REPORT

of

Commission to Recommend Codification of Criminal Laws

Established under Chapter 451 Laws of 1967

Richard H. Keefe — Clifford J. Ross
Frank R. Kenison, Chairman

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Introduction

This volume contains the proposed text of a new criminal code for New Hampshire. It was prepared under the supervision of the Commission created by Chapter 451 of the Laws of 1967.

This Commission was charged with the responsibility to recommend revisions of the substantive criminal law of the state. Following some preliminary consideration of how best the Commission could undertake this task of reviewing a body of law that is the foundation of the orderly and just functioning of our entire society, the Commission, in November 1967, engaged Professor Sanford J. Fox of the Boston College Law School to do the research and drafting that was necessary to produce this Report. The Commission is pleased to report that, together with Professor Fox, it has succeeded in providing the Legislature with an up-to-date and comprehensive statement of the criminal law in the space of a little more than one year. The significance of this can best be appreciated by noting that, with substantially more than a one-man staff, similar revisions in New York took four years; three years in Michigan; two years in Pennsylvania. The Illinois Criminal Code of 1961 was six years in the making. It is also a source of satisfaction that the Commission has been able to accomplish this at a cost to the state many times smaller than what has been expended elsewhere.

Part of the explanation for this accomplishment lies in the fact that there have been so many other law revision projects of a like nature. In addition to the invaluable drafts and comments of the American Law Institute's Model Penal Code, at least eighteen other states have undertaken to rewrite their criminal law and the resulting documents—drafts and enacted legislation—have supplied the Commission with a wealth of material to draw upon. During the course of its deliberations, much of this was carefully considered by the Commission as possible models for New Hampshire law. As is apparent from the Comments accompanying each draft section in this Report, however, the Commission has found especially useful the Model Penal Code, the Michigan Revised Criminal Code, Final Draft—September 1967, and the New York Penal Law, 1967. In consulting these and the other sources, the Commission has, however, been continually desirous of shaping a criminal law that is adapted to the conditions and traditions of the State of New Hampshire. To this end, the Commission has, for example, left unchanged the broad and flexible doctrine of criminal insanity that has prevailed here for nearly a century.

In addition to the availability of highly useful material from other jurisdictions, the presentation of the Report at this time was made possible by the very intensive work of the Commission during the past fourteen months

which included fruitful informal consultations with police officials, prosecuting and defense lawyers, the Office of the Attorney General and judges in many of our courts. The fact that everyone has served and contributed his time without compensation is in keeping with the best New Hampshire traditions of public service.

The basic aim of the Commission has been to produce a more concise and simplified criminal law than now applies in this state. Where there has been a multitude of statutory provisions, such as in the matter of Attempts, consolidated statements have been substituted. Where statutes have been vague and imprecise, such as Kidnapping and Aggravated Assault, the Commission has sought to articulate the elements of conduct and intent that ought to be involved. In addition, the draft statutes reflect the effort of the Commission to have the criminal law comply with requirements of the Federal Constitution as they have been described by decisions of the United States Supreme Court. This is most clearly observable in the sections dealing with sentencing for Murder. The Commission is aware, however, that much more of the New Hampshire *corpus juris* has been placed in constitutional jeopardy by developments in constitutional doctrine. Several parts of the juvenile court law, for example, appear clearly to be invalid and the Commission strongly recommends that this law be rewritten as well as the law governing procedure in criminal cases generally. Although criminal procedure is every bit as important as the substantive law, both the terms of the resolve and the time available have prevented the Commission from engaging in revision of that sort, even where it is closely related to matters that were of concern to the project, such as dispositions of persons found not guilty by reason of insanity or rules of double jeopardy. In addition, in view of the creation of a Traffic Safety Commission by RSA 259–A: 1, this Commission has not examined the multitude of criminal statutes relating to the operation of motor vehicles. Similarly the extensive Report of the Governor's Committee on Drug Abuse, September 1968, with its recommended legislation, has made it unnecessary for the Commission to review the drug laws.

The Commission wishes to express, for itself and for the people of New Hampshire, its gratitude to the Equity Publishing Corporation for its generous contribution in publishing and distributing this report.

Information concerning this Report can be obtained from Clifford J. Ross, Esq., Secretary, Criminal Law Revision Commission, 70 Market St., Manchester, N.H. 03101.

April 1969.

COMMISSION FOR THE REVISION

OF THE

CRIMINAL LAWS

(Created by chapter 451 of Laws of 1967)

RICHARD H. KEEFE
CLIFFORD J. ROSS
FRANK R. KENISON, *Chairman*

Contents

OF THIS REPORT

CHAPTER 570

PRELIMINARY

570:1 Name. This Title shall be known as the Criminal Code.

Comments

With few exceptions (the Uniform Commercial Code, RSA ch. 382-A; the Uniform Code of Military Justice, incorporated by RSA 110-A:55), the New Hampshire statutes do not have any groupings designated as "Codes". It is useful, however, to use such a title for the criminal laws in order to emphasize that the major provisions of penal laws are collected here, to provide a uniform means of citation to the collection, and to facilitate location of statutes that govern *all* criminal prosecutions regardless of where in the Revised Statutes Annotated a particular offense may be defined. It is important to note, however, that the Commission has not proposed legislation on all possible details of criminal law in the belief that the Code should not be a restatement of the entire corpus of penal law so much as it should be a statutory statement of principles where there is need for change or certainty.

570:2 Effective Date.

I. This Code shall take effect on July 1, 1970.

II. Prosecution for offenses committed prior to the effective date of this Code shall be governed by the prior law, which is continued in effect for that purpose as if this Code were not in force; provided, however, that in any such prosecution the court may, with the consent of the defendant, impose sentence under the provisions of this Code.

III. For purposes of this section, an offense was committed prior to the effective date if any of the elements of the offense occurred prior thereto.

Comments

The effective date in paragraph I is approximately one year from the date this Report is submitted to the Legislature in order to provide a sufficient period of familiarization for bench, bar, police and others concerned in the administration of criminal justice.

Paragraphs II and III are based on Model Penal Code § 1.01(2) and (3). Ideally, the revisions in this Code ought to govern as soon as possible. Principles of an *ex post facto* nature prevent applicability to offenses committed prior to the effective date and this limitation is expressed in II.

The consent of the defendant can, however, remove the limitation. The Model Penal Code § 1.01(3)(a) and (b)

provide for such consent as to "procedural provisions" and matters of "defense or mitigation". These provisions are also found in the Proposed Crimes Code for Pennsylvania, § 103 (b) (1) and (2). They have not been incorporated here on the ground that what is or is not "procedural" is too unclear for efficient administration and, although matters of "defense or mitigation" may be relatively more discernible, they are too integral a part of this Code's affirmative provisions for it to be wise to have them apply to another body of law.

The sentencing provisions are another matter. They are both as clear on their face as principles of drafting permit and are readily applicable to offenses other than those defined in the Code. They are, in fact, expressly declared to govern offenses defined in other portions of the Revised Statutes Annotated. Sentencing is, moreover, so vital a part of criminal law administration that every effort should be made to introduce the new provisions early.

570:3 Construction of the Code. The rule that penal statutes are to be strictly construed does not apply to this Code. All provisions of this Code shall be construed according to the fair import of their terms and to promote justice.

Comments

It is not perfectly clear whether New Hampshire follows the common law rule that criminal statutes are to be strictly construed. In State v. Williams, 92 NH 377, 31 A2d 369 (1943), it was stated that the statutes are to be read for their "fair import", while in State v. Morey, 103 NH 529, 176 A2d 328 (1961), it was indicated that "they are to be construed liberally in favor of the accused." This section settles that there is no rule of strict construction, following the position of the Model Penal Code, § 1.02(3), and others, e.g., Michigan Revised Criminal Code, Final Draft, § 115; Pennsylvania Proposed Crimes Code, § 106.

570:4 Territorial Jurisdiction.

I. Except as otherwise provided in this section, a person may be convicted under the laws of this state for any offense committed by his own conduct or by the conduct of another for which he is legally accountable if:

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

(b) conduct occurring outside this state constitutes an attempt to commit an offense under the laws of this state and the purpose is that the offense take place within this state; or

(c) conduct occurring outside this state would constitute a criminal conspiracy under the laws of this state, and an overt act in furtherance of the conspiracy occurs within this state, and the object of the conspiracy is that an offense take place within this state; or

(d) conduct occurring within this state would constitute complicity in the commission of, or an attempt, solicitation or conspiracy to commit an offense in another jurisdiction which is also an offense under the law of this state; or

(e) the offense consists of the omission to perform a duty imposed on a person by the law of this state regardless of where that person is when the omission occurs; or

(f) jurisdiction is otherwise provided by law.

II. Paragraph I(a) does not apply if

(a) causing a particular result or danger of causing that result is an element and the result occurs or is designed or likely to occur only in another jurisdiction where the conduct charged would not constitute an offense; or

(b) causing a particular result is an element of an offense and the result is caused by conduct occurring outside the state which would not constitute an offense if the result had occurred there.

III. When the offense is homicide, either the death of the victim or the bodily impact causing death constitutes a "result" within the meaning of paragraph I(a) and if the body of a homicide victim is found within this State, it is presumed that such result occurred within the State.

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

Comments

This section is drawn from the Model Penal Code, § 1.03 and deals with the problem of jurisdiction to try offenses when there are elements of the offense which take place outside of New Hampshire. Paragraph I(a) provides the general rule that will govern most cases, where at least some of the criminal conduct occurs within the state. Paragraph I(e) permits prosecution of persons who fail to perform a duty imposed on them by New Hampshire law and specifically negates any defense that might be based on the offender's being out of the jurisdiction at the time of his default. These provisions replace RSA 590-A:9 and 590-A:10 which create a similar jurisdiction. Paragraph I(b), (c) and (d) grant jurisdiction in cases of inchoate offenses where New Hampshire is either the scene of the preparatory action or the place where the substantive offense is to occur.

Paragraph II states two commonly found limitations on the extent of jurisdiction provided. Both are designed to give limited effect to foreign law by withholding jurisdiction when the conduct is legal by the law of the place where it takes place. The Model Penal Code, § 1.03(2) contains an exception to II(a) that serves to make I(a) applicable again when "a legislative purpose plainly appears to declare the conduct criminal regardless of the place of the result". This has not been adopted on grounds that it is too vague and can serve only to introduce unnecessary litigation.

Paragraph I(e) insures that where New Hampshire law imposes a duty to act and the person defaults on the duty while in another jurisdiction he may still be prosecuted in this State. In Hardy v. Betz, 105 NH 169 (1963), Massachusetts sought to extradite a person who defaulted on his Massachusetts duty although he was not in Massachusetts at the time. The case held that Massachusetts law was not intended to apply in those circumstances. This section makes clear that New Hampshire law would apply.

570:5 Civil Actions. This Code does not bar, suspend, or otherwise affect any right or liability for damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in such civil action constitutes an offense defined in this Code.

Comments

This is modeled on New York Penal Law § 5.10(3). Its purpose is to insure that, where a conflict appears between provisions of the Code and matters of civil law, there will be no implied repeal or modification of the latter. For example, RSA 49-A:55 declares it to be a misdemeanor for members of a municipal council to interfere in certain ways with the appointment of local officials and also that conviction requires a forfeiture of office. This forfeiture will be unaffected by Code provisions.

570:6 All Offenses Defined by Statute. No conduct or omission constitutes an offense unless it is a crime or violation under this Code or under another statute.

Comments

This section embodies one of the most central policy decisions of the entire Code. Consistently with all other recent reformulations of penal law (Model Penal Code § 1.05(1); Pennsylvania Proposed Crimes Code § 108(a); Michigan Revised Criminal Code, Final Draft, § 110), the Commission recommends abolition of the system of common law crimes whereby courts have the power to declare conduct to be criminal that was not previously prohibited. The attempt here is to achieve a greater degree of certainty in the law and to limit the use of penal sanctions to instances where a dispassionate legislative judgment rather than the emotion-laden details of individual cases calls for prosecution.

570:7 Application to Offenses Outside the Code. The provisions of chapters 570 through 574 are applicable to offenses defined outside this Code unless the Code otherwise provides.

Comments

This section follows the general practice of subjecting all criminal offenses to certain basic principles. See Model Penal

Code § 1.05(2); Michigan Revised Criminal Code, Final Draft, § 120(2); Proposed Crimes Code for Pennsylvania, § 108(b). Chapters 570 through 574 contain general principles of penal law which are applicable to all instances of criminal conduct and their prosecution. While the Commission has not undertaken to review the hundreds of criminal sections that now lie outside RSA Title LVIII, it is proposed that these preliminary chapters of the Code set forth rules of criminal liability regardless of where the particular statutory proscription is found.

570:8 Limitations.

I. Except as otherwise provided in this section, prosecutions are subject to the following periods of limitations:

(a) for a class A felony, six years;

(b) for a class B felony, three years;

(c) for a misdemeanor, one year;

(d) for a violation, six months.

II. Murder may be prosecuted at any time.

III. If the period prescribed in paragraph I has expired, a prosecution may nevertheless be commenced

(a) within one year after its discovery by an aggrieved party or by a person who has a duty to represent such person and who is himself not a party to the offense for a theft where possession of the property was lawfully obtained and subsequently misappropriated or for any offense, a material element of which is either fraud or a breach of fiduciary duty; and

(b) for any offense based upon misconduct in office by a public servant, at any time when the defendant is in public office or within two years thereafter.

IV. Time begins to run on the day after all elements of an offense have occurred or, in the case of an offense comprised of a continuous course of conduct, on the day after that conduct or the defendant's complicity therein terminates.

V. A prosecution is commenced on the day when a warrant or other process is issued, an indictment returned, or an information is filed, whichever is the earliest.

VI. The period of limitations does not run

(a) during any time when the accused is continuously absent from the state or has no reasonably ascertainable place of abode or work within this state; or

(b) during any time when a prosecution is pending against the accused in this state based on the same conduct.

Comments

This is a somewhat modified version of Model Penal Code, § 1.06. Comparably structured statutes of limitations are in Michigan Revised Criminal Code, Final Draft, § 130 and Proposed Crimes Code for Pennsylvania, § 109. These others are, however, more complex by virtue of their having a larger number of classes of offenses to provide for. Under this section, the period of limitations depends upon the classification of the crime rather than on the punishment provided, or the particular offense involved, as is found in RSA 603:1 (1967 supp.). In misdemeanor prosecutions, however, the period is virtually the same as in present law, since the Code defines a misdemeanor as an offense punishable by no more than one year, which is the same standard used in RSA 603:1 for invoking a one-year period of limitations. But, whereas present law places a six-year limit on murder prosecutions, the Code permits murder to be prosecuted at any time. While considerations such as staleness of evidence and disappearance of witnesses might indicate a need for some limitation, the needs of general public security against offenders of this sort dictates an absence of limits and a reliance on the integrity of the trial process to refuse convictions where the evidence does not indicate guilt with sufficient persuasion.

Paragraph III provides for tolling of the statute when the defendant successfully shields his misconduct from his victim or is in a position of public trust which provides the opportunity to hide criminality. These provisions are complimentary to paragraph VI(a) in the sense that the latter tolls the statute when there is successful secreting of the criminal while the former has a similar effect while the crime is being secreted.

Paragraph IV identifies the commencement of the period while paragraph V deals with its termination. The latter section substitutes the earliest of the prosecution steps for the "commenced, filed or found" language of RSA 603:1.

The provisions of section 582:2(V) dealing with aggregating amounts involved in a course of thefts combine with the latter part of paragraph IV and paragraph I to permit a longer period of limitations than would be applicable if only amounts involved in each theft were considered, and also provide for running of this same period upon completion of the scheme or course of conduct rather than upon each theft individually. These sections of the Code reverse the result in State v. Morey, 103 NH 529, 176 A2d 328 (1961).

The purpose of paragraph VI(b) is to prevent a limitations bar when, for example, a pending prosecution for theft by deception (582:4) is replaced by one for fraudulent use of a credit card (583:5) where the same conduct is involved but the period has run at the time of the change.

570:9 Classification of Crimes.

I. The provisions of this section govern the classification of every offense, whether defined within this Criminal Code or by any other statute.

II. Every offense is either a felony, misdemeanor or violation.

(a) Felonies and misdemeanors are crimes.

(b) A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

III. A felony is murder or a crime so designated in this Code or a crime defined by statute outside of this Code where the maximum penalty provided is imprisonment in excess of one year: provided, however, that a crime defined by statute outside of this Code is a felony when committed by a corporation or an unincorporated association if the maximum fine therein provided is more than two hundred dollars.

(a) Felonies are either class A felonies or class B felonies when committed by an individual. Felonies committed by a corporation or an unincorporated association are unclassified.

(1) Class A felonies are crimes so designated in this Code and any crime defined by statute outside of this Code for which the maximum penalty, exclusive of fine, is imprisonment in excess of five years.

(2) Class B felonies are crimes so designated in this Code and any crime defined outside of this Code for which the maximum penalty, exclusive of fine, is imprisonment in excess of one year but not in excess of five years.

IV. A misdemeanor is any crime so designated in this Code and any crime defined outside of this Code for which the maximum penalty, exclusive of fine, is imprisonment not in excess of one year: provided, however, that a crime defined by statute outside of this Code is a misdemeanor when committed by a corporation or an unincorporated association if the maximum fine therein provided is more than fifty dollars but not more than two hundred dollars.

V. A violation is an offense so designated in this Code and, except as provided in this subsection, any offense defined outside of this Code for which there is no other penalty provided other than a fine or fine and forfeiture or other civil penalty. In the case of a corporation or an unincorporated association, offenses defined outside of this Code are violations if the amount of any such fine provided does not exceed fifty dollars.

Comments

This section is patterned on Model Penal Code § 1.04 and classifies all offenses, whether they are in the Code or in another part of the statutes, into four categories. The purpose of the classification is to provide a framework whereby the relative seriousness of offenses may be scaled and sentences authorized accordingly. Except for murder, all offenses are felonies, misdemeanors or violations. The latter class is applicable to offensive conduct of such minimal seriousness that it is specifically declared not to be criminal. Except for

the fact that use of the criminal process for enforcement has been traditional, there would be no reason to include violations in the Criminal Code. The major effect of having a class of violations will be to make non-criminal the breach of numerous prohibitions scattered throughout the statute books for which no imprisonment penalty is now provided.

Unlike some other recent recodifications, this section provides for only three classes of criminal offenses; Michigan, for example, has six (§ 1201). It is the view of the commission that a large number of classes makes it exceedingly difficult to grade offenses rationally since such a scheme calls for making distinctions among offenses that are too fine to be clearly supportable by reason or experience.

Offenses defined outside the Code relating to corporations have been classified on the basis of fines since there are, quite naturally, no terms of imprisonment mentioned in those statutes.

570:10 Burden of Proof. No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.

Comments

This rule is taken from the Model Penal Code, § 1.12(1) and restates the traditional principle concerning the weight of the burden of proof in criminal cases and the so-called presumption of innocence. Many New Hampshire cases have upheld this burden of proof rule, e.g., State v. Tetrault, 78 NH 14, 95 A 669 (1915), and it is restated here in order to designate clearly the matters to which the rule applies. This is accomplished by virtue of this section and the definition of "element of an offense" in section 570:11. There are, of course, other things to be proved in a criminal trial than the elements of the offense charged, e.g., "evidentiary facts" State v. Burley, 95 NH 77, 57 A2d 618 (1948) (identity and consciousness of guilt); facts which make an offense of one classification or another (see section 576:1(I) which declares: "Assault is a misdemeanor unless committed in a fight entered into by mutual consent, in which case it is a violation"); or, facts relating to sentencing (see chapter 607). Several of the recently proposed criminal law revisions contain additional rules relating to the location of the burden of proof—on the defense or on the prosecution—concerning proof of facts that are not elements of an offense and the weight of that burden. The Model Penal Code, § 1.12(4), for example, provides that "When the application of the Code depends upon the finding of a fact which is not an element of an offense, unless the Code otherwise provides: (a) the burden of proving the fact is in the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made;

and (b) the fact must be proved to the satisfaction of the Court or jury, as the case may be." The Commission believes that present law, e.g., the Burley case supra, is adequate on the subject.

570:11 General Definitions. The following definitions apply to this Code.

I. "Conduct" means an action or omission, and its accompanying state of mind, or, a series of acts or omissions:

II. "Person", "he", and "actor" include any natural person and, a corporation or an unincorporated association:

III. "Element of an offense" means such conduct, or such attendant circumstances, or such a result of conduct as

(a) is included in the definition of the offense; or
(b) establishes the required kind of culpability; or
(c) negatives an excuse or justification for such conduct; or
(d) negatives a defense under the statute of limitations; or
(e) establishes jurisdiction or venue;

IV. "Material element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unrelated to (1) the harm sought to be prevented by the definition of the offense, or (2) any justification or excuse for the prescribed conduct.

V. "Deadly weapon" means any firearm, knife or other substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury.

VI. "Serious bodily injury" means any harm to the body which causes severe, permanent or protracted loss or impairment of the function of any bodily member or organ.

Comments

There are several crucial terms which occur a number of times through the Criminal Code and whose meaning needs to be made clear. It is, therefore, convenient to provide definitions for them at the outset of the Code rather than repeat them in a number of places. The substance of the first four definitions has been taken from the Model Penal Code, § 1.13. The last two definitions are based on terminology found in the Michigan Revised Criminal Code, Final Draft, § 135. Both the Model Code and the Michigan Draft contain 16 separate definitions. This section does not incorporate or refer to most of the terms defined in those provisions for the reason that (1) they appear to be so substantially free of controversy as

to their meaning that there is no need for legislative clarification; or (2) this Code provides definitions in a more appropriate place. An example of (1) from the Model Code is: "'reasonably believes' or 'reasonable belief' designates a belief which the actor is not reckless or negligent in holding." An example of (2) from the Michigan Draft are the definitions of "violation," "misdemeanor," and "felony," which are found in section 570:9.

The definition of "conduct" is designed to make clear that it is used in the Code with a more comprehensive meaning than mere physical movement. The inclusion of corporations and unincorporated associations within the proscriptions of the Code is accomplished by the definition in paragraph II. "Element of an offense" needs to be defined so that the meaning of the burden of proof provision in section 570:10 relates to all of the things which it is appropriate to require the prosecution to prove. The definition in IV provides clarifying scope to the provision of section 571:2(I) which states the general rule that each material element of an offense must be accompanied by a culpable state of mind. "Deadly weapon" is defined in recognition of the fact that virtually anything, if used in a fitting manner, can cause death or serious injury. Whether there is a deadly weapon involved is, therefore, made to turn on how the actor proposes to use the thing he wields. The last definition indicates that risk of death is not the only criteria for finding a serious injury. A severe impairment of the body's normal functioning, or an impairment that persists through a long period of time also falls under the definition.

CHAPTER 571

GENERAL PRINCIPLES

571:1 Requirement of a Voluntary Act.

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

II. Possession is a voluntary act if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

Comments

Paragraph I states the common law requirement of an *actus reus*. Its requirement of a voluntary act ought to be broad enough to preclude criminal liability under circumstances of duress or involuntary intoxication. Unlike many of the other restatements of criminal law, e.g., Model Penal Code, § 2.01(2), this section similarly does not deal expressly with problems of hypnosis, somnambulism or involuntary reflexes. Paragraph II deals with a frequently encountered problem, i.e., is there a mental element involved in the act of possessing? An affirmative position is taken, with knowledge of awareness identified as the element. Absent this sort of requirement, possession is a matter of chance, a factor on which criminal liability ought not to depend.

571:2 General Requirements of Culpability.

I. A person is guilty of murder, a felony, or a misdemeanor only if he acts purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense. He may be guilty of a violation without regard to such culpability. When the law defining an offense prescribes the kind of culpability that is sufficient for its commission, without distinguishing among the material elements thereof, such culpability shall apply to all the material elements, unless a contrary purpose plainly appears.

II. The following are culpable mental states:

(a) "Purposely." A person acts purposely with respect to a material element of an offense when his conscious object is to cause the result or engage in the conduct that comprises the element.

(b) "Knowingly." A person acts knowingly with respect to conduct or to a circumstance that is a material element of an offense when he is aware that his conduct is of such nature or that such circumstances exist.

(c) "Recklessly." A person acts recklessly with respect to a material element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard constitutes a gross deviation from the conduct that a law-abiding person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of having voluntarily engaged in intoxication or hypnosis also acts recklessly with respect thereto.

(d) "Negligently." A person acts negligently with respect to a material element of an offense when he fails to become aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that his failure to become aware of it constitutes a gross deviation from the conduct that a reasonable person would observe in the situation.

III. When the law provides that negligence suffices to establish an element of an offense, such element is also established if the person acts purposely, knowingly or recklessly. When recklessness suffices, the element is also established if the person acts purposely or knowingly. When acting knowingly suffices, the element is also established if a person acts purposely.

IV. A requirement that an offense be committed wilfully is satisfied if the person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

V. Neither knowledge nor recklessness nor negligence as to whether conduct constitutes an offense or as to the existence or meaning of the law defining the offense is an element of such offense, unless the law so provides.

Comments

This section deals with the *mens rea* elements of offenses and substitutes relatively clear definitions for commonly found terms such as "wilfully" or "maliciously" or "corruptly", etc. Paragraph I provides for liability without regard to a mental element in the case of a violation. The definitions in paragraph II are patterned on Model Penal Code § 2.02(2). Paragraph III provides for proving an offense by establishing a higher degree of culpability than that charged. Paragraph V makes clear that this section does not impose any requirement relating to knowledge of the law.

571:3 Effect of Ignorance or Mistake.

I. A person is not relieved of criminal liability because he acts under a mistaken belief of fact unless:

(a) The mistake negatives the culpable mental state required for commission of the offense; or

(b) The statute defining the offense expressly provides that such mistake is a defense; or

(c) Such mistake supports a defense of justification as defined in chapter 572.

II. A person is not relieved of criminal liability because he acts under a mistaken belief that his conduct does not, as a matter of law, constitute an offense unless his belief is founded upon a statement of the law contained in a statute or other enactment, or an administrative order or grant of permission, or a judicial decision of a state or federal court, or a written interpretation of the law relating to the offense officially made by a public servant, agency or body legally empowered with authority to administer, enforce or interpret such law. The defendant must prove a defense arising under this subsection by a preponderance of evidence.

Comments

This section is taken from § 325 of the Michigan Revised Criminal Code, Final Draft of September 1967. Paragraph I states obvious principles of relevance; the more important legislative statements are in II which sets forth a limited defense based upon reliance on the opinions of certain constituted authorities. The effect of this section is to repudiate, in the circumstances set forth, the broad language in State v. Marsh, 36 NH 196 (1858), to the effect that a mistake concerning the law is never a defense to a criminal charge. The facts of the case, however, involved reliance on the advice of private counsel as to what the state of the law was, and, for reasons primarily related to the risks of fraud and perjury, this section leaves undisturbed the rule of Marsh to the effect that this sort of reliance does not give rise to a defense.

571:4 Absolute Liability.

I. When an offense defined by a statute outside of this Code imposes criminal liability without requiring either purpose, knowledge, recklessness or negligence with respect to any material element thereof, the offense constitutes a violation, except as the conviction is governed by paragraph II.

II. Although absolute liability is imposed by law with respect to a material element of an offense defined by a statute other than this Code, the offense may be charged as having been committed negligently, in which case the offense shall be a misdemeanor.

Comments

The policy embodied in this section is found in Model Penal Code, § 2.06(2). In New Hampshire, it has been declared that the legislature may impose criminal liability upon the mere commission of certain acts, independently of any mental element, State v. Cornish, 66 NH 329 (1890). This section recognizes that ability but adds two major

policy decisions. One, embodied in paragraph I, declares that these kinds of offenses are violations, meaning that they are not criminal according to section 570:9(II)(b) and that, except as provided for in paragraph II, no imprisonment may be imposed. Section 607:2(III) authorizes only sentences of probation, conditional or unconditional discharge, or a fine for a violation. Paragraph II permits conviction of a misdemeanor, with a potential one year's imprisonment, if the offense is committed culpably. It is sufficient to charge that the defendant was negligent in view of section 571:2(III) which provides that such a charge is sustained if he acted either negligently, knowingly, purposely or recklessly. This alternative for a higher degree of guilt set forth in paragraph II would be most useful in the case of repeated violations of an absolute liability statute.

571:5 Entrapment. It is an affirmative defense that the actor committed the offense because he was induced or encouraged to do so by a law enforcement official or by a person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence against him and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. However, conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Comments

This section is a modification of § 640 of the Michigan draft and codifies existing New Hampshire law on the subject. Thus, the motive of the officer to test the honesty of the defendant does not, of itself, create the defense, as was held in State v. Snow, 98 NH 1 (1953). Similarly, opportunity to commit an offense, without more, is not entrapment. State v. Del Bianco, 96 NH 436 (1951); State v. Groulx, 106 NH 44 (1964). What has been troublesome is the question of how to measure the extra ingredient that does give rise to entrapment. This section proposes that the test be the risk that an honest man would respond to the inducement or opportunity by committing the offense. This is not an easy to apply mechanical rule but it does serve to identify the issue that is involved.

