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COMMENTARIES ON THE MAINE CRIMINAL CODE

Prefatory Note

In its recent simplification and clarification of the criminal law, the Maine Criminal Law Revision Commission was also obliged to reconsider the proper breadth of the criminal sanction itself. The results of these parallel efforts are apparent throughout the Criminal Code. Those activities ordinarily considered criminal have been more precisely and comprehensively regulated, while the limits of the law controlling activities less socially damaging have been readjusted in the process of exact delineation.

The Articles in this Special Issue offer an explanation and critical evaluation of the Commission's efforts. In the case of conduct most clearly perceived as undesirable, such as property crimes and homicide, the Commission's effort was primarily one of simplification and rationalization. Here, Mr. Ballou's Article on property offenses considers the major reworking of laws governing theft as well as the new provisions controlling burglary, robbery, forgery, and similar offenses, while Mr. Rubin's Article covers the new six-degree homicide scheme. The redrafting of laws penalizing less obviously objectionable activities has sought both to align the impact of the law with community views, in order to strengthen the integrity of the criminal law itself, and also to reassign the limited enforcement capacity of the criminal process to more critical areas. The results of the Commission's redefinition of criminal sexual activity and unlawful gambling are representative of this effort. Professor Potter, in her Article on sex offenses, and Mr. Seitzinger, in his Article on gambling under the new Code, present comprehensive discussions of the new provisions in their evaluations of the Code's changes in these areas. The Staff paper on white collar crimes similarly discusses the fraud, bribery, and perjury chapters, which establish the scope of the criminal penalty in the context of writings and official activity.

The Commission's effort to improve the sentencing system was directed toward somewhat different ends. The Code includes, in addition to the new offense classification system, an unusual attempt to reduce administrative control and uncertainty under the old indeterminate sentencing process. Professor Zarr's Article considers the basic philosophies of criminal punishment and responds principally to the Commission's novel effort to reduce uncertainty and inequality in sentences of imprisonment.

This collection of commentaries is representative rather than exhaustive. Certain provisions have been omitted from consideration in separately titled articles, but not necessarily overlooked. The redefi-

nition of culpability requirements[1] and the new provisions regarding pleading and proof,[2] for example, are dealt with in relation to the various substantive offenses rather than as independent subjects. The decriminalization of possession of marijuana is covered in general terms by Professor Petruccelli's Introduction. Other provisions of the Code involve issues whose import is broader than the Commission's treatment of them. The disorderly conduct provisions of Chapter 21, for example, raise constitutional problems common to all such statutes.[3] Similarly, the development of Maine law's definition of mental abnormality[4] parallels in statutory form the development and abrogation of the Durham rule by the District of Columbia Court of Appeals,[5] and is best left for consideration in articles more general in

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1. The culpability requirements of the Code are found at ME. REV. STAT. ANN. tit. 17-A, §§ 51-62 (Supp. 1975). The homicide provisions, *id.* §§ 201-206, exemplify the new definitions. Sections 101 through 108 control defenses based on justification.

2. ME. REV. STAT. ANN. tit. 17-A, § 5 (Supp. 1975). *Id.* § 9 requires indictment in certain cases and controls the jurisdiction of the District Courts.

3. *Id.* § 501 punishes as disorderly conduct such activities as "making loud and unreasonable noises," and accosting, insulting, taunting or challenging another person "with offensive, derisive or annoying words, or by gestures or other physical conduct" where a violent response is likely. *Id.* § 502 also refers to "disorderly conduct." The Maine statute's restriction to acts likely to provoke violent response is suggested by Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

For the Supreme Court's recent treatment of similar statutes, see Norwell v. Cincinnati, 414 U.S. 14 (1973) (*per curiam*); Colten v. Kentucky, 407 U.S. 104 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971); Bachellar v. Maryland, 397 U.S. 564 (1970). State court construction of these statutes may affect their constitutional validity. *Compare* Gooding v. Wilson, 405 U.S. 518 (1972), *and* Lewis v. New Orleans, 415 U.S. 131 (1974), *with* Colten v. Kentucky, *supra.* The Court recently declined to hear Pace v. Squire, 516 F.2d 240 (4th Cir. 1975), *cert. denied,* ___ U.S. ___, 96 S. Ct. 68 (1975), and Seaver v. Wiegand, 504 F.2d 303 (5th Cir. 1974), *appeal dismissed and cert. denied,* 421 U.S. 924 (1975).

