, for the consideration the thief gave for the property in question.

§ 31.08. Aggregation of Amounts Involved in Theft

Amounts stolen pursuant to one scheme or course of conduct, whether from the same or several owners and whether at the same or different times, constitute a single criminal episode and may be aggregated in determining the grade of the offense.

Historical Note

Derivation:

Conn.Gen.Stat. § 53-123(b)
Cal.Prop.Pen.Code § 2901(2)(e)

Cross References

Compulsory joinder, see § 3.02.
"Conduct" defined, see § 1.07.
Counts, see C.C.P. art. 21.24, as amended.
"Criminal episode" defined, see ch. 3.
Multiple sentences prohibited, see § 3.03.
"Owner" defined, see § 31.01.
Separate verdict for each count, see C.C.P. art. 37.07, as amended.
"Steal" defined, see § 31.01.
Value, see § 31.07.

Committee Comment

The common law restricted the scope of a theft to a single victim and a single time and place; if more than one victim or more than one time was involved, more than one theft was committed. The Texas Court of Criminal Appeals has relaxed the common-law requirements only slightly in stating that "When several articles or things in bulk are taken by continuous acts, there being one purpose, one impulse, the act is one without regard to time," Cody v. State, 20 S.W. 398 (Tex.Crim.App.1892).

This section represents a more substantial departure from the common law. It provides that, if an actor adopts and pursues a single "scheme or course of conduct" for acquiring property or services in a manner that constitutes theft, he may be convicted of a felony even though he was careful to limit the theft from each individual to a misdemeanor amount. This provision reflects the

committee's determination that the reprehensibility of an actor, and thus the appropriate penal sanction, is not necessarily determined by the amount he steals at a single moment from a single person. A swindler who sells 1,000 one dollar tickets to a nonexistent charitable function, for example, evidences the same disrespect for property rights as the embezzler who takes $1,000 from his employer or the car thief who steals a $1,000 automobile. Each intends to acquire valuable property illegally, and although the swindler harms no individual victim significantly, his harm to society is as great as that of the embezzler and the car thief.

Section 31.08 also defines a series of thefts pursuant to a single scheme or course of conduct as constituting a single "criminal episode," a term defined in Section 3.01. This invokes the provisions of Chapter 3 (multiple prosecutions and double jeopardy), which ordinarily require the state to join each offense of a single criminal episode in a single prosecution. The concept of a "criminal episode" is discussed in the comment to Section 3.01.

§ 31.09. Actor's Interest in Property

It is no defense to prosecution under this chapter that the actor has an interest in the property or service stolen if another person also has an interest that the actor is not entitled to infringe.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 16-4
Cal.Prop.Pen.Code § 2900(5)

Cross References

Hindering secured creditors, see § 32.33.
"Owner" defined, see § 31.01.
"Property" defined, see § 31.01.
"Service" defined, see § 31.01.
"Steal" defined, see § 31.01.
Value, see § 31.07.

Committee Comment

Section 31.01 defines "owner" for purposes of this chapter to include any interest, including possessory interests, but excluding nonpossessory security interests, that a person may have in property. Under this definition, many people, including the thief, will frequently be "owners" of the property stolen. Section 31.09 seeks to clarify the theft responsibility of an owner when others also have an interest in the property. It declares that one of several owners cannot obtain or exercise control over the property without the other owner's consent and with intent to deprive them of their interests if their interests are of a type he has no right to infringe.

This section expands the present theft protection of multiple interests, which under present law is fragmented and inconsistent.

Embezzlement and conversion protect specified owners against the conduct of others with an interest; crimes governing the conduct of possessors of secured property protect others; but generally the criminal law protects one with a joint interest in property from the conduct of other joint owners only if he alone has the right to possession. See Penal Code arts. 1416, 1417. Thus some conduct by a joint owner can escape criminal sanction even though he deprives other owners of valuable interests, e. g., Hall v. State, 279 S. W. 464 (Tex.Crim.App.1926) (partner in possession cannot commit theft). Section 31.09 removes any doubt about the penal responsibility of partners, tenants-in-common, and owners of joint bank accounts, for example. It will also apply, for example, to an actor who surreptitiously takes his automobile from a mechanic who is holding it subject to a lien for repairs.

§ 31.10. Claim of Right

It is a defense to prosecution under this chapter that the actor:

(1) acted under an honest claim of right to the property or service involved; or

(2) acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did; or

(3) obtained or exercised control over property or service honestly believing that the owner, if present, would have consented.

Historical Note

Derivation:

Cal.Prop.Pen.Code § 2901(3)

Cross References

Defense explained, see § 2.03.
Ignorance or mistake of fact or law, see § 8.02.
"Obtain" defined, see § 31.01.
"Owner" defined, see § 31.01.
"Property" defined, see § 31.01.
Secured creditor's right to recover on default, see Business & Commerce Code § 9.503.
"Service" defined, see § 31.01.

Committee Comment

The object of the theft offense is to deter those who would acquire something of value knowing that they have no right to it. "Persons who take only what they believe themselves entitled to constitute no significant threat to our property system and manifest no character trait worse than ignorance." Model P.C. § 206.-10, Comment at 98 (Tent.Draft No. 2, 1954). This position is reflected in Texas case law, which has established that a genuine be-

lief in one's legal right to acquire something of value or an honest intent to pay for it is a defense to prosecution for theft, Pyles v. State, 136 S.W. 464 (Tex.Crim.App.1911); Darnell v. State, 63 S. W. 631 (Tex.Crim.App.1901); Young v. State, 30 S.W. 238 (Tex. Crim.App.1895).

Section 31.10 restates this existing case law. Subdivision (1) provides a defense for persons who believe that they own the property, that the owner or person they believe to be the owner consented, or that no one owns the property. Subdivision (2) exonerates a person who believes he has the right to acquire something as he does, such as taking property to satisfy or secure an unsecured debt. Subdivision (3) applies, for example, when a person takes something displayed for sale with intent to pay for it.

The claim of right defense is included despite the general ignorance or mistake defense, Section 8.02, because mistake may not negate intent, particularly the kind contemplated by Section 31.-10(2), see generally Green v. State, 221 S.W.2d 612 (Tex.Crim. App.1949).

Although the claim of right defense will exculpate one who believes he has a right to the property from a charge of theft, it does not apply to other offenses committed to acquire the property. Thus, one who uses force or threats of force may be guilty of assault, and one who enters private property may be guilty of trespass.

§ 31.11. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Municipal ordinances presently conflict with and overlap state law in the theft area. The Austin Municipal Code (1967), for ex-

ample, punishes the refusal or failure to pay a taxicab fare, § 34-39, and the Dallas City Code (1967) prohibits refusal or failure to pay for one's food in a restaurant, § 31-42. These ordinances exist even though state law prohibits the same conduct, Penal Code arts. 1545-1551, 1553a. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, Section 31.11 makes clear the state intends to preempt the area of theft and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Chapter 31 creates a consolidated theft offense, designed to forbid every unlawful acquisition of property by whatever means. It purposely abolishes the distinctions between methods of acquisition, and governmental subdivisions and agencies are thus prohibited from enacting or enforcing laws punishing shoplifting or receiving stolen property, for example. Local laws changing the value cutoff between felony and misdemeanor theft, or redefining joyriding, are of course also prohibited because in conflict with the provisions of this chapter.

CHAPTER 32. FRAUD

SUBCHAPTER A. GENERAL PROVISIONS

Section
32.01. Chapter Definitions.
32.02. Value.
32.03. Aggregation of Amounts Involved in Fraud.

SUBCHAPTER B. FORGERY

32.21. Forgery.
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SUBCHAPTER C. CREDIT

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32.32. False Statement to Obtain Property or Credit.
32.33. Hindering Secured Creditors.
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32.35. Receiving Deposit, Premium, or Investment in Failing Financial Institution.

SUBCHAPTER D. OTHER DECEPTIVE PRACTICES

32.41. Issuance of Bad Check.
32.42. Deceptive Business Practices.
32.43. Commercial Bribery.
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32.45. Misapplication of Fiduciary Property or Property of Financial Institution.
32.46. Securing Execution of Document by Deception.
32.47. Fraudulent Destruction, Removal, or Concealment of Writing.

SUBCHAPTER A. GENERAL PROVISIONS

Section 32.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

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

(2) "Owner" means a person other than the actor who has possession of property, or any interest other than a mortgage, deed of trust, or security interest in property, even if the possession or interest is unlawful.

(3) "Property" means:

(A) real property; or

(B) tangible or intangible personal property including anything severed from land; or

(C) a document, including money, that represents or embodies anything of value.

(4) "Service" includes:

(A) labor and professional service; and

(B) telecommunication, public utility, and transportation service; and

(C) lodging, restaurant service, and entertainment; and

(D) the supply of a motor vehicle or other property for use.

(5) "Steal" means to acquire property or service by theft.

Committee Comment

See Committee Comment following Section 32.03.

§ 32.02. Value

(a) Subject to the additional criteria of Subsections (b)–(d), value under this chapter is:

(1) the market value of the property or service at the time and place of the offense; or

(2) if the market value of property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense.

(b) The value of documents, other than those having a readily ascertainable market value, is:

(1) the amount due and collectible at maturity less any part that has been satisfied, if the document constitutes evidence of a debt; or

(2) the greatest amount of economic loss that the owner might reasonably suffer by virtue of loss of the document, if the document is other than evidence of a debt.

(c) If property or service has value that cannot be ascertained by the criteria set forth in Subsections (a) and (b), the property or service is deemed to have a value of less than $250.

(d) If the actor gave consideration for or had a legal interest in the property or service stolen, the amount of the consideration or the value of the interest shall be deducted from the value of the property or service ascertained under Subsection (a), (b), or (c) to determine value for purposes of this chapter.

Committee Comment

See Committee Comment following Section 32.03.

§ 32.03. Aggregation of Amounts Involved in Fraud

Amounts obtained in violation of this chapter pursuant to one scheme or course of conduct, whether from the same or several sources and whether at the same or different times, constitute a single criminal episode and may be aggregated in determining the grade of the offense.

Historical Note

Derivation:

§ 32.01(1): Model P.C. § 223.0(2)
(2): Ill.Stat.Ann. ch. 38, § 15-2
(3): New
(4): N.Y.Rev.Pen.Law § 165.10(1)
(5): New
§ 32.02(a)-(c): N.Y.Rev.Pen.Law § 155.20
(d): Wis.Stat.Ann. § 943.20(2)(c)
§ 32.03: Cal.Prop.Pen.Code § 2901(2)(e)

Cross References

Compulsory joinder, see § 3.02.
Counts, see C.C.P. art. 21.24, as amended.
"Criminal episode" defined, see ch. 3.
"Property" defined, see § 32.01.
Separate verdict for each count, see C.C.P. art. 37.07, as amended.
"Service" defined, see § 32.01.
Theft, see ch. 31.
Value, see § 32.02.

Committee Comment

Except for "financial institution," all the terms in Section 32.01 have the same definitions as those set out in Chapter 31 (theft)

and are discussed in the comments to that chapter. The definition of "financial institution" should be read in the context of the sections in which it is used, e. g., 32.35 (receiving deposit in failing financial institution) and 32.45 (misapplication of property of financial institution).

Sections 32.02 (value) and 32.03 (aggregation of amounts involved in fraud) track their counterparts in the theft chapter and are explained in the comments to Sections 31.07 and 31.08.

SUBCHAPTER B. FORGERY

Section 32.21. Forgery

(a) An individual, corporation, or association commits an offense if he forges a writing with intent to defraud or harm another.

(b) For purposes of this section:

(1) "Forge" means:

(A) to alter, make, complete, execute, or authenticate any writing so that it purports:

(i) to be the act of another who did not authorize that act; or

(ii) to have been executed at a time or place or in a numbered sequence other than was in fact the case; or

(iii) to be a copy of an original when no such original existed; or

(B) to issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of Subdivision (A); or

(C) to possess a writing that is forged within the meaning of Subdivision (A) with intent to utter it in a manner specified in Subdivision (B).

(2) "Writing" includes printing or any other method of recording information; money, coins, tokens, stamps, seals, credit cards, badges, trademarks; and symbols of value, right, privilege, or identification.

(c) Except as provided in Subsections (d) and (e), an offense under this section is a Class A misdemeanor.

(d) An offense under this section 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 a state or national government or by a subdivision of either, or part of an issue of stock, bonds, or other instruments representing interests in or claims against any other person.

(e) An offense under this section is a felony of the third degree if the writing is or purports to be a will, codicil, deed, deed of trust, mortgage, security instrument, security agreement, credit card, check or similar sight order for payment of money, contract, release, or other commercial instrument.

Historical Note

Derivation:

N.Y.Rev.Pen.Law §§ 170.05–170.30
Model P.C. § 224.1

Cross References

"Act" defined, see § 1.07.
"Association" defined, see § 1.07.
Credit cards, see § 32.31.
Criminal simulation, see § 32.22.
"Government" defined, see § 1.07.
"Harm" defined, see § 1.07.
Theft, see ch. 31.

Committee Comment

This section consolidates a number of provisions covering forgery of different kinds of documents, e. g., Penal Code arts. 979–998, and 1006–1011. The new section also includes counterfeiting, presently in arts. 1012–1017. The broad definition of writing in Subsection (b)(2) achieves these results as well as coverage of miscellaneous items such as drug prescriptions.

Subsection (b)(1) retains the three kinds of criminal acts in the present law: (1) altering or making, (2) uttering, and (3) possessing with intent to utter. The scienter requirement of intent to defraud (Penal Code arts. 979, 984) is carried forward, but an alternative scienter requirement is added in terms of intent to harm.

Article 985 of the Penal Code generally limits forgery to acts which injure a victim pecuniarily or in relation to his property. By virtue of the definition of "harm," Section 32.21 extends the offense to nonmonetary and nonproperty injuries.

The most severe penalties are applied by Subsection (d) to the counterfeiting of money and government and corporate securities. The latter are included because of their wide circulation and potentially high value. The middle penalties are provided by Subsection (e) for documents of commerce and property transfer. This system supplants the present law that reserves the highest penalties for instruments affecting land and for bills of lading, Penal Code art. 1006; Business & Commerce Code § 35.19.

Forgery is a traditional offense which deserves to remain in the penal code. But it is a form of deception which partially overlaps Section 31.03 (theft) if the forgery is used to obtain property, and Section 31.04 (theft of services) if used to obtain services.

§ 32.22. Criminal Simulation

(a) An individual, corporation, or association commits criminal simulation if, with intent to defraud or harm another:

(1) he makes or alters an object, in whole or part, so that it appears to have value because of age, antiquity, rarity, source, or authorship that it does not have; or

(2) he sells, passes, or otherwise utters an object so made or altered; or

(3) he possesses an object so made or altered, with intent to sell, pass, or otherwise utter it; or

(4) he authenticates or certifies an object so made or altered as genuine or as different from what it is.

(b) Criminal simulation is a Class A misdemeanor.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 170.45
Model P.C. § 224.2

Cross References

"Association" defined, see § 1.07.
Forgery, see § 32.21.
"Harm" defined, see § 1.07.
Theft, see ch. 31.

Committee Comment

The forging of archaeological objects and antiquities is presently made criminal by R.C.S. art. 6145—9, §§ 14, 17 (antiquities code), but there is no specific criminal statute applicable to the forgery of paintings, sculptures, or similar modern art objects. Nor are they covered by Section 32.21, which is limited to forgery of "writings," even though that term is broadly defined. The proliferation of fake art indicates the need for a provision like Section 32.22, which comprehensively extends to ancient and modern works of art or rarity.

The section parallels Section 32.21 (forgery) in its scienter requirements and in its delineation of the offense as (1) altering or making, (2) uttering, or (3) possessing with intent to utter. Moreover, in Subsection (a)(4), it reaches the "expert" on whose authentication major art works are customarily sold.

Honest repairs and restorations of art objects are not covered by the section since the necessary intent is lacking. Appropriate disclosure of the repairs or restorations will protect restorers and dealers from possible charges under this section.

Like forgery of a writing, forgery of an art object may be theft under Section 31.03.

SUBCHAPTER C. CREDIT

Section 32.31. Credit Card Abuse

(a) An individual, corporation, or association commits an offense if:

(1) with intent to obtain property or service, he uses a credit card with knowledge that:

(A) the card, whether or not expired, has not been issued to him and is not used with the effective consent of the cardholder; or

(B) the card has been revoked or cancelled; or

(2) with intent to obtain property or service, he uses the pretended number or description of a fictitious credit card; or

(3) with intent to defraud or harm any person, he uses an expired credit card to obtain property or service; or

(4) he receives property or service that he knows has been obtained in violation of Subsection (a)(1), (a)(2), or (a)(3); or

(5) he steals a credit card or, with knowledge that it has been stolen, receives a credit card, with intent to use it, or to sell it, or to transfer it to a person other than the issuer or the cardholder; or

(6) he buys a credit card from a person whom he knows is not the issuer; or

(7) not being the issuer, he intentionally or knowingly sells a credit card; or

(8) he intentionally or knowingly uses or induces the cardholder to use the cardholder's credit card to obtain property or service for the actor's benefit for which the cardholder is financially unable to pay; or

(9) not being the cardholder, and without effective consent of the cardholder, he signs or writes his name or the name of another on a credit card with intent to use it; or

(10) he possesses two or more incomplete credit cards that have not been issued to him with intent to complete them without the effective consent of the issuer. For purposes of this subdivision, a credit card is "incomplete" if part of the matter that an issuer requires to appear on the credit card before it can be used (other than the signature of the cardholder) has not yet been stamped, embossed, imprinted, or written on it.

(b) It is presumed that a person who uses a revoked or cancelled credit card has knowledge that the card has been revoked or cancelled

if he has received notice of revocation or cancellation from the issuer. For purposes of this subsection, "notice" includes either notice given orally in person or by telephone, or in writing by mail or by telegram. If written notice was sent by registered or certified mail with return receipt requested, or by telegram, addressed to the cardholder at the last address shown by the records of the issuer, it is presumed that the notice was received by the cardholder no later than five days after sent.

(c) For purposes of this section:

(1) "Cardholder" means the person named on the face of a credit card to whom or for whose benefit the credit card is issued.

(2) "Credit card" means an identification card, plate, coupon, book, number, or any other device authorizing a designated person or bearer to obtain property or service on credit. It includes the number or description of the device if the device itself is not produced at the time of ordering or obtaining the property or service.

(3) "Expired credit card" means a credit card bearing an expiration date on it, after that date has passed.

(d) Except as provided in Subsections (e), (f), and (g), an offense under this section is a Class A misdemeanor.

(e) An offense under Subsection (a)(1), (a)(2), or (a)(3) is a felony of the third degree if the value of the property or service obtained was $250 or more.

(f) An offense under Subsection (a)(5) or (a)(6) is a felony of the third degree if the state alleges and proves that during any consecutive 12-month period the actor stole or received, under Subsection (a)(5), or bought, under Subsection (a)(6), two or more credit cards issued in the names of two or more other persons.

(g) An offense under Subsection (a)(10) is a felony of the third degree.

Historical Note

Derivation:

Penal Code arts. 1555b, 1555c
Ill.Stat.Ann. ch 38, § 17-1
Wis.Stat.Ann. § 943.41
Ga.Code Ann. § 26-1705
Model P.C. § 224.6

Cross References

"Association" defined, see § 1.07.
"Benefit" defined, see § 1.07.
Criminal instruments, see § 16.01.
"Effective consent" defined, see § 1.07.
Forgery, see § 32.21.
Presumption explained, see § 2.05.
"Steal" defined, see § 32.01.
Theft, see ch. 31.

Committee Comment

This section is largely a restatement of Articles 1555b and 1555c of the Penal Code with the following changes:

(1) An overall change is the elimination of the requirement of intent to defraud, except in the use of expired cards. The purpose is to specify with more particularity the culpable mental state required. In effect, Section 32.31 states exactly what present law really meant by "intent to defraud" in each of the situations covered.

(2) Subsection (a)(2) adds coverage for the use of fictitious credit cards and is based on the Illinois and Wisconsin statutes.

(3) Forgery of credit cards, see Penal Code art. 1555c(7), is covered by Section 32.21 (forgery).

(4) A person who is authorized by an issuer to honor credit cards and who does so, knowing that the card is forged, expired, revoked, or cancelled, see Penal Code art. 1555c(10) (a), is a party to an offense under this section by virtue of Chapter 7, Subchapter A (complicity).

(5) A person who is authorized to honor credit cards and who knowingly fails to furnish property or services which he represents to the issuer have been furnished, see Penal Code art. 1555c(10)(b), has committed theft under Chapter 31.

(6) That portion of Penal Code art. 1555c(11) which applies to possession of machinery, plates, or any other contrivance designed to reproduce instruments purporting to be the credit cards of an issuer who has not consented to the preparation of such credit cards is covered by Section 16.01 (criminal instruments).

(7) Penal Code art. 1555c(9)(b) appears to require that notice of revocation be made by registered or certified mail, return receipt requested. This seems an unreasonable requirement, but it would be helpful and certainly not unreasonable to provide a presumption of notice in such cases—as does Section 32.31(b).

(8) Subsection (f) is based largely on Penal Code art. 1555c (6) and is aimed at "dealers" in credit cards issued by others. The greater punishment for "dealers" is clearly justified, and receipt during a 12-month period of two or more cards issued in the names of other persons is appropriate evidence of "dealing."

(9) Penal Code art. 1555b(5), allowing service of process and compensation of witnesses as though the offense were a felony, is no longer required in view of C.C.P. art. 24.16.

§ 32.32. False Statement to Obtain Property or Credit

(a) An individual, corporation, or association commits an offense if he intentionally, knowingly, or recklessly makes a materially false or misleading written statement to obtain property or credit for himself or another.

(b) For purposes of this section, "credit" includes:

(1) a loan of money; and

(2) furnishing property or service on credit; and

(3) extending the due date of an obligation; and

(4) comaking, endorsing, or guaranteeing a note or other instrument for obtaining credit; and

(5) a line or letter of credit; and

(6) a credit card, as defined in Section 32.31 (credit card abuse).

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
New

Cross References

"Association" defined, see § 1.07.
"Property" defined, see § 32.01.
Theft, see ch. 31.

Committee Comment

Penal Code art. 1546a presently creates somewhat overlapping offenses for using a false statement of financial condition to obtain property or credit, or a false instrument of any sort to obtain credit in the transfer or improvement of real estate. Section 32.32 applies to any materially false statement, financial or otherwise, for obtaining credit or property. The new section, like art. 1546a, is limited to statements in writing. Credit is broadly defined in Subsection (b). Subsection (b)(4) includes the act of a comaker, endorser, or guarantor who gives a form of credit by signing the borrower's note. If his signature has been procured by a false or misleading statement, he is exposed to loss much like the primary creditor, and deserves similar protection.

The offense may be committed by making a statement about oneself or about another. There is no requirement that the statement be given directly to the prospective creditor. Thus, a statement to a financial reporting agency or to a credit rating agency would be covered if shown to be for the purpose of obtaining credit or property. It is not an element of the offense that the property or credit be obtained; if it is obtained there may be theft under Chapter 31.

The false or misleading statement must be material. The proper test of materiality is what would be important to a reasonable person in transferring property or granting credit. There is no requirement of reliance.

§ 32.33. Hindering Secured Creditors

(a) An individual, corporation, or association who has signed a security agreement creating a security interest in property or a mortgage or deed of trust creating a lien on property commits an offense if, with intent to hinder enforcement of that interest or lien, he destroys, removes, conceals, encumbers, transfers, or otherwise harms or reduces the value of the property.

(b) For purposes of this section:

(1) "Remove" means transport, without the effective consent of the secured party, from the state in which the property was located when the security interest or lien attached.

(2) "Security interest" means an interest in personal property or fixtures that secures payment or performance of an obligation.

(c) For purposes of this section, a person is presumed to intend to hinder enforcement of the security interest or lien if he fails, when any part of the debt secured by the security interest or lien is due either:

(1) to pay the part then due; or

(2) to deliver possession of the property on demand by the secured party.

(d) Except as provided in Subsection (e), an offense under this section is a Class A misdemeanor.

(e) If the actor removes the property, the offense is a felony of the third degree.

Historical Note

Derivation:

Business & Commerce Code §§ 25.01, 25.02
Ga.Stat.Ann. § 26-1707
Model P.C. § 224.10

Cross References

"Association" defined, see § 1.07.
Criminal mischief, see § 28.03.
"Effective consent" defined, see § 1.07.
"Harm" defined, see § 1.07.
Extradition, see C.C.P. art. 51.13.
Presumption explained, see § 2.05.
"Property" defined, see § 32.01.
Reckless damage, see § 28.04.

Committee Comment

This section derives from Business & Commerce Code §§ 25.01 and 25.02, but is somewhat broader in its choice of verbs. It is

narrower in that it does not outlaw refusal by the debtor to reveal the location of the property (although this may violate Section 32.-34); nor does it make the debtor's concealment of himself an offense. Removal of the property from the county is no longer a crime; county boundaries have lost their significance with better and faster transportation. But removal from the state (without the creditor's consent) remains an offense, and is a felony subject to extradition. This often helps the creditor recover the property.

Mortgaged crops, which are specifically mentioned in Business & Commerce Code § 25.02, are included in the new section because of the definition of "property" in Section 32.01. Indeed, the definition is broad enough to include a house removed from mortgaged land.

A parallel offense, intended primarily to protect unsecured creditors, appears as Section 32.34.

§ 32.34. Fraud in Insolvency

(a) An individual, corporation, or association commits an offense if, when proceedings have been or are about to be instituted for the appointment of a trustee, receiver, or other person entitled to administer property for the benefit of creditors, or when any other assignment, composition, or liquidation for the benefit of creditors has been or is about to be made:

(1) he destroys, removes, conceals, encumbers, transfers, or otherwise harms or reduces the value of the property with intent to defeat or obstruct the operation of a law relating to administration of property for the benefit of creditors; or

(2) he intentionally falsifies any writing or record relating to the property, or any claim against the debtor; or

(3) he intentionally misrepresents or refuses to disclose to a trustee or 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 that the actor could legally be required to furnish in relation to the administration.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 185.00
Model P.C. § 224.11

Cross References

Assignment for creditors, Business & Commerce Code §§ 23.01–23.33.
"Association" defined, see § 1.07.
Exemptions from forced sale, see R.C.S. arts. 3832–3840.

"Harm" defined, see § 1.07.
"Law" defined, see § 1.07.
Liquidation of bank or trust company, see R.C.S. arts. 342—801 through 342—816.
Liquidation of corporation, see R.C.S. arts. 1302—5.14 through 1302-5.19; Business Corporation Act art. 7.06.
Liquidation of credit union, see R.C.S. arts. 2461—35, 2461—36.
Liquidation of insurance company, see Insurance Code art. 21.28.
Petition for bankruptcy adjudication, see 11 U.S.C.A. § 95.
"Property" defined, see § 32.01.
Receiver, see R.C.S. arts. 2293-2319.
Receiver for corporation, see R.C.S. art. 1302—5.15; Business Corporation Act arts. 7.04-7.08.
Receiver for life, health, and accident insurance company, see Insurance Code art. 3.60.
Receiver for savings and loan association, see R.C.S. art. 852a, § 8.16.
Trustee in bankruptcy, see 11 U.S.C.A. § 72.

Committee Comment

This section is new to the state's criminal law although there have long been civil statutes voiding fraudulent conveyances, see Business & Commerce Code §§ 24.01-24.05, and Penal Code art. 1537 applies to assignors who conceal or transfer property. Broader criminal provisions, roughly comparable to this section, operate in federal bankruptcy proceedings by virtue of 18 U.S.C.A. § 152.

The offenses created by this section may be committed by the debtor or anyone else who does one of the specified acts. There are three broad classes of prohibited acts in Subsection (a): (1) disposition of or injury to the debtor's property, (2) falsification of property records or claims against the debtor, and (3) suppression of information. The prohibitions relating to property do not apply to property which is exempt from claims of creditors. This is explicit in Subsection (a)(3) since the property is not subject to administration. It is implicit in Subsection (a)(1) since there would be no obstruction of law if the property were not subject to administration. And it is implicit in Subsection (a)(2) where "the property" refers back to property subject to administration in Subsection (a).

The cross reference column lists a number of Texas statutes on receivers and liquidations. The list is not all-inclusive. Moreover, it does not include federal provisions which apply to various federally insured or otherwise federally regulated institutions. A receivership or liquidation under any of these laws is within the contemplation of this section.

Section 32.33, dealing with secured or mortgaged property, parallels Subsection (a) (1) of this section.

§ 32.35. Receiving Deposit, Premium, or Investment in Failing Financial Institution

(a) An officer, manager, or other person directing or participating in the direction of a financial institution commits an offense if he receives or permits the receipt of a deposit, premium payment, or investment in the institution knowing that, due to the financial condition of the institution:

(1) it is unable to make payment of the deposit on demand, if it is a deposit ordinarily payable on demand; or

(2) it is about to suspend operations or go into receivership.

(b) It is a defense to prosecution under this section that the person making the deposit, premium payment, or investment was adequately informed of the financial condition of the institution.

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 17-1(b)
Model P.C. § 224.12

Cross References

"Association" defined, see § 1.07.
Defense explained, see § 2.03.
"Financial institution" defined, see § 32.01.
Receiver, see R.C.S. arts. 2293–2319.
Receiver for corporation, see R.C.S. art. 1302—5.15; Business Corporation Act arts. 7.04–7.08.
Receiver for insurance company, see Insurance Code art. 21.28.
Receiver for life, health and accident insurance company, see Insurance Code art. 3.60.
Receiver for savings and loan association, see R.C.S. art. 852a, § 8.16.

Committee Comment

Penal Code art. 565 is analogous to this section, but applies only to private (unincorporated) banks; there is no penal provision of this nature governing the great majority of banks (which are incorporated) nor other financial institutions.

The purpose of the section is to protect the public by deterring the acceptance of depositors', policyholders', or investors' money by financial institutions on the brink of insolvency, when the risk of loss of the money is unusually high. The offense is limited to managerial personnel with the specified knowledge, and does not extend to ministerial employees such as tellers. There is a defense if the depositor, policyholder, or investor is adequately informed and nonetheless chooses to proceed, for example, as a stockholder seeking to shore up the institution.

The cross references column lists a number of Texas statutes on receivers. The list is not all-inclusive. Moreover, it does not include federal provisions which apply to various federally insured or otherwise federally regulated institutions. A receivership under any of these laws is within the contemplation of this section.

SUBCHAPTER D. OTHER DECEPTIVE PRACTICES

Section 32.41. Issuance of Bad Check

(a) An individual, corporation, or association commits an offense if he issues or passes a check or similar sight order for the payment of money knowing that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance.

(b) This section does not prevent the prosecution from establishing the required knowledge by direct evidence. However, for purposes of this section, the issuer's knowledge of insufficient funds is presumed (except in the case of a postdated check or order) if:

(1) he has no account with the bank or other drawee at the time he issues the check or order; or

(2) payment is refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer fails to make good within 10 days after receiving notice of that refusal.

(c) Notice for purposes of Subsection (b)(2) may be notice in writing, sent by registered or certified mail with return receipt requested or by telegram, and addressed to the issuer at his address shown:

(1) on the check or order; or

(2) on the records of the bank or other drawee; or

(3) on the records of the person to whom the check or order has been issued or passed.

(d) If notice is given in accordance with Subsection (c), it is presumed that the notice was received no later than five days after it was sent.

(e) An offense under this section is a Class C misdemeanor.

Historical Note

Derivation:

Penal Code art. 567b
Model P.C. § 224.5

Cross References

"Association" defined, see § 1.07.
Presumption explained, see § 2.05.
Theft by check, see §§ 31.03, 31.05.

Committee Comment

This section expands present law in the bad check area. Underlying this provision is the belief that the issuance or passing of a known bad check is, in itself, not only harmful to the recipient but also injurious to the community at large and is, therefore, a proper subject for criminal sanction without regard to the purpose for which the check was given. For example, even if the immediate recipient gives up nothing in return for the check, and, therefore, is not defrauded in the strict sense of that term, he may further negotiate the check, or deposit it and draw against it. This possibility places him in a precarious position and creates a threat of harm to the general public. Another important function of the provision is the encouragement of prompt payment of dishonored checks.

The broad scope of this section obviously includes the issuance or passing of a bad check in purported payment of a preexisting debt. Article I, Section 18, of the Texas Constitution forbids imprisonment for debt. To the argument that application of Section 32.41 to a preexisting debt violates this prohibition, it need only be answered that it is the act of issuing or passing the bad check which is punished and not the failure to pay the debt. The question is further mooted since the penalty does not include imprisonment.

Section 31.05 (presumption for theft by check) creates a similar presumption if a bad check is used to obtain property or service.

§ 32.42. Deceptive Business Practices

(a) An individual, corporation, or association commits an offense if in the course of business he intentionally, knowingly, recklessly, or with criminal negligence commits one or more of the following deceptive business practices:

(1) using, selling, or possessing for use or sale a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or

(2) selling less than the represented quantity of a property or service; or

(3) taking more than the represented quantity of property or service when as a buyer the actor furnishes the weight or measure; or

(4) selling an adulterated or mislabeled commodity; or

(5) passing off property or service as that of another; or

(6) representing that a commodity is original or new if it is deteriorated, altered, rebuilt, reconditioned, reclaimed, used, or secondhand; or

(7) representing that a commodity or service is of a particular style, grade, or model if it is of another; or

(8) advertising property or service with intent:

(A) not to sell it as advertised, or

(B) not to supply reasonably expectable public demand, unless the advertising adequately discloses a time or quantity limit; or

(9) representing the price of property or service falsely or in a way tending to mislead; or

(10) making a materially false or misleading statement of fact concerning the reason for, existence of, or amount of a price, or price reduction; or

(11) conducting a deceptive sales contest; or

(12) making a materially false or misleading written statement in connection with the sale of securities, or omitting information required by law to be disclosed in written documents relating to securities; or

(13) making a materially false or misleading statement:

(A) in an advertisement for the purchase or sale of property or service; or

(B) otherwise in connection with the purchase or sale of property or service.

(b) For purposes of this section:

(1) "Adulterated" means varying from the standard of composition or quality prescribed by law or set by established commercial usage.

(2) "Business" includes trade and commerce and advertising, selling, and buying service or property.

(3) "Commodity" means any tangible or intangible personal property.

(4) "Contest" includes sweepstake, puzzle, and game of chance.

(5) "Deceptive sales contest" means a sales contest:

(A) that misrepresents the participant's chance of winning a prize; or

(B) that fails to disclose to participants on a conspicuously displayed permanent poster (if the contest is conducted

by or through a retail outlet) or on each card game piece, entry blank, or other paraphernalia required for participation in the contest (if the contest is not conducted by or through a retail outlet):

(i) the geographical area or number of outlets in which the contest is to be conducted; and

(ii) an accurate description of each type of prize; and

(iii) the minimum number and minimum amount of cash prizes; and

(iv) the minimum number of each other type of prize; or

(C) that is manipulated or rigged so that prizes are given to predetermined persons or retail establishments. But a sales contest is not deceptive if the total value of prizes to each retail outlet is in a uniform ratio to the number of game pieces distributed to that outlet.

(6) "Mislabeled" means varying from the standard of truth or disclosure in labeling prescribed by law or set by established commercial usage.

(7) "Prize" includes gift, discount, coupon, certificate, gratuity, and any other thing of value awarded in a sales contest.

(8) "Sales contest" means:

(A) a contest in connection with the sale of a commodity or service; and

(B) by which a person may, as determined by drawing, guessing, matching, or chance, receive a prize; and

(C) which is not regulated by the rules of a federal regulatory agency.

(9) "Sell" and "sale" include offer for sale, advertise for sale, expose for sale, keep for the purpose of sale, deliver for or after sale, solicit an offer to buy, and every disposition for value.

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

Penal Code art. 1037
R.C.S. art. 5069—10.01(b)
Model P.C. § 224.7

Cross References

"Agency" defined, see § 1.07.
"Association" defined, see § 1.07.

Consumer Credit Code, see R.C.S. art. 5069—10.01.
Food, Drug, and Cosmetic Act, see R.C.S. art. 4476—5.
"Law" defined, see § 1.07.
"Property" defined, see § 32.01.
Securities Act, see R.C.S. art. 581.
"Service" defined, see § 32.01.
Weights and measures, see R.C.S. arts. 5705–5736f.

Committee Comment

Most of Chapter 32 is designed to protect businesses against customers who cheat. Section 32.42 strikes a balance by protecting customers against businesses which cheat.

Many of the offenses in this section now appear in scattered corners of the Texas statutes. Sometimes, as in the Consumer Credit Code, they are not criminal but grounds for injunction which is then subject to heavy civil penalty ($10,000) for violation. Without disturbing the regulatory statutes, there is a need for a comprehensive criminal provision on deceptive business practices. This will serve to guide the honest business, and to permit local prosecution of the dishonest business as a supplement to the enforcement activities of the several regulatory agencies.

The deceptive practices proscribed by this section are those which primarily victimize consumers. Other provisions, including some in the Consumer Credit Code, are aimed primarily at unfair competition among businesses; these are better left to the civil statutes. However, it should be noted that Section 32.42 has a secondary effect of protecting honest businesses against dishonest competition.

Under Subsection (a), the offense must be committed in the course of business. Even though business is broadly defined in Subsection (b)(2), it does not encompass casual personal transactions. Someone engaging in business assumes certain responsibilities to his customers, which are partially codified here.

Deceptive practices in the sale of land are generally not covered in present law but are included here, along with those in the sale of tangible and intangible personal property. Also included are deceptive practices in the sale of services. Finally, in some instances, e. g., Subsections (a)(3) and (a)(13), deception in purchases is covered if part of a business transaction.

Adulterated and mislabeled commodities in Subsection (a)(4) are defined in Subsection (b)(6) by reference to other laws (e. g., the Food, Drug, and Cosmetic Act) or by reference to established commercial usage if there is any.

Some of the offenses, particularly Subsections (a)(8) and (a)(13)(A), deal specifically with advertising. However, the definition of sale in Subsection (b)(10) includes advertising, so that an offense described in terms of sale, like Subsection (a)(4), may be committed by advertising. So may offenses of representation, like

Subsections (a)(6), (a)(7), and (a)(9), or of statement, like Subsections (a)(10) and (a)(12).

A newspaper or other publisher of advertising is not within the section unless it acts intentionally, knowingly, recklessly, or with criminal negligence.

§ 32.43. Commercial Bribery

(a) An individual, corporation, or association who is a fiduciary commits an offense if he intentionally or knowingly solicits, accepts, or agrees to accept any benefit as consideration:

(1) for violating a duty to a beneficiary; or

(2) for otherwise causing harm to a beneficiary by act or omission.

(b) An individual, corporation, or association commits an offense if offers confers, or agrees to confer, any benefit the acceptance of which is an offense under Subsection (a).

(c) For purposes of this section:

(1) "Beneficiary" means a person for whom a fiduciary is acting.

(2) "Fiduciary" means:

(A) an agent or employee; or

(B) a trustee, guardian, custodian, administrator, executor, conservator, receiver, or similar fiduciary; or

(C) a lawyer, physician, accountant, appraiser, or other professional adviser; or

(D) an officer, director, partner, manager, or other participant in the direction of the affairs of a corporation or association.

(d) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

Model P.C. § 224.8

Cross References

"Association" defined, see § 1.07.
"Benefit" defined, see § 1.07.
Bribery, see § 36.02.
"Harm" defined, see § 1.07.
Official misconduct, see § 39.01.
Rigging publicly exhibited contest, see § 32.44.

Committee Comment

Except for Penal Code arts. 166–167 on bribery of attorneys, there is no present Texas criminal law on commercial bribery.

This section does not reach a simple breach of fiduciary duty; it covers only corrupt breaches that involve a bribe. Briber and bribee are then equally guilty. The expansive definition of fiduciary in Subsection (c) encompasses a number of relationships in which loyalty or impartiality is expected, and which thus deserve protection from corruption. Some quasifiduciaries, e. g., arbitrators, referees, are defined as public servants, however, and thus covered by Sections 36.02 (bribery) and 39.01 (official misconduct).

The section is aimed principally at kickbacks. If the beneficiary expressly or impliedly consents to the kickback—as is customary in some trades—there is no violation of duty and hence no violation of Subsection (a)(1). Nonetheless, if harm to the beneficiary can be shown, there is still a violation of Subsection (a) (2).

More than half the states have commercial bribery statutes. See Note, Control of Nongovernmental Corruption by Criminal Legislation, 108 U.Pa.L.Rev. 848 (1960); Annot., 1 A.L.R.3d 1350 (1965).

Bribery of an athlete or other public contestant is covered by Section 32.44.

§ 32.44. Rigging Publicly Exhibited Contest

(a) An individual, corporation, or association commits an offense if, with intent to affect the outcome (including the score) of a publicly exhibited contest:

(1) he offers, confers, or agrees to confer any benefit upon, or threatens harm to:

(A) a participant in the contest to induce him not to use his best efforts; or

(B) an official or other person associated with the contest; or

(2) he tampers with a person, animal, or thing in a manner contrary to the rules of the contest.

(b) An individual, corporation, or association commits an offense if he intentionally or knowingly solicits, accepts, or agrees to accept any benefit the conferring of which is an offense under Subsection (a).

(c) Except as provided in Subsection (d), an offense under this section is a Class A misdemeanor.

(d) An offense under this section is a felony of the third degree if the actor's conduct is in connection with betting or wagering on the contest.

Historical Note

Derivation:
Model P.C. § 224.9

Cross References

"Association" defined, see § 1.07.
"Benefit" defined, see § 1.07.
Commercial bribery, see § 32.43.
Gambling, see ch. 47.
"Harm" defined, see § 1.07.
"Rule" includes regulation, see § 1.07.

Committee Comment

Bribery in athletic contests is currently an offense under Penal Code art. 178b. Section 32.44 is similar in substance but extends to nonathletic contests as well, if they are publicly exhibited, e. g., animal races, quiz shows, and musical auditions. The offense embraces bribes to lose a contest, or to narrow the margin of victory. Briber and bribee are equally guilty. Tampering and threatening are added as offenses.

Knowing participants in, or producers of, a rigged contest are adequately covered by the complicity and criminal facilitation provisions, see Chapter 7, Subchapter A.

More than half the states have penal laws against sports bribery. See Note, Control of Nongovernmental Corruption by Criminal Legislation, 108 U.Pa.L.Rev. 848 (1960); Annot., 49 A.L.R.2d 1234 (1956).

Bribery in commercial contexts is covered by Section 32.43.

§ 32.45. Misapplication of Fiduciary Property or Property of Financial Institution

(a) An individual, corporation, or association commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary, or property of a financial institution, in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

(b) For purposes of this section:

(1) "Fiduciary" includes:

(A) trustee, guardian, administrator, executor, conservator, and receiver; and

(B) any other person acting in a fiduciary capacity, but not a commercial bailee; and

(C) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

(2) "Misapply" means deal with property contrary to:

(A) an agreement under which the fiduciary holds the property; or

(B) a law prescribing the custody or disposition of the property.

(c) An offense under this section is a Class B misdemeanor unless the value of the property misapplied was $250 or more, in which event the offense is a Class A misdemeanor.

Historical Note

Derivation:

Mich. Prop. Pen. Code § 4155
Model P.C. § 224.13

Cross References

Aggregation of amounts involved in fraud, see § 32.03.
"Association" defined, see § 1.07.
"Financial institution" defined, see § 32.01.
"Law" defined, see § 1.07.
Official misconduct, see § 39.01.
"Owner" defined, see § 32.01.
"Property" defined, see § 32.01.
Theft, see ch. 31.
Value, see § 32.02.

Committee Comment

Present Texas law has no offense corresponding to this section.

The section deals with misapplication of property which belongs to a financial institution or is held by anyone as a fiduciary. Fiduciary relations are identified in Subsection (b)(1). Misapplication is defined in Subsection (b)(2). In addition, to violate Subsection (a) the misapplication must involve substantial risk of loss, and at least reckless misapplication.

Only a person who is a fiduciary (as defined) can violate the first clause of Subsection (a). But any person can violate the second clause—for example, an employee of a financial institution.

It is not an element of the offense that the actor or anyone else receive a benefit from the misapplication. If he does receive a benefit, there may also be a violation of Chapter 31 (theft). If a third person gives a benefit to procure the misapplication, there may also be a violation of Section 32.43 (commercial bribery).

§ 32.46. Securing Execution of Document by Deception

(a) An individual, corporation, or association commits an offense if with intent to defraud or harm any person he causes another to

sign or execute any document affecting property or service or the pecuniary interest of any person.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
Model P.C. § 224.14

Cross References

"Association" defined, see § 1.07.
"Harm" defined, see § 1.07.
"Property" defined, see § 32.01.
Theft, see ch. 31.

Committee Comment

This section is slightly broader than Penal Code arts. 1000 and 1001 (falsely reading or substituting instrument), since it covers any form of deception while those articles recite specific kinds of deception, but otherwise it does not change present law.

§ 32.47. Fraudulent Destruction, Removal or Concealment of Writing

(a) An individual, corporation, or association commits an offense if, with intent to defraud or harm another, he destroys, removes, conceals, or otherwise impairs the verity, legibility, or availability of a writing, other than a governmental record.

(b) For purposes of this section, "writing" includes printing or any other method of recording information; money, coins, tokens, stamps, seals, credit cards, badges, trademarks; and symbols of value, right, privilege, or identification.

(c) Except as provided in Subsection (d), an offense under this section is a Class A misdemeanor.

(d) An offense under this section is a felony of the third degree if the writing:

(1) is a will or codicil of another, whether or not the maker is alive or dead, and whether or not it has been admitted to probate; or

(2) is a deed, mortgage, deed of trust, security instrument, security agreement, or other writing for which the law provides public recording or filing, whether or not the writing has been acknowledged.

Historical Note

Derivation:
Model P.C. §§ 224.3, 224.4

Cross References

"Association" defined, see § 1.07.
Criminal mischief, see § 28.03.
Governmental record, see §§ 37.01, 37.10.
"Harm" defined, see § 1.07.
Reckless damage, see § 28.04.

Committee Comment

This section is largely new law, although Penal Code art. 1350 (malicious mischief) may now apply to documents, and art. 1427 (stealing record book) may apply to nongovernmental records. Section 32.47 outlaws a variety of injuries to documents which may result in financial harm or which may prevent public recording or filing. The section is analogous to criminal mischief, Section 28.03, which is limited to tangible property. Similar injury to governmental records is treated by Section 37.10; "governmental record" is defined in Section 37.01 to include certain private records.

The higher penalty is reserved for damage to documents which may be irreplaceable (e. g., a will whose removal is not discovered before the maker's death), or whose loss or destruction is likely to have a substantial effect on the rights of others (e. g., a mortgage or financing statement which, without recording or filing, is ineffective against third persons).

Alteration of the documents described in this section may be forgery under Section 32.21. Sometimes results similar to forgery can be achieved by removal or destruction of a writing. Hiding a will may favor the heirs at law as effectively as a forged will naming them as beneficiaries. This section therefore complements the forgery provision.

TITLE 8. OFFENSES AGAINST THE STATE AND PUBLIC ADMINISTRATION

CHAPTER 36. BRIBERY AND CORRUPT INFLUENCE

Section

36.01. Chapter Definitions.
36.02. Bribery.
36.03. Coercion of Public Servant or Voter
36.04. Improper Influence.
36.05. Tampering with Witness.
36.06. Retaliation for Past Official Action.
36.07. Compensation for Past Behavior.
36.08. Gift to Public Servant by Person Subject to his Jurisdiction.
36.09. Offering Gift to Public Servant.
36.10. Exceptions and Defenses.

Section 36.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Coercion" means a threat, however communicated:

(A) to commit any offense; or

(B) to inflict bodily injury on the person threatened or another; or

(C) to accuse any person of any offense; or

(D) to expose any person to hatred, contempt, or ridicule; or

(E) to harm the credit or business repute of any person; or

(F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

(2) "Custody" means under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court.

(3) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant authorized by law to take statements under oath.

(4) "Party official" means a person who holds any position or office in a political party, whether by election, appointment, or employment.

(5) "Vote" means to cast a ballot in an election regulated by law.

§ 36.02. Bribery

(a) An individual, corporation, or association commits bribery if he offers, confers, or agrees to confer any benefit upon a public servant, party official, or voter:

(1) with intent to influence the public servant or party official in a specific exercise of his official powers or a specific performance of his official duties; or

(2) with intent to influence the voter not to vote or to vote in a particular manner.

(b) A public servant or party official commits bribery if he solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will be influenced in a specific exercise of his official powers or a specific performance of his official duties.

(c) A voter commits bribery if he accepts or agrees to accept any benefit on the representation or understanding that he will not vote or will vote in a particular manner.

(d) Bribery is a felony of the third degree.

Historical Note

Derivation:

Penal Code arts. 158, 159, 160

Cross References

"Association" defined, see § 1.07.
"Benefit" defined, see § 1.07.
Forfeiture of office, see Tex.Const. art. XVI, § 41.
"Party official" defined, see § 36.01.
"Public servant" defined, see § 1.07.
"Vote" defined, see § 36.01.

Committee Comment

Bribery subverts the impartial functioning of government to the benefit of a private person, economic interest, or class since the choices of bribed public servants are made in response to the opportunity for personal gain rather than legitimate considerations. Bribery is defined as a crime in Tex.Const. art. XVI, § 41, and forfeiture of office is there prescribed for an executive or judicial officer or member of the legislature convicted of this offense.

This section follows the traditional definition of the offense and is essentially like present Penal Code arts. 158, 159, and 160. However, the present law includes numerous separate articles proscribing bribery of specific officials—e. g., art. 160-a (bribery of Basic Science Board). This section applies broadly to all classes of officials now covered, and in addition, to arbitrators acting under private written agreement, notaries, political candidates, and party officials.

The section applies to both parties to a bribe and to both the offer and solicitation as well. A voter, however, is not guilty of solicitation of a bribe since his solicitation is not significantly harmful. "Vote" is defined to exclude purely private elections, those in which the public interest is insufficient to warrant regulation by law.

There are instances of bribery that are so petty that a felony conviction is inappropriate. No attempt is made to define the less serious forms of bribery for misdemeanor grading; rather, the court must exercise its discretion under Section 12.47 to reduce a conviction for petty bribery to the appropriate grade of misdemeanor.

§ 36.03. Coercion of Public Servant or Voter

(a) An individual, corporation, or association commits an offense if by means of coercion:

(1) he influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty; or

(2) he influences or attempts to influence a voter not to vote or to vote in a particular manner.

(b) An offense under this section is a Class A misdemeanor unless the coercion is a threat to commit a felony, in which event the offense is felony of the third degree.

Historical Note

Derivation:
New

Cross References

"Association" defined, see § 1.07.
"Coercion" defined, see § 36.01.
"Public servant" defined, see § 1.07.

Committee Comment

This section has no counterpart in present Texas law except for the statutes dealing with intimidation of voters, Penal Code arts. 220, 256, and 258. The new offense is analogous to theft by coercion, Section 31.03; a threat is employed to extort favorable governmental action (or a favorable vote) instead of money. The conduct is at least as reprehensible as extortion since the integrity of the governmental process is corrupted.

"Coercion" is carefully defined to exclude legitimate threats, e. g., a threat of reprisal at the ballot box. The use of coercion is forbidden only if intended to induce specific conduct by the offi-

cial; thus, a threat to expose or prosecute a corrupt official is not an offense if the intent is to induce the official to act according to law.

§ 36.04. Improper Influence

(a) An individual, corporation, or association commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) For purposes of this section, "adjudicatory proceeding" means any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
Model P.C. § 240.2

Cross References

"Agency" defined, see § 1.07.
"Association" defined, see § 1.07.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
"Public servant" defined, see § 1.07.

Committee Comment

The fairness of adjudicatory proceedings can be seriously jeopardized by ex parte communication with the decision-making officials. Pressures can be exerted on these officials that do not constitute bribery or coercion but may materially impair the impartial administration of justice.

This provision is new to Texas law. Federal law, however, has long made it a felony to "corruptly . . . influence, obstruct, or impede the due and proper administration of the law" under which a proceeding is being had before a department or agency of the United States, 18 U.S.C.A. § 1505.

§ 36.05. Tampering with Witness

(a) An individual, corporation, or association commits an offense if he offers, confers, or agrees to confer any benefit upon a witness or prospective witness in an official proceeding, or coerces a witness or

prospective witness in an official proceeding, with intent to influence the witness:

(1) to testify falsely; or

(2) to withhold any testimony, information, document, or thing; or

(3) to elude legal process summoning him to testify or supply evidence; or

(4) to absent himself from an official proceeding to which he has been legally summoned.

(b) A witness or prospective witness in an official proceeding commits an offense if he solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will do any of the things specified in Subsection (a).

(c) An offense under this section is a felony of the third degree.

Historical Note

Derivation:
Hawaii Prop. Pen. Code §§ 1070-1072

Cross References

"Association" defined, see § 1.07.
"Benefit" defined, see § 1.07.
"Coercion" defined, see § 36.01.
Compounding, see § 38.06.
"Official proceeding" defined, see § 36.01.

Committee Comment

Penal Code arts. 175 and 176 prohibit bribery of a witness to disobey or elude service of a subpoena or other legal process. This section replaces those articles and also covers a wider range of criminal conduct that impairs the integrity or availability of a witness who may be called to offer evidence in an official proceeding.

The purpose of this section is to prevent the risks of unreliable, false, and unavailable testimony induced by bribery or threats. It focuses on steps prior to perjury that create those risks.

Note that the person whom the actor attempts to influence need not actually be a witness. Tampering with a prospective witness creates a risk of interference with an official proceeding even if the person bribed or threatened has not been officially called to offer evidence.

§ 36.06. Retaliation for Past Official Action

(a) An individual, corporation, or association commits an offense if he harms a public servant or former public servant by any unlawful

act in retaliation for anything the public servant did in his official capacity.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
Model P.C. § 240.4

Cross References

Assault, see §§ 22.01, 22.02.
"Association" defined, see § 1.07.
"Harm" defined, see § 1.07.
"Public servant" defined, see § 1.07.
Resisting arrest, see § 38.03.
"Unlawful" defined, see § 1.07.

Committee Comment

This section will aggravate the penalty for misdemeanor assaultive-type offenses against a public servant in retaliation for his official acts. For example, a simple assault, Section 22.01 (Class B misdemeanor), could be prosecuted under this section as a Class A misdemeanor.

The aggravation of the lesser grades of misdemeanors is warranted because retaliatory unlawful acts jeopardize public administration as well as the individual public servant.

Penal Code art. 1147 aggravates the penalty for an assault against a peace officer. This section is based on the same principle as art. 1147, but extends its application to all public servants and all Class B and C misdemeanors committed against them in retaliation for their official acts.

§ 36.07. Compensation for Past Official Behavior

(a) An individual, corporation, or association commits an offense if he offers, confers, or agrees to confer any benefit upon a public servant for the public servant's having exercised his official powers or performed his official duties in favor of the actor or another.

(b) A public servant commits an offense if he solicits, accepts, or agrees to accept any benefit for having exercised his official powers or performed his official duties in favor of another.

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
N.Y.Rev.Pen.Law §§ 200.30, 200.35

Cross References

"Association" defined, see § 1.07.
"Benefit" defined, see § 1.07.

Bribery, see § 36.02.
Exceptions and defenses, see § 36.10.
"Public servant" defined, see § 1.07.

Committee Comment

New to Texas law, this section covers the offer, solicitation, or acceptance of compensation for the past actions of public servants. Such "gifts" may imply a promise of similar compensation for future favor. Apart from this implied bribery, when some "clients" of a public servant undertake to pay him for favors, others who deal with the same public servant are pressured to make similar contributions or risk disfavor.

This offense is a lesser included offense of bribery since the accused may be suspected of bribery but the state unable to prove that there was any direct relationship between anticipation of compensation and the official action. See C.C.P. art. 37.09, as amended. On the other hand, assuming that the official action has not been influenced in advance by promise of gain, the consequence of a violation of this section is less serious than the harm of bribery and the misdemeanor penalty is therefore appropriate.

§ 36.08. Gift to Public Servant by Person Subject to his Jurisdiction

(a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

(b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.

(c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.

(d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

(e) A public servant who has judicial or administrative authority, or who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decisions, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.

(f) A public servant who is a member of or employed by the legislature or by an agency of the legislature commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in any matter pending before or contemplated by the legislature or an agency of the legislature.

(g) An offense under this section is a Class A misdemeanor.

Committee Comment

See Committee Comment following Section 36.10.

§ 36.09. Offering Gift to Public Servant

(a) An individual, corporation, or association commits an offense if he offers, confers, or agrees to confer any benefit upon a public servant that he knows the public servant is prohibited by law from accepting.

(b) An offense under this section is a Class A misdemeanor.

Committee Comment

See Committee Comment following Section 36.10.

§ 36.10. Exceptions and Defenses

(a) It is an exception to the application of Sections 36.07 (compensation for past official behavior), 36.08 (gift to public servant), and 36.09 (offering gift to public servant) that the benefit involved is a fee prescribed by law to be received by a public servant or any other benefit to which the public servant is lawfully entitled.