571:6 Consent.

I. The consent of the victim to conduct constituting an offense is a defense if such consent negatives an element of the offense or precludes the harm sought to be prevented by the law defining the offense.

II. When conduct constitutes an offense because it causes or threatens bodily harm, consent to the conduct is a defense if the bodily harm is not serious; or the harm is a reasonably foreseeable hazard of lawful activity.

III. Consent is no defense if it is given by a person legally incompetent to authorize the conduct or by one who, by reason of immaturity, insanity, intoxication or use of drugs is unable and known by the actor to be unable to exercise a reasonable judgment as to the harm involved.

Comments

This section is based on § 2.11 of the Model Penal Code. Paragraph I provides the general rule that consent may prevent the occurrence of any harm, as when a property owner consents to an entry that would otherwise be a trespass, or a confined person agrees to a confinement that would otherwise be a false imprisonment. In II, however, the victim's consent does not prevent serious injuries from being criminal. The last provision of II relates to sports activity where body contact is to be expected. Paragraph III qualifies both I and II by indicating that some persons are not legally capable of consenting in the circumstances described.

571:7 Defenses; Affirmative Defenses and Presumptions.

I. When evidence is admitted on a matter declared by this Code to be

(a) a defense, the state must disprove such defense beyond a reasonable doubt; or

(b) an affirmative defense, the defendant has the burden of establishing such defense by a preponderance of the evidence.

II. When this Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences:

(a) when there is evidence of the facts which 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 negatives the presumed fact; and

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

Comments

These two subjects are both of major importance and traditionally vague so that a statement as to their meaning in the Code is necessary. Paragraph I indicates that it is the design of this Code to denominate each matter of defense which it contains as either an affirmative or simple defense, with the burden of proof consequences that are entailed. This is deemed preferable to the Model Penal Code approach (§ 1.12(3)) which would have the distinction at times turn on the nature of the particular defense as it appears in a particular case. This injects a degree of uncertainty which is not necessary.

The presumption rules in paragraph II are taken from the Model Penal Code, § 1.12(5). The rule in II(a) restates the general principle that a presumption means that proof of the basic fact is normally enough to get to the jury on the question of the presumed fact. The problem of rebutting or destroying the presumption is dealt with in the latter part of (a) which requires the court to rule, as a matter of law, against the existence of the presumed fact when the total posture of the case clearly indicates that to be so. Unless the court finds the case to be so strongly against the presumed fact, the issue is to go to the jury. In II(a), the troublesome question of what, if anything, a jury is to be told about a presumption is settled by requiring a restatement of the reasonable doubt rule and an instruction that proof of the basic fact satisfies that rule insofar as the presumed fact is concerned.

571:8 Criminal Liability for Conduct of Another.

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

II. A person is legally accountable for the conduct of another person when:

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

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

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

III. A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense, he solicits such other person in committing it, or aids or agrees or attempts to aid such other person in planning or committing it; or

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

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

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

VI. Unless otherwise provided, a person is not an accomplice in an offense committed by another person if (a) he is the victim of that offense; (b) the offense is so defined that his conduct is inevitably incident to its commission; or (c) he terminates his complicity prior to the commission of the offense and wholly deprives it of effectiveness in the commission of the offense or gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

VII. An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

Comments

This section is derived from the Model Penal Code § 2.06 and was enacted in 1967 as chapter 590-A, RSA. The last three sections (8, 9, and 10) of that chapter have not been incorporated since their provisions are found in other parts of this Code, i.e., section 587:3 embodies the substance of section 8. Jurisdiction to prosecute when elements of the offending conduct occur outside the state, the concern of sections 9 and 10, is provided in section 570:4.

CHAPTER 572

JUSTIFICATION

572:1 General Rule. Conduct which is justifiable under this chapter constitutes a defense to any offense. The fact that such conduct is justifiable, however, does not abolish or impair any remedy for such conduct which is available in any civil action.

Comments

In combination with section 571:7, this section allocates to the prosecution the burden of disproving beyond a reasonable doubt any ground of justification which the defendant may bring forth. There are no New Hampshire decisions pertaining to burden of proof on the issue of justification. Similar provisions are commonly found, e.g. New York Penal Law, § 35.00; Michigan Revised Criminal Code, Final Draft § 645. The second sentence is taken from the Model Penal Code § 3.01(2) and is a recognition that the policies and values promoted by chapter 572 are often different from those involved in civil litigation.

572:2 Public Duty.

I. Any conduct, other than the use of physical force under circumstances specifically dealt with in other sections of this chapter, is justifiable when it is authorized by law, including laws defining functions of public servants or the assistance to be rendered public servants in the performance of their duties; laws governing the execution of legal process or of military duty; and judgments or orders of courts or other tribunals.

II. The justification afforded by this section to public servants is not precluded by the fact that the law, order or process was defective provided it appeared valid on its face or, as to persons assisting public servants, by the fact that the public servant to whom assistance was rendered exceeded his legal authority or that there was a defect of jurisdiction in the legal process or decree of the court or tribunal, provided the actor believed the public servant to be engaged in the performance of his duties or that the legal process or court decree was competent.

Comments

The function of this section is to make clear that carrying out public duties does not entail criminal liability even when there may be a literal violation of a penal statute. Since the use of force presents relatively complex rules of justification, an exception is created here in order to avoid a repetition of those rules. Paragraph II provides for justification in the face of a mistake of law which the actor could not reasonably be expected to investigate.

Unlike other provisions of this import, e.g. N.Y. § 35.05(1) and Michigan § 601, this section does not require that the law or other order be in fact valid in order for a public servant's acts to be justified. This expresses the holding in State v. Weed, 21 NH 262 (1850), that if the process under which an officer acts is valid on its face any knowledge that the officer may have that indicates its invalidity is irrelevant to the legality of his actions. The reason for this is that the machinery of justice would be unduly hampered if officers had to govern their official acts by the state of their subjective beliefs rather than by the directives they receive. Since this consideration does not come into play in regard to private citizens, paragraph II permits the justification otherwise afforded to be withdrawn if the actor believes the events to be illegal.

572:3 Competing Harms.

I. Conduct which the actor believes to be necessary to avoid harm to himself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the offense charged. The desirability and urgency of such conduct may not rest upon considerations pertaining to the morality and advisability of such statute, either in its general or particular application.

II. When the actor was reckless or negligent in bringing about the circumstances requiring a choice of harms or in appraising the necessity of his conduct, the justification provided in paragraph I does not apply in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish criminal liability.

Comments

This section is based largely on N.Y. § 35.05(2) and states what the Model Penal Code calls the "choice of evils" doctrine. The criteria on which the justification rests must, of necessity, be fairly general and function to direct a jury's attention to the means for reaching a decision rather than to determine their verdict once facts are found. The section is designed to function in such circumstances as the destruction of property in order to control a general conflagration or running an uncontrollable automobile through a store window in order to avoid striking pedestrians. Paragraph II declares that if the actor was at fault in bringing on the dilemma he may be held liable for the harm he causes on the basis of that fault.

572:4 Physical Force in Defense of a Person.

I. A person is justified in using non-deadly force upon another person in order to defend himself or a third person from what he reasonably believes to be the imminent use of unlawful, non-deadly force by such other

person, and he may use a degree of such force which he reasonably believes to be necessary for such purpose. However, such force is not justifiable if:

(a) With a purpose to cause physical harm to another person, he provoked the use of unlawful, non-deadly force by such other person; or

(b) He was the initial aggressor, unless after such aggression he withdraws from the encounter and effectively communicates to such other person his intent to do so, but the latter notwithstanding continues the use or threat of unlawful, non-deadly force; or

(c) The force involved was the product of a combat by agreement not authorized by law.

II. A person is justified in using deadly force upon another person when he reasonably believes that such other person is about to use unlawful, deadly force against the actor or a third person, or is likely to use any unlawful force against the occupant of a dwelling while committing or attempting to commit a burglary of such dwelling, or is committing or about to commit kidnapping or a forcible sex offense. However, a person is not justified in using deadly force on another to defend himself or a third person from deadly force by the other if he knows that he can, with complete safety

(a) retreat from the encounter, except that he is not required to retreat if he is in his dwelling and was not the initial aggressor; or

(b) surrender property to a person asserting a claim of right thereto; or

(c) comply with a demand that he abstain from performing an act which he is not obliged to perform; nor is the use of deadly force justifiable when, with the purpose of causing death or serious bodily harm, the actor has provoked the use of force against himself in the same encounter.

(d) If he is a law enforcement officer or a private person assisting him at his direction and was acting pursuant to section 572: 5, he need not retreat.

Comments

This section is a modification of § 615 of the Michigan Revised Criminal Code, Final Draft, and undertakes to clarify and articulate the law relating to self-defense as well as the circumstances in which force may be used against another even in the absence of some aggression against the actor. Distinctions are made between the use of deadly and non-deadly force, terms which are defined in section 572:9.

Both sorts of force may be used in defense of a third person as well as in defense of the actor. Paragraph I provides the general rule that in order to repel unlawful and non-deadly force an amount of force necessary for the purpose may be used. The provisions of I(a)–(c) deal with situations where it would generally be agreed that the general rule ought not to apply.

The use of deadly force is governed by broader criteria than preservation of the actor or a third person. Para-

graph II sanctions its use to prevent kidnapping or a forcible sex offense and against burglars who are likely to use *any* personal violence. Paragraph II(a)–(d) deals with rules concerning limitations on the defensive use of deadly force. The provisions of II(a) constitute a rejection of the holding in State v. Grierson, 96 NH 36 (1949), that a person in his own dwelling must retreat if the aggressor is a guest and not an intruder. Judge Duncan's dissenting view, 96 NH at p. 42, that there is no duty to retreat in one's home, regardless of who the attacker is, is embodied in II(a) on the grounds that any distinction between guests and trespassers is irrelevant when deadly force is offered to a person in his home.

Paragraph II(b) and (c) state a priority of the value of human life over the possession of property claimed by another and the freedom to do lawful acts. Where there is no claim of right to the property then the demand for it accompanied by the offer of deadly force is robbery and the limitation against a response with deadly force is inapplicable.

572:5 Physical Force in Law Enforcement.

I. A law enforcement officer is justified in using non-deadly force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest or detention or to prevent the escape from custody of an arrested or detained person, unless he knows that the arrest or detention is illegal, or to defend himself or a third person from what he reasonably believes to be the imminent use of non-deadly force encountered while attempting to effect such an arrest or detention or while seeking to prevent such an escape.

II. A law enforcement officer is justified in using deadly force only when he reasonably believes such force is necessary

(a) to defend himself or a third person from what he reasonably believes is the imminent use of deadly force; or

(b) to effect an arrest or prevent the escape from custody of a person whom he reasonably believes

(1) has committed a felony involving the use or threatened use of deadly force, or is using a deadly weapon in attempting to escape, or otherwise indicates that he is likely seriously to endanger human life or to inflict serious bodily injury unless apprehended without delay; and

(2) he had made reasonable efforts to advise the person that he is a law enforcement officer attempting to effect an arrest and has reasonable grounds to believe that the person is aware of these facts:

provided that nothing in this paragraph constitutes justification for conduct by a law enforcement officer amounting to an offense against innocent persons whom he is not seeking to arrest or retain in custody.

III. A private person who has been directed by a law enforcement officer to assist him in effecting an arrest or preventing an escape from custody is justified in using

(a) non-deadly force when and to the extent that he reasonably believes such to be necessary to carry out the officer's direction, unless he believes the arrest is illegal; or

(b) deadly force only when he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the imminent use of deadly force, or when the law enforcement officer directs him to use deadly force and he believes such officer himself is authorized to use deadly force under the circumstances.

IV. A private person acting on his own is justified in using non-deadly force upon another when and to the extent that he reasonably believes it necessary to arrest or prevent the escape from custody of such other whom he reasonably believes to have committed a felony and who in fact has committed that felony: but he is justified in using deadly force for such purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the imminent use of deadly force.

V. A guard or law enforcement officer in a facility where persons are confined, pursuant to an order of a court or as a result of an arrest, is justified in using deadly force against such persons under the circumstances described in paragraph II of this section. They are justified in using non-deadly force when and to the extent they reasonably believe it necessary to prevent any other escape from such a facility.

VI. A reasonable belief that another has committed an offense means such belief in facts or circumstances which, if true, would in law constitute an offense by such person. If the facts and circumstances reasonably believed would not constitute an offense, an erroneous though reasonable belief that the law is otherwise does not make justifiable the use of force to make an arrest or prevent an escape.

VII. Use of force that is not justifiable under this section in effecting an arrest does not render illegal an arrest that is otherwise legal and the use of such unjustifiable force does not render inadmissible anything seized incident to a legal arrest.

Comments

The policies expressed in this section are derived from § 630 of the Michigan Revised Criminal Code, Final Draft, although several changes have been made in the language which expresses those policies.

Paragraph I specifies circumstances in which non-deadly force may be used for an arrest or detention or to prevent escape by an arrested or detained person. Their effect is to put in a positive way that which RSA 594: 4(a) now declares negatively and generally that "No unnecessary or unreasonable force" may be used.

Paragraph II broadens the circumstances in which deadly force may be used by an officer beyond the present justification

in RSA 594:4(b)(2). This occurs in II(b)(2) where factors of dangerousness are set forth which more adequately relate to the justification provided than does the single specification that the arrest be for a felony contained in RSA 594:4(b)(2). The requirement of RSA 594:4(b)(3) that "There is no other apparently possible means of effecting the arrest" has not been restated in the belief that the situations in which the justification of II(b) is likely to come into play involve rapid and accurate decision-making by the officer which it would be unwise to burden with the further requirement that alternatives be weighed. The notice requirement in II(b)(2) restates RSA 594:4(b)(4) on the ground that it is a sufficiently inherent part of the arrest process as to impose virtually no added burden on the officer while it may serve to save life if the person he seeks to arrest surrenders upon receiving the notice. This may well occur if the officer is not in uniform and his acts have been perceived as private aggression.

Paragraphs III and IV deal with justification for private persons who participate in the law enforcement process, either assisting an officer, III, or on their own, IV. Both sections, in essence, authorize non-deadly force in order to arrest or maintain custody and deadly force only to defend against a similar aggression or at the specific order of an officer.

Officers working in jails or other penal institutions are granted the same justification in paragraph V as are other law enforcement officers in paragraph II.

Problems of mistake on the part of those who rely on the justification in this section are dealt with in paragraph VI. The traditional rule that a reasonable mistake of fact benefits the actor while one relating to law does not is set out.

Paragraph VII responds to the question of the legal effects of using an excessive amount of force or force under circumstances that do not amount to justification. In and of itself, such illegality is declared not to taint the legality of what is otherwise a legal arrest and does not affect the rule that searches incident to a legal arrest are not invalid.

572:6 Physical Force by Persons with Special Responsibilities.

I. A parent, guardian or other person responsible for the general care and welfare of a minor is justified in using force against such minor when and to the extent that he reasonably believes it necessary to prevent or punish such minor's misconduct.

II. A teacher or person otherwise entrusted with the care or supervision of a minor for special purposes is justified in using force against any such minor who creates a disturbance when and to the extent that he reasonably believes it necessary to expel such minor from the scene of such disturbance.

III. A person responsible for the general care and supervision of an incompetent person is justified in using force for the purpose of safeguarding

his welfare, or, when such incompetent person is in an institution for his care and custody, for the maintenance of reasonable discipline in such institution.

IV. The justification extended in paragraph I, II, and III does not apply to the purposeful or reckless use of force that creates a risk of death, serious bodily injury, or substantial pain, mental distress or humiliation.

V. A person authorized by law to maintain decorum or safety in a vessel, aircraft, vehicle, train or other carrier, or in a place where others are assembled may use non-deadly force when and to the extent that he reasonably believes it necessary for such purposes, but he may use deadly force only when he reasonably believes it necessary to prevent death or serious bodily injury.

VI. A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious bodily injury upon himself may use a degree of force on such person as he reasonably believes to be necessary to thwart such a result.

VII. A licensed physician, or a person acting under his direction, may use force for the purpose of administering a recognized form of treatment which he reasonably believes will tend to promote the physical or mental health of the patient, provided such treatment is administered

(a) with consent of the patient or, if the patient is a minor or incompetent person, with the consent of the person entrusted with his care and supervision; or

(b) in an emergency when the physician reasonably believes that no one competent to consent can be consulted and that a reasonable person concerned for the welfare of the patient would consent.

Comments

This section relates to many different types of activity such as parent-child and teacher-student relationships. These are among the most crucial settings of group life and the regulations contained in this section are correspondingly important. Provisions of similar import are found in Model Penal Code § 3.08, New York Penal Law § 35.10 and Michigan Revised Criminal Code, Final Draft, § 610. The policies in this section, however, differ somewhat from these others.

The use of force authorized in the first three paragraphs is subject to the limitations expressed in paragraph IV which is designed to insure preservation of the most central interests of the minors and incompetents against whom the force is used.

Paragraph I recognizes that the family or its surrogates have the primary responsibility for socializing children and that discipline is a core matter in this process. Although many persons would insist that corporal punishment is not a desirable form of discipline, it does not seem to be a proper func-

tion of law to impose a particular view of child-rearing so long as the limits of paragraph IV are observed.

Paragraph II provides a more restrictive view of the use of force once a child leaves his family setting and is in the more impersonal school situation. Here the proper limit-setting role for the authorities is to insure that the activities of the group are not interrupted by the misbehavior of individuals. There are normally sufficient disciplinary alternatives available to school authorities so that the use of physical force against children can be limited to what is necessary for continuation of the educational process. This section changes the law as it was established in Heritage v. Dodge, 64 NH 297 (1886). It was there held that "The law clothes the teacher, as it does the parent in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment." 298–99. Since it is now generally recognized, as it was not in 1886, that the school is not and and cannot be a second family, there is no reason to equate the authority of teachers to that of parents. To enforce discipline generally, as compared with such of it as is necessary to carry out teaching responsibilities, is too great a burden to place on schools. This section envisages that the circumstances in Heritage, where a child persisted in making noises after having been told by the teacher to stop, would be met, not with the blows which were there judicially approved, but by expulsion from the class and an inquiry by the school to determine what lies behind the misbehavior.

Paragraph III, like the previous two, is designed to give the relevant authorities permission to use the force necessary to carrying out their assigned functions.

Paragraph V seeks to provide authority to act for those who are responsible for the safety of others, even to the extent of using deadly force to preserve the lives of the group.

Paragraph VII provides physicians with immunity from criminal liability in circumstances which would generally be recognized as constituting a proper use of his medical skills.

572: 7 Use of Force in Defense of Premises. A person in possession or control of premises or a person who is licensed or privileged to be thereon is justified in using non-deadly force upon another when and to the extent that he reasonably believes it necessary to prevent or terminate the commission of a criminal trespass by such other in or upon such premises, but he may use deadly force under such circumstances only in defense of a person as prescribed in section 572: 4 or when he reasonably believes it necessary to prevent an attempt by the trespasser to commit arson.

Comments

This section is modeled on Michigan Revised Criminal Code, Final Draft, § 620. It is designed to permit termination of conduct in violation of section 580:2, Criminal Trespass, by the use of such force as appears reasonably to be required. The use of deadly force, however, is not permitted unless

there are present, in addition to the trespass, the circumstances described in section 572:4. Deadly force is also justified in order to prevent arson by a trespasser, a provision which supplements the justification in section 572:4 relating to use of such force to prevent personal violence by a burglar, kidnapping or forcible sex offenses. State v. Woodward, 50 NH 527 (1871), held that force was not justified to expel a trespasser, unless "refusal to depart on request". p. 529. Although under section 580:2 a trespass may be committed without a request and refusal, the present section does not change the rule of the Woodward case since whether a request had been made and refused would bear on the necessity to use force, a matter specifically noted in Woodward: "the violence used appears to have been wholly unnecessary and unjustifiable". p. 529. The only present statute bearing on this is RSA 572:9 which authorizes an arrest by any person who sees a trespass to improved land.

572: 8 Use of Force in Property Offenses. A person is justified in using force upon another when and to the extent that he reasonably believes it necessary to prevent what is or reasonably appears to be an unlawful taking of his property, or criminal mischief, or to retake his property immediately following its taking; but he may use deadly force under such circumstances only in defense of a person as prescribed in section 572: 4.

Comments

This section authorizes force to protect one's property. It differs in significant respects from other recent and proposed statutes dealing with the same problem, a prototype of which is the Michigan Revised Criminal Code, Final Draft, § 625. It is more narrowly drawn in the sense that it grants permission to use force in protection of property only to the owner or person in possession. The Michigan statute speaks of force to prevent theft or criminal mischief which seemingly can be used by anyone to protect anyone else's property. This creates an undue potential for breaches of the peace.

The problem of the person in possession faced with a demand for the property based on a claim of right is also dealt with here by justifying the use of force against *any* taking that appears to be unlawful. The Michigan draft is in terms of preventing "theft" which would seem to require the person in possession to stand aside when another seeks the property under a claim of right if the possessor knows that such a claim precludes criminal theft liability. State v. Richardson, 38 NH 208 (1859), appears to be in accord with the policy of this section. It was there held that the owner of property could not use force against a sheriff seeking to attach the property under a writ of attachment when the owner "knew he was duly appointed and authorized to serve the writ". p. 208. In terms of the present section, the acts of the sheriff did not "reasonably appear to be an unlawful taking" and the use of force is unjustified.

This section also settles that the use of force that is justifiable to prevent an unlawful taking is also justifiable to accomplish an immediate recapture of the property. The fact that the property has quickly come to rest in the hands of the intruder is not a sufficient reason to require the owner to give up his struggle for it. The limitation implied in the word "immediate" is designed to draw a line between the *res gestae* of the conflict over the property and the total transfer of possession which should relegate the owner to his legal remedies. The owner may pursue his property beyond this line with immunity from theft liability for his self-help behavior, but he will be accountable for any assaults he may commit in the process. The right to use reasonable force to recapture property taken under a claim of right was recognized in State v. Elliot, 11 NH 540 (1841), where the accused chased the taker one hundred yards and forcefully retrieved property that had been taken under a claim of right. It was held that the assault and battery were justified.

572:9 Definitions. As used in this chapter:

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

II. Non-deadly force means any assault or confinement which does not constitute deadly force.

Comments

Since these terms occur through many parts of this chapter it is necessary to provide a clear definition of them. Paragraph I is taken from the Model Penal Code, § 3.11(1). It provides that there are two elements to be found, an assault or confinement and the purpose indicated. The combination of these two constitutes a threat to life of the most serious type. Life may be equally in danger, however, even when the purpose to take it is absent. The second sentence of Paragraph I seeks to identify such a situation and, in conjunction with other provisions of this chapter, declares that a weapon may be fired at a person, even if the purpose is only to wound or to frighten, only where there is specific statutory authority to use deadly force. The risks inherent in the use of a weapon are sufficiently grave to justify this sort of restriction.

The last sentence of paragraph I, on the other hand, is designed to permit law enforcement officials to induce compliance with their orders by drawing their weapons and threatening their use. They may, under both this sentence and the previous one in paragraph I fire the weapon in the air, but

not in the direction of other persons. The lines between threat and action and between verticle and horizontal firing may be thin ones, but law enforcement officers must be entrusted to observe them in good faith.

CHAPTER 573

RESPONSIBILITY

573:1 Immaturity. A person less than fifteen years old is not criminally responsible for his conduct.

Comments

At the present time there is neither legislation nor judicial authority in New Hampshire which modifies the common law rule concerning the defense of infancy. Thus a child under the age of seven cannot be held criminally responsible while one who reaches the age of fourteen is held accountable as if he were an adult. Within these age limits the question of whether a child can be found guilty of a crime depends on a test usually formulated in terms of his knowledge of the wrongness of his act. See Perkins, Criminal Law 729–32 (1957).

This section does away with the need to litigate moral responsibility of those between seven and fourteen by raising the age of incapacity to fourteen. This is recommended in order to have the law recognize that pre-puberty children lack maturity of judgment which would make invocation of the criminal process against them inappropriate. Many of the other criminal law recodifications adopt substantially the same limits for capacity, e.g. Model Penal Code § 4.10(15); Michigan Revised Criminal Code, Final Draft, § 701(14); New York Penal Law, § 30.00(15).

The effect of this section on the New Hampshire Juvenile Court Law, RSA chapter 169, is significant. Section 2 (supp. 1967) of that chapter defines a delinquent child as being *inter alia*, under the age of seventeen, while section 21 authorizes a transfer from the Municipal (Juvenile) Court to the Superior Court for a criminal trial of any child against whom a felony is charged. Since no transfers will be made of children who, by statute, lack the capacity to commit a felony, this section impliedly amends section 21 so that henceforth transfers for a felony trial will only be made concerning children who are sixteen years old, and who committed the felonious acts when they had the legal capacity to do so—when they were 15 or 16.

It is important to note that RSA 169:21 authorizes the transfer prior to any hearing and therefore, is very likely in violation of the federal constitution under Kent v. United States, 383 U.S. 541 (1966), and In re Gault, 387 U.S. 1 (1967). Although Kent arose under the District of Columbia juvenile court law, state courts have uniformly held that a full hearing to decide the transfer question is constitutionally required. See e.g., Hopkins v. State, 209 So.2d 841 (Miss. 1968); Summers v. State, 230 N.E.2d 320 (Ind. 1967). Chapter 169 should be revised as soon as possible.

573:2 Insanity.

I. A person who is insane at the time he acts is not criminally responsible for his conduct. Any distinction between a statutory and common law defense of insanity is hereby abolished and invocation of such defense waives no right an accused person would otherwise have.

II. Evidence of insanity is not admissable unless the defendant within ten days after entering his plea of not guilty or at such later time as the court may for good cause permit, notifies the court and the State of his purpose to rely on such defense.

Comments

It is the purpose of this section to preserve the New Hampshire doctrine of criminal insanity as it was described in State v. Pike, 49 NH 399, 429–44 (1870), and later in State v. Jones, 50 NH 369 (1871), where the rejection of any rule of law was stated by Judge Doe:

> Neither delusion, nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or to transact business, or manage affairs, is, as a matter of law, a test of mental disease; but all symptoms, and all tests of mental disease are purely matters of fact to be determined by the jury.

That the existence of mental disease and its effect on an accused are both questions of fact for the jury to decide and not the subject of legal rules, seems not to be as broadly understood in New Hampshire as might be hoped. See Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity,* 15 Miami L. Review 14 (1960). The proper solution to this, however, is a program of education for those concerned and not a change in an otherwise satisfactory body of law which entrusts the issue entirely to the jury.

The second sentence of paragraph I relates to the fact that there is both a common law defense of insanity, described above, and one provided by statute, RSA 607:2. The only difference between the two is that the use of the statutory plea of insanity constitutes a waiver of all other defenses, while reliance on the common law plea of not guilty works no such waiver and leaves to the accused the opportunity to invoke insanity as well as any other defense he may also have. State v. Forcier, 95 NH 341, 63 A2d 235 (1949). Insofar as this state of affairs constitutes a trap for unwary defendants and their lawyers who may inadvertantly waive important defenses by using the statutory plea, there is no reason to continue to use it. The statutory plea does, however, have the advantage of informing the prosecution that it will have to meet the insanity defense. Where an accused simply pleads not guilty he is free to raise insanity with no prior notice at all to the prosecution. Paragraph II is designed to preserve the value of prior notice so that the prosecution may move at the earliest time to prepare for a contest on this issue.

CHAPTER 574

INCHOATE CRIMES

574:1 Attempt.

I. A person is guilty of an attempt to commit a crime if, with a purpose that a crime be committed, he does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step toward the commission of the crime.

II. As used in this section, "substantial step" means conduct that is strongly corroborative of the actor's criminal purpose.

III. It is an affirmative defense to prosecution under this section that the actor voluntarily renounces his criminal purpose by abandoning his effort to commit the crime or otherwise preventing its commission under circumstances manifesting a complete withdrawal of his criminal purpose.

A renunciation is not "voluntary" if it is substantially motivated by circumstances the defendant was not aware of at the inception of his conduct which increase the probability of his detection or which make more difficult the commission of the crime. Renunciation is not complete if the purpose is to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

IV. The penalty for attempt is the same as that authorized for the crime that was attempted, except that in the case of an attempt to commit murder it is a class A felony.

Comments

This section is a modified and shortened version of the Model Penal Code, § 5.01. It substitutes for the law of attempts which is now punishable by three different sorts of New Hampshire statutes. One is a specific and separate provision which is in terms of an attempt to commit designated offenses, such as RSA 584:5 which punishes any person who "wilfully and maliciously attempt[s] to commit any crime mentioned in the preceding four sections" (arson offenses). A second type uses attempt language in the same section which sets forth a substantive offense such as RSA 572:3, which enumerates a variety of property offenses and then adds, "or attempts any of the foregoing". The third type does not use the language of attempt, but rather is cast in language of substantive behavior, although it is obvious that an attempt to commit another offense is what the law seeks to prevent. An example is RSA 582:15 (1967 supp.) which punished

the concealing of goods within a store, conduct that is usually part of an attempt to steal goods.