4. Ch. 310, [1961] Laws of Maine enacted ME. REV. STAT. ch. 149, § 38-A, which was later repealed by ch. 311, [1963] Laws of Maine § 2 and recodified without amendment by section 3 of the same chapter as ME. REV. STAT. ch. 149, § 17-B (Supp. 1963). The statute was again recodified without amendment as ME. REV. STAT. ANN. tit. 15, § 102 (1964). This statute excused a defendant from criminal liability "if his unlawful act was the product of a mental disease or defect." *Id.* tit. 17-A, § 58 (Supp. 1975) now excuses a defendant only if, "as a result of a mental disease or defect, he either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct."

Prior to 1961, Maine law in this area had been judicially controlled. *See* State v. Park, 159 Me. 328, 193 A.2d 1 (1963); State v. Quigley, 135 Me. 435, 199 A. 269 (1938); State v. Lawrence, 57 Me. 574 (1870).

See generally Comment, *Criminal Responsibility: The Durham Rule in Maine,* 15 MAINE L. REV. 107 (1963).

5. *Durham v. United States* held that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect." 214 F.2d 862, 874-75 (D.C. Cir. 1954). The Durham rule, it was hoped, would reflect the community's views on criminal responsibility and facilitate expert evaluation of the insanity issue. Eighteen years after the *Durham* case, the District of Columbia Circuit in United States v. Brawner, 471 F.2d 966 (*en banc*), adopted the American Law Institute's formulation:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he *lacks substantial capacity* either

scope and purpose than those in this Special Issue.[4]

The particular composition of this issue has required some modification in the ordinary documentation routine of legal periodicals. Since this issue is released almost simultaneously with the effective transition from the former law to the new Code, both sets of statutes are cited to their respective codifications, rather than referring to one or the other in session law form. The repealer provisons of the Code are found in sections 2 through 71 of Chapter 499, [1975] Laws of Maine, and are not ordinarily referred to specifically in these Articles. Disposition and derivation tables in the 1975 Supplement, Title 17-A of the Maine Revised Statutes Annotated, include a comprehensive accounting of prior laws which remain in effect as well as those repealed by Chapter 499.

Finally, numerous amendments to the Code are before the Legislature in Special Session at this printing, and the amending bill, L.D. No. 2217, 107th Legis., Spec. Sess. (1976), should be consulted.

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to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

MODEL PENAL CODE § 4.01(1) (Proposed Official Draft, 1962) (brackets in original; emphasis added). The *Brawner* court sought to restrict somewhat the impact of expert opinion testimony upon the jury's decision. 471 F.2d at 982-83.

The Code expressly incorporates this development. ME. REV. STAT. ANN. tit. 17-A, § 58, Comment (Supp. 1975).

6. *See generally* Comment, *Graduated Responsibility as an Alternative to Current Tests of Determining Criminal Capacity*, 25 MAINE L. REV. 343 (1973).

SEX OFFENSES

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A central theme of the Maine Criminal Code is to "distinguish behavior that is merely socially undesirable from that which is sufficiently threatening to require the specialized effort of the criminal law to prevent it."[1] Nowhere in the Code is this distinction more apparent than in the area of sex offenses, which encompasses a wide spectrum of degrees of social harm. At one end of this spectrum are acts which clearly involve dangerous behavior, such as nonconsensual sexual acts and acts of sexual imposition on minors and incompetents. At the other end of the spectrum are sexual acts done in private between consenting competent adults. In between these two extremes are acts defined as public indecency and prostitution.

The sex offenses sections of the new Code reflect the Maine Criminal Law Revision Commission's efforts to prevent an overbroad extension of the criminal law in this area and to limit criminal sanctions to those areas where such sanctions are widely and strongly supported by the community and where uniform enforcement is widely expected and encouraged.[2] The sex offenses sections also reflect some generally

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†The amendments referred to in the Preface to this issue should be consulted with regard to the author's discussion of Code §§ 251(C), 252, 253, 254(1), 255, 556, 854(1)(A)(2).

1. ME. REV. STAT. ANN. tit. 17-A, *Introduction to the Proposed Code* at XX (Supp. 1975) [hereinafter cited as *Introduction to Proposed Code*].

2. *Id.* at XXI. In drawing this line, the Commission was apparently less concerned with moral values than with enforcement problems. It therefore avoided the issue of the interrelation of law and morality which has caused debate among legal scholars for years. *See generally* J. MILL, ON LIBERTY (1849); J. STEPHEN, LIBERTY, EQUALITY AND FRATERNITY (1874).