(b) It is a defense to prosecution under Sections 36.07 (compensation for past official behavior), 36.08 (gift to public servant), and 36.09 (offering gift to public servant) that the benefit involved was:

(1) a gift or other benefit conferred on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient; or

(2) a trivial benefit incidental to personal, professional, or business contacts, which involves no substantial risk of undermining official impartiality; or

(3) a contribution made under the election laws for the political campaign of an elective public servant when he is a candidate for nomination or election to public office.

Historical Note

Derivation:

Hawaii Prop.Pen.Code § 1042
Model P.C. § 240.5

Cross References

"Agency" defined, see § 1.07.
"Association" defined, see § 1.07.
"Benefit" defined, see § 1.07.
Bribery, see § 36.02.
"Custody" defined, see § 36.01.
Defense explained, see § 2.03.
Exception explained, see § 2.02.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
"Public servant" defined, see § 1.07.

Committee Comment

Although giving gifts to public servants may be innocent, it casts grave doubts on the integrity of the governmental process when the servant makes decisions that affect the donor. Moreover, it is often quite difficult to distinguish between a "gift" and a bribe or other illicit compensation. There is no comparable provision in the present Penal Code.

Section 36.09 applies to the person who is the donor of the illicit gift if he knows the public servant is prohibited by law from accepting the gift.

Section 36.10(a) creates an exception for the receipt of a benefit (e. g., a fee) prescribed by law. Subsection (b) provides defenses for those instances of giving and receiving gifts where the relationship between the donor and recipient would normally involve such exchanges and therefore not corrupt public administration.

CHAPTER 37. PERJURY AND OTHER FALSIFICATION

Section

37.01. Chapter Definitions.
37.02. Perjury.
37.03. Aggravated Perjury.
37.04. Materiality.
37.05. Retraction.
37.06. Inconsistent Statements.
37.07. Irregularities No Defense.
37.08. False Report To Peace Officer.
37.09. Tampering with or Fabricating Physical Evidence.
37.10. Tampering with Governmental Record.
37.11. Impersonating Public Servant.
37.12. Impersonating Peace Officer.

Section 37.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Governmental record" means anything:

(A) belonging to, receiver, or kept by government for information; or

(B) required by law to be kept by others for information of government.

(2) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant authorized by law to take statements under oath.

(3) "Statement" means any representation of fact.

§ 37.02. Perjury

(a) An individual, corporation, or association commits perjury if, with intent to deceive and with knowledge of the statement's meaning:

(1) he makes a false statement under oath, or swears to the truth of a false statement previously made; and

(2) the statement is required or authorized by law to be made under oath.

(b) Perjury is a Class A misdemeanor.

Committee Comment

See Committee Comment following Section 37.04.

§ 37.03. Aggravated Perjury

(a) An individual, corporation, or association commits aggravated perjury if he commits perjury as defined in Section 37.02, and:

(1) the false statement is made during or in connection with an official proceeding; and

(2) the false statement is material.

(b) Aggravated perjury is a felony of the third degree.

Committee Comment

See Committee Comment following Section 37.04.

§ 37.04. Materiality

(a) A statement is material, regardless of the admissibility of the statement under the rules of evidence, if it could have affected the course or outcome of the official proceeding.

(b) It is no defense to prosecution for aggravated perjury that the declarant mistakenly believed the statement to be immaterial.

(c) Whether a statement is material in a given factual situation is a question of law.

Historical Note

Derivation:

§ 37.02: Mich.Prop.Pen.Code § 4910
§ 37.03: N.Y.Rev.Pen.Law § 210.15
§ 37.04: Mich.Prop.Pen.Code § 4901(2)

Cross References

"Association" defined, see § 1.07.
Evidentiary requirements, see C.C.P. art. 38.18, as amended.
"Oath" includes affirmation, see § 1.07.
"Official proceeding" defined, see § 37.01.
Subornation or perjury as complicity in committing perjury, see ch. 7, subch. A.
"Statement" defined, see § 37.01.
"Swear" includes affirm, see § 1.07.

Committee Comment

Section 37.02 restates the present law against false swearing, Penal Code art. 310, and Section 37.03 that against perjury, Penal Code art. 302.

The law has traditionally required an oath for the receipt of information the truthfulness of which is essential to the administration of justice and has punished those who lie under oath. These sections provide two grades of punishment depending on the presence of the aggravating elements of materiality and an official

proceeding. Perjury is a lesser included offense of aggravated perjury, see C.C.P. art. 37.09, as amended.

Authorized punishments for the present offenses of false swearing (2 to 5 years) and perjury (2 to 10 years) are lowered in the belief that many defendants who are clearly guilty of the offense are not found guilty because of the harsh punishments. In promulgating a Model Act on Perjury, the National Conference of Commissioners on Uniform State Laws mentioned this problem.

> . . . [A] great difficulty in administering the law of perjury has been the severity of the penalties specified by the statutes. In the less aggravated forms of perjury, much could be gained in effectiveness and respect by making penalties less severe in the books and more frequently applied in the court rooms.

Model P.C., Comment at 102–03 (Tent.Draft No. 6, 1957).
Therefore, the offense of "simple" perjury is a Class A misdemeanor and aggravated perjury is a third degree felony.

Section 37.04 restates existing case law on the nature of materiality as an aggravating factor of perjury, Childress v. State, 398 S.W.2d 754 (Tex.Crim.App.1966); Foster v. State, 22 S.W. 21 (Tex.Crim.App.1893).

C.C.P. art. 38.18 is amended to require only one witness plus corroboration to convict for either perjury or aggravated perjury; the article does not apply if the prosecution is based on inconsistent statements, however.

§ 37.05. Retraction

It is a defense to prosecution for aggravated perjury that the actor retracted his false statement:

(1) before completion of the testimony at the official proceeding; and

(2) before it became manifest that the falsity of the statement would be exposed.

Committee Comment

See Committee Comment following Section 37.07.

§ 37.06. Inconsistent Statements

An information or indictment for perjury or aggravated perjury that alleges that the declarant has made statements under oath, both of which cannot be true, need not allege which statement is false. At the trial the prosecution need not prove which statement is false.

Committee Comment

See Committee Comment following Section 37.07.

§ 37.07. Irregularities No Defense

(a) It is no defense to prosecution for perjury or aggravated perjury that the oath was administered or taken in an irregular manner, or that there was some irregularity in the appointment or qualification of the person who administered the oath.

(b) It is no defense to prosecution for perjury or aggravated perjury that a document was not sworn to if the document contains a recital that it was made under oath, the declarant was aware of the recital when he signed the document, and the document contains the signed jurat of a public servant authorized to administer oaths.

Historical Note

Derivation:

§ 37.05: N.Y.Rev.Pen.Law § 210.25
§ 37.06: N.Y.Rev.Pen.Law § 210.20
§ 37.07: Model P.C. § 241.1

Cross References

Defense explained, see § 2.03.
"Oath" includes affirmation, see § 1.07.
"Official proceeding" defined, see § 37.01.
"Public servant" defined, see § 1.07.
"Statement" defined, see § 37.01.
"Swear" includes affirm, see § 1.07.

Committee Comment

Section 37.05 provides a defense of retraction not now available under Texas law. The purpose of allowing the defense is to encourage a witness to correct his misstatement and tell the truth before the end of the proceeding. A danger in allowing the retraction defense is that perjury may be encouraged by the perjurer's belief that he can give false testimony and protect himself by retraction if the falsity is discovered. To prevent this abuse, the defense is allowed only if the misstatement is corrected before completion of testimony in the official proceeding *and* before it becomes clear that the falsity will be exposed.

Section 37.06 changes the present Texas law that requires the prosecution to select one of two conflicting statements and prove its falsity, Whitaker v. State, 36 S.W. 253 (Tex.Crim.App.1896), and that does not recognize falsity proved solely by the existence of conflicting statements, King v. State, 16 S.W.2d 1072 (Tex. Crim.App.1929).

Section 37.07(a) follows Texas cases disallowing a defense to perjury based on irregularities in administration of the oath, Weadock v. State, 36 S.W.2d 757 (Tex.Crim.App.1930); Manning v. State, 81 S.W. 957 (Tex.Crim.App.1904). Subsection (b) prevents the perjurer from denying having sworn to a document that is

signed and notarized; such a defense is clearly specious where the declarant signed a document that contains a completed jurat.

§ 37.08. False Report to Peace Officer

(a) An individual, corporation, or association commits an offense if:

(1) he reports to a peace officer an offense or incident within the officer's concern knowing that the offense or incident did not occur; or

(2) he makes a report to a peace officer relating to an offense or incident within the officer's concern knowing that he has no information relating to the offense or incident.

(b) An offense under this section is a Class B misdemeanor.

Historical Note

Derivation:
N.Y.Rev.Pen.Law § 240.50
Model P.C. § 241.5

Cross References

"Association" defined, see § 1.07.
False alarm, see § 42.06.
"Peace officer" defined, see § 1.07.

Committee Comment

There is no comparable offense under present Texas law. Section 37.08(a)(1) deals with reports of fictitious crimes, while Subsection (a)(2) reaches the person who, when a real crime receives publicity, impedes law enforcement by volunteering fictitious leads. Reports of "incidents" cover matters that may not be offenses in themselves, but are nevertheless within the scope of police investigation, e. g., a suicide or drowning. Subsection (a)(2) does not apply, however, to anyone who makes a report in good faith, even if the report is based on unreliable hearsay.

§ 37.09. Tampering With or Fabricating Physical Evidence

(a) An individual, corporation, or association commits an offense if, knowing that an investigation or official proceeding is pending or in progress:

(1) he alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

(2) he makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
N.Y.Rev.Pen.Law § 215.40

Cross References

"Association" defined, see § 1.07.
"Official proceeding" defined, see § 37.01.

Committee Comment

No specific protection from this type of conduct exists in present Texas law, although in some cases the forgery and malicious mischief statutes, Penal Code arts. 979–1005 and 1350, may apply. This section makes it an offense both to conceal true evidence and to offer false evidence, since to do either misrepresents the truth which it is the object of the proceeding to determine.

An offense under Section 37.09(a)(1) requires an intent to render the evidence false or unavailable. An offense under Subsection (a)(2) requires an intent to affect the course or outcome of the proceeding and is analogous to the concept of materiality in the perjury offenses.

This section does not apply to the concealment of any record, document, or thing that is not subject to subpoena, such as records protected by the attorney-client privilege.

§ 37.10. Tampering With Governmental Record

(a) An individual, corporation, or association commits an offense if:

(1) he knowingly makes a false entry in, or false alteration of, a governmental record; or

(2) he makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record; or

(3) he intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record.

(b) It is an exception to the application of Subsection (a)(3) that the governmental record is destroyed pursuant to legal authorization.

(c) An offense under this section is a Class A misdemeanor unless the actor's intent is to defraud or harm another, in which event the offense is a felony of the third degree.

Historical Note

Derivation:
N.Y.Rev.Pen.Law §§ 175.20, 175.25

Cross References

"Association" defined, see § 1.07.
Exception explained, see § 2.02.
"Governmental record" defined, see § 37.01.
"Harm" defined, see § 1.07.

Committee Comment

This section replaces Penal Code arts. 1002 (altering or injuring public records), 438c, 438d (simulating documents of legal process), and 1427 (stealing record books or filed papers). Subsection (a)(1) broadens Texas law to include a prohibition against making false entries in governmental records. See Nogueira v. State, 59 S.W.2d 831 (Tex.Crim.App.1933). Subsection (a)(2) extends the coverage of Penal Code arts. 438c and 438d to prohibit making, presenting, or using all fabricated governmental records. All court records and legal process are included in the definition of "governmental record"—"anything belonging to, received, or kept by government for information."

The second half of the definition—"anything required by law to be kept by others for information of government"—expands the number of protected records to certain privately held records. The Model Penal Code comments explain:

> Although public record statutes do not generally cover records which private persons are compelled to maintain for official inspection, the integrity of such records is often backed by criminal sanctions in special legislation requiring the record to be kept, or by general provisions against false entries in corporate books of record . . . [and thus] fall within the principle that requires the government's own records to be kept inviolate.

Model P.C. § 208.27, Comment at 123 (Tent.Draft No. 8, 1958).

Subsection (a)(3) prohibits impairment of the truth or availability of records by intentional destruction, concealment, or any other means, and is similar to present art. 1427 of the Penal Code.

A wide range of punishments is available under the Class A misdemeanor—third degree felony grading of Subsection (c). Intent to defraud or harm another must be established to warrant felony conviction, although the definition of "harm" is broad enough to subject most offenders to felony punishment.

§ 37.11. Impersonating Public Servant

(a) An individual, corporation, or association commits an offense if he impersonates a public servant with intent to induce another to submit to his pretended official authority or to rely upon his pretended official acts.

(b) An offense under this section is a Class B misdemeanor.

Committee Comment

See Committee Comment following Section 37.12.

§ 37.12. Impersonating Peace Officer

(a) An individual, corporation, or association commits an offense if he impersonates a peace officer with intent to deceive another.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

Wis.Stat.Ann. §§ 946.69, 946.70
Mich.Prop.Pen.Code §§ 4545, 4550

Cross References

"Association" defined, see § 1.07.
"Peace officer" defined, see § 1.07.
"Public servant" defined, see § 1.07.

Committee Comment

These sections replace present Penal Code art. 429 (false personation of officer). The object of these sections is to prevent imposition by the pretense of authority.

There are two offenses of impersonation. Section 37.11 applies to impersonation of any public servant with intent to induce submission or reliance upon pretended authority and is a Class B misdemeanor. Section 37.12 applies specifically to impersonation of a peace officer with intent to deceive another and carries a higher authorized punishment. These sections have no specific requirement of an "act" in addition to the false pretense, as does present art. 429, but it will ordinarily be necessary to show some act in order to prove the required intent.

As under present law, an impersonator violates these sections even if the acts he proposes to do are beyond the legal power of the office he purports to fill, Boyett v. State, 368 S.W.2d 769 (Tex.Crim.App.1963). A person who honestly believes he is entitled to act as a public servant does not violate the law if it turns out he was in error, Stahmann v. State, 70 S.W.2d 709 (Tex.Crim. App.1934).

Since the definition of public servant includes peace officer, Section 37.11 overlaps 37.12, but 37.11 is not a lesser included offense since it requires a different intent than 37.12.

CHAPTER 38. OBSTRUCTING GOVERNMENTAL OPERATION

Section

38.01. Chapter Definitions.
38.02. Failure to Identify as Witness.
38.03. Resisting Stop, Frisk, Halt, Arrest, or Search.
38.04. Evading Arrest.
38.05. Hindering Apprehension or Prosecution.
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38.07. Escape.
38.08. Permitting or Facilitating Escape.
38.09. Effect of Unlawful Custody.
38.10. Implements for Escape.
38.11. Bail Jumping and Failure to Appear.
38.12. Barratry.
38.13. Preemption.

Section 38.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Complaining witness" means a person who signs a criminal complaint.

(2) "Custody" means under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court.

(3) "Escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole.

(4) "Governmental function" includes any activity that a public servant is lawfully authorized to undertake on behalf of government.

§ 38.02. Failure to Identify as Witness

(a) An individual commits an offense if he intentionally refuses to report or gives a false report of his name and present or last address to a peace officer who has lawfully stopped him under Code of Criminal Procedure Article 14.01, Section 2(b) or (c)(2) (stopping person at scene of offense) and demanded the information.

(b) An offense under this section is a Class C misdemeanor.

Historical Note

Derivation:
C.C.P. art. 2.24

Cross References

Failure to exhibit driver's license on demand, see R.C.S. art. 6687b(13).
False alarm, see § 42.06.
Perjury and other falsification, see ch. 37.
Stop, see C.C.P. art. 14.01, as amended.

Committee Comment

Section 38.02 in conjunction with C.C.P. art. 14.01, as amended, imposes on citizens a limited duty to identify themselves to peace officers. Together, these two provisions replace the present identification of witnesses statute, C.C.P. art. 2.24.

Under C.C.P. art. 14.01, § 2(b), as amended, a peace officer can stop a person found near the scene of a recently committed offense when he reasonably suspects the person has "knowledge of material aid to the investigation of the offense," and an officer can stop persons he reasonably suspects were "present at the scene" of a previously committed offense under C.C.P. art. 14.01, § 2(c)(2), as amended. The peace officer can then demand of the person so stopped his name and present or last address under C.C.P. art. 14.-01, § 4(1), as amended.

Section 38.02 authorizes a maximum $200 fine for refusing to identify or giving a false identification to the stopping officer. This approach alters present law, C.C.P. art. 2.24, under which a recalcitrant citizen can be held in jail until he identifies himself "to the satisfaction of the magistrate."

§ 38.03. Resisting Stop, Frisk, Halt, Arrest, or Search

(a) An individual or corporation commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer, or a person acting in a peace officer's presence and at his direction, from effecting a stop, frisk, halt, arrest, or search of the actor or another by using force against the peace officer or another.

(b) It is no defense to prosecution under this section that the stop, frisk, halt, arrest, or search was unlawful.

(c) Except as provided in Subsection (d), an offense under this section is a Class A misdemeanor unless the actor resists a stop or frisk, in which event the offense is a Class B misdemeanor.

(d) An offense under this section is a felony of the third degree if the actor uses a deadly weapon to resist the stop, frisk, halt, arrest, or search.

Historical Note

Derivation:
Mich.Prop.Pen.Code § 4625

Cross References

Arrest under warrant, see C.C.P. ch. 15.
Arrest without warrant, see C.C.P. ch. 14, as amended.
Assault, see §§ 22.01, 22.02.
"Deadly weapon" defined, see § 1.07.
Force justified in law enforcement, see ch. 9, subch. E.
Frisk, see C.C.P. art. 14.01, as amended.
Halt at roadblock, see C.C.P. art. 14.02, as amended.
"Peace officer" defined, see § 1.07.
Search, see C.C.P. ch. 18.
Stop, see C.C.P. art. 14.01, as amended.

Committee Comment

This section replaces Penal Code arts. 338, 339, and 341, which prohibit opposing or resisting execution of a warrant of arrest, and is expanded to cover searches, stops, halts, and frisks as well.

The section applies only to resistance by the use of force. One who runs away or makes an effort to shake off the officer's detaining grip may be guilty of evading arrest under Section 38.04, but he is not responsible under this section. Unlike present law, this section covers an arrest or search with *and* without warrant.

As under present law the actor must know the person he is resisting is a peace officer, or someone working with a peace officer, Granado v. State, 275 S.W.2d 680 (Tex.Crim.App.1955); Fulkerson v. State, 67 S.W. 502 (Tex.Crim.App.1902).

Under this section the unlawfulness of the stop, halt, frisk, arrest, or search is no defense, but if the peace officer (or another acting under his direction) initially uses unnecessary force to effect the stop, arrest, etc., the actor is justified in responding with reasonable force under Section 9.31. However, the place to challenge the lawfulness of a stop, arrest, etc., is in the courtroom and not on the street.

The use of a deadly weapon to resist so endangers peace officers (and perhaps bystanders) that felony punishment is authorized.

§ 38.04. Evading Arrest

(a) An individual commits an offense if he intentionally flees from a person he knows is a peace officer who he knows is attempting to arrest him.

(b) It is an exception to the application of this section that the attempted arrest is unlawful.

(c) An offense under this section is a Class C misdemeanor.

Historical Note

Derivation:
New

Cross References

Arrest, see C.C.P. chs. 14, as amended, 15.
Exception explained, see § 2.02.
"Peace officer" defined, see § 1.07.

Committee Comment

This section is new to Texas law. It provides a misdemeanor sanction for evading arrest by flight. Section 38.03 (resisting arrest) does not apply to flight if no force is used against the peace officer, and Section 38.07 (escape) does not apply to a flight prior to arrest. If flight from arrest can be deterred by the threat of an additional penalty, there should be fewer instances in which peace officers resort to force to effect an arrest.

The exception in Subsection (b) provides that flight from an unlawful arrest is not an offense. This approach differs from Sections 38.03 (resisting arrest) and 38.09 (effect of unlawful custody) under which the unlawfulness of an arrest or custody is no defense to the offenses of resisting arrest or escape. The effect of the exception is that the state must prove the attempted arrest lawful.

§ 38.05. Hindering Apprehension or Prosecution

(a) An individual, corporation, or association commits an offense if, with intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense:

(1) he harbors or conceals the other; or

(2) he provides or aids in providing the other with any means of avoiding arrest or effecting escape; or

(3) he warns the other of impending discovery or apprehension.

(b) It is a defense to prosecution under Subsection (a)(3) that the warning was given in connection with an effort to bring another into compliance with the law.

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
N.Y.Rev.Pen.Law §§ 205.50-205.65

Cross References

"Association" defined, see § 1.07.
Defense explained, see § 2.03.
"Escape" defined, see § 38.01.
Escape offense, see § 38.07.
Permitting or facilitating escape, see § 38.08.

Committee Comment

This section replaces the present Penal Code provisions relating to accessories, arts. 77–79, 81. The new offense is defined in terms of hindering public law enforcement; this approach avoids the complications that arise from the use of a complicity theory. For example, this section omits the requirement that the offender know a crime has been committed or that the purported offender is guilty of the crime, see Jones v. State, 128 S.W.2d 803 (Tex.Crim. App.1939). Instead, the section requires an intent to hinder apprehension, prosecution, conviction, or punishment. Furthermore, the prosecution or conviction is not dependent upon the prosecution or conviction of the person aided, as required by present art. 81, see Moore v. State, 51 S.W. 1108 (Tex.Crim.App.1899).

Hindering is graded a Class A misdemeanor. Present law prescribes the lowest penalty to which the principal would be liable, Penal Code art. 79.

This section omits the present law's exemption for relatives and servants, following the Model Penal Code's suggestion to leave this factor to prosecutorial discretion or for consideration in sentencing.

§ 38.06. Compounding

(a) An individual, corporation, or association commits an offense if he solicits, accepts, or agrees to accept any benefit in consideration of refraining from reporting to a peace officer the commission or suspected commission of an offense.

(b) A complaining witness commits an offense if he solicits, accepts, or agrees to accept any benefit in consideration of abstaining from, discontinuing, or delaying the prosecution of another for an offense.

(c) It is a defense to prosecution under this section that the benefit was solicited or accepted by the victim and did not exceed an amount the victim believed to be due as restitution or indemnification for economic loss caused by the offense.

(d) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

Hawaii Prop.Pen.Code § 1013
Model P.C. § 242.5

Cross References

"Association" defined, see § 1.07.
"Benefit" defined, see § 38.01.
"Complaining witness" defined, see § 38.01.

Defense explained, see § 2.03.
"Peace officer" defined, see § 1.07.
Tampering with witness, see § 36.05.

Committee Comment

The crime of compounding is aimed at deterring or punishing the witness or victim who is "bought off" by the perpetrator of a crime. The law does not go so far as to punish the mere failure to report a crime, but does here punish such failure if secured by a bribe.

Section 38.06(b) applies to the complaining witness who has already reported the crime, but then solicits or accepts a bribe to refuse to cooperate with the state in prosecuting the accused.

Subsection (c) provides a defense to a victim who violates this section if the consideration amounts to no more than restitution for the loss caused by the offense. It should be noted, however, that the defense applies only to the offense of compounding—not to the primary offense. The state may choose to prosecute the latter even though it has been compromised by the accused and his victim.

§ 38.07. Escape

(a) An individual arrested for, charged with, or convicted of an offense commits an offense if he escapes from custody.

(b) Except as provided in Subsection (c), an offense under this section is a Class A misdemeanor.

(c) An offense under this section is a felony of the third degree if:

(1) the actor was charged with or convicted of a felony; or

(2) the actor was confined in a penal institution; or

(3) the actor used or threatened to use a deadly weapon to effect his escape.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 31-6

Cross References

"Custody" defined, see §§ 38.01, 38.09.
"Deadly weapon" defined, see § 1.07.
"Escape" defined, see § 38.01.
Evading arrest, see § 38.04.
Hindering apprehension or prosecution, see § 38.05.
"Penal institution" defined, see § 1.07.

Committee Comment

This section restates Penal Code arts. 353a, 353b, and 353d without significant change. Escape from custody undermines the ef-

fectiveness of the system of criminal correction and punishment. It often creates danger to the captors and bystanders, disrupts prison routine, and requires allocation of police resources to effect recapture. Moreover, when a question is raised concerning the legality of the detention, it is desirable to encourage reliance on legal proceedings rather than self-help.

"Custody" is defined as restraint by a public servant pursuant to court order or arrest by a peace officer. This definition enlarges the scope of the present escape law which does not apply to escape from arrest. "Escape" is defined as unauthorized departure from custody or failure to return to custody following a temporary leave for a specific purpose or limited period, but violations of probation or parole are not escapes. "Penal institution" is defined to include jails and penitentiaries but to exclude detention facilities for juveniles or mental patients who are not accused of an offense. Therefore, escape from such a detention facility is not a violation of this section.

The offense is aggravated to a third degree felony if the escapee was charged with or convicted of a felony, was confined in a penal institution, or used or threatened to use a deadly weapon. These aggravating factors are roughly the same as present law.

§ 38.08. Permitting or Facilitating Escape

(a) An official or employee of an institution, which is responsible for maintaining persons in custody, commits an offense if he intentionally, knowingly, or recklessly permits or facilitates the escape of a person in custody.

(b) An individual, corporation, or association commits an offense if he intentionally or knowingly causes or facilitates the escape of one who is in custody pursuant to:

(1) an allegation or adjudication of delinquency; or

(2) a statutory procedure authorizing involuntary commitment for mental illness, alcoholism, or drug addiction.

(c) Except as provided in Subsection (d), an offense under this section is a Class A misdemeanor.

(d) An offense under this section is a felony of the third degree if:

(1) the person in custody was charged with or convicted of a felony; or

(2) the person in custody was confined in a penal institution; or

(3) the actor used or threatened to use a deadly weapon to effect the escape; or

(4) the offense under Subsection (a) was committed intentionally.

Historical Note

Derivation:
New

Cross References

"Association" defined, see § 1.07.
Complicity in escape, see ch. 7, subch. A; § 38.07.
"Custody" defined, see §§ 38.01, 38.09.
"Deadly weapon" defined, see § 1.07.
"Escape" defined, see § 38.01.
Hindering apprehension or prosecution, see § 38.05.
"Penal institution" defined, see § 1.07.

Committee Comment

Although this section follows generally the present Texas law and that of other recent revising states in defining this offense, the particular language used is unique. The section replaces 16 articles of the Penal Code, arts. 317-322 and 326-334.

Most forms of aiding escape constitute complicity in the escape. This section enlarges the scope of complicity in the escape to include reckless conduct by an official or employee of a jail, penitentiary, insane asylum, etc., which results in an escape. Causing or facilitating the escape of a person whose escape is not itself a crime—e. g., a juvenile delinquent or involuntary hospital inmate --is also covered by this section, but not under the complicity theory, since complicity in a noncrime is not an offense.

Aiding an escapee who was charged with or convicted of a felony, or confined in a penal institution, aggravates the offense to a felony, as do the use or threatened use of a deadly weapon by the aider and the intentional aiding by an institution employee.

§ 38.09. Effect of Unlawful Custody

It is no defense to prosecution under Section 38.07 (escape) or 38.-08 (facilitating escape) that the custody was unlawful.

Historical Note

Derivation:
Model P.C. § 242.6(3)

Cross References

"Custody" defined, see § 38.01.
"Unlawful" defined, see § 1.07.

Committee Comment

Most of the present Texas escape statutes require the custody to be lawful, e. g., Penal Code arts. 317 (legal custody), 326 (lawfully detained), and 330 (legally detained in custody). However, the

harm to be prevented by an escape offense is the same regardless of the lawfulness of the detention. Moreover, when a person is in official custody, there are legal remedies to challenge his confinement, and resort to these remedies, rather than self-help, is encouraged by this section.

§ 38.10. Implements for Escape

(a) An individual, corporation, or association commits an offense if, with intent to facilitate escape, he introduces into a penal institution, or provides an inmate with, a deadly weapon or anything that may be useful for escape.

(b) An offense under this section is a Class A misdemeanor unless the actor introduced or provided a deadly weapon, in which event the offense is a felony of the third degree.

Historical Note

Derivation:
N.Y.Rev.Pen.Law §§ 205.20, 205.25

Cross References

"Association" defined, see § 1.07.
"Deadly weapon" defined, see § 1.07.
"Escape" defined, see § 38.01.
"Penal institution" defined, see § 1.07.

Committee Comment

This section replaces portions of Penal Code arts. 326 and 327 (aiding one charged with felony or misdemeanor to escape from jail). Although the category of "implements" is very broad—anything that may be useful for escape—the required culpable mental state—intent to facilitate escape—is stringent enough to narrow the scope of this offense to reach what is a form of attempting to facilitate an escape.

Unlike Section 38.08 (permitting or facilitating escape), this offense is complete regardless of whether the escape is accomplished.

The offense is a Class A misdemeanor unless the implement is a deadly weapon. The aggravating factor is thus the nature of the implement rather than the charge against the recipient as under present law.

§ 38.11. Bail Jumping and Failure to Appear

(a) An individual or corporation lawfully released from custody, with or without bail, on condition that he subsequently appear at a specified time and place, commits an offense if he intentionally or knowingly fails to appear at that time and place.

(b) It is an exception to the application of this section that the appearance is required as an incident of probation or parole.

(c) It is a defense to prosecution under this section that the actor had a reasonable excuse for his failure to appear at the specified time and place.

(d) Except as provided in Subsections (e) and (f), an offense under this section is a Class A misdemeanor.

(e) An offense under this section is a Class C misdemeanor if the offense for which the actor's appearance was required is punishable by fine only.

(f) An offense under this section is a felony of the third degree if the offense for which the actor's appearance was required is classified as a felony and he intentionally failed to appear.

Historical Note

Derivation:

Cal.Prop.Pen.Code §§ 1307, 1308
Model P.C. § 242.8

Cross References

"Custody" defined, see § 38.01.
Defense explained, see § 2.03.
Exception explained, see § 2.02.

Committee Comment

This section replaces the 1967 bail jumping statute, C.C.P. art. 22.01a. However, the objective of this section goes beyond the present law by providing a sanction for failure to appear by one released on personal bond; hopefully this will encourage the use of personal bonds.

The present law defines the offense as knowingly and willfully failing to appear within 30 days after a bail forfeiture. Under this section the offense is committed by an intentional or knowing failure to appear at the time and place specified. The defense in Subsection (c) places the burden of producing evidence on the defendant to show an excuse for his failure to appear.

There are administrative sanctions for failure to appear in connection with probation or parole requirements, and such failures are therefore excepted from this section.

The grade of this offense varies with the seriousness of the charged offense for which appearance is required. However, the offense is a felony only if the failure to appear was intentional, e. g., by one who took flight or went into hiding to avoid apprehension.

§ 38.12. Barratry

(a) An individual, corporation, or association commits barratry if, with intent to obtain a benefit for himself or to harm another:

(1) he institutes any suit or claim in which he knows he has no interest; or

(2) he institutes any suit or claim that he knows is false; or

(3) he solicits employment to prosecute or defend a suit or to collect a claim.

(b) Barratry is a Class A misdemeanor.

Historical Note

Derivation:
Penal Code art. 430

Cross References

"Benefit" defined, see § 1.07.
Disbarment of attorney guilty of barratry, see R.C.S. art. 313.
"Harm" defined, see § 1.07.
Legal ethics, see State Bar Rules art. XIII, § 3.

Committee Comment

This section restates in simpler terms the offense of barratry now found in Penal Code art. 430. Barratry is defined to prohibit conduct which tends to foment litigation, for purposes other than the pursuit of justice, in situations where litigation might not otherwise arise. Litigation so fomented imposes a burden on the judicial institutions and allows them to be employed as instruments of oppression or private aggrandizement rather than for the orderly resolution of bona fide disputes. Furthermore, a lawsuit instituted for the purposes proscribed in this section unjustifiably vexes those forced to defend the suit.

Barratry by an attorney is punishable by disbarment, R.C.S. art. 313. The tort remedy for malicious prosecution is also available for a suit filed maliciously and without probable cause. This section provides a criminal sanction to supplement these remedies. The authorized punishment is increased from the $500 and/or 3 months maximum of the present law to a Class A misdemeanor.

§ 38.13. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Municipal ordinances presently conflict with and overlap state law in the area of offenses against obstructing governmental operation. Houston and Dallas, for example, both prohibit resisting arrest and escaping from custody, see Houston City Code §§ 32–3, 32–5 (1968); Dallas City Code §§ 31–3, 31–14 (1967). The Houston code also punishes the refusal to assist a police officer in the execution of his lawful duty when summoned or commanded to do so, § 32–4. These ordinances exist even though state law clearly proscribes the conduct they cover, Penal Code arts. 317–322, 326–334, 338, 339, 341, 348, 353a, 353b, 353d. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, Section 38.13 makes clear the state intends to preempt the area of offenses against obstructing governmental operation and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Refusal to aid a peace officer, although now an offense under Penal Code art. 348, was purposely omitted from this code, and governmental subdivisions and agencies are thus prohibited by Section 38.13 from penalizing or otherwise regulating this conduct. This section also forbids, for example, local laws punishing failure to report an offense, fleeing after being stopped for investigation, or malicious prosecution. In addition, of course, laws conflicting with the provisions of this chapter are forbidden, e. g., making unlawfulness of an arrest a defense to its resistance, criminalizing escape from a juvenile detention home.

CHAPTER 39. ABUSE OF OFFICE

Section

39.01. Official Misconduct.
39.02. Official Oppression.
39.03. Misuse of Official Information.

Section 39.01. Official Misconduct

(a) A public servant commits an offense if, with intent to obtain a benefit for himself or to harm another, he intentionally or knowingly:

(1) commits an act relating to his office or employment that constitutes an unauthorized exercise of his official power; or

(2) commits an act under color of his office or employment that exceeds his official power; or

(3) refrains from performing a duty that is imposed on him by law or that is clearly inherent in the nature of his office or employment; or

(4) violates a law relating to his office or employment.

(b) For purposes of Subsection (a)(2), a public servant commits an act under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
N.Y. Rev. Pen. Law § 195.00

Cross References

"Act" defined, see § 1.07.
"Benefit" defined, see § 1.07.
Bribery and corrupt influence, see ch. 36.
Commercial bribery, see § 32.43.
"Harm" defined, see § 1.07.
Impersonating public servant, see § 37.11.
"Law" defined, see § 1.07.
Misuse of official information, see § 39.03.
Official oppression, see § 39.02.
"Public servant" defined, see § 1.07.

Committee Comment

This section replaces a large number of Texas statutes, most of which apply to violations of specific duties by specified public servants, e. g., Penal Code arts. 87 (misapplication of public mon-

ey), 416 (neglect in drawing juries), 397 (commissioner failing to attend court), 422 (officer refusing to give data). It proscribes generally misfeasance and nonfeasance in public office and provides a uniform mens rea requirement and penalty structure.

Unlike some of the present articles, this section requires intentional and knowing violations before the criminal sanction is available. Simple negligence and incompetence are not appropriate concerns of the penal law.

This section broadens the coverage of present law to embrace the comprehensive category of public servant, which includes, in addition to officers and employees of government, jurors and notaries public.

The four subdivisions of this section describe the different ways in which the offense can be committed. The public servant is responsible for unauthorized exercise of his power, acts beyond his power, failure to perform a mandatory duty, and violation of a law relating to his office.

§ 39.02. Official Oppression

(a) A public servant acting under color of his office or employment commits an offense if:

(1) he intentionally subjects another to mistreatment or to arrest, detention, stop, frisk, halt, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or

(2) he intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
Model P.C. § 243.1

Cross References

Impersonating public servant, see § 37.11.
Official misconduct, see § 39.01.
Public duty justification, see § 9.22.
"Public servant" defined, see § 1.07.

Committee Comment

Present law does not contain a provision penalizing official oppression. Rather, the Penal Code includes statutes prohibiting cer-

tain oppressive activities, mostly relating to law enforcement—e. g., inflicting unauthorized punishment on a prisoner (art. 353), using violence to induce confession (art. 1157), detaining a person who has been ordered released on habeas corpus (art. 1175), refusing to allow a person in custody to consult with counsel (art. 1176), and "hitting, striking, or whipping" inmates of certain state institutions (arts. 349 and 1158). Section 39.02 replaces these ad hoc statutes with a general offense of official oppression that applies to all public servants.

In order to convict a public servant of official oppression under this section, the state must prove that he intentionally acted in one of the ways specified with knowledge that his doing so was unlawful. The state must also prove that the public servant was acting or purporting to act in his official capacity or taking advantage of such actual or purported capacity, i. e., acting under color of his office or employment.

A public servant may be guilty of official oppression although he takes no aggressive or affirmative action against the victim; his denying or impeding the victim in securing his legal rights or privileges, for example, violates Subsection (a)(2).

The inclusion of this offense to deter and punish official oppression is especially important in view of the code's denial of the traditional defense of illegality to charges of resisting or escaping from arrest, search, stop and frisk, and custody.

§ 39.03. Misuse of Official Information

(a) A public servant commits an offense if, in reliance on information to which he has access in his official capacity and which has not been made public:

(1) he acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information; or

(2) he speculates or aids another to speculate on the basis of the information.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:
N.H.Prop.Crim.Code § 588:2
Mich.Prop.Pen.Code § 4810

Cross References

"Public servant" defined, see § 1.07.

Committee Comment

This offense is new to Texas law, but it is analogous to several statutes in the present law forbidding disclosure of certain insider

information, Penal Code arts. 144, 145, 426, and prohibiting a state official from buying claims against the state, art. 368.

The fiscal integrity of the state may be undermined if public servants are permitted to profit from confidential information acquired by virtue of their position. Enrichment of insiders will also disadvantage citizens who deal with the insiders in ignorance, and the temptation to profiteer may motivate public servants to delay, slant, or even falsify information concerning governmental transactions.

This section does not apply to investment or speculation based on information available to the public, even though the information is not generally known.

TITLE 9. OFFENSES AGAINST PUBLIC ORDER AND DECENCY

CHAPTER 42. DISORDERLY CONDUCT AND RELATED OFFENSES

Section

42.01. Disorderly Conduct.
42.02. Riot.
42.03. Obstructing Highway or Other Passageway.
42.04. Defense When Conduct Consists of Speech or Other Expression.
42.05. Disrupting Meeting or Procession.
42.06. False Alarm or Report.
42.07. Harassment.
42.08. Public Intoxication.
42.09. Desecration of Venerated Object.
42.10. Abuse of Corpse.
42.11. Cruelty to Animals.
42.12. Preemption.

Committee Comment

The ideal of certainty in the criminal law has sometimes been quietly abandoned in offenses at the lower level of the criminal spectrum. In some states statutes forbid "disorderly conduct" or "breaches of the peace" without defining those terms. In other states statutes are more elaborate but no more precise. In Texas, for example, it has been illegal to assemble for "any illegal object," to behave in a "boisterous and tumultuous" way and thereby create a danger of "illegitimate" alarm, or to be a person "leading an idle, immoral or profligate life" who has no property to support him and who is able to, but does not, work.

Modern draftsmen have commonly given no more precision to their definitions of disorderly conduct offenses than did the authors of nineteenth century penal codes. In the 1961 revision of the Illinois Criminal Code, for example, offenses against public order were largely encompassed in the following language: "A person commits disorderly conduct when he knowingly . . . [d]oes any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." Ill.Stat. Ann. ch. 38, § 26–1(1).

This sacrifice of certainty is, in part, a product of necessity. The varieties of human mischief are so great that no draftsman can anticipate them all, and limitations of language prevent the precise description of some mischief that can be anticipated. Neither the committee's proposal nor any other can, for example, pre-

cisely define the point at which noise in a neighborhood becomes so loud that criminal remedies are required.

The requirement that crimes be precisely defined in advance serves at least three separate policies, all of which are as applicable to minor as well as more serious offenses. First, a man should have fair warning; he should know the consequences of his conduct before he acts. Second, he should be able to prepare a defense when a charge is brought against him. And third, his liberty should not be subject to the unconfined discretion of those who enforce the law; the criminal law should be formulated in advance by a democratic law-making body.

This last policy may have special importance in defining minor offenses for two reasons. Arrest is itself a major sanction for disorderly conduct, and the policeman's need for guidance in this increasingly sensitive area is unusually great. Moreover, persons charged with offenses against public order are commonly tried in justice and corporation courts—where representation by counsel is exceptional; where judges are not always trained in the law; where, at least in urban areas, large caseloads are commonplace; and where appeals to higher courts are rare. Paradoxically, the law applied by lower judicial officers has left more to their personal, subjective discretion than that applied by judges who must meet more stringent legal qualifications, who are more carefully reviewed, and who are more rigorously confined by procedural safeguards.

The committee's principal goal in this chapter has been to apply the usual principles of criminal draftsmanship to minor offenses —offenses that have traditionally been regarded as "catchalls" and that have sometimes been defined with an almost deliberate imprecision.

The results of the committee's efforts should, of course, be evaluated in the context of the entire code. Disorderly conduct and related offenses cover a narrower field in this chapter than in current Texas law, but the principal reason is not that the committee has legalized much previously outlawed behavior. Instead, the committee has chosen to treat many problems traditionally regarded as disorderly conduct problems under other sections of the code. For example, the offenses of vagrancy and disorderly conduct have sometimes been used to justify the interruption of persons found in suspicious circumstances. The committee recognizes that the power to interrupt these persons may be necessary, but in its view the problem should not be solved by subjecting a person's harmless conduct to condemnation under the substantive criminal law. Instead, the committee has given the power to interrupt directly—through a carefully drawn "stop-and-frisk" statute that is new to Texas jurisprudence.

Similarly, the committee has drafted statutes concerning criminal trespass, criminal mischief, obstructing highways and other

passageways, and disrupting meetings or processions. In each instance, the committee has attempted to provide a more precise mechanism for resolving problems that, in the past, have been treated under broad-gauged disorderly conduct provisions.

The possibility remains, of course, that despite the committee's best efforts some unanticipated forms of disorder may fall outside the scope of this chapter. On occasion, certainty in the criminal law inevitably involves a cost to law enforcement. This chapter proceeds on the view that the cost is worth paying, for to underpenalize rather than overpenalize has always been the course of liberty.

§ 42.01. Disorderly Conduct

(a) An individual or corporation commits disorderly conduct if he intentionally or knowingly:

(1) makes a coarse and obviously offensive utterance, gesture, or display in a public place; or

(2) creates, by chemical means, a noxious and unreasonable odor in a public place; or

(3) abuses or threatens a person in a public place in an obviously offensive manner; or

(4) makes unreasonable noise in a public place, or near a private residence that he has no right to occupy; or

(5) fights with another in a public place; or

(6) discharges a firearm in a public place; or

(7) displays a deadly weapon in a public place in a manner calculated to alarm.

(b) It is a defense to prosecution under Subsection (a)(3) that the actor had significant provocation for his abusive or threatening conduct.

(c) For purposes of this section, "public place" means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops. An act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near the private residence.

(d) An offense under Subsections (a)(1)–(a)(5) is a Class C misdemeanor; an offense under Subsection (a)(6) or (a)(7) is a Class B misdemeanor.

Historical Note

Derivation:
New

Cross References

Assault, see § 22.01.
Criminal mischief, see § 28.03.
Criminal trespass, see § 30.03.
"Deadly weapon" defined, see § 1.07.
Defense explained, see § 2.03.
Defense when conduct consists of speech or other expression, see § 42.04.
Disrupting meeting or procession, see § 42.05.
"Firearm" defined, see § 1.07.
Obstructing highway, see § 42.03.
Prohibited weapons, see § 46.03.
Public intoxication, see § 42.08.
Riot, see § 42.02.
Stop and frisk, see C.C.P. art. 14.01, as amended.

Committee Comment

Grading

Except in cases involving the use or display of a deadly weapon, this section treats disorderly conduct as a Class C misdemeanor, which is punishable by a maximum $200 fine. In this respect, its approach is the same as that of present law, which, in the main, sets the maximum penalty for minor offenses against public order at a $100 or $200 fine.

There are probably instances of disorderly conduct that merit more severe punishment than this draft permits, but the approach of current Texas law was preferred for two reasons. First, it is almost impossible to describe the circumstances that merit greater punishment. Second, an increase in punishment would work a substantial reallocation of jurisdiction among Texas courts. The possibility of imposing a greater penalty than a $200 fine would remove disorderly conduct cases from the jurisdiction of justice and corporation courts and thus transfer a large segment of their workload to other courts.

The Public Place Concept

The requirement that disorderly conduct occur in a public place is traditional in Texas law. This requirement reflects the view that a disorderly conduct statute is not a suitable instrument for regulating what the Model Penal Code draftsmen have called "intramural or intrafamilial disputes." Unlike the Model Penal Code, however, this section recognizes one exception to its requirement that disorderly conduct occur in a public place. Unreasonable noise near a private residence, however isolated, should not be viewed as private or intramural behavior. In the committee's view, this behavior should remain subject to sanction as disorderly conduct, as it is under existing law.

Types of Disorderly Conduct

Subsection (a)(1), which proscribes coarse and obviously offensive utterances, gestures, and displays in a public place, is derived

in part from the Model Penal Code. It simplifies and expands two provisions of existing law. Article 482 of the Penal Code applies when offensive language is directed to a specific individual, who must be present, or to one of his female relatives. Under this article, the state must demonstrate that the actor's language was reasonably calculated to provoke a breach of the peace. The second provision, art. 474, forbids violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct when this conduct would tend to cause or provoke a disturbance.

Both provisions of current Texas law are defective in that they turn the actor's punishment on how persons other than the actor are likely to respond to his conduct. Thus, abusive language directed to a lumberjack might be punishable, because it is likely to provoke a disturbance, while abusive language directed to an old lady might be permissible, because the old lady is unlikely to respond with her fists. Throughout Chapter 42 the committee has rejected the view that disorderly behavior should be punished only when it is likely to provoke a breach of the peace. The offensive character of the behavior itself—what the actor did—provides the occasion for punishment under this chapter, and the anticipated reaction of victims and bystanders is immaterial.

The terms "coarse and obviously offensive" seemed to the committee as precise as the nature of this offense permits. In the committee's view, it would have been inappropriate to prohibit all "offensive" utterances in a public place, since that term might have been construed to prohibit the expression of offensive ideas, a constitutionally protected activity. The committee's goal was, of course, to regulate the manner of public expression, not its content. Similarly, in the committee's opinion, it would have been inappropriate to prohibit all "coarse" utterances in a public place, since coarse language is not offensive in certain social contexts. The two operative terms therefore limit each other. An utterance, gesture, or display must be *both* coarse and obviously offensive before it can be punished. (The committee preferred the term "coarse" to terms such as obscene, lewd, profane, and indecent, because this term, unlike the others, is devoid of archaic overtones that clutter, rather than clarify, its meaning.)

Subsection (a)(2), which outlaws the creation of noxious and unreasonable odors in a public place, is the code's "stink bomb" provision. It is more general than the provision it replaces in present law, which makes it "unlawful to break, open, or explode or to abet in the breaking, opening, or exploding of any stink bomb or any stinking, offensive smelling, or injurious bomb or substance with a malicious intent wrongfully to injure, molest or coerce another. . . . ." Penal Code art. 1339b. Existing law treats stink bombs and explosives in the same manner; the use of either is a felony, punishable by as much as 25 years' imprisonment. These penalties are clearly excessive for persons who, however se-

verely they may have offended their neighbors' sense of smell, have not exposed them to any danger of physical injury.

Subsection (a)(3), which concerns threats and verbal abuse in a public place, is broader than existing law. Current law does not specifically prohibit any form of threat, and it requires that verbal abuse be reasonably calculated to provoke a breach of the peace before it can be punished, Penal Code art. 482.

Subsection (b) provides a defense to prosecution under Subsection (a)(3) if the actor has significant provocation for his threatening or abusive behavior. The significance of the provocation must, of course, be measured in terms of the seriousness of the threat or abuse that followed.

Subsection (a)(4), which prohibits unreasonable noise in a public place or near a private residence, is largely derived from Penal Code art. 474. Article 474, in part, prohibits the use of unreasonably loud language in a public or private place, whenever that language tends to provoke a disturbance. Article 474 also prohibits behavior of a boisterous and tumultuous character in a public place or in a residential area when "there is a clear and present danger of alarming persons where no legitimate reason for alarm exists." This section expands existing law by eliminating the requirement that "alarm" or a provoked "disturbance" be likely; under this section, excessive noise itself provides the reason for punishment.

This section contracts existing law when the actor's behavior does *not* occur in a public place. It remains an offense under this section to disturb a private residence, but only when the actor has no legal right to occupy the residence. The committee felt it inappropriate to punish a man for making excessive noise in or near his own house, at least when only his fellow occupants are disturbed, thus disapproving the holding in Pritchett v. State, 214 S.W.2d 623 (Tex.Crim.App.1948).

Subsection (a)(5), which prohibits fighting in a public place, does not depart substantially from present law, Penal Code art. 473. It should be noted, however, that self-defense and other principles of justification (see Chapter 9) apply to offenses against public order, this code thus resolving an ambiguity in present law, see Pollock v. State, 22 S.W. 19 (Tex.Crim.App.1893).

Subsections (a)(6) and (7) are derived from present law, which prohibits the "alarming" or "frightening" display of firearms in a public place, Penal Code art. 474, and the firing of firearms in a public place, arts. 480, 480a.

§ 42.02. Riot

(a) An individual or corporation commits an offense if he intentionally joins with three or more other persons in a violent course of disorderly conduct.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

New

Cross References

Disorderly conduct, see § 42.01.
Disrupting meeting, see § 42.05.
Incitement to riot, see ch. 7, subch. A; ch. 15.
Obstructing highway, see § 42.03.

Committee Comment

Present law contains over 30 articles defining the crimes of unlawful assembly and riot, Penal Code arts. 439–454, 455–472. An unlawful assembly occurs whenever three or more persons meet together with intent to aid each other to commit a criminal act or to disturb any person in the enjoyment of a legal right. An unlawful assembly becomes a riot when a member of the group commits, or attempts to commit, an illegal act. Thus, if three businessmen meet and formulate plans for persuading an associate to break a contract, they are guilty of an unlawful assembly. If they proceed to the associate's place of business where one of them successfully advocates the breach (a tortious interference with a contractual relationship), the three become rioters.

Probably the most frequently used of the riot and unlawful assembly articles are those which proscribe assemblies designed to interfere with a man's pursuit of his occupation. Almost any group action that may prove financially costly to another seems potentially subject to criminal sanction under these provisions. As a result, prosecutors have used broadly-drafted riot and unlawful assembly provisions to compensate for serious omissions in the Penal Code—notably the lack of a comprehensive statute on group obstruction of highways and passageways. Most of the persons convicted under Texas' group action statutes have merited criminal punishment of some sort, but the existing riot and unlawful assembly offenses are unnecessary under this code.

The committee has therefore eliminated the crime of unlawful assembly and has defined the offense of riot more simply—as disorderly conduct aggravated by group action and an element of violence. Behavior by a group is often more alarming, more dangerous, and more difficult to control than behavior by an individual; and because the penalties provided for disorderly conduct in this draft are highly restricted, the committee felt it desirable to authorize a wider range of sentencing alternatives in cases of group activity.

§ 42.03. Obstructing Highway or Other Passageway

(a) An individual or corporation commits an offense if without legal privilege he intentionally, knowingly, or recklessly:

(1) obstructs a highway; street; sidewalk; railway; waterway; elevator, aisle, or hallway to which the public or a substantial group of the public has access; or any other place used for the passage of persons, vehicles, or conveyances, whether the obstruction arises from his acts alone or from his acts and the acts of others; or

(2) disobeys a reasonable request or order to move issued by a person he knows to be a peace officer, a fireman, or a person with authority to control the use of the premises:

(A) to prevent obstruction of a highway or passageway; or

(B) to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.

(b) For purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or hazardous.

(c) An offense under this section is a Class B misdemeanor.

Historical Note

Derivation:
New

Cross References

Criminal trespass, see § 30.03.
Defense when conduct consists of speech or other expression, see § 42.04.
Disrupting meeting, see § 42.05.
Public intoxication, see § 42.08.
Riot, see § 42.02.
Stop and frisk, see C.C.P. art. 14.01, as amended.

Committee Comment

The Penal Code currently deals with the obstruction of highways and passageways only in specialized situations. Article 1335 is captioned "Obstructing Railroad Track" and is limited to activities that endanger human life. Article 1347 is a narrowly drawn provision that forbids "throwing or depositing" materials likely to injure persons, animals, automobiles, or other vehicles on a public road. As recently revised, art. 474 prohibits the "wilful and malicious" obstruction of passageways in public buildings; and another recent enactment, art. 295a, punishes the unwarranted obstruction of exits and entrances on the campuses of educational institutions. Texas seems to have too many statutes on passage obstruc-

tion that do too little, and the committee has therefore drafted a single, more comprehensive provision outlawing the unprivileged obstruction of any place used for the passage of persons or vehicles.

The phrase "without legal privilege" would, of course, be redundant if it referred only to the principles of justification set forth in Chapter 9. Its primary function, however, is to incorporate privileges from the civil law. For example, the manager of a supermarket is surely privileged to close one of the store's shopping aisles, although the same act by a customer might constitute an illegal obstruction of the passageway. The store manager's closing of the aisle is not specifically justified under Chapter 9, however, and this section therefore incorporates the applicable privilege from the law of property and agency. It should be emphasized that although the phrase "without legal privilege" authorizes courts to "borrow" existing privileges from other branches of law, it does not allow them to create new privileges whenever they believe that conviction would be unjust.

Some of the language of this section was derived from Model P. C. § 250.7. The section is, however, broader than the Model Penal Code in that it applies to private as well as public passageways, and in that it requires members of a crowd to obey "unofficial" orders to disperse under certain circumstances. The Model Penal Code also contains special provisions to prevent the arrest of a speaker for obstructing a highway or passageway when the police could remedy the obstruction by controlling the size or location of his audience. Under this chapter the problem of the obstructing audience is treated in the next section, 42.04.

§ 42.04. Defense When Conduct Consists of Speech or Other Expression

(a) If conduct that would otherwise violate Section 42.01(a)(4) (unreasonable noise) or 42.03 (obstructing highway) consists of speech or other communication, or of gathering with others to hear or observe such speech or communication, or of gathering with others to picket or otherwise express in a nonviolent manner a position on social, economic, political, or religious questions, the actor must be ordered to move, disperse, or otherwise remedy the violation prior to his arrest if he has not yet intentionally and substantially harmed the interests of others.

(b) The order required by this section may be given by a peace officer or, when a peace officer is not immediately available, by any person affected by the violation.

(c) It is a defense to prosecution under Section 42.01(a)(4) or 42.03:

(1) that in circumstances in which this section requires an order, no order was given; or

(2) that an order, if given, was manifestly unreasonable in scope or content; or

(3) that an order, if given, was obeyed.

(d) For purposes of Subsection (c)(2):

(1) an order to move, addressed to a person whose speech or other communication attracts an obstructing audience, is manifestly unreasonable if the obstruction can be effectively remedied by police control of the size or location of the audience;

(2) an order to move, disperse, or otherwise remedy a violation is manifestly unreasonable if measures less restrictive of freedom of communication and assembly are readily available.

Historical Note

Derivation:
New

Cross References

Defense explained, see § 2.03.
Disorderly conduct, see § 42.01.
Obstructing highway, see § 42.03.
Stop and frisk, see C.C.P. art. 14.01, as amended.

Committee Comment

This section establishes general guidelines for resolving certain problems of speech and communication that often arise in the area of offenses against public order.

Despite the use of some undeniably vague language, this section represents an advance in specificity over the law currently in effect throughout the United States. The problems with which it deals have, in the main, been handled by general disorderly conduct provisions, which, in turn, have been qualified by general constitutional guarantees. The problem of ensuring free expression in public places has thus been relegated to the uncertain course of adjudication under the first amendment.

The section may diminish the role of first amendment litigation by giving speakers and demonstrators specific warning when they begin to impinge on interests that are properly protected by the criminal law. At the same time, the section is flexible, and obviously does not attempt to resolve *all* the constitutional issues that may arise in demonstration cases, or, for example, to perform the tasks of a municipal parade ordinance.

The section's chief function is to express two basic legislative policies: first, that in cases involving the expression of a political or social viewpoint, the use of on-the-spot directives is preferable to the immediate use of criminal sanctions; and second, that on-the-spot directives should be designed to restrict freedom of communication and assembly to the smallest extent practicable.

As suggested, the section is little more than an expression of policy. It does contain an escape valve. Once a court has concluded that a defendant has violated some section of the code, it may conclude that he has also harmed the interests of others in a substantial and intentional way. In that event, on-the-spot correction is not required. This exemption is, of course, meant to be construed in a limited spirit—to dispense with the requirement of on-the-spot correction only when deliberate and serious harm has already occurred.

It should be noted that this section does not provide a defense when the actor's crime consists of the use of coarse and obviously offensive language, or of other forms of language that are deliberately designed to harass; nor does the section apply when the actor has engaged in violence of any sort, even if he maintains that the violence was a form of social protest.

§ 42.05. Disrupting Meeting or Procession

(a) An individual or corporation commits an offense if, intending to prevent or disrupt a lawful meeting, procession, or gathering, he significantly obstructs or interferes with the meeting, procession, or gathering by physical action, verbal utterance, or any other means.

(b) An offense under this section is a Class B misdemeanor.