Section 574:1 deals with all attempts comprehensively. It follows traditional law in requiring that the defendant's acts be accompanied by a design to commit an offense and that he do more than prepare himself for the accomplishment. The latter requirement is put as a flexible standard—"a substantial step". Paragraph II gives the jury some guidance in applying this by focusing its attention on whether the defendant's acts are highly consistent with his criminal plan.

Since all of the offenses in this chapter involve conduct that is prior in time to the commission of any substantive offense, each section provides for a defense where the defendant reverses himself and seeks to prevent the ultimate harm. This is accomplished by the provisions of paragraph III.

In view of the relatively low scale of penalties contemplated by the Code (15 years for a class A felony and 5 years for a class B felony), the punishment for all offenses in this chapter has generally been set as the same as that for the offense envisioned by the inchoate conduct. Only where the substantive punishment is death (murder) is the penalty for inchoate criminality different.

574:2 Criminal Solicitation.

I. A person is guilty of criminal solicitation if, with a purpose that another engage in conduct constituting a crime, he commands, solicits or requests such other person to engage in such conduct.

II. It is an affirmative defense to prosecution under this section that the actor renounced his criminal purpose by persuading the other not to engage in the criminal conduct or by otherwise preventing commission of the crime under circumstances manifesting a purpose that it not occur.

III. It is no defense to prosecution under this section that the person solicited would be immune from liability for engaging in the criminal conduct by virtue of irresponsibility, incapacity or exemption.

IV. The penalty for criminal solicitation is the same as that authorized for the crime that was solicited, except that in the case of solicitation of murder it is a class A felony.

Comments

This is also an offense that can be committed only purposely and is based on traditional conceptions of inducing others to engage in criminal activity. The Model Penal Code, § 5.02, from which this is partly derived, is written in terms of soliciting a crime, an attempt or complicity. The words "conduct constituting a crime" are intended to encompass all of these. The draft also differs from the Model Penal Code in not using the word "encourages" among the terms describing the *actus reus*, in the belief that it is too vague to serve here. The same decision is in the Michigan Revised Criminal Code, Final Draft, § 1010.

Paragraph III is based on the rule that a criminally culpable person is no less so if he uses a human but legally innocent tool to accomplish his criminal ends. The person solicited need not, of course, actually engage in criminal conduct and, therefore, this subsection is put in terms of *would be* immune, etc. This same principle applies when the innocent person does carry out the plan; this is already provided for by RSA 590-A: 2, I (1967 supp.).

574: 3 Conspiracy.

I. A person is guilty of conspiracy if, with a purpose that a crime defined by statute be committed, he agrees with one or more persons to commit or cause the commission of such crime, and an overt act is committed by one of the conspirators in furtherance of the conspiracy.

II. For purposes of paragraph I, "one or more persons" includes, but is not limited to, persons who are immune from criminal liability by virtue of irresponsibility, incapacity or exemption.

III. It is an affirmative defense to prosecution under this statute that the actor renounces his criminal purpose by giving timely notice to a law enforcement official of the conspiracy and of the actor's part in it, or by conduct designed to prevent commission of the crime agreed upon.

IV. The penalty for conspiracy is the same as that authorized for the crime that was the object of the conspiracy, except that in the case of a conspiracy to commit murder, it is a class A felony.

Comments

The broad scope of this offense has been the subject of much criticism, e.g., by Jackson, J. in Krulewich v. United States, 336 U.S. 440, at 448–9 (1949), and the draft is, accordingly, more narrow than the common law form. While the latter offense has been declared to arise in New Hampshire upon an agreement to do what the fact finder deemed to be in some way immoral, State v. Burnham, 15 NH 396 (1884), the present draft follows the lead of virtually all recodifications in confining the conspiratorial object to the commission of a crime. See e.g., Model Penal Code, § 5.03. The defendant himself, however, need not agree that he will be an actual participant in perpetrating the crime. The words "cause the commission of the crime" are intended to cover agreements merely to assist in the planning or the logistical support of the offense itself. Paragraph I also changes New Hampshire law in requiring an overt act, overruling State v. Straw, 42 NH 393 (1861), in the belief that the requirement is a salutory safeguard against possible injustices inherent in retaining this offense.

Paragraph II is the analogue to paragraph III of the solicitation draft in making clear that the culpability of the particular defendant is important and not legal status of those with whom he deals. Thus, if the defendant himself "agrees" it makes no difference that some incapacity of his fellow somehow prevents an "agreement" from coming into being.

CHAPTER 575

HOMICIDE

575:1 Murder.

I. A person is guilty of murder if he

(a) purposely or knowingly causes the death of another; or

(b) causes such death recklessly under circumstances manifesting an extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor causes the death by use of a deadly weapon in the commission of, or in an attempt to commit, or in immediate flight after committing or attempting to commit arson, burglary or any felony against the person.

II. Punishment for murder shall be governed by the provisions of section 575:6.

III. As used in this section and sections 575:2 and 575:3, the meaning of "another" does not include a foetus.

Comments

The present statute, RSA 585:1, is common law murder divided into two degrees. The function of dividing murder into degrees was originally in order to distinguish capital murder from noncapital murder. At present, however, this distinction is made by the jury, but only when there is murder in the first degree, RSA 585:4. Since the sentencing of murderers is now dealt with separately in section 575:6, it is not necessary for the law defining the offense also to make sentencing distinctions and section 575:1 therefor, attempts to describe the most serious kinds of criminal homicides while leaving to the more appropriate procedural devices of section 575:6 the task of distinguishing the capital murderers from other murderers.

This section follows closely the provisions of Model Penal Code, § 210.2. Paragraph I-a restates a common law basis of murder which would be widely accepted as the most serious type of homicide. The requirement of purpose or knowledge focuses on what were the major ingredients in the premeditation and deliberation formula, one which has not been repeated in any of the restatements of homicide law. Intentional killing which is first degree manslaughter under RSA 585:8 is murder under paragraph I-a. It is not necessary to insert that the homicide is unjustifiable, as might be expected in a common law definition, since all of the principles of justification are in chapter 572, and section 572:1 makes that chapter applicable to all crimes.

Paragraph I-b restates another aspect of common law malice that is sometimes called "depraved heart murder" and

is here described in terms of indifference to human life. It is patterned on Model Penal Code, § 210.2. Like the Model Penal Code, this section defines felony murder only where the felon is indifferent to human life. The prosecution is provided the benefit of a presumption as to this indifference when the felon uses a deadly weapon in the perpetration of certain felonies. Of course, indifference may also be proved when no such weapon was used. Conversely, the use of the presumption gives the felon the opportunity to demonstrate that the killing was in fact accidental and not attributable to any indifference on his part to human life.

Paragraph III is designed to keep murder, manslaughter and negligent homicide distinct from abortion.

575:2 Manslaughter. A person is guilty of a class A felony when he causes the death of another

I. recklessly; or

II. under the influence of extreme mental or emotional disturbance but which would otherwise constitute murder.

Comments

RSA 585:8 and 585:9 define manslaughter as any criminal homicide that is not murder and divide the offense into two degrees. Since the problem of sentencing is one which the Commission realizes needs to be dealt with separately, as is done in chapter 607, the degree device for accomplishing sentencing distinctions is abandoned and manslaughter is defined as a single offense. It is patterned on the Model Penal Code, § 210.3, and retains many of its former common law and statutory features.

Reckless homicide, provided for in I, is closely related to what has often been described as "wanton" or "willful" homicide, which has generally meant a species of conduct that created high risks of death. Whether there was a specific *mens rea* element involved in traditional conceptions of manslaughter and, if there were, how manslaughter of this sort was to be distinguished from murder hardly ever emerged clearly in common law development. This problem is dealt with in part by virtue of the definition of "recklessly" in section 571:2(II)(c) which requires a conscious awareness and disregard of the risk that life may be at stake. The ingredients of first degree manslaughter under RSA 585:8, such as the number of persons involved or the type of instrument used, do not continue to have independent significance and would be relevant only insofar as they might bear on whether the actor was reckless. Whether he was engaged in the commission of another offense would also no longer require a finding of manslaughter. If the advertence and disregard are so blatant as to manifest an extreme indifference to life, then the offense is murder under section 575:1(I)(b).

Paragraph II deals with the problem of what the common law called the provocation that reduces murder to manslaughter. The artificial restrictions that have developed about this

reduction have led to a reformulation of this branch of the offense and this part of the draft is patterned on Model Penal Code, § 210.3(1)(b). The Model Penal Code, however, contains the additional phrase "for which there is reasonable explanation or excuse", a qualification which the Commission has rejected on the grounds that there does not seem to be any meaning in a search for the "excuse" for a mental or emotional disturbance, and whether there is "reasonable explanation" for the disturbance would seem to depend solely upon how much time and effort goes into an analysis of the defendant's nature and nurture: some explanation will be found and whether it is reasonable may depend more on the theory of personality development held by a juror than on any more objective standard. It is the view of the Commission that once a jury is satisfied that the homicide was, in fact, committed under the influence of the disturbance they have sufficient warrant for rejecting murder liability and finding manslaughter.

575:3 Negligent Homicide. A person is guilty of a class B felony when he causes the death of another:

I. Negligently; or

II. In consequence of his being under the influence of intoxicating liquor or habit forming drug while operating a propelled vehicle, as defined in section 582:9 II or a boat, as defined in section 576:5 III.

Comments

This relatively simple statute is based partly on the Model Penal Code, § 210.4(1), and partly on the determination that using an instrumentality as dangerous to human life as a vehicle or a boat while in a state of intoxication is *per se* negligence. Prosecution under this paragraph II should be aided by the "implied consent" law of RSA 262-A:69-a dealing with tests to determine blood alcohol content. RSA 262-A:63, however, declares blood alcohol evidence to be admissible in prosecutions for violation of RSA 262-A:62 (driving while intoxicated) and it is possible that this will be interpreted to mean that such evidence is not admissible for any other purpose. RSA 262-A:63 should be amended to remove this possibility.

In prosecutions for manslaughter and for causing death by reckless driving under RSA 262-A:61, a conviction under this section is possible as a lesser offense.

At the present time "culpable negligence" is a requirement for second degree manslaughter found in RSA 585:9. While this is not further defined in New Hampshire law, the definition of "negligent" in section 571:2(II)(d) supplies a not dissimilar conception of the kind of fault envisaged in RSA 585:9.

575:4 Causing or Aiding Suicide.

I. A person is guilty of causing or aiding suicide if he purposely aids or solicits another to commit suicide.

II. Causing or aiding suicide is a class B felony if the actor's conduct causes such suicide or an attempted suicide. Otherwise it is a misdemeanor.

Comments

This section is derived from New York Penal Law, § 120.30 (paragraph I), and the Model Penal Code, § 210.5(2) (paragraph II). This is included as a separate offense because the voluntary participation of the victim in his own death serves to distinguish it from murder or manslaughter. Where, however, the suicide is induced by duress or deception, this participation is rendered involuntary and prevailing conceptions of causation would support a charge of a more serious homicide.

575:5 Abortion.

I. A person is guilty of a class B felony if he purposely terminates the pregnancy of a woman by any means other than a birth, except under the circumstances described in paragraphs II and III.

II. A licensed physician may, in an accredited hospital, terminate the pregnancy of a woman by means other than a birth if the majority of a committee of three licensed physicians who are members of the staff of said hospital, certify in writing their opinion that:

(a) The pregnancy resulted from rape or incest, as defined in sections 577:1 and 584:2; or

(b) The child is likely to be born with serious physical or mental defects; or

(c) Continuation of the pregnancy is likely to result in the serious impairment of the physical or mental health of the woman.

III. A licensed physician who believes there to exist an emergency which requires termination of a pregnancy in order to preserve the life of a pregnant woman, may do so without first obtaining the opinion of the committee described in paragraph II. He shall, however, within five days following such termination, provide a written description of the circumstances constituting the emergency to an accredited hospital.

IV. For purpose of this section, a woman is pregnant when an embryo becomes implanted in her uterus.

Comments

This section contains elements and concepts from the Model Penal Code, § 230.3, and Colorado Revised Statutes 1963, § 40-2-50 (supp. 1967). There are, however, several variances from both of these models.

Both the Model Penal Code and the Colorado Act indentify the core offense as an unauthorized termination of a pregnancy other than by a "live birth." Both formulations use the word "terminate" to include the process of birth and it is used in that sense here. The "live birth" phrase, however, seems to be too narrow in that it does not serve to make clear that

a physician who delivers a stillborn or naturally dead child commits no criminal offense. This section, therefore, exempts from criminality anyone who delivers a child, be it alive or dead.

The remainder of this section is concerned with describing exceptions to the basic offense. The circumstances constituting these exceptions, in paragraph II(a)(b), and (c), are given similar legal effect not only in the Model Penal Code and the Colorado Law, but can also be found in Proposed Crimes Code for Pennsylvania, § 1803(b), Michigan Revised Criminal Code, Final Draft, § 7015(3), Proposed Kansas Criminal Code, § 21-407, and in other states.

It should be noted that the claim of any woman that the exceptional circumstances exist must be verified by three physicians. Unlike the Colorado Law, their opinion need not be unanimous, although in most instances it likely will be. This section also provides that the termination must take place in "an accredited hospital", meaning that it must be one approved by the Joint Commission on Accreditation of Hospitals.

Both the Model Penal Code and the Colorado Act require that the state prosecuting authorities be informed when a pregnancy has resulted from rape or incest. Kansas and Michigan impose no such requirement. This section adopts the latter view in the belief that it would be inconsistent to enact a law that is designed to destroy the illegal abortion business and, at the same time, send women to that very business who may be afraid that they and others who, for one reason or another they would like to protect, would become involved in a public prosecution. One of the needs this section is designed to meet is to encourage women to abandon recourse to the clandestine and illegal abortionist and the statute ought not to be of two minds about this.

The fact that scientists can now detect by examination of a foetus whether it will be born with serious abnormalities makes it all the more important to include the grounds specified in paragraph II(b). See report in New York Times, September 2, 1968, p. 19, col. 1. The inclusion of the circumstances of paragraph II(c) in so many restatements of abortion law conforms with the view of the Commission that the health of the pregnant woman is a prime consideration in dealing with this question and that it is neither medically valid nor socially desirable to attempt to draw a rigid line between mental and physical health.

Paragraph III provides the necessary permission for emergency medical treatment under conditions where there may not be time for the consultation of paragraph II.

Paragraph IV adopts the Colorado position that, in view of the availability of contraceptive techniques which prevent the implantation of a fertilized egg in the uterus, it is necessary to start pregnancy for purposes of this statute at the time of implantation. Otherwise the law would function as a narrow anti-contraception rule. See Note, Colorado's New Abortion Law, 40 University of Colorado Law Review 297, 300 (1968). This paragraph also serves to permit medical intervention in cases of tubal or ovarian pregnancies.

575:6 Sentence for Murder.

I. A person convicted of murder, following trial or plea, shall be sentenced to death or to a term of imprisonment that may be for any period up to the rest of his life.

II. Upon the return of a verdict of guilty of murder, the court shall conduct a proceeding pursuant to section 575:7 in order to determine whether sentence of death shall be imposed if

(a) either:

(1) the victim of the crime was a law enforcement officer who was killed while performing his duties; or

(2) at the time of the murder, the defendant was in prison or otherwise in custody upon a sentence for the term of his life or, having escaped from such custody, he was in immediate flight therefrom; or

(3) at the time the murder was committed, the defendant also committed another murder; or

(4) the defendant was previously convicted of another murder; or

(5) the murder was committed for pecuniary gain; or

(6) the victim was an appointed or elected officer of the state or of the United States; or

(7) the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity; and

(b) the defendant was more than eighteen years old at the time of the commission of the crime.

III. If the court fails to find the presence of the factors specified in (a) and (b) of paragraph II, it shall proceed to impose a sentence of imprisonment for any term up to the remainder of the defendant's life.

Comments

In United States v. Jackson, 88 S.Ct. 1209 (1968) and Duncan v. Louisiana, 88 S.Ct. 1444 (1968), the Supreme Court of the United States has cast such grave doubt over the constitutionality of the present murder sentencing laws in RSA 585:4 and 585:5 that a failure to rewrite them runs an unacceptably high risk of having them struck down. The Jackson case held that the sentencing provisions of the Federal Kidnapping Act, 18 U.S.C. § 1201(a), violated the Sixth Amendment right to a jury trial because an accused person could receive the death penalty only by decision of a jury. The pressure thus to waive a jury trial is constitutionally improper. The Court also indicated that placing power to sentence to death solely in the hands of a jury constituted an invalid burden of the Fifth Amendment right not to plead guilty. Duncan ruled that the jury trial right in the Sixth Amendment is applicable to the states through the Fourteenth.

There is, of course, a difference between the Federal Kidnapping Act and the New Hampshire statutes inasmuch as RSA 585:5 provides for applying the death penalty when an accused murderer pleads guilty. If New Hampshire law con-

tained only the alternatives of 18 U.S.C. § 1201(a), then it has long ago been declared that the state constitution's right to jury trial would be violated. State v. Comery, 79 NH 6, 8 (1915). It appears to the Commission, however, that since a guilty plea under RSA 585:5 makes it *less* likely that capital punishment will be imposed than if a jury trial is chosen, there is still a constitutional infirmity in the New Hampshire statutes. This situation comes about because, when a person pleads guilty to first degree murder, he has the opportunity to persuade the judge not to impanel a sentencing jury and thereby to save his life. If he fails in that plea, he has *another* opportunity, in the hearing before the jury, to argue for his life. But if he elects a jury trial, he has only the *one* appearance in that proceeding to press for a non-capital penalty. In Jackson, the government urged the Court to interpret the Kidnapping Act as providing the alternatives now found in New Hampshire law. In a dictum response to this argument, the Court gave the clearest warning about the need to change the law of this state:

> Even if the Government's interpretation were sound, the validity of its conclusion would still be far from clear. As the District Court observed, "even if the trial court has the power to submit the issue of punishment to a jury, that power is discretionary, its exercise uncertain. . . . [The] fact would remain that the defendant convicted on a guilty plea or by a judge completely escapes the threat of capital punishment unless the trial judge makes an affirmative decision to commence a penalty hearing and to impanel a special jury for that purpose, whereas the defendant convicted by a jury automatically incurs a risk that the same jury will recommend the death penalty. . . ."

This section is a response to this warning. It provides for a jury decision concerning a death sentence in *all* designated cases, whether the defendant be convicted following trial (jury or bench) or by guilty plea. The Court has no discretion in the matter and a jury must be given the death penalty question in all cases where the convicted person was more than eighteen years old at the time of the murder *and* the murder was a type specified in paragraph I(a). The effect of these latter provisions is to restrict capital punishment to those types of murders when they are committed by a person at least nineteen years old.

The following section, 575:7, provides that the jury is to have all relevant evidence, free from the limits of exclusionary rules, in deciding whether imprisonment or death is the appropriate penalty. When imprisonment is to be the sentence, either because the jury decides on that alternative or because it is unable to reach a decision after a reasonable time and the judge chooses imprisonment rather that impanel a new jury, the term of imprisonment may be for any period, including life.

575:7 Proceedings to Determine Sentence for Murder.

I. Any further proceeding authorized by section 575:6 with respect to a sentence for murder shall be conducted in the manner provided in this section.

II. Such proceeding shall be conducted before a jury, either the jury that found the defendant guilty or a new jury impanelled for that purpose when there has been no jury trial; provided, however, that the court may, for good cause, discharge the trial jury and impanel another.

III. In such proceeding, evidence may be presented by either party on any matter relevant to sentence including, but not limited to, the nature and circumstances of the crime, defendant's background and history, and any aggravating or mitigating circumstances. Any relevant evidence shall be received regardless of its admissibility under the exclusionary rules of evidence.

IV. If the jury report agreement on the imposition of the penalty of death, the court shall discharge the jury and shall impose the sentence of death. If the jury report agreement on the imposition of the sentence of imprisonment, the court shall discharge the jury and shall impose a sentence of imprisonment. If, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and shall, in its discretion, either impanel a new jury to determine the sentence or impose sentence of imprisonment.

Comments

See Comments to section 575:6.

CHAPTER 576

ASSAULT AND RELATED OFFENSES

576:1 Assault.

I. A person is guilty of assault if he

(a) attempts to cause or purposely or recklessly causes bodily injury or physical contact to another; or

(b) negligently causes bodily injury to another with a deadly weapon.

II. Assault is a misdemeanor unless committed in a fight entered into by mutual consent, in which case it is a violation.

Comments

This section replaces RSA 585:21 which, in providing little by way of definition, entails the common law definition of assault, i.e., an attempted battery or the intentional placing of the victim in apprehension of an impending battery. There is some judicial indication, however, that an actual battery is also considered an assault. See State v. Smith, 98 NH 149, 150 (1953). Absent the battery, it appears that the fear-producing assault is also recognized. State v. Gorham, 55 NH 152 (1875); State v. Cornwell, 97 NH 446 (1952). There does not appear to be any case construing assault purely as an attempted battery. Although section 574:1, Attempts, is adequate to deal with attacks that do not succeed, attempted batteries are included here in order to preserve the traditional conception of assault.

The proposed definition of assault is limited to cases involving battery or attempted battery. In this, it follows the Model Penal Code, § 211.1(1)(a) and (b). This section, unlike the Model Penal Code provision, includes "physical contact" as well as "bodily injury" in order to make clear that unlawful touching is prohibited even if no actual damage is caused to the victim. The fear-producing type of conduct, included as an Assault in the Model Penal Code, is made an offense, and its common law scope expanded, in section 576:4, Criminal Threatening, which deals with similar kinds of inchoate assaults. The inclusion of conduct that is merely negligent relates only to harm caused by means of a deadly weapon. When this harm is caused purposely or recklessly, the offense becomes the felony of aggravated assault. "Deadly weapon" is is defined in section 570:11(V).

576:2 Aggravated Assault. A person is guilty of a class B felony if he attempts to cause or purposely, knowingly, or recklessly causes

I. serious bodily injury to another; or

II. bodily injury to another by means of a deadly weapon; or

III. bodily injury to another under circumstances manifesting extreme indifference to the value of human life.

Comments

This is a modified version of Model Penal Code, § 211.1(2) and defines an offense which falls short of homicide only insofar as the victim, by some good fortune, does not die as a result of the attack made on him. The serious bodily injury required in paragraph I is defined in section 570:11(VI).

Although RSA 585:22, which this section replaces, contains no substantive definition, the proposed aggravated assault includes the serious type of injury to which 585:22 relates. As is true concerning simple assault, attempts are included here because they are usually considered a species of assault. See State v. White, 105 NH 159 (1963). Any injury purposely or recklessly caused by a deadly weapon is also included. Paragraph III also requires only bodily injury of any degree and the justification for permitting slight harm to be the basis for a felony conviction is that the defendant's conduct was of the most threatening sort and it is largely by chance that a murder was not committed.

576:3 Reckless Conduct. A person is guilty of a misdemeanor if he recklessly engages in conduct which places or may place another in danger of serious bodily injury.

Comments

This section is derived from Model Penal Code, § 211.2. It has no counterpart in common law or in the New Hampshire statutes. But in dealing with conduct that endangers but does not harm others, it fills an undesirable gap in the law. If actual harm occurs, then a criminal assault will have taken place. Since, when a person acts recklessly, he disregards a risk he knows of and acts with an indifference to the injury he may cause to others, he is just as culpable when the risk does not eventuate in the injury as when it does. Without a statute of this sort, however, a person whose behavior menaces in this way could be prosecuted only if the harm actually occurs.

The scope of this new offense is limited in two ways, however, in view of the fact that conditions of modern urban living require that to some extent we leave others to their own resources to avoid the harm our conduct threatens. Driving an automobile during a rush hour is an example of this endangering conduct. One of the limits is that the actor be reckless and know of the undue risk he is creating. The second is that *serious* bodily injury be at stake, not merely any harm.

The Model Penal Code creates a presumption of recklessness whenever a firearm is pointed at another. This has not been included on the grounds that almost any time a firearm is held in the presence of others a pointing could occur entirely inadvertently.

576:4 Criminal Threatening. A person is guilty of a misdemeanor when,

I. By physical conduct, he purposely places or attempts to place another in fear of imminent bodily injury or physical contact; or

II. He threatens to commit any crime against the person of another with a purpose to terrorize any person; or

III. He threatens to commit any crime of violence with a purpose to cause evacuation of a building, place of assembly, facility of public transportation or otherwise to cause serious public inconvenience, or in reckless disregard of causing such fear, terror or inconvenience.

Comments

Paragraph I of this section describes the fear-producing type of conduct which would be considered an assault at common law. It is included here because it is more closely related to the other forms of criminal threatening than it is to an assault in that all of the conduct in this section is characterized by an absence of intent to cause any immediate actual harm.

The remainder of the section is based on Model Penal Code, § 211.3. There is no similar offense in present New Hampshire law. The purpose of these provisions is to prevent grave fears for personal safety. This not only safeguards an important psychological interest but also serves to forestall breaches of the peace that might ensue as a reaction to the fear produced by the threats. Paragraph III deals with conduct that is likely to result in large scale panic and the problems of personal injury that are likely to arise when crowds of people are under the influence of fear of an impending catastrophe.

576:5 Operating Boats Under Influence of Liquor or Drugs.

I. A person is guilty of a misdemeanor if he operates a boat while under the influence of intoxicating liquor or a narcotic or habit-producing drug.

II. The meaning of "boat" as used in this section includes any craft that can be propelled on the water by motor, sail, paddle, oar, or any other manual or mechanical means.

III. Any person convicted of a violation of

(a) this section; or

(b) sections 576:1, 576:2, 576:3 or 575:2 wherein the offense was committed by means of his operation of a boat,

shall not operate a boat on the waters of this state for a period of one year from the date of his conviction, whether or not such conviction is appealed. Any person operating a boat during such a period is guilty of a misdemeanor.

Comments

RSA 570:28 (1967 supp.) presently defines this offense but includes more than is restated in this section. It includes recklessly endangering others, a problem dealt with generally in section 576:3. Homicide occurring from the reckless operation of a boat, also part of the present statute, is not

repeated here since the provisions of chapter 575 constitute a body of criminal homicide law adequate to include death produced by improper operation of boats.

Paragraph III repeats the present law's provisions concerning suspension of the right to operate a boat, with cross references to include improper operation in violation of section 576:3 or chapter 575.

576:6 Failure to Report Injuries. A person is guilty of a misdemeanor if, having knowingly treated or assisted another for a gunshot wound or for any other injury he believes to have been caused by a criminal act, he fails immediately to notify a law enforcement official of all the information he possesses concerning the injury.

Comments

This section repeats the provisions of RSA 587:19 with terminology amendments to conform with the format of the Code.

CHAPTER 577

RAPE

577:1 Rape.

I. A male who has sexual intercourse with a female not his wife is guilty of a class A felony if

(a) he compels her to submit by force, or by threatening imminent force or serious bodily injury, or kidnapping to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by administering without her knowledge a substance for purposes of preventing resistance; or

(c) the female is unconscious or less than fifteen years old; or

(d) he knows that she suffers from a mental abnormality which renders her incapable of appraising the nature of her conduct; or

(e) he knows she is unaware of the sexual nature of the act being committed upon her.

II. Sexual intercourse has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.

Comments

This section is based on the Model Penal Code, § 213.1 and expands the circumstances that constitute rape beyond what is now specified in RSA 585:16. The threat to kidnap another in order to overcome the woman's resistance goes beyond what the common law, embodied in RSA 585:16, would find to be rape. The other circumstances specified by which the man imposes himself on the woman have normally been found to be rape when the question has arisen. See, e.g., Commonwealth v. Burke, 105 Mass. 376 (1870) (woman unconscious); State v. Smith, 161 Ga. 421 (1925) (mentally retarded woman); State v. Atkins, 292 S.W. 422 (Mo. 1926) (man pretended medical treatment).

The age provision in paragraph I(c) must be considered in conjunction with section 577:4. A male who has sexual relations with a female under the age of seventeen commits an offense regardless of the girl's consent to the act. If the girl is under the age of fifteen, the offense is automatically rape, a class A felony under this section. If she is fifteen or sixteen years old, it is the offense of corruption of minors, a class B felony under section 577:4. This latter section also prohibits females from sexual intercourse with boys who are fifteen or sixteen.

Rape occurs only when there is ordinary sexual intercourse under the circumstances of imposition specified here. Other forms of sexual abuse are dealt with in section 577:2.

577:2 Deviate Sexual Relations.

I. Any person, male or female, who engages in deviate sexual relations with another who is not his spouse is guilty of a class A felony if:

(a) He compels the other person to submit by force or by threatening imminent force or serious bodily injury, or kidnapping, to be inflicted on anyone; or

(b) He has substantially impaired the other person's power to control his conduct by administering without the knowledge of the other person a substance for the purpose of preventing resistance; or

(c) The person is unconscious or less than fifteen years old; or

(d) He knows that the other person suffers from an abnormality which renders the other person incapable of appraising the nature of his conduct; or

(e) He knows that the other person submits because he is unaware of the sexual nature of the act being committed upon him.

II. Any person who engages in deviate sexual relations with another not his spouse under any other circumstances, except those specified in section 577:4, or has any form of sexual intercourse with an animal is guilty of a misdemeanor.