The latest bout over the legal regulation of morality was precipitated by the publication of the *Report of the Committee on Homosexual Offenses and Prostitution* in 1957, commonly known as "The Wolfenden Report." The drafters of that Report recommended that:

> [The] function [of the criminal law] as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, [or] inexperienced. . . .
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> . . . Unless deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there remains a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

REPORT OF THE GREAT BRITAIN COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION,

(1957), published in the U. S. as THE WOLFENDEN REPORT, ¶¶ 13 and 61, at 23 and 48 (1963).

The ensuing debate was mainly between Lord Devlin and H.L.A. Hart. Lord Devlin's thesis was that a set of common moral values is essential to society and therefore private conduct that threatens a moral principle, which is not a menace to others, is a threat to the existence of society. Hart, on the other hand, aligning himself with John Stuart Mill, felt that insofar as the enforcement of morality was concerned, regulation of private conduct is justified only if it is necessary to prevent harm to other members of society. Hart departs from the strict principles of Mill when he adds to the justification of regulation of private conduct the prohibition on the infliction of suffering. *See* P. DEVLIN, THE ENFORCEMENT OF MORALS 4-5 (1965); H.L.A. HART, LAW, LIBERTY AND MORALITY 32-34 (1963). *See generally* Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940); Dworkin, *Lord Devlin and The Enforcement of Morals*, 75 YALE L.J. 986 (1966); Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967); Raz, *Legal Principles and The Limits of Law*, 81 YALE L.J. 837 (1972); Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891 (1972); Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968).

The American Law Institute reached a position similar to that taken by the drafters of *The Wolfenden Report*. MODEL PENAL CODE § 207.5, Comment (Tent. Draft No. 4, 1956) contained a recommendation that all private consensual relations between adults should be excluded from the scope of the criminal law because "no harm to the secular interests of the community is involved in a typical sex practice in private between consenting adult partners" and because "there is the fundamental question of the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others." (Quoted in H.L.A. HART, LAW, LIBERTY, AND MORALITY 15 (1963)). This recommendation had been adopted by the Advisory Committee of the Institute but was rejected by a majority vote of the Council because some members believed that taking this position "would prejudice acceptance of the Code generally." Others believed "that sodomy was a cause or symptom of moral decay in society and therefore should be repressed by law." MODEL PENAL CODE § 207.5, Comment (Tent. Draft No. 4, 1956). Hart reports that:

> The issue was therefore referred to the annual meeting of the Institute . . . and the recommendation, supported by an eloquent speech of the late Justice Learned Hand, was, after a hot debate, accepted by a majority of 35 to 24.

H.L.A. HART, *supra*, at 15 (citing TIME, May 30, 1955, at 13).

Professor Packer did not see the issues as those set forth in the historical debate. He felt that "the question is not whether certain kinds of sexual conduct should be subject to criminal punishment, but rather whether the laws in question are too broad: the issue is not whether to punish but when to do so," and also whether the definitions of the offenses "should be narrowed to cover only those situations that law enforcement actually deals with today." H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 302, 303 (1968). According to Packer, sexual behavior may be validly regulated by the criminal law in order to prohibit the use of force to secure sexual gratification, to protect the immature or incompetent against sexual exploitation, and to prevent conduct that gives offense to or is likely to offend innocent bystanders. *Id.* at 306-12. Packer suggested that the criminal law should not be used to regulate behavior when:

(1) Rarity of enforcement creates a problem of arbitrary police and prosecutorial discretion.

(2) The extreme difficulty of detecting such conduct leads to undesirable police practices.

(3) The existence of the proscription tends to create a deviant subculture.

(4) Widespread knowledge that the law is violated with impunity by thousands every day creates disrespect for law generally.

(5) No secular harm can be shown to result from such conduct.

(6) The theoretical availability of criminal sanctions creates a situation in which extortion and, on occasion, police corruption may take place.

(7) There is substantial evidence that the moral sense of the community no longer exerts strong pressure for the use of criminal sanctions.

(8) No utilitarian goal of criminal punishment is substantially advanced by

accepted goals of codification, including simplification and organization of the laws, articulating rules unexpressed by statute and incompletely developed by the judiciary, eliminating vague, archaic, and ambiguous language, and effecting proportionality between the gravity of the harm and the penalty imposed.