Historical Note

Derivation:

New

Cross References

Disorderly conduct, see § 42.01.
Obstructing highway, see § 42.03.
Public intoxication, see § 42.08.
Riot, see § 42.02.
Stop and frisk, see C.C.P. art. 14.01, as amended.

Committee Comment

It has long been a crime under Texas law to "disturb" a congregation assembled for religious worship, Penal Code art. 281. A more common current problem, however, arises when demonstrators opposed to a particular political viewpoint attempt to prevent the free expression of that viewpoint by others. If a disrupting group uses force, violence, or the threat of force or violence to accomplish its objectives, and if the disruption occurs on the campus of an educational institution, the group's activities fall within the prohibition of the recently enacted art. 295a. Otherwise, the state must rely on art. 474, as revised in 1969, which makes it a crime "wilfully and maliciously" to disrupt a lawful assembly "when such conduct tends to cause or provoke a disturbance." In the committee's view, this 1969 legislation largely plugged a significant gap

in our penal law, but this section is somewhat broader in that it prevents disruption of a lawful assembly regardless of whether the disruption would tend to provoke a disturbance.

§ 42.06. False Alarm or Report

(a) An individual or corporation commits an offense if he intentionally initiates or circulates a report of a present, past, or impending bombing, fire, offense, or other emergency, knowing that the report is false or baseless and intending or knowing:

(1) that it will cause action of any sort by an official or volunteer agency organized to deal with emergencies; or

(2) that it will place a person in fear of imminent serious bodily injury; or

(3) that it will prevent or interrupt the occupation of any building; room; place of assembly; place to which the public has access; or aircraft, automobile, or other form of conveyance.

(b) An offense under this section is a Class B misdemeanor unless the actor's intent is to prevent or interrupt the occupation of a building, a place to which the public has access, or a facility of public transportation operated by a common carrier, in which event the offense is a Class A misdemeanor.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Serious bodily injury" defined, see § 1.07.
Terroristic threat, see § 22.06.

Committee Comment

This section proscribes not only false alarms to agencies of public safety but, in addition, false alarms to members of the public. It is, in several respects, broader than existing Texas law. Penal Code art. 1723a prohibits false reports to members of the public, but only when they concern the "presence of a bomb or other explosive or incendiary device." Article 1724 prohibits the false report of "any fact situation" to a public agency, but the actor is not guilty of a crime until "an Authorized Emergency Vehicle" responds to the alarm.

This section is not intended to reach situations in which a person causes terror or public inconvenience by threatening to commit a crime himself; those situations are the subject of Section 22.06 (terroristic threat). The two sections largely complement each other, however, since the committee's object is to ensure that no

form of misconduct falls into a "no man's land" between the two provisions. Similar considerations prompted the inclusion of both "official" alarms and alarms to members of the public in a single section. Both this section and Section 22.06 will simplify pleading and prevent the development of technical distinctions between closely similar situations.

§ 42.07. Harassment

(a) An individual or corporation commits an offense if he intentionally:

(1) communicates by telephone or in writing in a coarse and obviously offensive manner, and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient; or

(2) threatens, by telephone or in writing, to take unlawful action against any person, and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient; or

(3) places one or more telephone calls anonymously, or at an inconvenient hour, or in an offensively repetitious manner, or without a legitimate purpose of communication, and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient.

(b) For purposes of Subsection (a)(3), a person places a telephone call as soon as he dials a complete telephone number, whether or not a conversation ensues.

(c) An offense under this section is a Class C misdemeanor.

Historical Note

Derivation:

Mich.Prop.Pen.Code § 5535
Model P.C. § 250.4

Cross References

Assault, see § 22.01.
"Coarse and obviously offensive" see § 42.01 comment.
False alarm or report, see § 42.06.
Terroristic threat, see § 22.06.

Committee Comment

This section, which is concerned primarily with obscene and harassing telephone calls, changes Penal Code art. 476 in only one respect. It does not punish the use of "vulgar, profane, obscene, or indecent language" over a telephone unless this language is likely to annoy or alarm the recipient. In the committee's view, the morality of persons who choose to communicate with each other in crude language over the telephone should not be the concern of the criminal law.

§ 42.08. Public Intoxication

(a) An individual commits an offense if he appears in a public place obviously under the influence of alcohol or any other substance, to the degree that he may endanger himself or another.

(b) For purposes of this section, "public place" means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(c) A peace officer or magistrate may release from custody an individual arrested under this section if he believes imprisonment is unnecessary for the protection of the individual or another.

(d) It is a defense to prosecution under this section that the alcohol or other substance was therapeutically administered.

(e) An offense under this section is a Class C misdemeanor.

Historical Note

Derivation:

Cal.Pen.Code Ann. § 849
Model P.C. § 250.5
Penal Code art. 477

Cross References

Defense explained, see § 2.03.
Disorderly conduct, see § 42.01.
"Magistrate" defined, see C.C.P. art. 2.09.
"Peace officer" defined, see § 1.07.
Stop and frisk, see C.C.P. art. 14.01, as amended.

Committee Comment

There were two million arrests for the offense of public intoxication in 1965, one for every three arrests in America. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness Offenses 1 (1967). There is evidence that a large number of those arrested had a lengthy history of prior drunkenness arrests, and that a disproportionate number were poor persons living in slums. The result is that alcoholics become part of the "revolving door" system in which they are arrested, convicted, fined and, unable to pay the fine, jailed for several days.

The chronic alcoholic should be treated as a sick person rather than a criminal, but adequate treatment facilities are not currently available. Model legislation designed to treat alcoholism as a medical—social problem has been proposed, see Alcoholism and Intoxication Treatment Act, National Institute of Mental Health (Final Draft: 1969). When treatment facilities become available, the

committee recommends that the legislature consider implementing this model act.

Some courts have held that a chronic alcoholic cannot be constitutionally convicted under a drunkenness statute, e. g., Easter v. District of Columbia, 361 F.2d 50 (D.C.Cir.1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969). However, the Supreme Court in Powell v. Texas, 88 S.Ct. 2145, 392 U.S. 514 (1968), rejected the argument that the eighth amendment's prohibition against cruel and unusual punishment automatically prevented the conviction of a chronic alcoholic for being drunk in a public place. Accord: City of Seattle v. Hill, 72 Wash.2d 786, 435 P.2d 692 (1967); People v. Hoy, 380 Mich. 597, 158 N.W.2d 436 (1968); Vick v. State, 453 P.2d 342 (Alaska 1969).

Section 42.08 is similar to present law, Penal Code art. 477. However, the definition of public place, which parallels that in Section 42.01 (disorderly conduct), eliminates the present law's reach to "any private house except his own."

Subsection (c) is derived from California law and validates present police practice. It will also permit the arresting officer or magistrate to initiate medical care for chronic alcoholics by releasing them to treatment facilities.

The defense in Subsection (d) is necessary to exculpate one under the influence of a therapeutically administered substance, since the term substance, which is intentionally broad, includes, for example, prescription medication.

§ 42.09. Desecration of Venerated Object

(a) An individual or corporation commits an offense if he intentionally desecrates:

(1) a public monument; or

(2) a place of worship or burial; or

(3) a state or national flag; or

(4) any other object of veneration owned by another.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) an offense under this section is a Class B misdemeanor.

Historical Note

Derivation:
Model P.C. § 250.9

Cross References

Criminal mischief, see § 28.03.
Criminal trespass, see § 30.03.

Committee Comment

This section, although derived from the Model Penal Code, is somewhat broader than that code in several respects. It does not require that the actor's conduct be offensive to more than one person; it does not require that the actor's conduct occur in a public place; and it does not require that an object be venerated by "the public or a substantial segment thereof" before its desecration can be punished. Thus, although the defilement of a personal religious symbol in a private room is not specifically condemned by the Model Penal Code, it is punishable under this section.

Although the section is broader than the Model Penal Code, its flag-desecration provisions are less stringent than those of present law. Article 152 of the Penal Code declares that a person who casts contempt upon "any flag, standard, color, or ensign of the United States," whether "by word or act," is punishable by confinement "in the penitentiary not less than two nor more than twenty-five years." In a rarely enforced provision, Texas also prohibits use of the Texas flag for commercial purposes, Business & Commerce Code § 17.07; cf. R.C.S. arts. 6139–6142.

In prohibiting desecration of the flag "by word," the current Penal Code is unconstitutional, Street v. New York, 89 S.Ct. 1354, 394 U.S. 576 (1969). Moreover, although the committee concluded that the psychological affront involved in flag desecration justifies its treatment as a crime, the present law's 25-year penalty is excessive. Restraint, the committee believes, is often a sign, not of weakness, but of self-confidence.

The present statutory provisions on the desecration of graves are unnecessarily elaborate. They specifically forbid, for example, removing a fence that encloses a cemetery without the owner's consent, Penal Code arts. 528, 528a. Every act punished by existing law remains an offense under this code, however, either under this section or under Section 28.03 (criminal mischief).

§ 42.10. Abuse of Corpse

(a) An individual or corporation commits an offense if without legal privilege he intentionally or knowingly:

(1) treats a corpse in a seriously offensive manner; or

(2) disinters or dissects a corpse that has been buried or otherwise interred.

(b) An offense under this section is a Class B misdemeanor.

Historical Note

Derivation:
New

Cross References

Theft, see ch. 31.
"Without legal privilege," see § 42.03 comment.

Committee Comment

Penal Code art. 529 specifically forbids the disinterment or dissection of a corpse without legal authorization. It also condemns various sorts of "grave robbing" (e. g., removing "jewels, apparel, or anything")—conduct this code treats under Chapter 31 (theft). This section expands existing law by making *any* seriously offensive treatment of a corpse an offense.

§ 42.11. Cruelty to Animals

(a) An individual or corporation commits an offense if he intentionally or knowingly:

(1) tortures or seriously overworks an animal; or

(2) fails unreasonably to provide necessary food, care, or shelter for an animal in his custody; or

(3) abandons unreasonably an animal in his custody; or

(4) transports or confines an animal in a cruel manner; or

(5) kills, injures, or administers poison to an animal belonging to another without legal privilege or the owner's effective consent; or

(6) causes one animal to fight with another.

(b) It is a defense to prosecution under this section that the actor engaged only in accepted veterinary practices or bona fide experimentation for scientific research.

(c) For purposes of this section, "animal" means a domesticated living creature and a wild living creature previously captured. "Animal" does not include an uncaptured wild creature or a wild creature whose capture was accomplished by conduct at issue under this section.

(d) An offense under this section is a Class B misdemeanor.

Historical Note

Derivation:
New

Cross References

Criminal mischief, see § 28.03.
Defense explained, see § 2.03.
"Effective consent" defined, see § 1.07.
Game laws, see R.C.S. tit. 103A, as amended.
Theft, see ch. 31.
"Without legal privilege," see § 42.03 comment.

Committee Comment

This section is substantially simpler than existing law. Article 1373 of the Penal Code proscribes the willful maiming, wounding, or disfiguring of any horse, ass, mule, cattle, sheep, goat, swine, dog, or other domesticated animal. It then provides separately for the wilful killing, maiming, wounding, poisoning, or disfiguring of any dog, domesticated bird, or fowl of another. Article 1373a contains an elaborate penalty provision that requires a determination of the monetary harm done by the defendant. Article 1374 concerns, among other things, the overdriving, wilful overloading, driving when overloaded, overworking, or needless killing of any animal. See also Penal Code arts. 613, 1375.

The squabbles and disputes of a frontier society come to life in the Penal Code's provisions on animals, but the code's elaboration has not yielded precision. By contrast, this section describes in simple, understandable terms the conduct that virtually all statutes in this area seek to proscribe.

The protection of this section is limited to domesticated animals (pets and livestock) and to captured wild animals. In the committee's opinion, inhumane methods of hunting, trapping, or capturing other wild animals are properly the subject of the game laws rather than this code.

§ 42.12. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Municipal ordinances presently conflict with and overlap state law in the area of disorderly conduct and related offenses against

public order. The Austin Municipal Code (1967), for example, prohibits spitting in public places and disturbing the peace by "beating a drum . . . or making any other loud noise," §§ 13-10, 23-12; discharging firearms, § 23-6; loitering, §§ 23-9, 23-10, 23-11; sleeping in streets or parks, § 23-23; and throwing articles out of the windows of upper stories of buildings, § 23-24. These ordinances exist even though state law clearly proscribes these and other forms of disorderly conduct, e. g., Penal Code arts. 474-475, 480-480a, 607-609. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, Section 42.12 makes clear the state intends to preempt the area of disorderly conduct and related offenses against public order and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Chapter 42 deals comprehensively with disorderly conduct and related offenses against public order, and forms of disorderly-type conduct omitted from this chapter (and not covered elsewhere in the code) are purposely exempted from criminal sanction. Thus, a governmental subdivision or agency may not enact or enforce a law criminalizing vagrancy or loitering, for example, or directing abusive language at a peace officer, or wearing a mask in public. In addition, of course, laws conflicting with the provisions of this chapter—e. g., redefining the public place concept, prohibiting drunkenness in a private residence, punishing negligent or reckless desecration of a flag—are prohibited.

CHAPTER 43. PUBLIC INDECENCY

SUBCHAPTER A. PROSTITUTION

Section
43.01. Subchapter Definitions.
43.02. Prostitution.
43.03. Promotion of Prostitution.
43.04. Aggravated Promotion of Prostitution.
43.05. Compelling Prostitution.

SUBCHAPTER B. OBSCENITY

43.21. Definition of Obscene.
43.22. Obscene Display.
43.23. Obscenity.
43.24. Sale, Distribution, or Display of Harmful Material to Minor.

SUBCHAPTER C. MISCELLANEOUS

43.31. Preemption.

SUBCHAPTER A. PROSTITUTION

Section 43.01. Subchapter Definitions

In this subchapter, unless the context requires a different definition:

(1) "Deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person.

(2) "Prostitution" means the offense defined in Section 43.02.

(3) "Sexual contact" means any touching of the anus or any part of the genitals of another person, or of the breast of a female 10 years or older, with intent to arouse or gratify the sexual desire of any person.

(4) "Sexual conduct" includes deviate sexual intercourse, sexual contact, and sexual intercourse.

(5) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

§ 43.02. Prostitution

(a) An individual commits prostitution if:

(1) he offers to engage, agrees to engage, or engages in sexual conduct in return for a fee payable to the actor; or

(2) he solicits another in a public place to engage with him in sexual conduct for hire.

(b) An offense is established under Subsection (a)(2) whether the actor solicits a person to hire him or offers to hire the person solicited.

(c) For purposes of Subsection (a)(2), "public place" means any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(d) Prostitution is a Class C misdemeanor unless the actor has been convicted one or more times before under this section, in which event prostitution is a Class B misdemeanor.

Historical Note

Derivation:
Subsec. (a)(1): N.Y.Rev.Pen.Law § 230.00
Subsecs. (a)(2), (b)-(d): New

Cross References

Aggravated promotion of prostitution, see § 43.04.
Compelling prostitution, see § 43.05.
"Conviction" defined, see § 1.07.
Disorderly conduct, see § 42.01.
Promotion of prostitution, see § 43.03.
"Sexual conduct" defined, see § 43.01.

Committee Comment

Subsection (a)(1) redefines the offense of prostitution presently set out in various subdivisions of the vagrancy statute, Penal Code art. 607(9), (16)-(20). It differs from present law by focusing on conduct rather than status or location. It also applies only to the prostitute.

The hire and fee elements in Subsection (a) preserve present law, art. 607(20), by limiting the proscription to commercialized sex. Since the pronoun "he" includes both male and female, see Section 1.05 (construction of code), both homosexual and heterosexual prostitution is covered.

Subsection (a)(2) focuses on the public nuisance aspect of prostitution. It reflects the notion that citizens ought to be able to go about in public places without being exposed to offensive solicitation. Since this interest is violated whether the solicitation comes from a potential customer or from a prostitute, Subsection (b) makes clear that the offense is committed if either a prostitute or customer solicits another in a public place.

§ 43.03. Promotion of Prostitution

(a) An individual, corporation, or association commits an offense if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he receives money or other property pursuant to an agreement to participate in the proceeds of prostitution.

(b) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 230.20

Cross References

Aggravated promotion of prostitution, see § 43.04.
"Association" defined, see § 1.07.
Compelling prostitution, see § 43.05.
Injunction, see R.C.S. art. 4667, as amended.
Nuisance, see R.C.S. art. 4664, as amended.
Prostitution, see § 43.02.
"Prostitution" defined, see § 43.01.

Committee Comment

Section 43.03 applies to persons other than prostitutes, such as the pimp and procurer, who profit from prostitution. Present law does not distinguish on the basis of whether a promoter receives compensation for his efforts, e. g., Penal Code arts. 519 (pandering), 525 (procuring). Of course, a person who aids in the commission of prostitution, whether or not for pecuniary gain, is responsible as a party under Chapter 7, Subchapter A (complicity).

This section, along with Sections 43.04 and 43.05, replace several offenses in present law: Penal Code arts. 514 (keeping bawdy or disorderly house); 516 (employing prostitutes); 518 (liquor in bawdy or disorderly house); 519 (pandering); 522 (keeping resort to aid pandering); 525 (procuring); 607(15) (persons who invite, entice, solicit, take or transport males for purposes of prostitution); 607(19) (persons who aid or abet in the doing of anything prohibited in art. 607).

§ 43.04. Aggravated Promotion of Prostitution

(a) An individual, corporation, or association commits an offense if he owns, invests in, finances, controls, supervises, or manages a continuing prostitution enterprise that uses two or more prostitutes.

(b) An offense under this section is a felony of the third degree.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 230.25

Cross References

"Association" defined, see § 1.07.
Compelling prostitution, see § 43.05.
Injunction, see R.C.S. art. 4667, as amended.
Nuisance, see R.C.S. art. 4664, as amended.
Promotion of prostitution, see § 43.03.
Prostitution, see § 43.02.
"Prostitution" defined, see § 43.01.

Committee Comment

Section 43.04 replaces those articles of the Penal Code aimed at prohibiting maintenance of houses of prostitution. Penal Code art. 514 (keeping bawdy or disorderly house) is the statute most frequently employed and provides a mandatory punishment of a $200 fine and 20 days in jail *for each day* the defendant keeps such a house. One defendant was convicted under this article of 51 counts, and sentenced to 1,020 days in jail and fined $10,200, Green v. State, 320 S.W.2d 818 (Tex.Crim.App.1959). Section 43.-04 grades the offense a felony, which authorizes up to six years in the penitentiary, and expands its scope to cover operation of a continuing prostitution enterprise whatever its form or location.

The requirements of continuing operation and at least two prostitutes to constitute an enterprise change present law under which convictions for "keeping a bawdy house" have been sustained even though only one prostitute was kept for one night, e. g., Spears v. State, 232 S.W. 326 (Tex.Crim.App.1921).

§ 43.05. Compelling Prostitution

(a) An individual or corporation commits an offense if:

(1) he causes another by force, threat, or fraud to commit prostitution; or

(2) he causes a person younger than 16 years to commit prostitution.

(b) An offense under this section is a felony of the second degree.

Historical Note

Derivation:
New

Cross References

Aggravated promotion of prostitution, see § 43.04.
Computation of age, see § 1.06.
False imprisonment, see § 20.02.
Promotion of prostitution, see § 43.03.
Prostitution, see § 43.02.
"Prostitution" defined, see § 43.01.
Rape, see §§ 21.02, 21.09.
Sexual abuse, see §§ 21.04, 21.10.

Committee Comment

This section has no precise counterpart in the Penal Code, but does cover the most reprehensible forms of "pandering" described in art. 519. Article 519 provides for imprisonment "for any term of years not less than five," but unlike Section 43.06 does not require proof of force, threat, or fraud for conviction, e. g., Humphries v. State, 186 S.W. 332 (Tex.Crim.App.1916) (arranging for prostitute to ply her trade in new location).

SUBCHAPTER B. OBSCENITY

Section 43.21. Definition of Obscene

(a) In this subchapter, unless the context requires a different definition, "obscene" means having as a whole a dominant theme:

(1) that appeals to a prurient interest in sex or excretion; and

(2) that is patently offensive because it affronts contemporary community standards relating to the description or representation of sex or excretion; and

(3) that is utterly without redeeming social value.

(b) For purposes of Subsection (a)(2), "community" may not encompass an area less than the territory of this state.

(c) In determining whether material is obscene under Subsection (a), the trier of facts shall consider the following factors among others:

(1) the character of the audience for which the material was designed or to which it was directed;

(2) the predominant appeal of the material for ordinary adults or any special audience to which it was directed;

(3) the degree of acceptance of the material in this state;

(4) the purpose of the author, creator, publisher, or distributor;

(5) any artistic, literary, scientific, educational, or other merit of the material.

Historical Note

Derivation:
Penal Code art. 527
Ill.Stat.Ann. ch. 38, § 11-20
Model P.C. § 251.4

Cross References

Harmful material, see § 43.24.
Indecent exposure, see § 21.08.

Obscene display, see § 43.22.
Obscenity offense, see § 43.23.
Public lewdness, see § 21.07.

Committee Comment

The definition of obscene tracks that in present law and is the current constitutional standard, Memoirs v. Massachusetts, 86 S.Ct. 975, 383 U.S. 413 (1966). Each of the three elements must be considered independently. The Model Penal Code's element of excretion is included because of Sections 43.22 and 43.24 on obscene and harmful displays.

Although Penal Code art. 527 does not define community, former art. 527 included a definition similar to Subsection (b). Justice Brennan expressed the view in Jacobellis v. Ohio, 84 S.Ct. 1676, 378 U.S. 184 (1964), that the appropriate standard was that of the national community. See also Newman v. Conover, 313 F.Supp. 623 (N.D.Tex.1970); Stein v. Batchelor, 300 F.Supp. 602 (N.D. Tex.1969).

The evidentiary rules are derived from the Illinois law. These rules will guide the trier of facts in determining whether material is obscene, and expert testimony is admissible if relevant to the rules.

§ 43.22. Obscene Display

(a) An individual, corporation, or association commits an offense if he knowingly displays an obscene photograph, drawing, or similar visual representation and is reckless about whether a person is present who will be offended or alarmed by the display.

(b) An offense under this section is a Class C misdemeanor.

Historical Note

Derivation:
Mich.Prop.Pen.Code § 6320

Cross References

"Association" defined, see § 1.07.
Harmful material, see § 43.24.
Indecent exposure, see § 21.08.
"Obscene" defined, see § 43.21.
Obscenity offense, see § 43.23.
Public lewdness, see § 21.07.

Committee Comment

This section creates a new offense in Texas. The Supreme Court has suggested that obtrusive publication may be an element of obscenity if it is impossible for an unwilling individual to avoid exposure to it, Redrup v. New York, 87 S.Ct. 1414, 386 U.S. 767

(1967). This section recognizes that the public is acutely sensitive to public breaches of sexual and scatological taboos. The public place concept in this section, which parallels that in Sections 21.07 (public lewdness) and 21.08 (indecent exposure), depends on the nature of the audience rather than the location.

§ 43.23. Obscenity

(a) An individual, corporation, or association commits an offense if, knowing the matter is obscene:

(1) he sells, commercially distributes, or possesses for sale or commercial distribution an obscene writing, picture, recording, or other representation or embodiment of the obscene; or

(2) he presents or directs an obscene play, dance, or performance or participates in that portion of the play, dance, or performance that makes it obscene.

(b) It is an exception to the application of this section:

(1) that the obscene material is possessed by a person having scientific, educational, governmental, or other similar justification; or

(2) that the obscene matter is distributed or presented to personal associates of the actor.

(c) An offense under this section is a Class B misdemeanor.

Historical Note

Derivation:
New

Cross References

"Association" defined, see § 1.07.
Exception explained, see § 2.02.
Harmful material, see § 43.24.
Indecent exposure, see § 21.08.
"Obscene" defined, see § 43.21.
Public lewdness, see § 21.07.

Committee Comment

The main purpose of this section is to prohibit commercial distribution of obscenity. Possession of obscene material for private consumption is protected by the first amendment, Stanley v. Georgia, 89 S.Ct. 1243, 394 U.S. 557 (1969); Stein v. Batchelor, 300 F. Supp. 602 (N.D.Tex.1969).

"Knowing" is used because the actor must have scienter, Smith v. California, 80 S.Ct. 215, 361 U.S. 147 (1959). If a seller could be convicted because he is reckless about whether matter is obscene, he would tend to restrict the matter sold, and the state

would be proscribing the sale of some constitutionally protected matter.

Penal Code art. 527 prohibits the exhibition or distribution of obscene matter and authorizes its seizure and an injunction against its exhibition or distribution. In Fontaine v. Dial, 303 F. Supp. 436 (N.D.Tex.1969), a three-judge federal district court held that Section 6 of the article, which authorizes seizure, could not be utilized unless a prior adversary hearing was afforded; the court in so ruling followed the Supreme Court decision in A Quantity of Copies of Books v. Kansas, 84 S.Ct. 1723, 378 U.S. 205 (1964). Section 9 of art. 527, which allows seizure and ex parte search warrants without an adversary hearing, was held unconstitutional in Newman v. Conover, 313 F.Supp. 623 (N.D.Tex.1970). Because of these cases, and the resulting awkwardness in using the seizure and injunctive remedies, Section 43.23 does not provide either.

Performers who are not involved in the obscene act and those who assist with the production are not punishable under Subsection (a)(2), but persons who control or direct the performance are.

In a classic case the Kinsey Institute was allowed to import obscene photographs for scientific investigation, United States v. 31 Photographs, 156 F.Supp. 350 (S.D.N.Y.1957), and Subsection (b)(1) continues this exception, cf. Penal Code art. 527, § 2. The exception for noncommercial distribution to personal associates of the actor, Subsection (b)(2), is consistent with the section's purpose of prohibiting commercial dissemination and Stanley v. Georgia, 89 S.Ct. 1243, 394 U.S. 557 (1969).

§ 43.24. Sale, Distribution, or Display of Harmful Material to Minor

(a) In this section, unless the context requires a different definition:

(1) "Minor" means an individual younger than 16 years.

(2) "Harmful material" means material whose dominant theme taken as a whole:

(A) appeals to the prurient interest of a minor in sex or excretion; and

(B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) is utterly without redeeming social value for minors.

(b) For purposes of Subsection (a)(2)(B), "community" may not encompass an area less than the territory of this state.

(c) An individual, corporation, or association commits an offense if, knowing the material is harmful:

(1) he sells, distributes, or possesses for sale or distribution harmful material to a minor; or

(2) he displays harmful material and is reckless about whether a minor is present who will be offended or alarmed by the display.

(d) It is an exception to the application of this section:

(1) that the harmful material is distributed by a minor to his personal associates; or

(2) that the sale or distribution is by a person having scientific, educational, governmental, or other similar justification.

(e) It is a defense to prosecution under this section:

(1) that the sale or distribution was to a minor who the actor reasonably believed was 16 years or older; or

(2) that the sale or distribution was to a minor who was accompanied by his parent, guardian, or spouse, or by an adult who the actor reasonably believed was the minor's parent, guardian, or spouse.

(f) An offense under this section is a Class B misdemeanor.

Historical Note

Derivation:

Penal Code art. 534b
N.Y.Rev.Pen.Law §§ 235.21, 235.22

Cross References

"Association" defined, see § 1.07.
Computation of age, see § 1.06.
Defense explained, see § 2.03.
Exception explained, see § 2.02.
Indecent exposure, see § 21.08.
Obscene display, see § 43.22.
Public lewdness, see § 21.07.
"Reasonable belief" defined, see § 1.07.

Committee Comment

It has long been recognized that the state has a valid special interest in the well-being of its children, Prince v. Massachusetts, 64 S.Ct. 438, 321 U.S. 158 (1944). A state may regulate the materials that juveniles view and read even if they could not be proscribed for adults.

The definition of harmful material is the same as present law, Penal Code art. 534b, and is the current constitutional standard, Ginsberg v. New York, 88 S.Ct. 1274, 390 U.S. 629 (1968). Each of the three elements must be considered independently.

By defining "community" as an area not less than the territory of this state, the section avoids problems that might be created by Justice Brennan's statement in Jacobellis v. Ohio, 84 S.Ct. 1676, 378 U.S. 184 (1964), to the effect that the appropriate standard was the national community.

Knowledge is the required mental element because the actor must have scienter, Smith v. California, 80 S.Ct. 215, 361 U.S. 147 (1959).

Although Penal Code art. 534b provides for seizure and an injunctive remedy against those distributing harmful material, the Supreme Court has held that there must be an adversary hearing before seizure, A Quantity of Copies of Books v. Kansas, 84 S.Ct. 1723, 378 U.S. 205 (1964); see also Fontaine v. Dial, 303 F.Supp. 436 (N.D.Tex.1969). Because of these cases and the resulting awkwardness in using the seizure and injunctive remedies, this section does not provide either.

Subsection (c) (2) creates a new offense of harmful display to a minor, paralleling the obscene display offense in Section 43.22.

The exception for distribution of harmful material by a minor to his personal associates recognizes that young people may share harmful material with their friends and that this conduct is not deserving of criminal sanction. Subsections (d)(2) and (e) preserve exemptions in present law, Penal Code art. 534b, § 13.

SUBCHAPTER C. MISCELLANEOUS

Section 43.31. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Municipal ordinances presently conflict with and overlap state law in the area of public indecency. Antiprostitution and antiobscenity ordinances are found in both the Dallas and Austin codes. For example, the Dallas code (1967) imposes strict liability for possession or sale of obscene publications, §§ 31-25 through 31-27; bans from the city all commonly reputed prostitutes or sexual perverts, § 31-41; and prohibits accompanying a commonly reputed prostitute, lewd woman, or sexual pervert in a public place, § 31-52. The Austin Municipal Code (1967) prohibits soliciting unlawful sexual intercourse and entering a building to engage in such intercourse, §§ 23-18, 23-20; taxicab drivers are specially prohibited from soliciting by § 34-41.

These ordinances were enacted despite the existence of state law proscribing most of the same conduct, e. g., Penal Code arts. 510-523, 525, 527, 527b, 534b, 607, and to eliminate this conflict and confusion between state and local law, and prevent future conflict and confusion, Section 43.31 makes clear the state intends to preempt the area of public indecency and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Even without Section 43.31 most current antiobscenity ordinances are invalid in light of recent U. S. Supreme Court decisions. Subchapter B of this chapter for the most part codifies these recent decisions, and together with this Section 43.31 prohibits local laws, for example, that authorize seizure of allegedly obscene material.

Many of the state's antiprostitution statutes have also fallen victim to constitutional attack in recent years. Subchapter A comprehensively prohibits all forms of harmful prostitution, however, so there is no need (and in light of Section 43.31 no state constitutional authorization) for local law on the subject.

Local law conflicting with the provisions of this chapter is of course also prohibited, e. g., redefining the public place concept, raising the age of minority, deleting the scienter element of the obscenity offense.

TITLE 10. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, AND MORALS

CHAPTER 46. WEAPONS

Section
46.01. Chapter Definitions.
46.02. Unlawful Possession of Weapon.
46.03. Prohibited Weapons.
46.04. Unlawful Sale of Firearm.
46.05. Interstate Purchase.

Section 46.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Club" means any instrument that is specially designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with the instrument.

(2) "Explosive weapon" means any explosive, incendiary, or poison gas:

(A) bomb;

(B) grenade;

(C) rocket;

(D) mine;

(E) shell, missile, or projectile

that is designed, made, or adapted for the purpose of inflicting serious bodily injury, death, or substantial property damage.

(3) "Firearm" means any device designed, made, or adapted to expel a projectile by the action of springs or expanding gas, or any device readily convertible to that use.

(4) "Firearm silencer" means any device designed, made, or adapted to muffle the report of a firearm.

(5) "Handgun" means any firearm with a barrel length of less than 12 inches that is designed, made, or adapted to be fired with one hand.

(6) "Knife" means any bladed hand instrument that is capable of inflicting serious bodily injury or death by cutting or stabbing a person with the instrument.

(7) "Knuckles" means any instrument that consists of finger rings or guards made of a hard substance and that is designed,

made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with a fist enclosed in the knuckles.

(8) "Machine gun" means any firearm that is capable of shooting more than two shots automatically, without manual reloading, by a single function of the trigger.

(9) "Rifle" means any firearm designed, made, or adapted to be fired from the shoulder and to use the energy of the explosive in a fixed metallic cartridge to fire a projectile through a rifled bore by a single function of the trigger.

(10) "Short barrel" means a barrel length of less than 16 inches for a rifle and 18 inches for a shotgun, or an overall firearm length of less than 26 inches.

(11) "Shotgun" means any firearm designed, made, or adapted to be fired from the shoulder and to use the energy of the explosive in a fixed shotgun shell to fire through a smooth-bore barrel either a number of ball shot or a single projectile by a single function of the trigger.

(12) "Switchblade knife" means any knife that has a blade that folds or closes into the handle or sheath, and:

(A) that opens automatically by pressure applied to a button or other device located on the handle; or

(B) that opens or releases a blade from the handle or sheath by the force of gravity or by the application of centrifugal force.

§ 46.02. Unlawful Possession of Weapon

(a) An individual or corporation commits an offense if:

(1) he possesses what he knows to be a firearm, a knife with a blade length exceeding five and one-half inches, or a club; or

(2) he possesses any deadly weapon with intent to employ it in the commission of an offense.

(b) It is a defense to prosecution under Subsection (a)(1) that the actor's possession:

(1) was incident to the performance of his official duty as a peace officer, a member of the armed forces or national guard, or as a guard employed by a penal institution; or

(2) occurred at his:

(A) place of residence; or

(B) place of business; or

(C) premises; or

(3) was incident to engaging in lawful hunting, trapping, fishing, camping, or other lawful sporting activity, and:

(A) the weapon is a type reasonably necessary for or commonly used in the activity; and

(B) if the possession occurred in the course of proceeding to or from the activity, the conditions of Subdivisions (4)(B)(i) and (4)(B)(ii) or (4)(C) are satisfied; or

(4) was incident to transporting the weapon:

(A) in the course of business as a commercial carrier; or

(B) from one place or circumstance of lawful possession to another under the following conditions:

(i) the weapon was not concealed on or about the person; and

(ii) if the weapon is a firearm, it was unloaded; and

(iii) if the weapon is a handgun, knife, or club, the actor proceeded directly from his point of departure to his destination; or

(C) that was broken down in a nonfunctioning condition and could not be readily reassembled; or

(5) was incident to displaying the weapon in a public museum, exhibition, or to using it in a dramatic performance; or

(6) was brief and occurred as a consequence of having found or been given the weapon or having taken it from an aggressor.

(c) Unless otherwise provided by ordinance or order of a county commissioners court, it is a defense to prosecution under Subsection (a)(1) for possession of a firearm or club that the actor's possession was incident to engaging in a private patrol or guard service licensed by a governmental agency authorized by state law to license the service, if the possession occurred under the following conditions:

(1) the firearm or club was not concealed on or about the person, and, if worn, was in plain view; and

(2) the actor wore a distinctive uniform indicating that he was performing services as a guard or patrolman; and

(3) the possession occurred in the course of performance of the actor's duties as a guard or patrolman at his place of work.

(d) The defenses described in Subsections (b)(2)(B) and (C), (b)(3), (b)(4)(B) and (C), and (c) are not available to an actor identified in Subsection (e)(3) (A)–(C).

(e) Except as provided in Subdivisions (1)–(3), an offense under Subsection (a)(1) is a Class B misdemeanor. An offense under Subsection (a)(1) is:

(1) a Class A misdemeanor if the actor's possession of a handgun occurred at a place open to the public where five or more persons were gathered or assembled; or

(2) a felony of the third degree if the actor's possession of a handgun occurred at a place open to the public where alcoholic beverages were served; or

(3) a felony of the third degree if:

(A) the actor possessed a handgun; and

(B) the actor has been convicted of a felony involving the intentional or knowing use or attempted use of force or a deadly weapon: and

(C) the handgun's possession occurred within five years after his:

(i) release from a penal institution; or

(ii) discharge from probation; or

(iii) conviction, if neither Subdivision (i) nor (ii) applies.

(f) An offense under Subsection (a)(2) is a Class A misdemeanor.

Historical Note

Derivation:

Penal Code arts. 483-489, 489c

Cross References

"Agency" defined, see § 1.07.
"Club" defined, see § 46.01.
"Conviction" defined, see § 1.07.
Criminal instruments, see § 16.01.
"Deadly weapon" defined, see § 1.07.
Defense explained, see § 2.03.
Disposition of weapons, see C.C.P. art. 18.32, as amended.
"Firearm" defined, see § 46.01.
Fireworks regulations, see R.C.S. art. 4590h, as amended.
"Government" defined, see § 1.07.
"Handgun" defined, see § 46.01.
Hunting regulations, see R.C.S. tit. 103A, as amended.
Interstate purchase, see § 46.05.
"Knife" defined, see § 46.01.
Licensing regulations for private guards, see R.C.S. art. 4413(29bb).
"Peace officer" defined, see § 1.07.
"Penal institution" defined, see § 1.07.
Possession as voluntary act, see § 6.02.
"Possess" defined, see § 1.07.
Prohibited weapons, see § 46.03.
Sign display on premises where alcoholic beverages served, see R.C.S. tit. 5A, as amended.
Unlawful sale of firearm, see § 46.04.

Committee Comment

Section 46.02 regulates the possession of weapons that have lawful as well as unlawful uses. Texas has historically treated this area in the Penal Code, though some aspects of regulation could be more effectively administered through nonpenal legislation (e. g., registration and licensing laws). Section 46.02 adopts the present Texas regulatory scheme of outright prohibition with statutory exemptions and supersedes Penal Code arts. 483–489 and 489c.

Subsection (a) defines two distinct types of offenses with respect to possession of weapons. Following the pattern of Penal Code art. 483, Subsection (a)(1) is a regulatory penal statute that proscribes possession of three kinds of weapons most commonly used unlawfully—firearms, knives, and clubs. Because unusual weapons, such as spears and "slung-shots" (enumerated in Penal Code art. 483), are only rarely involved in serious crime, possession of such weapons is controlled by Subsection (a)(2), which is a catchall inchoate-type offense having no statutory analogue in present weapons law. Under Subdivision (2) the possession of *any* deadly weapon is an offense if accompanied by the required criminal intent. Subdivision (1), being essentially a regulatory measure paralleling Penal Code art. 483, requires no intent to use the weapon unlawfully.

Subsection (a)(1) alters Penal Code art. 483 in three respects. First, knives and clubs are functionally defined in Section 46.01(1) and (6) rather than by listing as in Penal Code art. 483. The word "specially" in the definition of club is significant in that it excludes such ordinary items as a baseball bat, rolling pin, broom, etc., from the offense. Of course, possession of such things, as well as various kinds of knives listed in Penal Code art. 483 but not covered by Subsection (a)(1), is an offense under Subsection (a)(2) if the requisite criminal intent is present.

Second, the offense is defined in terms of "possession" rather than "carrying." This change, although not a significant expansion of present law, will alter the outcome of such cases as Walker v. State, 195 S.W.2d 363 (Tex.Crim.App.1946) (holding no unlawful carrying when defendant obtained pistol from his wife while in a bar, brandished it, but did not leave the club with it). The change will not offend Tex.Const. art. I, § 23 (right to bear arms in certain circumstances); cf. Morrison v. State, 339 S.W.2d 529 (Tex.Crim.App.1960).

Third, Subsection (a)(1) covers all firearms rather than just "pistols." Read together with Subsections (b) and (c), which provide exemptions for legitimate uses of weapons, broadening the offense to cover all firearms is not a substantial change, but will prevent a person from possessing a *loaded* rifle or shotgun in public.

Subsections (b) and (c) provide exemptions from responsibility under Subsection (a)(1) by delineating the circumstances under

which a person may legally possess a weapon. Subsection (b) (1) and (2) restates existing Texas statutory exemptions in Penal Code art. 484. The remaining exemptive provisions are all new as a matter of statutory law, though several are derived from judicial opinion. The reticence of Penal Code arts. 483 and 484 has thrust the burden on the courts to create exemptions, and the result for the most part has been confusion and conflict about the nature and circumstances of exemption.

Subsection (b)(3) grants express approval to legitimate sporting uses of weapons; present law is changed by legalizing possession of handguns for such use and by requiring that firearms being transported incident to sporting use be unloaded and not concealed on the person. Subsection (b)(4) prescribes the lawful ways to transport a weapon and basically codifies present case law, which allows a person to take a pistol from one place of lawful possession to another—but not "merely for the sake of carrying it, or habitually," Deuschle v. State, 4 S.W.2d 559, 561 (Tex.Crim.App. 1927); to take it to a gunsmith for repair, Vincent v. State, 162 S.W. 840 (Tex.Crim.App.1914); to take it to town to sell, Hollins v. State, 158 S.W. 514 (Tex.Crim.App.1913); and to carry it from his business to his home, Davis v. State, 122 S.W.2d 635 (Tex. Crim.App.1938). Subsection (b)(6) is also a codification of present case law, see Henson v. State, 116 S.W.2d 393 (Tex.Crim. App.1938). The travelers' defense presently available under Penal Code art. 484 is no defense under Section 46.02 because conditions under which it was originally conceived no longer exist, and traveling with loaded firearms constitutes a menace to the public.

Subsection (c) extends a defense to all private guards and patrolmen licensed under state law, presently R.C.S. art. 4413(29bb). Legal authorization for such persons to possess arms is necessary because it is not adequately provided under present law. These persons are not peace officers, and their privilege to possess weapons is thus a limited one, subject, for example, to withdrawal by local government.

The penalty enhancement provisions of Subsection (e)(1) and (2) follow present law, under which it is a felony to possess a weapon in a public place where alcoholic beverages are served (Penal Code art. 483), and a misdemeanor punishable by up to 12 months in jail to possess a weapon in specified public places (art. 485).

Subsections (d) and (e)(3) together implement present law regarding convicted felons, Penal Code art. 489c. Subsection (e) (3) enhances the penalty for possession of handguns by felons and provides a five-year limitation on its application. Subsection (d) reflects Penal Code art. 489c in forbidding possession of handguns by convicted felons except at their place of residence, but alters present law by also allowing them to possess them under circumstances described in Subsections (b)(1), (b)(4)(A), (b)(5), and (b)(6).

§ 46.03. Prohibited Weapons

(a) An individual, corporation, or association commits an offense if he intentionally or knowingly possesses, manufactures, transports, repairs, or sells:

(1) an explosive weapon;

(2) a device principally designed, made, or adapted for delivering or shooting an explosive weapon;

(3) a machine gun;

(4) a short-barrel rifle or shotgun;

(5) a firearm silencer;

(6) a switchblade knife or knuckles.

(b) It is a defense to prosecution under this section that the actor's conduct:

(1) was incident to the performance of official duty by the armed forces or national guard, a governmental law enforcement agency, or a penal institution; or

(2) was incident to engaging in a lawful commercial or business transaction with an organization identified in Subdivision (1); or

(3) was incident to using an explosive weapon in a manner reasonably related to a lawful industrial or commercial enterprise; or

(4) was incident to using the weapon in a manner reasonably related to a lawful dramatic performance or scientific research; or

(5) was incident to displaying the weapon in a public museum or exhibition.

(c) It is an affirmative defense to prosecution under this section, which the actor must prove by a preponderance of the evidence:

(1) that his conduct was incident to dealing with the weapon solely as a curio, ornament, or keepsake, and if the weapon is a type described in Subsection (a)(1)–(5), that it was in a nonfunctioning condition and could not readily be made operable; or

(2) that his possession was brief and occurred as a consequence of having found the weapon or taken it from an aggressor.

(d) An offense under Subsection (a)(1)–(5) is a felony of the second degree; an offense under Subsection (a)(6) is a Class B misdemeanor.

Historical Note

Derivation:

Penal Code arts. 489(1), 489b, 1723
Gun Control Act of 1968, 18 U.S.C.A. § 921(a)

Cross References

Affirmative defense explained, see § 2.04.
"Agency" defined, see § 1.07.
"Association" defined, see § 1.07.
Criminal instruments, see § 16.01.
Defense explained, see § 2.03.
Disposition of prohibited weapons, see C.C.P. art. 18.31, as amended.
"Firearm silencer" defined, see § 46.01.
Fireworks regulations, see R.C.S. art. 4590h, as amended.
"Explosive weapon" defined, see § 46.01.
"Government" defined, see § 1.07.
Hunting regulations, see R.C.S. tit. 103A, as amended.
Interstate purchase, see § 46.05.
"Knuckles" defined, see § 46.01.
"Machine gun" defined, see § 46.01.
Mining regulations, see R.C.S. tit. 95, ch. 3, as amended.
"Peace officer" defined, see § 1.07.
"Penal institution" defined, see § 1.07.
Possession as voluntary act, see § 6.02.
"Possess" defined, see § 1.07.
"Rifle" defined, see § 46.01.
Search warrant for prohibited weapons, see C.C.P. ch. 18.
"Short-barrel" defined, see § 46.01.
"Shotgun" defined, see § 46.01.
"Switchblade knife" defined, see § 46.01.
Unlawful possession of weapon, see § 46.02.
Unlawful sale of firearm, see § 46.04.

Committee Comment

Section 46.03 concerns weapons that have little or no lawful use. Subsection (a) criminalizes possession and also manufacture, transport, sale, and repair of the specified prohibited weapons. The proscription extends to weapons and conduct presently covered by Penal Code arts. 489(1) (switchblades and knuckles), 489b (machine guns), and 1723 (bombs), and expands existing law by including "sawed-off" shotguns and rifles, silencers, and cannons.

Subsection (b)(1) and (2) provides defenses for the military and law enforcement, and Subsection (b)(3)-(5) creates defenses that restate exemptions presently found in Penal Code arts. 489(1), 489b, and 1723. The two defenses provided in Subsection (c) place the burden of persuasion on the defendant because allowing the defenses at all is questionable and the facts necessary to establish the defenses usually are known exclusively to the defendant.

§ 46.04. Unlawful Sale of Firearm

(a) An individual, corporation, or association commits an offense if:

(1) he intentionally or knowingly sells or makes a gift of a firearm to a child younger than 18 years without the written consent of the child's custodial parent or guardian; or

(2) he intentionally, knowingly, or recklessly sells a firearm or ammunition for a firearm to a person who is intoxicated.

(b) For purposes of this section, "intoxicated" means substantial impairment of mental or physical capacity resulting from introduction of any substance into the body.

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

Subsec. (a)(1): Penal Code art. 489(2)
Subsec. (a)(2): New
Subsecs. (b) and (c): New

Cross References

"Association" defined, see § 1.07.
Computation of age, see § 1.06.
"Firearm" defined, see § 46.01.
Interstate purchase, see § 46.05.
Prohibited weapons, see § 46.03.
Unlawful possession of weapon, see § 46.02.

Committee Comment

Section 46.04 focuses on the weapons dealer rather than possessor. Subsection (a)(1) implements present law, Penal Code art. 489(2), but covers all firearms rather than just pistols.

Subsection (a)(2), by restricting the accessibility of guns and ammunition to intoxicated persons, hopefully will reduce the disproportionate share of offenses committed by inebriates with a firearm. The section applies to all firearms because an intoxicated individual is as likely to misuse a longgun as a pistol. The definition of "intoxicated" in Subsection (b) is a modified version of that used in Section 8.03 (intoxication defense). There is no similar present statute, although Penal Code art. 489a proscribed the sale of a pistol to a person "under the heat of passion" until it was declared unconstitutional because of a defective caption in Doucette v. State, 317 S.W.2d 200 (Tex.Crim.App.1958).

§ 46.05. Interstate Purchase

If not otherwise prohibited by law, a Texas resident may purchase a rifle or shotgun in a state contiguous to Texas.

Historical Note

Derivation:
Penal Code art. 489d

Cross References

Gun Control Act of 1968, 18 U.S.C.A. § 922(b).
"Law" defined, see § 1.07.
Prohibited weapons, see § 46.03.
"Rifle" defined, see § 46.01.
"Shotgun" defined, see § 46.01.
Unlawful sale of firearm, see § 46.04.

Committee Comment

Section 46.05 preserves Penal Code art. 489d, which was enacted in 1969 in order to implement Section 922(b)(3)(A) of the federal Gun Control Act of 1968.

CHAPTER 47. GAMBLING

Section

47.01. Chapter Definitions.
47.02. Gambling.
47.03. Gambling Promotion.
47.04. Aggravated Gambling Promotion.
47.05. Possession of Gambling Device or Record.
47.06. Possession of Slot Machine.
47.07. Accomplice Witness: Testimony and Immunity
47.08. Preemption.

Committee Comment

This chapter comprehensively proscribes gambling with only a narrow exemption in the form of a defense for purely noncommercial gambling in a private place. Class A misdemeanor and third degree felony penalties are provided for gambling promotion, usually conducted by organized crime, with Class C misdemeanor treatment reserved for customers of gambling enterprises and others whose social gambling does not fall within the narrow defense. The sections prohibiting gambling promotion, along with the gambling paraphernalia possession offenses, seizure provisions of the Code of Criminal Procedure, and the injunctive remedies of the civil statutes provide full statutory authority for the prevention of commercialized, exploitative gambling in this state.

Unhappily, these prohibitions apply literally to various forms of gambling that are usually condoned, e. g., matching coins in a coffee shop, church bingo games, and charity raffles. The difficulty in framing exemptions for socially accepted forms of gambling lies in the facility with which they may be used as loopholes by profes-

sional gambling promoters who are the primary target of the prohibition. Furthermore, the constitutional prohibition against the "establishment of lotteries," Tex.Const. art. III, § 47, appears to preclude a statutory exemption for the gambling activities of churches and charities. Therefore, many socially accepted forms of gambling will be ignored at the prosecutor's discretion, as under present law.

Section 47.01. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Gambling" means risking anything of value for a profit whose return is to any degree contingent on chance, but does not include:

(A) a lawful business transaction; or

(B) playing an amusement device that confers only an immediate and unrecorded right of replay not exchangeable for value.

(2) "Gambling bet" means anything of value risked in gambling.

(3) "Gambling device or record" means anything specially designed for use in gambling, or used primarily for gambling.

(4) "Gambling proceeds" means money used in gambling.

(5) "Private place" means a place to which the public does not have access, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transport facilities, and shops.

(6) "Profit" means anything of value in addition to the gambling bet.

Committee Comment

The definition of gambling derives from N.Y.Rev.Pen.Law § 225.00, and is similar to the definition of lottery worked out by Texas courts in interpreting the constitutional prohibition, e. g., Brice v. State, 242 S.W.2d 433 (Tex.Crim.App.1951); State v. Socony Mobil Oil Company, 386 S.W.2d 169 (Tex.Civ.App.—San Antonio 1964, writ ref'd n. r. e.). The first exception to the definition of gambling, Subdivision (1)(A), excludes insurance, indemnity contracts, stock market and futures speculation, etc., all of which involve money risked on chance. The exception for pinball-type machines tracks present law, Penal Code art. 630(b).

The term "gambling proceeds" is not used in this chapter, but is included here for ready reference because used in the Code of Criminal Procedure articles dealing with search, seizure, and forfeiture, C.C.P. arts. 18.02, 18.06, 18.31, as amended.

§ 47.02. Gambling

(a) An individual, corporation, or association commits an offense if he knowingly engages in gambling.

(b) It is a defense to prosecution for gambling:

(1) that the actor engaged in gambling in a private place; and

(2) that no participant received any economic benefit other than personal winnings; and

(3) that, except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) An offense under this section is a Class C misdemeanor.

Historical Note

Derivation:
New

Cross References

"Association" defined, see § 1.07.
Defense explained, see § 2.03.
"Gambling" defined, see § 47.01.
Injunction, see R.C.S. arts. 4664, 4667, as amended.
"Private place" defined, see § 47.01.

Committee Comment

This section prohibits every form of gambling, but provides a defense for the "friendly poker game." The application of the section depends on the comprehensive definition of gambling in Section 47.01: "risking anything of value for a profit whose return is to any degree contingent on chance," with exceptions for business transactions and certain amusement devices.

The elements of the defense are designed to exclude any form of exploitative or commercialized gambling. The evidence must show that no participant received an economic benefit other than winnings; therefore, if one party gets a special cut from each pot or charges for the privilege of using the facilities, none of the participants can rely on the defense.

If the "odds" of the game are stacked in favor of one party, Subsection (b)(3) excludes the defense. However, the equal risks and chances requirement of Subsection (b)(3) refers only to the rules of the game, not to the advantages that accrue to a skilled player. Therefore, a game which ensures a profit to the house or banker, regardless of the luck or skill involved, is not a "friendly" game to which the defense applies: but the presence of a superior, even professional player, who relies on skill and luck, does not vitiate the defense.

Finally, the requirement of presence in a private place expands present law, which allows card and domino games only in private residences. Penal Code arts. 615, 616, 617. The committee's main concern is to prohibit social gambling in public places. Of course if a private residence or hotel room is converted to a gambling casino, it becomes subject to injunction under R.C.S. arts. 4664 and 4667, as amended, and the promoters are criminally responsible under the gambling promotion and paraphernalia possession offenses of this chapter. The defense is not extended to clubs and other locations that are only nominally private and to which, in fact, the public has access.

§ 47.03. Gambling Promotion

(a) An individual, corporation, or association commits gambling promotion if he induces or aids another to engage in gambling, and:

(1) he intends to derive or derives an economic benefit other than personal winnings from the gambling; or

(2) he participates in the gambling and has, other than by virtue of skill or luck, a lesser risk of losing or greater chance of winning than one or more of the other participants.

(b) Gambling promotion is a Class A misdemeanor.

Historical Note

Derivation:
New

Cross References

"Association" defined, see § 1.07.
Gain fine, see § 12.41.
"Gambling" defined, see § 47.01.
Injunction, see R.C.S. arts. 4664, 4667, as amended.
Rigging contest, see § 32.44.

Committee Comment

Section 47.03 defines and prohibits exploitative gambling. It reaches the professional gambler, one who solicits or aids others to gamble and profits from the gambling by playing with advantageous odds or by charging the other participants for use of the facilities or equipment. These are the elements which distinguish social gambling, in which the only possibility of exploitation arises from the superior skill of a player, from commercial gambling, in which the promoter is ensured a profit regardless of his skill or luck in playing the game. This form of gambling exploits human weakness and attracts organized crime and is therefore punishable as the highest class of misdemeanor.

Present law has no similar comprehensive prohibition, but instead proscribes specific manifestations of promotional gambling,

e. g., Penal Code arts. 619 (keeping or exhibiting gaming table or bank), 627 (permitting premises to be used for gaming), 629 (equipping gaming house), and 647 (pool selling or bookmaking).

Inducing or aiding others to gamble includes soliciting or taking bets, furnishing facilities and paraphernalia, and staging games or contests for the purpose of gambling. Of course, any form of gambling requires that someone initiate the game and thus induce another to gamble; but it is the exploitative element of Subsection (a)(1) or (a)(2) that distinguishes the gambling promoter from the social gambler and establishes criminal responsibility under this section.

§ 47.04. Aggravated Gambling Promotion

(a) An individual, corporation, or association commits aggravated gambling promotion if he knowingly invests in, finances, owns, controls, supervises, manages, or participates in a gambling enterprise.

(b) For purposes of this section, "gambling enterprise" means two or more persons regularly engaged in gambling promotion as defined in Section 47.03.

(c) Aggravated gambling promotion is a felony of the third degree.

Historical Note

Derivation:
New

Cross References

"Association" defined, see § 1.07.
Gain fine, see § 12.41.
Gambling, see § 47.02.
Gambling promotion, see § 47.03.
Injunction, see R.C.S. arts. 4664, 4667, as amended.
Rigging contest, see § 32.44.

Committee Comment

This section provides a felony penalty for organized gambling promotion by two or more persons. It replaces various felony offenses in present law which refer to the forms of gambling usually employed by commercialized gambling, e. g., arts. 621 (faro, monte, roulette) and 652a (bookmaking on sports events).

The prohibition against owning, financing, managing, or participating in a gambling enterprise reaches all persons involved in the business, whether directly as game operators or dealers, or indirectly as promoters. A gambling enterprise is defined in terms of a continuing operation involving two or more persons, all of whom are violating Section 47.03 (gambling promotion). The gambling promotion enterprise is the most profitable means for gambling exploitation and is therefore graded a felony.

§ 47.05. Possession of Gambling Device or Record

(a) An individual, corporation, or association commits an offense if he knowingly possesses a gambling device or record with intent to use it in gambling.

(b) It is a defense to prosecution under this section that the gambling device or record was possessed for use only in connection with gambling in a private place where no participant received any economic benefit other than personal winnings and where, except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) An offense under this section is a Class A misdemeanor.

Historical Note

Derivation:

N.Y.Rev.Pen.Law §§ 225.00, 225.15, 225.30

Cross References

Defense explained, see § 2.03.
Disposition of gambling paraphernalia, see C.C.P. art. 18.31, as amended.
"Gambling device or record" defined, see § 47.01.
Injunction, see R.C.S. arts. 4664, 4667, as amended.
"Possess" defined, see § 1.07.
Possession of slot machine, see § 47.06.
"Private place" defined, see § 47.01.
Search and seizure of gambling paraphernalia, see C.C.P. art. 18.02, as amended.

Committee Comment

This section employs the functional definition of "gambling device or record" in Section 47.01 to prohibit knowing possession with intent to use for gambling. Gambling proceeds are not included in the offense because of the difficulty of identifying money based on its use or intended use, but such money may be seized and forfeited to the county under C.C.P. arts. 18.02 and 18.31, as amended.