III. Deviate sexual relations means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another.

Comments

The circumstances of imposition in paragraph I are based on the Model Penal Code, § 213.2. The definition of deviate sexual relations is taken from the Michigan Revised Criminal Code, Final Draft, § 2301(b). The impositions described are the same as those which form the basis of rape under section 577:1. The major difference is in the form of sexual abuse that occurs. Both are class A felonies.

Paragraph II creates a misdemeanor for deviate sexual relations under most other circumstances, including such relations between consenting adults. This restates the substance of RSA 579:9. This matter is one of great controversy. The Model Penal Code and the Michigan draft both reject imposing criminality upon such adults. The New York Commission on Revision of the Penal Law and Criminal Code proposed a similar rejection, but the New York legislature did not approve and consensual sodomy is now § 130.38 of the Penal Law.

When deviate sexual relations are committed with the consent of a child fifteen or sixteen years old, the offense is a class B felony under section 577:4.

577:3 Sexual Assault.

I. Any person, male or female, who purposely engages in any sexual contact with another person, not his spouse, is guilty of a misdemeanor if:

(a) He knows that the contact is offensive to the other; or

(b) He knows that the other person suffers from a mental abnormality which renders him incapable of appraising the nature of his conduct; or

(c) He knows that the other person is unaware that a sexual contact is being committed; or

(d) The other person is less than fourteen years old; or

(e) He has substantially impaired the other person's power to appraise or control his conduct by administering without the other's knowledge a substance for purposes of preventing resistance.

II. Sexual contact means any touching of the sexual or other intimate parts of a person, including the female breasts and buttocks.

Comments

This section is drawn from Model Penal Code, § 213.4 and describes an offense, the core of which seems now to be prosecuted as lewd or lascivious behavior under RSA 579:3. See State v. Lizotte, 101 NH 494 (1959); State v. Smith, 98 NH 149 (1953). The offense as described in the draft includes touching of sexual parts knowing that it is offensive to the person touched or under circumstances of imposition similar to those that would constitute rape or deviate sexual relations. When the "victim" is more than thirteen years old and none of the circumstances of imposition in paragraph I are present, no offense is committed by a sexual contact.

577:4 Corruption of Minors.

I. Any person, male or female, is guilty of a class B felony if he has sexual relations with another who is more than fourteen and less than seventeen years of age.

II. For purposes of this section, "sexual relations" means sexual intercourse as defined in section 577:1 and deviate sexual relations as defined in section 577:2.

Comments

This is the statutory rape section of the Criminal Code. Similar provisions are found in all the restatements of penal law. The lower age limit is derived from the "less than fifteen years old" provisions of sections 577:1 and 577:2. This section protects children who are fifteen and sixteen years old, whether they become involved in normal sexual intercourse or some form of deviate sexual relations. RSA 585:16 provides less protection in that it is limited to "carnal copulation" and extends only to children who are less than sixteen. RSA 579:9, dealing with sodomy, however, includes the same persons and acts as are contemplated by the deviate sexual relations part of this section.

577:5 Fornication. A person is guilty of a misdemeanor if he has sexual intercourse with another not his spouse. No person may be convicted under this section, however, solely on the testimony of such other.

Comments

This section restates the offense in RSA 579:4. Like adult consensual homosexuality, it involves conduct which many consider should be beyond control by the criminal law. Neither the Model Penal Code, New York, Michigan, Pennsylvania or Kansas have or propose such an offense. It is, however, found in the Illinois Criminal Code of 1961, § 11-8, and the Wisconsin Criminal Code of 1955, § 944.15.

577:6 Limitations of Prosecution. No prosecution may be maintained under this chapter unless the alleged offense was brought to the attention of a police officer within six months of its occurrence.

Comments

This section is taken from the policy in the Model Penal Code, § 213.6(5). It is designed to prevent prosecutions where there is a high risk of a false complaint being made.

CHAPTER 578

INTERFERENCE WITH FREEDOM

578:1 Kidnapping.

I. A person is guilty of kidnapping if he knowingly confines another under his control with a purpose to:

(a) Hold him for ransom or as a hostage; or

(b) Avoid apprehension by a law enforcement official; or

(c) Terrorize him or some other person; or

(d) Commit an offense against him.

II. Kidnapping is a class A felony unless the actor voluntarily releases the victim without serious bodily injury and in a safe place prior to trial, in which case it is a class B felony.

Comments

The structure of kidnapping statutes varies greatly among the recent restatements of penal law. The substance of this section most nearly resembles Michigan Revised Criminal Code, Final Draft, § 2210. Where Michigan uses the term "abduct", defined in § 2201(b) as "to restrain a person with intent to prevent his liberation by either (i) secreting or holding him in a place where he is not likely to be found, or (ii) using or threatening to use deadly physical force", this section expresses the key concept as "knowingly confines another under his control".

The purposes set forth in I (a)–(d) resemble, but do not restate the Michigan provisions. The latter include, for example, "Facilitate the commission of any felony". This has not been adopted since it would include an offender who "abducts" by placing a householder in a basement closet in order to be free to steal the silver in the dining room. This ought not to be kidnapping.

RSA 585:19 currently condemns kidnapping in terms that seem to include slavery, a matter not covered in this draft. RSA 585:20 deals with kidnapping of minors and specifies constituent elements, most of which are repeated in this section.

In some respects, the draft is more narrow than present law. More than violation of a parent's or guardian's custodial rights are required for the offender to be a kidnapper, although this would constitute a violation of section 578:3, false imprisonment. Assertions of custody of children which are essentially disputes between separated or divorced parents are currently kidnapping offenses, see e.g., State v. Farrar, 41 NH 53 (1860). So, too, a confinement imposed on a willing minor is not kidnapping under the draft, although it is under present law. State v. Lacoshus, 96 NH 76 (1950). The view of the Commission is that there is too large a dif-

ference in seriousness and personal danger between these sorts of misconduct and those described in the draft section for them all to be encompassed in one offense.

Paragraph II is designed to provide an incentive for the kidnapper to release the victim unharmed. "Serious" injury is the criteria because almost any forcible confinement involves some minor bodily harm, such as wrist bruises resulting from being tied up, and it seems unwise to give up the incentive on those grounds.

578: 2 **Criminal Restraint.**

I. A person is guilty of a class B felony if he knowingly confines another unlawfully in circumstances exposing him to risk of serious bodily injury.

II. The meaning of "confines another unlawfully", as used in this and the following section, includes but is not limited to confinement accomplished by force, threat or deception or, in the case of a person who is under the age of sixteen or incompetent, if it is accomplished without the consent of his parent or guardian.

Comments

This section is taken from the Model Penal Code, § 212.2 and provides penalties which are intermediate between those for kidnapping, § 578: 1, and false imprisonment, § 578: 03. The elements of this offense also fall between the other two in terms of seriousness. Like kidnapping, the actor must "knowingly confine". But whereas kidnapping specifies circumstances (the purpose of the actor) which pose the most grave sorts of threats to the safety of the victim, criminal restraint seeks to deal with cases where the threats are of a lesser magnitude. These are identified as a risk of serious bodily injury which the actor must be aware of. In this and the following section, the term "unlawfully" is used in order to clarify the kinds of confinements contemplated. This is, of course, not necessary in kidnapping where confinement plus one of the designated purposes automatically constitute unlawfulness. The definition in paragraph II is not exhaustive and serves primarily to insure that immature and incompetent persons are not endangered by their own judgments of risks of personal injury.

578: 3 **False Imprisonment.** A person is guilty of a misdemeanor if he knowingly confines another unlawfully, as defined in section 578: 2, so as to interfere substantially with his physical movement.

Comments

False imprisonment is a common law misdemeanor that was early recognized in New Hampshire. See State v. Rollins, 8 NH 550, 565 (1837). This section, and the Model Penal Code, § 212.3 from which it is derived, substantially restate the common law. Under it, there need be no actual harm or risk of harm to the person confined and, by virtue of the defi-

nition of "unlawfully" incorporated from section 578: 2, limits are imposed on the classes of persons who may consent to their own confinement. Cf. State v. Rollins, supra., where the consent of a six-year-old boy to his restraint was held invalid.

CHAPTER 579

DESTRUCTION OF PROPERTY

579:1 Arson.

I. A person is guilty of arson if he knowingly starts a fire or causes an explosion which unlawfully damages the property of another.

II. Arson is a class A felony if the property damaged is an occupied structure and the actor knew it was an occupied structure.

III. Arson is a class B felony if

(a) the property is either that of another or the actor's property, and the fire was started or the explosion caused for the purpose of collecting insurance on such property; or

(b) the actor purposely starts a fire or causes an explosion on anyone's property and thereby recklessly places another in danger of death or serious bodily injury, or places an occupied structure of another in danger of damage.

IV. All other arson is a misdemeanor.

V. As used in this section, "occupied structure" has the same meaning as in section 580:1, III; "property" has the same meaning as in section 582:2, I; "property of another" has the same meaning as in section 582:2, IV.

Comments

This offense is presently found in four separate New Hampshire statutes, RSA 584:1–4, dealing respectively with dwellings, other buildings, personal property, and insured property. This section consolidates all arson into one offense which continues the substance of present law. It is structured differently from other restatements by virtue of its inclusion of personal property as the subject of arson. This has been done because there may be the same elements of insurance fraud or risks to life and safety, specified in paragraph III, when the burned property is personalty as when it is realty.

Three things are fundamental in paragraph I. The actor must know that he is starting a fire; carelessness does not suffice. Second, the damage must be unlawful, thereby excluding criminal liability for helping another to destroy his barn or for aiding a fire fighting operation by burning another's property. Such exclusions are also supported by the provisions on consent in section 571:6. The third major requirement of paragraph I is that the property harmed be that of another. This is necessary in order to structure the difference between arson as a class A felony and as a class B felony. In order for it to be of the more severely punished type, the actor must knowingly damage another's occupied

structure. If he burns his own property, it is an offense only if he is after the insurance or if he recklessly endangers other persons or their occupied structures, III(a) and III(b) and then it is a class B felony. Thus, if a person desires to burn his own property and is neither seeking insurance proceeds or endangering others, he is free to do so.

579: 2 Criminal Mischief.

I. A person is guilty of criminal mischief when, having no right to do so nor any reasonable basis to believe that he has such a right, he purposely or recklessly damages property of another.

II. Criminal mischief is a class B felony if the actor purposely causes

(a) pecuniary loss in excess of $1,000; or

(b) a substantial interruption or impairment of public communication, transportation, supply of water, gas or power or other public service.

III. All other criminal mischief is a misdemeanor.

IV. As used in this section, "property" has the same meaning as in section 582: 2 I; "property of another" has the same meaning as in section 582: 2 IV.

Comments

This section is patterned on the Michigan Revised Criminal Code, Final Draft, §§ 2705, 2706 and 2707. There are presently several statutes dealing with criminal injury to property, e.g., RSA 572: 14 (tree or other property); 572: 21 (monuments in cemeteries); 255: 7 (aqueducts or pipes). This section deals comprehensively with all property by virtue of the broad definition incorporated from section 582: 2 I. The requirement of purpose or recklessness reaches the cases normally included in "malicious", the *mens rea* term that prevails in current law. Negligent injury to property is part of neither present statutes nor this draft. The grading of this offense is based upon considerations of seriousness similar to those that govern theft offenses, namely, the amount of property lost, and upon the seriousness as measured by effects on essential public services.

579: 3 Unauthorized Use of Propelled Vehicle or Animal.

I. A person is guilty of a misdemeanor if, knowing that he does not have the consent of the owner, he takes, operates, exercises control over, or otherwise uses a propelled vehicle or animal. A person who engages in any such conduct without the consent of the owner is presumed to know that he does not have such consent.

II. As used in this section, "propelled vehicle" has the same meaning as in section 582: 9 II.

Comments

This is a "joy-riding" statute which covers a large variety of vehicles in addition to automobiles. It is patterned on the Michigan Revised Criminal Code, Final Draft, § 3230.

RSA 263: 82 (motor vehicle) and 572: 45 (boats) constitute present coverage of this problem. By virtue of the presumption of knowledge in paragraph I, the prosecution need only prove the taking and the lack of consent. The accused may, however, defend by showing a belief that he had consent, even if this is based on a mistake that would be considered unreasonable; the offense does not seek to punish negligence.

CHAPTER 580

UNAUTHORIZED ENTRIES

580:1 Burglary.

I. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied section thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

II. Burglary is a class B felony unless it is perpetrated in the dwelling of another at night, or if, in the commission of the offense, attempt at commission or in flight immediately after attempt or commission, the actor is armed with a deadly weapon or explosives or he purposely, knowingly or recklessly inflicts bodily injury on anyone; in which case it is a class A felony.

III. "Occupied structure" shall mean any structure, vehicle, boat or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present. "Night" shall mean the period between thirty minutes past sunset and thirty minutes before sunrise.

IV. A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a class A felony.

V. A person is guilty of a misdemeanor if he makes or mends, or begins to make or mend, or knowingly has in his possession, an engine, machine, tool, or implement adapted and designed for cutting through, forcing or breaking open a building, room, vault, safe, or other depository, in order to steal therefrom money or other property, or to commit any other crime, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ or allow the same to be used or employed for such purpose.

Comments

This section is a restatement of RSA chapter 583-A (1967 supp.) which was taken from the Model Penal Code, §§ 221.0 and 221.1.

580:2 Criminal Trespass.

I. A person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place.

II. Criminal trespass is a misdemeanor if

(a) the trespass takes place in an occupied structure as defined in section 580:2, III; or

(b) the person knowingly enters or remains

(1) in any secured premises; or

(2) in any place in defiance of an order to leave or not to enter which was personally communicated to him by the owner or other authorized person.

III. All other criminal trespass is a violation.

IV. As used in this section, "secured premises" means any place which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders, or which is fenced or otherwise enclosed in a manner designed to exclude intruders.

Comments

This section will replace all of the trespass provisions in RSA chapter 572. The basic proscription is against entering a place knowing there is no right to do so. This is a violation. There may, however, be circumstances that make the offense a good deal more serious, such as a trespass in a place likely to cause alarm (an occupied structure) or following a lawful order to leave or in defiance of notice by sign or fence that trespass is not permitted. The offense then is a misdemeanor.

Its substance is derived from the Model Penal Code, § 221.2.

CHAPTER 581

ROBBERY

581:1 Robbery.

I. A person commits the offense of robbery if, in the course of committing a theft, he

(a) uses physical force on the person of another and such person is aware of such force; or

(b) threatens another with or purposely puts him in fear of immediate use of physical force.

II. An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft, in an effort to retain the stolen property immediately after its taking, or in immediate flight after the attempt or commission.

III. Robbery is a class B felony, except that if the defendant

(a) was actually armed with a deadly weapon; or

(b) inflicted or attempted to inflict death or serious injury on the person of another

the offense is a class A felony.

Comments

The basic elements of this offense are patterned on the Model Penal Code, § 222.1. RSA 585:18 is essentially a description of common law robbery. At common law, it was necessary that the violence or putting in fear that is the essence of robbery precede or accompany the taking of the property of the victim. Perkins, *Criminal Law*, p. 239 (1957). The principle was approved in State v. Gorham, 55 NH 152 (1875), although there is some language in one of the three opinions in Gorham that would find the requisite violence in a struggle to retain the property after it had been taken. See 55 NH 170.

This section expands the period of time during which the presence of aggravating circumstances (the force or attempts specified in I(a) and I(b) will make the offense robbery. Where the offender has not succeeded in obtaining the property so as to have committed a consummated theft, but has gone so far as to have engaged in an attempt, paragraph II would make him guilty of robbery. Under present law, he would probably be guilty only of attempted robbery. This change is proposed in recognition of the fact that robbery is essentially a threat to personal security and only secondarily an invasion of property rights. The fortuity that the victim may have succeeded in hanging on to his property is, in this view, not a factor lessening the seriousness of the behavior.

Similar considerations prompt extending robbery to a period beyond the time when the theft has actually been committed. The shoplifter who is confronted by the proprietor immediately after he has taken property from a counter or as he is about to leave the shop is as much a problem for the victim and the community when he then engages in violent or threatening behavior as is the offender who forces the property into his control initially. The same is true for the pickpocket or handbag snatcher who is overtaken one or two steps from his victim. The intimate association, irrespective of temporal sequence, of force and property deprivation is what substantively distinguishes robbery from extortion, on the one hand, and assault and battery on the other. This view of robbery seems already adopted by virtue of the robbery statute, RSA 585:18, being placed in the chapter dealing with offenses against the person.

A problem exists concerning description of a line between the use of such force as is necessary to dislodge property from a pocket and that which may render the victim unconscious and incapable of preventing the theft. Although by common law the pickpocket has not been considered a robber, the statute needs, in some way, to indicate that the offense is not being so broadened as now to change that. The Model Penal Code requirement of "serious bodily injury" accomplishes just that but, by doing so, excludes from its coverage cases which need to be included, e.g., where the victim is thrown to the ground by the thief but suffers little actual physical injury. The Illinois Criminal Code of 1961, § 18-1, requires only "force". The New York Penal Law, § 160.00(1) provision requiring an intent to prevent the taking seems to place the threshhold too low, however, since it would appear to include the kind of jostling that is indeed designed to prevent resistance to the taking but which would still normally be considered in the realm of pickpocketing.

The draft statute deals expressly with what appears to be the central issue, namely, the victim's awareness that force is being used to obtain his property. In most cases of robbery, this requirement will, of course, be easily satisfied. Its presence in the statute does, however, serve to preclude from conviction the clumsy pickpocket whose ineptitude falls short of arousing the victim to the danger. Where the victim is rendered aware by the use of force, there is both a sufficient fright on his part and a high enough likelihood that the use of force will escalate, to justify making the offense robbery.

CHAPTER 582

THEFT

582:1 Consolidation. Conduct denominated theft in this chapter constitutes a single offense embracing the separate offenses such as those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, fa'se pretense, extortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the indictment or information.

Comments

This section is derived from the Model Penal Code, § 223.1(1). Its effect is to declare that what has heretofore existed as a number of offenses, either defined by statute, mostly in RSA chapters 580 and 582, or as a matter of the common law of crimes, is now to be considered as one offense. The sections which follow in this chapter define the various ways in which the offense of theft may be committed and provide appropriate penalties for the variety of property offenses that are defined. Since defining crimes entirely through judicial decision has been declared impermissible by this Code in section 570:6, it is necessary that this chapter spell out the elements of the offenses that constitute theft. The important function of this section is to declare that variances between theft charged in one form and proved in another are no longer important. There is, of course, the latent qualification to this that the accused must not be taken by surprise and must be given every opportunity to defend against the case that is proved by the state. The Model Penal Code expresses this with the phrase "subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise". This language has not been repeated here since there is always that power in the court and there is no need to repeat that it is the court's responsibility to ensure a fair trial. The effect of this section is to change the law as it was declared in State v. Larkin, 49 NH 39 (1860), that the state must elect between a charge of theft of property or the criminal receiving of it. Under this section, the state may, if the contingencies of the trial require it, charge theft and prove receiving subject, of course, to the fair trial principle. So, too, the problem of whether title or possession of property has passed, crucial in State v. Watson, 41 NH 533 (1860), is no longer of any importance.

582:2 Definitions. The following definitions are applicable to this chapter:

I. "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds,

written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing any thing of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

II. "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph or other reproduction.

III. "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that the major portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

IV. "Property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.

V. (a) "Value" means the highest amount determined by any reasonable standard of property or services.

(b) Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

Comments

The only terms defined here are those which appear through most of the chapter. There are many other terms which have detailed definitions in the particular sections in which they appear, e.g., "deception" in section 582:4(II), "extortion" in section 582:5(II), etc. It would have been possible to place *all* matters of definition in this introductory section, as is done, for example, in the Michigan draft, § 3201. But this sort of neatness is obtained at the price of not having anywhere a complete and detailed statement of each type of theft. Thumbing back and forth from proscription to definitions disserves the need for clarity.

The definition of "property" is an expanded statement of Model Penal Code § 223.0(6) and is meant to provide comprehensive coverage of what would generally be conceived of as economic wealth. Almost all of such wealth is now protected by New Hampshire statutes. The key phrase is "anything of value", with the remainder of the definition supplying examples to illustrate the breadth of the concept and to emphasize the inclusion of items that may be questionable or excluded under present law. For example, the decision in Norton v. Ladd, 5 NH 203, 204 (1830) that "a sable caught in a trap in the woods cannot be the subject of a larceny", is changed by the inclusion of "captured ... animals"; State v. James, 58 NH 67 (1877) declaring a list of newspaper subscribers not to be the subject of larceny is changed by the inclusion of "... other writings ... containing anything of value to the owner". The substance of RSA 580:32 (1967 supp.), dealing with theft of trade secrets, is preserved by virtue of inclusion of this sort of wealth in the definition of property. Similarly, telecommunications, now protected by RSA 580:1-a (1967 supp.), are included.

The definition of "obtain" is designed to describe comprehensively the intrusions into property interests that can give rise to theft liability. It follows generally suggested definitions, such as in Model Penal Code § 223.0(5) and Michigan Revised Criminal Code, Final Draft, § 3201(e)(i), except that the phrase "purported transfers", found in those provisions, has not been included since it does not appear that there are any situations where no transfer (a purported transfer) has taken place that ought to be deemed theft. Such situations ought to be adequately covered by the law governing attempts.

The mens rea requirement specified in "purpose to deprive" specifies the circumstances where the scheme of the thief involves substantial risk of loss to the owner. With only minor verbal changes, it follows the Model Penal Code, § 223.0(1).

The "property of another" definition deals with the question of theft of property in which the thief has some interest, establishing the general rule that unauthorized dealing with other interests in the same property can give rise to theft liability. State v. McCoy, 14 NH 364 (1843), holding that a partner cannot steal partnership property would be reversed by this rule. This definition also adopts the position of the Model Penal Code, § 223.0(7), Michigan Revised Criminal Code, Final Draft, § 3201(g) and N.Y. Penal Law, § 155.00(5) to the effect that the purchaser in a conditional sale arrangement does not commit theft when he treats the property as his own, even when legal title has been retained by the seller pursuant to a security agreement. RSA 580:5-a (1967 supp.) creates an offense in this situation where there is an intent to defraud.

The definition of "value" is a statement of law that would likely be applied when questions of value arise. It is taken from the Model Penal Code, § 223.1(2)(c). The rule in V(b) concerning aggregating several thefts seems already to have

been pronounced in State v. Merrill, 44 NH 624 (1863), although the precise standard applied there to authorize aggregation is not clear.

582:3 Theft by Unauthorized Taking or Transfer.

I. A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

II. As used in this and the next two sections; "obtain or exercise unauthorized control" includes but is not necessarily limited to conduct heretofore defined or known as common law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

Comments

This section is a modified version of Model Penal Code, § 223.2. It preserves as theft the common law offense of larceny as well as several forms of statutory property crimes such as are found in RSA 582:1 through 582:9.

The Model Penal Code uses the term "takes" where this section says "obtains". This choice has been made in order to invoke the broad definition of "obtains" set forth in section 582:2, free of common law technicalities that the use of the common law "takes" might imply. Except for these words, the same formula as the Model Penal Code is used. The function of this formulation is best explained in the Model Penal Code, Tentative Draft 2, p. 62 (1954).

> We have chosen "taking or exercise of unlawful control" as the test, thus dispensing with the mechanical common law standards of physical seizure and movement. "Taking" unauthorized control becomes the touchstone in the ordinary case of theft by a stranger; "exercise" of unauthorized control is the requirement in the typical embezzlement situation where the actor already has lawful control. The test has the virtue of simplicity, which is important especially for use in jury trials. It has sufficient flexibility for application to the tremendous diversity of situations to be covered in a modern economy. The test also appears to discriminate between attempt and accomplishment at a psychologically significant point. It seems likely, for example, that the critical psychological "threshhold" for a would-be auto thief is probably the point at which he enters the car and addresses himself to the controls, rather than the moment when he releases the clutch or steps on the gas to put the car in motion. Before he "takes the wheel" he will be more easily frightened off or he may voluntarily desist. The psychological difference between starting the engine and starting the car is probably very small.

582:4 Theft by Deception.

I. A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof.

II. For purposes of this section, deception occurs when a person purposely:

(a) Creates or reinforces an impression which is false and which that person does not believe to be true, including false impressions as to law, value, knowledge, opinion, intention or other state of mind. Provided, however, that an intention not to perform a promise, or knowledge that it will not be performed, shall not be inferred from the fact alone that the promise was not performed; or

(b) Fails to correct a false impression which he previously had created or reinforced and which he did not believe to be true, or which he knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

(c) Prevents another from acquiring information which is pertinent to the disposition of the property involved; or

(d) Fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

III. Theft by deception does not occur, however, when there is only falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. "Puffing" means an exaggerated commendation of wares in communications addressed to the public or to a class or group.

Comments

This section is patterned on the Model Penal Code, § 223.3. It deals with the general problem of acquiring property by practicing some fraud on the owner. Both larceny by trick and false pretenses are included in its coverage by virtue of the elimination of any distinction relating to whether title or possession passes. Also included is the situation where the thief deceives the owner into permitting the exercise of control over property that does not go so far as to involve a transfer of some interest in it, as where the thief already has lawful possession of the property and fraudulently obtains permission to use it for his own benefit. This would be within the "exercises control" phrase of Paragraph I. Paragraph II undertakes to specify the kinds of deception that give rise to this kind of theft. Some kinds of trickery are included in II(a) that have often been held not to fall within the required misstatement of "fact".

The provision in II(a) dealing with "intention or other state of mind" is broad enough to have deception occur when there is a promise made with a covert intention that it not be performed. This reverses the result in cases like State v. Shevlin, 81 NH 121, 123 A. 233 (1923), where it was stated that a false promise is not a false pretense. The proviso in II(a) is intended to insure that a simple failure to perform does not give rise to criminal prosecution.

That part of RSA 580:1 which punishes obtaining signatures by false pretense is covered by section 583:12, fraudulent execution of documents.

582:5 Theft by Extortion.

I. A person is guilty of theft as he obtains or exercises control over the property of another by extortion and with a purpose to deprive him thereof.

II. As used in this section, extortion occurs when a person threatens to:

(a) Cause physical harm in the future to the person threatened or to any other person or to property at any time; or

(b) Subject the person threatened or any other person to physical confinement or restraint; or

(c) Engage in other conduct constituting a crime; or

(d) Accuse any person of a crime or expose him to hatred, contempt or ridicule; or

(e) Reveal any information sought to be concealed by the person threatened; or

(f) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(g) Take action as an official against anyone or anything, or withhold official action, or cause such action or withholding; or

(h) Bring about or continue a strike, boycott or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(i) Do any other act which would not in itself substantially benefit him but which would harm substantially any other person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships.

Comments

Paragraph I restates the basic concept of theft as obtaining or exercising control over another's property with a purpose to deprive. This section defines a special kind of theft, that which is accomplished by the use of threats. With minor verbal changes, the nature of the threats set forth in paragraph II is taken from the Michigan Revised Criminal Code, Final Draft, § 3201(1).

RSA 572:46 presently defines the offense of blackmail in terms that are almost entirely repeated here. Blackmail, as defined in RSA 572:46 is, however, not entirely a property offense since it also includes threats made in order "to compel the person so threatened to do any act against his will". Section 576:4, criminal threatening, deals with the subject of threats that are unrelated to property acquisition.

The threats described in paragraph I cover broadly the types of circumstances in which a person is induced to give up his property. The action threatened need not necessarily be

directed against the person whose property is sought. In this regard, this section expands the protection now found in RSA 572: 46. The same expansion occurs by virtue of the specification of threats that do not involve the accusation of crime or the threat of personal or property injury. RSA 572: 46 is limited to these sorts of threats. The additional threats included in paragraph II are directed at interests, such as reputation, which the Commission deems ought to be protected.

582: 6 Theft of Lost or Mislaid Property.

A person commits theft when

I. he obtains property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or as to the nature or amount of the property, without taking reasonable measures to return the same to the owner, and

II. he has the purpose to deprive the owner of such property when he obtains the property or at any time prior to taking the measures designated in paragraph I.

Comments

At common law, it was an offense to steal lost property. But the commission of the offense depended on a number of technical factors. This has been concisely described in Perkins, Criminal Law 208 (1957):

> Since lost property is in the legal possession of the loser until someone else actually takes it into his own possession, it follows that if a finder takes charge of a lost (or mislaid) article, he at that moment takes the possession from the owner. If this taking was unlawful he is guilty of larceny if his intent was to deprive the owner permanently of his property. If this taking was lawful he is not guilty of larceny even if by a change of mind or a change of circumstances he should later be guilty of wrongfully appropriating the property of another. The reason for the latter result is that this misappropriation by one having lawful possession and hence lacking the element of a *trespassory* taking.

RSA chapter 471 presently requires that anyone finding money or goods or a stray beast give notice to the town clerk, and provides a penalty of a sum equal to double the value of the found property for failure to give the notice.

This section is patterned on the Model Penal Code, § 223.5 and is designed to simplify the common law and to provide a more adequate penalty—inducement for the return of lost property. The circumstances of mistake and misdelivery are included since they entail essentially the same problem of a person inadvertently parting with his property as is involved with actual loss.