This Article will examine the most serious sex offenses under the Code in Part I, and in Parts II and III it will examine the less serious offenses of prostitution and public indecency. Finally, Part IV will deal with private sexual behavior between consenting competent adults. Throughout the Article, questions will be addressed concerning the changes which the Code effects in Maine law, the goals these changes were meant to serve, whether these goals are effectively implemented by the Code, the problems presented by the Code, and possible solutions to some of these problems.

I. Non-consensual Sexual Behavior

A. *Rape*

Prior Maine law defined rape as carnal knowledge of a female over the age of fourteen by force and against her will.[3] This offense was punishable by any term of years and, if the attacker was armed with a firearm, by mandatory imprisonment.[4] The crime consisted of three elements: carnal knowledge of a female, by force, and without consent.[5] The courts construed the element of carnal knowledge to require some evidence of penetration, however slight,[6] although one case upheld the conviction for rape of a man who participated in a rape by forcibly restraining the victim but who did not have intercourse with her.[7] The element of force could be satisfied by evidence of physical violence or threats which put the victim in fear of bodily injury or death.[8] Any force or threats of future bodily harm which prevented the victim from resisting sufficed.[9] Although resistance was

proscribing private adult consensual sexual conduct.

Id. at 304. The drafters of the Maine Criminal Code took a position similar to that of Professor Packer, and they too were concerned with limiting the criminal sanction where the above circumstances exist. *Introduction to Proposed Code* XX, XXI.

3. Me. Rev. Stat. Ann. tit. 17, § 3151 (1964) (repealed 1976). It was also unlawful to take or detain a woman for the purpose of sexual intercourse. *Id.* § 3055. Assault with intent to rape was prohibited by *id.* § 3153. For a detailed account of recent developments in the law of rape, see Comment, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 Va. L. Rev. 1500 (1975).

4. *Id.* § 3151-A (Supp. 1975), enacted by [1971] Laws of Maine, ch. 539, § 17 (repealed 1976).

5. Wilson v. State, 268 A.2d 484 (Me. 1970); State v. Field, 157 Me. 71, 170 A.2d 167 (1961); State v. Dipietrantonio, 152 Me. 41, 122 A.2d 414 (1956); State v. Flaherty, 128 Me. 141, 146 A.7 (1929).

6. Wilson v. State, 268 A.2d 484 (Me. 1970); State v. Bernatchez, 159 Me. 384, 193 A.2d 436 (1963); State v. Croteau, 158 Me. 360, 184 A.2d 683 (1962).

7. State v. Flaherty, 128 Me. 141, 146 A.7 (1929).

8. State v. Mower, 298 A.2d 759 (Me. 1973).

9. State v. Dipietrantonio, 152 Me. 41, 122 A.2d 414 (1956).

not an element of the offense, the lack of resistance and the lack of corroborating evidence could be considered by the jury on the issue of consent.[10] Whether threats to third persons could constitute the element of force has not been decided. The courts construed the term "against her will" to mean without consent, and this element was satisfied where the victim was incapable of giving consent, as where she was drugged or *non compos mentis*.[11] No Maine case has addressed the issue of whether a man can be convicted of rape of his spouse; presumably, the common law rule of immunity for the rape of a spouse applied in Maine as elsewhere.[12]

The Code defines rape as compelling a person, other than the actor's spouse, to submit to sexual intercourse either by force and against the person's will or by threat of immediate death, serious bodily injury or kidnapping to be inflicted upon the victim or a third person.[13] Rape is punishable by twenty years in prison[14] or, if the victim was a voluntary social companion of the actor and had at that time permitted some sexual contact, by ten years in prison.[15] The fact that the parties were living together as husband and wife or were married and not living apart under a de facto separation at the time of the rape is a complete defense to the charge.[16] The elements of the crime—sexual intercourse, threats of violence or force and lack of consent—remain the same as under the prior law.

Sexual intercourse is defined by the Code as penetration of the female organ by the male sex organ, with or without emission.[17] This definition replaces such archaic terminology as "ravish" and "carnal knowledge," used in the prior statutes. Although in practice the offense of rape is committed by a male against a female, the Code's definition encompasses rape by a female of a male.[18] The statute is therefore sexually neutral. Other forms of sexual abuse are also de-

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10. State v. Carlson, 308 A.2d 294 (Me. 1973); State v. Field, 157 Me. 71, 170 A.2d 167 (1961); State v. Dipietrantonio, 152 Me. 41, 122 A.2d 414 (1956); State v. Wheeler, 150 Me. 332, 336, 110 A.2d 578, 580 (1954). Consent and resistance are not serious legal issues in any crime of violence other than rape. The law does not require a victim of aggravated assault to fight back. If a robbery victim tamely hands over her wallet, preferring the loss of money to a possible physical attack, the law does not sanction the crime because of lack of resistance.