Present law has a wide range of penalties for possession of different kinds of gambling paraphernalia, e. g., Penal Code art. 654 ($50 fine, possession of lottery ticket), art. 642c (4 years, possession of policy game), and art. 642b (1 year and $1,000 fine, possession of punchboard). This section provides uniform Class A misdemeanor punishment for possessing any gambling device or record except a slot machine, which is treated as a felony by Section 47.06.

Section 47.05(b) allows the same "friendly poker game" defense as the basic gambling offense, Section 47.02.

§ 47.06. Possession of Slot Machine

(a) An individual, corporation, or association commits an offense if he knowingly possesses a slot machine or an essential part of a slot machine.

(b) For purposes of this section, "slot machine" means a mechanical device designed or adapted for use in gambling:

(1) that has, as an essential part, a drum or reel with insignia thereon; or

(2) that is operated by means of the insertion of a coin, token, or other object.

(c) An offense under this section is a felony of the third degree.

Historical Note

Derivation:
Penal Code art. 642a

Cross References

"Association" defined, see § 1.07.
Disposition of slot machine, see C.C.P. art. 18.31, as amended.
"Gambling" defined, see § 47.01.
Injunction, see R.C.S. arts. 4664, 4667, as amended.
"Possess" defined, see § 1.07.
Possession of gambling device or record, see § 47.05.
Search and seizure of slot machine, see C.C.P. art. 18.02, as amended.

Committee Comment

This offense restates present law, Penal Code art. 642a, adding the requirement that the state prove the actor knows that what he possesses is a slot machine or an essential part of a slot machine. The knowledge requirement parallels that in Section 47.05 (possession of gambling device or record) and is consistent with this code's inclusion of a culpable mental state in every offense.

Section 47.05 (gambling device or record) overlaps this section, but is not a lesser included offense since it requires an intent to use in gambling, an element not included in this section. See C.C. P. art. 37.09, as amended.

§ 47.07. Accomplice Witness: Testimony and Immunity

(a) A party to an offense under this chapter may be required to furnish evidence or testify about the offense.

(b) A party to an offense under this chapter may not be prosecuted for any offense about which he is required to furnish evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury.

(c) For purposes of this section, "adjudicatory proceeding" means a proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(d) A conviction under this chapter may be had upon the uncorroborated testimony of a party to the offense.

Historical Note

Derivation:

Penal Code arts. 639, 642c, 652, 652a, § 7

Cross References

Accomplice witness, see C.C.P. art. 38.14.
"Agency" defined, see § 1.07.
Aggravated perjury, see § 37.03.
"Government" defined, see § 1.07.
Party to offense, see ch. 7, subch. A.

Committee Comment

Section 47.07 continues and expands provisions in present law dealing with betting and bookmaking, Penal Code arts. 639, 642c, 652, and 652a, to facilitate conviction of any offense in this chapter on the testimony of a patron of gambling promoters.

Subsection (a) authorizes compelling evidence from persons who may be guilty of a gambling offense, but Subsection (b) provides plenary immunity to preserve their privilege against self-incrimination, see Gardner v. Broderick, 88 S.Ct. 1913, 392 U.S. 273 (1968); Murphy v. Waterfront Comm'n, 84 S.Ct. 1594, 378 U.S. 52 (1964). The witness on giving evidence becomes immune from prosecution for every offense about which he was compelled to give evidence, and the compelled evidence is excluded from use against the witness in any adjudicatory proceeding except a perjury prosecution. The exception to the exclusionary rule for a perjury prosecution preserves the witness' competency to testify under oath and does not detract from the witness' privilege against self-incrimination, cf. Freasier v. State, 84 S.W. 360 (Tex.Crim.App.1904).

Subsection (d) creates an exception to the general accomplice witness rule barring conviction based on the uncorroborated testimony of an accomplice, C.C.P. art 38.14.

§ 47.08. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Municipal ordinances presently conflict with and overlap state law in the area of gambling. For example, the Dallas City Code (1967) forbids possession of a marble board or pinball machine if used as a gambling device, § 31–38; gambling in a billiard hall, § 9A–18; and playing a marble board or pinball machine by a minor, § 31–35. The Houston City Code (1968) prohibits enticing another to bet or wager, § 11–121; running a horse race on Sunday, § 11–122; and playing cards in a public place, § 11–125. These and similar ordinances exist despite the existence of elaborate prohibitions against all forms of gambling in Title 11, Chapters 5 and 6, of the Penal Code. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, Section 47.08 makes clear the state intends to preempt the area of gambling and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Chapter 47 consolidates and simplifies the state's antigambling prohibitions, and in some instances expands the prohibitions of present law. There is no need, consequently, for local law in the area, and Section 47.08 specifically prohibits its enactment and enforcement. Thus, local laws prohibiting dart games, for example, or any other special form of gambling, are invalid, as are, of course, local laws conflicting with the provisions of this chapter, e. g., contracting the private place defense, redefining gambling device or record.

CHAPTER 48. DRUGS

Section

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Committee Comment

The drug offenses included in this chapter deal solely with mind and mood-altering drugs, such as narcotics, hallucinogens, stimulants, depressants, and marihuana. Unlike the present Texas Dangerous Drug Law (Penal Code art. 726d) they do not deal with all prescription drugs, with abortifacients, or with poisons. Penal treatment of nonmind or mood-altering prescription drugs and poisons presents different problems and is left to the food and drug and hazardous substances law; abortifacients are dealt with in Section 25.06 of this code.

For purposes of penal treatment this chapter does not distinguish between narcotics and so-called dangerous drugs per se, but classifies drugs into three categories: dangerous drugs, abusable drugs, and restricted drugs. Some of the drugs in a given category may be either narcotics or so-called dangerous drugs. Classification is based on an assessment of the potential for harm and abuse presented by a given drug and also on a consideration of the social costs of a particular criminal treatment. Illicit transactions in dangerous drugs carry the highest penalties, illicit transactions in abusable drugs carry lower penalties, and those in restricted drugs the least severe penalties.

The drug offenses included in this chapter depend for complete definition on the existence of a comprehensive regulatory scheme contained outside of the Revised Penal Code. Thus, this chapter deals with *unauthorized* trafficking and possession, leaving it to the regulatory law to state what trafficking and possession is unauthorized and what authorized. Two separate regulatory schemes

(one for narcotics and one for dangerous drugs) are found in the present Texas version of the Uniform Narcotic Drug Act (Penal Code art. 725b) and in the Texas Dangerous Drug Law (Penal Code art. 726d). However, the basic distinction between narcotics, on the one hand, and so-called dangerous drugs, on the other, with different regulatory schemes and penal treatment for each, is a questionable one. Some so-called dangerous drugs present the same problems as some narcotics, while other dangerous drugs present the same problems as other narcotics.

The present federal administration has introduced legislation, the Omnibus Controlled Dangerous Substances Act of 1969, which provides a single regulatory scheme for mind and mood-altering drugs. This legislation has been passed by the United States Senate (S. 3246, 91st Cong., 2d Sess., 1970) and in somewhat different form by the House of Representatives (H.R. 18583, 91st Cong., 2d Sess., 1970). It is expected to go to a conference committee shortly. At the same time the federal Bureau of Narcotics and Dangerous Drugs and the National Conference of Commissioners on Uniform State Laws have prepared a Uniform State Controlled Dangerous Substances Act, modeled on the federal bill, which will be circulated for adoption by the states. Since it is likely that most states, including Texas, will enact this legislation after the federal legislation is enacted, and since the uniform act provides a single, comprehensive, and rational regulatory scheme, an attempt has been made to integrate the provisions of this chapter with the uniform act. There is, however, an area of overlap between penal and regulatory legislation in this area, and because of this some of the provisions contained in the chapter will require modifications in the regulatory provisions of the uniform act if it is adopted, or in the existing Texas narcotics and dangerous drug regulatory provisions if it is not.

This chapter does not contain all penal provisions dealing with mind and mood-altering drugs. Rather, it contains only those basic provisions dealing with the illicit drug traffic. Penal provisions involving regulatory matters (e. g., violation of recordkeeping requirements) and obtaining drugs by misrepresentation or deception are better handled in the regulatory law, and such provisions are contained in the uniform act as well as in the present Texas narcotic and dangerous drug laws. Obtaining drugs by misrepresentation or deception is not an offense under this chapter, because such conduct is usually directed against legitimate distributors, and therefore is better treated in the regulatory law. However, except in the case of "restricted" drugs, such conduct could be reached under this chapter on the theory that the person who so obtains drugs unlawfully possesses them, see Section 48.11. If a person obtains them for the purpose of sale or distribution, however, he would unlawfully possess with intent to distribute and be subject (even in the case of "restricted" drugs) to the high penal-

ties prescribed for trafficking, see Sections 48.02(3), 48.04, 48.06, 48.08.

In addition to regulatory provisions and provisions against obtaining drugs by misrepresentation or deception, the uniform act treats differently some of the same conduct treated in this chapter, and adoption of this chapter will require excision of some provisions from the uniform act if the latter is enacted. Generally speaking the differences between parallel provisions of this chapter and of the uniform act reflect differences in approach in grading or criminalizing certain conduct.

The sentencing structure of this chapter differs from that of present law; in some cases this chapter's penalties are higher than at present and in some cases lower. In part, these differences are due to the fact that, unlike present law, this chapter discriminates between those offenders whose conduct warrants the imposition of severe penalties and those offenders whose conduct does not; and in part, they reflect reassessment of the risks presented by different drugs. In addition, however, the entire sentencing structure of the new code differs radically from that of present law, and this chapter of course reflects that difference.

The chapter leaves untouched the existing accommodation agent, procuring agent, or purchasing agent defense. This defense has evolved judicially, e. g., Jones v. State, 427 S.W.2d 616 (Tex.Crim. App.1968); Smith v. State, 396 S.W.2d 876 (Tex.Crim.App.1965), and the committee believes the courts should be left free to retain, expand, or contract the defense as necessary to further the purposes of this chapter.

The chapter principally derives from the drug provisions of the Study Draft of a New Federal Criminal Code prepared by the National Commission on Reform of Federal Criminal Laws (1970). That commission is engaged in a revision project similar to this committee's. Despite the derivation, the grading of offenses in this chapter originated independently with this committee, and the classification of drugs in this chapter differs somewhat from that proposed in the federal code study draft.

Section 48.01. Legislative Policy

(a) It is the policy of this state, as reflected by enactment of this chapter, to employ penal sanctions to control the dissemination of dangerous, abusable, and restricted drugs without undue restrictions on practitioners of the healing arts, research, or legitimate manufacture or distribution, and with a view to facilitating medical, psychiatric, and social rehabilitation of addicts and other victims.

(b) It is also the policy of the state to ensure by this chapter that all agencies of the criminal justice system distinguish between those engaged in commercial exploitation, on the one hand, and those who

engage in noncommercial distribution or who are experimenters or users, on the other hand, and that the courts in particular so distinguish in sentencing offenders under this chapter.

Historical Note

Derivation:

Cf. Fed.Prop.Crim.Code, Introductory Note at 242-43

Cross References

Construction of code, see § 1.05.
Objectives of code, see § 1.02.
Principles of sentencing, see § 12.06.

Committee Comment

The committee believes that a declaration of policy is desirable because of the great controversy as to the proper role of the criminal law in dealing with drugs and drug offenders. The declaration will help guide agencies of the criminal justice system at all levels (e. g., police, prosecutors, courts, corrections) in the performance of their duties, aid the courts in construction of the chapter, and guide the courts and correctional authorities in the exercise of their discretion in sentencing and treating offenders.

Subsection (a) stresses control of the illicit drug traffic while at the same time emphasizing the importance of rehabilitating addicts and other victims of illicit traffic and not unduly restricting legitimate drug uses. Subsection (b) distinguishes between those engaged in commercial exploitation, on the one hand, and experimenters and users, on the other, because the committee believes that the commercial exploiter both presents a greater menace to control efforts and is more blameworthy.

§ 48.02. Chapter Definitions

In this chapter, unless the context requires a different definition:

(1) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium and opiate;

(B) any compound, manufacture, salt, derivative, or preparation of Opium or opiate;

(C) any substance (and any compound, manufacture, salt, derivative, or preparation thereof) that is chemically identical with any of the substances specified in Subdivisions (A) and (B).

(2) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability.

(3) "Trafficks" means:

(A) transfer or administer a drug to another;

(B) prescribe a drug not in the course of professional practice;

(C) possess a drug with intent to transfer or administer it to another;

(D) produce a drug.

Historical Note

Derivation:

Fed.Prop.Crim.Code § 1829

Cross References

Abortifacients, see § 25.06.
"Abusable drug" defined, see § 48.07.
Addition of drugs to chapter by regulation, see § 48.03.
"Dangerous drug" defined, see § 48.05.
Drug paraphernalia, see § 48.12.
"Restricted drug" defined, see § 48.09.

Committee Comment

Under present law, Penal Code art. 725b, § 1(14), the term "narcotic drugs" includes cannabis (both the plant [marihuana] and its derivatives) and cocaine in addition to opioids and opiates. Under Section 48.02(1) the term "narcotic drug" is limited to opioids and opiates. Marihuana and its derivatives are hallucinogens or intoxicants, and cocaine is a stimulant; they are not narcotics in standard medical terminology. The definition contained in present law has been extensively criticized, because it departs from medical usage, and the chapter avoids this objection.

The definition of "opiate" in Subdivision (2) is derived from the present federal narcotics laws and from the federal omnibus bill and is intended to cover addictive synthetic substances similar to morphine.

Rather than creating separate offenses for conduct that involves distribution, that is preparatory to distribution, or that creates a substantial risk of future distribution, Subdivision (3) treats all such conduct as "trafficking." Trafficking means transferring or administering a drug to another; prescribing a drug "not in the course of professional practice;" possessing a drug with intent to transfer or administer it to another; or producing a drug. This approach is derived from the federal code study draft and is sub-

stantially similar to the approach of the federal omnibus bill and the uniform act.

Subdivision (3)(B), by including prescribing a drug "not in the course of professional practice" as trafficking, refers to prescriptions that go beyond the bounds of proper medical practice, e. g., issuing a prescription for a narcotic to an addict without regard to whether it is medically warranted. The subdivision does not purport to state when a prescription goes beyond the bounds of proper medical practice, but leaves that question to the regulatory law and the medical profession. The language "not in the course of professional practice" appears in the present Texas and federal narcotic laws, in the federal omnibus bill, and in the uniform act. The subdivision does not include as trafficking all unlawful prescribing, because it is possible that under the regulatory law (as under present law) a prescription may be unlawful on account of having no date or address. Transgressions such as these should not be treated as stringently as "trafficking," but should be handled as minor infractions of the regulatory law itself.

The present Texas narcotics law specifically prohibits unlawfully prescribing a drug, Penal Code art. 725b, § 2(a). The Texas Dangerous Drug Law does not.

By including prescribing as a form of trafficking, it is unnecessary to rest criminal responsibility on complicity or innocent agent theories. It will also be possible to reach the prescriber when the prescription is not filled.

Subdivision (3)(C) includes as trafficking possession of a drug with intent to transfer or administer it to another. This offense is new to Texas law, but it is found in the present federal dangerous drug law, 21 U.S.C.A. § 360a(c)(1), in some state narcotics and dangerous drug laws, e. g., Cal. Health & Safety Code §§ 11500.5, 11911; Mass.Gen.Laws Ann. ch. 94, § 187E, and in the federal code study draft, the federal omnibus bill, and in the uniform act. This definition will prove useful in cases where the quantities possessed are large enough to warrant an inference of possession with intent to distribute and in other situations where there is evidence that the defendant possessed with intent to distribute.

The term "produce," Subdivision (3)(D), is not defined in the chapter. It is intended to include manufacturing, producing, cultivating and repackaging, encapsulating, or otherwise changing the form of a drug, and is similarly defined in the uniform act. If that act is not enacted in Texas, "produce" should probably be defined in this chapter.

§ 48.03. Addition of Drug by Regulation

A drug made subject to this chapter by regulation is deemed to be a restricted drug.

Historical Note

Derivation:
New

Cross References

Authorization defense, see § 48.13.
"Rule" includes regulation, see § 1.07.
"Restricted drug" defined, see § 48.09.

Committee Comment

This section applies only if the regulatory law gives a governmental agency authority to designate for inclusion drugs that are not enumerated in this chapter. Such authority is contained in the uniform act but not in the present Texas narcotics or dangerous drug laws. (The Texas narcotic law makes drugs added to the federal narcotics law by regulation subject to Texas law, Penal Code art. 725b, § 1(14). There is doubt about the validity of this provision under the state constitution.) If the regulatory law does contain this authority, this section subjects designated drugs to penal sanction without legislative action. If the legislature believes that the restricted drug category is not stringent enough for a particular drug, it can amend the chapter to place the drug in a more stringent category.

§ 48.04. Trafficking in Dangerous Drug

(a) An individual, corporation, or association commits an offense if he intentionally or knowingly trafficks in a dangerous drug.

(b) Except as provided in Subsection (c), an offense under this section is a felony of the second degree unless the actor has been convicted one or more times before of a felony of the first or second degree under this chapter, in which event the offense is a felony of the first degree.

(c) The court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a felony of the second degree if the actor has been convicted one or more times before of a felony under this chapter, or for a felony of the third degree if the actor has never before been convicted of a felony under this chapter, if the actor proves by a preponderance of the evidence at the sentencing hearing:

(1) that he did not act for profit or to further commercial distribution; and

(2) that he did not transfer or administer, or possess with intent to transfer or administer, the drug involved to a child younger than 18 years:

(A) when he knew or was reckless or criminally negligent in ascertaining the child's age; and

(B) when he was at least three years older than the child.

Historical Note

Derivation:
Fed.Prop.Crim.Code §§ 1822, 1823

Cross References

"Association" defined, see § 1.07.
Computation of age, see § 1.06.
"Conviction" defined, see § 1.07.
"Dangerous drug" defined, see § 48.05.
"Felony" defined, see § 1.07.
Lesser offense charged, see § 48.15.
Organized criminal offender, see § 12.43.
"Possess" defined, see § 1.07.
Sentencing hearing, see C.C.P. art. 42.02, as amended.
"Trafficks" defined, see § 48.02.

Committee Comment

Subsection (a) makes it an offense to knowingly traffick in a dangerous drug. "Knowingly" is the culpable mental state required under present narcotics law, Hernandez v. State, 129 S.W.2d 301 (Tex.Crim.App.1939); Sosa v. State, 275 S.W.2d 655 (Tex. Crim.App.1955), but the requirement is unclear under the dangerous drug law, Barbar v. State, 318 S.W.2d 78 (Tex.Crim.App. 1959).

Subsection (b) states the basic penalty for the offense. In addition, it should be noted that Section 12.43 permits extended term imprisonment for organized criminal operations violating this chapter.

Subsection (c) mitigates transfers and potential transfers to persons 18 or older which are not for profit or to further commercial distribution. The committee believes that gifts and other noncommercial distributions, although serious, do not present the same threat of illicit traffic as do commercial distributions and that the commercial distributor is more culpable than the noncommercial distributor. It should be noted that a gift made to prove to a potential buyer that the donor sells high quality LSD, for example, or otherwise as a "loss leader," is a transfer to further commercial distribution.

In addition to mitigating the penalty for gifts and other noncommercial tranfers, Subsection (c) also mitigates some conduct which, although it comes within the meaning of the word "traf-

ficks," amounts only to possession for personal use. Thus, producing for one's own use or prescribing for oneself amounts only to possession, i. e., is not for profit or to further commercial distribution.

The mitigation determination is made at the sentencing hearing, rather than during the trial on the merits, to avoid problems of self-incrimination which might arise if a defendant were required to admit guilt of a lesser offense in order to avoid conviction of a greater. In order to ensure that trafficking does not masquerade as possession, the burden of coming forward with and persuading the judge of the existence of the mitigating facts is on the defendant. However, under Section 48.15 the prosecutor is given discretion to charge the lesser offense in the first instance.

§ 48.05. Dangerous Drug Defined

For purposes of this chapter, "dangerous drug" means:

(1) Any of the following substances, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation:

(i) Acetylmethadol;

(ii) Allylprodine;

(iii) Alphacetylmethadol;

(iv) Alphameprodine;

(v) Alphamethadol;

(vi) Benzethidine;

(vii) Betacetylmethadol;

(viii) Betameprodine;

(ix) Betamethadol;

(x) Betaprodine;

(xi) Clonitazene;

(xii) Dextromoramide;

(xiii) Dextrorphan;

(xiv) Diampromide;

(xv) Diethyliambutene;

(xvi) Dimenoxadol;

(xvii) Dimepheptanol;

(xviii) Dimethyliambutene;

(xix) Dioxaphetyl butyrate;

(xx) Dipipanone;

(xxi) Ethylmethylthiambutene;

(xxii) Etonitazene;

(xxiii) Etoxeridine;

(xxiv) Furethidine;

(xxv) Hydroxypethidine;

(xxvi) Ketobemidone;

(xxvii) Levomoramide;

(xxviii) Levophenacylmorphan;

(xxix) Morpheridine;

(xxx) Noracymethadol;

(xxxi) Norlevorphanol;

(xxxii) Normethadone;

(xxxiii) Norpipanone;

(xxxiv) Phenadoxone;

(xxxv) Phenampromide;

(xxxvi) Phenomorphan;

(xxxvii) Phenoperidine;

(xxxviii) Piritramide;

(xxxix) Proheptazine;

(xl) Properidine;

(xli) Racemoramide;

(xlii) Trimeperidine.

(2) Any of the following Opium derivatives, their salts, isomers, and salts of isomers, whenever the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(i) Acetorphine;

(ii) Acetyldihydrocodeine;

(iii) Benzylmorphine;

(iv) Codeine methylbromide;

(v) Codeine-N-Oxide;

(vi) Cyprenorphine;

(vii) Desomorphine;

(viii) Dihydromorphine;

(ix) Etorphine;

(x) Heroin;

(xi) Hydromorphinol;

(xii) Methydesorphine;

(xiii) Methylhydromorphine;

(xiv) Morphine methylbromide;

(xv) Morphine methylsulfonate;

(xvi) Morphine-N-Oxide;

(xvii) Myrophine;

(xviii) Nicocodeine;

(xix) Nicomorphine;

(xx) Normorphine;

(xxi) Pholcodeine;

(xxii) Thebacon.

(3) Any material, compound, mixture, or preparation containing any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, whenever the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(i) 3, 4-Methylenedioxy Amphetamine;

(ii) 5-Methoxy-3, 4-Methylenedioxy Amphetamine;

(iii) 3, 4, 5-Trimethoxy Amphetamine;

(iv) Bufotenine;

(v) Diethyltryptamine;

(vi) Dimethyltryptamine;

(vii) 4-Methyl-2, 5-Dimethoxyamphetamine;

(viii) Ibogaine;

(ix) Lysergic acid diethylamide;

(x) Mescaline;

(xi) N-Ethyl-3-Piperidyl Benzilate;

(xii) N-Methyl-3-Piperidyl Benzilate;

(xiii) Psilocybin;

(xiv) Psilocyn;

(xv) Tetrahydrocannabinols.

(4) Any of the following substances, other than those narcotic drugs included in the definitions of abusable and restricted drugs, whether produced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(i) Opium and opiate;

(ii) any salt, compound, derivative, or preparation of Opium or opiate;

(iii) any salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances specified in Subdivisions (i) and (ii), other than the Isoquinoline Alkaloids of Opium;

(iv) opium poppy and poppy straw.

(5) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation:

(i) Alphaprodine;

(ii) Anileridine;

(iii) Bezitramide;

(iv) Dihydrocodeine;

(v) Diphenoxylate;

(vi) Fentanyl;

(vii) Isomethadone;

(viii) Levomethorphan;

(ix) Levorphanol;

(x) Metazocine;

(xi) Methadone;

(xii) Methadone-Intermediate, 4-Cyano-2-Dimethylamino-4, 4-Diphenyl Butane;

(xiii) Moramide-Intermediate, 2-Methyl-3-Morpholino-1, 1-Diphenyl-Propane-Carboxylic acid;

(xiv) Pethidine;

(xv) Pethidine-Intermediate-A, 4-Cyano-1-Methyl-4-Phenylpiperidine;

(xvi) Pethidine-Intermediate-B, Ethyl-4-Phenylpiperidine-4-Carboxylate;

(xvii) Pethidine-Intermediate-C, 1-Methyl-4-Phenylpiperdine-4-Carboxylic acid;

(xviii) Phenazocine;

(xix) Piminodine;

(xx) Racemethorphan;

(xxi) Racemorphan.

(6) Any of the following substances, other than those included in the definitions of abusable and restricted drugs, whether pro-

duced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(i) Cocoa leaves;

(ii) any salt, compound, derivative, or preparation of Coca leaves;

(iii) any salt, compound, derivative, or preparation that is chemically equivalent or identical with any of the substances specified in Subdivisions (i) and (ii), other than decocainized Coca leaves or extractions of Coca leaves, which extractions do not contain Cocaine or Ecognine.

(7) Any material, compound, mixture, or preparation, other than that described in Section 48.07(1) (five or fewer pills), containing any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(i) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(ii) Phenmetrazine and its salts;

(iii) Methamphetamine, its salts, isomers, and salts of isomers;

(iv) Methylphenidate.

(8) Any material, compound, mixture, or preparation, other than that described in Section 48.07(1) (five or fewer pills), containing any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(i) any substance that contains any quantity of a derivative of Barbituric acid, or any salt of a derivative of Barbituric acid, other than those substances described in Section 48.07 (abusable drug);

(ii) Chlorhexadol;

(iii) Ethchlorvynol;

(iv) Glutethimide;

(v) Lysergic acid;

(vi) Lysergic acid amide;

(vii) Methyprylon;

(viii) Sulfondiethylmethane;

(ix) Sulfonethylemethane;

(x) Sulfonmethane.

Historical Note

Derivation:

Fed.Prop.Crim.Code § 1829
H.R. 18583. 91st Cong., 2d Sess. (1970)
S. 3246, 91st Cong., 2d Sess. (1970)

Cross References

"Abusable drug" defined, see § 48.07.
"Restricted drug" defined, see § 48.09.

Committee Comment

Under this section dangerous drugs include particularly harmful opioids and opiates (e. g., heroin and morphine); most hallucinogens (e. g., LSD and psilocybin); cocaine and its derivatives; and amphetamines and similar stimulants and most barbiturates and similar depressants except when they appear in the limited quantity of five or fewer tablets or capsules of limited strength.

§ 48.06. Trafficking in Abusable Drug

(a) An individual, corporation, or association commits an offense if he intentionally or knowingly trafficks in an abusable drug.

(b) Except as provided in Subsections (c) and (d), an offense under this section is a felony of the third degree unless the defendant has been convicted one or more times before of a felony under this chapter, in which event the offense is a felony of the second degree.

(c) The court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a felony of the third degree if the actor has been convicted one or more times before of a Class A misdemeanor or felony under this chapter, or for a Class A misdemeanor if the actor has never before been convicted of a Class A misdemeanor or felony under this chapter, if the actor proves by a preponderance of the evidence at the sentencing hearing:

(1) that he did not act for profit or to further commercial distribution; and

(2) that he did not transfer or administer, or possess with intent to transfer or administer, the drug involved to a child younger than 18 years:

(A) when he knew or was reckless or criminally negligent in ascertaining the child's age; and

(B) when he was at least three years older than the child.

(d) If the actor is found guilty of prescribing or producing an abusable drug under this section, the court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a Class A misdemeanor if the actor has been convicted one or more times be-

fore under this chapter of any offense, or for a Class B misdemeanor if the actor has never before been convicted under this chapter, if the actor proves by a preponderance of the evidence at the sentencing hearing that he did not intend to transfer or administer the drug to another.

Historical Note

Derivation:
Fed.Prop.Crim.Code §§ 1822, 1823

Cross References

"Abusable drug" defined, see § 48.07.
"Association" defined, see § 1.07.
Computation of age, see § 1.06.
"Conviction" defined, see § 1.07.
"Felony" defined, see § 1.07.
Lesser offense charged, see § 48.15.
Organized criminal offender, see § 12.43.
"Possess" defined, see § 1.07.
Sentencing hearing, see C.C.P. art. 42.02, as amended.
"Trafficks" defined, see § 48.02.

Committee Comment

Trafficking in abusable drugs is the subject of this section, which parallels Section 48.04 (trafficking in dangerous drugs) except for penalty and an additional mitigation feature, Subsection (d).

Subsection (d) treats production or prescription of an *abusable* drug for personal use the same as possession for personal use (Section 48.11) because it is not the kind of trafficking for which a severe penalty is justified. The personal use feature may be shown by the quantity of the abusable drug involved, the nature of the transaction, or other circumstances.

§ 48.07. Abusable Drug Defined

For purposes of this chapter, "abusable drug" means:

(1) A total of five or fewer tablets or capsules, or a total combination of five tablets and capsules, each tablet or capsule containing not more by weight of any dangerous drug defined in Section 48.05(7) and (8) (stimulants and depressants) than is contained in the highest dosage tablet or capsule containing such drug manufactured for oral use by a manufacturer registered under Section —— of [the federal regulatory law].

(2) Any material, compound, mixture, or preparation containing any quantity of the following substances having a potential

for abuse associated with a depressant effect on the central nervous system:

(i) Barbital;

(ii) Chloral Betaine;

(iii) Chloral hydrate;

(iv) Ethchlorvynol;

(v) Ethinamate;

(vi) Methohexital;

(vii) Methylphenobarbital;

(viii) Paraldehyde;

(ix) Petrichloral;

(x) Phencyclidine;

(xi) Phenobarbital.

(3) Nalorphine.

(4) Any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(i) not more than 1.8 grams of Codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an Isoquinoline Alkaloid of Opium;

(ii) not more than 1.8 grams of Codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(iii) not more than 300 milligrams of Dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an Isoquinoline Alkaloid of Opium;

(iv) not more than 300 milligrams of Dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(v) not more than 1.8 grams of Dihydrocodeinone per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vi) not more than 300 milligrams of Ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage

unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vii) not more than 500 milligrams of Opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Cannabis. For purposes of this chapter, "cannabis" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin; but does not include:

(A) the mature stalks of the plant;

(B) fiber produced from the stalks;

(C) oil or cake made from the seeds of the plant;

(D) any other compound, manufacture, salt, derivative, mixture, or preparation of the stalks (except the resin extracted therefrom), fiber, oil, or cake;

(E) the sterilized seed of the plant that is incapable of germination.

(6) Peyote.

Historical Note

Derivation:

Fed.Prop.Crim.Code § 1829
H.R. 18583, 91st Cong., 2d Sess. (1970)
S. 3246, 91st Cong., 2d Sess. (1970)

Cross References

"Dangerous drug" defined, see § 48.05.
"Restricted drug" defined, see § 48.09.

Committee Comment

The abusable drug category covers some of the less harmful opioids and opiates (essentially those treated as "Class B Narcotics" under existing federal law) such as codeine and aspirin combination drugs, five or fewer tablets or capsules of limited strength containing amphetamines or similar stimulants or those barbiturates or depressants included as dangerous drugs, other less harmful depressants in any form, cannabis (marihuana and its derivatives), and the hallucinogen peyote.

Five or fewer capsules of limited strength containing amphetamines or similar stimulants or those barbiturates or depressants treated as dangerous drugs are included as abusable drugs because

transactions in these limited quantities and strengths do not present the same risk of harm as do transactions in larger quantities or greater strengths. The definition is limited to drug forms that are generally used orally, for oral use in small quantity does not generally present risks as extensive as intravenous use. By limiting the strength to the highest dosage tablet or capsule containing the drug that is manufactured for oral use by a manufacturer registered under the federal regulatory law, the definition makes it impossible for illicit laboratories to escape dangerous drug treatment by stuffing high dosages in tablets or capsules. In addition, the limitation to a small number of tablets or capsules (or any combination thereof) makes it impossible for users or traffickers to purchase a great quantity in Mexico without prescription and suffer only abusable drug treatment if apprehended and convicted in Texas: they are guilty of trafficking in or possessing, as the case may be, a dangerous drug. Moreover, these drugs do have medical use, and treating limited quantities as an abusable drug spares the housewife who obtains a few pills for personal use from her pharmacist without prescription, and the person who gives a few tablets to a friend in the common practice of self-medication, from serious penal sanction. It is the judgment of the committee that while such self-medication is extremely undesirable, it should not occasion the same penalties provided for transactions in dangerous drugs.

§ 48.08. Trafficking in Restricted Drug

(a) An individual, corporation, or association commits an offense if he knowingly trafficks in a restricted drug.

(b) It is an affirmative defense to prosecution under this section, which the actor must prove by a preponderance of the evidence, that he did not intend to transfer or administer the drug to another.

(c) Except as provided in Subsection (d), an offense under this section is a Class A misdemeanor.

(d) The court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a Class B misdemeanor, if the actor proves by a preponderance of the evidence at the sentencing hearing:

(1) that he did not act for profit or to further commercial distribution; and

(2) that he did not transfer or administer, or possess with intent to transfer or administer, the drug involved to a child younger than 18 years:

(A) when he knew or was reckless or criminally negligent in ascertaining the child's age; and

(B) when he was at least three years older than the child.

Historical Note

Derivation:
Fed.Prop.Crim.Code § 1823

Cross References

"Association" defined, see § 1.07.
Affirmative defense explained, see § 2.04.
Computation of age, see § 1.06.
Lesser offense charged, see § 48.15.
"Possess" defined, see § 1.07.
"Restricted drug" defined, see § 48.09.
Sentencing hearing, see C.C.P. art. 42.02, as amended.
"Trafficks" defined, see § 48.02.

Committee Comment

With appropriate reduction in penalty this section treats trafficking in restricted drugs in the same manner Sections 48.04 and 48.06 treat trafficking in dangerous and abusable drugs. Commercial are distinguished from noncommercial transfers, and transfers to minors from those to adults, by the mitigation device of Subsection (d).

Subsection (b), which is unique to this section, implements the committee's judgment that mere possession of a restricted drug should not be an offense. See Section 48.11 and comment. The affirmative defense device is employed, however, to ensure that trafficking does not masquerade as possession.

§ 48.09. Restricted Drug Defined

For purposes of this chapter, "restricted drug" means:

(1) Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which compound, mixture, or preparation includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(i) not more than 200 milligrams of Codeine per 100 milliliters or per 100 grams;

(ii) not more than 100 milligrams of Dihydrocodeine per 100 milliliters or per 100 grams;

(iii) not more than 100 milligrams of Ethylmorphine per 100 milliliters or per 100 grams;

(iv) not more than 2.5 milligrams of Diphenoxylate and not less than 25 micrograms of Atropine Sulfate per dosage unit;

(v) not more than 100 milligrams of Opium per 100 milliliters or per 100 grams.

[(2) Any material, compound, mixture, or preparation containing any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(i) Chlordiazepoxide;

(ii) Diazepam;

(iii) Meprobamate.]

Historical Note

Derivation:

Fed.Prop.Crim.Code § 1829
H.R. 18583, 91st Cong., 2d Sess. (1970)
S. 3246, 91st Cong., 2d Sess. (1970)

Cross References

"Abusable drug" defined, see § 48.07.
"Dangerous drug" defined, see § 48.05.

Committee Comment

This section covers "Schedule IV Controlled Dangerous Substances" under the Senate version of the federal Omnibus Controlled Dangerous Substances bill (Schedule V substances under the House version) as well as the tranquilizers Chlordiazepoxide ("Librium"), Diazepam ("Valium"), and Meprobamate ("Miltown" and "Equanil"). The former are essentially the "exempt narcotics" under present federal law—the less harmful opioids and opiates, which include cough syrups such as elixir of terpinhydrate with codeine. These and the tranquilizers are classified as restricted drugs because of their low potential for harm relative to the drugs in other classifications. The tranquilizers, Subdivision (2), are bracketed because it is unclear whether they present a sufficient potential for abuse or harm to be regulated under this chapter, or whether, on the other hand, regulation under the federal and Texas food, drug, and cosmetic laws will suffice. All three are included in the administration's federal Omnibus Controlled Dangerous Substances bill as it passed the Senate, but their inclusion was hotly opposed. As reported by the House Committee on Interstate and Foreign Commerce, the House bill included only Meprobamate. Possibly, the final decision on whether or not these drugs should be included in this chapter should await resolution by Congress; possibly also Meprobamate but not Chlordiazepoxide or Diazepam should be included because of the greater risk of harm and abuse presented by the former.

§ 48.10. Trafficking with Minor

(a) An individual, corporation, or association commits an offense if he intentionally or knowingly transfers or administers, or possesses with intent to transfer or administer, a dangerous, abusable, or restricted drug to a child younger than 18 years, and:

(1) he knows or is reckless or criminally negligent in ascertaining the child's age; and

(2) he is at least three years older than the child.

(b) An offense under this section:

(1) is a felony of the first degree if:

(A) the offense involved a dangerous drug; or

(B) the offense involved an abusable drug and the actor has been convicted one or more times before of a felony of the first or second degree under this chapter;

(2) is a felony of the second degree if the offense involved an abusable drug and the actor has not been convicted before of a felony of the first or second degree under this chapter;

(3) is a felony of the third degree if the offense involved a restricted drug.

Historical Note

Derivation:

Penal Code arts. 725b, § 23(a), 726d, § 15 (d)
Fed.Prop.Crim.Code §§ 1822, 1823

Cross References

"Abusable drug" defined, see § 48.07.
"Association" defined, see § 1.07.
Computation of age, see § 1.06.
"Conviction" defined, see § 1.07.
"Dangerous drug" defined, see § 48.05.
"Felony" defined, see § 1.07.
"Possess" defined, see § 1.07.
"Restricted drug" defined, see § 48.09.
"Trafficks" defined, see § 48.02.

Committee Comment

This section creates an aggravated offense for trafficking with a minor under 18. The penalty depends upon whether the transaction involved a dangerous, abusable, or restricted drug, and in the case of each the offense is graded one degree above trafficking which does not involve a minor-recipient. The enhanced grading reflects the community's extensive interest, as the committee sees it, in protecting minors from exposure to controlled drugs through

seduction and imposition. The section does not distinguish between commercial and noncommercial transactions, because the concern is with the protection of minors. The committee believes that the distinction between minors under 18 and those 18 and over is a reasonable one, because 18-year-olds are increasingly being treated as adults for a number of purposes (e. g., for induction into the Armed Services and for voting), and in today's drug culture the 18-year-old is as or more likely to be sophisticated in the ways of drugs than an adult.

Section 48.10 also requires that the offender be at least three years older than the child. This "peer factor" is used because the element of seduction or imposition is less likely to be present if the trafficker is close in age to the recipient. A five-year age differential is specified in the federal code study draft, and both the federal omnibus bill as passed by the Senate and the uniform act require that the offender be at least three years older than the child. The same age differential concept is employed in sexual offenses involving children, see Chapter 21.

Generally the culpable mental state required under this section is knowledge. However, if the offender is reckless or criminally negligent in ascertaining the child's age, his mistake is unavailable. This feature also follows the treatment of mistake of age in sexual offenses.

§ 48.11. Possession of Dangerous or Abusable Drug

(a) An individual, corporation, or association commits an offense if he knowingly possesses a usable quantity of a dangerous or abusable drug.

(b) Except as provided in Subsections (c) and (d), an offense under this section is a felony of the third degree unless the actor has been convicted one or more times of a felony under this chapter, in which event the offense is a felony of the second degree.

(c) If the actor is found guilty of possession of an abusable drug, the court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a felony of the third degree if the actor has been convicted one or more times before of a Class A misdemeanor or felony under this chapter, or for a Class A misdemeanor if the actor has never before been convicted of a Class A misdemeanor or felony under this chapter, if the actor proves by a preponderance of the evidence at the sentencing hearing:

(1) that he did not act for profit or to further commercial distribution; and

(2) that he did not transfer or administer, or possess with intent to transfer or administer, the drug involved to a child younger than 18 years:

(A) when he knew or was reckless or criminally negligent in ascertaining the child's age; and

(B) when he was at least three years older than the child.

(d) If the actor is found guilty of possession of an abusable drug, the court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a Class A misdemeanor if the actor has been convicted one or more times before under this chapter of any offense, or for a Class B misdemeanor if the actor has never before been convicted under this chapter, if the actor proves by a preponderance of the evidence at the sentencing hearing that he did not intend to transfer or administer the drug to another.

Historical Note

Derivation:

Penal Code arts. 725, § 2(a), 726d, § 3(d)
Fed.Prop.Crim.Code §§ 1822, 1823, 1824(1)

Cross References

"Abusable drug" defined, see § 48.07.
"Association" defined, see § 1.07.
"Conviction" defined, see § 1.07.
"Dangerous drug" defined, see § 48.05.
"Felony" defined, see § 1.07.
"Possess" defined, see § 1.07.

Committee Comment

The usable quantity requirement of this section is consistent with what appears to be present law, Pelham v. State, 298 S.W.2d 171 (Tex.Crim.App.1957); Greer v. State, 292 S.W.2d 122 (Tex. Crim.App.1956); cf. Blaylock v. State, 352 S.W.2d 727 (Tex.Crim. App.1961), and is desirable because it prevents conviction on possession of mere traces of a drug, traces that suggest possession was unknowing and that "leave too much doubt as to the identity of the person who, presumably then in possession of usable quantities, left these evidentiary traces behind," Fed.Prop.Crim.Code § 1824, Comment at 247.

Note that possession includes constructive possession, see Section 1.07 (code definitions).

Under Subsection (b) unlawful possession of a dangerous drug is a felony of the third degree for a first offense and a felony of the second degree for subsequent offenses. The offense is directed at both suspected traffickers and users, and the grading is stringent enough to deter traffickers. Initially, possession of an abusable drug is graded in the same way in order to deter traffickers and to make it possible to treat suspected traffickers as felons without having to prove a sale or possession with intent to sell. However, the committee deems felony penalties too stringent for possession of abusable drugs for personal use. Consequently, such

persons may avail themselves of misdemeanor treatment under Subsection (d), cf. Section 48.06(d).

On occasion, a person who gives away marihuana or another abusable drug is charged with possession rather than distribution. Under Subsection (c) his offense may be mitigated to a Class A misdemeanor for a first offense and a felony of the third degree for subsequent offenses. This parallels the provision for mitigation in Section 48.06(c) if the person is charged with trafficking based on a gift.

In both instances the prosecutor may charge the less serious (mitigated) offense initially under Section 48.15.

Permitting mitigation of first offense possession of an abusable drug for personal use to a Class B misdemeanor substantially reduces the present law's authorized penalty for possession of marihuana for personal use. The committee classified marihuana an abusable drug because, although its use is certainly not without risk for some, it is one of the least harmful and most widely used hallucinogens and, in light of its wide use, continuing to treat its possession for personal use as a felony risks criminalizing a substantial proportion of the population, especially those under age 35. The reclassification and reduced penalty, besides encouraging respect for the law, especially among the young, will aid law enforcement since grand juries are more likely to indict, petit juries to convict, and courts to assess meaningful sentences when the law's classification and penalty structure is reasonable. Moreover, many states have reduced marihuana possession to a misdemeanor, and both the administration's federal omnibus bill and the federal code study draft (which labels it an infraction, this code's Class C misdemeanor) do likewise. See Rosenthal, A Plea for Amelioration of the Marihuana Laws, 47 Texas L.Rev. 1359 (1969).

Possession of a restricted drug (see Sections 48.08 and 48.09) is not an offense under this chapter because the restricted category contains drugs with the least potential for harm relative to the other drug categories.

§ 48.12. Possession of Drug Paraphernalia

(a) An individual or corporation commits an offense if he possesses a hypodermic syringe, needle, or other instrument that has on or in it any quantity (including a trace) of a dangerous drug with intent to use it for administration of a dangerous drug by subcutaneous injection in a human being.

(b) An offense under this section is a felony of the third degree unless the actor has been convicted one or more times of a felony under this chapter, in which event the offense is a felony of the second degree.

Historical Note

Derivation:

Penal Code art. 725b, § 2(c)

Cross References

"Association" defined, see § 1.07.
"Conviction" defined, see § 1.07.
"Dangerous drug" defined, see § 48.05.
"Felony" defined, see § 1.07.
"Possess" defined, see § 1.07.

Committee Comment

This section is directed chiefly against users. Like present law, Penal Code art. 725b, § 2(c), Subsection (a) requires proof that the possessor possessed the paraphernalia for the purpose of injection in a human being. Unlike present law, however, the subsection requires that the instrument actually have on or in it any quantity of a dangerous drug. This element may be proved by qualitative chemical analysis, and its presence gives some assurance that the instrument was possessed for use, whereas under present law a person might be convicted even if the instrument contained no amount of a drug.

Section 48.12 is limited to instruments adapted for the use of *dangerous* drugs. Abusable and restricted drugs are excluded because the committee believes that only dangerous drugs present risks serious enough to justify an offense which reaches even further than unlawful possession.

The section does not make it an offense to possess an opium pipe or an instrument or contrivance used in smoking a narcotic drug. In this respect it departs from Penal Code art. 725b, § 2(b). Although opium is still occasionally smoked, the practice is relatively infrequent. In addition, the committee believes that prohibiting possession of a common smoking pipe or other device that can be used to smoke marihuana or hashish extends criminal responsibility too far and circumvents the usable quantity requirement of the possession offense. The extension is justified with respect to the *injection* of dangerous drugs because of the much greater potential for harm in injection.

Subsection (b) grades paraphernalia possession on the same level as dangerous drug possession.

§ 48.13. Authorization Defense

(a) It is a defense to prosecution under this chapter that the alleged criminal conduct was authorized by [the regulatory law].

(b) It is an affirmative defense to prosecution under this chapter, which the actor must prove by a preponderance of the evidence, that

he reasonably believed the alleged criminal conduct was authorized by [the regulatory law].

Historical Note

Derivation:
Subsec. (a): Fed.Prop.Crim.Code § 1825
Subsec. (b): New

Cross References

Affirmative defense explained, see § 2.04.
Defense explained, see § 2.03.

Committee Comment

Not all production, distribution, or possession of controlled drugs is unlawful. Many controlled drugs (e. g., morphine, codeine, amphetamines, barbiturates) are lawfully produced, distributed, and possessed, chiefly for medical or scientific purposes. Naturally, such lawful conduct is not subject to this chapter, and this section refers to the regulatory law for determination of what trafficking and possession is lawful and what unlawful. This section is probably consistent with present law, Penal Code arts. 725b, § 21, 726d, § 12.

Section 48.13(b) makes it an affirmative defense, to be proved by the defendant by a preponderance of the evidence, that he reasonably believed the alleged criminal conduct was authorized by the regulatory law. Thus, a licensed manufacturer whose license is invalid because undated, and a patient whose prescription is invalid because issued by an unlicensed physician, can escape criminal responsibility under this subsection.

§ 48.14. Household Use Defense

It is a defense to prosecution under this chapter that the drug that is the subject of prosecution:

(1) was issued for the actor or for a member of his household by a practitioner, by a pharmacist under a prescription, or otherwise in compliance with [the regulatory law], and the actor transferred or administered the drug to a member of his household for use by a member of his household or possessed it for his personal use or for use of a member of his household; or

(2) was issued for an animal in the care of the actor or a member of his household by a practitioner, by a pharmacist under a prescription, or otherwise in compliance with [the regulatory law], and the actor transferred the drug to another for administration to an animal or possessed it for the transfer or administration to an animal.

Historical Note

Derivation:
New

Cross References

Authorization defense, see § 48.13.
Defense explained, see § 2.03.
"Possess" defined, see § 1.07.

Committee Comment

Section 48.14(1) excludes from criminal responsibility the common practice of intrafamily use of drugs *legitimately* prescribed, dispensed, or obtained over-the-counter for one member of the family. Although intrafamily use is unwise and to be discouraged, the committee believes that it should not be subject to criminal sanction. Most such use probably involves small quantities, and the taking of such small quantities when they are obtained legitimately does not present a significant risk of harm. In addition, the practice is both widespread and, in our society, constitutes "normal" conduct. It is questionable whether the criminal law should be used against widespread and "normal" conduct, especially when it is not clear that the conduct creates a significant risk of harm. Further, it is doubtful whether the criminal law can deter in this situation.

Because language excluding transfer, administration, and possession within a "family" might be difficult to apply, the defense created by Subdivision (1) is limited to transfer, administration, and possession within a "household."

Subdivision (2) contains a similar defense for drugs legitimately made available for animals. Under it, for example, the dog owner who gives a drug prescribed for her dog to a neighbor for administration to that dog in the owner's absence, or to the neighbor's dog, can escape criminal responsibility.

§ 48.15. Prosecution for Less Severe Offense

When this chapter authorizes the court to enter judgment of guilt and sentence for a lesser category of offense, the prosecuting attorney may initially prosecute for the lesser category of offense.

Historical Note

Derivation:
Fed.Prop.Crim.Code §§ 1822(3), 1823(2)

Cross References

Mitigation reducing offense category, see §§ 48.04, 48.06, 48.08, 48.11.
Nol. pros., see C.C.P. art. 32.02.

Committee Comment

Under this chapter the court is, in several instances, required to enter judgment of conviction and sentence for a less severe offense than the one charged if the defendant establishes certain mitigating facts at the sentencing hearing. See Sections 48.04(c), 48.06(c) and (d), 48.08(d), 48.11(c) and (d). There will probably be cases where it is clear to the prosecutor that on the facts the defendant is entitled to mitigation. Rather than going through a trial or plea proceeding for the greater offense and then a sentencing hearing to establish mitigation in these situations, this section explicitly authorizes the prosecutor to charge initially the less severe (mitigated) offense. Thus, if the prosecutor believes that the defendant's possession of marihuana was for personal use, he may initially prosecute him for possession of an abusable drug for personal use, a Class B misdemeanor (if the first offense), rather than for simple possession as a felony. This authority will expedite the processing of cases.

§ 48.16. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:
New

Cross References

"Agency" defined, see § 1.07.
"Conduct" defined, see § 1.07.
Effect of code, see § 1.03.
"Government" defined, see § 1.07.
"Law" defined, see § 1.07.
Preemption by code, see § 1.03 comment.

Committee Comment

Municipal ordinances presently conflict with and overlap state law in the drug area. The Austin Municipal Code (1967), for example, forbids glue sniffing, § 23-8, and the Dallas City Code (1967) proscribes possession and sale of marihuana, §§ 17-67, 17-68. Most of this conduct is of course proscribed by state law, Penal Code arts. 725b, 725c, 726d, and to eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, Section 48.16 makes clear the state intends

to preempt the area of mind and mood-altering drugs and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

In light of this section, local laws punishing mere possession of restricted drugs, for example, possession of smoking pipes, or drug intoxication (see also Sections 42.08 and 42.12) are invalid, as are local laws conflicting with any provision of this chapter, e. g., contracting the household use defense, adding a drug to the restricted category other than by the authorized state agency.

CONFORMING AMENDMENTS

CHAPTER 3. MULTIPLE PROSECUTIONS AND DOUBLE JEOPARDY

Conforming Amendments

CODE OF CRIMINAL PROCEDURE

Art. 3.04. Criminal Episode

In this Code, unless the context requires a different definition, "criminal episode" means all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective, even though the harm is directed toward or inflicted upon more than one person.

Art. 21.24. Joinder of Certain Offenses

(a) Two or more offenses may be joined in a single indictment, information, or complaint, with each offense stated in a separate count, if the offenses arise out of the same criminal episode.

(b) A count may contain as many separate paragraphs charging the same offense as the attorney who prepares it, acting in good faith, believes necessary, but no paragraph may charge more than one offense.

(c) A count is sufficient if any one of its paragraphs is sufficient. An indictment, information, or complaint is sufficient if any one of its counts is sufficient.

Art. 27.05. Special Plea for Defendant

A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode, and that the former prosecution:

(1) resulted in acquittal, as that term is defined in Penal Code Section 3.04; or

(2) resulted in conviction, as that term is defined in Penal Code Section 3.04; or

(3) was improperly terminated, as that term is defined in Penal Code Section 3.04; or

(4) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that

necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

Art. 28.04. Quashing Charge in Misdemeanor

If the motion to set aside on the exception to an indictment or information is sustained, the defendant in a misdemeanor case shall be discharged, but may be again prosecuted within the time allowed by law unless the granting of the motion necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

Art. 28.05. Quashing Indictment in Felony

If the motion to set aside or the exception to the indictment in cases of felony be sustained, the defendant shall not therefore be discharged, but may immediately be recommitted by order of the court, upon motion of the State's attorney or without motion; and proceedings may afterward be had against him as if no prosecution had ever been commenced unless the granting of the motion necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

Art. 36.09. Severance of Defendant and Offenses

Severance on separate indictments

Sec. 1. Two or more defendants who are jointly or separately indicted or complained against for the same offense or any offense growing out of the same transaction may be, in the discretion of the court, tried jointly or separately as to one or more defendants; provided that in any event either defendant may testify for the other or on behalf of the State. In cases in which, upon timely motion to sever, and evidence introduced thereon, it is made known to the court that there is a previous admissible conviction against one defendant or that a joint trial would be prejudicial to any defendant, the court shall order a severance to the defendant whose joint trial would prejudice the other defendant or defendants.

Severance of offenses arising out of the same criminal episode

Sec. 2. (a) The court on written motion of the prosecuting attorney or defendant may sever one or more offenses if:

(1) the motion is filed before the trial begins and the court finds and states for the record that severance is appropriate to

promote a fair determination of defendant's guilt or innocence of each offense; or

(2) the motion is filed during trial with the defendant's consent and the court finds and states for the record that severance is necessary to achieve a fair determination of defendant's guilt or innocence of each offense.

(b) In determining whether to sever offenses under Paragraph (a), the court shall consider whether, in view of the number of offenses joined and the complexity of the evidence offered or anticipated, the trier of facts will be able to distinguish the evidence and apply the law intelligently to each offense.

Art. 36.10. Order of Trial Following Severance of Defendants

If a severance of defendants is ordered, the defendants may agree upon the order in which they are to be tried, but if they fail to agree, the court shall direct the order of trial.

Art. 36.11. Discharge Before Verdict

If it appears during a trial that the court has no jurisdiction of the offense, or that the facts charged in the indictment do not constitute an offense, the jury shall be discharged. The accused shall also be discharged, but such discharge shall be no bar in any case to a prosecution before the proper court for any offense unless termination of the former prosecution was improper as defined in Penal Code Section 3.04.

Art. 37.07. Content of Verdict

(a) The verdict in every criminal action must be general.

(b) If the plea is not guilty, the jury must find the defendant either guilty or not guilty, and if the indictment, information, or complaint contains more than one count, the jury must make this finding on a separate verdict form as to each count.

(c) If there is a special plea on which a jury is to find, it must say in its verdict whether the allegations in the plea are true or untrue.

Art. 37.12. Judgment on Verdict

(a) Except as provided in Paragraph (b), the court shall enter judgment immediately on each verdict of acquittal or conviction.

(b) In misdemeanor cases where there is returned a verdict, or a plea of guilty is entered and the punishment assessed is by fine only, the court may, on written request of the defendant and for good cause

shown, defer judgment until some other day fixed by order of the court; but in no event shall the judgment be deferred for a longer period of time than six months. On expiration of the time fixed by the order of the court, the court or judge thereof, shall enter judgment on the verdict or plea and the same shall be executed as provided by Chapter 43 of this Code. Provided further, that the court or judge thereof, in the exercise of sound discretion may permit the defendant where judgment is deferred, to remain at large on his personal bond, or may require him to enter into bail bond in a sum at least double the amount of the assessed fine and costs, conditioned that the defendant and sureties, jointly and severally, will pay such fine and costs unless the defendant personally appears on the day, set in the order and discharges the judgment in the manner provided by Chapter 43 of this Code; and for the enforcement of any judgment entered, all writs, processess and remedies of this Code are made applicable so far as necessary to carry out the provisions of this Article.

Art. 45.32. The Only Special Plea

The only special plea allowed is that defined in Article 27.05.

CHAPTER 7. CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

SUBCHAPTER B. CORPORATIONS AND ASSOCIATIONS

Conforming Amendments

CODE OF CRIMINAL PROCEDURE

CHAPTER SEVENTEEN–A

CORPORATIONS AND ASSOCIATIONS

Art.

17A.01. Application and Definitions.
17A.02. Allegation of Name.
17A.03. Summoning Corporation or Association.
17A.04. Service on Corporation.
17A.05. Service on Association.
17A.06. Appearance.
17A.07. Presence of Corporation or Association.
17A.08. Probation.
17A.09. Notifying Attorney General of Corporation's Conviction.

Article 17A.01. Application and Definitions

(a) This Chapter sets out some of the procedural rules applicable to the criminal responsibility of corporations and associations. Where not in conflict with this Chapter, the other Chapters of this Code apply to corporations and associations.

(b) In this Code, unless the context requires a different definition:

(1) "Agent" means a director, officer, employee, or other person authorized to act in behalf of a corporation or association.

(2) "Association" means a government or governmental subdivision or agency, trust, partnership, or two or more persons having a joint or common economic interest.

(3) "High managerial agent" means:

(A) an officer of a corporation or association;

(B) a partner in a partnership; or

(C) an agent of a corporation or association who has duties of such responsibility that his conduct may reasonably be assumed to represent the policy of the corporation or association.

(4) "Person," "he," and "him" include corporation and association.