582: 7 Receiving Stolen Property.

I. A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it has probably been stolen, with a purpose to deprive the owner thereof.

II. The knowledge or belief required for paragraph I is presumed in the case of a dealer who

(a) is found in possession or control of property stolen from two or more persons on separate occasions; or

(b) has received other stolen property within the year preceding the receiving charged; or

(c) being a dealer in property of the sort received, retained or disposed, acquires it for a consideration which he knows is far below its reasonable value.

III. As used in this section, "receives" means acquiring possession, control or title or lending on the security of the property; and "dealer" means a person in the business of buying or selling goods.

Comments

This section is based on Model Penal Code, § 223.6(2). It differs from the present statute on the subject, RSA 582:10, in several respects, although the core of the offense, receiving property known to be stolen property, remains the same. Paragraph I adds to this the alternative *mens rea* that the receiver might have, namely, a belief rather than knowledge, that the goods were stolen.

The more important addition, however is found in the presumption of knowledge or belief that arises under the circumstances described in paragraph II. These are cases where the probability of knowledge is sufficiently high that the prosecution may properly be given the benefit of the presumption that the receiver knew the nature of the property.

The third addition made by this statute is in paragraph III in which receiving is defined to include lending on the security of the property.

582:8 Theft of Services.

I. A person commits theft if he obtains services which he knows are available only for compensation by deception, threat, force, or any other means designed to avoid the due payment therefor. "Deception" has the same meaning as in section 582:4, II, and "threat" the same meaning as in section 582:5, II.

II. A person commits theft if, having control over the disposition of services of another, to which he knows he is not entitled, he diverts such services to his own benefit or to the benefit of another who he knows is not entitled thereto.

III. As used in this section, "services" includes, but is not necessarily limited to, labor, professional service, public utility and transportation services, restaurant, hotel, motel, tourist cabin, rooming house and like accommodations, the supplying of equipment, tools, vehicles, or trailers for temporary use, telephone or telegraph service, gas, electricity, water or steam, admission to entertainment, exhibitions, sporting events or other events for which a charge is made.

Comments

At common law, services could not be the subject of larceny. Statutes have, however, attempted to reach dishonesty of this sort. RSA 580: 6, defrauding inn keeper, and RSA 580: 7, obtaining transportation, are New Hampshire examples of dissatisfaction with this narrowness of the common law. Recent restatements of criminal law have dealt with this problem comprehensively and this section is based upon the Model Penal Code, § 223.7. It seeks to provide the same protection for services as other sections in this chapter provide for more tangible forms of wealth. A common form of misuse of services, diverting them to an unauthorized use, is specifically covered in paragraph II.

582: 9 Unauthorized Use of a Propelled Vehicle or Rented Property.

I. A person is guilty of theft if

(a) having custody of a propelled vehicle pursuant to an agreement between himself or another and the owner thereof whereby the actor or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, he intentionally uses or operates the same, without the consent of the owner, for his own purposes in a manner constituting a gross deviation from the agreed purpose; or

(b) having custody of a propelled vehicle pursuant to a rental or lease agreement with the owner thereof whereby such vehicle is to be returned to the owner at a specified time and place, he intentionally fails to comply with the agreed terms concerning return of such vehicle, without the consent of the owner, for so lengthy a period beyond the specified time for return as to render his retention or possession or other failure to return a gross deviation from the agreement; or

(c) having custody of any property pursuant to a rental or lease agreement whereby such property is to be returned in a specified manner, intentionally fails to comply with the terms of the agreement concerning return so as to render such failure a gross deviation from the agreement.

(d) Theft under this section is a misdemeanor regardless of the value of the propelled vehicle.

II. As used in this section, "propelled vehicle" means any automobile, airplane, motorcycle, motorboat or any other motor-propelled vehicle or vessel, or any boat or vessel propelled by sail, oar or paddle.

Comments

Unlike the other provisions of this chapter, section 582: 9 deals with temporary deprivations of property. The vexing "joy riding" problem, however, is covered by section 579: 3. The substance of this section is based on N.Y. Penal Law, § 165.05 and RSA 582: 16 and 17 (1967 supp.). Unauthorized use by a repairman and a person renting a vehicle are described in I(a) and I(c), respectively. Paragraph I(b) deals

with other rented property that is not returned when and where it is supposed to be. In I(a), (b) and (c), the misuse of the vehicle or rented property must be a serious one. What constitutes a "gross deviation" in any given case under these provisions will be a matter of judgment for the finder of fact. It would be too strict to have *any* failure to comply with the agreement constitute an offense while, on the other hand, a statute could not undertake to specify in detail all of the deviations that would be punishable. Providing a standard for judgment, such as "gross deviation", seems to be the most satisfactory solution.

Special provision is made for grading of this offense since the value of the property is not the important deprivation involved. It is rather its use that is being taken from the owner and this is substantially the same whether the vehicle involved is a dented Chevrolet or a new Buick.

582:10 Theft by Misapplication of Property.

I. A person commits theft if he obtains property from anyone or personal services from an employee upon agreement, or subject to a known legal obligation, to make a specified payment or other disposition to a third person, whether from that property or its proceeds or from his own property to be reserved in an equivalent or agreed amount, if he purposely or recklessly fails to make the required payment or disposition and deals with the property obtained or withheld as his own.

II. Liability under paragraph I is not affected by the fact that it may be impossible to identify particular property as belonging to the victim at the time of the failure to make the required payment or disposition.

III. An officer or employee of the government or of a financial institution is presumed

(a) to know of any legal obligation relevant to his liability under this section, and

(b) to have dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of his accounts.

IV. As used in this section

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

(b) "government" means the United States, any state or any county, municipality or other political unit within territory belonging to the United States, or any department, agency, or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government or formed pursuant to interstate compact or international treaty.

Comments

This section relates to the difficult problem of trying to separate and describe that kind of dealing with property that is essentially an unauthorized use or is a result of deception, from the failure to use or pay over property according to agreement that is nothing more than a debtor-creditor problem and involves no misconduct that ought to give rise to criminal liability. The substance of this section is based on the Michigan Revised Criminal Code, Final Draft, § 3225. Like the Michigan provision, this section includes cases where the actor receives the services of his employees as well as cases where property is received.

The presumption created in paragraph III is designed to deal with persons who, by law or regulation, are obliged to make deposits in certain accounts or in designated ways. Such persons would invariably be informed of such obligations of their office and the presumption accords with the knowledge they would have.

582: 11 Penalties. Except as provided in section 582: 9, I(d)

I. Theft constitutes a class A felony if

(a) the value of the property or services exceeds 1000 dollars, or

(b) the property stolen is a firearm, or

(c) the actor is armed with a deadly weapon at the time of the theft.

II. Theft constitutes a class B felony if

(a) the value of the property or services is more than one hundred dollars but not more than one thousand dollars, or

(b) the actor has been twice before convicted of theft of property or services valued at one hundred dollars or less, or

(c) the theft constitutes a violation of section 582: 5, II(a) or (b).

III. Theft constitutes a misdemeanor if the value of the property or services does not exceed one hundred dollars.

Comments

This section provides grading, for sentencing purposes, of all of the offenses described in this chapter, except for the unauthorized use offenses in section 582: 9. It follows the policy of the Model Penal Code § 223.1(2)(a) by having the seriousness of the offense depend on the value of the property involved or on circumstances that pose a risk to life and safety. In addition, II(b) provides a limited habitual offender authority, and II(c) recognizes that extortion involving threats to the person of the victim or to commit a crime are of a degree of seriousness that does not depend upon the value of the property.

CHAPTER 583

FRAUD

583:1 Forgery.

I. A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:

(a) Alters any writing of another without his authority or utters any such altered writing; or

(b) Makes, completes, executes, authenticates, issues, transfers, publishes or otherwise utters any writing so that it purports to be the act of another, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

II. As used in this section, "writing" includes printing or any other method of recording information, checks, tokens, stamps, seals, credit cards, badges, trademarks, and other symbols of value, right, privilege, or identification.

III. Forgery is a class B felony if the writing is or purports to be

(a) a security, revenue stamp, or any other instrument issued by a government, or any agency thereof; or

(b) a check, an issue of stocks, bonds, or any other instrument representing an interest in or a claim against property, or a pecuniary interest in or claim against any person or enterprise.

IV. All other forgery is a misdemeanor.

V. A person is guilty of a misdemeanor if he knowingly possesses any writing that is a forgery under this section or any device for making any such writing. It is an affirmative defense to prosecution under this paragraph that the possession was without an intent to defraud.

Comments

RSA 581:1, 2 and 3 presently define the basic forgery offense. This section, which is derived from the Model Penal Code, § 224.1(1), differs from the current statutes in several respects. Instead of enumerating at length in one statute (RSA 581:1) the types of documents which are susceptible of being forged for purposes of the penal law and covering all others in another statute (RSA 581:3), this section provides one generic definition of "writing" in paragraph II. Paragraph I–b also expands the coverage now found in the law by virtue of the prohibition against making or uttering a writing that is false in its details as to time or place of execution or the numbered sequence in which the writing was issued

or the making of something that purports to be a copy when there has never been an original. These expansions of the law fall short, however, of changing the result of State v. Young, 46 NH 266 (1865) where it was held that it was not forgery to alter one's own books. The writing must still be, or purport to be, the writing of another before the offense of forgery can be committed.

This offense is graded on the basis of the type of writing that is involved. If it is or purports to be an act of the government or concerns property or a pecuniary interest, it is a class B felony. In regard to government writings, paragraph III–a does not include money on the ground that counterfeiting of money has become so exclusively a matter of law enforcement by federal officials that there is no reason for the state's substantive law to continue an offense which it is not likely state enforcement authorities will become involved in.

583: 2 Fraudulent Handling of Recordable Writings. A person is guilty of a misdemeanor if, with a purpose to deceive or injure anyone, he destroys, removes or conceals any will, deed, mortgage, security instrument or other writing for which the law provides public recording.

Comments

This section is based on the Model Penal Code, § 224.3. RSA 582: 6 now punishes theft of such documents as deeds, wills and public records. The fraudulent handling of recordable writings produces approximately the same sort of problem as a theft since the destruction of a will and its theft both may involve an attempt to have an earlier testamentary instrument take effect. But this section goes further and is designed to protect the integrity of the public record by protecting the physical existence of all documents that are capable of being recorded.

583: 3 Tampering with Records. A person is guilty of a misdemeanor if, knowing he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record with a purpose to deceive or injure anyone or to conceal any wrongdoing.

Comments

Like section 583: 2, this section is designed to guard against deception that involves reliance on a record. This time, however, it is private records that are protected. The language is taken from the Model Penal Code, § 224.4. There presently are penalties for falsification of stocks and records of a corporation in RSA 580: 19, 20, 21 and 22. This section expands the coverage of these laws in the belief that "In a highly organized society like ours where accuracy of corporate and other records is nearly as important as accuracy of public records, the need for deterring tampering with such records seems reasonably clear, and there is no occasion to distinguish in this regard between corporate records and those of a church,

union or club. Neither is it significant whether the actor was an employee of the enterprise whose accounts he falsifies." Model Penal Code, Tentative Draft 11, p. 98 (1960).

583:4 Issuing Bad Checks.

I. A person is guilty of a misdemeanor if he issues or passes a check for the payment of money knowing or believing that it will not be paid by the drawee and payment is refused by the drawee.

II. For purposes of this section, as well as in any prosecution for theft committed by means of a bad check, a person who issues a check for which payment is refused by the drawee is presumed to know that such check would not be paid if he had no account with the drawee at the time of issue.

Comments

This section makes few changes in the present law relating to bad checks found in RSA 582:12–14. One of the changes is the substitution of knowledge or belief that the check will not be paid for the current requirement of an intent to defraud. By using this *mens rea* element, found also in the Michigan Revised Criminal Code, Final Draft, § 4040(1), this section comes closer to a description of the dishonest state of mind than does the more vague "intent to defraud". This section also follows the New York Penal Law in requiring that, as one of the substantive elements of the offense, payment of the instrument be refused. At present, such a refusal might constitute prima facie evidence of intent to defraud and of knowledge of insufficient funds under RSA 582:13. The refusal does not have this effect if the amount due is paid within ten days of receiving notice of the dishonor. It is the view of the Commission that, although a prosecution would be rare in a situation where the check was in fact paid after being issued with the belief that it would be refused, it is proper for the law to express directly, by including refusal as an element, the policy that would withhold prosecution. The Commission also considers that the ten-day grace period in RSA 582:13 and in the Model Penal Code, § 224.5(b), New York Penal Law, § 190.15(1), and Michigan Revised Criminal Code, § 4040(2)(b), constitutes an invitation to undermine reliance on checks.

583:5 Fraudulent Use of Credit Card.

I. A person is guilty of fraudulent use of a credit card if he uses a credit card for the purpose of obtaining property or services with knowledge that:

(a) The card is stolen; or

(b) The card has been revoked or cancelled; or

(c) For any other reason his use of the card is unauthorized by either the issuer or the person to whom the credit card is issued.

II. "Credit card" means a writing or other evidence of an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.

III. Fraudulent use of a credit card is a class B felony if property or services are obtained which exceed the value of five hundred dollars. Any other violation of this section is a misdemeanor.

Comments

A merchant who does business through the credit cards of his customers is usually paid by the company issuing the card. His interest in the actual identity or authority of the person presenting the card to him is, therefore, quite minimal. For this reason, it may be that there is no reliance or loss of the sort that would give rise to theft liability. There is, thus, a need for an offense such as this, based upon the Michigan Revised Criminal Code, Final Draft, § 4045.

583: 6 Deceptive Business Practices.

I. A person is guilty of a misdemeanor if, in the course of business, he:

(a) Uses or possesses for use, a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or

(b) Sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service; or

(c) Takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure; or

(d) Sells, offers or exposes for sale adulterated or mislabeled commodities. "Adulterated" means varying from the standard of composition or quality prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage. "Mislabeled" means varying from the standard of truth or disclosure in labeling prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage; or

(e) Makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof for the purpose of promoting the purchase or sale of property or services.

II. It is an affirmative defense to prosecution under this section that the defendant's conduct was not knowing or reckless.

Comments

This section is based on the Model Penal Code, § 224.7. It is directed primarily at fraud that is practiced in the sale or advertisement of goods. There are already large numbers of statutes in this state which deal with the subject matter of this section. For example, RSA chapter 359 controls weights

and measures; RSA 580:9 punishes false advertising; RSA chapter 146 regulates adulterated food and drugs. The purpose of this section is to provide a uniform offense and penalty for violation of these sorts of law, without requiring any rewriting of the substance of most of them. The paragraph I–d definition of "adulterated", for example, incorporates the substantive standards set forth in RSA chapter 146. It is necessary, however, to eliminate by amendment the various penalty provisions found in such laws so that common issues such as *mens rea* can be consistently dealt with under this section.

583:7 **Commercial Bribery.**

I. A person is guilty of a misdemeanor when, without the consent of the employer or principal:

(a) He confers, offers, or agrees to confer upon the employee, agent or fiduciary of such employer or principal, any benefit with the purpose of influencing the conduct of the employee, agent or fiduciary in relation to his employer's or principal's affairs; or

(b) He, as an employee, agent or fiduciary of such employer or principal, solicits, accepts or agrees to accept any benefit from another upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs: provided that this section does not apply to inducements made or accepted solely for the purpose of causing a change in employment by an employee, agent or fiduciary.

II. A person is guilty of violation of this section if he holds himself out to the public as being engaged in the business of making disinterested selection, appraisal or criticism of goods or services and he solicits, accepts, or agrees to accept any benefit to influence his selection, appraisal or criticism.

Comments

This section is a modified version of the Michigan Revised Criminal Code, Final Draft, §§ 4201 and 4205. There are presently no New Hampshire statutes dealing with this subject. The purpose of this section is to insure that improper influences do not determine the way an employee or fiduciary conducts the affairs of the employer or principal. To this end, the offense includes the one who offers or gives the bribe as well as the taker who betrays the trust of his position. This section does not, however, constitute a blanket prohibition against practices such as giving Christmas presents to employees of another with whom one does business. It merely requires that this not be done without the consent of the employer. Since inducements made to an employee to get him to leave one place of employment and to accept another would fall within the prohibition, the proviso in paragraph I–b is necessary to permit this competition for services to continue.

Paragraph II is taken from the Model Penal Code, § 224.8(2) and is designed to protect the integrity of objective evaluations on which the public is induced to rely.

583:8 **Sports Bribery.** A person is guilty of a class B felony if

I. with a purpose to influence any participant or prospective participant not to give his best efforts in a publicly exhibited contest, he confers or offers or agrees to confer any benefit upon or threatens any injury to such participant or prospective participant; or

II. with a purpose to influence an official in a publicly exhibited contest to perform his duties improperly, he confers or offers or agrees to confer any benefit upon or threatens any injury to such official; or

III. with a purpose to influence the outcome of a publicly exhibited contest, he tampers with any person, animal or thing contrary to the rules and usages purporting to govern such a contest; or

IV. he knowingly solicits, accepts or agrees to accept any benefit, the giving of which would be criminal under paragraph I or II.

Comments

This section is based partly on the Model Penal Code, § 224.9 and partly on the Michigan Revised Criminal Code, §§ 4211, 4212 and 4215. The offense is adopted in order to promote the integrity of sports contests or exhibits. RSA 577:16 presently punishes bribery of the kind encompassed in this section. Two basic changes are made. One is to substitute "publicly exhibited contest" for the enumerated sports activity in RSA 577:16. The second is to describe the prohibited behavior as "not to give his best efforts" in place of the causing to lose or limit the margin of victory terminology of RSA 577:16.

There is also included in the proscription the matter of tampering with persons or animals involved in publicly exhibited contests. At the present time, New Hampshire law appears to protect only horses from this sort of interference. See RSA 284:38.

583:9 **Fraud on Creditors.** A person is guilty of a misdemeanor if

I. he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with a purpose to hinder enforcement of that interest; or

II. knowing that proceedings have been or are about to be instituted for the appointment of a person entitled to administer property for the benefit of creditors, he

(a) destroys, removes, conceals, encumbers, transfers or otherwise deals with any property with a purpose to defeat or obstruct the claim of any creditor, or otherwise to obstruct the operation of any law relating to administration of property for the benefit of creditors; or

(b) presents to any creditor or to an assignee for the benefit of creditors, orally or in writing, any statement relating to the debtor's estate, knowing that a material part of such statement is false.

Comments

This section is a combination of Model Penal Code, §§ 224.10 and 224.11. It complements the prohibitions against theft which declare that property cannot be stolen by a debtor who takes what another has only a security interest in. See section 582:2, paragraph IV. Although the person who takes the "finance company's" car out of the state without the "owner's" permission ought not to be considered a thief, he ought not to be free to deal with the property in order to prevent the finance company from preserving its interest in the automobile. Thus, paragraph I defines an offense which requires "a purpose to hinder enforcement" of the secured interest. This is the substance of RSA 361:16 and RSA 580:5-a (1967 supp.).

Paragraph II is drafted for the same end. It extends the protection to unsecured creditors by prohibiting the sort of action on the part of the debtor that would tend to defeat the just recovery of their debts.

583:10 Frauds on Depositors. A person is guilty of a misdemeanor if

I. as an officer, manager, or other person participating in the direction of a financial institution, as defined in section 582:10, IV(a), he receives or permits receipt of a deposit or other investment knowing that the institution is or is about to become unable, from any cause, to pay its obligations in the ordinary course of business; and

II. he knows that the person making the payment to the institution is unaware of such present or prospective inability.

Comments

This section is based on the Michigan Revised Criminal Code, Final Draft, § 4150. It seeks to protect depositors in circumstances where, without knowledge on their part, they place their money in an institution that is not likely to be able to return it to them. There are three conditions that must be met before there can be a conviction under this section, however. One is that the defendant must be in such a position of employment in the institution that he has some influence in determining when the financial condition of the institution requires cessation of receipt of deposits. The second is that this person must have actual knowledge that the institution is or is about to become insolvent in the sense described in paragraph I. The third requirement is that the accused know that the depositor is unaware of the financial straits of the institution. Although this set of circumstances might also constitute theft of the false pretenses type, it might be difficult to prove that any person in a managerial position made a representation to an individual depositor and it would be an undue burden to place on the tellers and clerks who do deal with such individuals to be aware of the financial condition of their employing institution.

583:11 Misapplication of Property.

I. A person is guilty of a misdemeanor if he deals with property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is a violation of his duty and which involves substantial risk of loss to the owner or to a person for whose benefit the property was entrusted.

II. As used in this section, "fiduciary" includes any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary. "Government" and "financial institution" have the meanings given in section 582:10, IV. "Property" has the meaning given in section 582:2, I.

Comments

This section is a modified version of the Michigan Revised Criminal Code, Final Draft, § 4155. It reaches wrongful conduct that would not be theft because it does not involve a permanent deprivation of the property. Creation of this offense seeks to deter misuse of property by persons to whom it has been entrusted subject to specific duties and responsibilities.

Current embezzlement statutes deal with some of the misconduct described in this section. RSA 580:28 punishes "any officer, agent, or servant of a corporation, public or private, or the clerk, servant, or agent of a person" who pays or delivers any "money, bill, note, security for money, evidence of debt or other effects or property to any person or to the order of any person, knowing that such person is not entitled to receive it." This has been interpreted as including employees of a government agency. State v. Ellard, 95 NH 217, 60 A2d 461, cert. den. 335 U.S. 904 (1948). RSA 580:29 deals with "any officer, agent, clerk, or servant of any incorporated or unincorporated trades union, fraternal or benevolent association, club, society, or other association of persons levying assessments or dues upon its members or supported in whole or in part by their voluntary contributions" who may "voluntarily misapply any money or other effects or property of such association." RSA 580:30 covers persons in a fiduciary role but punishes only misappropriation for their own use.

This section generalizes from these statutes so as to make it an offense for any of the persons whom they describe to violate a known duty concerning use of property under circumstances that expose the property to loss.

583:12 Fraudulent Execution of Documents. A person is guilty of a misdemeanor if, by deception or threat, he causes another to sign or execute any instrument which affects or is likely to affect the pecuniary interest of any person.

Comments

This section is based on the Model Penal Code, § 224:14. It is designed to prevent conduct which is not theft since a signature is not property which can be stolen and is not for-

gery because the resulting document truly is what it purports to be. The behavior is more in the nature of preparation for a fraud which, in substance, is not very different from the dishonesty that is condemned by the theft and forgery laws.

583:13 Use and Possession of Slugs.

I. A person is guilty of a misdemeanor if,

(a) with a purpose to defraud the supplier of property or a service offered or sold by means of a coin machine, he inserts, deposits or uses a slug in that machine; or

(b) he makes, possesses, or disposes of a slug with the purpose of enabling a person to use it fraudulently in a coin machine.

II. As used in this section, "coin machine" means any mechanical or electronic device or receptacle designed to receive a coin or bill of a certain denomination, or a token made for the purpose; and in return for the insertion or deposit thereof, automatically to offer, provide, assist in providing or permit the acquisition of property or a public or private service. "Slug" means any object which, by virtue of its size, shape or other quality, is capable of being inserted, deposited, or otherwise used in a coin machine as an improper substitute for a genuine coin, bill or token.

Comments

This section is a modified version of the Michigan Revised Criminal Code, Final Draft, §§ 4050, 4051 and 4052. Similar offenses are now in RSA 581:11 and 12.

CHAPTER 584

OFFENSES AGAINST THE FAMILY

584:1 Bigamy. A person is guilty of a misdemeanor if, having a spouse and knowing that he is not legally eligible to marry, he marries another.

Comments

This section is a statement of the offense of bigamy that is different from other definitions of the offense. The Michigan Revised Criminal Code, Final Draft, § 7001, prohibits intentional marriage at a time when the actor has a living spouse, but provides for a defense when he "believes that he is legally eligible to marry." The comments which accompany this state "The Draft does not list specifically any exemptions from criminality, but instead eliminates from its coverage any instance in which the defendant believes he is eligible to marry." It seems a much more direct statement of the essence of the wrongdoing to say that the actor knows that there is some impediment to the marriage and this section is drafted accordingly.

The present New Hampshire statute is cast in terms of absolute liability, making it an offense to marry while another spouse is alive, regardless of any knowledge of wrongdoing on the part of the actor. See RSA 579:5. This is obviously unduly harsh and RSA 579:6 provides four exceptions: (1) the spouse has not been heard from for three years; or (2) is believed to be dead; or (3) there has been a divorce; or (4) the marriage took place within the age of consent. These instances all appear to be examples where the spouse cannot justly be charged with knowing that he is prohibited from a second marriage. It has been held, however, that only the statutory conditions constitute a defense and any other instance of good faith, such as the erroneous belief that a divorce had taken place, constitutes no exemption from criminal liability. See State v. Goonan, 89 NH 528, 3 A2d 105 (1938). This section overrules that decision.

The Model Penal Code provides, in a catch-all exemption, that "the actor reasonably believes that he is legally eligible to remarry". No requirement of reasonableness is imposed here on the grounds that the bigamy law ought not to punish negligence and that if there is good faith belief that a new marriage can be undertaken then there is no reason to impose criminal punishment. This section puts the burden of proving knowledge that the marriage is not proper on the prosecution.

584:2 Incest. A person is guilty of a class B felony if he marries or has sexual intercourse, or lives together with, under the representation of being married, a person whom he knows to be his ancestor, descendant,

brother or sister, of the whole or half blood, or an uncle, aunt, nephew or niece; provided, however, that no person under the age of eighteen shall be liable under this section if the other party is at least three years older at the time of the act.

Comments

This section is a somewhat modified version of the Model Penal Code, § 230.2. It differs from the present incest statute, RSA 579:7, in that there is here a requirement that the actor know that the person with whom he has the improper relations is one who is denied to him by law. RSA 579:7 has been interpreted to include a prohibition against relations with stepchildren and it is the purpose of this section to continue such coverage. The proviso is intended to preclude criminal liability on the part of the victim of an incestuous relation. This is usually a child and a blanket exemption for children under a certain age would be adequate to accomplish this protection. It is, however, possible to have incest cases where both parties are under the stated age, in which case there is likely no victimization. The proviso is, therefore, drawn so as to describe cases where imposition on a child is most likely, viz., when there is a significant age disparity.

584:3 Endangering Welfare of Child or Incompetent.

I. A person is guilty of a misdemeanor if he knowingly endangers the welfare of a child under eighteen or of an incompetent person by purposely violating a duty of care, protection or support he owes to such child or incompetent, or by inducing such child or incompetent to engage in conduct that endangers his health or safety.

II. In the prosecution of any person under this section,

(a) the furnishing of cigarettes, cigars or tobacco in any other form to a child under the age of eighteen by any person other than the parent or guardian; or

(b) the tattooing by any person of a child under the age of eighteen constitutes endangering the welfare of such child.

Comments

There are at present a number of New Hampshire statutes that seek the same end of child-protection as does this section. Chapter 571 contains many specific provisions dealing with such mistreatments as cruelty, abandonment, and selling cigarettes. The most general proscription, however, is found in RSA 169:32 (1967 supp.). That statute declares that "Any parent, or guardian or person having custody or control of a child, or anyone else, who shall knowingly or wilfully encourage, aid, cause, or abet, or connive at, or has knowingly done any act to produce, promote, or contribute to the delinquency of such child, may be punished . . . ."

This section is intended to generalize from these statutes and to substitute for them. The first portion of the prohibition

is taken from the Model Penal Code, § 230.4. To this has been added the offense of inducing the child to engage in injurious conduct and the declarations of paragraph II which have been taken from RSA 571:20 and 21, and 571:24 (1967 supp.).

584:4 **Non-Support.** A person is guilty of a misdemeanor if he knowingly fails to provide support which he knows he is legally obliged to provide and which he can provide to a spouse, child or other dependant.

Comments

This section is drawn from the Model Penal Code, § 230.5. Unlike that provision, however, there is no requirement here that the failure to support be "persistent". If there is a duty to support, knowledge of it, and ability to provide the support, then the law ought to attempt to induce the support at whatever point complaint is made, whether the failure be persistent or not.

Criminal penalties are now provided for non-support of children or wife in RSA 460:23 (1967 supp.). The duty of a mother to provide for her children is demanded by the criminal penalties in RSA 460:24 (1967 supp.). In addition to these two statutes, RSA 571:2 punishes the wilful neglect or refusal to support a child under the age of sixteen "in destitute or necessitous circumstances". This section substitutes for the penalty provisions in present law and clarifies the elements of the offense. Under this section, the offender must know that he must support the particular dependents involved and know that whatever he might be doing does not satisfy that obligation. Most importantly, he is not subject to criminal penalties unless he is able to provide the missing support, thus avoiding the problem of punishing a person for not paying over money he does not have and cannot get.

584:5 **Concealing Death of a Newborn.** A person is guilty of a misdemeanor if he conceals the corpse of a newborn child for the purpose of concealing the fact of its birth or of preventing a determination of whether it was born dead or alive.