11. State v. Worrey, 322 A.2d 73 (Me. 1974); State v. Dipietrantonio, 152 Me. 41, 122 A.2d 414 (1956); State v. Flaherty, 128 Me. 141, 144, 146 A. 7, 8 (1929) (dictum).

12. *See* ME. REV. STAT. ANN. tit. 17-A, § 251, Comment (Supp. 1975).

13. ME. REV. STAT. ANN. tit. 17-A, § 252(1)(B) (Supp. 1975).

14. *Id.* §§ 252(3), 1252(2)(A). Under prior Maine law, there was no maximum sentence. Under the Code, if rape is committed by a person armed with a dangerous weapon, that fact should be seriously considered in sentencing. *Id.* § 1252(4). "Dangerous weapons" are broadly defined in the Code and include weapons other than firearms. *Id.* § 2(9).

15. ME. REV. STAT. ANN. tit. 17-A, §§ 252(3), 1252(2)(B) (Supp. 1975).

16. *Id.* §§ 251(1)(A), 252(1)(B), (2).

17. *Id.* § 251(1)(B).

18. The Code's definitions of rape and of sexual intercourse do not assume that either sex is necessarily the aggressor. *Id.* §§ 251(1)(B), 252.

fined by the Code without reference to the sex of the actor.[19] Therefore, the Code's definitions should survive constitutional challenge since males and females are equally protected from unwanted sexual assault.[20]

The Code is more specific than the prior law concerning the definition of "threats." Only threats of serious bodily injury, kidnapping, or death will suffice to make out the crime of rape.[21] Sexual intercourse which is compelled by threats of any lesser degree constitutes gross sexual misconduct, rather than rape, and is punishable by five years in prison.[22] There is no provision in the Code specifically prohibiting an assault with intent to commit rape. Such an act might be covered by other sections of the Code, depending on the circumstances of the assault.[23]

The term "force" is also more precisely defined under the Code than under prior law. Thus "deadly force" means physical force used with the intent of causing death or serious bodily injury,[24] and "nondeadly force" includes all other kinds of physical force.[25] Either deadly or nondeadly force will suffice as an element of rape.[26] In view of the definitions of "force" and "threat" and the use of the term "compels" in the statute, the added words "and against the person's will" appear redundant and should be omitted.

The spousal immunity derived from common law is appropriately narrowed by the Code by excluding from the definition of "spouse" a person legally married to the actor but living apart from him under a de facto separation.[27] This limitation is a sensible one in view of the

19. *See id.* §§ 253, 254, 255.

20. Neither the United States Constitution nor the proposed Equal Rights Amendment necessarily requires rape laws to be redrafted to conform with standards of sexual neutrality, since rape involves a unique sexual characteristic. *See* People v. Medrano, 24 Ill. App. 3d 429, 321 N.E.2d 97 (1974); State v. Price, 215 Kan. 718, 529 P.2d 85 (1975); Brooks v. State, 24 Md. App. 334, 330 A.2d 670 (1975); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 894 (1971).

21. ME. REV. STAT. ANN. tit. 17-A, § 252(1)(B)(2) (Supp. 1975). "Serious bodily injury" refers to such injury as creates a substantial risk of death or which causes permanent disfigurement or extended impairment of any part of the body. *Id.* § 2(23). The drafters of the *Model Penal Code* add the threat of infliction of extreme pain to the list of serious threats. MODEL PENAL CODE § 213(1)(a) (Proposed Official Draft, 1962). This would be a sensible addition to the Maine Code, since the threat of extreme pain will not always constitute a threat of serious bodily injury under the Code's present definition.

22. ME. REV. STAT. ANN. tit. 17-A, §§ 253(2)(B), (5), 1252(2)(C) (Supp. 1975). Section 253(2)(B) refers only to sexual acts and not to sexual intercourse. It is clear that the Commission and the Legislature intended the section to apply to sexual intercourse as well as to sexual acts. The omission was apparently an oversight and should be corrected by amendment.