Art. 17A.02. Allegation of Name

(a) In alleging the name of a defendant corporation, it is sufficient to state in the complaint, indictment, or information the corporate name, or to state any name or designation by which the corporation is known or may be identified. It is not necessary to allege that the defendant was lawfully incorporated.

(b) In alleging the name of a defendant association, it is sufficient to state in the complaint, indictment, or information the association's name, or to state any name or designation by which the association is known or may be identified, or to state the name or names of one or more members of the association, referring to the unnamed members as "others." It is not necessary to allege the legal form of the association.

Art. 17A.03. Summoning Corporation or Association

(a) When a complaint is filed or an indictment or information presented against a corporation or association, the court or clerk shall issue a summons to the corporation or association. The summons shall be in the same form as a capias except that:

(1) it shall summon the corporation or association to appear before the court named at the place stated in the summons; and

(2) it shall be accompanied by a certified copy of the complaint, indictment, or information; and

(3) it shall provide that the corporation or association appear before the court named at or before 10 a. m. of the Monday next after the expiration of twenty days after it is served with summons, except when service is made upon the Secretary of State or Chairman of the State Board of Insurance, in which instance the summons shall provide that the corporation or association appear before the court named at or before 10 a. m. of the Monday next after the expiration of thirty days after the Secretary of State or Chairman of the State Board of Insurance is served with summons.

(b) No individual may be arrested upon a complaint, indictment, information, judgment, or sentence against a corporation or association.

Art. 17A.04. Service on Corporation

(a) Except as provided in Paragraph (d), a peace officer shall serve a summons on a corporation by personally delivering a copy of it to the corporation's registered agent. However, if a registered agent has not been designated, or cannot with reasonable diligence be found at the registered office, then the peace officer shall serve the summons by personally delivering a copy of it to the president or a vice president of the corporation.

(b) If the peace officer certifies on the return that he diligently but unsuccessfully attempted to effect service under Paragraph (a), or if the corporation is a foreign corporation that has no certificate of authority, then he shall serve the summons on the Secretary of State by personally delivering a copy of it to him, or to the Assistant Secretary of State, or to any clerk in charge of the corporation department of his office. On receipt of the summons copy, the Secretary of State shall immediately forward it by certified or registered mail, return receipt requested, addressed to the defendant corporation at its registered office, or, if it is a foreign corporation, at its registered or principal office in the state or country under whose law it was incorporated.

(c) The Secretary of State shall keep a permanent record of the date and time of receipt and his disposition of each summons served under Paragraph (b) together with the return receipt.

(d) The method of service on a corporation regulated under the Insurance Code is governed by that code.

Art. 17A.05. Service on Association

(a) Except as provided in Paragraph (b), a peace officer shall serve a summons on an association by personally delivering a copy of it:

(1) to a high managerial agent at any place where business of the association is regularly conducted; or

(2) if the peace officer certifies on the return that he diligently but unsuccessfully attempted to serve a high managerial agent, to any employee of suitable age and discretion at any place where business of the association is regularly conducted; or

(3) if the peace officer certifies on the return that he diligently but unsuccessfully attempted to serve a high managerial agent, or employee of suitable age and discretion, to any member of the association.

(b) The method of service on an association regulated under the Insurance Code is governed by that code.

Art. 17A.06. Appearance

(a) In all criminal actions instituted against a corporation or association, in which original jurisdiction is in a district or county-level court:

(1) appearance is for the purpose of arraignment;

(2) the corporation or association has ten full days after the day the arraignment takes place and before the day the trial begins to file written pleadings.

(b) In all criminal actions instituted against a corporation or association, in which original jurisdiction is in a justice court or corporation court:

(1) appearance is for the purpose of entering a plea; and

(2) ten full days must elapse after the day of appearance before the corporation or association may be tried.

Art. 17A.07. Presence of Corporation or Association

(a) A defendant corporation or association appears through counsel.

(b) If a corporation or association does not appear in response to summons, or appears but fails or refuses to plead:

(1) it is deemed to be present in person for all purposes; and

(2) the court shall enter a plea of not guilty in its behalf; and

(3) the court may proceed with trial, judgment, and sentencing.

(c) If, having appeared and entered a plea in response to summons, a corporation or association is absent without good cause at any time during later proceedings:

(1) it is deemed to be present in person for all purposes; and

(2) the court may proceed with trial, judgment, or sentencing.

Art. 17A.08. Probation

Probation granted by court

Sec. 1. (a) Following conviction or plea of guilty or nolo contendere, a court of record may suspend the imposition of all or part of the sentence and grant the corporation or association probation if the court finds, after considering the factors enumerated in Paragraph (b), that probation would best serve the interests of society and of the corporation or association.

(b) In determining whether to grant probation, the court shall consider the following factors among others:

(1) whether the corporation's or association's criminal conduct neither caused nor threatened serious harm to another's person or property;

(2) whether the corporation or association did not plan or expect that its criminal conduct would cause or threaten serious harm to another's person or property;

(3) whether the victim induced or facilitated the corporation's or association's criminal conduct;

(4) whether the corporation or association has made or will make restitution or reparation to the victim for the damage or injury sustained;

(5) whether the corporation or association has no history of prior criminal conduct;

(6) whether the corporation's or association's criminal conduct was the result of circumstances unlikely to recur;

(7) whether the character and history of the corporation or association indicate that it is unlikely to commit another offense.

CONFORMING AMENDMENTS

Jury probation

Sec. 2. (a) A defendant corporation or association may request the jury to recommend probation if it has never before been adjudged guilty of a felony, or granted probation following a judgment of guilt of a felony, in this or any other jurisdiction.

(b) A defendant corporation or association requests jury probation by filing a written motion with the court and serving a copy on the prosecuting attorney. The defendant corporation or association must state in the motion that it is eligible for jury probation under Paragraph (a), and a high managerial agent of the defendant corporation or association must swear to the truth of the statement. The motion must be filed, and the copy served, before the trial on the merits begins, or if the court sets a pretrial hearing, the motion must be filed and served at the hearing.

(c) If the defendant corporation or association is found guilty by the jury, the court shall conduct the sentencing hearing under Article 42.02, Section 2, before the jury that found defendant guilty. However, only legally competent evidence is admissible at the sentencing hearing before the jury on the probation issue.

(d) At the conclusion of the sentencing hearing the jury shall retire and determine whether to recommend probation. If the jury recommends probation, the court shall grant defendant corporation or association probation for a period and on conditions the court determines under Section 3. If the jury recommends against probation, the court may nevertheless grant probation, or it may sentence the defendant corporation or association to any punishment authorized by law.

Conditions and period of probation

Sec. 3. (a) The court granting probation shall determine the period and conditions of probation and supervise the corporation or association during probation. The court shall design the period and conditions to prevent the corporation or association from engaging in similar criminal conduct in the future. The conditions of probation must be reasonable and shall include, but are not limited to, the requirements that the corporation or association:

(1) commit no offense of the same character as the present offense against the law of this or another state or of the United States;

(2) pay all costs of its trial;

(3) pay all or so much of its fine as the court directs;

(4) make restitution to each victim of its offense;

(5) report periodically to the court through a high managerial agent on the business affairs and conduct of the corporation or association that are relevant to the terms of probation.

(b) A period of probation may not exceed

(1) fifteen years from the date it was granted if the corporation or association was convicted of a capital felony or felony of the first degree;

(2) twelve years from the date it was granted if the corporation or association was convicted of a felony of the third degree;

(3) six years from the date it was granted if the corporation or association was convicted of a felony of the third degree;

(4) two years from the date it was granted if the corporation or association was convicted of a Class A misdemeanor.

(5) one year from the date it was granted if the corporation or association was convicted of a Class B misdemeanor.

(c) The court with probation jurisdiction over the corporation or association may terminate probation, and discharge the corporation or association under Section 4(a) before the period of probation expires, if warranted by the corporation's or association's conduct.

(d) The clerk of the court granting probation shall promptly furnish the corporation or association with a written statement of the period and conditions of its probation. If the period or conditions are later modified under Paragraph (e), the clerk of the modifying court shall promptly furnish the corporation or association with a written statement of the modifications. A high managerial agent of the corporation or association shall acknowledge in writing receipt of each statement furnished under this paragraph.

(e) After giving the corporation or association notice and an opportunity to be heard, the court with probation jurisdiction over the corporation or association may modify the period or conditions of probation if warranted by the corporation's or association's conduct.

Discharge or revocation

Sec. 4. (a) When a corporation or association satisfies the period and conditions of its probation, the court shall enter an order in the minutes of the court discharging the corporation or association from probation. After discharge the court may also set aside the judgment of conviction and dismiss the complaint, information, or indictment against the corporation or association. After the criminal action against the corporation or association is dismissed, the judgment of conviction may not be considered for any purpose except to determine the corporation's or association's entitlement to a future probation.

(b) If the court has probable cause to believe that a corporation or association has violated a condition of its probation, it shall summon the corporation or association to appear before it in the manner provided in Article 17A.03. Service of the summons and the corporation's or association's presence at the hearing are governed by Articles 17A.04, 17A.05, and 17A.07. When the corporation or association appears, the court without a jury shall hold a hearing on the alleged violation and after the hearing shall continue, modify, or revoke the probation as the evidence warrants. If the court revokes the probation, it shall immediately pronounce sentence against the corporation or association.

Appeal

Sec. 5. When it is granted probation a corporation or association is entitled to appeal its judgment of conviction as in other cases. It is also entitled to appeal the court's revocation of probation under Section 4(b).

Art. 17A.09. Notifying Attorney General of Corporation's Conviction

If a corporation is convicted of an offense, or if a high managerial agent is convicted of an offense committed in the conduct of the affairs of the corporation, the court shall notify the attorney general in writing of the conviction when it becomes final and unappealable. The notice shall include:

(1) the corporation's name, and the name of the corporation's registered agent and the address of the registered office, or the high managerial agent's name and address, or both; and

(2) certified copies of the judgment and sentence and of the complaint, information, or indictment on which the judgment and sentence were based.

Historical Note

Derivation:

Business Corporation Act arts. 2.11, 8.10
C.C.P. arts. 23.03, 25.01, 27.11, 27.12, 42.12, as amended, 45.33
La.Code Civ.Proc. arts. 1261, 1264
La.Code Crim.Proc. arts. 467, 836

Cross References

Criminal responsibility of corporation, see R.P.C. § 7.22.
Criminal responsibility of association, see R.P.C. § 7.23.
Dissolution of corporation, see Business Corporation Act art. 7.01; R.C.S. art. 1396-7.01, as amended.
Punishment authorized for corporation or association, see R.P.C. § 12.51.
Revocation of certificate of authority, see Business Corporation Act art. 8.16; R.C.S. art. 1396—8.15, as amended.

Committee Comment

This new chapter for the Code of Criminal Procedure sets out special procedural rules necessary to subject corporations and associations to the criminal process. See Thompson v. Stauffer Chemical Co., 348 S.W.2d 274 (Tex.Civ.App.—Waco 1961, writ ref'd n. r.e.). As art. 17A.01(a) makes clear, however, the procedural rules of the new chapter are not exhaustive and the other provisions of the Code of Criminal Procedure apply to corporations and associations unless in conflict with the rules provided in the new chapter.

Definitions

The definitions of "agent," "association," and "high managerial agent" in art. 17A.01(b) come from the Revised Penal Code. "Person" and the personal pronouns are expanded to cover corporations and associations throughout the Code of Criminal Procedure since the code presently contemplates only an individual by use of these terms.

Pleading

Article 17A.02 derives from Louisiana law and will assist the prosecution in identifying for pleading purposes the defendant corporation or association. See La.Code Crim.Proc. art. 467. Paragraph (a) of the article applies to corporations and Paragraph (b) to associations; the difference in treatment results from the different nature of the two kinds of legal entities.

Summons

Article 17A.03 tracks present Article 23.03 of the code, which since 1966 has authorized the use of a summons, as an alternative to the traditional capias and arrest, to bring a defendant before a criminal court. Paragraph (a)(2) ensures that the corporation or association will receive notice of the charge, and Paragraph (a)(3) tracks the civil rules for appearance. When a defendant corporation or association is served through the Secretary of State or Board of Insurance, it is given 10 extra days to answer.

Paragraph (b) prevents arresting an individual when only a corporation or association is charged with a criminal offense. However, this paragraph does not prevent the arrest of an individual in connection with an offense for which *both* he and a corporation or association are prosecuted; nor does it prevent the individual's arrest for contempt of court at any point during the prosecution, for example.

Service

Articles 17A.04 and 17A.05 derive from Louisiana law, La.Code Civ.Proc. arts. 1261–1264, and from the Texas Business Corporation Act, arts. 2.11 and 8.10.

The service rules for associations differ slightly from those for corporations because of the great variety of organizational

and management forms unincorporated associations may assume. For this reason service is required in the first instances on a "high managerial agent" of the association. If the association is a trust, this individual would be a trustee; if a municipality, the mayor or a city councilman or alderman; and if a state government agency, its head or director.

Note finally that the service rules for corporations or associations regulated under the Insurance Code are those provided in that code.

Appearance

Article 17A.06 distinguishes between prosecutions on the district and county court levels and those on the justice or corporation court level because the Code of Criminal Procedure now makes a similar distinction in terms of arraignment. Present art. 26.01 requires arraignment of each (individual) defendant charged with a felony or misdemeanor punishable by imprisonment; arraignment is not required for a justice or corporation court. Although corporations or associations obviously may not be imprisoned, the Revised Penal Code does subject them to heavy fines on conviction of an offense over which the district or county-level court has jurisdiction, and it is thus desirable to afford them the protection of formal arraignment. At the same time, Paragraph (b) makes clear that arraignment is not required before a justice or corporation court.

The 10-day period for pleading tracks present arts. 27.11 and 27.12, and Paragraph (b)(1) follows art. 45.33 except that it permits a written, as well as oral, plea.

Presence

Article 17A.07 deals with the difficult problem of compelling a legal entity's presence before a criminal court. The article derives from La.Code Crim.Proc. art. 836 and declares the defendant corporation or association present for all purposes once it has been properly served under arts. 17A.03–17A.05. See also arts. 33.03, 37.06.

Probation

Article 17A.08 extends to the legal entity in a criminal prosecution the same probation benefits now extended by art. 42.12, as amended, to the individual defendant. The few differences in treatment—e. g., the conditions of probation in Section 3—are necessitated by the peculiarities of legal entities.

Notice of Conviction

Article 17A.09 derives from art. 7.02 of the Business Corporation Act and ties into the attorney general's authority to seek dissolution of a domestic corporation, or revocation of the certificate of authority of a foreign corporation, convicted of a serious criminal offense, see Business Corporation Act arts. 7.01, 8.16; R.C.S. arts. 1396—7.01, 1396—8.15, as amended.

CHAPTER 8. GENERAL DEFENSES TO CRIMINAL RESPONSIBILITY

Conforming Amendments

CODE OF CRIMINAL PROCEDURE

Art. 46.02. Incompetency and Insanity

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PART A. INCOMPETENCY

Mental incompetency to proceed

Section 1.01. No person may be tried, sentenced, or executed if, as a result of mental disease or defect:

(1) he lacks the mental competency to understand the nature of the proceedings against him; or

(2) he lacks the mental competency to assist and participate in the proceedings against him.

Historical Note

Derivation:

Ill.Stat.Ann. ch. 38, § 104-1
Model P.C. § 4.04

Cross References

Appointment of psychiatrist, see art. 46.02, § 3.01, as amended.
Commitment for psychiatric examination, see art. 42.06, § 3.02, as amended.
Hearing on incompetency issue, see art. 46.02, § 1.03, as amended.
Hospitalization of incompetent, see art. 46.02, § 1.04, as amended.
Raising incompetency issue, see art. 46.02, §§ 1.02, 1.03, as amended.

Committee Comment

The mental condition of an accused may be at issue in a criminal proceeding as of the time of the alleged offense, prior to trial, at trial, after conviction but before sentence, or before execution. Only the accused's mental condition at the time of the offense involves a determination of sanity or mental responsibility for crime. A finding of mental incompetency results in delay, not termination, of the proceeding until competency is restored. Under present Texas law, there is a basic conceptual and semantic confusion between insanity as a defense establishing nonresponsibility and mental incompetency to stand trial. The Code of Criminal Procedure refers to competency to stand trial as "present insanity," C.C.P. art. 42.06, § 2, and although it provides that the test of present insanity is competency "to make a rational defense," the courts rely, in part, on the M'Naghten Rules to determine competency, see, e. g., Ex parte Hodges, 314 S.W.2d 581 (Tex.Crim.App.1958); 2 Willson, Texas Criminal Forms § 3526 (7th ed. 1966).

Section 1.01 substitutes "mental competency" for the present term "present insanity" and establishes new criteria for determining competency. Although either criterion must be a result of mental disease or defect, Section 1.01 rejects any reliance of the M'Naghten Rules—knowing the nature or consequences of the act or knowing right and wrong—or even the new test of insanity, R.P.C. § 8.01, because insanity and incompetency are entirely different concepts.

As in present law, incompetency may delay trial, sentencing, or execution, C.C.P. art. 46.02, §§ 2, 4, 5, but unlike present law, art. 46.02, § 4, an appeal is not delayed because of a defendant's incompetency. Since appeals turn almost exclusively on questions of law and do not depend on the presence or participation of the defendant, there is no need for delay.

Raising the incompetency issue before trial

Sec. 1.02. (a) After the indictment or information has been presented (or when pleading in a justice or corporation court), but before

the trial on the merits begins, a defendant or his counsel, or the prosecuting attorney, may file with the court a written motion asserting that due to the defendant's mental disease or defect there is reason to doubt his mental competency to proceed. A defendant, his counsel, or the prosecuting attorney may file the motion after the trial on the merits begins if for good cause shown the mental condition of the defendant was not known or apparent before the trial on the merits began.

(b) Before acting on a motion challenging mental competency to proceed, the court shall state the consequences of the motion to the defendant.

Historical Note

Derivation:
New

Cross References

Commitment for psychiatric examination, see art. 46.02, § 3.02, as amended.
Competency hearing, see art. 46.02, § 1.03, as amended.
Mental incompetency to proceed, see art. 46.02, § 1.01, as amended.

Committee Comment

This section establishes the procedures for the accused's assertion of incompetency to proceed. Under Section 1.03, the court may raise the competency issue at any time, see Pate v. Robinson, 86 S.Ct. 836, 383 U.S. 375 (1966), but because of the desirability of determining the competency issue prior to trial, a defendant who desires to assert his incompetency must do so prior to trial except for good cause. Pretrial assertion will facilitate the use of Sections 3.01 (appointment of psychiatrist) and 3.02 (commitment for psychiatric examination).

Incompetency as delay of criminal action

Sec. 1.03. (a) When a defendant's mental competency to proceed is put in issue under Section 1.02, by evidence developed at trial, or by motion filed before sentencing or execution, the court shall determine the issue. If the defendant is awaiting execution of his death sentence, a district court of the county in which he is confined may determine the competency issue.

(b) If the mental competency issue is contested, the court shall hold a hearing and require the state to prove the defendant's mental incompetency to proceed by a preponderance of the evidence, unless the defendant raised the issue, in which event the defendant must prove his incompetency to proceed by a preponderance of the evidence.

(c) If a jury has been impaneled and the court determines the defendant mentally incompetent to proceed or orders a psychiatric

examination before deciding the issue, the court may declare a mistrial. Declaration of a mistrial does not constitute jeopardy nor does it prohibit the trial, sentencing, or execution of the defendant for the same offense after he has been determined mentally competent to proceed.

(d) Determination that the defendant is mentally incompetent to proceed does not prevent consideration and disposition of a legal objection to the prosecution that may be fairly decided without the defendant's personal participation.

Historical Note

Derivation:
New

Cross References

Competency determination by court, see Tex.Const. art. I, § 15-b, as amended.
Commitment for psychiatric examination, see art. 46.02, § 3.02, as amended.

Committee Comment

Section 1.03(a) departs from present law and returns to the common-law practice of requiring the court without a jury to determine the competency issue. The competency decision is a complex of legal and medical considerations. It involves the question of delaying or resuming the criminal proceeding and not the determination of responsibility for crime in which the jury, as moral spokesmen for the community, has a legitimate role. Trial to the court should reduce the tendency to dramatize and appeal to emotion and increase the likelihood of the development of experience and sophistication on the part of the decision-maker. Court determination of the competency issue, however, requires a constitutional amendment, a draft of which follows this article.

Although C.C.P. art. 46.02, § 1, purports to permit a preliminary hearing on the issue of competency only if the prosecution consents and the court approves, the Court of Criminal Appeals has read Penal Code art. 34 to require the hearing if the issue is timely raised, Townsend v. State, 427 S.W.2d 55 (Tex.Crim.App. 1968). Section 1.03(b) goes beyond Townsend and requires a hearing before the court, separate from the trial on the merits, whenever the competency issue is raised and contested. It also clarifies the burden of proving incompetency, requiring proof by preponderance of evidence by the state unless the defendant raises the issue, in which event the defendant has the burden.

Paragraph (c) restates present law, C.C.P. art. 46.02, §§ 2(e), 2(h), and Paragraph (d) provides for disposition of appeals and pleas in bar, such as no jurisdiction and former jeopardy, when a defendant has been found incompetent.

Commitment after determination of incompetency

Sec. 1.04. (a) If the court determines that the defendant is mentally incompetent to proceed under Section 1.03 or 1.05, the court shall also determine whether because of mental disease or defect the defendant presently requires hospitalization because he is a danger to himself or others.

(b) If the commitment issue is contested, the court shall require the state to prove that the defendant requires hospitalization because he is a danger to himself or others by a preponderance of the evidence.

(c) If the court determines that because of mental disease or defect the defendant presently is a danger to himself or others, the court may commit the defendant to a state mental hospital or other facility until it is determined that he no longer requires hospitalization.

(d) The clerk of the court shall forward the commitment order to the institution together with certified copies of:

(1) the complaint, information, or indictment; and

(2) the report of examination filed under Section 3.03, if any; and

(3) a transcript of testimony on the hospitalization issue, if any.

(e) If the court does not hospitalize the defendant, the court may enter any order, other than to require hospitalization, necessary to facilitate the defendant's restoration to mental competency.

Historical Note

Derivation:

New

Cross References

Commitment by court, see Tex.Const. art. I, § 15–b, as amended.

Release from hospitalization:

On defendant's application, see art. 46.02, § 1.07, as amended.

By hospital authority, see art. 46.02, § 4.01, as amended.

Restoration hearing, see art. 46.02, § 1.05, as amended.

Committee Comment

This section sets out the procedural consequences of a determination of incompetency at any point in a criminal proceeding. It resembles present law in separating the competency and hospitalization decisions and requiring dangerousness for hospitalization, C.C.P. art. 46.02, § 2(b)(2)(b). It also authorizes treatment alternatives other than hospitalization.

Hearing on restoration of competency

Sec. 1.05. (a) The court may order a restoration hearing at any time on its own motion, on motion of the prosecuting attorney, or on

motion of the defendant if he has not been committed under Section 1.04, to determine if the defendant has become mentally competent to proceed. The court shall order a hearing if:

(1) the head of the institution to which the defendant was committed files the report specified in Section 1.07(c) certifying that the defendant is mentally competent to proceed; or

(2) a physician who has been treating the defendant files the report specified in Section 1.07(c) certifying that the defendant is mentally competent to proceed, if the defendant was not committed.

(b) At the hearing the state is required to prove that the defendant has become mentally competent to proceed by a preponderance of the evidence, unless the defendant raised the issue, in which event the defendant must prove his competency to proceed by a preponderance of the evidence. Both parties are entitled to present evidence, summon and cross-examine witnesses, and make opening and closing statements. If the defendant is not represented by counsel, the court shall appoint counsel, if authorized by Article 26.04, and allow adequate time for consultation and preparation. Counsel appointed under this section is entitled to compensation at the rate fixed by Article 26.05 for representing a felon or misdemeanant before a court of record.

Historical Note

Derivation:
New

Cross References

Action after restoration hearing, see art. 46.02, § 1.06, as amended.
Competency determination by court, see Tex.Const. art. I, § 15-b, as amended.
Release from hospitalization:
On patient's application, see art. 46.02, § 1.07, as amended.
By hospital authority, see art. 46.02, § 4.01, as amended.

Committee Comment

This section elaborates present law by spelling out who can initiate the restoration hearing and the nature of the hearing. It preserves the requirement of a hearing when the hospital authority certifies to the committing court that the defendant has regained his competency, C.C.P. art. 46.02, § 7, and requires a hearing when a physician treating a defendant who has not been committed certifies to the court that he has regained his competency. It also authorizes the court to conduct a hearing on its own motion, on motion of the prosecutor, or on motion of a defendant who has not been committed. If the defendant has been committed, Section 1.07 provides the applicable release procedures, and in most instances the release and restoration issues will be considered at the same hearing.

As in Section 1.03, this section requires the court to make decisions presently made by the jury. See the comment to Section 1.03.

Action after hearing on restoration of competency

Sec. 1.06. (a) If the court determines after a hearing under Section 1.05 that the defendant is mentally competent to proceed, the court shall resume the trial or sentencing proceedings or carry out the sentence. The court shall credit any time spent while committed in a state mental hospital or other facility against both the maximum term and any minimum term imposed.

(b) If the court determines that the defendant is mentally competent to proceed and if the court believes that so much time has elapsed since the original determination of incompetency that it would be unjust to resume the criminal action, the court may set aside the conviction, if any, dismiss the complaint, information, or indictment, and either order the defendant discharged or take appropriate steps to sesecure the civil commitment of the defendant.

(c) If, after the hearing held under Section 1.05, the court determines that the defendant remains mentally incompetent to proceed, the court shall commit or recommit the defendant or enter any new order necessary to facilitate the defendant's restoration to mental competency.

(d) A determination that the defendant has regained his mental competency is not admissible against the defendant on the issue of guilt.

Historical Note

Derivation:
New

Cross References

Civil commitment, see R.C.S. arts. 5547—27 through 5547—67.
Credit against sentence, see art. 42.03, as amended.
Evidence admissible, see art. 46.02, § 3.03, as amended.
Restoration hearing, see art. 46.02, § 1.05, as amended.

Committee Comment

Section 1.06 sets out the consequences that follow a determination of either restored competency or continued incompetency at the restoration hearing. The second sentence of Paragraph (a) preserves present law, C.C.P. art. 46.02, § 10.

Paragraph (b) permits the court to make a "speedy trial" or simply equitable decision when a substantial period of time elapses before restoration.

Paragraph (c) permits the court to order new or different treatment than that ordered at the original competency hearing, see Sec-

tion 1.04(e), including commitment of an accused not previously committed. Commitment, however, may only follow proof of dangerousness by a preponderance of evidence, as required by Section 1.04(b).

Paragraph (d) will help keep separate the incompetency and insanity issues.

Release from hospitalization by court on patient's application

Sec. 1.07. (a) Any time after the expiration of 90 days following the date of the commitment order, a patient committed under Section 1.04 (after a determination of incompetency) is entitled to apply to the committing court in writing for a hearing on the issue of whether he now requires hospitalization. Unless the court for good cause shown permits, the patient is not entitled to a subsequent hearing on the hospitalization issue for at least one year after the date of his immediately preceding hearing.

(b) On receipt of an application timely filed under Paragraph (a), the court shall direct the head of the institution in which the patient is hospitalized to prepare a current report of the patient's mental and physical condition. The court may also appoint one or more psychiatrists, not connected with the institution in which the patient is hospitalized, to report on the patient's current mental and physical condition. A psychiatrist appointed by the court is entitled to a reasonable fee for preparing the report, to be fixed by the court and paid from the general fund of the county in which the court is sitting. If the patient wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with a reasonable opportunity to examine the patient.

(c) The report of the patient's mental and physical condition shall include, but is not limited to:

(1) the name of each physician and any other expert who examined the patient; and

(2) a description of the nature, content, and extent of the examination and any tests conducted; and

(3) a summary of the patient's history while hospitalized in the institution, including a résumé of treatment administered; and

(4) a diagnosis and prognosis of the patient's mental and physical condition; and

(5) an opinion on whether the patient suffers from a mental disease or defect and, if so, whether he is a danger to himself or others; and

(6) an opinion of the patient's mental competency to understand the nature of the proceedings against him and to assist and participate in the proceedings against him; and

(7) an opinion on whether the patient requires continued hospitalization.

(d) Each report of a patient's mental and physical condition prepared under this section shall be delivered to the clerk of the court, who shall file it with the papers of the case and furnish a copy each to the prosecuting attorney and to counsel for the patient.

(e) On receipt of all reports required under Paragraph (b), the court shall conduct a hearing on the hospitalization issue. At the hearing the patient is required to prove his entitlement to discharge by a preponderance of the evidence, and all parties are entitled to present evidence, summon and cross-examine witnesses, and make opening and closing statements. If the patient is not represented by counsel, the court shall appoint counsel, if authorized by Article 26.04, and allow adequate time for consultation and preparation. Counsel appointed under this section is entitled to compensation at the rate fixed by Article 26.05 for representing a felon or misdemeanant before a court of record.

(f) If the court determines after the hearing that the patient no longer requires hospitalization (because he no longer suffers from a mental disease or defect or is no longer a danger to himself or others), the court shall order his discharge when the judgment becomes final. If the court determines that the patient requires further hospitalization, the court shall recommit the patient when the judgment becomes final.

Historical Note

Derivation:
New

Cross References

Release from hospitalization by hospital authority, see art. 46.02, § 4.01, as amended.

Committee Comment

The Mental Health Code excludes from its discharge procedures all patients committed under this article, R.C.S. art. 5547—69, as amended. Thus, the criminally committed patient can obtain a review of the legality of continuing his commitment, apart from habeas corpus, only under procedures established by this article.

Under present law, review is conditioned on the hospital authority's certification to the court that the patient has regained his sanity, C.C.P. art. 46.02, § 3(b). This treatment of the criminally committed is constitutionally suspect in light of the Supreme Court's decision in Baxtrom v. Herold, 86 S.Ct. 760, 383 U.S. 107 (1966), since the civilly committed patient is entitled, in addition to habeas corpus, to a review of the legality of continuing his commitment on his own application, see R.C.S. art. 5527—82.

Section 1.07 creates a procedure for review of a commitment based on a finding of incompetency to proceed. Because his commitment delays the criminal proceeding and he has been committed by the court, often before trial, see Section 1.04, the patient is entitled on demand to review of his commitment 90 days after it occurs. (Section 1.05 permits the court on its own, the prosecuting attorney's, or the hospital authority's motion to review competency, which of course includes commitment, at any time.) The patient is not entitled to a subsequent review, however, for at least a year after the preceding review.

Paragraphs (b)-(d) ensure the availability to the court of expert opinion on the patient's current mental condition. The report contents specified in Paragraph (c) are similar to those specified for the initial psychiatric examination in Section 3.03 and for the Certificate of Medical Examination for Mental Illness provided in the Mental Health Code, R.C.S. art. 5547—82.

In prescribing the elements of a trial-type hearing for determining the legality of the patient's continued commitment, Paragraph (e) tracks the indefinite commitment and discharge procedures of the Mental Health Code, R.C.S. arts. 5547—43 through 5547—57, 5547—82. Issues in this section, like all other competency issues in this Part A, are decided by the court.

PART B. INSANITY

Notice of insanity defense

Section 2.01. (a) A defendant planning to offer evidence of mental disease or defect to establish insanity shall enter a plea of "not guilty by reason of insanity" at least 10 days before trial begins, or if the court sets a pretrial hearing, the defendant shall enter the plea during the hearing. However, the court for good cause shown may permit entry of the plea at a later time determined by the court.

(b) Before accepting a plea of "not guilty by reason of insanity," the court shall state the consequences of the plea to the defendant.

(c) Except in extenuation or mitigation during the sentencing hearing, evidence of mental disease or defect is not admissible unless the plea of "not guilty by reason of insanity" is timely entered under Paragraph (a).

Historical Note

Derivation:
New

Cross References

Commitment for psychiatric examination, see art. 46.02, § 3.02, as amended.
Insanity, see R.P.C. § 8.01.

Pretrial hearing, see art. 28.01.
Psychiatric examination, see art. 46.02, § 3.01, as amended.
Sentencing hearing, see art. 42.02, as amended.

Committee Comment

Section 2.01(a) adds another plea to those presently available under Texas law, see C.C.P. art. 27.02, as amended. Its purpose is to require a defendant who anticipates reliance on the insanity defense to provide notice of that intention to the state. It is designed to prevent a hastily contrived insanity defense from being sprung on a surprised and unprepared prosecutor. The insanity defense is sufficiently unique and sufficiently technical to justify special treatment. Timely notice is also a necessary precondition to Section 3.01 (appointment of a psychiatrist) and Section 3.02 (commitment for psychiatric examination).

Unless the defendant or his counsel can demonstrate "good cause," the entry of the plea at the pretrial hearing or, if none, 10 days before trial, is a necessary precondition to reliance on the insanity defense at trial. Paragraph (c), however, makes clear that evidence of mental disease or defect is always admissible in extenuation or mitigation.

Paragraph (b) ensures that the defendant will understand the consequences of his plea.

Separate hearing on insanity issue

Sec. 2.02. (a) When he enters his plea of not guilty by reason of insanity under Section 2.01(a), the defendant may request the court in writing to order a separate hearing on the insanity issue before a different jury than the one that determines the guilt or innocence issue.

(b) If the defendant properly requests it under Paragraph (a), the court shall order separate hearings on the insanity and guilt or innocence issues before different juries. The court may determine the order of the hearings in its discretion.

(c) If the court orders a separate hearing on the insanity issue held first, the insanity issue may not be relitigated during the hearing on guilt or innocence. However, evidence of mental disease or defect is admissible during the hearing on guilt or innocence if relevant to negate the culpable mental state required for the offense charged, and, if such evidence is admitted, the finding of sanity from the first hearing is also admissible.

Historical Note

Derivation:
New

CONFORMING AMENDMENTS

Cross References

Burden of proof, see art. 46.02, § 2.03.
Evidence admissible, see art. 46.02, §§ 1.06, 3.03.

Committee Comment

This section creates a procedure for ensuring defendant a fair trial when trying the insanity and guilt or innocence issues at the same time before the same jury would be confusing or otherwise prejudicial. The section is based on the District of Columbia practice, see, e. g., Holmes v. United States, 363 F.2d 281 (D.C.Cir. 1966).

When defendant has both a substantial defense on the merits and a substantial insanity defense, his counsel faces a dilemma. For example, if coupled with the insanity evidence there is substantial proof defendant acted in self-defense, could not form the culpable mental state required, or did not commit the act charged, defense counsel often chooses not to raise the insanity defense for fear of confusing the jury and prejudicing his client. The U.S. Court of Appeals for the District of Columbia Circuit has succinctly summarized the policy reasons justifying a bifurcated trial in this context.

> . . . The court has recognized that substantial prejudice may result from the simultaneous trial on the pleas of insanity and "not guilty". . . . Ordinarily, this [insanity] testimony will tend to make the jury believe that [defendant] did the act. Also, evidence of past anti-social behavior and present anti-social propensities, which tend to support a defense of insanity, is highly prejudicial with respect to other defenses. Moreover, evidence that the defendant has a dangerous mental illness invites the jury to resolve doubts concerning commission of the act by finding him not guilty by reason of insanity, instead of acquitting him, so as to assure his confinement in a mental hospital. . . .
>
> Relevant considerations upon a request for bifurcation include the substantiality of [defendant's] insanity defense and its prejudicial effect on other defenses. The court not only has a broad discretion in considering bifurcation, but also in prescribing its procedure, the form of the charge and submission of the questions to the jury, the admissibility of evidence in each stage, and even the impaneling of a second jury to hear the second stage if this appears necessary to eliminate prejudice.

Holmes v. United States, 363 F.2d 281, 282–83 (D.C.Cir. 1966).

The Texas Court of Criminal Appeals has recognized the same risk of prejudice in a closely-related area—the determination of mental competency to be tried. In Ramirez v. State, 241 S.W. 1020

(Tex.Crim.App.1922), the court found reversible error in the trial court's refusal of defendant's request for a preliminary trial on the incompetency issue alone.

> . . . To try the prisoner for present insanity and for the crime charged in one and the same proceeding . . . would be manifestly confusing to the jury and unfair to the accused. If he be now insane, the fair decision of that issue should not be clouded and prejudiced by the introduction of the facts involving a bloodcurdling murder—facts which alone might well so stir the minds of the jury as to make difficult the exercise of calm judgment upon the question of present insanity. . . .

Id. at 1021; see also McCanter v. State, 438 S.W.2d 575 (Tex. Crim.App.1969).

And since the U.S. Supreme Court's decision in Jackson v. Denno, 84 S.Ct. 1774, 378 U.S. 368 (1964), the risk of jury confusion and resulting prejudice has assumed constitutional dimension, e. g., Townsend v. State, 427 S.W.2d 55 (Tex.Crim.App.1968).

Under Section 2.02(a) a defendant must timely notify the court (and prosecutor) in writing of his desire for separate hearings and separate juries. Under Paragraph (b), timely notice requires the court to hold separate hearings.

Paragraph (c) is necessary because mental disease or defect may constitute a negation of mens rea. As such, an attempt to foreclose its admission during the trial on guilt or innocence—even though the insanity defense was rejected at an earlier hearing—might deny a defendant due process.

The provision allowing the state to introduce the earlier finding of sanity accords with the Texas practice between 1937 and 1966 when a defendant could try the insanity issue in both the preliminary trial on competency and the trial on the merits, see, e. g., Parsons v. State, 271 S.W.2d 643 (Tex.Crim.App.1953).

Determination of insanity issue

Sec. 2.03. (a) The defendant has the burden of proving his insanity by a preponderance of the evidence.

(b) When the insanity issue is submitted, the trier of facts shall determine, and include in the verdict or judgment or both, whether the defendant was suffering from a mental disease or defect and if so whether at the time of the alleged conduct he lacked capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

Historical Note

Derivation:

New

Cross References

Insanity, see R.P.C. § 8.01.
Separate hearing, see art. 46.02, § 2.02 as amended.

Committee Comment

This section preserves the burden of proof on insanity that presently obtains in Texas, e. g., McGee v. State, 238 S.W.2d 707 (Tex. Crim.App.1950). Also as in present law, C.C.P. art. 46.02, § 2(c)(2), it requires a special finding of insanity.

Determination of need for hospitalization

Sec. 2.04. (a) If the defendant is determined not guilty by reason of insanity, the trier of facts shall determine, and include in the verdict or judgment or both, whether the defendant because of mental disease or defect presently requires hospitalization because he is a danger to himself or others.

(b) If the trier of facts determines that the defendant requires hospitalization, the court shall commit the defendant to a state mental hospital or other facility until it is determined that he no longer requires hospitalization.

(c) The clerk of the court shall forward the commitment order to the institution together with certified copies of:

(1) the complaint, information, or indictment; and

(2) the report of examination filed under Section 3.03; and

(3) a transcript of testimony on the hospitalization issue.

Historical Note

Derivation:
New

Cross References

Psychiatric examination, see art. 46.02, pt. C, as amended.
Release from hospitalization, see art. 46.02, §§ 1.07, 4.01, as amended.

Committee Comment

This section recognizes the need to separate the question of mental responsibility from the question of hospitalization since the commitment decision involves a determination of dangerousness, not simply insanity. The section preserves present law, C.C.P. art. 46.02, § 2(d).

Release from hospitalization on patient's application

Sec. 2.05. (a) Any time after the expiration of one year following the date of the commitment order, a patient committed under

Section 2.04 (after a determination of not guilty by reason of insanity) is entitled to apply to the committing court in writing for a hearing on the issue of whether he now requires hospitalization. Unless the court for good cause shown permits, the patient is not entitled to a subsequent hearing on this issue for at least two years after the date of his immediately preceding hearing.

(b) On receipt of an application timely filed under Paragraph (a), the court shall direct the head of the institution in which the patient is hospitalized to prepare a current report of the patient's mental and physical condition. The court may also appoint one or more psychiatrists, not connected with the institution in which the patient is hospitalized, to report on the patient's current mental and physical condition. A psychiatrist appointed by the court is entitled to a reasonable fee for preparing the report, to be fixed by the court and paid from the general fund of the county in which the court is sitting. If the patient wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with a reasonable opportunity to examine the patient.

(c) The report of the patient's mental and physical condition shall include, but is not limited to:

(1) the name of each physician and any other expert who examined the patient; and

(2) a description of the nature, content, and extent of the examination and any tests conducted; and

(3) a summary of the patient's history while hospitalized in the institution, including a résumé of treatment administered; and

(4) a diagnosis and prognosis of the patient's mental and physical condition; and

(5) an opinion on whether the patient suffers from a mental disease or defect and, if so, whether he is a danger to himself or others; and

(6) an opinion on whether the patient requires continued hospitalization.

(d) Each report of the patient's mental and physical condition prepared under this section shall be delivered to the clerk of the court, who shall file it with the papers of the case and furnish a copy each to the prosecuting attorney and to counsel for the patient.

(e) On receipt of all reports required under Paragraph (b), the court shall conduct a hearing on the hospitalization issue. At the hearing the patient is required to prove his entitlement to discharge

by a preponderance of the evidence, and all parties are entitled to present evidence, summon and cross-examine witnesses, and make opening and closing statements. If the patient is not represented by counsel, the court shall appoint counsel, if authorized by Article 26.04, and allow adequate time for consultation and preparation. Counsel appointed under this section is entitled to compensation at the rate fixed by Article 26.05 for representing a felon or misdemeanant before a court of record.

(f) If the trier of facts determines after the hearing that the patient no longer requires hospitalization (because he no longer suffers from a mental disease or defect or is no longer a danger to himself or others), the court shall order his discharge when the judgment becomes final. If the trier of facts determines that the patient requires further hospitalization, the court shall recommit the patient when the judgment becomes final.

Historical Note

Derivation:

New

Cross References

Release by hospital authority, see art. 46.02, § 4.01, as amended.

Committee Comment

This section creates procedures for review of the legality of continuing the commitment of a patient found not guilty by reason of insanity on the patient's application. It largely parallels Section 1.07 (release of mental incompetent), but limits the frequency of release applications to the periods prescribed in the Mental Health Code, R.C.S. art. 5547—82, and permits a jury trial on the patient's demand.

PART C. PSYCHIATRIC EXAMINATION OF DEFENDANT

Appointment of psychiatrist

Sec. 3.01. (a) If a defendant has entered a plea of "not guilty by reason of insanity," or a defendant, his counsel, or the prosecuting attorney has filed a motion asserting that there is reason to doubt the defendant's mental competency to proceed, or if the court after a hearing has reason to believe that mental disease or defect will otherwise become an issue in the trial, the court may appoint at least one psychiatrist to examine and report on the mental and physical condition of the defendant.

(b) A psychiatrist appointed by the court is entitled to a reasonable fee for conducting the examination, to be fixed by the court and paid from the general fund of the county in which the court is sitting.

(c) When a defendant wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with a reasonable opportunity to examine the defendant.

(d) The defendant shall cooperate fully with the psychiatrist appointed by the court. The defendant has no privilege against self-incrimination during the course of the examination into his mental and physical condition ordered under this section.

Historical Note

Derivation:
New

Cross References

Commitment for psychiatric examination, see art. 46.07, § 3.04, as amended.
Incompetency, see art. 46.07, § 1.01, as amended.
Insanity, see R.P.C. § 8.01.
Insanity plea, see art. 46.07, § 2.01, as amended.
Psychiatric report, see art. 46.02, § 3.02, as amended.
Raising incompetency, see art. 46.02, §§ 1.02, 1.03, as amended.
Self-incrimination privilege, see art. 46.02, § 3.04, as amended.

Committee Comment

This section permits the court to obtain an expert examination of a defendant whose mental condition is or may be questioned. Paragraph (d) ensures a meaningful examination by the state's psychiatrist, and Section 3.02, providing a limited commitment for observation, maximizes the opportunities for a thorough examination. Section 3.04 provides immunity to protect the defendant's self-incrimination privilege during the compulsory examination.

Commitment for psychiatric examination

Sec. 3.02. (a) The court may commit a defendant to a state mental hospital or other facility for an initial period not exceeding 30 days to obtain an examination and report of his mental and physical condition.

(b) The court may extend the initial commitment period for an additional period not exceeding 60 days after:

(1) providing the defendant and his counsel with notice and a hearing; and

(2) determining that there is good cause justifying the extension.

(c) The state is required to prove good cause justifying the extension under Paragraph (b) by a preponderance of the evidence.

Historical Note

Derivation:
New

Cross References

Psychiatric examination, see art. 46.02, § 3.01, as amended.

Committee Comment

This section permits a limited commitment to maximize the opportunity for thorough expert examination under Section 3.01. The maximum commitment period is 90 days, but any extension beyond 30 days is conditioned on proof by the state of good cause after a hearing.

Report of examination

Sec. 3.03. (a) The report of examination ordered under Section 3.01 shall include, but is not limited to:

(1) the name of each physician and any other expert who examined the defendant; and

(2) a description of the nature, content, and extent of the examination and any tests conducted; and

(3) a diagnosis and prognosis of the defendant's physical and mental condition; and

(4) an opinion on whether the defendant suffers from a mental disease or defect, and if so:

(A) a description of the treatment recommended, if any; and

(B) an opinion of the defendant's mental competency to understand the nature of the proceedings against him and to assist and participate in the proceedings against him; and

(C) an opinion on whether the defendant presently is a danger to himself or others and thus requires hospitalization; and

(D) an opinion as to the extent, if any, to which there was at the time of the alleged criminal conduct impairment of the capacity of the defendant either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

(b) The report of examination shall be delivered to the clerk of the court, who shall file it with the papers of the case and furnish

a copy each to the prosecuting attorney and to counsel for the defendant.

Historical Note

Derivation:
New

Cross References

Commitment for psychiatric examination, see art. 46.02, § 3.02, as amended.
Self-incrimination privilege, see art. 46.02, § 3.04, as amended.

Committee Comment

The context of the examination report parallels that specified in Sections 1.07 and 2.05.

Paragraph (b) requires that copies of the report be made available to the court, the prosecutor, and the defense attorney. To the extent this provision is inconsistent with C.C.P. art. 39.14 (discovery), which excludes from discovery "written communications between the State or any of its agents or representatives or employees," Section 3.03 controls. The defendant and his counsel should not be surprised at trial by the contents of a report likely to be accorded great weight, and to the extent unfavorable reports convince defendants to change their pleas, this sharing of data will assist judicial administration.

Evidence obtained during examination

Sec. 3.04. (a) A communication derived from the defendant's mental processes is not admissible against the defendant on the issue of guilt if the communication's truth or falsity is relevant to an element of any offense or to the defendant's credibility.

(b) Paragraph (a) applies to a communication obtained during the course of psychiatric examination, hospitalization, or treatment, whether the examination, hospitalization, or treatment is ordered under this Article, secured by the state, or secured by the defendant.

Historical Note

Derivation:
New

Cross References

Psychiatric examination, see art. 46.02, § 3.01 as amended.

Committee Comment

This section immunizes a defendant's incriminating communications made during the course of psychiatric examination, hospitalization, or treatment. It is necessary because Section 3.01(d) requires a defendant to cooperate during a court-ordered examina-

tion, see Danforth, Deathknell for Pre-trial Mental Examination? Privilege Against Self-Incrimination, 19 Rutgers L.Rev. 489 (1965). It will encourage the necessary candor and rapport between the defendant and the examining psychiatrist, whereas without immunity a defendant would be predictably reluctant to speak out for fear of incriminating himself. The federal government and a few states now have similar immunity statutes, e. g., 18 U.S.C.A. § 4244; Colo.Rev.Stat. § 39-8-2(5)(b); Ill.Stat.Ann. ch. 38, § 104-3(d), and Texas law now provides:

> No statement made by the defendant during examination into his competency shall be admitted into evidence against the accused on the issue of guilt in any criminal proceeding no matter under what circumstances such examination takes place.

C.C.P. art. 46.02, § 2(f)(4).

The phrase "communication derived from the defendant's mental processes" identifies the testimonial quality that the privilege against self-incrimination was designed to protect. It focuses on the essence of the psychiatric examination and will cover, for example, a defendant's tacit admissions, such as silence or a grimace, and nonverbal responses elicited by standard personality tests, e. g., draw a person.

It is only when a communication's truth or falsity is relevant to an element of an offense or to defendant's credibility that is inadmissible. Thus, a defendant's statement to the psychiatrist that he was dropped on his head when an infant, or that he was beaten when caught masturbating as an adolescent, would be admissible; on the other hand, his statement that he shot the victim because he believed the victim was sleeping with his wife would be inadmissible since it tends to prove both the criminal act and defendant's mens rea. Finally, incriminating communications are inadmissible only against the defendant and only on the issue of guilt. At a hearing on defendant's competency to stand trial, for example, all of his communications to the psychiatrist would be admissible, as they would be at a separate hearing on the insanity issue under Section 2.02, because guilt is not in issue at either hearing. Moreover, a defendant may waive his immunity, under general waiver principles, by eliciting incriminating communications from, for example, his own psychiatrist.

Section 3.03(b) makes defendant's immunity coextensive with the scope of his privilege against self-incrimination; his communications to his own psychiatrist will be as fully protected as those made to the state's, for example.

PART D. RELEASE FROM HOSPITALIZATION BY HOSPITAL AUTHORITY

Release by hospital authority

Sec. 4.01. (a) When the head of the institution to which a patient has been committed under this Article determines that the patient no longer requires hospitalization (because he no longer suffers from a mental disease or defect or is no longer a danger to himself or others), the head of the institution shall report this determination to the court that committed the patient in the form and manner provided in Section 1.07(c) or 2.05(c), depending on whether the patient was committed following a determination of incompetency or a finding of not guilty by reason of insanity. The clerk of the court shall file the report with the papers of the case and furnish a copy each to the prosecuting attorney and counsel for the patient.

(b) After delivering his report, the head of the institution shall discharge the patient on the 30th day after the date of the report unless before that day the court or prosecuting attorney objects to discharge.

(c) If either the court or prosecuting attorney timely objects to discharge, the court shall conduct a hearing to determine whether the patient should be discharged. At the hearing the state is required to prove mental disease or defect and dangerousness by a preponderance of the evidence. The right to counsel and hearing requirements set out in Sections 1.07(e) and 2.05(e) apply to a hearing conducted under this paragraph.

(d) If the trier of facts determines after the hearing that the patient no longer requires hospitalization (because he no longer suffers from a mental disease or defect or is no longer a danger to himself or others), the court shall order his discharge when the judgment becomes final. If the trier of facts determines that the patient requires further hospitalization, the court shall recommit the patient when the judgment becomes final.

Historical Note

Derivation:
New

Cross References

Release from hospitalization on patient's application, see art. 46.02, §§ 1.07, 2.05, as amended.

Committee Comment

The Code of Criminal Procedure now authorizes review of a criminal commitment by the committing court if the hospital

authority certifies that the patient has regained his sanity, C.C.P. art. 46.02, §§ 3(b), 7. Section 4.01(a) continues this authority and adds the requirement of a medical report to parallel Sections 1.07 and 2.05.

Paragraphs (b) and (c) significantly change present law by permitting discharge on the hospital authority's recommendation alone unless the committing court or its prosecuting attorney timely objects. This more sensibly allocates the release responsibility between the expert (hospital authority) and representatives (court and prosecutor) of the community from which the patient was committed. If the community representatives believe the expert acted hastily, there must be a trial-type hearing on the discharge issue. This procedure also avoids the delay and expense of a jury trial, now required if demanded in every restoration proceeding, see Swinford v. Logue, 313 S.W.2d 547 (Tex.Civ.App.—Waco 1958, no writ), unless a hearing is held. After the expert determines that his patient is entitled to discharge, it is only fair to require the state to rebut this determination by proving the need for continued hospitalization.

* * * * * * * * * *

TEXAS CONSTITUTION ART. I

Sec. 15–b. Mental Competency Determination in Criminal Action

Notwithstanding other provisions of this Constitution, the Legislature may provide by law for a court of record without a jury in a criminal action:

(1) to determine whether a person is mentally competent to be tried, sentenced, or executed; and

(2) to commit a person to a hospital or other facility for examination, care, or treatment; and

(3) to determine whether a person so committed should be discharged.

CHAPTER 12. PUNISHMENTS

Conforming Amendments

CODE OF CRIMINAL PROCEDURE

SENTENCING PROCEDURE

Art. 21.03. What Should be Stated

Everything should be stated in an indictment which is necessary to be proved. However, prior convictions shall not be stated in an indictment unless necessary to establish jurisdiction.

Historical Note

Derivation:
C.C.P. art. 21.03

Cross References

Burden of proof, see R.P.C. ch. 2.
"Conviction" defined, see R.P.C. § 1.07.
Habitual offender, see R.P.C. § 12.42.
Indictment, see ch. 21.
Notice of exceptional sentence, see art. 42.02, § 6, as amended.

Committee Comment

Under revised Article 42.02, Section 6, a defendant will receive notice of prior convictions the state intends to prove to support extended term imprisonment by written motion filed before the trial begins. Under present law prior convictions the state intends to use for enhancement purposes under Penal Code arts. 61–64 must be alleged in the indictment or information, e. g., Armendariz v. State, 294 S.W.2d 98 (Tex.Crim.App.1956); Kinney v. State, 79 S.W. 570 (Tex.Crim.App.1904).

The present requirement had its genesis in the 1872 Semicolon Court case of Long v. State, 36 Tex. 6 (1872). Long was indicted and convicted on his guilty plea of assault with intent to murder. The indictment did not allege any prior conviction, but the trial court after accepting Long's plea allowed the state to prove a prior conviction for enhancement purposes under what is now art. 62. Two of the three supreme court justices voted to reverse Long's conviction, holding:

> . . . "Again, it is a doctrine pervading the entire law of indictments, that whatever matter affects the degree or kind of punishment, must be specially alleged."
>
> As the punishment affixed by this statute for a second conviction is the highest for such offense in ordinary cases,

> as a matter of course a second conviction affects the degree of punishment, and must be alleged. . . .
>
> A contrary construction would, in effect, do away with criminal pleadings, which the legislature has not the power to do, since no man, under our Constitution, can be tried, convicted, and be deprived of liberty or life, without first having been charged by indictment, setting forth the offense in plain and intelligible words. . . .

Id. at 9-10.

Long v. State is the only Texas case found discussing the problem of notifying a defendant that he faces habitual criminal treatment; it is also the only case found holding that the notice must be alleged in the accusation. Long's paternity in the Semicolon Court, and the fact that it was decided before adoption of the present constitution, weaken its precedential value. Surely the Long court's allusion to what is now the "nature and cause of the accusation" provision of the Texas Constitution, art. I, § 10, was misplaced.

The concurring justice in the Long case recognized, as has the U. S. Supreme Court, see Graham v. West Virginia, 32 S.Ct. 583, 224 U.S. 616 (1912), that a prior conviction is not an offense in the constitutional sense, Long v. State, 36 Tex. 6, 13 (1872). Texas courts through the years have made clear that the rigorous pleading requirements generally applicable to indictments and informations do not apply to prior convictions alleged for enhancement purposes, e. g., Warden v. State, 366 S.W.2d 786 (Tex.Crim.App. 1963); Palmer v. State, 81 S.W.2d 76 (Tex.Crim.App.1935). Moreover, the U. S. Supreme Court held unanimously in the Graham case that prior convictions need not be alleged in the indictment, but could appropriately be the subject of a separate proceeding after the determination of guilt of the principal offense. Finally, the true meaning of the Long case—that a defendant is entitled to notice that he faces habitual criminal treatment—was thrown in sharp relief recently by the Court of Criminal Appeals in Bevins v. State, 422 S.W.2d 180 (Tex.Crim.App.1967). There defendant was convicted of burglary with intent to commit theft and sentenced to the maximum under art. 62 on allegation and proof of a prior conviction for "burglary." He claimed on appeal his prior conviction was unlike the present offense of burglary with intent to commit theft. In affirming the court noted that defendant had admitted on the stand his prior conviction, and thus "cannot now be heard to complain that he was not put on sufficient notice to know with what he was being charged," id. at 182.

The U. S. Supreme Court squarely confronted the notice issue in the 1962 case of Oyler v. Boles, 82 S.Ct. 501, 368 U.S. 448 (1962). Boles was convicted of second-degree murder and sentenced to life imprisonment upon proof under the West Virginia habitual criminal statute of two prior felony convictions. Under

that statute the prosecutor filed an information with the court, *after* the conviction but before sentencing, alleging the prior convictions; Boles appeared with retained counsel at the sentencing proceeding and admitted his prior convictions. On appeal to the Supreme Court Boles argued he was entitled as a matter of due process to notice of the habitual criminal allegations *before* commencement of the trial on the merits. Mr. Justice Clark and four members of the court disagreed:

> . . . If West Virgina chooses to handle the matter at two separate proceedings, due process does not require advance notice that the trial on the substantive offense will be followed by an habitual criminal proceeding. . . .
>
> Nevertheless, a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge even if due process does not require that notice be given prior to the trial on the substantive offense. . . .

Id. at 452.

The separate sentencing proceeding of revised Article 42.02, with its requirement in Section 6 of 10 days' notice before trial by the state of its intent to offer proof of prior convictions, clearly complies with procedural due process, both state and federal, so there is no need to include prior convictions in the accusation except when they are necessary to establish jurisdiction, see Parasco v. State, 309 S.W.2d 465 (Tex.Crim.App.1958).