Comments

The conduct involved in this section is presently punishable under RSA 585:15. The terms of this section are taken from Michigan Revised Criminal Code, § 7025 and constitute a change in the elements of the offense from what they now are.

RSA 585:15 is restricted to an offense committed by females, whereas the offense defined here may be committed by anyone. Since the basic purpose of the offense is to prevent concealment and homicide of illegitimate children, it seems wise to provide for the case of the father who may be just as anxious to avoid disclosure of the birth as the mother. This section is also broad enough to cover any newborn child, regardless of its legitimacy, in order that all cases that might involve infanticide be included.

CHAPTER 585

CORRUPT PRACTICES

585:1 Bribery in Official and Political Matters.

I. A person is guilty of a class B felony if

(a) he promises, offers, or gives any pecuniary benefit to another with the purpose of influencing the other's action, decision, opinion, recommendation, vote, nomination, or other exercise of discretion as a public servant, party official, or voter; or

(b) being a public servant, party official, candidate for electoral office, or voter, he solicits, accepts or agrees to accept any pecuniary benefit from another knowing or believing the other's purpose to be as described in paragraph I(a), or fails to report to a law enforcement officer that he has been offered or promised a pecuniary benefit in violation of paragraph I(a).

II. As used in this section and other sections of this chapter, the following definitions apply. "Public servant" means any officer or employee of the state or any political subdivision thereof, including judges, legislators, consultants, jurors, and persons otherwise performing a governmental function. A person is considered a public servant upon his election, appointment or other designation as such, although he may not yet officially occupy that position. A person is a candidate for electoral office upon his public announcement of his candidacy. "Party official" means any person holding any post in a political party whether by election, appointment or otherwise. "Pecuniary benefit" means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally.

Comments

Bribery statutes can now be found in RSA chapters 69 and 587. The provisions of the former are concerned with bribery of voters, while the latter punishes the giving and receiving of bribes involving public officials. See RSA 69:11 and 12; 587:25, 26 (1967 supp.), 27 (1967 supp.), and 28.

This section is patterned on the Michigan Revised Criminal Code, Final Draft, §§ 4701 and 4705. There have been added references to bribery of voters in order to continue the offenses contained in RSA 69:11 and 12. This section expands present bribery law by including the matter of bribing officials of political parties, on the grounds that the discretion of these people is as important a part of the political process, in matters of nominations, for example, as is anything in the more visible

and traditional sphere of politics. Protecting the integrity of political and governmental functions, therefore, requires that bribery of political party officials be prohibited. Further expansion occurs by virtue of the definition of "public servant" in paragraph II. Consultants whose reports and decisions are often of vital significance in determining government policy are listed among those whose discretion may not be bribed. Since many consultants serve without compensation, there is no requirement that they be on a compensated basis. The prohibition of this section takes place as soon as the public servant is elected or appointed and does not await his official occupancy of the office, since it is obvious that bribery at that point can be just as pernicious as any which occurs later.

The exception at the end of paragraph II is important. It is designed to make clear that there is no misconduct involved when a public official promises to improve economic conditions through the exercise of his discretion, in return for which he solicits the electoral support of his constituents. He may not, however, accept pecuniary benefits from a particular segment of the economy, a trade association, for example, in return for his support of its economic progress. Campaign contributions that are intended to secure election to office and are not tied to a specific exercise of discretion are not prohibited by this section. The inclusion of candidates for electoral office puts incumbents and their challengers on a par in terms of what they may solicit or accept in return for a particular exercise of discretion when they achieve office.

In view of the many difficulties of enforcing bribery laws, paragraph I–b requires that reports be made of bribery attempts.

585:2 Improper Influence.

I. A person is guilty of a class B felony if he

(a) threatens any harm to a public servant, party official or voter with the purpose of influencing his action, decision, opinion, recommendation, nomination, vote or other exercise of discretion; or

(b) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law; or

(c) being a public servant or party official, fails to report to a law enforcement officer conduct designed to influence him in violation of paragraphs I(a) or I(b) of this section.

II. "Harm" means any disadvantage or injury, pecuniary or otherwise, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official, or voter is interested.

Comments

This section is a modified version of the Model Penal Code, § 240.2. Like the bribery law, it is designed to preserve the

integrity of the governmental process. Paragraph I protects persons with key roles in this process from intimidation aimed at influencing their decisions. The prohibition in paragraph II is limited to judicial and administrative proceedings because legislative and executive officers are traditionally subject to such a variety of special pleas for the exercise of their discretion that there are no prevailing norms, short of penalties for threat or outright bribery, that prohibit communications to them for favor. In the absence of a widely held view that there is something wrong about appealing to legislative and executive personnel, the law ought not to create the condemnation on its own. But in judicial and administrative proceedings, the situation is quite different. The forms of communication and their substance are much more formally structured. Canon 17 of the Canons of Judicial Ethics of the American Bar Association expresses a related principle:

> A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

Administrative proceedings that are based on a court model undoubtedly have similar ethical obligations. This section does not go so far as to enact these ethics into penal law, however. It is a combination of the substance of the communication and the privacy of its transmission that gives rise to the penalty. *Ex parte* appeals to a judicial officer that one of the litigants is a meritorious relative of counsel is the practice this section operates against. See, also, RSA 495: 1, 2.

585: 3 Compensation for Past Action. A person is guilty of a misdemeanor if

I. being a public servant, he solicits, accepts or agrees to accept any pecuniary benefit in return for having given a decision, opinion, recommendation, nomination, vote, otherwise exercised his discretion, or for having violated his duty; or

II. he promises, offers or gives any pecuniary benefit, acceptance of which would be a violation of paragraph I.

Comments

This section is based on the Model Penal Code, § 240.3. It fills a gap in the law dealing with official integrity which is occasioned by giving or receiving what, in essence, is a bribe *after* the official action has taken place. The rationale for reaching unofficial compensation under these circumstances is described by the Model Penal Code comments:

> Soliciting or accepting pay for past official favor should be discouraged because it undermines the integrity of administration. Compensation for past action implies a promise of similar compensation for future favor. Apart from this implied bribery for the future, when some "clients" of a

public servant undertake to pay him for favors, others who deal with the same public servant are put under pressure to make similar contributions or risk subtle disfavor.

585:4 Gifts to Public Servants. A person is guilty of a misdemeanor if

I. being a public servant he solicits, accepts or agrees to accept any pecuniary benefit from a person who is or is likely to become subject to or interested in any matter or action pending before or contemplated by himself or the governmental body with which he is affiliated; or

II. he knowingly gives, offers, or promises any pecuniary benefit prohibited by paragraph I.

Comments

RSA 587:27 (1967 supp.) prohibits the receipt of gifts by any officer or employee of a governmental unit. The statute, however, prohibits any "gift . . . made as aforesaid," thereby incorporating something from the prior section dealing with giving bribes, RSA 587:26 (1967 supp.). That section prohibits giving any thing of value "with intent to influence action as to any matter over which said officer or employee has control or is entrusted with on behalf of the body by which he is employed." It seems, therefore, that present law prohibits only gifts that are made with the specified corrupt motive.

This section, a shortened version of the Model Penal Code, § 240.5, similarly does not prohibit all gifts. But the focus is different. Instead of forbidding gifts made with a certain motive, the prohibition is on gifts from certain people. It seems to be a warranted assumption that gifts from persons who have an interest in an official matter before the public servant would be so often made with the hope and intent of influencing him that it is appropriate to prohibit all such gifts generally.

585:5 Compensation for Services. A person is guilty of a misdemeanor if

I. being a public servant, he solicits, accepts, or agrees to accept any pecuniary benefit in return for advice or other assistance in preparing or promoting a bill, contract, claim, or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise; or

II. he gives, offers or promises any pecuniary benefit, knowing that it is prohibited by paragraph I.

Comments

This section is based upon the Model Penal Code, § 240.6. It is intended to prevent another sort of evasion of the bribery laws, namely, where the public servant purports to be acting privately but where the work he does is so intimately related to his official role that he is serving two masters when the public interest requires that it only be served.

585:6 Purchase of Public Office. A person is guilty of a misdemeanor if

I. he solicits, accepts or agrees to accept, for himself, another person, or a political party, money or any other pecuniary benefit as compensation for his endorsement, nomination, appointment, approval or disapproval of any person for a position as a public servant or for the advancement of any public servant; or

II. he knowingly gives, offers or promises any pecuniary benefit prohibited by paragraph I.

Comments

This section reaches one of the most pernicious invasions of public integrity. Few public interests exceed that of having the most qualified men fill public office. When the selection for public office is based not on quality but on a *quid pro quo*, the stage is set for inefficiency of performance, a breakdown of morale among civil servants, and even corrupt practices. This section is based on the Model Penal Code, § 240.7(1).

CHAPTER 586

FALSIFICATION IN OFFICIAL MATTERS

586:1 Perjury.

I. A person is guilty of a class B felony if in any official proceeding

(a) he makes a false material statement under oath or affirmation, or swears or affirms the truth of a material statement previously made, and he does not believe the statement to be true; or

(b) he makes inconsistent material statements under oath or affirmation, both within the period of limitations, one of which is false and not believed by him to be true. In a prosecution under this subdivision, it need not be alleged or proved which of the statements is false but only that one or the other was false and not believed by the defendant to be true.

II. "Official proceeding" means any proceeding before a legislative, judicial, administrative or other governmental body or official authorized by law to take evidence under oath or affirmation including a notary or other person taking evidence in connection with any such proceeding. "Material" means capable of affecting the course or outcome of the proceeding. A statement is not material if it is retracted in the course of the official proceeding in which it was made before it became manifest that the falsification was or would be exposed and before it substantially affected the proceeding. Whether a statement is material is a question of law to be determined by the court.

Comments

This section is a restructured version of the Model Penal Code, § 241.1. It replaces RSA 587:1-a through 1-e (1967 supp.), although there is very little change made in the substantive elements of the offenses involved. One of the changes that is accomplished by this section is that the statement made must be false so that truth goes to negate one of the material elements instead of being a matter of defense, as it is under RSA 587:1-a. This change is a matter of shifting the burden of proof to the state and is justified on the ground that the truth or falsity issue is of major importance and, therefore, ought to be one which the state must assert and prove. The change does not, however, require the state to prove that the actor knew that the statement was false. It is sufficient if it is objectively false and the actor does not believe it to be true. The requirement that the statement be objectively false differs from RSA 587:1-a which has no such requirement and which permitted, therefore, perjury prosecutions where the statement involved was factually true. The Commission has adopted the position of the Model Penal Code, the Michigan Revised Criminal Code, Final Draft, § 4905, New York Penal Law, § 210(5),

and Proposed Crimes Code for Pennsylvania, § 2102(a) for reasons set forth by the draftsmen of the Model Penal Code:

> The possibility of such prosecutions is disquieting. The situation is peculiar in that the same proof which establishes falsity of the implied assertion of defendant's belief, *ipso facto,* establishes the *mens rea* also, whereas generally the criminal law requires two distinct elements of guilt, which for perjury would mean (1) false statement, and (2) disbelief. Moreover, the making of true statements which the declarant believes to be false can hardly obstruct justice or impede Congressional investigations. We may agree that "a man who tells the truth quite unintentionally is, morally, a liar," and it is possible to bring the situation within the concept of "attempt"; but not much good and some harm might come from applying the criminal law to this situation. The likelihood of achieving moral reformation by imprisoning one who has, objectively, told the truth is not high. Encouraging the police to inquire as to subjective dishonesty behind the objective truth would not only waste their time, but opens substantial possibility of abuse. Model Penal Code, Tentative Draft No. 6, pp. 117–18 (1957).

This section also substitutes "does not believe the statement to be true" for the *mens rea* elements in RSA 587: 1-a (1967 supp.) to the effect that "the declarant does not believe that the statement is true or knows that it is not true or intends thereby to avoid or obstruct the ascertainment of the truth." The first two alternatives are included in the proposed *mens rea* formulation. The third, if coupled with the *actus reas* of making a false statement, is surplusage since a person could hardly intend to obstruct justice with a false statement without believing that it is false. If, on the other hand, an intent to obstruct justice is joined with the making of a statement which need not be objectively false, as is the situation under RSA 587: 1-a, the law would be authorizing prosecution of one who testifies truthfully solely because he intended the truth to obstruct the ascertainment of some other truth. This seems to the Commission to be too thin a veneer of dishonesty to justify imposing criminality.

Paragraph I–b provides essentially the same offense concerning inconsistent statements that is now found in RSA 587: 1-b and 587: 1-d(3) (1967 supp.).

The definition of "material" in paragraph II is consistent with that now provided by RSA 587: 1(d) (2) and by case law. See State v. Norris, 9 NH 96 (1837). To this has been added the proviso concerning retraction.

586: 2 False Swearing. A person is guilty of a misdemeanor if

I. he makes a false statement under oath or affirmation or swears or affirms the truth of such a statement previously made if

(a) the falsification occurs in an official proceeding, as defined in section 586: 1, II, or is made with a purpose to mislead a public servant in performing his official function; or

(b) the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths; or

II. he makes inconsistent statements under oath or affirmation, both within the period of limitations, one of which is false and not believed by him to be true. In a prosecution under this subsection, it need not be alleged or proved which of the statements is false but only that one or the other was false and not believed by the defendant to be true.

III. No person shall be guilty under this section if he retracts the falsification before it becomes manifest that the falsification was or would be exposed.

Comments

This section has no counterpart in New Hampshire statutes. There is, however, a common law offense of false swearing which is, in effect, perjury in other than a judicial proceeding. See Perkins, Criminal Law, p. 383 (1957). The offenses contained in this section, patterned on those in the Model Penal Code, § 241.2, are similar to those enacted by the previous section, with two important exceptions. One is that the statement need not be material. This facet distinguishes this section from present law which requires the element of materiality to be shown. State v. Norris, 9 NH 96 (1837); State v. Tappan, 58 NH 152 (1877). The second is that the false swearing to a non-material statement need not necessarily occur in an official proceeding, thereby including transactions which involve statements on oath or affirmation which are made in order to deceive a public official.

586:3 **Unsworn Falsification.** A person is guilty of a misdemeanor if

I. he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing a notification authorized by law to the effect that false statements made therein are punishable; or

II. with a purpose to deceive a public servant in the performance of his official function, he

(a) makes any written false statement which he does not believe to be true; or

(b) knowingly creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading; or

(c) submits or invites reliance on any writing which he knows to be lacking in authenticity; or

(d) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

III. No person shall be guilty under this section if he retracts the falsification before it becomes manifest that the falsification was or would be exposed.

Comments

This section is also a progression down in seriousness from perjury. It is taken from the Model Penal Code, § 241.3, and requires no swearing in order for the offense to be committed. The false statement must, however, be in writing or involve a physical object such as a map or sample specimen of something. The subdivisions in paragraph II describe common forms of deception.

586:4 False Reports to Law Enforcement. A person is guilty of a misdemeanor if he

I. knowingly gives false information to any law enforcement officer with the purpose of inducing such officer to believe that another has committed an offense; or

II. knowingly gives information to any law enforcement officer concerning the commission of an offense, or the danger from an explosive or other dangerous substance, knowing that the offense or danger did not occur or exist or knowing that he has no information relating to the offense or danger.

Comments

This is a modified version of the Model Penal Code, § 241.5, and replaces RSA 572:49 (1967 supp.) which defines a similar offense.

586:5 Tampering with Witnesses and Informants. A person is guilty of a class B felony if

I. believing that an official proceeding, as defined in section 586:1, II, or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to

(a) testify or inform falsely; or

(b) withhold any testimony, information, document or thing; or

(c) elude legal process summoning him to provide evidence; or

(d) absent himself from any proceeding or investigation to which he has been summoned; or

II. he commits any unlawful act in retaliation for anything done by another in his capacity as witness or informant; or

III. he solicits, accepts or agrees to accept any benefit in consideration of his doing any of the things specified in paragraph I(a) through I(d).

Comments

Subornation of perjury is now punished by RSA 587:1-c (1967 supp.). This section, taken from the Model Penal Code, § 241.6, includes that and expands the offense to include a number of other serious interferences with the administration of justice. As to subornation, paragraph I-a has no requirement that the false testimony sought by the actor be material, contrary to State v. Tappan, 58 NH 152 (1877).

586: 6 Falsifying Physical Evidence. A person commits a misdemeanor if, believing that an official proceeding, as defined in section 586: 1, II, or investigation is pending or about to be instituted, he

I. alters, destroys, conceals or removes any thing with a purpose to impair its verity or availability in such proceeding or investigation; or

II. makes, presents or uses any thing which he knows to be false with a purpose to deceive a public servant who is or may be engaged in such proceeding or investigation.

Comments

This section is a counterpart to other sections in this chapter. Here, instead of protecting the verity of testimony, the offense is designed to deter falsification or concealment of physical evidence or the fraudulent use of such evidence. The terminology is based on the Model Penal Code, § 241.7.

586: 7 Tampering with Public Records or Information. A person is guilty of a misdemeanor if he

I. knowingly makes a false entry in or false alteration of any thing belonging to, received, or kept by the government for information or record, or required by law to be kept for information of the government; or

II. presents or uses any thing knowing it to be false, and with a purpose that it be taken as a genuine part of information or records referred to in paragraph I; or

III. purposely and unlawfully destroys, conceals, removes or otherwise impairs the verity or availability of any such thing.

Comments

Certain public officials are presently subject to criminal penalties for acts similar to those described here. See RSA 547: 18 (Register of Deeds); RSA 548: 28 (Register of Probate). In addition, RSA 587: 31 penalizes any public officer who "wilfully neglects any duty of his office", which may include officials who have duties regarding public records and who "neglect" this duty in ways provided for in this section. The provisions of this section generalize the above statutes so as to protect the integrity of all records which are kept in the public interest. It is a modified version of the Model Penal Code, § 241.8.

CHAPTER 587

OBSTRUCTING GOVERNMENTAL OPERATIONS

587:1 Obstructing Government Administration. A person is guilty of a misdemeanor if he uses force, violence, intimidation or engages in any other unlawful act with a purpose to interfere with a public servant, as defined in section 585:1, II, performing or purporting to perform an official function; provided, however, that flight by a person charged with an offense, refusal by anyone to submit to arrest or any such interference in connection with a labor dispute with the government shall be prosecuted under the statutes governing such matters and not under this section.

Comments

New Hampshire statutes currently punish any wilful assault or other obstruction of an officer in the service of process in civil and criminal cases. The penalties provided vary depending on whether the interference is with civil (not more than one year, RSA 587:5) or criminal justice. In the latter cases, RSA 587:6 provides for imposition of half of the term that is authorized for the offense involved in the case where the obstruction occurred, and RSA 587:7 authorizes a ten-year penalty if the offense involved is punishable by death or life imprisonment. In addition, RSA 587:8 defines a more general offense of wilfully assaulting or obstructing "any officer or other person duly authorized in the discharge of any duty of his office", except in the cases described above. This latter statute comes closest to the offense defined in this section.

Under this section, all public servants are protected from unlawful interference with the performance of their official duties. The section is framed in terms of "a public servant performing or purporting to perform an official function" in order to continue the rule of State v. Roberts, 52 NH 492 (1872) that a latent defect in the authority of the public official does not justify another in interfering with the performance of his duties. Except for this phraseology, this section is a modified version of the Model Penal Code, § 242.1.

The proviso is designed to make the generality of the offense defined in this section inapplicable to circumstances that are subject to policy considerations not involved here, such as the limits of labor union activity against government agencies.

587:2 Resisting Arrest or Detention. A person is guilty of a misdemeanor when he purposely interferes with a person recognized to be a law enforcement official seeking to effect an arrest or detention of himself or another.

Comments

This section replaces RSA 594:5. It differs from that statute in that this section includes detention as well as arrest and prohibits interference with the law enforcement official when he is seeking to arrest or detain a third person.

Other provisions of this sort often contain requirements that force or violence be used in the interference or that the actor create some risk of physical injury. See, for example, Michigan Revised Criminal Code, Final Draft, § 4625, and the Model Penal Code, § 242.2. This section does, however, follow closely the provisions of New York Penal Law, § 205.30.

587: 3 Hindering Apprehension or Prosecution.

I. A person is guilty of an offense if, with a purpose to hinder, prevent or delay the discovery, apprehension, prosecution, conviction or punishment of another for the commission of a crime, he

(a) harbors or conceals the other; or

(b) provides such person a weapon, transportation, disguise or other means for avoiding discovery or apprehension; or

(c) warns such person of impending discovery or apprehension; or

(d) conceals, destroys or alters any physical evidence that might aid in the discovery, apprehension or conviction of such person; or

(e) obstructs by force, intimidation or deception anyone from performing an act which might aid in the discovery, apprehension, prosecution or conviction of such person.

II. The offense is a misdeameanor unless the actor knows that the charge made or liable to be made against the other is murder or a class A felony, in which case it is a class B felony.

Comments

This section is drawn from the Model Penal Code, § 242.3. It was enacted in 1967 as RSA 590-A: 8 (1967 supp.) as an accessory after the fact statute.

587: 4 Aiding Criminal Activity. A person is guilty of a misdemeanor if he purposely aids another who has committed a crime in profiting or benefiting from the criminal activity, as by safeguarding the proceeds thereof or converting the proceeds into negotiable funds.

Comments

This is a slightly modified version of the Model Penal Code, § 242.4. It fills a gap in the law governing accessories after the fact by punishing assistance rendered to criminals that does not constitute the obstruction of justice involved in helping the offender avoid detection or apprehension. Although it is unusual for a penal statute to provide examples of the proscribed conduct, the examples in this section have been incorporated from the Model Penal Code in order to provide an added dimension of clarity to a new penal statute.

587: 5 Compounding. A person is guilty of a misdemeanor if he

I. solicits, accepts, or agrees to accept any benefit as consideration for his refraining from initiating or aiding in a criminal prosecution; or

II. confers, offers, or agrees to confer any benefit upon another as consideration for such person refraining from initiating or aiding in a criminal prosecution.

Comments

Compounding crime is a common law offense designed to prevent the victim of an offense from hindering the administration of justice. State v. Carver, 69 NH 216, 39 A 973 (1898). This version of compounding is a modification of New York Penal Law, § 215.45. The New York law punishes refraining from initiating a prosecution, but does not reach the matter of aiding. Since "post-initiating activity", such as providing testimony as a witness, is as important as making the first complaint, this section is broader than the New York statute.

A controversy exists concerning whether the offense is committed when the victim receives no more than he reasonably believes is necessary to reimburse or compensate him for the damage caused by the criminal act. The Model Penal Code, § 242.5 and New York Penal Law, § 215.45 provide a defense under these circumstances. The Michigan Revised Criminal Code, Final Draft, Comments to § 4530, reviews the basis for the Model Penal Code and New York defense, then presents the view which the Commission has adopted:

> The contrary argument has been raised, however, that the compounding provision, although rarely if ever used against the reimbursed victim, is frequently employed as a threatening device to retain the victim's continued cooperation in the prosecution of the crime. In other words, although the prosecutor will not in fact prosecute for compounding, he will frequently warn the reimbursed victim that his decision to forgo prosecution, to refuse to be a witness, etc., may open him up to a charge of compounding. This warning, it is argued, will often be enough to insure continued cooperation. The Committee in the end decided that the practical necessity for a "warning device" of this sort justified retention of the compounding provision in its present form, without a "victim-reimbursement" exception.

587:6 Escape.

I. A person is guilty of an offense if he escapes from official custody.

II. "Official custody" means arrest, custody in a penal institution, an institution for confinement of juvenile offenders or other confinement pursuant to an order of a court.

III. The offense is a class B felony if the actor employs force, threat or a deadly weapon to effect the escape. Otherwise it is a misdemeanor.

Comments

New Hampshire statutes now punish escapes from a variety of institutions, i. e., RSA 620:9 (1967 supp.) (House of Correction); RSA 587:9 (jail or other place, other than prison, house of correction or industrial school); RSA 622:12 (escape from prison by person serving life sentence); RSA 622:13

(escape from prison by other prisoner). There is not a statute dealing with escape from arrest, prior to the time the arrested person is confined. This section includes escape from all confinements and grades the offense on the basis of the involvement of personal danger in the means used.

587:7 Implements for Escape and Other Contraband. A person is guilty of a misdemeanor if

I. he knowingly provides a person in official custody, as defined in section 587:6, II, with anything which may facilitate such person's escape or the possession of which by such person is contrary to law or regulation, or in any other manner facilitates such person's escape; or

II. being a person in official custody, as defined in section 587:6, II, he knowingly procures, makes or possesses any thing which may facilitate escape.

Comments

This section continues the punishment of persons who aid others to escape now provided for in RSA 587:12, 13, 14 and 18. Providing contraband to a person in custody, described in paragraph I, is currently made an offense by RSA 578:10 and 11. The terms of this section are much briefer than the Model Penal Code, §§ 242.6 and 242.7 but the policies are similar.

587:8 Bail Jumping.

I. A person is guilty of an offense if, having been released with or without bail upon condition that he appear at a specified time and place in connection with a criminal action, without just cause, he fails so to appear.

II. The offense is a class B felony if the offense involved in the specified appearance is murder or a class A felony. Otherwise, it is a misdemeanor.

Comments

This section is taken from the Model Penal Code, § 242.8 and is similar to RSA 597:14-a. Minor verbal changes are made. For example, the present statute requires that the person "wilfully" fail to appear, while this section requires that the failure be "without just cause".

CHAPTER 588

ABUSE OF OFFICE

588: 1 Official Oppression. A public servant, as defined in section 585: 1, II, is guilty of a misdemeanor if, with a purpose to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office; or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

Comments

This section is based on New York Penal Law, § 195.00. It replaces RSA 587: 31 which punishes any public officer who "wilfully neglects any duty of his office". Under this section, it is clear that the offense may be committed by affirmative acts as well as by omission. It is limited by the requirement that the official seek to benefit himself or hurt another when he acts improperly. Mere bad judgment is not an offense.

588: 2 Misuse of Information. A public servant, as defined in section 585: 1, II, is guilty of a misdemeanor if, knowing that official action is contemplated or in reliance on information which he has acquired by virtue of his office or from another public servant, he

I. acquires or divests himself of a pecuniary interest in any property, transaction or enterprise which may be affected by such action or information; or

II. speculates or wagers on the basis of such action or information; or

III. aids another to do any of the foregoing.

Comments

This section is a modification of the Model Penal Code, § 243.2 and has no counterpart in current law. Although the Model Penal Code and the Michigan Revised Criminal Code, Final Draft, § 4810, both restrict the prohibition in paragraph I to the acquisition of property, this section includes the divesting of property on the basis of inside information in order to protect ignorant purchasers and because the public servant benefits himself by avoiding a decline in the value of his holdings as much as he does by purchasing property that is going to increase in value. This section also differs from the others by prohibiting the conduct in paragraphs I, II and III when it is motivated by information from another public servant. Information from this source is not mentioned in the Model Penal Code or Michigan provisions. It is included here, however, to discourage relationships among public servants which involve swapping inside information of pecuniary value.

CHAPTER 589

BREACHES OF THE PEACE AND RELATED OFFENSES

589:1 Riot.

I. A person is guilty of riot if

(a) simultaneously with two or more other persons, he engages in tumultuous or violent conduct and thereby purposely or recklessly creates a substantial risk of causing public alarm; or

(b) he assembles with two or more other persons with the purpose of engaging soon thereafter in tumultuous or violent conduct, believing that two or more other persons in the assembly have the same purpose; or

(c) he assembles with two or more other persons with the purpose of committing an offense against the person or property of another whom he supposes to be guilty of a violation of the law, believing that two or more other persons in the assembly have the same purpose.

II. Any person who refuses to comply with a lawful order to withdraw given to him immediately prior to, during, or immediately following a violation of paragraph I is guilty of riot. It is no defense to liability under this paragraph that withdrawal must take place over private property; provided, however, that no person so withdrawing shall incur criminal or civil liability by virtue of acts reasonably necessary to accomplish the withdrawal.

III. Upon the request of a police officer, any person present during a violation of paragraph I or II shall render assistance, other than the use of force, in the suppression of such violations. Any person refusing to render such assistance is guilty of a misdemeanor.

IV. Riot is a class B felony if, in the course of and as a result of the conduct, any person suffers physical injury, or substantial property damage occurs, or the defendant was armed with a deadly weapon. Otherwise, it is a misdemeanor.

Comments

This section contains elements taken from the Michigan Revised Criminal Code, Final Draft, §§ 5510 (Riot), 5515 (Unlawful Assembly), 5520 (Failure of Disorderly Persons to Disperse), and from the present New Hampshire law on the subject found in RSA chapter 609-A (1967 supp.).

One of the changes this section accomplishes is a clear specification of the *mens rea* elements involved in the offense. For example, RSA 609-A:1, II, declares that mob action consists of "The assembly of two or more persons to do an unlawful act". In the prosecution of one of these persons, it would seem that the intent of that person and the intent of

the others present must also be proved, placing an undue burden on the state. Under paragraph I-b of this section, it is solely the knowledge or belief of the person charged that is in issue. If he joins what appears to him to be a riotous assembly, then he has committed an offense, regardless of the actual state of mind of the other persons present. The same sort of change is made in paragraph I-c of this section in regard to the offense now defined in RSA 609-A: 1, III.