23. *See* ME. REV. STAT. ANN. tit. 17-A, §§ 152(1), 207, 208, 253, 255 (Supp. 1975).

24. *Id.* § 2(8).

25. *Id.* § 2(18).

26. *Id.* § 252(1)(B)(1).

27. *Id.* § 251(1)(A).

time required to obtain a divorce or decree of separation and the animosity frequently involved in a marital separation. It is unclear, however, what kinds of situations constitute de facto separations. Unofficial separations will have to be defined on a case by case basis according to the parties' acts and intentions, as demonstrated by the length of time, distance and other circumstances which separate them. The problem of defining a de facto separation would be eliminated if the Code simply abolished the spousal immunity. The decision whether to prosecute a rape complaint brought by a wife against her husband would be left to the discretion of the prosecutor, as it is in other crimes involving family members, and the burden of proof beyond a reasonable doubt and the difficulty of proving the required amount of force or threats would safeguard against frivolous complaints.

The penalty for rape is reduced to ten years in prison if the victim was a voluntary social companion of the accused at the time of the offense and had, on that occasion, permitted some sexual contact.[28] This reduction in penalty reflects an apparent assumption that if sexual contact was permitted, then the sexual imposition which ensued was somehow less frightening or less dangerous to the victim. This assumption has been criticized by Maine feminists who are concerned with the liberalization of the rape laws. However, the reduced penalty is still severe enough to act as a deterrent, and it makes clear to the jury that allowing some "petting" does not constitute consent or an absolute defense to rape. This provision of the Code will thus facilitate convictions for rape.[29]

B. Forcible Sexual Acts

Prior Maine law criminalized most sexual acts other than intercourse under the label of "crimes against nature." The former statute punished acts involving the penetration of a natural orifice of the body, whether or not force was used.[30] The Code criminalizes sexual

28. *Id.* §§ 252(3), 1252(2)(B).

29. Convictions for rape are rare where the prosecutrix knew the defendant before a rape, where there is no extrinsic evidence of violence, and where there is only one assailant. When juries perceive that the complainant assumed some risk of rape, they will find defendants guilty of a lesser crime, or acquit if a lesser crime is not available. *See* J. KALVEN & H. ZEISEL, THE AMERICAN JURY 252, 254 (1962).

The Commission proposed that a sex offense not be prosecuted unless reported within three months of its occurrence. The rationale of the proposal was to safeguard against false accusations. L. D. No. 314, 107th Legis., § 1, ch. 11, § 251(2) (1975); *id.*, Comment. This proposal was correctly rejected by the Legislature. Contrary to popular belief, rape is one of the most underreported crimes. FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORT 1970 at 14 (1971); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); Kanin, *Sex Aggression by College Men*, 4 MEDICAL ASPECTS OF HUMAN SEXUALITY 25 (1970).

30. ME. REV. STAT. ANN. tit. 17, § 1001 (1964) (repealed 1976). The "crime against nature" was defined as including all acts of unnatural carnal copulation with humans

acts only when force or threats are used,[31] when one party is under the age of sixteen,[32] or where the victim is incapable of resisting or consenting to the act.[33]

The new offense of "gross sexual misconduct" in section 253(1) is an exact parallel to the new rape law, requiring the same elements, with the difference that a sexual act other than intercourse occurs.[34] The term "sexual act" is defined as one involving the direct physical contact of the sex organs of one person with the mouth or anus of another or with a device manipulated by another or with the sex organs of another without penetration.[35] Where the element of force or threats of serious violence are present, the crime is in the same sentencing classification as rape and is punishable by twenty years in prison.[36] If, however, either a sexual act or sexual intercourse is accomplished through threats of less serious harm, the offense is punishable by only five years in prison.[37] Spousal immunity is incorporated into this section of the Code as it is in rape.[38] The offense is also reduced from a Class A crime to a Class B crime if the victim was a voluntary social companion and had on that occasion permitted the defendant some sexual contact.[39] The offense of gross sexual misconduct would include attempted rapes which involve sexual acts, as defined above; other attempted rapes would be Class B crimes rather than Class A crimes.[40]

C. *Sexual Abuse of Incompetent Persons*

Prior Maine law did not specifically deal with sexual imposition on a person who is incompetent, although the court has stated that the offense of rape could be established when the victim was drugged or *non compos mentis*.[41] The new Code includes in its definition of Class B gross sexual misconduct several circumstances under which the commission of a sexual act or sexual intercourse without force or threats will be deemed criminal because the victim is incapacitated or mentally deficient or stands in a special subservient relationship

or animals and thus included bestiality, fellatio, sodomy and cunnilingus. State v. Pratt, 151 Me. 236, 116 A.2d 924 (1955); State v. Townsend, 145 Me. 384, 71 A.2d 517 (1950).