Art. 42.02. Sentencing Proceedings

Sentencing by court

Sec. 1. (a) Except when the jury recommends probation, and in capital cases in which the state seeks the death penalty, the court shall determine the sentence of every defendant adjudged guilty of a felony or misdemeanor or resentenced following the reversal or setting aside of his judgment of guilt or sentence.

(b) Except for good cause stated in the record, the judge who adjudges a defendant guilty shall conduct the sentencing hearing and determine the defendant's sentence. When for good cause a different judge is to determine sentence, that judge shall ascertain the facts and circumstances of defendant's offense and plea.

(c) A sentencing hearing is required in every criminal action tried before a court of record.

Historical Note

Derivation:
New

Cross References

"Criminal action" defined, see art. 3.02.
Death penalty, see art. 42.02, § 7, as amended.

CONFORMING AMENDMENTS

"Felony" defined, see R.P.C. § 1.07.
Jury probation, see art. 42.12, § 3a, as amended.
"Misdemeanor" defined, see R.P.C. § 1.07.
Notice of death penalty, see art. 1.14.
Punishments, see R.P.C. ch. 12.
Sentencing hearing, see art. 42.02, § 2, as amended.

Committee Comment

Sentencing under the Revised Penal Code is exclusively a judicial function in all but death penalty cases and when a jury recommends probation, whether tried in the justice or district court, but only courts of record are required to conduct a sentencing hearing. Present C.C.P. art. 42.02 requires a "sentence"—i. e., the formal pronouncement of the judgment of guilt, which now includes the jury's punishment—from every court of record; the revised article requires every court to determine sentence, i. e., the defendant's punishment.

In Johnson v. State, 436 S.W.2d 906, 909 (Tex.Crim.App.1968), the Court of Criminal Appeals held: "The constitutional right to trial by jury does not encompass the right to have the jury assess the punishment. . . ." This holding should lay to rest any lingering doubts about the need for an amendment to the state constitution in order to abolish jury sentencing.

A sentence is necessary under Tex.Const. art. IV, § 11a, to empower a court to grant probation; again, however, only courts of record can grant probation, C.C.P. arts. 42.12 § 2(a), 42.13, § 2(1). A pronounced sentence is also a prerequisite to appeal to the Court of Criminal Appeals, art. 42.04, so Section 3(e) of this revised art. 42.02 requires pronouncement.

The other requirements of present art. 42.02—that sentence be pronounced in defendant's presence with one exception, that it be entered of record, and that it order the punishment into execution—are covered by revised art. 42.02, § 3(e), and present arts. 40.09, § 1, 42.14, 42.15, and 45.49.

Paragraph (b) of this section follows the ABA Sentencing Standards § 5.1 to ensure that the judge who knows most about the defendant will sentence him. The "good cause" exception covers the obvious cases of the trial judge's death or incapacity before sentencing as well as the practice in many courts of one judge accepting guilty pleas and another subsequently determining sentence.

Sentencing Hearing

Sec. 2. (a) If a new trial is not granted nor judgment arrested, the court shall set the sentencing hearing for a date subsequent to expiration of the time allowed for filing the motion for a new trial or to arrest judgment.

(b) At the sentencing hearing the prosecuting attorney, defendant, and counsel for the defendant are entitled to be present, offer evidence, subpoena, confront, and cross-examine witnesses, and argue. Except for the presentence and diagnostic reports, only legally competent evidence is admissible at the sentencing hearing. The court shall afford the prosecuting attorney and defendant a reasonable opportunity to controvert information contained in the presentence and diagnostic reports.

(c) A court reporter shall record the sentencing hearing.

Historical Note

Derivation:
(a): C.C.P. art. 42.03, sen. 1
(b): C.C.P. art. 37.07, §§ 2, 3
(c): New

Cross References

Arrest of judgment, see ch. 41.
Death penalty, see art. 42.02, § 7, as amended.
Diagnostic report, see art. 42.02, § 5, as amended.
Exceptional sentences, see art. 42.02, § 6, as amended.
New trial, see ch. 40.
Presentence report, see art. 42.02, § 4, as amended.
Record on appeal, see art. 40.09, as amended.

Committee Comment

Present law contemplates a sentencing hearing, C.C.P. art. 37.07, §§ 2, 3, although its elements are not detailed, and this section continues and elaborates present law as well as lays down a due process blueprint for the sentencing structure of the Revised Penal Code.

Paragraph (a) tracks present art. 42.03. Since revised art. 42.03 deals only with credit against the sentence, references in present art. 42.03 to sentencing procedure are relocated in this section.

Paragraph (b) outlines the elements of the sentencing hearing. It is a trial-type hearing, distinct from the trial on the merits, and contains the minimal safeguards necessary for a proceeding at least as important as the adjudication of guilt. The Court of Criminal Appeals has begun to sketch in the content of the punishment hearing identified in present law, describing it, for example, as separate from the trial on the merits, Brumfield v. State, 445 S.W.2d 732 (Tex.Crim.App.1969), and Paragraph (b) picks up where the court left off, specifying the full content of the sentencing hearing.

The second sentence of Paragraph (b) identifies the evidence admissible at the sentencing hearing. C.C.P. art. 37.07, § 3(a), presently admits evidence of the defendant's "prior criminal record . . . general reputation and his character," but the court has broadened this statement to include all "[e]vidence legally admis-

sible to mitigate punishment or evidence that is relevant to the application for probation, if any, . . .", Allaben v. State, 418 S.W.2d 517, 519 (Tex.Crim.App.1967), as well as evidence admitted during the trial on the merits, which is considered before the sentencing authority without reintroduction at the sentencing hearing, Branch v. State, 445 S.W.2d 756 (Tex.Crim.App.1969).

Paragraph (b) continues the present law's competency requirement, with two important exceptions. The presentence and diagnostic reports, whose contents are specified in Sections 4 and 5, are the core of the court's information source about the defendant before him for sentencing, see generally ABA Sentencing Standards, Comment at 200–228. And although both reports are hearsay, their admission in the sentencing hearing is justified both because of their great value to the sentencing hearing and because both the state and defendant may inspect them before the hearing and controvert any information they contain, cf. Specht v. Patterson, 87 S.Ct. 1209, 386 U.S. 605 (1967); Williams v. New York, 69 S.Ct. 1079, 337 U.S. 241 (1949).

Paragraph (c) ensures a record of the sentencing hearing for purposes of appellate review, see arts. 4.03 and 40.09, as amended.

Duties of court at sentencing hearing

Sec. 3. (a) The court shall state for the record:

(1) findings of fact and conclusions of law on every controverted issue developed during the sentencing hearing; and

(2) its reasons for imposing the sentence selected.

(b) If the defendant pled guilty or nolo contendere, the court shall ascertain the nature of any plea discussions and agreements and the extent to which they involved recommendation as to an appropriate sentence.

(c) The court in sentencing the defendant shall state the reasons for the sentence selected in the defendant's presence if the defendant is required to be present.

(d) After sentencing the defendant the court shall notify him of his right to appeal the sentence.

(e) Except in those cases described in Article 42.04, the court shall pronounce sentence after affording the defendant an opportunity under Article 42.07 to say why sentence should not be pronounced.

Historical Note

Derivation:

(a): New
(b): ABA Sentencing Standards § 5.5 (b)(v)
(c): C.C.P. art. 42.14
(d): ABA Appellate Review Standards § 2.2(b)(1)
(e): C.C.P. art. 42.02

Cross References

Allocution, see art. 42.07.
Appeal, see arts. 4.03, as amended, 40.09, ch. 44.
Principles of sentencing, see R.P.C. § 12.06.
Record on appeal, see art. 40.09, as amended.
Sentence not pronounced when death assessed or probation granted, see art. 42.04.

Committee Comment

The law in Texas, as well as in most jurisdictions, does not require the judge to articulate his reasons for imposing a particular sentence. The general rule is that so long as the judge follows the minimal procedural requirements for sentencing and imposes a sentence within the legislatively established limits, he is not accountable to anyone for his decision.

Everyone agrees that the selection of a proper sentence is an intellectually and emotionally demanding decision and that it may be the most important decision made in the criminal process. Unless the decision-making process is made more visible, and unless the decision-maker is somehow accountable, it is difficult to envision how the process will improve.

By requiring a record of the reasons for a sentence, Paragraph (a) ensures a meaningful review by the Court of Criminal Appeals. Moreover, the duty to formulate reasons justifying a particular sentence will assist the trial court in selecting a rational punishment.

Paragraph (b) recognizes the reality of plea bargaining and will provide the court with much information relevant to the sentencing decision.

Paragraph (c) ensures the defendant will know why he received the punishment he did, and Paragraph (d) requires informing him of his appellate rights regarding the sentence.

Paragraph (e) preserves present law.

Presentence report

Sec. 4. (a) A court shall order a presentence investigation made of every defendant adjudged guilty of a felony, unless the court determines not to sentence the defendant to the custody of the Department of Corrections. The court may order a presentence investigation made of a defendant adjudged guilty of a misdemeanor, or in other appropriate circumstances, if the court believes the investigation will aid in determining sentence.

(b) Unless a defendant consents in writing, the presentence investigation may not begin until the defendant is adjudged guilty.

(c) A probation officer shall conduct each presentence investigation and report the results in writing to the court.

(d) The presentence report shall include, but is not limited to:

(1) a description of the circumstances of each offense of which defendant was adjudged guilty; and

(2) the defendant's criminal record; and

(3) the defendant's family and social history; and

(4) the diagnostic report described in Section 5, if feasible to secure the report; and

(5) a reasoned opinion of the defendant's rehabilitative potential; and

(6) any other information requested by the court.

(e) The prosecuting attorney and counsel for the defendant are entitled to examine the presentence report before the sentencing hearing begins. However, the court may prohibit examination of any portion of the report if there is compelling reason to do so. When the court so prohibits, it shall state for the record its reason for doing so.

(f) The presentence report is not a public record, but the court may permit those with a legitimate need to examine the report or portions of it. If the defendant is sentenced to imprisonment, the clerk of the sentencing court shall forward the presentence report to the penal institution after the sentence becomes final and unappealable.

Historical Note

Derivation:

(a): ABA Sentencing Standards § 4.1(b)
(b): ABA Sentencing Standards § 4.2(a)
(c), (d): C.C.P. art. 42.12, § 4
(e), (f): ABA Sentencing Standards § 4.4

Cross References

Death penalty procedure, see art. 42.02, § 7, as amended.
Diagnostic report, see art. 42.02, § 5, as amended.
"Felony" defined, see R.P.C. § 1.07.
"Penal institution" defined, see R.P.C. § 1.07.
Probation officer, see art. 42.12, § 10.
Record on appeal, see art. 40.09, as amended.
Sentencing hearing, see art. 42.02, § 2, as amended.

Committee Comment

All the writers, all the studies and recommendations in this area—from the Model Sentencing Act to the President's Crime Commission to the Model Penal Code and ABA Sentencing Standards—view the presentence report as the sine qua non of rational sentencing. No extensive comment or recitation of authorities is included here, therefore, and the reader is referred to part IV of the ABA Sentencing Standards for a succinct but comprehensive statement on the value and need for the presentence investigation.

Paragraph (b) ensures that the presentence report will not prejudice defendant's trial on the merits; when a case is disposed of on guilty plea, however, there is no reason to postpone the investigation, and the defendant will normally consent to its early preparation.

Paragraphs (c) and (d) restate and elaborate Section 4 of the present Adult Probation and Parole Law, art. 42.12.

The arguments for and against disclosing to defense counsel the presentence report are well-rehearsed in the ABA Sentencing Standards, Comment at 214–24. Paragraph (e) adopts the compromise solution of the Standards, requiring disclosure as a general rule, protecting confidential sources, for example, as an exception. Paragraph (f) also makes clear the confidential nature of the report.

Diagnostic report

Sec. 5. (a) A court many order a diagnostic examination under this section if the court believes the examination will aid in determining sentence.

(b) A doctor appointed by the court to conduct a diagnostic examination is entitled to a reasonable fee for conducting the examination, to be fixed by the court and paid from the general fund of the county in which the court is sitting.

(c) The court may commit the defendant to a state mental hospital or other facility under Article 46.02, Section 3.02, to obtain the diagnostic examination.

(d) The diagnostic report shall include, but is not limited to:

(1) the name of each physician and any other expert who examined the defendant; and

(2) a description of the nature, content, and extent of the examination and any tests conducted; and

(3) a diagnosis and prognosis of the defendant's physical and mental condition; and

(4) a description of recommended treatment, if any, and an opinion on the availability of the treatment; and

(5) a reasoned opinion of whether the defendant is reasonably likely to inflict or attempt to inflict death or serious bodily injury on another in the foreseeable future; and

(6) any other information requested by the court.

(e) The prosecuting attorney and counsel for the defendant are entitled to examine the diagnostic report before the sentencing hearing begins. However, the court may prohibit examination of any portion of the report if there is compelling reason to do so. When

the court so prohibits, it shall state for the record its reason for doing so.

(f) The diagnostic report is not a public record, but the court may permit those with a legitimate need to examine the report or portions of it. If the defendant is sentenced to imprisonment, the clerk of the sentencing court shall forward the diagnostic report to the penal institution after the sentence becomes final and unappealable.

Historical Note

Derivation:
ABA Sentencing Standards § 4.6

Cross References

Commitment for psychiatric examination, see art. 46.02, § 3.02, as amended.
Death penalty procedure, see art. 42.02, § 7, as amended.
"Penal institution" defined, see R.P.C. § 1.07.
Presentence report, see art. 42.02, § 4, as amended.
Record on appeal, see art. 40.09, as amended.

Committee Comment

This section furnishes another informational tool for the sentencing court. Conducting a diagnostic examination is discretionary in all but capital cases in which the state sought the death penalty, see Section 7(e) of this article, but where time and resources permit its preparation, a diagnostic report can prove very informative, especially for certain types of offenders.

Paragraphs (e) and (f) resolve the disclosure problem for the diagnostic report in the same manner it is resolved for the presentence report.

Additional requirements for exceptional sentence

Sec. 6. (a) In addition to the requirements of Sections 1–5, the requirements of this section apply if a prosecuting attorney or defendant seeks imposition of an exceptional sentence (other than the death penalty) authorized by Penal Code Chapter 12, Subchapter D.

(b) If the prosecuting attorney or defendant intends to seek imposition of an exceptional sentence, he shall file with the court a written motion of his intent and serve a copy of the motion on the opposing party. The motion must be filed and the copy served at least 10 days before the trial begins, or if the court sets a pretrial hearing, the motion must be filed and served at the hearing.

(c) The motion may be amended in writing before the sentencing hearing begins. The amending party shall file the amendment with the court and serve a copy of the amendment on the opposing party.

The amendment must be filed and the copy served in time to provide both the court and the opposing party with fair notice of the nature of the amendment.

(d) The motion shall contain detailed legal and factual allegations and copies of any documents necessary to support the imposition of an exceptional sentence.

(e) The party seeking imposition of an exceptional sentence has the burden of producing evidence and proving to the court by a preponderance of the evidence that imposition of the exceptional sentence is appropriate under the standards set out in the Penal Code.

(f) The existence and content of the motion and any amendment may not be disclosed to the jury.

Historical Note

Derivation:

(a)-(d): New

(e): ABA Sentencing Standards § 5.5 (b)(iv)

(f): New

Cross References

Alleging prior conviction, see art. 21.03, as amended.
Death penalty notice, see art. 1.14.
Exceptional sentences:
Admission of unadjudicated offenses, see R.P.C. § 12.48.
Consecutive terms of imprisonment, see R.P.C. § 12.45.
Gain fine, see R.P.C. § 12.41.
Habitual offender, see R.P.C. § 12.42.
Habitual petty thief, see R.P.C. § 12.44.
Organized criminal offender, see R.P.C. § 12.43.
Reduction of third degree felony to misdemeanor, see R.P.C. § 12.47.
Pretrial hearing, see art. 28.01.

Committee Comment

Under present law the state notifies the defendant it will seek habitual criminal treatment by alleging prior convictions in the accusation; see the comment to art. 21.03, as amended. It must also notify defendant of those portions of his "prior criminal record" it intends to offer at the punishment hearing under art. 37.07, § 3(a), e. g., Redd v. State, 452 S.W.2d 919 (Tex.Crim.App.1970). Paragraphs (b)-(d) of this section prescribe similar notice requirements for all exceptional sentences authorized by the Revised Penal Code.

The state must prove prior convictions beyond a reasonable doubt for enhancement purposes under present law, e. g., Green v. State, 387 S.W.2d 410 (Tex.Crim.App.1965); Arbuckel v. State, 105 S.W.2d 219 (Tex.Crim.App.1937), and presumably the same proof requirement applies to a defendant's "prior criminal record," although the Court of Criminal Appeals has not yet decided the

point. The reasonable doubt requirement apparently developed by accident—no case discussing it was found—and Paragraph (e) rejects it in favor of the preponderance of evidence standard imposed on the party seeking the benefit of an exceptional sentence.

Special procedural requirements for death penalty cases are set out in Section 7.

Procedure for determining death penalty

Sec. 7. (a) If a defendant is adjudged guilty of a capital felony for which the state sought the death penalty, the court shall conduct the sentencing hearing in the presence of the jury that found the defendant guilty. However, only legally competent evidence is admissible at the sentencing hearing before the jury on the death penalty issue.

(b) The prosecuting attorney has the burden of producing evidence and persuading the jury beyond a reasonable doubt that imposition of the death penalty is appropriate.

(c) The court shall charge the jury:

(1) on the prosecution's burden of proof set out in Paragraph (b); and

(2) that it may recommend that the defendant live or die; and

(3) that if it recommends that the defendant live, the court shall sentence him:

(A) to life imprisonment; or

(B) to a term of imprisonment the minimum of which the court shall fix at not less than 1 year nor more 12 years and the maximum at not more than life imprisonment; or

(C) to a term of imprisonment the minimum of which the court shall fix at not less than 1 year nor more than 10 years and the maximum at not more than 30 years; and

(4) on any other matter appropriate under the circumstances of the particular case.

(d) If the jury unanimously recommends death, the court may sentence the defendant to death or life imprisonment. If the jury unanimously recommends that the defendant live, the court shall sentence him as if he were adjudged guilty of a felony of the first degree.

(e) After the jury has made its recommendation, the court shall order preparation of the presentence and diagnostic reports described in Sections 4 and 5, and shall consider both reports before sentencing the defendant.

(f) The prosecuting attorney and counsel for the defendant are entitled to examine the presentence and diagnostic reports before the court sentences the defendant. However, the court may prohibit examination of any portion of the report if there is compelling reason to do so. When the court so prohibits, it shall state for the record its reason for doing so. The court shall afford the prosecuting attorney and defendant a reasonable opportunity to controvert information contained in the presentence and diagnostic reports.

(g) If the jury cannot unanimously agree on a recommendation, the court shall discharge the jury and declare a mistrial of the entire criminal action.

Historical Note

Derivation:

N.Y.Rev.Pen.Law § 125.35

Cross References

Death sentence, see R.P.C. § 12.46.
Diagnostic report, see art. 42.02, § 5, as amended.
Felony of first degree, see R.P.C. §§ 12.22, 12.31.
Presentence report, see art. 42.02, § 4, as amended.
Sentencing hearing, see art. 42.02, § 2, as amended.

Committee Comment

Paragraphs (a) and (b) clarify current practice in capital cases in which a sentencing hearing is conducted before the jury on the death penalty issue, C.C.P. art. 37.07, §§ 2, 3. Present law is unclear, however, on what evidence is admissible, compare Pittman v. State, 434 S.W.2d 352 (Tex.Crim.App.1968) with Dempsey v. State, 266 S.W.2d 875 (Tex.Crim.App.1954), so the second sentence of Paragraph (a) specifies that only legally competent evidence is admissible before the jury, i. e., the presentence and diagnostic reports are *not* admissible.

The jury is given only an advisory role in the death penalty decision by Paragraphs (c)—(e), and this differs significantly from present law. This new division of responsibility, between the conscience of the community and a trained jurist who has access to information about the defendant and his offense traditionally denied the jury under the exclusionary rules of evidence, hopefully will produce more rational imposition of the ultimate sanction.

Paragraph (g) preserves existing law, C.C.P. art. 36.29.

Art. 42.03. Credit on Sentence

(a) A defendant sentenced for a felony or misdemeanor to any term of imprisonment is entitled to credit against both the maximum term and any minimum term imposed for all time spent in custody following arrest and during trial.

(b) A defendant who appeals his judgment of guilt or sentence or both is entitled to credit against both the maximum term and any minimum term imposed for all time spent in custody pending disposition of his appeal. The clerk of the sentencing court shall endorse on both the mandate and commitment all credit against the sentence to which a defendant is entitled under this paragraph.

(c) A defendant resentenced following the reversal or setting aside of his judgment of guilt or sentence for a felony or misdemeanor, whether he is resentenced following a judgment of guilt for the same offense or a different offense arising out of the same criminal episode, is entitled:

(1) to credit, including all time earned for good behavior, against the new sentence of imprisonment for all time spent in custody under the prior sentence of imprisonment; and

(2) to credit against the new sentence of a fine for any amount paid or earned by imprisonment on the prior sentence of a fine.

(d) The Department of Corrections and each sheriff in charge of a county jail shall grant all credit to which a defendant is entitled under this Article in computing the defendant's eligibility for parole and discharge.

Historical Note

Derivation:

ABA Sentencing Standards § 3.6

Cross References

Commencement of sentence, see art. 42.09, as amended.
Credit against fine for imprisonment, see art. 43.09.
"Criminal episode" defined, see art. 3.04, as amended.
"Felony" defined, see R.P.C. § 1.07.
Good time credit, see R.C.S. arts. 5118a, 6184*l*.
"Misdemeanor" defined, see R.P.C. § 1.07.
Transfer to Department of Corrections pending disposition of appeal, see art. 42.09, as amended.

Committee Comment

Present art. 42.03 gives the trial court discretion to grant or deny credit, and to determine the amount of credit, for time spent in custody following arrest, during trial, or pending disposition of an appeal, e. g., Hiltz v. State, 443 S.W.2d 851 (Tex.Crim.App. 1969).

Why an individual who is presumed to be innocent and unable to make bail—or in the statistically infrequent case of a capital felony, found ineligible for bail—should receive no credit for time served in jail has never been made clear. It is no answer that criminal dockets are overcrowded and thus delays are unavoidable.

The point is not so much why the accused is in jail during the course of the proceedings but why it is just ever to deny him credit for such time. Indeed, given the primitive conditions of nearly all county jails it seems ironic that this should even be an issue today.

As the comment to Section 3.6 of the ABA Sentencing Standards points out, in many cases the mandatory credit provision will not impose a limitation, but will only ensure that the court has considered a relevant factor. The only time Paragraph (a) will limit the authority of the court is when the sum of the sentence which the court would like to give and the time already served would exceed the statutory limit for the offense. In that event, the ABA Advisory Committee takes the position that the statutory limit should prevail.

The case for mandatory credit prior to conviction seems unimpeachable while the case for credit during the pendency of an appeal, Paragraph (b), is perhaps not so obvious. The ABA Sentencing Standards commentary suggests that although the reason for denying credit pending appeal is not immediately clear, it probably has the effect of discouraging appeals, and this reason was cited recently by the Fifth Circuit in requiring credit for time spent in the Department of Corrections pending disposition of a Texas convict's unsuccessful appeal, Robinson v. Beto, 426 F.2d 797 (5th Cir. 1970); see also Ex parte Griffith, 457 S.W.2d 60 (Tex.Crim.App.1970).

Paragraph (c) codifies the Supreme Court's decision in Simpson v. Rice, 89 S.Ct. 2072, 395 U.S. 711 (1969). Note that Paragraphs (a)-(c) require credit for all time in custody of whatever nature—e. g., jail, whether consecutive or broken, in transit to the penitentiary—although the Court of Criminal Appeals was unwilling to interpret Simpson v. Rice so generously in Bennett v. State, 450 S.W.2d 652 (Tex.Crim.App.1969).

The portions of present art. 42.03 dealing with endorsing credit on the mandate and commitment are covered in the second sentence of Paragraph (b). The last sentence of present art. 42.03, authorizing a work-release program, is relocated in the revised probation article, 42.12, § 4.

Art. 42.08. Increasing Severity of Sentence Prohibited

After a judgment of guilt or sentence is reversed or set aside, the sentencing court may not increase the severity of the original sentence, whether the defendant is reconvicted or resentenced for the same offense or for a different offense arising out of the same criminal episode.

Historical Note

Derivation:

ABA Sentencing Standards § 3.8

Cross References

Concurrent or consecutive terms of imprisonment, see R.P.C. § 12.45.
"Criminal episode" defined, see art. 3.04, as amended.
Increased sentence on appeal, see art. 44.25, as amended.

Committee Comment

North Carolina v. Pearce, 89 S.Ct. 2072, 2089, 395 U.S. 711 (1969), prohibits a more severe sentence following reconviction absent evidence in the record of defendant's misconduct subsequent to imposition of the original sentence. Although the Court of Criminal Appeals has rejected Pearce's application to jury sentencing, e. g., Casias v. State, 452 S.W.2d 483 (Tex.Crim.App.1970), this committee follows the recommendation of the ABA Sentencing Standards, believing as it does that present Texas law discourages exercise of the right to appeal by subjecting only the defendant who appeals to the risk of a more severe sentence, and that the Court of Criminal Appeals, which is given authority by revised art. 44.25 to increase as well as decrease an inappropriate sentence, can correct errors of leniency by trial courts.

Present art. 42.08 deals with concurrent and consecutive sentences, a subject now dealt with in Section 12.45 of the Revised Penal Code.

Art. 42.09. Commencement of Sentence and Delivery to Jail or Department of Corrections

(a) Except as provided in Paragraphs (b) and (c), a defendant shall be delivered to jail or the Department of Corrections when his sentence to imprisonment is pronounced, or his sentence to death announced, by the court. The defendant's sentence begins to run when he is delivered to jail or the Department of Corrections.

(b) If a defendant appeals his judgment of guilt or sentence or both and is released on bail pending disposition of his appeal, when his judgment of guilt or sentence or both are affirmed, the clerk of the trial court, on receipt of the mandate from the Court of Criminal Appeals, shall issue a commitment against the defendant. The officer executing the commitment shall endorse thereon the date he takes the defendant into custody and the defendant's sentence begins to run from the date endorsed on the commitment.

(c) If a defendant sentenced to death or the Department of Corrections appeals his judgment of guilt or sentence or both, the trial court or the Court of Criminal Appeals may order the defendant retained in a local jail, rather than delivered to the Department of Corrections, if the defendant requests retention by written motion and the court finds that special circumstances justify the retention pend-

ing disposition of the appeal. If the judgment and sentence are affirmed, the defendant shall be delivered to the Department of Corrections on receipt of the mandate from the Court of Criminal Appeals, and the defendant's sentence begins to run when he is delivered to the department.

Historical Note

Derivation:
(a): New
(b): C.C.P. art. 42.09
(c): New

Cross References

Appeal, see arts. 4.03 and 44.25, as amended.
Bail pending appeal, see art. 44.04, as amended.
Credit against sentence, see art. 42.03, as amended.
Death sentence, see art. 42.02, § 7, as amended.
Pronouncement of sentence, see arts. 42.02, § 2, as amended, 42.04.
Revocation of bail pending appeal, see art. 44.04a, as amended.

Committee Comment

Paragraph (a) will alleviate the serious overcrowding in many of our county jails. Under present C.C.P. art. 42.09 a defendant sentenced to death or the Department of Corrections remains in jail pending disposition of his appeal; his sentence is not "running" during this period, and he is thus ineligible for good time credit, and few jails have any type of rehabilitation program.

Most appeals are decided exclusively on the record so there is no need for the appellant to appear before the Court of Criminal Appeals. Paragraph (c) provides for the few instances in which retaining the defendant in the local jail may be appropriate—for example, when reversal or a reduction in sentence is highly likely.

Paragraph (b) preserves a portion of present art. 42.09.

Art. 42.12. Adult Probation and Parole Law

* * * * * * * * * *

Sec. 3. (a) Following conviction or plea of guilty or nolo contendere for an offense, a court may suspend the imposition of all or part of the sentence and grant probation if the court finds, after considering the factors enumerated in Paragraph (b) of this section and in Penal Code Section 12.06, that probation would best serve the interest of society and the defendant.

(b) In determining whether to grant probation, the court shall consider the following factors among others:

(1) whether the defendant's criminal conduct caused or threatened serious harm to another's person or property;

(2) whether the defendant planned or expected that his criminal conduct would cause or threaten serious harm to another's person or property;

(3) whether the defendant acted under strong provocation;

(4) whether there were substantial grounds tending to excuse the defendant's conduct, though insufficient to establish a legal defense;

(5) whether the victim induced or facilitated the defendant's criminal conduct;

(6) whether the defendant has made or will make restitution or reparation to the victim for the damage or injury sustained;

(7) whether the defendant has a history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before commission of the present offense;

(8) whether the defendant's criminal conduct was the result of circumstances unlikely to recur;

(9) whether the character, history, and attitude of the defendant indicate that he is unlikely to commit another offense;

(10) whether the defendant is particularly likely to respond affirmatively to probationary treatment;

(11) whether imprisonment of the defendant would entail disproportionate hardship to himself or his dependents.

Sec. 3a. (a) A defendant may request the jury to recommend probation if he has never before been adjudged guilty of a felony, or granted probation following a judgment of guilt of a felony, in this or any other jurisdiction.

(b) A defendant requests jury probation by filing a written motion with the court and serving a copy on the prosecuting attorney. The defendant must state in the motion that he is eligible for jury probation under Paragraph (a), and he must swear to the truth of his statement. The motion must be filed, and the copy served, before the trial on the merits begins, or if the court sets a pretrial hearing, the motion must be filed and served at the hearing.

(c) If the defendant is found guilty by the jury, the court shall conduct the sentencing hearing under Article 42.02, Section 2, before the jury that found defendant guilty. However, only legally competent evidence is admissible at the sentencing hearing before the jury on the probation issue.

(d) At the conclusion of the sentencing hearing the jury shall retire and determine whether to recommend probation. If the jury recommends probation, the court shall grant defendant probation for a period and on conditions the court determines under Sections 3b and 4. If the jury recommends against probation, the court may nevertheless grant probation, or it may sentence the defendant to any punishment authorized by law.

Sec. 3b. (a) A period of probation may not exceed:

(1) fifteen years from the date it was granted if the probationer was convicted of a capital felony or felony of the first degree;

(2) twelve years from the date it was granted if the probationer was convicted of a felony of the second degree;

(3) six years from the date it was granted if the probationer was convicted of a felony of the third degree;

(4) two years from the date it was granted if the probationer was convicted of a Class A misdemeanor;

(5) one year from the date it was granted if the probationer was convicted of a Class B misdemeanor.

(b) The court may terminate probation, and discharge the defendant under Section 7 before the period of probation expires, if warranted by the probationer's conduct and progress toward rehabilitation.

Sec. 4. (a) The court granting probation shall determine the period and conditions of probation and supervise the probationer. The court shall design the period and conditions to prevent recidivism and promote rehabilitation of the probationer.

(b) The conditions of probation must be reasonable and shall include, but are not limited to, the requirements that the probationer:

(1) commit no offense against the law of this or any other state or of the United States; and

(2) report to the probation officer as directed; and

(3) permit the probation officer to visit him at his home or elsewhere at reasonable hours; and

(4) work faithfully at suitable employment insofar as possible; and

(5) support his dependents; and

(6) remain within a specified geographical area; and

(7) pay in one or several sums any fine, all court costs, and all reparation determined by the court; and

(8) make any restitution determined by the court;

(c) The court may also require, as a condition of probation, the defendant to serve during nonworking hours any imprisonment assessed.

(d) The clerk of the court granting probation shall promptly furnish the probationer with a written statement of the period and conditions of his probation. If the period or conditions are later modified under Paragraph (e), the clerk of the modifying court shall

promptly furnish the probationer with a written statement of the modifications. The probationer shall acknowledge in writing receipt of each statement furnished under this paragraph.

(e) After giving the probationer notice and an opportunity to be heard, the court with jurisdiction over the probationer may modify the period or conditions of probation if warranted by the probationer's conduct.

* * * * * * * * * *

Sec. 7. (a) When a probationer satisfies the period and conditions of his probation, the court, by order duly entered, shall amend or modify the original sentence imposed, if necessary to conform to the probation period, and shall discharge the defendant.

(b) After discharging the defendant hereunder, the court may set aside the verdict, or permit the defendant to withdraw his plea, and dismiss the complaint and information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty or nolo contendere, except that proof of his said conviction or plea of guilty or nolo contendere shall be made known to the court should the defendant again be convicted of any criminal offense.

Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. Thereupon, the court shall cause the defendant to be brought before it and after a hearing without a jury, may either continue or revoke the probation and, if probation is revoked, shall proceed to dispose of the case as if there had been no probation.

(b) If a probationer is not represented by counsel at the revocation hearing, the court shall appoint counsel, if authorized by Article 26.04, and allow appointed counsel adequate time for consultation with the probationer and preparation of a defense. Counsel appointed under this section is entitled to compensation at the rate fixed by Article 26.05 for representing a felon or misdemeanant before a court of record.

(c) Any probationer who removes himself from the State of Texas without permission of the court having jurisdiction of the case, shall

be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law.

(d) No part of the time that the defendant is on probation shall be considered as any part of the time that he shall be sentenced to serve.

(e) The right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation. When he is notified that his probation is revoked for violation of the conditions of probation and he is called on to serve a sentence in a jail or in an institution operated by the Department of Corrections, he may appeal the revocation.

* * * * * * * * * *

Sec. 15. (a) The Board is authorized to release on parole, with the approval of the Governor, any person confined in a penal or correctional institution of this state who has served his minimum term of imprisonment or twenty years, whichever is the lesser. Time served on both the minimum and maximum terms of imprisonment shall be the total calendar time served and all credits allowed under the laws governing the operation of the Department of Corrections and executive clemency. All paroles shall issue upon order of the Board, duly adopted and approved by the Governor.

(b) The Board, in cooperation with the Department of Corrections, shall formulate, publish, and distribute to all prisoners and the interested public criteria reflecting the principles set out in this section and in Penal Code Section 12.06, together with an explanation of the factors considered by the Board in making the parole decision.

(c) The Board shall consider each prisoner entitled to parole at the time of his first eligibility determined under Paragraph (a). However, the Board may recommend against parole at that time when reasons to do so appear in the prisoner's record. The Board shall state its reasons in writing for recommending for or against parole and furnish the prisoner with a copy of its reasons.

(d) Within one year after a prisoner's admittance to the penal or correctional institution and at such intervals thereafter, as it may determine, the Board shall secure and consider all pertinent information regarding each prisoner, except any under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made.

(e) Before ordering the parole of any prisoner, the Board may have the prisoner appear before it and interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered to be a reduction of sentence or

pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the Board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be amenable to the orders of the Board.

(f) The Board may adopt such other reasonable rules not inconsistent with law as it may deem proper or necessary with respect to the conduct of parole hearings or conditions to be imposed upon parolees. Whenever an order for parole is issued it shall recite the conditions thereof in clear and intelligible language.

(g) It shall be the duty of the Board at least ten days before ordering the parole of any prisoner or upon the granting of executive clemency by the Governor to notify the sheriff, the district attorney and the district judge in the county where such person was convicted that such parole or clemency is being considered by the Board or by the Governor.

(h) If no parole officer has been assigned to the locality where a person is to be released on parole or executive clemency the Board shall notify the chairman of the Voluntary Parole Board of such county prior to the release of such person. The Board shall request such Voluntary Parole Board, in the absence of a parole officer, for information which would herein be required of such duly appointed parole officer. This shall not, however, preclude the Board from requesting information from any public agency in such locality.

Historical Note

Derivation:

§ 3(a): C.C.P. art. 42.12, § 3
(b): Model P.C. § 7.01(2)
§ 3a: C.C.P. art. 42.12, §§ 3a-3c
§ 3b: New
§ 4: C.C.P. arts. 42.12, § 6, 42.13, § 5
§ 7: C.C.P. art. 42.12, § 7
§ 8(a): C.C.P. art. 42.12, § 8
(b): New
(c)-(e): C.C.P. art. 42.12, § 8
§ 15(a): C.C.P. art. 42.12, § 15(a)
(b): New
(c): New
(d)-(h): C.C.P. art. 42.12, § 15(b)-(f)

Cross References

Appeal from denial of probation, see art. 4.03, as amended.
"Felony" defined, see R.P.C. §§ 1.07, 12.02, 12.03.
Fines, see R.P.C. ch. 12, subch. B.
"Misdemeanor" defined, see R.P.C. §§ 1.07, 12.02, 12.04.
Occupational drivers license, see R.C.S. art. 6687b, § 23A.
Presentence report, see art. 42.02, § 4, as amended.
Probation as preferred sentence, see R.P.C. § 12.06.
Punishments, see R.P.C. ch. 12.
Sentencing combinations, see R.P.C. § 12.05.
Sentencing principles, see R.P.C. § 12.06.

Committee Comment

Probation is one of many, albeit the preferred, sentencing alternatives under the Revised Penal Code. For this reason, and because the revised code abolishes jury sentencing, the application for probation requirement of present law is omitted, except for purposes of Section 3a (jury probation), and the trial court is directed by R.P.C. § 12.06 (general principles of sentencing) to consider the appropriateness of probation in every case.

Both misdemeanor and felony probation will be handled under this art. 42.12; art. 42.13, the Misdemeanor Probation Law, largely duplicates art. 42.12 and is omitted.

Before 1965 the Court of Criminal Appeals consistently held that the former Adult Probation Law, C.C.P. art. 781d (1925), did not apply to misdemeanors, e. g., Ex parte Hayden, 215 S.W.2d 620 (Tex.Crim.App.1948). However, the bar committee revising the Code of Criminal Procedure took pains to ensure that art. 42.12 would apply to misdemeanors, see the Interpretive Commentary to art. 42.12, at 282. Moreover, there are lingering doubts about the constitutionality of the Misdemeanor Probation Law, see the Special Commentary to art. 42.13, at 304–05, although the attorney general ruled it constitutional in 1965, Tex.Att'y Gen.Op. No. C–492 (1965). In any event there is no need for two probation laws.

Standards for Granting or Denying Probation (§ 3)

Section 3(b), when coupled with R.P.C. § 12.06, furnishes the trial court with meaningful standards for deciding the appropriateness of probation. These standards will also assist the Court of Criminal Appeals in reviewing the trial court's decision denying probation, a decision not now reviewable, e. g., Kerry v. State, 452 S.W.2d 480 (Tex.Crim.App.1970).

Jury Probation (§ 3a)

This section restates present Sections 3a–3c, thereby preserving the jury probation authorization of present law. Note that a regular sentencing hearing is conducted before the jury, but that incompetent evidence (e. g., the presentence report) admissible before the court in the hearing is not admissible before the jury.

Period of Probation (§ 3b)

Present Section 3b deals with jury probation, which is restated in revised Section 3a.

This new Section 3b clarifies the authorized periods of probation, tying them to the maximum punishment terms prescribed, except for the capital and first degree felonies.

Paragraph (b) of this section is recognized in principle in present art. 42.12, § 7; however, that section as presently worded requires satisfactory completion of one-third of the probationary

period or two years, whichever is the lesser. No good reason is perceived to deny the court authority to recognize good conduct and satisfactory progress before the running of a fixed period, and Paragraph (b) thus permits the court to discharge the probationer at any time.

Conditions of Probation (§ 4)

Section 4 of present art. 42.12, dealing with the presentence report, has been relocated as revised art. 42.02, § 3.

This new Section 4 restates and elaborates present Section 6 of art. 42.12. The revision states general guidelines for the court in structuring the period and conditions of probation, deletes from the list of mandatory conditions, and ensures due process to the probationer whose period or conditions are modified by the court.

The design of probation language in Paragraph (a) comes from the Misdemeanor Probation Law, art. 42.13, § 5(b). Conditions in the present law requiring avoidance of injurious or vicious habits and of persons or places of disreputable or harmful character are omitted from Paragraph (b) because meaninglessly vague. If the court believes a probationer should avoid a specific habit, person, or place, it may so specify as one of the conditions.

Paragraph (c) preserves the work-release provisions now located in art. 42.03.

If the court decides to modify conditions already imposed and presumably relied on by the probationer, then both elementary fairness and the contractual nature of probation, e. g., McDonald v. State, 442 S.W.2d 386 (Tex.Crim.App.1969), demand giving the probationer notice and an opportunity to be heard on the modification issue and Paragraph (d) so provides.

Termination of Probation (§ 7)

The first sentence of present Section 7, dealing with the period of probation, is relocated in revised Section 3b. No other change of substance is made in this section.

Revocation of Probation (§ 8)

Paragraph (b) is added to comply with present case law, e. g., Ex parte Wood, 456 S.W.2d 395 (Tex.Crim.App.1970); see also C.C.P. art. 42.12, § 3b.

Parole Eligibility (§ 15)

Reference to the minimum term is added to Paragraph (a) since it controls parole eligibility under the new sentencing structure. There is no other change in the paragraph.

Paragraphs (b) and (c) are new. It is clear that the decision to grant or deny parole has all the components of the initial sentencing decision; only the time when it is made differs. Thus the need for guidelines to influence this decision is equally urgent and, although it would be possible to spell out these guidelines, it

is preferable to place this responsibility on those who are most experienced and who must apply them.

The requirement of giving reasons for the parole decision will ensure more consistent and rational decisions, based on the criteria published under Paragraph (b), as well as furnish a basis for judicial review should it be authorized.

Paragraphs (b)–(f) of present Section 15 are relettered (d)–(h) of the revised section, but otherwise unchanged.

APPELLATE REVIEW OF SENTENCES

Art. 4.03. Court of Criminal Appeals

(a) The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. However, this jurisdiction shall not be construed to embrace any case which has been appealed from an inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court, or the county court at law shall not exceed one hundred dollars.

(b) The appellate jurisdiction of the Court of Criminal Appeals shall include the power to review sentences as to their legality and appropriateness, the procedure by which they were imposed, and the sufficiency and accuracy of the evidence on which they were based. The court's power extends to sentences and resentences imposed after trial on the merits, after reversal and remand of a sentence, or after entry of a guilty plea or a plea of nolo contendere.

(c) The court's power to review sentences and resentences does not constitute a reprieve, commutation, parole, or pardon, nor may it interfere with the clemency power reserved to the executive branch by Texas Constitution Article IV, Section 11.

Historical Note

Derivation:
(a): C.C.P. art. 4.03
(b), (c): New

Cross References

Bail pending disposition of appeal, see art. 44.04, as amended.
Disposition of appeal, see art. 44.25, as amended.
Punishments, see R.P.C. ch. 12.
Record on appeal, see art. 40.09, as amended.
Sentencing proceedings, see art. 42.02, as amended.

Committee Comment

Another major change of the new sentencing structure is to authorize the Court of Criminal Appeals to review the appropriate-

ness, as well as the legality, of sentences. The addition of Paragraphs (b) and (c) to this article represents the core amendment necessary to implement this authorization. Other necessary changes include expanding the appellate record, art. 40.09, adding to the court's dispositional alternatives, art. 44.25, and modifying the authorization to grant bail pending disposition of appeal, art. 44.04. No special procedure is created for sentence review, however: it is made coextensive with conviction review and the procedure for conviction review applies to sentence review.

The Problems of Texas Law

1. *Statutory Authority to Review Sentences*

It is probably accurate to state that the Court of Criminal Appeals does not believe it has statutory authority to review a sentence claimed to be inappropriate. One must hedge, because of contradictory statements in the decisions and failure to distinguish the types of challenge to which a sentence is susceptible, but our tradition of jury sentencing, the absence of sentencing standards, the nonexistence in most cases of a sentencing record for review, and the absence of clearcut dispositional alternatives, have all militated against the court's construing the applicable statutes to authorize across-the-board sentence review.

Clearly the court can and has corrected erroneous sentences and reduced sentences that exceeded statutory limits or were unconstitutional in the cruel-and-unusual-punishment sense, e. g., Byrd v. State, 228 S.W.2d 858 (Tex.Crim.App.1950); Ex parte Hudson, 283 S.W.2d 956 (Tex.Crim.App.1955); Ellison v. State, 419 S.W. 2d 849 (Tex.Crim.App.1967), jdgmt. vacated, 88 S.Ct. 2290, 392 U.S. 649 (1967). More typical, however, of how the court views its sentence revisory powers is this statement: "While a reduction of the punishment would seem to be appropriate, this court is without authority to reduce it or to set aside the conviction upon the theory that the punishment is excessive." Mason v. State, 375 S.W.2d 916, 919 (Tex.Crim.App.1964); see also Walker v. State, 161 S.W.2d 1077 (Tex.Crim.App.1942); Calhoun v. State, 214 S.W. 335 (Tex.Crim.App.1919).

2. *Constitutional Power to Review Sentences*

Another question that must be answered is whether the establishment of expanded sentence review may be accomplished by legislation or whether it requires an amendment to the Texas Constitution.

The question has two dimensions:

(1) Does Tex.Const. art. V, § 5, contain a sufficiently broad grant of authority to permit expanded review of sentences?

(2) Does the institution of such review in any way interfere with the exclusive executive power to grant reprieves, commutations, and pardons as set out in Tex.Const. art. IV, § 11? Section 11A should also be consulted.

a. Constitutional power

Article V, Section 5, reads in pertinent part, "The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law."

It is clear that the sentence, which under the new structure contains the punishment, is an integral part of a criminal action. Indeed, the Court of Criminal Appeals has consistently held that, absent a sentence in the record, it has no jurisdiction to entertain an appeal, e. g., Bratt v. State, 422 S.W.2d 453 (Tex.Crim.App. 1968). Not only is the sentence itself an integral part of the action, but so is the procedure by which it is determined. In Mempa v. Rhay, 88 S.Ct. 254, 389 U.S. 128 (1967), the Supreme Court held that the fourteenth and sixth amendments require that the states accord a defendant the right to counsel at the sentencing stage, thus recognizing it as a "critical stage" in the criminal action. See also Specht v. Patterson, 87 S.Ct. 1209, 386 U.S. 605 (1967).

Accordingly, so far as the language in art. V, § 5, is concerned —"in all criminal cases"—there is no doubt that the sentence and the procedure by which it is determined are not only part of the criminal action, but are constitutionally viewed as "critical stages" as well.

No Texas case disputes this analysis—all that have denied authority to review the appropriateness of sentences have referred to the absence of statutory authority and the finality of jury-assessed punishment—e. g., Burrows v. State, 143 S.W.2d 609 (Tex. Crim.App.1940); Reeves v. State, 167 S.W.2d 176 (Tex.Crim.App. 1942)—and there is no hint of any constitutional impediment to the types of sentence review authorized by revised art. 4.03(b).

Finally, the elaboration of the court's appellate jurisdiction over criminal cases in this revision is as much aimed at clarification as expansion. No new type of case is added, territorial jurisdiction is not expanded, and the jurisdiction of no other court is transgressed.

b. Interference with executive clemency

The revision to art. 44.25 (disposition of appeals) substantially expands the court's remedies for reviewing and correcting sentences. This expansion raises the other dimension of the constitutional question: does the court's added authority to reduce or increase a sentence assessed by the trial court unconstitutionally

interfere with the executive's clemency power? Some general comments on the nature of appellate review by the judiciary and the executive's clemency power will serve as an introduction to this more difficult of the two issues under the Texas Constitution.

In a case upholding against federal constitutional attack the judicial power to modify a sentence already being served, the Supreme Court stated:

> We find nothing in the suggestion that the action of the district court in reducing the punishment after the prisoner has served a part of the imprisonment originally imposed was a usurpation of the pardoning power of the executive. The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the *enforcement* of the judgment, but does not alter it qua judgment. To reduce a sentence is a judicial act as much as the imposition of the sentence in the first instance.

United States v. Benz, 51 S.Ct. 113, 159, 282 U.S. 304, 311 (1931).

More recently, the commentary to the ABA Appellate Review Standards dismissed any possible problem by stating:

> To respond that the executive should have the obligation to filter out and correct such errors when they occur, or that granting the power to a court to reduce an excessive sentence interferes with the executive pardoning power, misses the point. Executive clemency is, and should remain, for the highly exceptional case where the question is not one of excessiveness based on the ordinary factors affecting sentence, but where intervention of the executive is prompted by unusual public interests. That more mistakes occur in sentencing than can be corrected by this process is unfortunately clear. It is equally clear that as in every other phase of the law the judiciary should have both the power and the obligation to correct its own errors.

ABA Appellate Review Standards, Comment at 22–23.

Although the constitutionality of appellate review of the appropriateness of sentences is clear elsewhere—indeed, no recent authority to the contrary was found—it may not be so clear in Texas. Through the years the Court of Criminal Appeals has decided a series of cases dealing with misdemeanor probation, the release of civil and political disabilities after successful completion of probation, the validity of parole, and "commutation" of a jail sentence for driving while intoxicated that have muddied the analytical stream.

Several important points should be made before dissecting these cases. First, the institution of expanded sentence review does not

take away any authority from the governor. He may continue to exercise clemency after a sentence has been made final. Second, the clear impact of sentence review is that for this purpose—the point where executive power begins—the sentence is not final until the time for appeal has lapsed or the appeal has finally been decided. Third, sentence review will actually aid the governor and his advisers in the exercise of clemency powers. The judiciary will now be required to further scrutinize itself in the exercise of the sentencing function. This added scrutiny suggests that fewer injustices will reach the governor.

Article IV, Section 11, of the Texas Constitution reads in pertinent part: "In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction . . . to grant reprieves and commutations of punishment and pardons; . . ." The revision to art. 4.03 deals with review of sentences and obviously there can be no sentence until there first has been a conviction. At first blush, therefore, there appears to be a clash in authority. But recall that the Court of Criminal Appeals now, and for a long time, has reviewed a sentence that is claimed to be unconstitutional or illegal; obviously, this occurs after conviction and yet no serious question has been raised. It is of the essence of the judicial function to be concerned with unconstitutional and extra-legal actions.

The proposed addition to art. 4.03 is not the unregulated dispensation of mercy—it is appellate supervision over the exercise of judicial discretion, see Mueller, Penology on Appeal: Appellate Review of Legal but Excessive Sentences, 15 Vand.L.Rev. 671 (1962). Judicial control over sentencing discretion is one of the rare areas where such an awesome decision has been ceded, in large part, to one man. One major objective of this revision is to alter that situation.

The analytical stream becomes clouded on turning to the Texas cases. Snodgrass v. State, 150 S.W. 162 (Tex.Crim.App.1912), voided the original suspended sentence law on the ground that it conferred the pardoning power on courts. Forty-two years later, in Gilderbloom v. State, 272 S.W.2d 106 (Tex.Crim.App.1954), the court focused on the inartful term "commute"—which obviously was intended to mean suspend sentence as an incident of a grant of probation—and disallowed the grant of probation in driving while intoxicated cases. There are other cases of course—e. g., Ex parte Levinson, 274 S.W.2d 76 (Tex.Crim.App.1955); Ex parte Griffin, 258 S.W.2d 324 (Tex.Crim.App.1953)—but except to point out that they were wrongly decided, and that the overwhelming majority of authorities from other jurisdictions, both early and modern, have rejected this constitutional attack, this commentary will not be expanded. See, e. g., Palmer v. State, 70 Neb. 136, 97 N.W. 235 (1903); Fritz v. State, 80 Okla.Crim. Rep. 342, 128 P. 170 (1912); State v. Laws, 51 N.J. 494, 242 A.2d 333 (1968); see generally Annot., 89 A.L.R. 294 (1934).

The Additions to Art. 4.03

Article 4.03(b) uses the term "legality and appropriateness" to make plain that the existing authority to review illegal (including unconstitutional) sentences is continued, and hopefully clarified, and that authority is added to review sentences that are neither unconstitutional nor contrary to the statutory limits, but are inappropriate because too severe or lenient, not supported by the record, or the product of unlawful procedure.

Paragraph (b) also provides for review after a plea as well as a trial. It is imperative that review be available after a plea of guilty or nolo contendere because from 70 to 90 percent of all criminal cases are disposed on plea, and if sentence review were denied following a plea of guilty, there would be few sentencing appeals and the number of not guilty pleas would probably increase.

Paragraph (c), hopefully unnecessary, is nevertheless included out of an abundance of caution, cf. C.C.P. art. 42.12, § 2(c).

Art. 40.09. The Record on Appeal

1. Record in appeals to the Court of Criminal Appeals

In all cases appealable by law to the Court of Criminal Appeals, the clerk of the court that entered the conviction sought to be appealed from shall, under his hand and seal of the court, make and prepare an appellate record comprising a true copy of the matter designated by the parties, but shall always include, whether designated or not, copies of the material pleadings, material docket entries made by the court, the charge, verdict, judgment, sentence, notice of appeal, any appeal bond, all written motions and pleas and orders of the court, and bills of exception. For all appeals concerning the legality or appropriateness of the sentence, the clerk shall include, whether designated or not, the presentence and diagnostic reports, if any, and the transcription of the sentencing hearing. The matter so prepared shall be assembled under one cover and shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the record. The record shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.

* * * * * * * * * *

4. Effect of transcription of reporter's notes

At the request of either party, or if required by law, the court reporter shall take shorthand notes of all trial proceedings, including voir dire examination, objections to the court's charge, final arguments, and the sentencing hearing. He is not entitled to any fee in addition to this salary for taking these notes. A transcription of the

reporter's notes when certified to by him and included in the record shall establish the occurrence and existence of all testimony, argument, motions, pleas, objections, exceptions, court actions, refusals of the court to act and other events thereby shown and no further proof of the occurrence or existence of same shall be necessary on appeal; provided, however, that the court shall have power, after hearing, to enter and make part of the record any finding or adjudication which the court may deem essential to make any such transcription speak the truth and any such finding or adjudication having support in the evidence shall be final.

5. Responsibility for obtaining transcription of reporter's notes

Except as provided in Section 1, a party desiring to have included in the record a transcription of notes of the reporter shall have the responsibility of obtaining such transcription and furnishing same to the clerk in duplicate in time for inclusion in the record and defendant shall pay therefor. The court shall order the reporter to make such transcription without charge to defendant if the court finds, after hearing in response to affidavit by defendant that he is unable to pay or give security therefor. Upon certificate of the court that this service has been rendered, payment therefor shall be made from the general funds by the county in which the offense is alleged to have been committed. The court reporter shall report any portion of the proceedings if required by law, requested by either party, or directed by the court.

Historical Note

Derivation:
C.C.P. art. 40.09

Cross References

Appeal of sentence, see arts. 4.03 and 44.25, as amended.
Diagnostic report, see art. 42.02, § 5, as amended.
Presentence report, see art. 42.02, § 4, as amended.
Sentencing hearing, see art. 42.02, § 2, as amended.

Committee Comment

The additions to these three sections ensure the presence of the sentencing proceedings in the record on appeal, a basic requirement for appellate review of sentences. The transcription of the sentencing hearing will cover most of the proceedings—e. g., allocution, the court's reasons for imposing the sentence—and it is thus necessary to add to Section 1 only the presentence and diagnostic reports (when they are prepared) to ensure a complete record.

It is only when defendant appeals his sentence that the sentencing hearing must be transcribed for the record on appeal, Sections 1 and 5. Since the vast majority of sentences are imposed after a guilty plea, the transcription will not be lengthy in most cases.

Art. 44.04. Bail Pending Disposition of Appeal

(a) After sentence is pronounced, a defendant who appeals his judgment of guilt or sentence or both is entitled to bail pending disposition of his appeal unless:

(1) he is sentenced to imprisonment for a maximum term in excess of fifteen years; or

(2) he appeals only his sentence, seeking only a reduction in it.

(b) If a defendant appeals only his sentence, seeking only a reduction in it, either the trial court or Court of Criminal Appeals may fix bail if the defendant requests it by written motion and the court finds that special circumstances justify releasing defendant on bail pending disposition of his sentencing appeal.

(c) If a defendant is on bail when the trial commences and is convicted of a misdemeanor appealable to any court where a trial de novo may be had and is on bail when the trial commences, he shall remain on such bail and such bail shall not be considered as discharged until his conviction becomes final or he files an appeal bond as required by this Code for appeal from such conviction.

(d) If a defendant is on bail when the trial commences, and following pronouncement of sentence he is entitled to bail under Paragraph (a), he shall remain on bail, which bail is not discharged until his conviction becomes final and unappealable. However, the trial court may increase or decrease the amount of bail on its own motion or the motion of the State or defendant.

(e) If a defendant is in custody when the trial commences, and following pronouncement of sentence he is entitled to bail under Paragraph (a), he may apply for bail at any time prior to the time such conviction becomes final, and the trial court shall set his bail at such amount as such court deems proper, which bail and sureties on which bond shall be approved by the trial court. Such defendant shall be committed to jail unless he enters into such bail. If he be in custody, his motion for new trial or notice of appeal shall have no effect to release him from such custody unless he enters into such bail.

(f) Bail under this Article may be entered into and given either in the same or any subsequent term of the court, and shall be sufficient if it substantially meets the requirements of Article 17.09.

(g) In no event shall the defendant and the sureties on his bond be released from their liability on such bond or bonds until the defendant is placed in the custody of the sheriff.