Paragraph II restates the offense now in RSA 609-A: 4. The last sentence of this paragraph enacts the holding of State v. Galvin, 107 NH 441, 224 A2d 574 (1966).

RSA 609-A: 5 defines the offense of refusing to aid a peace officer in suppressing a mob. This is repeated in paragraph IV with the qualification that a private citizen cannot be required to use force in rendering the aid. This has been added on the basis of the belief that riot situations are often explosive and tense, calling for the most professional sort of law enforcement response, especially when it comes to the use of force. Precipitous or excessive force can convert a tumultuous gathering into a grave threat to life and safety. Since private citizens normally have no experience or training in the use of force in these circumstances, it seems the wiser course of action not to recruit their force.

589:2 **Disorderly Conduct.** A person is guilty of disorderly conduct if

I. he refuses to comply with a lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition by any act which serves no legitimate purpose; or

II. with a purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof

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

(b) he makes unreasonable noises; or

(c) in a public place, he engages in a course of abusive or obscene language or makes obscene gestures; or

(d) he obstructs vehicular or pedestrian traffic.

III. As used in this section, "public" means likely to affect persons in a place to which the public or a substantial group has access, including but not limited to schools, government-owned facilities, and the lobbies or hallways of apartment houses.

IV. Disorderly conduct is a misdemeanor if the offense continues after a request by any person to desist. Otherwise it is a violation.

Comments

The conduct prohibited in this section is presently the subject of a number of New Hampshire statutes, i.e., RSA 377: 8 (disorderly conduct on a train); RSA 570: 1 (brawls, rude, indecent, or disorderly conduct in a public place); RSA

570:2 (derisive words in a public place); RSA 570:3 (obscene songs or words); RSA 570:7 (obstructing highways); RSA 570:18 (misconduct in a public conveyance); RSA 570:25 (1967 supp.) (vagabonds or disorderly persons).

This section is a modified version of the Michigan Revised Criminal Code, Final Draft, § 5525. It describes the elements of the offense in more detail than is now found in the statutes and consolidates the several types of disorderly conduct into one penal statute.

Paragraph I describes two distinct offenses. The first is designed to deal with such situations as where an individual is disturbing a public gathering and refuses to remove himself after having been ordered to do so by the police. The second is an *ejusdem generis* necessitated by the fact that the statute cannot detail all of the specific kinds of acts that are properly punishable as disorderly conduct. Such a provision is found also in the Model Penal Code, § 250.2(1)(c) and New York Penal Law, § 240.20(7).

Paragraph II contains a number of different offenses, all of which are characterized by the intent to disturb the public. Subdivision (c) differs from other similar formulations in the requirement that the actor engage in a *course* of conduct therein described, rather than a single instance. This has been inserted in order to avoid the risk of having offenses arise upon the more or less spontaneous outburst of a single profane word or phrase.

Paragraph IV grades the offense on the basis of the extent to which the conduct persists. There is no requirement that the offense be of the higher grade only if the request to desist has been made by a law enforcement officer since notice to the actor by anyone that his conduct is offensive ought to distinguish those who are petty nuisances from those who are bent upon creating a major disturbance.

589:3 False Public Alarms. A person is guilty of a misdemeanor if he purposely communicates to an official or volunteer fire department or other government agency that deals with emergencies involving danger to life or property a false report concerning a fire, explosion or other catastrophe or emergency knowing such report to be false.

Comments

This section is a modified version of the Michigan Revised Criminal Code, Final Draft, § 4535. The purpose of the section is to deter false alarms concerning disasters of the sort mentioned. There are two mens rea requirements set forth. One is that it must be the purpose of the actor to communicate the false alarm to the agencies listed, precluding any offense based on negligence or recklessness. Secondly, the actor must know that the alarm he transmits is false.

RSA 570:5 presently punishes making a false fire alarm. This section generalizes this offense so as to include such false alarms as might relate to floods, explosions or other catastrophes caused by violent storms.

589:4 Harassment. A person is guilty of a misdemeanor if, with a purpose to annoy or alarm another, he

I. makes a telephone call, whether or not a conversation ensues, without purpose of lawful communication; or

II. makes repeated communications at extremely inconvenient hours or in offensively coarse language; or

III. repeatedly insults, taunts or challenges another in a manner likely to provoke a violent or disorderly response.

Comments

This section is a modified version of the Model Penal Code, § 250.4. It replaces several current New Hampshire statutes, such as RSA 570:2 which prohibits annoying or offending another and the various provisions of RSA 572:38-b (1967 supp), Abusing or Obscene Telephone Calls. The conduct described in this section is, as to individual victims, the equivalent of the prohibited behavior involving the public at large found in other sections of this chapter.

589:5 Intoxication. A person is guilty of a violation if he is under the influence of intoxicating liquor, narcotics or drugs, or any substance having the property of releasing toxic vapors, in a public place or in a private place where he unreasonably disturbs other persons therein.

Comments

This section is an expanded version of the present law on drunkenness, RSA 570:14. The offense can be committed under this section by intoxication caused by drugs or "glue sniffing." RSA 570:17-a currently prohibits "inhaling toxic vapors for effect" and is replaced by this section. The provisions of that statute relating to minors are not repeated inasmuch as any violation of this section will subject the child to juvenile court treatment under RSA chapter 169. The sale of the "glue" to minors would be an offense under provisions of this Code relating to endangering the welfare of minors, section 584:3.

The second form of expanding the offense now in RSA 570:14 occurs by virtue of the description of the persons whose tranquility is protected from drunks. Presently, the statute mentions "his family". Under this section, any persons in the private place wherein the intoxication occurs are included. There is, however, one qualification inserted. That is that they must be "unreasonably" disturbed. Thus the statute does not extend to those whose sensitivities lead them to be disturbed merely by the sight of a person in any degree under the influence of intoxicants.

589:6 Loitering.

I. A person is guilty of a violation if he appears at a place or at a time under circumstances that warrant alarm for the safety of persons or property in the vicinity, and, upon inquiry by a law enforcement

official, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes.

II. No person shall be convicted under this section if the explanation he gave of his conduct and purposes was true and, if believed by the law enforcement official at the time, would have dispelled the alarm. In such cases, any record of the arrest or detention made under the authority of paragraph I shall be expunged.

Comments

This section is a modified version of the Model Penal Code, § 250.6. Like the Model Penal Code draftsmen, this section and section 589: 2, disorderly conduct, deal only with conduct that has a degree of aggressiveness which warrants prohibition by the Criminal Code. See Model Penal Code, Tentative Draft 13, p. 65 (1961). There is sufficient power in municipalities to deal with lesser disturbances on the public streets. RSA 47: 17, VIII (1967 supp.) grants city councils authority to make bylaws in order to "regulate all streets and public ways, . . . and . . . other amusement or practice having a tendency to annoy persons passing in the streets and sidewalks." RSA 320: 14 also provides a means for regulating the conduct of persons who have been granted licenses to conduct their businesses on the public streets.

This section, therefore, is not directed against begging, vagrancy or other forms of essentially passive annoyances. It is rather an offense which deals with loitering that gives grounds for suspecting that the actor is involved in other criminal conduct. The Model Penal Code comments to § 250.6 provide examples.

> Typical suspicious loitering situations would be the following: a known professional pickpocket is seen loitering in a crowded railroad station: a rough-looking character, not recognized by the policeman as a local resident, is seen lurking in a doorway looking up and down the street as if to see whether anyone is watching; a nervous housewife summons police to her neighborhood because an unknown man has been standing for some time in a dark alley. These situations would not be covered by the law of attempt, even under the definition of that offense in Article 5 of this Code, since no act has yet been done which is a "substantial step" toward commission of an offense or "strongly corroborative of the actor's criminal purpose". Tentative Draft 13, p. 64, (1961).

The offense defined by this section also supplements the provisions of RSA 594: 2 which gives peace officers authority to detain persons suspected of crime. If the detention occurs under the circumstances contained in this section, then a substantive offense may be charged.

Paragraph II is included to deal with the situation where the person questioned gives an account of himself which is true but not credible. If later investigation discloses the lawful activity of the actor, then there is no justification for either a conviction or a police record of arrest or detention.

589:7 Abuse of Corpse. A person is guilty of a misdemeanor if he unlawfully removes, conceals or destroys a corpse or any part thereof.

Comments

This section continues, with minor verbal changes, the offense presently defined in RSA 572:20. Similar provisions are in the Model Penal Code, § 250.10, and the Michigan Revised Criminal Code, Final Draft, § 5560.

589:8 Cruelty to Animals. A person is guilty of a misdemeanor if, without lawful authority, he purposely or recklessly mistreats any animal or grossly neglects an animal in his custody.

Comments

RSA chapter 575 presents and defines several offenses involving cruelty to animals. This section consolidates these into one offense. It is a modified version of the Michigan Revised Criminal Code, Final Draft, § 5565.

589:9 Violation of Privacy.

I. A person is guilty of a misdemeanor if he unlawfully and without the consent of the person entitled to privacy therein, installs or uses

(a) in any private place, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in such place; or

(b) outside a private place, any device for hearing, recording, amplifying or broadcasting sounds originating in such place which would not ordinarily be audible or comprehensible outside.

II. As used in this section, "private place" means a place where one may reasonably expect to be safe from surveillance but does not include a place to which the public or a substantial group thereof has access.

Comments

This section is based upon the Model Penal Code, § 250.12(1). At the present time there is no such offense in New Hampshire. Similar offenses are found in the Michigan Revised Criminal Code, Final Draft, chapter 56, and New York Penal Law, Article 250.

The requirement of unlawfulness in paragraph I is included in order to avoid deciding the question of the extent to which law enforcement agents may intrude on privacy, leaving that to other provisions of law governing criminal procedure. Under this section an offense does not occur until there has been a decision that the intrusion is not sanctioned by law.

It is largely within the power of the "victim" to safeguard his privacy and an offense does not arise under this section unless there is a violation of the privacy the "victim" himself has constructed. Thus, communication or conduct is protected only when it takes place in private, as defined in paragraph II. Similarly, observation by binoculars of conduct behind an unshaded window is no offense. If, however, the actor accom-

plishes his visual observation by trespassing into premises in order to secrete a camera, then I(a) does indicate an offense to have taken place.

589:10 Violation of Privacy of Messages.

I. A person is guilty of a misdemeanor if, without the consent of the sender or receiver, he unlawfully

(a) intercepts a message by telephone, telegraph, letter or other means of communicating privately; or

(b) divulges the existence or contents of any such message either knowing that it was illegally intercepted or having learned of the message in the course of employment with an agency engaged in transmitting it.

II. As used in this section, "intercept" does not include overhearing of messages by the telephone company or subscriber incident to enforcement of regulations limiting use of the facilities or to other normal use.

Comments

This section is a modification of the Model Penal Code, § 250.12(2). It defines an offense that is not now found in New Hampshire law. The purpose of this section is to provide safeguards for privacy that are analogous to that found in section 589:9. The offense defined here occurs upon either the interception *or* the divulgence of the message. Employees of telecommunications companies are forbidden by paragraph I(b) from revealing messages they have seen by virtue of their employment. Their work with such messages, however, would not be an interception under paragraph I(a). The person sending or receiving the message may authorize a third person to intercept or divulge, in which case no offenses occur even though the other party to the message is unaware of the third party's involvement.

The purpose of paragraph II is to provide a limited privilege to engage in conduct otherwise prohibited in paragraph I(a). Thus the telephone company may listen in to conversations as a means of checking the quality of transmissions or the functioning of equipment. So, too, an employer may use an extension in order to find out if his employees are using his time and equipment for their own private purposes. The "limiting other normal use" exception is designed to provide judicial authority to deal with a variety of circumstances which may or may not call for the protection of privacy, such as an employee listening in on conversations held by another employee in order to learn his business techniques, or a host overhearing calls by guests in his home.

589:11 Criminal Defamation.

I. A person is guilty of a misdemeanor if he purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule.

II. As used in this section "public" includes any professional or social group of which the victim of the defamation is a member.

Comments

This offense is a modified version of the Proposed Kansas Criminal Code, § 21-1004 (1968). It is designed to provide protection to reputations against false attack. The actor must not only know that what he communicates is not true but must also be consciously aware that the result of what he is doing will be severe damage to the standing of the victim either in general or among the groups which are significant to him.

589:12 **Emergency Calls.** A person is guilty of a misdemeanor if he purposely refuses to yield the use of a telephone party line upon being informed that it is needed for any call to summon fire, police or medical assistance; to invoke or operate the civil defense system; or otherwise to deal with an immediate threat to life or health.

Comments

An offense similar to the one defined in this section is presently in RSA 572:38-a (1967 supp.). The Michigan Revised Criminal Code, Final Draft, § 7515 also punishes the conduct described. The purpose of this provision is to promote the availability of essential communication facilities at a time when they are needed to deal with private or public catastrophes.

CHAPTER 590

PUBLIC INDECENCY

590:1 Indecent Exposure and Lewdness. A person is guilty of a misdemeanor if he exposes his genitals or performs any other act of gross lewdness under circumstances which he should know will likely cause affront or alarm.

Comments

RSA 579:3 punishes any person "guilty of gross lewdness or lascivious behavior." This section continues the general prohibition on "gross lewdness" and in addition defines the circumstances of indecent exposure that are also sufficiently offensive to be prohibited. The New York Penal Law, § 245.00 is similar in declaring a person guilty of an offense "when in a public place, he intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act."

590:2 Prostitution and Related Offenses.

I. A person is guilty of a misdemeanor

(a) if he or she solicits or engages in sexual intercourse as defined in section 577:1, II, or deviate sexual relations as defined in section 577:2, III, in return for consideration; or

(b) induces or otherwise purposely causes another to violate paragraph I(a); provided, however, that if such other is under the age of eighteen or is compelled by force or intimidation, the offense is a class B felony; or

(c) transports another into or within this state with the purpose of promoting or facilitating such other in engaging in conduct in violation of paragraph I(a); or

(d) not being a legal dependent incapable of self-support, knowingly is supported in whole or in part by the proceeds of violation of paragraph I(a); or

(e) knowingly permits a place under his control to be used for violation of paragraph I(a).

II. A person is guilty under this section regardless of the sex of the persons involved.

Comments

RSA 579:10 through 18 presently deal with the subject of this section. RSA 579:8 prohibits involving a child in the business of prostitution, conduct which, under paragraph I(b) of this section constitutes a circumstance raising the offense from a misdemeanor to a class B felony. Similar offenses are found in the New York Penal Law, Article 230, and the Michigan Revised Criminal Code, Final Draft, chapter 62. This sec-

tion does not, however, prohibit patronizing a prostitute, as do New York and Michigan. It does expand present law by virtue of including commercial deviate sexual relations as well as normal sexual intercourse.

590:3 Adultery. A person is guilty of a misdemeanor if, being a married person, he engages in sexual intercourse with another not his spouse or, being unmarried, engages in sexual intercourse with another known by him to be married.

Comments

Adultery is now punished by RSA 579:1 and 2. Neither the Model Penal Code nor the Michigan Revised Criminal Code, Final Draft, include such an offense. It is found, however, in the New York Penal Law, § 255.17. This section defines the offenses so as to require that only one of the parties to the intercourse be married and that the person charged with the commission of the offense have knowledge of the married state of either himself or his partner.

CHAPTER 591

OFFENSES AGAINST THE FLAG

591:1 Misuse of Flag. A person is guilty of a violation if he

I. purposely places any unauthorized inscription or other thing upon any flag of the United States or of any state of the United States; or

II. knowingly exhibits any such flag knowing the inscription or other thing to be unauthorized; or

III. for purposes of advertising a product or service for sale or free distribution, affixes a representation of the flag of the United States or of a state of the United States to such product or on any display whereon such product or service is advertised; or

IV. purposely or knowingly mutilates or defiles any such flag; or

V. having been presented with a flag in behalf of this state and using such flag in violation of this section, refuses to comply with a request by the governor that such flag be returned.

Comments

This and the following section are a continuation of the offenses defined in RSA chapter 573.

591:2 Wrongful Display of Flag. A person is guilty of a violation if he

I. displays the flag of any foreign country upon any state, county, or municipal building, except that when any foreign person has been declared a guest by an appropriate official of the United States Government, the governor or a mayor, the flag of the country of such person may be displayed; or

II. displays the flag of the United Nations on the property of the state, a county, a municipality or any institution of learning in any manner other than along with and subordinated to the flag of the United States.

Comments

See comments to section 591:1.

CHAPTER 592

GAMBLING OFFENSES

592:1 Lotteries. A person is guilty of a misdemeanor if he knowingly and unlawfully

I. conducts a lottery or disposes or offers to dispose of property in any way whereby the payment for such property is, in whole or in part, induced by the hope of gain by luck or chance; or

II. sells, offers for sale, or possesses for the purpose of sale, any lottery ticket or other thing which is evidence that the purchaser will be entitled to a share or chance in a lottery or deposits for mailing any such ticket or thing, or notice of the drawing of a lottery; or

III. publishes or deposits for mailing information as to the location or identity of the person where or from whom a ticket or other thing described in paragraph II may be obtained.

IV. "Unlawfully" means not specifically authorized by law.

Comments

This section is based on current statutes, namely RSA 577:1, 2 and 3. The terminology found in these statutes has largely been retained in view of interpretive decisions based thereon. See, e.g., State v. Eames, 87 NH 477, 183 A S90 (1936) (lottery requires prize, chance, and consideration). The definition in paragraph IV is included in order to make clear that activities such as those authorized by RSA chapter 287 and chapter 284 (1967 supp.) are exempt from these prohibitions.

592:2 Gambling. A person is guilty of a misdemeanor if he knowingly and unlawfully

I. permits gambling in any place under his control; or

II. gambles, or loans money or any thing of value for the purpose of aiding another to gamble; or

III. has in his possession a gambling machine.

IV. For purposes of this section "unlawfully" means not specifically authorized by law or not solely for amusement, without stake or possibility of gain or loss. "Gambling machine" means any device or equipment which is capable of being used to discharge money or anything that may be exchanged for money, or to display any symbol entitling a person to receive money. "Gambling" means to risk something of value upon a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

V. All implements, equipment, and apparatus used in violation of this section shall be forfeited.

Comments

This section restates the offenses presently in RSA 577: 6, 7, 10, 11 and 12. The definitions in paragraph IV are also taken from present law, e.g., "Unlawfully" includes the terminology now in RSA 577: 8. The definition of gambling is taken from New York Penal Law § 225.00(2).

CHAPTER 593

SUBVERSIVE ACTIVITIES

Transfer RSA Chapter 588 to this Chapter. At the present time, the Commission has not deemed it expedient to revise RSA Chapter 588.

CHAPTER 594

SABOTAGE PREVENTION ACT

Transfer RSA Chapter 589 to this Chapter. At the present time, the Commission has not deemed it expedient to revise RSA Chapter 589.

CHAPTER 595

OBSCENE MATTERS

Transfer RSA Chapter 571-A (1967 supp.) to this Chapter. The present highly unsettled state of constitutional law governing this subject has made it inexpedient for the Commission to revise RSA Chapter 571-A (1967 supp.).

CHAPTER 607

SENTENCES

607: 1 Applicability.

I. The provisions of this chapter govern the sentencing for every offense other than murder, whether defined within or outside the Criminal Code. A person convicted of murder shall be sentenced according to section 575: 6.

II. This chapter does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Any appropriate order exercising that authority may be included as part of the judgment of conviction.

Comments

This section establishes the authority of the sentencing provisions of this Code to govern sentencing of all criminal offenders, regardless of where in the statutes the offense they have been convicted of is defined. An exception is created for the crime of murder since the possibility of the death penalty makes important several sentencing criteria and procedures not otherwise applicable. Paragraph I is based upon the Model Penal Code, § 6.02(1) and (2). Paragraph II is taken from the Michigan Revised Criminal Code, § 1210(9).

607: 2 Sentences and Limitations.

I. A person convicted of a felony or misdemeanor may be sentenced to imprisonment, probation, conditional or unconditional discharge, or a fine.

II. If a sentence of imprisonment is imposed, the court shall fix the maximum thereof which is not to exceed:

(a) Fifteen years for a class A felony.

(b) Five years for a class B felony.

(c) One year for a misdemeanor.

III. A person convicted of a violation may be sentenced to probation, conditional or unconditional discharge, or a fine.

IV. A fine may be imposed in addition to any sentence of imprisonment, probation, or conditional discharge. The amount of any fine imposed on

(a) any individual may not exceed two thousand dollars for a felony, one thousand dollars for a misdemeanor, and one hundred dollars for a violation.

(b) a corporation or unincorporated association may not exceed fifty thousand dollars for a felony, ten thousand dollars for a misdemeanor and five hundred dollars for a violation. A writ of execution may be issued by the court against the corporation or unincorporated association to compel payment of the fine, together with costs and interest.

(c) If a defendant has gained property through the commission of any felony, then in lieu of the amounts authorized in paragraphs IV(a) and IV(b), the fine may be an amount not to exceed double the amount of that gain.

V. A person may be placed on probation if the court finds he is in need of the supervision and guidance that the probation service can provide. The period of probation shall be for a period to be fixed by the court not to exceed five years for a felony, two years for a misdemeanor, and one year for a violation. Upon petition of the probation officer or the probationer the period may be terminated sooner by the court if the conduct of the probationer warrants it.

VI. A person may be sentenced to a period of conditional discharge if he is not imprisoned and the court is of the opinion that probationary supervision is unnecessary, but that the defendant should conduct himself according to conditions determined by the court. The period of a conditional discharge shall be three years for a felony and one year for a misdemeanor or violation. However, if the court has required as a condition that the defendant make restitution or reparation to the victim of his offense and that condition has not been satisfied, the court may, at any time prior to the termination of the above periods, extend the period for a felony by no more than two years and for a misdemeanor or violation by no more than one year in order to allow the defendant to satisfy the condition. During any period of conditional discharge the court may, upon its own motion or on petition of the defendant, discharge the defendant unconditionally if the conduct of the defendant warrants it. The court is not required to revoke a conditional discharge if the defendant commits an additional offense or violates a condition.

VII. When a probation or a conditional discharge is revoked, the defendant may be fined, as authorized by paragraph IV, if a fine was not imposed in addition to the probation or conditional discharge. Otherwise the defendant shall be sentenced to imprisonment as authorized by paragraph II.

VIII. A person may be granted an unconditional discharge if the court is of the opinion that no proper purpose would be served by imposing any condition or supervision upon the defendant's release. A sentence of unconditional discharge is for all purposes a final judgment of conviction.

Comments

This section defines the alternative dispositions that are available to a court sentencing a convicted offender, sets the

limits of severity of the various alternatives, and provides some criteria of choice where relevant.

Paragraph I enumerates the alternatives that apply to persons convicted of a felony or a misdemeanor. Imprisonment, fine, and probation are traditional punishments in the criminal process. There is now no express authority in the New Hampshire statutes for what this section defines as conditional discharge and unconditional discharge. There is, however, language in RSA 607 which indicates that courts do have authority to dispose of a case in ways not dissimilar to an unconditional discharge, i.e., "when the case is otherwise filed . . . ." This same portion of the current law governing sentencing, entitled "Suspended Sentences," also indicates that in cases of misdemeanors the court may order what is herein called a conditional discharge. RSA 607:15, 16, and 17 authorize conditional sentences in felony cases. They limit the condition, however, to the payment of a fine. The provisions of paragraph VI of this section permit the court to impose such conditions as appear proper in any given case. Except for these expansions in present law so as to authorize unconditional discharge in all cases and to impose a conditional discharge on conditions in addition to the payment of a fine, paragraph I continues the authority sentencing courts now have to deal with convicted persons.

Paragraph II establishes two rules. One is that when a court chooses to impose imprisonment, it may only set the maximum amount of time that the offender may spend in custody. There is normally no authority to fix a minimum term. When, however, a person is sentenced to an extended term of imprisonment under section 607:6 a minimum term must be set by the court. The second important rule provided for in paragraph II is that the maximum period of imprisonment to which the offender is sentenced may not exceed the limits declared for each class of offense. There are presently a number of statutes which authorize much longer terms than those set here, e.g., RSA 585:19 (kidnapping, twenty-five years); RSA 585:18 (robbery, thirty years). It is the opinion of the Commission, however, that the periods included in this section represent the limits which are ordinarily imposed in criminal cases and do not detract from the authority courts need and use in ordinary criminal cases, regardless of the offense. In addition, the provisions of section 607:6 grant ample additional authority to deal with more serious cases where longer terms of imprisonment are called for. The Michigan Revised Criminal Code, Final Draft, § 1401(2) provides for its three classes of felonies terms of twenty, ten and five years. The New York Penal Law, § 70.00(2) sets limits for its five classes of felonies from life imprisonment to four years. This section follows the structure of both Michigan and New York in granting sentencing courts authority to impose a maximum term within the statutory limits. The Model Penal Code, on the other hand, gives the court authority to set a minimum term within legislatively set limits while the maximum term of the sentence is fixed by statute and is beyond the control of the court. See Model Penal Code, § 6.06.

That sentences should be less severe in New Hampshire than elsewhere involves no change from tradition. In 1960, for example, only 28.1% of persons sentenced to imprisonment in New Hampshire received terms of 5 years or more. This placed New Hampshire sixteenth among 49 states (New Jersey not included) in an ascending order of percent receiving this sentence. The range was from 9.0% (Vermont) to 99.7% (Washington). See National Prisoner Statistics, Prisoners Released from State and Federal Institutions in 1960, table 55 (1963), reproduced in Murrah and Rubin, Penal Reform and the Model Sentencing Act, 65 Columbia Law Review 1167 (1965). The relative reluctance of New Hampshire penal authorities to keep offenders incarcerated for long periods of time is also reflected by the fact that while in 1960 the median time served by all persons in the United States on their first release was 20.8 months, in New Hampshire the comparable period was 11.9 months. See id. at p. 1183.

Paragraph III is an expression of the policy that violations do not constitute crimes and, therefore, no sentence of imprisonment may be imposed. In this respect, this section follows the policy of the Model Penal Code, § 1.04(5). It differs from the Model Penal Code, however, in authorizing probation, conditional or unconditional discharge in cases of violation.

Paragraph IV sets the limits of fines that may be ordered upon conviction. The amounts in IV(a) are the same maxima as are found in the Michigan Revised Criminal Code, Final Draft, §§ 1501 and 1505. The alternative means of computing the amount of the fine contained in paragraph IV(c) is taken from the Michigan language in § 1505(5). The maximum amount of fine authorized against corporations and unincorporated associations is higher than is found in Michigan ($10,000) in the belief that the amount stated in this section is a more realistic assessment of what a court *may* need to impose when there is no other sentence available.

Paragraph V utilizes the periods for probation for the various classes of offenses that are found in the Michigan Revised Criminal Code, § 1310. The statement concerning earlier termination of the probation is patterned on the same Michigan section. RSA 504:1 and 4 are similar.

Paragraph VI articulates the circumstances in which conditional discharge is the proper disposition. These stand in somewhat of a midway position between probation and unconditional discharge in that the convicted person is not entirely free of obligations as he would be were an unconditional discharge to be the sentence, while at the same time the obligations which he must perform need not be done under the supervision of the probation staff of the court. The periods of the conditional discharge as well as the other provisions of this paragraph are also taken from the Michigan Revised Criminal Code, § 1320.

Paragraph VII is included in order to make clear that when there is a revocation of probation or conditional discharge the offender may be fined and need not necessarily be incarcerated. RSA 504:4 permits a summary hearing and revocation and any disposition.

Paragraph VIII provides authority for releasing a convicted person without imposing what is traditionally thought of as any form of sentence. It is a disposition that will likely be used by courts in cases where the fact of conviction itself is deemed to constitute sufficient punishment. The last sentence is included in order to insure that the offender may have an appeal on the merits of his case if he chooses after this disposition.

607: 3 Calculation of Periods.

I. A sentence of imprisonment commences when it is imposed if the defendant is in custody or surrenders into custody at that time. Otherwise, it commences when he becomes actually in custody. All the time actually spent in custody prior to the time he is sentenced shall be credited against the maximum term of imprisonment that is imposed and against any minimum term authorized by section 607: 6.

II. If a court determines that the defendant violated the conditions of his probation or conditional discharge but reinstates the probation or discharge, the period between the date of the violation and the date of restoration is not computed as part of the period of probation or discharge.

III. If a person who is imprisoned in a penal institution is convicted of a felony committed while he was imprisoned or during an escape from imprisonment, the term of imprisonment authorized by sections 607: 2, II, or 607: 6 may be added to the portion of the term which remained unserved at the time of the commission of the felony. Otherwise, any sentence of imprisonment imposed on a person who is subject to an undischarged term of imprisonment and any multiple sentences of imprisonment imposed on any person shall be served concurrently.