(h) If a defendant is sentenced to imprisonment for a maximum term in excess of fifteen years, or if he appeals only his sentence,

seeking only a reduction in it, his bail is discharged when the court pronounces sentence, or the defendant gives notice of appeal, and the sheriff shall immediately take him into custody.

Historical Note

Derivation:

(a): C.C.P. art. 44.04(a)
(b): ABA Appellate Review Standards § 2.2(b) (ix)
(c)–(h): C.C.P. art. 44.04(c)–(h)

Cross References

Appeal of sentence, see arts. 4.03 and 44.25 as amended.
Bail, see ch. 17.
Commencement of sentence, see art. 42.09, as amended.
Credit against sentence, see art. 42.03, as amended.
Delivery to jail or Department of Corrections pending disposition of appeal, see art. 42.09, as amended.
"Felony" defined, see R.P.C. §§ 1.07, 12.02, 12.03.
Notice of appeal, see art. 44.08.
Pronouncement of sentence, see arts. 42.02, § 2, as amended, 42.04.
Revocation of bail, see art. 44.04a, as amended.

Committee Comment

Paragraphs (a)(2) and (b), which are the only significant additions to this article, implement a recommendation of the ABA Appellate Review Standards regarding the defendant who seeks only a sentence reduction on appeal:

> . . . In most cases, where the defendant is seeking only a reduction in the term to which he has been sentenced, it is fairly clear that bail should not be granted, and that little would be served by detaining the defendant in a local institution to await the conclusion of the sentence appeal. In some cases, however, where there is a realistic chance that the appellate court will decide that probation instead of incarceration was the appropriate sentence, power in the sentencing court and appellate court to release the defendant pending disposition of the appeal could properly be exercised. It also may be desirable in some instances to permit either court to detain the defendant in a local facility until the review has been completed. . . .

ABA Appellate Review Standards, Comment at 41.

Paragraph (b) allows for the exceptional case, and the entire paragraph dovetails with revised art. 42.09, which requires delivering the defendant to the Department of Corrections, so he may begin earning good time, pending disposition of his appeal unless he is released on bail.

Art. 44.04a. Revocation of Bail Pending Disposition of Appeal

(a) The sentencing court may revoke the bail of a defendant released pending disposition of his appeal if the court after a hearing determines that there is probable cause to believe the defendant committed a felony while on bail.

(b) When notified of the probable commission of a felony, the sentencing court may cause the defendant's arrest by warrant as in other cases and conduct a hearing without a jury on the issue. At the hearing the state, defendant, and his counsel are entitled to be present, offer evidence, subpoena, confront and cross-examine witnesses, and argue. If defendant is not represented by counsel at the bail revocation hearing, the court shall appoint counsel, if authorized by Article 26.04, and allow appointed counsel adequate time for consultation and preparation. Counsel appointed under this paragraph is entitled to compensation at the rate fixed by Article 26.05 for representing a felon or misdemeanant before a court of record.

(c) If the sentencing court after the hearing determines there is probable cause to believe defendant committed a felony while on bail, the court shall revoke the bail, cancel any bond entered into, and order the defendant delivered to jail or the Department of Corrections to serve his sentence, which sentence begins to run on the date of the order.

Historical Note

Derivation:
New

Cross References

Appeal of sentence, see arts. 4.03 and 44.25, as amended.
Bail pending appeal, see art. 44.04, as amended.
Delivery to jail or Department of Corrections pending disposition of appeal, see art. 42.09, as amended.
"Felony" defined, see R.P.C. §§ 1.07, 12.02, 12.03.
Forfeiture of bail, see ch. 22.

Committee Comment

This new article plugs a gap in present law through which some defendants slip to commit other serious crimes while appealing their convictions of former crimes. The forfeiture hearing contemplated by this article is patterned after the revocation of probation hearing of present law, and Paragraph (c) dovetails with revised art. 42.09. Note that the bail bond itself (if there is one) is not forfeited; rather, it is cancelled, thus releasing the sureties from liability, and defendant is returned to custody.

Art. 44.25. Disposition of Appeals

(a) In reviewing a judgment of guilt and sentence, the Court of Criminal Appeals, as the law and nature of the criminal action require, may:

(1) affirm the judgment or sentence or both;

(2) reverse and remand the judgment for a new trial;

(3) reverse and remand the sentence for a new sentencing hearing;

(4) reform and correct the judgment or sentence or both;

(5) substitute for the sentence under review any other legal and appropriate sentence, whether more or less severe than the sentence under review;

(6) reverse and dismiss the criminal action.

(b) The Court of Criminal Appeals may reverse the judgment or sentence or both as well upon the law as upon the facts. A criminal action reversed because the judgment of guilt is contrary to the evidence shall be remanded for a new trial.

(c) If the Court of Criminal Appeals reverses a death sentence, it shall remand the criminal action for a new trial.

(d) In reviewing the legality and appropriateness of a sentence, the Court of Criminal Appeals shall consider the procedure by which the sentence was imposed, the sufficiency and accuracy of the evidence on which it was based, and the general principles of sentencing set out in Penal Code Section 12.06.

Historical Note

Derivation:

(a): C.C.P. art. 44.24, sen. 1
(b): C.C.P. art. 44.25
(c), (d): New

Cross References

Appeal of sentence, see art. 4.03, as amended.
Death penalty, see art. 42.02, § 7, as amended; R.P.C. § 12.46.
Increased sentence by trial court prohibited, see art. 42.08, as amended.
Presumptions on appeal, see art. 44.24, as amended.
Sentencing combinations, see R.P.C. § 12.05.
Sentencing hearing, see art. 42.02, § 2, as amended.
Written opinion on appeal, see art. 44.24, as amended.

Committee Comment

The dispositional alternatives of the Court of Criminal Appeals are collected in this article for easier accessibility. Present art. 44.25 constitutes Paragraph (b) of this restructured article; Paragraph (a) derives from the first sentence of present art. 44.24,

with additions to accommodate sentence review; and Paragraphs (c) and (d) are new.

One benefit of authorizing sentence review is the power to reverse the sentence only: the judgment of guilt remains valid and the Court of Criminal Appeals under Paragraphs (a)(3) and (a)(5) may either remand for a new sentencing hearing and resentencing by the trial court or substitute what it considers a more appropriate sentence.

Paragraph (a)(5) authorizes the Court of Criminal Appeals to *increase* as well as decrease in severity the sentence under review. (The trial court, on the other hand, is prohibited by revised art. 42.08 from increasing on resentencing the severity of the original sentence.) This authorization is not without constitutional risk, and the committee sharply divided over including any increase authorization. The constitutional and policy issues involved are well-summarized in the ABA Appellate Review Standards:

> The first [argument favoring increase power] was based on the principle that it is just as appropriate for the reviewing court to have the power to correct an excessively low sentence as it is for the court to have the power to correct an excessively high one. It is in general unsound to restrict the discretion of courts in a manner which may prohibit them from reaching the result dictated by justice in the particular case. On the other hand, the conflicting principle of double jeopardy undoubtedly will prevent the state or the appellate court from initiating review of a sentence deemed too low. Leaving the choice of seeking review to the defendant, however, and giving the appellate court the power to substitute in such a case the sentence which it deems appropriate would appear to satisfy both the spirit of the double jeopardy clause and the basic principle that courts should be authorized to do evenhanded justice in each case.
>
> The second argument that persuaded the majority of the Special Committee was based on the fear that the normal functioning of appellate courts would be seriously burdened by an excessive number of frivolous appeals. The inhibiting factors of cost are no longer present when the defendant is afforded a free attorney and a free transcript and it can thus be anticipated that defendants who have nothing to lose will flood the courts with frivolous appeals. The possibility of an increase on appeal from the sentence, on the one hand, will tend to discourage appeals by all but those who feel seriously aggrieved. And it is for this group that authority to review the sentence is primarily afforded.
>
> The arguments which have persuaded those who are of the view that the reviewing court should not have the power to increase are likewise set forth in the original report. They can be briefly summarized as follows:

To the point that principle argues in favor of the power to increase, the response is that there are practical factors which on balance outweigh the principle: there is the very real possibility that the defendant will be seriously embittered by the experience of asking for a decrease and getting an increase; and there is a certain illogic to the position that insulates from review and from an increase all those defendants who do not initiate the proceedings by seeking a decrease. In addition, there is the point that the principle of double jeopardy may well extend to the case where the defendant initiates the appeal.

There are basically two responses to the argument that an increase should be provided because of the possibility of too many frivolous appeals. Thie first is the practical one that courts which now review sentences without the authority to increase do not seem to be overburdened, perhaps because of the fact that defendants who have pleaded guilty in large part expected the sentence they received. There is also the fact that most frivolous appeals are obviously so, and they can be disposed of with dispatch. The second point is that this is not the kind of attack that should be made on the problems of frivolous appeals. This is a problem that exists in appeals from the merits of conviction and it exists in civil as well as criminal cases. It is unsound to attempt a solution of such problems by isolating a particular kind of appellate review and attaching a potential sanction that may discourage as many meritorious appeals as appeals that are frivolous.

ABA Appellate Review Standards, Proposed Revisions of Standards with Commentary 3–5 (1968).

CHAPTER 31. THEFT

Conforming Amendments

REVISED CIVIL STATUTES

Art. 1d. Privilege to Investigate Theft

A person reasonably believing another has stolen or is attempting to steal property is privileged to detain the person in a reasonable manner and for a reasonable period of time for the purpose of investigating ownership of the property.

CHAPTER 42. DISORDERLY CONDUCT AND RELATED OFFENSES

Conforming Amendments

CODE OF CRIMINAL PROCEDURE

CHAPTER FOURTEEN
STOP, HALT, AND ARREST WITHOUT WARRANT

Art.
14.01. Stopping Persons for Investigation.
14.02. Halt and Search at Roadblock.
14.03. Arrest by Peace Officer.
14.04. Arrest by Citizen
14.05. Rights of Officer or Person Making Arrest.
14.06. Prompt Appearance Before Magistrate or Issuance of Citation.
14.07. Preemption.

Committee Comment

Basic changes made in the substantive criminal law by the Revised Penal Code necessitate a restructuring of Chapter 14 of the Code of Criminal Procedure.

Traditional reliance on vague, overbroad substantive offenses such as vagrancy to deal with persons suspected of criminality is unwise as a matter of policy, see Kadish, The Crisis of Overcriminalization, 374 Annals 157, 167–69 (1967); Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1 (1960), and constitutionally impermissible, see, e. g., Gallant v. Barlow, Civil No. SA–69–CA–158 (W.D.Tex., filed Sept. 30, 1969), in which the vagrancy-type provisions of Penal Code art. 607(1)–(4), (10), and (12) were declared unconstitutional. C.C.P. art. 14.01, as amended, directly confers on peace officers authority to stop and investigate suspicious persons and identify witnesses. The statutory "stop" authority is new to Texas law but is analogous to the arrest power and replaces the unconstitutional vagrancy-type crimes that have been used as an indirect means to accomplish the same objective. C.C.P. art. 14.02, as amended, provides a limited authority to use roadblocks in emergency situations involving very serious offenses; there exists no such statutory authority in present law.

Arrest without warrant is illegal in Texas unless authority for the arrest is expressly provided by statute, Heath v. Boyd, 175 S.W. 2d 214 (Tex.1943); Giacona v. State, 298 S.W.2d 587 (Tex.Crim. App.1957); Mundine v. State, 38 S.W. 619 (Tex.Crim.App.1897). Presently the authority to arrest without warrant is furnished by C.C.P. arts. 14.01–14.04 and by numerous Penal Code provisions that apply to specific offenses, e. g., Penal Code art. 487 (warrant-

less arrest authorized for offense of unlawful carrying of arms). The specific arrest provisions in the Penal Code are not preserved in the Revised Penal Code, so C.C.P. art. 14.03, as amended, centralizes the location of warrantless arrest authority by peace officers for all offenses. The requirements for making a warrantless felony arrest are simplified by eliminating the restrictions imposed by present C.C.P. arts. 14.01–14.04, thus expanding the power to its constitutionally permissible limit, i. e., when there is probable cause to believe a person has committed a felony, see Henry v. United States, 80 S.Ct. 198, 361 U.S. 98 (1959); cf. Giordenello v. United States, 78 S.Ct. 1245, 357 U.S. 480 (1958).

C.C.P. art. 14.04, as amended, preserves and relocates the authority for a citizen's arrest provided by present C.C.P. art. 14.01 (a). C.C.P. art. 14.05 is not substantively altered, and C.C.P. art. 14.06 is amended to permit a peace officer to issue a citation in lieu of arrest for low-grade misdemeanors.

Art. 14.01. Stopping Persons for Investigation

Definition of stop

Sec. 1. (a) A stop is the temporary detention of a person that results when a peace officer orders the person to remain in his presence to enable the peace officer to accomplish the purposes authorized in this Article.

(b) The stop may:

(1) be ordered only by a peace officer who is lawfully present in any place; and

(2) be maintained only for a period of time that is reasonably necessary to accomplish the authorized purposes of the stop, but in no case for more than 30 minutes; and

(3) be maintained only in the area near the original place of the stop.

Cases in which stop authorized

Sec. 2. (a) A peace officer may stop any person he observes in circumstances that give the peace officer reasonable cause to suspect that the person has committed, is committing, or is about to commit an offense involving the use or attempted use of force against the person or the theft, damage, or destruction of property if the stop is reasonably necessary to obtain or verify an account of the person's presence or conduct, or to determine whether to arrest the person.

(b) A peace officer may stop any person he finds near the scene of an offense that the peace officer has reasonable cause to suspect has just been committed if:

(1) the peace officer has reasonable cause to suspect that the person has knowledge of material aid to the investigation of the offense; and

(2) the stop is reasonably necessary to obtain or verify the person's identity or an account of the offense.

(c) A peace officer may stop any person in connection with an offense that the peace officer has probable cause to believe has been committed if:

(1) the offense is a felony involving the use or attempted use of force against the person or the theft, damage, or destruction of property; and:

(A) the peace officer has reasonable cause to suspect the person committed the felony; and

(B) the stop is reasonably necessary to obtain or verify the person's identity to determine whether to arrest the person for the felony; or

(2) the peace officer has reasonable cause to suspect that the person was present at the scene of the offense, and the stop is reasonably necessary to obtain or verify the person's identity.

Frisk for weapon

Sec. 3. (a) A frisk is a search by an external patting of a person's clothing.

(b) A peace officer who has lawfully stopped a person under Section 2 may:

(1) frisk that person, and take other reasonably necessary steps for protection, if the peace officer has reasonable cause to suspect that the person is armed and presently dangerous to the peace officer or another person present; and

(2) take possession of any object the peace officer feels during the course of the frisk if the peace officer has probable cause to believe the object is a deadly weapon.

(c) Nothing seized by a peace officer in a frisk conducted under this section is admissible in any criminal action, civil suit, or administrative proceeding unless the stop, frisk, and seizure were authorized under this article.

Identification of person stopped

Sec. 4. A peace officer who has lawfully stopped a person under Section 2 may:

(1) demand of the person his name and his present or last address; and

(2) allow the person to be viewed by others at or near the scene of the stop if the person was stopped under Section 2(a).

Questioning person stopped

Sec. 5. (a) A peace officer who has stopped a person under Section 2 shall inform the person, as promptly as possible under the circumstances and in any case before engaging in questioning:

(1) that he is a peace officer; and

(2) that the stop is not an arrest but rather a temporary detention for investigation, and that upon completion of the investigation the person will be released unless he is arrested; and

(3) if the person was stopped under Section 2(b) or (c)(2), that the person is detained only as a witness who is required by law to identify himself to the peace officer; and

(4) that the person has a right to remain silent, that anything he says may be used against him, and that he has a right to terminate the questioning at any time.

(b) If the person is arrested during the course of the stop, the peace officer shall warn him under Article 15.17.

Action taken after stop

Sec. 6. After the authorized purposes of the stop have been accomplished or 30 minutes have elapsed, whichever occurs first, the peace officer shall allow the person to go unless he has arrested the person.

Historical Note

Derivation:

Model Prearraignment Code § 2.02
C.C.P. art. 2.24

Cross References

Arrest under warrant, see ch. 15.
Arrest without warrant, see arts. 14.03–14.06, as amended.
Attempt, see R.P.C. § 15.01.
"Deadly weapon" defined, see R.P.C. § 1.07.
Disorderly conduct, see R.P.C. § 42.01.
Evidence not to be used, see art. 38.23.
Failure to exhibit drivers license on demand, see R.C.S. art. 6687b(13).
Failure to identify as witness, see R.P.C. § 38.02.
Force justified in law enforcement, see R.P.C. ch. 9, subch. E.
Halt at roadblock, see art. 14.02, as amended.
Offenses against person, see R.P.C. tit. 5.
Offenses against property, see R.P.C. tit. 7.
Official oppression, see R.P.C. § 39.02.
"Peace officer" defined, see art. 2.12, as amended; R.P.C. § 1.07.
Resisting stop or frisk, see R.C.P. § 38.03.

Committee Comment

C.C.P. art. 14.01, as amended, authorizes a limited period of on-the-spot detention ("stop") and bodily search ("frisk") under certain conditions to facilitate the investigation of suspected criminality. Under the authority of this article, a peace officer can take the intermediate step of executing a stop when he does not have at that time probable cause to make an arrest. The article follows the lead of Terry v. Ohio, 88 S.Ct. 1868, 392 U.S. 1 (1968), in which the Supreme Court upheld the right to frisk and suggested that some limited investigative stops on evidence insufficient to support an arrest are constitutionally permissible, but did not elaborate standards for such stops. The recent case of Baity v. State, 455 S.W.2d 305 (Tex.Crim.App.1970), relied on the Terry case to uphold the legality of an investigative stop on less than probable cause for arrest.

A stop should *not* be considered an arrest without probable cause. Rather, the stop defined in Sections 1 and 2 of this article is a seizure of the person within the fourth amendment but is a less severe seizure than arrest. Accordingly, the evidentiary basis necessary to justify a stop under art. 14.01, "reasonable cause to suspect," is less stringent than the "probable cause" required for an arrest, cf. Camara v. Municipal Court, 87 S.Ct. 1727, 387 U.S. 523 (1967), and See v. City of Seattle, 87 S.Ct. 1737, 1741, 387 U.S. 541 (1967), in which the Supreme Court approved a less stringent standard of "probable cause" for health and safety inspection warrants. See generally La Fave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich.L.Rev. 39 (1968).

The purpose of Section 1 is to establish stop as a separate and distinct investigative procedure from arrest. The authority to stop is essentially a limited authority to immobilize a person. Section 1(b) (1) makes clear that the stopping officer is not legally empowered to enter or remain on premises solely by virtue of the authority granted by art. 14.01. To be constitutionally acceptable the stop must be reasonable and not entail a serious sense of constraint, hence Section 1(b)(2) and (b)(3) require that the stop be maintained only for a "reasonably necessary" time, not to exceed 30 minutes, and "in the area near the original place of the stop."

Section 2 circumscribes the three types of authorized stops. As noted above, the quantum of evidence required to justify a stop is "reasonable cause to suspect" as compared with the stricter "probable cause to believe" arrest standard. Paragraph (a) allows a peace officer to stop persons *he observes* in suspicious circumstances. This is the basic investigative stop and is limited to offenses involving force against the person or harm to property. Paragraph (b) permits a peace officer coming upon the scene of

a suspected offense to "freeze" the situation to obtain witness identification or an account of the event giving rise to the stop. Unlike the stops authorized by Paragraphs (a) and (b), which are limited to the res gestae of an offense, Paragraph (c) provides a special authority to stop persons reasonably suspected of perpetrating or witnessing a previously committed offense. Because this form of stop can occur long after the criminal event and far from the scene, before a peace officer can stop under Paragraph (c) he must have probable cause to believe the offense was committed, but as to whether the person stopped was the perpetrator or was present, the officer need have only a reasonable suspicion. As to suspected perpetrators, Paragraph (c)(1) limits the stop to felonies involving force against the person or harm to property and for the purpose of determining whether the person stopped fits the description of the perpetrator.

Section 3 authorizes the stopping officer to conduct a "frisk" and take other "reasonably necessary steps," such as ordering a person out of a car, when the officer has "reasonable cause to suspect" the person is armed and dangerous. Since the sole justification for allowing this limited search is to protect the safety of the officer and others present, Terry v. Ohio, 88 S.Ct. 1868, 392 U.S. 1 (1968), the officer may not seize anything he feels in the course of the frisk unless he has "probable cause to believe" the object is a deadly weapon, cf. Tinney v. Wilson, 408 F.2d 912 (9th Cir. 1969). Anything lawfully seized may be used as evidence against the person, but Paragraph (c) repeats the traditional exclusionary rule to make clear that all of the requirements of art. 14.01 must be observed before a frisk is lawful and the fruits therefrom admissible in evidence.

Section 4 facilitates one of the primary functions of the investigatory stop—the identification of suspects and witnesses. Subdivision (1) authorizes an officer to demand that a person stopped identify himself, and R.P.C. § 38.02 makes it a misdemeanor for a witness to refuse to identify himself on demand. Together, these two provisions replace the present identification of witness law, C.C.P. art. 2.24. However, if the person stopped is reasonably suspected of having committed or attempted to commit an offense, then his refusal to identify himself can be considered as a factor in the officer's determination of whether there exists probable cause to arrest the person for the offense. Subdivision (2) permits on-the-scene identification by other persons present of a person stopped under Section 2(a) to aid in the officer's investigation of the suspicious activity giving rise to the stop.

With appropriate alterations to suit the temporary, on-the-scene nature of the detention, Section 5 sets out the warnings required prior to interrogation "after a person has been taken into custody or otherwise deprived of his freedom in any significant way," Miranda v. Arizona, 86 S.Ct. 1602, 1612, 384 U.S. 436, 444 (1966).

Art. 14.02. Halt and Search at Roadblock

Circumstances in which roadblock authorized

Sec. 1. A peace officer may order the driver of a vehicle to halt at a roadblock if:

(1) the peace officer has probable cause to believe that a capital felony or felony of the first degree involving the use or attempted use of force against the person or the theft, damage, or destruction of property has been committed; and

(2) halting all or most vehicles moving in a particular direction is reasonably necessary to permit a search for a party to or victim of the felony.

Action taken after halt

Sec. 2. (a) A peace officer who has lawfully halted a vehicle under Section 1 may:

(1) search the vehicle as promptly as possible under the circumstances and to the extent reasonably necessary to locate the party or victim; and

(2) frisk each occupant as authorized by Section 3(a), (b)(1), and (b)(2) of Article 14.01.

(b) Nothing seized by a peace officer in a search or frisk conducted under this section is admissible in a criminal action, civil suit, or administrative proceeding unless the halt, frisk, search, and seizure were authorized by this article.

(c) After the authorized purpose of the halt has been accomplished or 20 minutes have elapsed, whichever occurs first, the peace officer shall inform the person that he is free to go unless the peace officer has arrested the person.

Historical Note

Derivation:

Model Prearraignment Code § 2.02(2)

Cross References

Arrest under warrant, see ch. 15.
Arrest without warrant, see arts. 14.03–14.06, as amended.
Attempt, see R.P.C. § 15.01.
Bureau of Communications directed to "establish and operate a State Roads Blockade System," see R.C.S. art. 4413(15) (13).
Evidence not to be used, see art. 38.23.
Failure to exhibit drivers license on demand, see R.C.S. art. 6687b(13).
Force justified in law enforcement, see R.P.C. ch. 9, subch. E.
Offenses against person, see R.P.C. tit. 5.
Offenses against property, see R.P.C. tit. 7.

Party to offense, see R.P.C. ch. 7, subch. A.
"Peace officer" defined, see art. 2.12, as amended; R.P.C. § 1.07.
Resisting halt, see R.P.C. § 38.03.
Stopping person for investigation, see art. 14.01, as amended.

Committee Comment

Article 14.02, as amended, authorizes halting vehicles at a roadblock under certain circumstances to accomplish the limited purpose of finding a party to or victim of a serious felony; there is no specific statutory authority of this kind in present law. The power conferred is for use in emergency situations, and specific authority is necessary because officers cannot be said to have "reasonable suspicion," the evidentiary standard required for a stop under art. 14.01, as amended, as to each of the hundreds of cars that might be stopped in the course of executing a roadblock. To be constitutional this power must be limited to exigent situations, cf. Brinegar v. United States, 69 S.Ct. 1302, 1314, 338 U.S. 160, 183 (1949), in which Mr. Justice Jackson, dissenting, noted that he would strive to uphold a roadblock if it were used to terminate a kidnapping but not if it were used "to salvage a few bottles of bourbon and catch a bootlegger."

Section 1 defines the evidentiary standard required for a lawful roadblock: first, there must be "probable cause to believe" that a serious felony has been committed, and second, "halting all or most vehicles" must be "reasonably necessary" to find the victim of or party to the felony. Accordingly, there must be some reasonable basis for believing that the person sought is traveling by motor vehicle.

Section 2 prescribes the lawful activity of peace officers at a roadblock. Paragraph (a)(1) authorizes a search that is limited to accomplishing the sole purpose of the roadblock halt, that is, to the extent "reasonably necessary" to find a party to or victim of the felony. Officers are not authorized to search for contraband or stolen property, and such a search (e. g., of the glove compartment or under the spare tire) conducted prior to a lawful arrest is illegal and the fruits thereof excludable under Paragraph (b). Paragraph (a)(2) authorizes a protective frisk according to the procedure of art. 14.01, § 3, as amended. Paragraph (c) limits the duration of the halt to a maximum of 20 minutes, after which time the officer is required to inform the person he is free to go unless the person has been arrested.

Art. 14.03. Arrest by Peace Officer

A peace officer may arrest a person without a warrant if the peace officer has probable cause to believe that the person:

(1) committed a felony; or

(2) committed a misdemeanor, and the peace officer has probable cause to believe that the person:

(A) committed the misdemeanor in the peace officer's presence or view; or

(B) will not be apprehended unless immediately arrested; or

(C) will cause bodily injury to himself or another or damage to property unless immediately arrested.

Historical Note

Derivation:

C.C.P. arts. 14.01(b)-14.04
Model Prearraignment Code § 3.01(1)

Cross References

Arrest by citizen, see art. 14.04, as amended.
Arrest under warrant, see ch. 15.
Evidence not to be used, see art. 38.23.
Force justified in law enforcement, see R.P.C. ch. 9, subch. E.
Halt at roadblock, see art. 14.02, as amended.
"Peace officer" defined, see art. 2.12, as amended; R.P.C. § 1.07.
Prompt appearance before magistrate or issuance of citation, see art. 14.06, as amended.
Resisting arrest, see R.P.C. § 38.03.
Rights of officer, see art. 14.05, as amended.
Stopping person for investigation, see art. 14.01, as amended.

Committee Comment

Article 14.03, as amended, consolidates the authority of peace officers to arrest without warrant into a single provision. This article supercedes present Articles 14.01(b)-14.04, and the various warrantless arrest provisions in the Penal Code, and it eliminates some of the present restrictions on warrantless felony arrests.

Under art. 14.03, as amended, warrantless felony arrests are authorized whenever there is "probable cause to believe" the person committed a felony, the evidentiary standard required by the fourth amendment and Tex.Const. art. I, § 9, see Lacy v. State, 7 Tex.Ct.App. 403 (1879). Warrantless misdemeanor arrests are allowed only in the cases of necessity described in Subdivision (2). Subdivision (2)(A) maintains the traditional "in view" requirement for nonfelony arrests without warrant embodied in present art. 14.01(b); Subdivisions (B) and (C) broaden the present nonfelony warrantless arrest power by authorizing such arrests in two additional cases of necessity.

Art. 14.04. Arrest by Citizen

Any person may arrest an offender without a warrant if the offender committed a felony or an offense against the public peace in the presence or view of the person making the arrest.

Historical Note

Derivation:

C.C.P. art. 14.01(a)

Cross References

Arrest by peace officer, see art. 14.03, as amended.
Arrest under warrant, see ch. 15.
Evidence not to be used, see art. 38.23.
Force justified in law enforcement, see R.P.C. ch. 9, subch. E.
Prompt appearance before magistrate or issuance of citation, see art. 14.06, as amended.
Rights of person making arrest, see art. 14.05, as amended.

Committee Comment

Article 14.04, as amended, preserves the authority for a citizen's warrantless arrest located in present art. 14.01(a); the scope of this authority is unchanged.

Art. 14.05. Rights of Officer or Person Making Arrest

In each case enumerated where arrests may be lawfully made without warrant, the officer or person making the arrest is justified in adopting all the measures he might adopt in cases of arrest under warrant.

Historical Note

Derivation:

C.C.P. art. 14.05

Cross References

Arrest under warrant, see ch. 15.
Arrest without warrant by citizen, see art. 14.04, as amended.
Arrest without warrant by peace officer, see art. 14.03, as amended.
Force justified in law enforcement, see R.P.C. ch. 9, subch. E.
"Peace officer" defined, see art. 2.12, as amended; R.P.C. § 1.07.

Committee Comment

This art. 14.05 amends only the caption of present art. 14.05.

Art. 14.06. Prompt Appearance Before Magistrate or Issuance of Citation

(a) In each case enumerated in this Code, the person making the arrest shall take the person arrested or have him taken without unnecessary delay before the magistrate who may have ordered the arrest or before some magistrate of the county where the arrest was made without an order. The magistrate shall immediately perform the duties described in Article 15.17 of this Code.

(b) Instead of taking the person arrested before a magistrate, a peace officer may issue a citation to the person arrested to appear in court if the justice or corporation court has jurisdiction over the offense for which the person was arrested.

Historical Note

Derivation:

(a): C.C.P. art. 14.06
(b): New

Cross References

Arrest under warrant, see ch. 15.
Arrest with warrant, see arts. 14.03-14.04, as amended.
Duty of magistrates, see art. 2.10.
Magistrates identified, see art. 2.09.
"Peace officer" defined, see art. 2.12, as amended; R.P.C. § 1.07.
Traffic offenses, promise to appear in court, see R.C.S. art. 6701d, § 148.

Committee Comment

Paragraph (b) is added to present art. 14.06 to provide a discretionary alternative to the requirement of taking a person arrested for a minor offense before a magistrate "without unnecessary delay." This procedure is presently used in traffic offenses under the authority of R.C.S. art. 6701d, § 148.

Art. 14.07. Preemption

The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

Historical Note

Derivation:

New

Cross References

"Agency" defined, see R.P.C. § 1.07.
"Conduct" defined, see R.P.C. § 1.07.
"Government" defined, see R.P.C. § 1.07.
"Law" defined, see R.P.C. § 1.07.
Preemption generally, see R.P.C. § 1.03 comment.

Committee Comment

Muncipal ordinances presently conflict with and overlap state law in the area of arrest without warrant and stop and frisk authorization. Austin, Dallas, and Houston, for example, all have

ordinances authorizing arrest without warrant, including arrest of persons "found in suspicious places," even if there is no probable cause, see Austin Municipal Code § 1–11 (1967); Houston City Code §§ 30–15, 30–16, 32–1 (1968); Dallas City Code §§ 37–5, 37–6 (1967). Austin and Houston also have ordinances proscribing the refusal of an arrested person to give his name, or his giving a false name or address, see Austin Municipal Code § 23–3 (1967); Houston City Code § 32–7 (1968). Further, the Houston Code regulates the search of arrested persons for concealed weapons, § 30–17, and the Dallas City Code requires arrested persons to be brought before a magistrate, § 37–7. These ordinances exist even though state law clearly covers the conduct they regulate, e. g., Penal Code arts. 156, 487, 609, 642c(8), 646a(5), 652a(10), 666–4 (c)(2), 827f(2), 1377b(4), 1407a(3); C.C.P. arts. 2.24, 14.01–14.04. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, art. 14.07 makes clear the state intends to preempt the area of stop, halt, and arrest without warrant and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

The committee purposefully excluded loitering, vagrancy, and other vague and overbroad status-type offenses from the Revised Penal Code. C.C.P. ch. 14, as amended, together with R.P.C. ch. 42 (disorderly conduct) and § 30.03 (criminal trespass), make this type offense unnecessary, and art. 14.07 ensures that no governmental subdivision or agency may resurrect it. The article also prevents, of course, local laws that conflict with any provision of this chapter, e. g., redefining probable cause for arrest or suspicious circumstances authorizing stop and frisk, expanding the list of suspected offenses for which halt at a roadblock is authorized.

CHAPTERS 46 & 47. WEAPONS & GAMBLING

Conforming Amendments

CODE OF CRIMINAL PROCEDURE

Art. 18.02. When It May Issue

A search warrant may be issued:

(1) to discover property acquired by theft or in any other manner which makes its acquisition a penal offense;

(2) to search suspected places where it is alleged property so illegally acquired is commonly kept or concealed;

(3) to search places where it is alleged criminal instruments, as that term is defined in Penal Code Section 16.01, are manufactured or kept;

(4) to search places where it is alleged slot machines, gambling devices or records, or gambling proceeds, as those terms are defined in Penal Code Chapter 47, are kept;

(5) to search places where it is alleged arms and munitions are kept or prepared for the purpose of insurrection or riot, or where it is alleged that weapons prohibited by Penal Code Section 46.03 are manufactured or kept;

(6) to seize and bring before a magistrate any such property, instruments, slot machines, gambling devices or records, gambling proceeds, arms and munitions, or weapons.

Art. 18.06. Rules Applicable

The mode of proceeding, directed to be pursued in applying for a warrant to search for and seize stolen property, and the rules prescribed for officers in issuing such warrants and executing the same, the disposition of the property seized, and all other rules herein prescribed on the subject, shall apply and be pursued, when the property to be searched for is:

(1) slot machines, gambling devices or records, or gambling proceeds, as those terms are defined in Penal Code Chapter 47;

(2) criminal instruments, as that term is defined in Penal Code Section 16.01;

(3) weapons prohibited by Penal Code Section 46.03;

(4) property that was acquired in any manner in violation of any provision of the Penal Code.

Art. 18.31. Disposition of Gambling Paraphernalia, Prohibited Weapon, Criminal Instrument

(a) Following the final conviction of a person for possession of a slot machine or gambling device or record, for an offense involving a criminal instrument, or for an offense involving a prohibited weapon, the court entering the judgment of conviction shall order that the machine, device, record, instrument, or weapon be destroyed or forfeited to the State. If forfeited, the court shall order the contraband delivered to the State, any political subdivision of the State, or to any State institution or agency. If gambling proceeds were seized, the court shall order them forfeited to the State and shall transmit them to the grand jury of the county in which they were seized, for use in investigating alleged violations of the Penal Code, or to the State, any political subdivision of the State, or to any State institution or agency.

(b) If there is no prosecution or conviction following seizure, the magistrate to whom the return was made shall notify in writing the person found in possession of the alleged slot machine, gambling device or record, gambling proceeds, prohibited weapon, or criminal instrument to show cause why the property seized should not be destroyed or the proceeds forfeited.

(c) The magistrate shall include in the notice a detailed description of the property seized and the total amount of alleged gambling proceeds; the name of the person found in possession; the address where the property or proceeds were seized; and the date and time of the seizure.

(d) The magistrate shall send the notice by registered or certified mail, return receipt requested, to the person found in possession at the address where the property or proceeds were seized. If no one was found in possession, or the possessor's address is unknown, the magistrate shall post the notice on the courthouse door.

(e) Any person interested in the alleged slot machine, gambling device or record, gambling proceeds, prohibited weapon, or criminal instrument seized must appear before the magistrate on the twentieth day following the date the notice was mailed or posted. Failure to timely appear forfeits any interest the person may have in the property or proceeds seized, and no person after failing to timely appear may contest destruction or forfeiture.

(f) If a person timely appears to show cause why the property or proceeds should not be destroyed or forfeited, the magistrate shall conduct a hearing on the issue and determine the nature of property or proceeds and the person's interest therein. Unless the person proves by a preponderance of the evidence that the property or proceeds is not a slot machine, gambling device or record, gambling proceeds, prohibited weapon, or criminal instrument, and that he is entitled to possession, the magistrate shall dispose of the property or proceeds in accordance with Paragraph (a).

(g) For purposes of this article:

(1) "criminal instrument" has the meaning defined in Penal Code Section 16.01;

(2) "gambling device or record" has the meaning defined in Penal Code Section 47.01;

(3) "gambling proceeds" has the meaning defined in Penal Code Section 47.01;

(4) "prohibited weapon" means a weapon identified in Penal Code Section 46.03;

(5) "slot machine" has the meaning defined in Penal Code Section 47.06.

Art. 18.32. Disposition of Certain Weapons

(a) Weapons seized in connection with an offense involving the use of a deadly weapon or an offense under Penal Code Section 46.02 shall be held by the law enforcement agency making the seizure, subject to the following provisions, unless:

(1) the weapon is a prohibited weapon identified in Penal Code Section 46.03, in which event Article 18.31 (disposition of gambling paraphernalia, prohibited weapon, criminal instrument) applies; or

(2) the weapon is alleged to be stolen property, in which event Chapter 47 applies.

(b) When a person seizes a weapon described in Paragraph (a), and the seizure is not made pursuant to a search or arrest warrant, the person shall prepare and deliver to a magistrate a written inventory of each weapon seized.

(c) If there is no prosecution or conviction for an offense involving the weapon seized, the magistrate to whom the seizure was reported shall notify in writing the person found in possession that he is entitled to the weapon upon request to the law enforcement agency holding the weapon. If the weapon is not requested within sixty days after notification, the magistrate may order the weapon destroyed or forfeited to the state for use by the law enforcement agency holding the weapon.

(d) A person convicted under Penal Code Section 46.02(a) (1) (possession of firearm, knife, club) is entitled to the weapon seized upon request to the law enforcement agency holding the weapon. However, the court entering the judgment of conviction may order the weapon destroyed or forfeited to the state for use by the law enforcement agency holding the weapon if:

(1) the person does not request the weapon within sixty days after his release from jail or the date of the judgment of conviction if he was not imprisoned; or

(2) the person has been convicted two or more times before under Penal Code Section 46.02(a) (1).

(e) If the person found in possession of a weapon is convicted of an offense involving the use of a deadly weapon or under Penal Code Section 46.02(a) (2) (possession of deadly weapon), the court entering judgment of conviction may order destruction of the weapon or forfeiture to the state for use by the law enforcement agency holding the weapon.

MISCELLANEOUS CONFORMING AMENDMENTS

CHAPTER 1

GENERAL PROVISIONS

CODE OF CRIMINAL PROCEDURE

Art. 2.12. Who Are Peace Officers

A peace officer is an officer, employee, or agent of government who has a duty imposed by statute:

(1) to maintain public order; or

(2) to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses; or

(3) to investigate the commission or suspected commission of offenses.

Art. 3.01. Words and Phrases

All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specially defined.

REVISED CIVIL STATUTES

Art. 1011. Powers

The City Council, or other governing body, shall have power to pass, publish, amend or repeal all ordinances, rules and police regulations, not inconsistent with the Constitution or general laws of this State, for the good government, peace and order of the City and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by this title in the corporation, the city government or in any department or office thereof; to enforce the observance of all such rules, ordinances and police regulations, and to punish violations thereof. No fine or penalty shall exceed Two Hundred Dollars ($200).

CHAPTER 6

CULPABILITY GENERALLY

CODE OF CRIMINAL PROCEDURE

Art. 21.15. Must Allege Acts of Recklessness or Criminal Negligence

Whenever recklessness or criminal negligence enters into or is a part or element of any offense, or it is charged that the accused acted

recklessly or with criminal negligence in the commission of an offense, the complaint, information, or indictment in order to be sufficient in any such case must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness or criminal negligence, and in no event shall it be sufficient to allege merely that the accused, in committing the offense, acted recklessly or with criminal negligence.

CHAPTER 7

CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

SUBCHAPTER A. COMPLICITY

CODE OF CRIMINAL PROCEDURE

Art. 18.10. Warrant to Arrest May Issue With Search Warrant

The magistrate, at the time of issuing a search warrant, may also issue a warrant for the arrest of the person accused of having stolen the property, or of having concealed the same, or of having in his possession or charge property concealed at a suspected place, or of having possession of implements designed for use in the commission of the offense of forgery or burglary, or of having the charge of arms or munitions prepared for the purpose of insurrection, or of having prepared such arms or munitions, or who may be, in any legal manner, accused of being a coparty to any offense above enumerated.

Art. 49.16. If Slayer Arrested

If it be found by the justice, upon evidence adduced at the inquest, that a person already arrested did in fact kill the deceased, or was a party to the death, the justice may, according to the facts of the case, commit him to jail or require him to execute a bail bond with security for his appearance before the proper court to answer for the offense.

Art. 49.18. Warrant of Arrest

When by the evidence adduced before a justice holding an inquest, it is found that any person not in custody killed the deceased, or was a party to the death, the justice shall forthwith issue his warrant of arrest to the sheriff or other peace officer, commanding him to arrest the person accused, and bring him before such justice, or before some other magistrate named in the writ.

Art. 50.03. Verdict

The jury after inspecting the place in question and after hearing the testimony, shall deliver to the justice holding such inquest its writ-

ten signed verdict in which it shall find and certify how and in what manner such fire happened or was attempted, and all the circumstances attending the same, and who are guilty thereof, and in what manner. If such a jury is unable to so ascertain it shall find and certify accordingly.

SUBCHAPTER B. CORPORATIONS AND ASSOCIATIONS

Art. 16.05. Witness Placed Under Rule

The magistrate shall, if requested by the accused or his counsel, or by the prosecutor, have all the witnesses placed in charge of an officer, so that the testimony given by any one witness shall not be heard by any of the others. However, if the defendant is a corporation or association, it may designate one representative in addition to counsel to assist at the examining trial, which representative may not be placed under the rule.

Art. 29.01. By Operation of Law

Criminal actions are continued by operation of law if:

1. An individual defendant has not been arrested;

2. A defendant corporation or association has not been served with summons; or

3. There is not sufficient time for trial at that term of court.

Art. 36.03. Witness Placed Under Rule

At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule. However, if the defendant is a corporation or association it may designate one representative in addition to counsel to aid in the presentation of its case, which representative may not be placed under the rule.

Art. 40.03. Grounds for New Trial in Felony

New trials, in cases of felony, shall be granted for the following causes, and for no other:

1. Where the defendant is an individual and has been tried in his absence, or has been denied counsel.

2. Where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant.

3. Where the verdict has been decided by lot, or in any other manner than by a fair expression of opinion by the jurors.

4. Where a juror has received a bribe to convict, or has been guilty of any other corrupt conduct.

5. Where any material witness of the defendant has, by force, threats or fraud, been prevented from attending the court, or where any written evidence, tending to establish the innocence of the defendant, has been intentionally destroyed or removed so that it could not be produced upon the trial.

6. Where new testimony material to the defendant has been discovered since the trial. A motion for a new trial on this ground shall be governed by the rules which regulate civil suits.

7. Where the jury, after having retired to deliberate upon a case, has received other testimony; or where a juror has conversed with any person in regard to the case; or where any juror at any time during the trial or after retiring for deliberation, may have become so intoxicated as to render it probable his verdict was influenced thereby. The mere drinking of liquor by a juror shall not be sufficient ground for a new trial.

8. Where, from the misconduct of the jury, the court is of opinion that the defendant has not received a fair and impartial trial. It shall be competent to prove such misconduct by the voluntary affidavit of a juror; and the verdict may, in like manner, be sustained by such affidavit.

9. Where the verdict is contrary to law and evidence. A verdict is not contrary to the law and evidence, within the meaning of this provision, where the defendant is found guilty of an offense of inferior grade to, but of the same nature as, the offense proved.

10. Should the jury assess the death penalty when the State has made known, under the provisions of this Code, that it will not seek the death penalty, the court shall, upon written motion of the defendant, immediately grant a new trial.

Art. 43.01. Discharging Judgment for Fine

(a) When the sentence against an individual defendant is for fine and costs he shall be discharged from the same:

(1) when the amount thereof has been fully paid; or

(2) when remitted by the proper authority; or

(3) when he has remained in custody for the time required by law to satisfy the amount thereof.

(b) When the sentence against a defendant corporation or association is for fine and costs, it shall be discharged from same:

(1) when the amount thereof has been fully paid; or

(2) when the execution against the corporation or association has been fully satisfied; or

(3) when the judgment has been fully satisfied in any other manner.

Committee Comment

These five articles are amended to conform them to the concept of corporate criminal responsibility. The amendment to Articles 16.05 and 36.03 ensures that a defendant corporation or association may have at least one of its agents in court during the trial to assist counsel.

The first subdivision of Articles 29.01 and 40.03 is amended to distinguish between individual and legal entity defendants so that the nonarrest or absence of the latter will not automatically require a continuance or new trial.

Paragraph (b) is added to Article 43.01 to provide for discharging fines assessed against corporations and associations.

BUSINESS CORPORATION ACT

Art. 7.01. Involuntary Dissolution

* * * * * * * * * *

F. When a corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense in the conduct of the affairs of the corporation, the Attorney General may file an action to involuntarily dissolve the corporation in a district court of the county in which the registered office of the corporation is situated or in the district court of Travis County. The court may dissolve the corporation involuntarily if it is established that:

(1) The corporation, or a high managerial agent acting in behalf of the corporation, has engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such dissolution.

G. Article 7.02 of this Act does not apply to Section F of this Article.

Art. 8.16. Revocation of Certificate of Authority

* * * * * * * * * *

F. When a foreign corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense

committed in the conduct of the affairs of the foreign corporation, the Attorney General may file an action to revoke the certificate of authority of the foreign corporation to transact business in this State in a district court of the county in which the registered office of the foreign corporation in this State is situated or in a district court of Travis County. The court may revoke the foreign corporation's certificate of authority if it is established that:

(1) The foreign corporation, or a high managerial agent acting in behalf of the foreign corporation, has engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such revocation.

G. Article 7.02 of this Act does not apply to Section F of this Article.

NON-PROFIT CORPORATION ACT

Art. 1396—7.01. Involuntary Dissolution

* * * * * * * * * *

F. When a corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense in the conduct of the affairs of the corporation, the Attorney General may file an action to involuntarily dissolve the corporation in a district court of the county in which the registered office of the corporation is situated or in a district court of Travis County. The court may dissolve the corporation involuntarily if it is established that:

(1) The corporation, or a high managerial agent acting in behalf of the corporation, has engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such dissolution.

G. Article 1396–7.02 does not apply to Section F of this Article.

Art. 1396—8.15. Revocation of Certificate of Authority

* * * * * * * * * *

F. When a foreign corporation is convicted of a criminal offense, or when a high managerial agent is convicted of a criminal offense committed in the conduct of the affairs of the foreign corporation, the Attorney General may file an action to revoke the certificate of authority of the foreign corporation to conduct affairs in this State in a district court of the county in which the registered office of the foreign corporation in this State is situated or in a district court of Travis

County. The court may revoke the foreign corporation's certificate of authority if it is established that:

(1) The foreign corporation, or a high managerial agent acting in behalf of the foreign corporation, has engaged in a persistent course of criminal conduct; and

(2) To prevent future criminal conduct of the same character, the public interest requires such revocation.

G. Article 1396—7.02 does not apply to Section F of this Article.

Historical Note

Derivation:

New
Cf. Model P.C. § 6.04(2)

Cross References

Criminal responsibility of corporation and association, see R.P.C. §§ 7.22, 7.23.
Dissolution or revocation in addition to criminal punishment, see R.P.C. § 12.05.
Notification of attorney general of conviction of corporation or association, see C.C.P. art. 17A.09, as amended.
Procedure for prosecuting corporation and association, see C.C.P. ch. 17A, as amended.
Punishment authorized for corporation and association, see R.P.C. § 12.51.

Committee Comment

Involuntary dissolution of a corporation or association or termination of the right to transact business is superficially similar to the death penalty. In fact, however, there is little comparability because the individuals involved can usually form a new corporation or association. Nevertheless, involuntary dissolution may be a deterrent since it may result in the loss of valuable good will and contract rights.

The amendments to the Code of Criminal Procedure provide for notification of the attorney general of a conviction of a corporation or association. It is discretionary with the attorney general whether or not he proceeds to seek the involuntary dissolution of the corporation or association.

Involuntary dissolution is in addition to the punishments authorized for corporations and associations in the Revised Penal Code.

CHAPTER 8

GENERAL DEFENSES TO CRIMINAL RESPONSIBILITY

CODE OF CRIMINAL PROCEDURE

Art. 26.13. Plea of Guilty

If the defendant pleads guilty, or enters a plea of nolo contendere, he shall be admonished by the court of the consequences; and neither of such pleas shall be received unless it plainly appears that he is mentally competent, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt.

Art. 27.17. Plea of Not Guilty Construed

The plea of not guilty shall be construed to be a denial of every material allegation in the indictment or information. Under this plea, evidence of every fact whatever tending to acquit the defendant of the accusation may be introduced, except such facts as are proper for a special plea under Article 27.05.

Art. 42.07. Reasons to Prevent Sentence

Before pronouncing sentence, the defendant shall be asked whether he has anything to say why the sentence should not be pronounced against him. The only reasons which can be shown, on account of which sentence cannot be pronounced, are:

1. That the defendant has received a pardon from the proper authority, on the presentation of which, legally authenticated, he shall be discharged.

2. That the defendant is mentally incompetent.

3. Where there has not been a motion for a new trial or a motion in arrest of judgment made, the defendant may answer that he has good grounds for either or both of these motions and either or both motions may be immediately entered and disposed of, although more than ten days may have elapsed since the rendition of the verdict; and

4. When a person who has been convicted escapes after conviction and before sentence and an individual supposed to be the same has been arrested he may before sentence is pronounced, deny that he is the person convicted, and an issue be accordingly tried before a jury as to his identity.

Art. 45.31. Defendant Shall Plead

After the jury is impaneled, or after the defendant has waived trial by jury, the defendant may plead guilty, not guilty, not guilty by reason of insanity, or may enter a plea of nolo contendere, or the special plea named in the succeeding Article.

MENTAL HEALTH CODE

Art. 5547—68. Admission and Detention

* * * * * * * * * *

(c) This Code does not affect admissions under:

(1) Acts 1951, Fifty-second Legislature, Chapter 398 (compiled as Texas Civil Statutes, Article 3196c (Vernon's 1952 Supplement); or

(2) the Code of Criminal Procedure.

Art. 5547—69. Persons Charged with Criminal Offense

The sections of this Code concerning the discharge of a patient are not applicable to a person admitted under the Code of Criminal Procedure.

CHAPTER 9

JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY

CODE OF CRIMINAL PROCEDURE

Art. 6.05. Duty of Peace Officer as to Threats

It is the duty of every peace officer, when he may have been informed in any manner that a threat has been made by one person to do some injury to himself or to the person or property of another, to prevent the threatened injury, if within his power; and, in order to do this, he may call in aid any number of citizens of his county.

Art. 6.06. Peace Officer to Prevent Injury

Whenever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another or to injure himself, it is his duty to prevent it; and, for this purpose the peace officer may summon any number of citizens of his county to his aid.

CONFORMING AMENDMENTS

Art. 16.21. Duty of Sheriff as to Prisoners

Every sheriff shall keep safely a person committed to his custody. He shall use no cruel or unusual means to secure this end. He may summon a guard of sufficient number, in case it becomes necessary to prevent an escape from jail, or the rescue of a prisoner.

Art. 18.17. Power of Officer Executing Warrant

In the execution of a search warrant, the officer may call to his aid any number of citizens in his county, who shall be bound to aid in the execution of the same.

MENTAL HEALTH CODE

Art. 5547—18. Liability

All persons acting in good faith, reasonably and without negligence in connection with the examination, certification, apprehension, custody, transportation, detention, treatment or discharge of any person, or in the performance of any other act required or authorized by this Code, shall be free from all civil liability by reason of such action.

REVISED CIVIL STATUTES

Art. 5765. General Provisions

Discharge of Duty

Sec. 8. Members of the State Military Forces ordered into active service of the State by proper authority shall not be liable civilly for any act or acts done by them while in the discharge of their duty. When a suit shall be commenced in any court by any person against any officer of the State Military Forces for any act done by such officer in his official capacity in the discharge of his duty, or against any person acting under the authority or order of any such officer, or by virtue of any warrant issued by him pursuant to the law, the court shall require the person instituting the suit to file security for the payment of costs that may be awarded to the defendant therein, and the defendant in all cases may make a general denial and give the special matter in evidence. In case the plaintiff shall be nonsuited, or have a verdict of judgment rendered against him, the defendant shall recover treble costs.

CHAPTER 12

SENTENCING

CODE OF CRIMINAL PROCEDURE

Art. 27.02. Defendant's Pleadings

On the part of the defendant, the following are the only pleadings:

(1) The motion to set aside the indictment or information.

(2) A special plea setting forth one or more facts as cause why the defendant ought not to be tried upon the accusation presented against him.

(3) An exception to the indictment or information for some matter of form or substance.

(4) A plea of guilty.

(5) A plea of not guilty.

(6) A plea of not guilty by reason of insanity, which includes the plea of not guilty.

(7) A plea of nolo contendere. The legal effect of such plea shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

(8) A motion for jury probation.

Art. 27.13. Plea of Guilty or Nolo Contendere in Felony

A plea of "guilty" or a plea of "nolo contendere" in a felony case must be made in open court by the defendant in person; and the proceedings shall be as provided in Articles 26.13 and 42.02.

Art. 27.14. Plea of Guilty or Nolo Contendere in Misdemeanor

A plea of "guilty" or "nolo contendere" in a misdemeanor case may be made either by the defendant or his counsel in open court, and the proceedings shall then be as provided in Articles 26.13 and 42.02. In a misdemeanor case arising out of a moving traffic violation for which the maximum possible punishment is by fine only, payment of a fine, or an amount accepted by the court, constitutes a finding of guilty in open court as though a plea of nolo contendere had been entered by the defendant.

Art. 36.01. Order of Proceeding in Trial

A jury being impaneled in any criminal action, the cause shall proceed in the following order:

(1) The indictment or information shall be read to the jury by the attorney prosecuting.

(2) The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be stated.

(3) The prosecuting attorney shall state to the jury the nature of the accusation and the facts which are expected to be proved by the state in support thereof.

(4) The testimony on the part of the state shall be offered.

(5) The nature of the defenses relied upon and the facts expected to be proved in their support shall be stated by the defendant's counsel.

(6) The testimony on the part of the defendant shall be offered.

(7) Rebutting testimony may be offered on the part of each party.

(8) In the event of a finding of guilty, the trial shall then proceed as set forth in Article 42.02.

Art. 42.01. Judgment

(a) A "judgment" is the declaration of the court entered of record showing:

(1) the title and number of the case;

(2) that the case was called for trial and that the parties appeared;

(3) the plea of the defendant;

(4) the selection, impaneling and swearing of the jury;

(5) the submission of the evidence;

(6) that the jury was charged by the court;

(7) the return of the verdict;

(8) the verdict;

(9) in the case of conviction, that it is considered by the court that the defendant is adjudged to be guilty of the offense as found by the jury; or in case of acquittal, that the defendant be discharged.

(b) The provisions of this Article shall apply to both felony and misdemeanor cases.

Art. 42.04. Sentence when Appeal is Taken

When an appeal is taken from a death penalty, sentence shall not be pronounced, but shall be suspended until the decision of the Court of Criminal Appeals has been received. In all other cases, except where imposition of sentence has been suspended in probation cases, sentence shall be pronounced before the appeal is taken.

Art. 42.06. Sentencing Nunc Pro Tunc

If there is a failure from any cause whatever to enter judgment and pronounce sentence, the judgment may be entered and sentence pronounced at any subsequent time, unless a new trial has been granted, or the judgment arrested, or an appeal has been taken.

Art. 42.12. Adult Probation and Parole Law

* * * * * * * * * *

Sec. 24. When any prisoner who has been paroled has complied with the rules and conditions governing his parole until the end of the term to which he was sentenced, and without a revocation of his parole, the Board shall report such fact to the Governor prior to the issuance of the final order of discharge, together with is recommendation as to whether the prisoner should be restored to citizenship.

Art. 42.15. Fine

When the court sentences defendant to pay a fine, the sentence shall require the defendant to pay the fine to the state.

Art. 42.16. Costs

(a) Unless the court for good cause provides otherwise, each sentence shall require the defendant to pay all costs of prosecution.

(b) The court may order all or part of the costs paid in installments or collected by execution against the defendant's property in the same manner as a judgment in a civil suit.

Art. 43.03. Pay or Jail

(a) If a defendant is sentenced to pay a fine or costs or both and he defaults in payment, the court may order him imprisoned in jail until discharged as provided by law. A certified copy of the judgment, sentence, and order is sufficient to authorize such imprisonment.

(b) A term of imprisonment for default in payment of fine or costs or both may not exceed the maximum term of imprisonment authorized

for the offense for which defendant was sentenced to pay the fine or costs or both.

(c) If a defendant is sentenced both to imprisonment and to pay a fine or costs or both, and he defaults in payment of either, a term of imprisonment for the default, when combined with the term of imprisonment already assessed, may not exceed the maximum term of imprisonment authorized for the offense for which defendant was sentenced.

Art. 43.04. If Defendant is Absent

If a defendant is sentenced in his absence to pay a fine or costs or both, the court may order a capias issued for his arrest. The sheriff shall execute the capias by bringing the defendant before the court or by placing the defendant in jail until he can be brought before the court.