Comments

Paragraph I is modeled on the Michigan Revised Criminal Code, Final Draft, § 1430(1) and (2). It sets out the general rule that the sentence of imprisonment commences when it is handed down, provided the convicted person is then in custody. If he is free on bail or otherwise out of the custody of the authorities, the sentence begins to run when he is taken into custody. An offender who has not been out on bail and who may have spent a substantial amount of time in custody both prior to and during his trial receives credit against the time he must serve for that time in custody. If he is given an extended term of imprisonment under the provisions of section 607: 6, then the credit is applied to the minimum term that is imposed under that section as well as against the maximum term that is set by the sentencing court in all cases. Although there is not now specific statutory authority to grant such time credits, it is undoubtedly within the power of a court to take presentence custody into account in determining the term of imprisonment that will be imposed.

Paragraph II is taken from the Michigan Revised Criminal Code, Final Draft, § 1330(2). It deals with the situation where there has been a violation of one of the conditions

which the convicted person was obliged to observe, either as part of his probation or as one of the terms of a conditional discharge. If the court decides to sentence the person to imprisonment at that point under the authority of section 607:2, VII, then the period of imprisonment will be calculated to run as of the time he is taken into custody according to paragraph I of this section. If, however, the probation or conditional discharge is not revoked as a result of the violation of the condition, then the period the offender must remain on probation or under the sentence of conditional discharge must be recalculated to exclude the period between the time the violation occurred and the time the probation or conditional discharge is ordered to continue.

Paragraph III is modeled on the Michigan Revised Criminal Code, Final Draft, § 1420. It creates a general rule that, when an offender is subject to two sentences of imprisonment, they must be served concurrently. This applies to the case of conviction of more than one offense resulting in imprisonment sentences as well as the case of a parolee who commits an offense. The exceptions whereby the terms of imprisonment may be added together involve serious misconduct while in prison or during a time of unauthorized absence from the prison.

607:4 Presentence Investigation.

I. No person convicted of a felony shall be sentenced before a written report of a presentence investigation has been presented to and considered by the court, unless waived by defendant and the state. The court may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor. The report shall include a recommendation as to disposition, together with reference to such material disclosed by the investigation as supports such recommendation.

II. Before imposing sentence, the court shall advise the defendant and his counsel of the factual contents of any presentence investigation and afford fair opportunity to controvert them. The sources of confidential information need not, however, be disclosed. The court shall also ask the defendant if there are any other offenses which he wishes to be taken into account in determining his sentence. If the defendant indicates that there are, the county attorney shall be notified and afforded an opportunity to be heard. If, after any such hearing, the court takes into account such other offenses as are disclosed, the record shall so state and the sentence imposed shall bar the prosecution or conviction in this state of the person sentenced for any such admitted crimes.

Comments

RSA 504:2 presently requires that no defendant be placed on probation unless a probation officer's report has been "presented to and considered by the court". This section expands that requirement to include all felony cases, regardless of the disposition that is made, unless it is waived by both sides. It is likely, however, that little additional burden is imposed

on the probation service by virtue of the expanded statutory language. Where the burden would not be excessive and the court considers a report called for, this highly useful adjunct to sentencing may be used in misdemeanor cases as well. The last sentence of paragraph I is included in order to maximize the usefulness of the report by having the probation officer make available to the court his experience and expertise relating to the significance of various aspects of the offender's background and their relationship to the disposition alternatives that the court has before it.

The policy of paragraph II is adopted from the Model Penal Code, § 7.05(4). Unlike the Model Code, however, this paragraph requires that the prosecution be notified and heard on the question of the effect of other uncharged offenses.

607: 5 Disposition of Certain Records.

I. If a person who has been sentenced to probation or conditional discharge has complied with the conditions of his sentence, he may, at the termination of the sentence or at any time thereafter, apply to the court in which the original sentence was entered for an order to annul the record of conviction and sentence.

II. If a person who has been sentenced to unconditional discharge has been convicted of no other crime except a traffic offense during a two-year period following such sentence, he may, at any time after such two-year period, apply to the court in which the original sentence was entered for an order to annul the record of conviction and sentence.

III. If a person under twenty-one years of age at the time of his criminal act is sentenced to imprisonment and in a five-year period following his release has been convicted of no other offense except a traffic offense, he may, at any time after such five-year period, apply to the court in which the original sentence was entered for an order to annul the record of conviction and sentence.

IV. When an application has been made under paragraph I, II or III, the court shall require a probation officer to report to it concerning any convictions, arrests or prosecutions of the applicant during the periods specified in those paragraphs.

V. The court shall enter the order applied for under paragraph I, II or III if in the court's opinion the order will assist in the applicant's rehabilitation and will be consistent with the public welfare. Upon entry of the order, the applicant shall be treated in all respects as if he had never been convicted and sentenced, except that, upon conviction of any crime committed after the order of annulment has been entered, the prior conviction may be considered by the court in determining the sentence to be imposed.

VI. Procedures governing application for an entry of an order annulling a conviction shall be established by rule of court. The application, how-

ever, may be made through an attorney or by a probation officer if the applicant gives him written authorization.

VII. Upon entry of the order of annulment of conviction, the court shall issue to the applicant a certificate stating that his behavior after the conviction has warranted the issuance of the order, and that its effect is to annul the record of conviction and sentence.

VIII. In any application for employment, license, or other civil right or privilege, or in any appearance as a witness in any proceeding or hearing, a person may be questioned about a previous criminal record only in terms such as "Have you ever been arrested for or convicted of a crime that has not been annulled by a court?".

IX. Nothing in this section shall affect any right of the applicant to appeal from his conviction or sentence or to rely on it in bar of any subsequent proceedings for the same offense.

Comments

This section is patterned on the Michigan Revised Criminal Code, Final Draft, § 1340. It is designed to provide an added incentive for convicted persons to lead a law-abiding life following their conviction and sentence, including compliance with any conditions they may have been required to live up to as part of a sentence of probation or conditional discharge. The procedures authorized in this section also make it easier for former criminals to abstain from further anti-social acts, to the great benefit of themselves and the entire community. This comes about by virtue of their increased ability to see themselves as honest citizens as a result of the formal declaration by the court that they have demonstrated their ability to reorient their lives. Social scientists now widely suggest that one of the reasons why recidivism may be such a problem relates to the fact that prosecution and trial make indelible impressions on the self-image of offenders and nothing is done to help them later to consider themselves as being capable of conforming behavior. In this sense, this section authorizes a ceremony designed to counteract the negative identity that is often implanted by the process of conviction. The certificate of annulment required by paragraph VII is the tangible evidence of society's confidence in the future of persons who have, by their own conduct, merited the confidence.

607: 6 Extended Term of Imprisonment.

I. If a court finds that a convicted person is more than twenty-one years of age, he may be sentenced according to paragraph II if the court also finds that

(a) the circumstances of the crime for which he is to be sentenced show that he has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the court has subjected him to a psychiatric examination on the basis of which the court finds that he is a serious danger to others due to a gravely abnormal mental condition; or

(c) he has twice previously been imprisoned, in this state or in any other jurisdiction, on sentences in excess of one year; or

(d) he manifested exceptional cruelty or depravity in inflicting death or serious bodily injury on the victim of his crime.

(e) Findings made under this paragraph shall be incorporated in the record.

II. If authorized by paragraph I, a person may be sentenced to an extended term of imprisonment. An extended term is, for a person convicted of

(a) any felony, a minimum to be fixed by the court of not more than 10 years and a maximum to be fixed by the court of not more than 30 years;

(b) a misdemeanor, a minimum to be fixed by the court of not more than 2 years and a maximum to be fixed by the court of not more than 5 years.

Comments

RSA 591:1 currently provides authority for increased sentences in the case of an habitual offender, defined as "Any person who has been twice convicted of crime, sentenced and committed to prison for terms of not less than three years each." When such a person is convicted of a felony he may be imprisoned for up to fifteen years. This section goes well beyond such authority in many respects. The circumstances justifying a longer term are more varied and are designed to take into account instances where there are strong indications that the public safety requires that authority for a long sentence be placed in the hands of the court. If this section is resorted to, a minimum as well as a maximum term of imprisonment must be included in the sentence. Paragraph II sets forth the limits in the maximum and minimum which must be observed. They are substantially more severe than the term authorized in RSA 591:1.

607:7 Release from State Prison.

I. Any person sentenced to imprisonment for more than one year under section 607:2 of this chapter whose record of conduct shows that he has faithfully observed all the rules of said prison, and has not been subjected to punishment, may be entitled to release from said prison upon the expiration of one-half of the term of his sentence, or at any later time, if there shall appear to said board of parole to be a reasonable probability that he will remain at liberty without violating the law and will conduct himself as a good citizen. Any person so released shall be given a permit to be at liberty during the unexpired portion of the term of his sentence.

II. Any person sentenced to an extended term of imprisonment under section 607:6 of this chapter may be entitled to release under the conditions specified in paragraph I upon the expiration of the minimum term of his sentence. Any person so released shall be given a permit to be at liberty during the unexpired maximum term of his sentence.

III. When a person is subject to multiple concurrent or consecutive sentences of imprisonment, as provided in section 607:3, III, the provisions of this section shall be computed from the longest of said sentences.

IV. The release of persons from state prison who have been sentenced thereto prior to the effective date of this Code shall be governed by the law in effect at the time of their sentence.

Comments

This section replaces the sections of RSA chapter 607 which provide for the time when a person in the state prison is eligible for parole. At the present time, this is computed as a portion of the minimum term of his sentence. Since section 607:2 of this Code authorizes only a maximum term to be set by the court within the limits therein provided, the parole eligibility rules have had to be revised. This has been done with the aim of continuing a broad discretion to parole administrators and an incentive for good conduct to prisoners. The general rule provided in this section is that a prisoner may be considered for release on parole upon the expiration of one-half of his sentence. He need not, of course, be released at that time and the standard of judgment on this question to be used by paroling authorities has been repeated from RSA 607:39 (1967 supp.).

607:8 et seq.

(Those sections of RSA ch. 607 not repealed or replaced by this Code are to be retained and renumbered starting with this section 607:8.)

Tables

Table 1. Distribution Table

The left column of this table lists the provisions of the present Title LVIII. The right column shows the recommended disposition of those provisions. The numbers in the right column refer to sections or chapters of the Criminal Code presented in this report which specifically or generally cover the same or approximately the same subject matter. The word "omitted" indicates that the provision of Title LVIII has not been included in the Criminal Code and that its repeal is recommended. The entry "tr. RSA" followed by numbers indicates that the section of Title LVIII should be transferred to another part of the Revised Statutes Annotated.

RSA Tit. LVIII	Disposition
Ch. 570	
§ 1	589: 2
§ 2	589: 2
§ 3	589: 2
§ 4	579: 2
§ 5	576: 3, 580: 2
§ 6	590: 1
§ 7	589: 2
§ 8	tr. RSA Ch. 31
§ 9	tr. RSA Ch. 31
§ 10	589: 2
§ 11	tr. RSA Ch. 447
§ 12	589: 2
§ 13	589: 2, 589: 3
§ 14	589: 5
§ 15	omitted
§ 16	omitted
§ 17	tr. RSA Chs. 619, 620
§ 17a	584: 3
§ 18	589: 2
§ 19	590: 2
§ 20	omitted
§ 21	omitted
§ 22	omitted
§ 23	584: 3
§ 24	589: 2
§ 25	589: 2
§ 26	tr. RSA Ch. 160
§ 27	omitted
§ 28	575: 2, 575: 3, 576: 3, 576: 5
§ 28a	576: 5
§ 29	tr. RSA Ch. 31
§ 30	tr. RSA Ch. 620
Ch. 571	
§ 1	584: 3
§ 2	584: 3
§ 3	584: 3

RSA Tit. LVIII	Disposition
Ch. 571 (cont.)	
§ 4	571: 8, 574: 3
§ 5	584; 3
§ 6	584: 3
§ 7	584: 3
§ 8	tr. RSA Title III
§ 9	omitted
§ 10	omitted
§ 11	584: 3
§ 12	omitted
§ 13	omitted
§ 14	omitted
§ 15	omitted
§ 16	omitted
§ 17	584: 3
§ 18	584: 3
§ 19	584: 3
§ 20	584: 3
§ 20a	584: 3
§ 21	584: 3
§ 22	584: 3
§ 23	584: 3
§ 24	584: 3
§ 25	tr. RSA Ch. 169
§ 26	tr. RSA Ch. 169
§ 27	tr. RSA Ch. 169
§ 29	tr. RSA Ch. 169
§ 30	tr. RSA Ch. 169
Ch. 571-A	
§ 1	Ch. 595
§ 2	Ch. 595
§ 3	Ch. 595
§ 4	Ch. 595
§ 5	Ch. 595
Ch. 572	
§ 1	576: 3, 579: 2
§ 2	576: 3, 580: 2, 589: 3

RSA Tit. LVIII	Disposition
Ch. 572 (cont.)	
§ 3	576: 3, 579: 2, 589: 2
§ 4	580: 2
§ 5	580: 2
§ 6	omitted
§ 6a	580: 2
§ 7	579: 2, 580: 2, 582: 3
§ 8	omitted
§ 9	omitted
§ 10	omitted
§ 11	580: 2
§ 12	579: 2
§ 13	580: 2
§ 14	579: 2
§ 15	580: 2
§ 15a	580: 2
§ 16	omitted
§ 17	omitted
§ 18	tr. RSA Ch. 207
§ 19	580: 2, 589: 2
§ 20	589: 7
§ 21	579: 2
§ 22	582: 3
§ 23	582: 3
§ 24	omitted
§ 25	579: 2
§ 26	579: 2
§ 27	579: 2
§ 28	tr. RSA Title XIX
§ 29	tr. RSA Title XIX
§ 30	tr. RSA Title XIX
§ 31	tr. RSA Title XIX

RSA Tit. LVIII	Disposition
Ch. 572 (cont.)	
§ 32	tr. RSA Title XIX
§ 33	tr. RSA Title XIX
§ 34	tr. RSA Title XIX
§ 35	omitted
§ 36	omitted
§ 37	576: 3, 579: 2
§ 38	576: 3, 579: 2, 589: 3
§ 38a	589: 12
§ 38b	589: 4
§ 39	579: 2
§ 40	576: 3, 579: 2, 589: 8
§ 40a	omitted
§ 41	576: 3, 579: 2
§ 42a	tr. RSA Title XVI
§ 42b	tr. RSA Title XVI
§ 43	tr. RSA Title XXXI
§ 44	579: 2
§ 45	579: 3
§ 46	582: 5, 576: 4
§ 47	tr. RSA Title XXXV
§ 48	tr. RSA Title XXXV
§ 49	586: 4, 589: 3
§ 50	580: 2
Ch. 573	
§ 1	591: 1
§ 2	591: 1
§ 3	591: 1
§ 4	591: 1
§ 5	591: 1
§ 6	591: 1
§ 7	591: 2
§ 8	591: 2
§ 9	591: 2
§ 10	591: 1
Ch. 574	
§ 1	582: 4
§ 2	582: 4
Ch. 575	
§ 1	589: 8
§ 1a	tr. RSA Title XLV
§ 2	tr. RSA Title VII
§ 3	tr. RSA Title VII
§ 4	tr. RSA Title VII

RSA Tit. LVIII	Disposition
Ch. 575 (cont.)	
§ 5	589: 8
§ 6	omitted
§ 7	589: 8
§ 8	589: 8
§ 9	589: 8
§ 10	tr. RSA Title XLI
§ 11	589: 8, 607: 2
§ 12	tr. RSA Title VII
§ 13	omitted
§ 14	tr. RSA Title VII
§ 15	607: 2
Ch. 575-A	
§ 1	tr. RSA Title XLV
§ 2	tr. RSA Title XLV
§ 2a	tr. RSA Title XLV
§ 3	tr. RSA Title XLV
§ 4	tr. RSA Title XLV
Ch. 577	
§ 1	592: 1
§ 2	592: 1
§ 3	592: 1
§ 4	tr. RSA Ch. 601
§ 5	592: 1
§ 6	592: 2
§ 7	592: 2
§ 8	omitted
§ 9	omitted
§ 10	592: 2
§ 11	592: 2
§ 12	592: 2
§ 13	592: 2
§ 14	omitted
§ 15	omitted
§ 16	583: 8
§ 17	omitted
§ 18	omitted
§ 19	tr. RSA Title XXVII
§ 20	tr. RSA Title XXVII
§ 21	tr. RSA Title XXVII
§ 22	tr. RSA Title XXVII
§ 23	tr. RSA Title XXVII
§ 24	tr. RSA Title XXVII

RSA Tit. LVIII	Disposition
Ch. 577 (cont.)	
§ 25	tr. RSA Title XXVII
§ 26	tr. RSA Title XXVII
§ 27	tr. RSA Title XXVII
§ 28	tr. RSA Title XXVII
§ 29	tr. RSA Title XXVII
§ 30	tr. RSA Title XXVII
Ch. 578	
§ 1	omitted
§ 2	589: 2
§ 3	tr. RSA Title XXX
§ 4	tr. RSA Title XXX
§ 5	tr. RSA Title XXX
§ 5a	tr. RSA Title XXX
§ 6	589: 2
§ 7	589: 2
§ 8	omitted
§ 9	589: 2
§ 10	607: 2
§ 11	omitted
§ 12	tr. RSA Title VII
§ 13	570: 8
Ch. 579	
§ 1	590: 3
§ 2	590: 3
§ 3	590: 1
§ 4	577: 5
§ 5	584: 1
§ 6	584: 1
§ 7	584: 2
§ 8	577: 4, 590: 2
§ 9	577: 2
§ 10	590: 2
§ 11	590: 2
§ 12	590: 2
§ 13	590: 2
§ 14	590: 2
§ 15	590: 2
§ 16	590: 2
§ 17	607: 2
§ 18	omitted
Ch. 580	
§ 1	582: 4, 582: 8
§ 1a	582: 4
§ 2	582: 4
§ 3	582: 4, 574: 3, 571: 8

RSA Tit. LVIII	Disposition
Ch. 580 (cont.)	
§ 4	582: 11
§ 5	583: 3, 582: 4
§ 5a	583: 9
§ 6	582: 4
§ 7	582: 4
§ 8	583: 12
§ 9	583: 6
§ 10	582: 4, 583: 1
§ 11	582: 4, 583: 1
§ 12	582: 4, 583: 1
§ 13	582: 4, 583: 1
§ 14	582: 4, 583: 1
§ 15	582: 4, 583: 1
§ 16	582: 4, 583: 1
§ 17	tr. RSA Title XXXVIII
§ 18	tr. RSA Title XXXVIII
§ 19	tr. RSA Title XXXVIII
§ 20	tr. RSA Title XXXVIII
§ 21	tr. RSA Title XXXVIII
§ 22	tr. RSA Title XXXVIII
§ 23	574: 1
§ 24	582: 4
§ 25	582: 4
§ 26	607: 2
§ 27	582: 3, 582: 10
§ 28	582: 3, 582: 10
§ 29	582: 2, 582: 3, 582: 10
§ 30	582: 2, 582: 3, 582: 10
§ 31	574: 3, 586: 3
§ 32	582: 3
Ch. 581	
§ 1	583: 1
§ 2	583: 1
§ 3	583: 1
§ 4	583: 1
§ 5	583: 1
§ 6	583: 1
§ 7	omitted
§ 8	omitted
§ 9	omitted
§ 10	omitted
§ 11	583: 13
§ 12	583: 13
Ch. 582	
§ 1	582: 3
§ 2	582: 3
§ 2a	582: 11
§ 3	582: 3, 582: 11
§ 4	582: 3, 582: 11

RSA Tit. LVIII	Disposition
Ch. 582 (cont.)	
§ 5	582: 3, 582: 11
§ 6	582: 3
§ 7	582: 3
§ 8	582: 3
§ 9	582: 3
§ 10	582: 7
§ 11	omitted
§ 12	583: 4
§ 13	583: 4
§ 14	583: 4
§ 15	574: 1
§ 16	582: 9
§ 17	582: 9
Ch. 583-A	
§ 1	580: 1
§ 2	580: 1
§ 3	580: 1
§ 4	580: 1
§ 5	580: 1
Ch. 584	
§ 1	579: 1
§ 2	579: 1
§ 3	579: 1
§ 4	579: 1
§ 5	574: 1
§ 6	579: 1
§ 7	omitted
§ 8	omitted
§ 9	omitted
Ch. 585	
§ 1	575: 1
§ 2	.. tr. RSA Ch. 600
§ 3	575: 6, 575: 7
§ 4	575: 6, 575: 7
§ 5	575: 6, 575: 7
§ 6	607: 2
§ 7	.. tr. RSA Ch. 600
§ 8	tr. RSA Ch. 600, 575: 2
§ 9	tr. RSA Ch. 600, 575: 2
§ 10	omitted
§ 11	tr. RSA Ch. 600, 575: 2
§ 12	575: 5
§ 13	575: 5
§ 14	575: 1, 575: 2, 575: 3
§ 15	584: 5
§ 16	577: 1, 577: 4
§ 17	576: 2
§ 18	581: 1
§ 19	578: 1
§ 20	578: 1, 578: 2, 578: 3
§ 21	576: 1
§ 22	576: 2

RSA Tit. LVIII	Disposition
Ch. 585 (cont.)	
§ 23	576: 1, 576: 2
§ 24	576: 1
§ 25	574: 3
§ 26	tr. RSA Ch. 159; retitle Ch. 159 "Weapons"
§ 27	tr. RSA Ch. 159; retitle Ch. 159 "Weapons"
§ 28	tr. RSA Ch. 159; retitle Ch. 159 "Weapons"
Ch. 586	
§ 1	omitted
§ 2	omitted
§ 3	omitted
Ch. 587	
§ 1a	586: 1
§ 1b	586: 1
§ 1c	586: 1
§ 1d	586: 1
§ 1e	586: 1
§ 5	587: 1
§ 6	587: 1
§ 7	587: 1
§ 8	587: 1
§ 9	587: 6
§ 10	587: 7
§ 11	587: 7
§ 12	571: 8
§ 13	571: 8
§ 14	571: 8
§ 15	571: 8
§ 16	omitted
§ 17	omitted
§ 18	571: 8, 587: 3
§ 19	576: 6
§ 20	omitted
§ 21	omitted
§ 22	tr. RSA Title VII
§ 23	tr. RSA Title VII
§ 24	tr. RSA Title VII
§ 25	585: 1
§ 26	585: 1
§ 27	585: 1
§ 28	585: 1
§ 29	582: 5, 588: 1
§ 30	588: 1
§ 31	588: 1
§ 32	omitted
§ 33	omitted
§ 34	574: 1
§ 35	omitted
§ 36	omitted

RSA Tit. LVIII	Disposition
Ch. 588	
§ 1	Ch. 593
§ 2	Ch. 593
§ 3	Ch. 593
§ 4	Ch. 593
§ 5	Ch. 593
§ 6	Ch. 593
§ 7	Ch. 593
§ 8	Ch. 593
§ 9	Ch. 593
§ 10	Ch. 593
§ 11	Ch. 593
§ 12	Ch. 593
§ 13	Ch. 593
§ 14	Ch. 593
§ 15	Ch. 593
§ 16	Ch. 593
§ 17	Ch. 593
§ 18	Ch. 593
§ 19	Ch. 593
Ch. 589	
§ 1	Ch. 594
§ 2	Ch. 594
§ 3	Ch. 594
§ 4	Ch. 594
§ 5	Ch. 594
§ 6	Ch. 594
§ 7	Ch. 594
§ 8	Ch. 594
§ 9	Ch. 594
§ 10	Ch. 594
§ 11	Ch. 594
§ 12	Ch. 594
§ 13	Ch. 594
§ 14	Ch. 594
Ch. 590	
§ 5	574:1
§ 6	574:1
§ 7	574:1
Ch. 590-A	
§ 1	571:8
§ 2	571:8
§ 3	571:8
§ 4	571:8
§ 5	571:8
§ 6	571:8
§ 7	571:8
§ 8	587:3
§ 9	570:4
§ 10	570:4
Ch. 591	
§ 1	607:6
§ 2	omitted

RSA Tit. LVIII	Disposition
Ch. 607	
(The sections of RSA Ch. 607 listed in the left-hand column are to be replaced by sections in the right-hand column or, in the case of Section 14, simply repealed. The remaining sections of RSA Ch. 607 are to be retained and renumbered, starting with 607:8.)	
§ 2	573:2
§ 12	607:2
§ 14	omitted
§ 15	607:2
§ 19	607:2
§ 20	607:2
§ 21	607:2
§ 30	587:7
§ 39	607:7
§ 41	607:7
§ 42	omitted
§ 43	607:7
§ 50	607:7

Table 2. Derivation Table

The left column of this table lists each section of the Criminal Code presented in this Report. The right column shows the corresponding section of the present Revised Statutes Annotated from which the section of the Code is specifically or generally derived. The word "New" indicates that there is no counterpart in the current statutes.

Proposed Code	RSA
Ch. 570	
§ 1	New
§ 2	New
§ 3	New
§ 4	590-A:9, 10
§ 5	New
§ 6	New
§ 7	New
§ 8	603:1
§ 9	New
§ 10	New
§ 11	New
Ch. 571	
§ 1	New
§ 2	New
§ 3	New
§ 4	New
§ 5	New
§ 6	New
§ 7	New
§ 8	590-A:1–7
Ch. 572	
§ 1	New
§ 2	New
§ 3	New
§ 4	New
§ 5	594:4
§ 6	New
§ 7	New
§ 8	New
§ 9	New
Ch. 573	
§ 1	New
§ 2	607:2
Ch. 574	
§ 1	590:5, 6, 7
§ 2	590-A:3
§ 3	New
Ch. 575	
§ 1	585:1
§ 2	585:8, 9
§ 3	585:9

Proposed Code	RSA
Ch. 575 (cont.)	
§ 4	New
§ 5	585: 12–14
§ 6	585: 4, 5
§ 7	585: 4, 5
Ch. 576	
§ 1	585: 21
§ 2	585: 22
§ 3	New
§ 4	585: 21
§ 5	570: 28
§ 6	587: 19
Ch. 577	
§ 1	585: 16
§ 2	579: 9
§ 3	579: 3
§ 4	579: 9, 585: 16
§ 5	579: 4
Ch. 578	
§ 1	589: 19, 20
§ 2	New
§ 3	New
Ch. 579	
§ 1	584: 1–4
§ 2	572: 14, 21
§ 3	263: 82, 572: 45
Ch. 580	
§ 1	Ch. 583-A
§ 2	Ch. 572
Ch. 581	
§ 1	585: 18
Ch. 582	
§ 1	Ch. 580, Ch. 582
§ 2	580: 1a, 580: 1–7, 32, 582: 2, 6, 9
§ 3	582: 1, 1a, 6–9, 580: 27, 28
§ 4	Ch. 580
§ 5	572: 46, 587: 29
§ 6	See Ch. 471
§ 7	582: 10
§ 8	580: 6, 7, 580: 1a
§ 9	582: 16, 17
§ 10	587: 31
§ 11	New

Proposed Code	RSA
Ch. 583	
§ 1	581: 1, 2, 3
§ 2	582: 6
§ 3	580: 19–22
§ 4	582: 12
§ 5	New
§ 6	580: 9, Ch. 146, Ch. 359
§ 7	New
§ 8	577: 16, 284: 38
§ 9	361: 16, 580: 5-a
§ 10	New
§ 11	580: 28–30
§ 12	New
§ 13	581: 11, 12
Ch. 584	
§ 1	579: 5, 6
§ 2	579: 7
§ 3	169: 32, Ch. 571
§ 4	460: 23, 24, 571: 2
§ 5	585: 15
Ch. 585	
§ 1	587: 25–28, 69: 11, 12
§ 2	495: 2
§ 3	New
§ 4	587: 26, 27
§ 5	New
§ 6	New
Ch. 586	
§ 1	587: 1-a–1-e
§ 2	New
§ 3	580: 31
§ 4	572: 49
§ 5	587: 1-c
§ 6	New
§ 7	587: 31, 547: 18, 548: 28
Ch. 587	
§ 1	587: 5–8
§ 2	594: 5
§ 3	590-A: 8
§ 4	New
§ 5	New
§ 6	587: 9, 620: 9, 622: 12, 13

Proposed Code	RSA
Ch. 587 (cont.)	
§ 7	587: 12–14, 18, 578: 10, 11
§ 8	597: 14-a
Ch. 588	
§ 1	587: 13
§ 2	New
Ch. 589	
§ 1	Ch. 609-A
§ 2	377: 8, 570: 1–3, 7, 8, 25
§ 3	570: 5
§ 4	570: 2, 572: 38-b
§ 5	570: 14, 17-a
§ 6	New
§ 7	572: 20
§ 8	Ch. 575
§ 9	New
§ 10	New
§ 11	New
§ 12	572: 38-a
Ch. 590	
§ 1	579: 3
§ 2	579: 8, 10–18
§ 3	579: 1, 2
Ch. 591	
§ 1	Ch. 573
§ 2	Ch. 573
Ch. 592	
§ 1	577: 1–3
§ 2	577: 6, 7, 10–12
Ch. 593	
Entire Chapter	Ch. 588
Ch. 594	
Entire Chapter	Ch. 589
Ch. 595	
Entire Chapter	Ch. 571-A
Ch. 607	
§ 1	New
§ 2	All Penal Statutes
§ 3	New
§ 4	504: 2
§ 5	New
§ 6	Ch. 591
§ 7	607: 39, 41, 43, 50

Index

References are to Chapter and Section