Art. 43.05. Capias Shall Recite What

Where such capias issues, it shall state the rendition and amount of the judgment and sentence, and command the sheriff to bring the defendant before the court or place him in jail until he can be brought before the court.

Art. 44.08. Notice of Appeal

It shall be necessary for defendant, as a condition of perfecting an appeal to the Court of Criminal Appeals, to give notice of appeal. This notice may be given orally in open court or may be in writing filed with the clerk. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment, from the sentence, or from both, to the Court of Criminal Appeals.

Art. 44.24. Presumptions on Appeal; Written Opinion

(a) The court shall presume that the venue was proved in the court below; that the jury was properly impaneled and sworn; that the defendant was arraigned; that he pleaded to the indictment; that the court's charge was certified by the judge and filed by the clerk before it was read to the jury, unless such matters were made an issue in the court below, or it otherwise affirmatively appears to the contrary from the record.

(b) In each case by it decided, the Court of Criminal Appeals shall deliver a written opinion, setting forth in intelligible language the reason for such decision.

Art. 44.32. Bail After Reversal

When a felony case is reversed and remanded either for a new trial or for a new hearing on the sentence, the defendant shall be released from custody upon his giving bail as in other cases when he is entitled to bail. The clerk of the appellate court shall send the officer having custody of the defendant an order to that effect.

Art. 45.34. Plea of Guilty

Proof of the offense may be heard upon a plea of guilty and a plea of nolo contendere and the punishment assessed by the court.

Art. 45.42. Verdict

When the jury has agreed upon a verdict, it shall bring the same into court; and the justice shall see that it is in proper form and shall enter it upon his docket and render the proper judgment thereon.

Art. 45.50. Sentence

When the justice sentences the defendant to pay a fine, the sentence shall require the defendant to pay the fine to the state.

Art. 45.52. Costs

(a) Unless the justice for good cause provides otherwise, each sentence shall require the defendant to pay all costs of prosecution.

(b) The justice may order all or part of the costs paid in installments or collected by execution against the defendant's property in the same manner as a judgment in a civil suit.

CHAPTER 25

OFFENSES AGAINST THE FAMILY

CODE OF CRIMINAL PROCEDURE

Art. 38.11. Husband or Wife as Witness

Neither husband nor wife shall, in any case, testify as to communications made by one to the other while married. Neither husband nor wife shall, in any case, after the marriage relation ceases, be made witnesses as to any communication made while the marriage relation existed except in a case where one or the other is on trial for an offense and a declaration or communication made by the wife to the husband or by the husband to the wife goes to extenuate or justify

the offense. The husband and wife may, in all criminal actions, be witnesses for each other, but except as hereinafter provided, they shall in no case testify against each other in a criminal prosecution. However, a wife or husband may voluntarily testify against each other in any case for an offense involving any grade of assault or violence committed by one against the other or against any child of either under sixteen years of age, or in any case where either is charged with incest of a child of either, or in any case where either is charged with bigamy, or in any case where either is charged with interference with child custody, or in any case where either is charged with nonsupport of his or her spouse or minor child.

CHAPTER 32

FRAUD

CODE OF CRIMINAL PROCEDURE

Art. 18.26. Shall Discharge Defendant

If the magistrate be not satisfied, upon investigation, that there was good ground for the issuance of the warrant, he shall discharge the defendant, and order restitution of the property taken from him, except implements which appear to be designed for forging or burglary. In such case, the implements shall be kept by the sheriff subject to the order of the proper court.

CHAPTER 37

PERJURY AND OTHER FALSIFICATION

CODE OF CRIMINAL PROCEDURE

Art. 20.16. Oaths to Witnesses

The following oath shall be administered by the foreman, or under his direction, to each witness before being interrogated: "You solemnly swear that you will not divulge, either by words or signs, any matter about which you may be interrogated, and that you will keep secret all proceedings of the grand jury which may be had in your presence, and that you will true answers make to such questions as may be propounded to you by the grand jury, or under its direction, so help you God." Any witness who divulges any matter about which he is interrogated, or any proceedings of the grand jury had in his presence shall be liable to a fine as for contempt of court, not exceeding five hundred dollars, and to imprisonment not exceeding thirty days.

Art. 21.14. Perjury and Aggravated Perjury

An indictment for perjury or aggravated perjury need not charge the precise language of the false statement, but may state the substance of the same, and no such indictment shall be held insufficient on account of any variance which does not affect the subject matter or general import of such false statement; and it is not necessary in such indictment to set forth the pleading, records or proceeding with which the false statement is connected, nor the commission or authority of the court or person before whom the false statement was made; but it is sufficient to state the name of the court or public servant by whom the oath was administered with the allegation of the falsity of the matter on which the perjury or aggravated perjury is assigned.

Art. 38.18. Perjury and Aggravated Perjury

(a) No person may be convicted of perjury or aggravated perjury if proof that his statement is false rests solely upon the testimony of one witness other than the defendant.

(b) Paragraph (a) does not apply to prosecutions for perjury or aggravated perjury involving inconsistent statements.

CHAPTER 42

DISORDERLY CONDUCT AND RELATED OFFENSES

CODE OF CRIMINAL PROCEDURE

Art. 15.22. When a Person is Arrested

Except as provided in Articles 14.01 (stop and frisk) and 14.02 (halt and search at roadblock), a person is arrested when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer or person arresting without a warrant.

CHAPTER 47

GAMBLING

REVISED CIVIL STATUTES

Art. 4664. Nuisance

Any hotel, rooming house or boarding house, country club, garage, rent car stand or other place to which the public commonly resort for

board or lodging or commonly congregate for business or pleasure, where intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away, or to which persons resort in assembling of two or more persons to the room for the purpose of drinking intoxicating liquor, or where intoxicating liquors are furnished to minors or to students or any educational institution, or where persons habitually resort for the purpose of prostitution or to gamble as prohibited by the Penal Code, is hereby declared to be a common nuisance. Any person who knowingly maintains such a place is guilty of maintaining a nuisance.

Art. 4667. Gambling and Prostitution Houses

(a) The habitual use, actual, threatened or contemplated, of any premises, place or building or part thereof, for any of the following uses shall be enjoined at the suit of either the State or a citizen thereof:

(1) for gambling or keeping any gambling device or record as prohibited by the Penal Code;

(2) for promoting or compelling prostitution as prohibited by the Penal Code.

(b) Any person who may use or be about to use, or who may be a party to the use of any such premises for any purpose mentioned in this Article may be made a party defendant in such suit. The Attorney General or any District or County Attorney may bring and prosecute all suits that either may deem necessary to enjoin such uses, and need not verify the petition; or any citizen of this State may sue in his own name and shall not be required to show that he is personally injured by the acts complained of.

LIMITATIONS, VENUE, AND LESSER INCLUDED OFFENSES

CODE OF CRIMINAL PROCEDURE

CHAPTER TWELVE

LIMITATION

Art.
12.01. Felonies.
12.02. Misdemeanors.
12.03. Facilitation, attempt, conspiracy, solicitation.
12.04. Computation.
12.05. Absence from State and time of pendency of indictment, etc., not computed.
12.06. An indictment is "presented," when.
12.07. An information is "presented," when.

Article 12.01. Felonies

Except as provided in Article 12.03, felony indictments may be presented within these limits, and not afterward:

(1) no limitation: murder and manslaughter.

(2) ten years from the date of the commission of the offense:

(A) theft of any estate, real, personal or mixed, by an executor, administrator, guardian or trustee, with intent to defraud any creditor, heir, legatee, ward, distributee, beneficiary or settlor of a trust interested in such estate;

(B) theft by a public servant of government property over which he exercises control in his official capacity;

(C) forgery or the uttering, using, or passing of forged instruments.

(3) five years from the date of the commission of the offense:

(A) theft, burglary, robbery;

(B) arson.

(4) one year from the date of the commission of the offense: any felony in Penal Code Chapter 21 (sexual offenses).

(5) three years from the date of the commission of the offense: all other felonies.

Art. 12.02. Misdemeanors

An indictment or information for any misdemeanor may be presented within two years from the date of the commission of the offense, and not afterward.

Art. 12.03. Facilitation, Attempt, Conspiracy, Solicitation

(a) The limitation period for facilitation of a felony is the same as that of the felony facilitated.

(b) The limitation period for criminal attempt is the same as that of the offense attempted.

(c) The limitation period for criminal conspiracy is the same as that of the object offense of the conspiracy.

(d) The limitation period for criminal solicitation is the same as that of the felony solicited.

Art. 12.04. Computation

The day on which the offense was committed and the day on which the indictment or information is presented shall be excluded from the computation of time.

Art. 12.05. Absence from State and Time of Pendency of Indictment, etc., not Computed

(a) The time during which the accused is absent from the State shall not be computed in the period of limitation.

(b) The time during the pendency of indictment, information, or complaint shall not be computed in the period of limitation.

(c) The term "during the pendency," as used herein, means that period of time beginning with the day the indictment, information, or complaint is filed in a court of competent jurisdiction, and ending with the day such accusation is, by an order of a trial court having jurisdiction thereof, determined to be invalid for any reason.

Art. 12.06. An Indictment is "Presented," When

An indictment is considered as "presented" when it has been duly acted upon by the grand jury and received by the court.

Art. 12.07. An Information is "Presented," When

An information is considered as "presented" when it has been filed by the proper officer in the proper court.

Historical Note

Derivation:
C.C.P. ch. 12

Cross References

Arson, see R.P.C. § 28.02.
Attempt, see R.P.C. § 15.01.
Burglary, see R.P.C. § 30.02.
Computation of time, see R.C.S. art. 5429b-2, § 2.04.
Conspiracy, see R.P.C. § 15.02.
Facilitation, see R.P.C. § 7.03.
"Felony" defined, see R.P.C. § 1.07.
Forgery, see R.P.C. § 32.21.
Manslaughter, see R.P.C. § 19.03.
"Misdemeanor" defined, see R.P.C. § 1.07.
Murder, see R.P.C. § 19.02.
Robbery, see R.P.C. ch. 29.
Solicitation, see R.P.C. § 15.03.
Theft, see R.P.C. ch. 31.

Committee Comment

This chapter of the Code of Criminal Procedure is revised to implement changes made in the Revised Penal Code. Most of the present limitations law is preserved, however, and this comment merely identifies the few changes made.

Manslaughter as well as murder is without limitation, and this continues the present law with respect to murder without malice, Ex parte Conway, 37 S.W.2d 1017 (Tex.Crim.App.1931). (The pre-1927 manslaughter offense had a three-year limitation, White v. State, 4 Tex.Ct.App. 488 (1878), but the committee rejected this as too short.)

The limitation on treason is omitted since it is no longer an offense under the Revised Penal Code. Counterfeiting is included in the definition of forgery and therefore covered by the ten-year limitation.

Theft by a public servant is added to the ten-year limitation list as another instance of theft by a fiduciary which is easily concealable. The five-year limitation on theft, art. 12.01(c)(1), refers only to felony theft, since art. 12.01 deals only with felonies; likewise, theft by a public servant refers only to felony thefts.

The present law's one-year limitation on rape is expanded to cover all felony offenses in the new code's chapter on sexual offenses, since the same policy considerations apply.

Article 12.03 ties the limitation for attempt, conspiracy, facilitation, and solicitation to the object offense. Otherwise the inchoate or complicitous offense might be barred while the object offense is not, thus hampering the process of plea negotiation.

CHAPTER THIRTEEN

VENUE

Article
13.01. Offenses committed outside this State.
13.02. Forgery.
13.03. Perjury.
13.04. On the boundary of two counties.
13.05. Criminal homicide committed outside this State.
13.06. Committed on a boundary stream.
13.07. Injured in one county and dying in another.
13.08. Committed on a boundary.
13.09. Theft.
13.10. Hindering secured creditors.
13.11. Persons acting under authority of this State.
13.12. On vessels.
13.13. False imprisonment, kidnapping.
13.14. Conspiracy.
13.15. Bigamy.
13.16. Rape.
13.17. Criminal nonsupport.
13.18. Proof of venue.
13.19. Other offenses.

Article 13.01. Offenses Committed Outside this State

Offenses committed wholly or in part without this State, under circumstances that give this State jurisdiction to prosecute the offender, may be prosecuted in any county in which the offender is found, or in any county in which an element of the offense occurs.

Art. 13.02. Forgery

Forgery may be prosecuted in any county where the writing was forged, or where the same was used or passed, or attempted to be used or passed, or deposited or placed with another person, firm, association, or corporation either for collection or credit for the account of any person, firm, association or corporation. All forging and uttering, using or passing of forged instruments in writing which concern or affect the title to land in this State may be prosecuted in Travis County, or in the county in which such land, or any part thereof, is situated.

Art. 13.03. Perjury

Perjury and aggravated perjury may be prosecuted in the county where committed, or in the county where the false statement is used or attempted to be used.

Art. 13.04. On the Boundary of Two Counties

An offense committed on the boundary of any two counties, or within four hundred yards thereof, may be prosecuted and punished in either county.

Art. 13.05. Criminal Homicide Committed Outside This State

The offense of criminal homicide committed wholly or in part without this State, under circumstances that give this State jurisdiction to prosecute the offender, may be prosecuted in the county where the injury was inflicted, or in the county where the offender was located when he inflicted the injury, or in the county where the victim died or the body was found.

Art. 13.06. Committed on a Boundary Stream

If an offense be committed upon any river or stream, the boundary of this State, it may be prosecuted in the county the boundary of which is upon such stream or river, and the county seat of which is nearest the place where the offense was committed.

Art. 13.07. Injured in One County and Dying in Another

If a person receives an injury in one county and dies in another by reason of such injury, the offender may be prosecuted in the county where the injury was received or where the death occurred, or in the county where the dead body is found.

Art. 13.08. Committed on a Boundary

Where a river or other stream or highway is the boundary between two counties, any offense committed on such river, stream or highway at a place where it is such boundary, is punishable in either county.

Art. 13.09. Theft

Where property is stolen in one county and carried off by the offender to another, the offender may be prosecuted either in the county where he took the property or in any other county through or into which he may have carried it.

Art. 13.10. Hindering Secured Creditors

If secured property is taken from one county and unlawfully disposed of in another county or state, the offender may be prosecuted

either in the county in which such property was disposed of, or in the county from which it was removed, or in the county in which the security agreement is filed.

Art. 13.11. Person Acting Under Authority of this State

An offense committed without this State by a commissioner of deeds, or other officer acting under the authority of this State, under circumstances that give this State jurisdiction to prosecute the offender, may be prosecuted in any county of this State.

Art. 13.12. On Vessels

An offense committed on board a vessel which is at the time upon any navigable water within the boundaries of this State, may be prosecuted in any county through which the vessel is navigated in the course of her voyage, or in the county where the voyage commences or terminates.

Art. 13.13. False Imprisonment, Kidnapping

Venue for false imprisonment and kidnapping belongs either to the county in which the offense was committed, or to any county through, into or out of which the person falsely imprisoned or kidnapped may have been taken.

Art. 13.14. Conspiracy

Criminal conspiracy may be prosecuted in the county where the conspiracy was entered into, or in the county where the conspiracy was agreed to be executed. If a conspiracy was entered into without this State under circumstances that give this State jurisdiction to prosecute the offender, the offender may be prosecuted in the county where the conspiracy was agreed to be executed, or in the county where any one of the conspirators was found, or in Travis County.

Art. 13.15. Bigamy

Bigamy may be prosecuted in the county where the bigamous marriage occurred or in any county in this State in which the parties to such bigamous marriage may live or cohabit together as man and wife.

Art. 13.16. Rape

Rape may be prosecuted in the county in which it is committed, or in any county of the judicial district in which it is committed, or in

any county of the judicial district the judge of which resides nearest the county seat of the county in which the offense is committed. When the judicial district comprises only one county, prosecutions may be commenced and carried on in that county, if the offense be committed there, or in any adjoining county. When it shall come to the knowledge of any district judge whose court has jurisdiction under this Article that rape has probably been committed, he shall immediately, if his court be in session, and if not in session, then, at the first term thereafter in any county of the district, call the attention of the grand jury thereto; and if the court be in session, but the grand jury has been discharged, he shall immediately recall said grand jury to investigate the accusation. Prosecution for rape shall take precedence in all cases in all courts; and the district courts are authorized and directed to change the venue in such cases whenever it shall be necessary to secure a speedy trial.

Art. 13.17. Criminal Nonsupport

Criminal nonsupport may be prosecuted in the county where the complaining spouse or child is residing at the time the information or indictment is presented.

Art. 13.18. Proof of Venue

In all cases mentioned in this Chapter, the indictment or information, or any proceeding in the case, may allege that the offense was committed in the county where the prosecution is carried on. To sustain the allegation of venue, it shall only be necessary to prove that by reason of the facts in the case, the county where such prosecution is carried on has venue.

Art. 13.19. Other Offenses

If venue is not specifically stated, the proper county for the prosecution of offenses is that in which the offense was committed.

Art. 37.08. Conviction of Lesser Included Offense

(a) In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense.

(b) A person charged as a party to the commission of a felony may be convicted of facilitation of the felony.

Historical Note

Derivation:

New

Cross References

Facilitation, see R.P.C. § 7.03.
Lesser included offense, see art. 37.09, as amended.
Parties, see R.P.C. ch. 7, subch. A.

Committee Comment

Paragraph (a) rewords slightly present art. 37.08 to employ the term "lesser included offense." Paragraph (b) is added to implement the policy decision involved in creating the offense of facilitation as a lesser degree of complicity, see R.P.C. § 7.03 and comment.

Art. 37.09. Lesser Included Offense

An offense is a lesser included offense if:

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

(2) 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 suffices to establish its commission; or

(3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or

(4) it consists of an attempt to commit the offense charged or an otherwise included offense.

Historical Note

Derivation:
Ill.Stat.Ann. ch. 38, § 2-9
Model P.C. § 1.07(4)

Cross References

Conviction of lesser included offense, see art. 37.08, as amended.
Culpable mental states, see R.P.C. § 6.05.
"Element of offense" defined, see R.P.C. § 1.07.

Committee Comment

In view of the increased number of offenses with lesser included offenses created by the Revised Penal Code, the list of these offenses in art. 37.09 is no longer accurate or comprehensive. Rather than list all offenses which include lesser offenses, this article functionally defines the concept of lesser included offense.

This definition does not change existing law, but rather articulates a complete statement of principles which can be inferred from the examples in present art. 37.09 and which have been developed

in case law. In Tomlin v. State, 233 S.W.2d 303, 304 (Tex.Crim. App.1950), for example, the Court of Criminal Appeals defined roughly the concept of lesser included offense.

> . . . [W]here the offense charged is not within the provisions of said Article [37.09] C.C.P., in order to warrant a conviction for a lesser offense than that charged in an indictment, it is necessary that every constituent element of the lesser offense be alleged in the indictment, and that there be no repugnancy between the constituent elements of the lesser offense and those of the offense charged.

Subdivision (1) of this revised art. 37.09 states the concept in terms of the proof of facts necessary to establish the greater offense also establishing the lesser offense. Therefore, in the new code, proof of aggravated perjury includes proof of perjury since aggravated perjury is defined as perjury plus two additional elements. The same is true of robbery and aggravated robbery, and a completed theft or felony is a lesser included offense of burglary.

Subdivision (2) defines as lesser included offenses those which differ from the greater offense only in the seriousness of the injury or risk of injury involved. For example, assault is included in aggravated assault, and both are included in murder and manslaughter. Compensation for past official behavior is included in bribery, since both involve the illicit offer or acceptance of benefits in order to corrupt public servants, but the risk of injury to the public interest is less serious in the former case.

Subdivision (3) refers to offenses which differ from a greater offense in that the actor's mental state is less culpable. For example, reckless damage or destruction of property is included in criminal mischief, the difference between the two offenses being whether the damage is caused recklessly or intentionally. Criminally negligent homicide is included in manslaughter, and both in murder, the nature of the offense depending on whether the actor killed intentionally or knowingly, recklessly, or with criminal negligence.

Subdivision (4) follows present law in designating attempt a lesser included offense of the offense attempted. In addition, an attempt to commit a lesser included offense is itself a lesser included offense. For example, since rape is included in aggravated rape, attempted rape is also included in aggravated rape.

This revised article does not change present law on the issue of whether the jury must be charged on a lesser included offense. Generally speaking, defendant is not entitled to a charge on lesser included offenses unless there is evidence raising the issue that the defendant, if guilty at all, is guilty only of a lesser included offense, e. g., Smith v. State, 411 S.W.2d 548 (Tex.Crim.App.1967); Daywood v. State, 248 S.W.2d 479 (Tex.Crim.App.1952).

APPENDIX A

DISPOSITION AND CROSS REFERENCE TABLES

TABLE 1

PENAL CODE TO REVISED PENAL CODE

Showing the disposition of each article compiled in Vernon's Texas Penal Code.

Penal Code Articles	Revised Penal Code Sections
1	1.02
2	1.02
3	1.03
4	1.05
5	1.05
6	1.03
7	1.05
8	1.05
9	2.01
10	1.03
11	Omitted
12	8.02
13–18	Omitted
19	1.07
20	1.05
21	1.05
22–28	1.07
29	1.04
30	8.06
31	12.46
32	8.04
33	7.02
34	8.01
35	8.01
36	8.03
37	9.22
38	8.04
39	6.01, 6.04
40	8.02
41	8.02
42–44	6.07
45	2.05
46	2.03, 2.04
47	12.02–12.04
48	12.05
49	12.05
50	Omitted
51	12.05
52	12.04
53–60	Omitted
61	12.44
62–64	12.42
65	7.01, 7.02
66	7.02
67	7.02, 7.03
68	6.07, 7.02
69	7.02
70	7.02, 7.03, 15.02
71	7.02
72	7.01, 7.02
73	6.07, 7.02, 8.02
74	Omitted
75	Omitted
76	7.02
77	38.05
78	Omitted
79	38.05
80	7.04
81	Omitted
82	Repealed
83–85	Omitted
86	31.03, 39.01
87	15.01, 31.03, 39.01
88	Omitted
89	15.01, 31.03, 39.01
90	15.01, 31.03, 39.01
91	31.03, 39.01
92	1.07
93	39.01
94	39.01
95	31.03, 39.01
96	31.03, 39.01
97	Repealed
98–107	Transfer
107A–107D	Repealed
107E	Transfer
107F	31.03, 37.02, 39.01
108	Transfer
108A–108D	Transfer
109	Omitted
110	31.03, 39.01
111	Transfer

Penal Code Articles	Revised Penal Code Sections
112	Transfer
113	Omitted
114	15.01, 31.03, 36.02, 39.01
115–119	Transfer
120	22.01, 36.03
121–131	Transfer
131a	Transfer
131b–131cc	Transfer
131c—1	Repealed
132–139	Transfer
140	Repealed
141	Transfer
141a—d	Repealed
141e	Transfer
141f	Transfer
142	Transfer
142a	Transfer
143	Transfer
144	Omitted; cf. 39.03
145	Transfer
146	39.01
146a	Transfer
147	31.03, 37.11
147a	Repealed
147b	Repealed
147c	37.11, 37.12
147d	31.03
148	42.09
149	Omitted
150	Repealed
151	Repealed
152	42.09
153–157	Omitted
158—160	36.02
160—a	36.02
160–b	36.02
161–164	36.02
165	1.07, 15.01
166	32.43
167	32.43
168–174	36.02
175	36.05
176	36.05
177–178a	36.02
178b	32.44
179–183	Repealed
183—1	Transfer
183—2	Transfer
184–187	Omitted
188–194	36.02
195	31.03
196	36.02
197	31.03
198–200A	Omitted
200A—1	Omitted
200A—2	Repealed
200A—3	Omitted
201–205a	Omitted
206	Transfer
207	39.01, 39.02
208	39.01
209	Transfer
210	7.02, 32.21, 39.01
211	Repealed
212	Transfer
212a	Transfer
213	Transfer
214	Repealed
215	32.21, 37.10
216	39.01
217	39.01, 39.02
218	Transfer
219	39.01
220	36.03
221	39.01
222	Transfer
223	32.21, 39.01
224	Repealed
225	Transfer
226	Transfer
227–230	39.01
231	Omitted
231a	39.01
231b	39.01
232	Transfer
233	Transfer
234	37.02
235	7.02, 37.02
236–243	Transfer
244	32.21, 37.10
245–246a	Transfer
247–250	Transfer
251	Repealed
252	Repealed
253	42.02
254	36.03, 42.03
255	42.01, 42.02
256	36.03
257	36.03, 42.01, 46.02
258	36.02, 36.03
259	Transfer
260	Transfer
261	39.01, 39.02
262–280	Repealed
281	42.01, 42.05
282–286	Omitted
286a	Transfer
287	Omitted
288–292	Repealed
292a	32.21
293–293b	Repealed
293c	Omitted
294	Repealed
295	Repealed

DISPOSITION TABLE

Penal Code Articles	Revised Penal Code Sections
295a	42.01, 42.03
295b	42.01, 46.02
296	Repealed
297	Transfer
298	Repealed
299	Transfer
300	Repealed
301	Repealed
301a	Transfer
301b-301d	Repealed
302	37.02, 37.03
303	37.02, 37.03
304	37.07
305	37.01
306–308	37.03
309	6.07, 19.03, 19.04, 37.02–.04
310	37.02
311	37.01
312	Omitted
313	37.02
314	Omitted
315	7.02
316	36.05
317	38.08
318	38.08
318a	38.05, 38.07, 38.08
319	38.07, 38.08
320–322	38.08
323	39.01
324	39.01
325	Omitted
326	38.07, 38.10
327	38.07, 38.10
328–330	7.02, 38.07
331–333a	20.02, 25.03
334	25.03, 38.08
335	38.05
336	Omitted
337	15.01
338	38.03
339	38.03
340	22.01, 36.03
341	38.03, 38.04
342	Omitted
343	Omitted
344	38.01
345	38.01
346	1.07
347	1.07
348	Omitted
349	22.01, 22.02, 39.02
350–352	Transfer
353	22.01, 39.02
353a	38.07
353b	15.01, 38.07
353c	Transfer
353d	15.01, 38.07
354	37.10
355	37.10
356	37.09
357	37.10
358	37.09, 37.10
359	37.10
360	37.10
361	37.09, 37.10
362	Transfer
363	Transfer
364	37.10
365	31.03, 39.01
366	15.01, 31.03
367	Omitted
368–371	Transfer
372	36.08
373	Transfer
374	Transfer
375	Omitted
376–378	Transfer
379	Transfer
380	Transfer
380a	Transfer
381	39.01
382	39.01
383	Transfer
383a	Transfer
384	Transfer
385–387	39.01
388–403	Transfer
404–406	Repealed
407	Transfer
408	Transfer
409	28.02, 28.03
410	Transfer
411	39.01
412	39.01
413	Transfer
414	39.01
414a	Transfer
414b	Transfer
415	39.01
416	Transfer
417	Transfer
418	39.01
419	Omitted
419a	Repealed
419b	Transfer
420	39.01
421	Transfer
422	39.01
422a	Repealed
422b	Transfer
423	39.01
424	Repealed
425–427	Transfer
427a	Repealed

Penal Code Articles	Revised Penal Code Sections
427b	Transfer
427c	Repealed
427c—1	Transfer
428	38.06
429	37.11, 37.12
430	38.12
431–438	Transfer
438a	Repealed
438b	Repealed
438c	37.10
438d	37.10
439	42.01, 42.02
440	36.03
441	36.03
442–446	38.06, 38.07
447	36.03
448	36.03
449	42.01, 42.02
450	22.01, 42.01
451	42.01
452	15.01, 42.01
453	42.04
454	42.04
454a–454c	Omitted
454d	42.05
454e	20.02, 22.01
454f	Omitted
454g	Omitted
455	15.01, 42.02
456	42.02
457	36.03, 42.02
458–463	38.06, 42.02
464	42.02
465	42.01, 42.02
466	42.02
466a	7.02, 42.01
467	15.01, 42.02
468	7.01, 7.02, 42.02
469	7.02, 42.02
470	7.04
471	Omitted
472	42.04
472a	42.03
473	42.01
474	42.01, 42.03, 42.05
475	42.01
475a	42.01
476	42.07
477	42.08
478	Omitted
479	30.03
480	42.01
480a	42.01
481	Omitted
482	42.01
482a	30.03, 42.01
483	46.02
484	46.02
485	42.01, 46.02
486	46.02
487	Omitted
488	46.02
489	46.03, 46.04
489a	Repealed
489b	46.03
489c	46.02
489d	46.05
490	25.01
490a	25.01
491	25.01
492	Repealed
493	Repealed
494	Omitted
495	25.02
496	Repealed
497	Repealed
498–509	Omitted
510–512	43.04
513	43.21, 43.22, 43.24
514	43.04
515	7.02, 7.03, 43.04
516	43.04
517	Omitted
518	Omitted
519	43.03, 43.04
520	1.04
521	Omitted
522	43.04
523	Omitted
524	21.04–21.06, 21.10, 21.11
525	43.03, 43.04
526	21.08, 43.24
527	43.21, 43.22, 43.23
527a	Repealed
527b	Repealed
528	28.03, 42.09
528a	42.09
529	31.03, 42.10
530	Transfer
531	Transfer
532	Repealed
533	Repealed
534	Omitted
534a	Omitted
534b	43.24
535	25.03
535a	Omitted
535b	15.01
535c	21.11
535d	15.01, 21.11
536–559a	Repealed
560	32.45
561–564	Transfer
565	32.35

DISPOSITION TABLE

Penal Code Articles	Revised Penal Code Sections
566	Transfer
567	31.03, 32.45
567a	Repealed
567b	31.03, 31.05, 32.44
568–570b	Transfer
571	Transfer
571a	Transfer
572–580b	Transfer
581–586	Transfer
587	Repealed
588–598	Transfer
599	Repealed
600	Repealed
601	Transfer
602	25.07
602A	25.07
603	1.04; C.C.P. 13.27
604	Omitted
605	C.C.P. 38.11
606	Omitted
606a	Transfer
607	C.C.P. 14.01
607(2)	C.C.P. 14.01
607(3)	C.C.P. 14.01
607(4)	C.C.P. 14.01
607(5)	31.03
607(6)	47.02
607(7)	Omitted
607(8)	Omitted
607(9)	43.02
607(10)	C.C.P. 14.01
607(11)	25.07
607(12)	Omitted
607(13)	Omitted
607(14)	43.02, 43.03
607(15)	43.02
607(16)	21.07, 21.08, 43.02
607(17)	43.02
607(18)	43.03, 43.04
607(19)	7.02
607(20)	43.01
607(21)	Omitted
607a	43.02
608	Omitted
609	C.C.P. 14.03
610–612	Omitted
613	42.11
614	Omitted
614a	Repealed
614b	Omitted
614—1–614—17	Transfer
614—17a–614—17c	Transfer
615–618	47.02
619	47.02, 47.04, 47.06
620	47.03–47.06
621	47.05, 47.06
622	Omitted
623	47.05, 47.06
624	47.02
625	47.03–47.06
626–630	7.03, 47.03–47.06
631	Omitted
632	Omitted
633	C.C.P. ch. 18
634	R.C.S. 4667
635	Omitted
636	C.C.P. Ch. 18
637	C.C.P. 18.31
638	C.C.P. 18.31
639	47.07
640	39.01
641	39.01
642	Omitted
642a	47.06
642b	47.02–47.05
642c	47.03–47.05
643	47.02
643a	47.02
644	Omitted
645	47.01
646	47.02–47.04
646a	47.02–47.04
647	47.03, 47.04
648	47.03, 47.04
648—1	47.03, 47.04
648—2	47.03, 47.04
649	7.02, 7.03
650	47.03, 47.04
651	47.02
652	47.07
652a	7.03, 47.03–47.05, 47.07
653	Repealed
654	47.03, 47.04
655	47.03, 47.04
655a	Omitted
655b	Omitted
656–664	Ch. 47
665	Repealed
666—1–666—57	Transfer
667—1–667—33	Transfer
668–694	Repealed
695	Omitted
696	Transfer
696a	Transfer
697–698a	Repealed
698b	Repealed
698c, Secs. 1–7, 14, 15	Transfer
698c, Secs. 8–13	C.C.P. ch. 17A
698d, Secs. 1–7, 13, 14	Transfer
698d, Secs. 7–12	C.C.P. ch. 17A
699	Transfer
700	Repealed
700a	Repealed
700b	Transfer

Penal Code Articles	Revised Penal Code Sections
701	Transfer
701a	Transfer
701b	Transfer
702	Transfer
703	Omitted
704	Transfer
705–705b	Repealed
705b—1	Transfer
705c	Repealed
705d	Transfer
706–709	Repealed
710–713a	Transfer
714–716	Transfer
717	Repealed
718	32.42
719–719b	Transfer
719c—1	Transfer
719d	Transfer
719e	Transfer
720–725a	Repealed
725b–725d	Ch. 48
726	Repealed
726—1	Transfer
726—2	Transfer
726a–726c	Repealed
726d	Ch. 48
727–734b	Transfer
735–738a	Repealed
739	Transfer
740–742c	Transfer
743–744b	Transfer
745–751a	Transfer
752–752c	Transfer
753–754c	Transfer
755–758a	Transfer
759–762a	Repealed
763–775	Transfer
776	Repealed
777	Repealed
778	Transfer
778a	Transfer
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783	42.03
784	42.03
784a—1–784a—3	Transfer
785	42.03
786	Transfer
787	42.03
788	42.03
789	Repealed
790	Transfer
791	9.21
792	Transfer
793	Repealed
794	Repealed
795–797b	Transfer
798–799a	Transfer
800	Omitted
801	Transfer
802	Transfer
802a	Repealed
802a—1	6.07, 8.03
802b	Transfer
802c	6.07, 8.03
802d–802f	Transfer
803	C.C.P. 14.03
803a	Transfer
803b	Transfer
804–806	Transfer
807	Repealed
807a	Transfer
807b	Transfer
808	Transfer
809	Transfer
810	Repealed
811–817	Transfer
818–820	Repealed
821	Transfer
821a	Transfer
822	Transfer
823–825	Repealed
826–827a	Transfer
827a—1	Repealed
827a—2–827a—6	Transfer
827aa	Transfer
827b	Transfer
827c	Transfer
827c—1	Transfer
827d	Transfer
827e	Transfer
827c—1	Transfer
827f, Secs. 1, 3–4a	Transfer
827f, Sec. 2	C.C.P. art. 14.03
827g	Transfer
828–830	Repealed
831	39.01
832	39.01
833	Transfer
834–835a	Repealed
836–848a	Transfer
849–855	Transfer
856	30.03
857	42.03
858	30.03
859	28.03
860	Omitted
861	30.03, 42.01
861a	Transfer
861b	Transfer
862	28.03
863	16.01
864	28.03, 31.03
865–899	Transfer

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978o	Ch. 31
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991	7.02, 32.21
992	32.21
993	8.02, 32.21
994	Repealed
995	32.21
996	32.21
997	16.01
998	32.21
999	Omitted
1000	32.46
1001	32.46
1002	32.21, 32.47, 37.10
1003	32.46
1004	32.21
1005	ch. 3
1006-1008	32.21
1009	1.04
1010	32.21
1011	Omitted
1012	32.21
1013	32.21
1014	16.01
1015	31.03
1016	Omitted
1017	32.21
1018-1025	Repealed
1026	32.21
1027	Transfer
1027a	Transfer
1028	Transfer
1029	Transfer
1030	32.42
1031-1036	Transfer
1037	32.42
1038-1040	Transfer
1041	39.01
1042	31.03
1042a	Repealed
1042b	Transfer
1043	Transfer
1044	32.42
1045	32.42
1046-1049	Transfer
1050	32.42
1051	15.01, 32.42
1052	39.01
1053	32.42
1054	Transfer
1055	Transfer
1056	31.04
1057	31.03
1057a-1057d	Transfer
1058-1066a	Repealed
1067-1070	Transfer
1071-1083	Repealed
1083a	Repealed
1084-1093	Transfer
1094	22.01, 22.06, 42.01
1095	15.02, 22.06, 42.01
1096	22.06, 42.07
1097	Omitted
1098	Ch. 9
1099	22.01, 22.06
1100	Omitted
1101-1106	Transfer
1106a	32.42
1107	Transfer
1108	32.42
1109-1111	Transfer
1111a	Repealed
1111a—1	Transfer
1111a	Repealed
1111b	28.03, 31.03
1111c	7.02, 32.21, 39.01
1111c—1	Transfer
1112	Transfer
1112a	Repealed
1112b	Transfer
1113-1115	Repealed
1116	Transfer
1117	31.03
1117a	Transfer
1118-1121	37.03
1122	Transfer
1123	32.21
1124-1125a	Transfer
1126-1129	Repealed
1129a	Repealed
1130	Repealed
1131	Transfer
1132-1136a—9	Repealed
1137	Transfer
1137a	Repealed
1137b	Transfer
1137b—1	Transfer
1137c	Repealed
1137d	Repealed
1137e	31.04
1137e—1	31.04
1137f	28.03, 28.04
1137g	Ch. 31
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1137i	Repealed
1137i—1	Transfer
1137j	7.02, 31.03
1137k, Secs. 1-4	Transfer
1137*l*-1137*l*—6	Repealed
1137*l*—10	Transfer
1137m	Repealed
1137n	Transfer
1137*o*	Transfer

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1139	22.01, 22.02
1140	22.01, 22.02
1141	15.01, 22.01
1142	Ch. 9
1143	9.31
1144	22.01
1145	22.01
1146	22.01, 22.06, 42.01
1146a	22.01, 22.03
1147–1149	22.02
1150	Transfer
1151	22.02
1152–1155	Repealed
1156	Omitted
1157	22.01, 22.02, 22.06, 39.01, 39.02
1158	22.01, 22.02, 39.01, 39.02
1159	15.01, 22.01, 22.02
1160	15.01, 19.02
1160a	15.01, 19.02
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1162	15.01, 21.02
1163	15.01, 29.02
1164	15.01, 22.01, 22.02
1165	15.01
1166	22.02
1167	22.01, 22.02
1167a	Transfer
1168	22.02
1169–1172	20.02
1173	9.03
1174	20.02
1175	39.02
1176	39.02
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1177a	20.01
1178	20.01
1179	20.02, 43.05
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1187	21.01
1188	8.06
1189	21.02, 21.03, 21.09
1190	15.01, 21.02
1191	25.04
1192	7.02, 7.03
1193	15.01, 25.04
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1195	25.04
1196	25.04
1197	15.01
1198	15.01
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1203	6.07, 19.02–19.04
1204	Omitted
1205	1.07
1206	6.07, 19.01
1207	9.32
1208–1211	9.22
1212	9.22, 9.51, 9.53
1213	9.22
1214	9.22, 9.51, 9.52
1215	9.22, 9.51, 9.52
1216	9.22, 9.51
1217	9.51
1218	9.22
1219	9.32, 9.33
1220	Omitted
1221	9.32
1222	9.54
1223	Omitted
1224	9.32, 9.44
1225	9.32, 9.33
1227	Omitted
1228	6.01, 6.04
1229	6.04, 9.61–9.63
1230	19.04
1231	19.04
1232	6.05
1233	6.05
1234	19.04
1235	19.04
1236	6.07, 19.04
1237–1239	19.04
1240	Omitted
1241	19.02–19.04
1242	19.04
1243	19.04
1244–1255	Repealed
1256	19.02, 19.03
1257	19.02, 19.03
1257a	Omitted
1257b	Omitted
1257c	19.03
1258	Omitted
1259	19.02–.04, 22.02
1260	6.07, 19.02–.04
1260a	19.02, 22.01, 22.02
1261–1264	Repealed
1265	15.01, 22.06
1266	15.01, 22.06
1267	22.06
1268	15.01, 22.06, 31.03
1268a	15.01, 22.06, 31.03
1269	Omitted
1269a	Repealed
1270	Omitted

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1296	42.07
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1299	7.02, 37.02, 37.03, 37.08
1300	7.02, 15.02, 31.03
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1302	Omitted
1303	Omitted
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1310	9.21
1311	9.21
1312	28.02
1313	28.02, 28.05
1314	28.02
1315	28.02
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1324	22.01, 22.02
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1326	15.01
1327	Repealed
1328	Repealed
1329	Transfer
1330	Repealed
1331	6.07, 19.02
1332	6.07, 19.02
1333	31.06
1333A	Transfer
1334	28.03
1334a	Transfer
1335	6.07, 19.02, 42.03
1336	28.03
1337	22.01, 22.02
1338	28.03, 28.04
1339	22.01–22.03
1339a	Repealed
1339b	42.01
1340	31.03
1341	31.05
1342	31.05
1343	28.03
1344–1346	Repealed
1347	22.03, 28.03, 42.03
1348	31.03
1349	31.03
1350	28.03, 28.04, 32.47
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1351a	Transfer
1352–1362	28.03, 28.04
1363	Transfer
1364–1366	28.03, 28.04
1367	31.04
1368	28.03, 30.03
1369–1370a	Transfer
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1371a	Transfer
1372	28.03, 28.04
1373	28.03, 28.04, 42.11
1373—a	28.03, 28.04, 42.11
1374–1376	42.11
1377	Repealed
1377a	42.11
1377b	30.03
1378	Repealed
1378a	Transfer
1379	28.03, 28.04, 31.03
1379a	28.03, 28.04
1380	Omitted
1381	28.03, 28.04
1382	31.03
1383	28.03, 28.04
1384	28.03, 28.04, 31.03
1385–1388	Transfer
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1388b—1, Secs. 1–2	15.01, 28.03, 28.04
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1401	31.03
1402	15.01
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1406	30.02
1407	31.03
1407	30.03, 31.05
1408	29.02, 29.03
1409	29.02, 29.03, 31.03
1410	31.03
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1416	31.01, 31.03
1417	31.01, 31.03
1418	31.01
1419	31.01
1420–1423	31.03
1424	Omitted
1425	31.01
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1436–1436—2	Transfer
1436a	Transfer
1436b	31.03
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1436d, Secs. 1–4	32.21
1436e, Secs. 1–6	31.03
1436f	31.03
1436g	31.03
1437	31.03
1438	31.03
1439	15.01
1440–1442	31.03
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1442b	31.03
1442c, Secs. 1–4	31.03
1443	31.03
1444	31.03
1444a	Transfer
1445	31.03
1446–1456	Transfer
1456a	Transfer
1457	Transfer
1458	31.03
1459	31.03
1460	Transfer
1461	Transfer
1462	28.03, 31.03
1463–1466	31.03
1467	28.03
1468	28.03
1469	31.03, 32.21
1470	31.03
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1489–1498	Repealed
1499–1504	Repealed
1504a	Repealed
1505–1533	Transfer
1534–1536	31.03
1537	32.34
1538	31.03
1539–1541	31.03, 39.01
1542	31.03
1543	31.03
1544	31.01
1544a	31.03
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1545	31.03
1546	31.03

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1547	31.01
1548	31.03
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1550	31.03
1551	31.04
1552	Transfer
1553	Transfer
1553a	31.04
1554	Repealed
1555	Repealed
1555a	Transfer
1555b	32.31
1555c	32.31
1556	32.33
1557	Repealed
1558	Repealed
1559	1.04, 31.03
1560	1.04, 31.03
1561–1599	Transfer
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1622–1627	15.02
1628	1.04
1629	1.04
1630	Transfer
1631	Transfer
1631a	Transfer
1632–1644	Repealed
1645–1648	Transfer
1648a	Transfer
1649–1661	Transfer
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1661a	Transfer
1662–1672	Transfer
1673	30.03, 31.03
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1700a	Repealed
1700a—1–1700a—3	Transfer
1701–1708	Transfer
1709–1720	Repealed
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1721a	22.03
1722	Transfer
1722a	Transfer
1723	46.02
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1725	Transfer

TABLE 2

REVISED PENAL CODE TO PENAL CODE

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1.06	New
1.07	19, 22, 23, 24, 25, 26 27, 28, 92, 165, 346, 347, 1205, 1415
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2.04	New
2.05	45
3.01	New
3.02	New
3.03	New
3.04	New
3.05	New
3.06	New
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6.02	New
6.03	New
6.04	39, 1228, 1229
6.05	1232, 1233
6.06	New
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7.03	67, 70, 515, 626, 627, 628, 629, 630, 649, 652a, 1192
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7.05	New
7.21	New
7.22	New
7.23	New
7.24	New
7.25	New
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8.04	32, 38
8.05	New
8.06	30, 1188
9.01	New
9.02	New
9.03	1173
9.04	New
9.05	New
9.21	791, 1310, 1311
9.22	37, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1218
9.31	1142, 1143
9.32	1207, 1219, 1221, 1224, 1225, 1226
9.33	1142, 1219, 1224, 1225, 1226
9.34	New
9.41	1142
9.42	1142
9.43	New
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9.53	1142, 1212
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9.62	1142, 1229
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12.02	47
12.03	47
12.04	47, 52
12.05	48, 49, 51
12.06	New
12.21	New
12.22	New
12.23	New
12.31	New
12.32	New
12.41	New
12.42	62, 63, 64
12.43	New
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12.47	New
12.48	New
12.51	New
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15.04	New
15.05	New
16.01	997, 1014, 1137g, 1462b
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19.02	1203, 1241, 1256, 1257, 1259, 1299, 1299a
19.03	300, 1203, 1241, 1256, 1257, 1257c, 1259, 1299
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21.06	524
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21.10	524
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21.13	New
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25.05	New
25.06	New
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25.08	New
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28.06	New
28.07	New
29.01	New
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29.03	1408, 1409
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31.08	New
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31.10	New
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38.03	338, 339, 341
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38.05	77, 79, 318a, 335
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38.10	326, 327
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38.12	430, 1298
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39.01	86, 87, 91, 93, 94, 95, 96, 107f, 110, 114, 146, 207, 208, 210, 216, 217, 219, 221, 223, 227, 228, 229, 230, 231a, 231b, 244, 261, 323, 324, 365, 381, 382, 385, 386, 387, 402, 403, 411, 412, 414, 415, 418, 420, 422, 423, 640, 641, 1111c, 1157, 1158, 1539, 1540, 1541
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39.03	New
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TABLE 3

CONFORMING AMENDMENTS AND REPEALS

Showing laws outside the Penal Code amended (A) or repealed (R) by the Revised Penal Code.

Outside Law	Conforming Action	Related to Revised Penal Code
Business & Commerce Code Section		**Section**
17.09	R	32.42
17.10	R	32.42
17.11	R	32.42
17.12	R	32.42
17.28	R	32.21, 32.42
17.29	R	32.42
17.30	R	32.42
25.01	R	32.33
25.02	R	32.33
25.03	R	32.33
35.19	R	32.21
Business Corporation Act Article		
7.01, secs. F & G	A	Ch. 7
8.16, secs. F & G	A	Ch. 7
Code of Criminal Procedure Article		
1.10	R	3.04
1.11	R	3.04
2.12	A	1.07
2.15	R	Omitted
2.24	R	38.02
3.01	A	1.07
3.04	A	Ch. 3
Ch. 5	R	9.31, 9.33
4.03	A	Ch. 12
6.05	A	Ch. 9
6.06	A	Ch. 9
6.07	R	9.31
7.11	R	Omitted
7.12	R	Omitted
8.06	R	Ch. 9
Ch. 12	A	—
Ch. 13	A	—
Ch. 14	A	Ch. 42
15.15	R	9.51
15.24	R	9.51
15.25	R	9.22
15.27	R	9.51
16.05	A	Ch. 7
16.21	A	Ch. 9
Code of Criminal Procedure Article		**Section**
17A.01–17A.09	A	Ch. 7
18.02	A	Chs. 46, 47
18.06	A	Chs. 46, 47, § 16.01
18.10	A	Ch. 32
18.17	A	Ch. 9
18.18	R	9.22, 9.51
18.22	R	9.41, 9.42
18.31	A	Chs. 46, 47, § 16.01
18.32	A	46.02
20.16	A	—
21.03	A	Ch. 12
21.14	A	Ch. 37
21.15	A	Ch. 6
21.24	A	Ch. 3
22.01a	R	38.10
26.13	A	8.01
26.14	R	Ch. 12
27.02	A	8.01
27.05	A	Ch. 3
27.13	A	Ch. 12
27.14	A	Ch. 12
27.17	A	8.01
28.04	A	Ch. 3
28.05	A	Ch. 3
28.13	R	3.04
29.01	A	Ch. 7
36.01	A	Ch. 12
36.03	A	Ch. 7
36.09	A	Ch. 3
36.10	A	Ch. 3
36.11	A	Ch. 3
37.07	A	Ch. 3
37.08	A	7.03
37.09	A	—
37.12	A	Ch. 3
37.13	R	Ch. 8
37.14	R	3.04
38.07	R	Ch. 25
38.11	A	Ch. 25
38.18	A	Ch. 37
40.03	A	Ch. 7
40.09	A	Ch. 12

Outside Law	Conforming Action	Related to Revised Penal Code
Code of Criminal Procedure Article		**Section**
42.02	A	Ch. 12
42.03	A	Ch. 12
42.04	A	Ch. 12
42.06	A	Ch. 12
42.07	A	Ch. 12
42.08	A	Ch. 12
42.09	A	Ch. 12
42.10	R	Ch. 12
42.12, sec. 3	A	Ch. 12
42.12, sec. 3a	A	Ch. 12
42.12, sec. 3b	A	Ch. 12
42.12, sec. 3c	R	Ch. 12
42.12, sec. 4	A	Ch. 12
42.12, sec. 6	R	Ch. 12
42.12, sec. 7	A	Ch. 12
42.12, sec. 8	A	Ch. 12
42.12, sec. 12	R	Ch. 12
42.12, sec. 15	R	Ch. 12
42.12, sec. 24	A	Ch. 12
42.13	R	Ch. 12
42.15	A	Ch. 7
42.16	A	Ch. 12
43.01	A	Ch. 7
43.03	A	Ch. 12
43.04	A	Ch. 12
43.05	A	Ch. 12
44.04	A	Ch. 12
44.04a	A	Ch. 12
44.24	A	Ch. 12
44.25	A	Ch. 12
44.32	A	—
45.31	A	8.01
45.32	A	Ch. 3
45.34	A	Ch. 12
45.42	A	Ch. 12
45.50	A	Ch. 12
45.52	A	Ch. 12
46.02	A	8.01
49.16	A	Ch. 7
49.18	A	Ch. 7
50.03	A	Ch. 7
Revised Civil Statutes Article		
1d	A	Ch. 9
907	R	Omitted
1011	A	1.03
1015, secs. 20–23	R	1.03
1396—7.01, secs. F & G	R	Ch. 7
1396—8.15, secs. F & G	A	Ch. 7
4664	A	Chs. 43, 47
4667	A	Chs. 43, 47
5069—10.01(b)	A	Ch. 32
5547—18	A	Ch. 9
5547—68(c)	A	8.01
5547—69	A	8.01
5765, sec. 8	A	Ch. 9
6139–6142	R	42.09
6145—9, sec. 14	R	32.22
6876	R	Omitted
Session Laws		
Laws 1965, ch. 164	R	Ch. 12
Texas Constitution		
Art. I, sec. 15–b	A	8.01

APPENDIX B

TABLE OF PUNISHMENTS

(Chapter 12)

FELONY, ORDINARY PUNISHMENT FOR INDIVIDUAL

FELONY GRADE	*IMPRISONMENT*			*FINE*		
	Minimum *		**Maximum**	**Minimum**	**Maximum**	**Exceptional**
	Not Less Than	Not More Than	Not More Than			
First degree	—	—	life			
	1	12	life	0	$5,000 or	Not to exceed double the amount gained
	1	10	30			
Second degree	1	4	12	0	5,000 or	
Third degree	1	2	6	0	5,000 or	

* The minimum term may not exceed one-third the maximum term, except when (1) life or death is authorized; or (2) in the case of a third degree felony, the minimum is one year and the maximum two years.

FELONY, EXCEPTIONAL PUNISHMENT FOR INDIVIDUAL

CONVICTED OF		*FINDING*	*IMPRISONMENT*	
			Minimum	**Maximum**
1. **Capital Felony** *		Aggravating factors outweigh mitigating factors	Death *or*	
			—	life
			1-12	life
			1-10	30
2. **Third Felony**	2d*	Extended term imprisonment necessary to protect public	1-12	30
	3d*		1-6	30
3. **Second degree felony of specified type**		Participation in organized crime and extended term imprisonment necessary to protect public	1-12	30
Third degree felony of specified type			1-6	30
4. **Third misdemeanor theft**		Habitual petty thief and extended term imprisonment necessary to protect public	1-2	6

* The committee will recommend alternatives to the legislature on the various capital punishment issues.

MISDEMEANOR

CLASS	*IMPRISONMENT*		*FINE*			
	Minimum	**Maximum**	**Minimum**	**Maximum**		**Exceptional**
A	0	1 year	0	$1,000	or	Not to exceed double the amount gained
B	0	3 months	0	500	or	
C	Not Authorized		0	200		Not Authorized

CORPORATIONS & ASSOCIATIONS

OFFENSE	*FINE*			
	Minimum	**Maximum**		**Exceptional**
Felony	0	$10,000	or	Not to exceed double the amount gained
Class A misdemeanor Class B misdemeanor	0	2,000	or	
Class C misdemeanor	0	200		Not Authorized

TABLE OF PUNISHMENTS

EXAMPLES OF PENALTY CLASSIFICATIONS *

Capital felonies

§ 19.02 Murder

First degree felonies

§ 20.01 Kidnapping
§ 21.03 Aggravated rape
§ 21.09 Rape of a child (under 14)
§ 29.03 Aggravated robbery
§ 30.02 Burglary (of a habitation)

Second degree felonies

§ 19.03 Manslaughter
§ 21.02 Rape
§ 25.04 Criminal abortion
§ 28.04 Arson
§ 29.02 Robbery
§ 30.02 Burglary (other than of a habitation)
§ 31.03 Theft ($10,000 or more)
§ 32.21 Forgery or counterfeiting (money, stamps, stocks, bonds, etc.)

Third degree felonies

§ 19.04 Criminally negligent homicide
§ 21.09 Rape of a child (between 14 and 16)
§ 22.02 Aggravated assault
§ 25.02 Incest
§ 28.03 Criminal mischief (loss of $250 or more)
§ 31.03 Theft ($250 or more but less than $10,000)
§ 32.21 Forgery (will, deed, mortgage, check, credit card, etc.)
§ 36.02 Bribery
§ 36.05 Tampering with witness
§ 37.03 Aggravated perjury
§ 43.04 Aggravated promotion of prostitution
§ 47.04 Aggravated gambling promotion
§ 47.06 Possession of slot machine

Class A misdemeanors

§ 21.06 Homosexual conduct
§ 25.01 Bigamy
§ 25.07 Criminal nonsupport
§ 32.42 Deceptive business practices
§ 37.02 Perjury
§ 37.12 Impersonating peace officer
§ 39.01 Official misconduct
§ 39.02 Official oppression
§ 43.03 Promotion of prostitution
§ 47.03 Gambling promotion

Class B misdemeanors

§ 20.02 False imprisonment
§ 22.01 Assault
§ 22.06 Terroristic threat
§ 37.11 Impersonating public servant
§ 42.03 Obstructing highway or other passageway

Class C misdemeanors

§ 21.08 Indecent exposure
§ 28.02 Reckless damage or destruction
§ 30.03 Criminal trespass
§ 31.03 Theft ($50 or less)
§ 32.41 Issuance of bad check
§ 42.01 Disorderly conduct
§ 43.02 Prostitution
§ 47.02 Gambling.

* See Appendix C for drug offenses

APPENDIX C
DRUG OFFENSES

(Chapter 48)

	DRUG CATEGORIES	TRAFFICKING *Ordinary*	TRAFFICKING *Minor Victim*	TRAFFICKING *Mitigation*	POSSESSION	PARAPHERNALIA
DANGEROUS	1. Narcotics (e. g., heroin, morphine)	1st offense:		Noncommercial and not to minor:	1st offense: 3d° felony;	1st offense: 3d° felony;
	2. Cocaine	2d° felony				
	3. Dangerous stimulants (e. g., amphetamines, most barbiturates, and some other depressants)	subsequent offenses:	1st° felony	1st offense: 3d° felony; subsequent offenses: 2d° felony	subsequent offenses: 2d° felony	subsequent offenses: 2d° felony
	4. Most hallucinogens (e. g., LSD)	1st° felony				
ABUSABLE	5. Cannabis (e. g., hashish, marihuana)			Noncommercial and not to minor:	1st offense: 3d° felony; subsequent offenses: 2d° felony	
	6. Less dangerous opiates (e. g., codeine & aspirin combinations)	1st offense:	1st offense:	1st offense— Class A; subsequent offenses—	*Mitigation*	No offense
	7. Other depressants	3d° felony;	2d° felony;	3d° felony	Noncommercial and not to minor— 1st offense: Class A; subsequent offenses— 3d° felony Personal use: 1st offense— Class B; subsequent offenses— Class A	
	8. No. 3 above in quantity of 5 or fewer pills of limited strength	subsequent offenses:	subsequent offenses:	Personal use: 1st offense— Class B; subsequent offenses— Class A		
	9. Peyote	2d° felony	1st° felony			
RESTRICTED	10. Exempt narcotics under federal law (e. g., codeine cough syrups)			Noncommercial and not to minor: Class B		
	11. Minor tranquilizers (e. g., Miltown, Equanil)	Class A misdemeanor	3d° felony	Personal use: no offense	No offense	No offense