31. Me. Rev. Stat. Ann. tit. 17-A, § 253(1)(A)(1), (2)(C) (Supp. 1975).
32. *Id.* §§ 253(1)(B), 254(1).
33. *Id.* § 253(2)(A), (C), (D), (E).
34. *Id.* § 253(1).
35. *Id.* § 251(C). Digital penetration would constitute "sexual contact" rather than a "sexual act." *Id.* § 251(D).
36. *Id.* §§ 253(1)(A), 1252(2)(A).
37. *Id.* §§ 253(2)(B), 1252(2)(C).
38. *Id.* § 253(1), (2), (4). One would assume that this defense might also be available for homosexuals living together "as husband and wife."
39. *Id.* § 253(4).
40. *Id.* § 152(1), (4), 252.
41. State v. Dipietrantonio, 152 Me. 41, 46, 122 A.2d 414, 417 (1956).

to the defendant.[42] Thus, if the victim is a patient in a hospital or a prisoner in any institution and the defendant has supervisory authority over the victim, all acts of sexual intercourse or sexual acts between the victim and the defendant are punishable by ten years in prison.[43] This offense does not deal with the doctor-patient relationship where the patient is not hospitalized. A like penalty is provided if the victim suffers from a mental disease or defect[44] or if the defendant has substantially impaired the victim's "power to appraise or control his sex acts by administering or employing drugs, intoxicants, or other similar means."[45] It is a complete defense to this latter offense that the victim voluntarily and knowingly consumed the drug or intoxicant.[46] This circumstance would function better as a factor which reduces the severity of the crime rather than as a complete defense, since it is similar in effect to the mitigating "voluntary social companion" defense, discussed above.[47] The mere fact that the victim of sexual intercourse or a sexual act is mentally deficient will not in and of itself make the act a crime; rather, the victim's mental illness must be known or reasonably apparent to the other party and it must be such as renders the victim "substantially incapable of appraising the nature of the contact involved."[48] It is a lesser crime under the Code to have sexual intercourse or engage in sexual acts with a person who is unconscious or otherwise physically incapacitated and who has not consented.[49]

The Code thus distinguishes situations where a sexual act or intercourse occurs without the use of force or threats and imposes a penalty upon such conduct where the victim for some reason is incapable of appreciating the nature of his or her acts. The penalty for such conduct is less severe than that for rape, since a less frightening or dangerous imposition is involved;[50] however, the penalty is severe enough to deter persons from taking advantage of others in these situations.

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42. ME. REV. STAT. ANN. tit. 17-A, § 253(2)(A), (C), (E) (Supp. 1975).

43. *Id.* §253(2)(E).

44. *Id.* § 253(2)(C). It is not required that the victim be declared legally incompetent as it is in *id.* § 55(3)(A) (Supp. 1975) (when consent is not a defense).

45. *Id.* §253(2)(A). Hypnosis might be classified within the category of "other similar means."

46. *Id.* § 253(3).

47. See notes 15, 28, 29, 39 and accompanying text *supra*.

48. ME. REV. STAT. ANN. tit. 17-A, § 253(2)(C) (Supp. 1975).

49. *Id.* § 253(2)(D), (5) (Supp. 1975). This section refers only to sexual acts and not to sexual intercourse; the omission is apparently an oversight and should be corrected for the sake of clarity. This is a Class C rather than a Class B crime and is punishable by up to five years in prison. *Id.* 1252(2)(C). The reduced penalty was provided apparently because the defendant did not cause the victim's unconscious state. *Compare id.* § 253(2)(A), (3).

50. *Id.* §252, Comment; § 253, Comment. The Code does not deal with the situation in which a woman's consent to sexual intercourse is obtained by fraud or ruse. See ME. REV. STAT. ANN. tit. 17, § 3055 (1964) (repealed 1976).

D. Sexual Abuse of Minors

Several prior Maine statutes dealt with the sexual abuse of minors of different age categories. Carnal knowledge of a girl under the age of fourteen, with or without consent, was defined as rape and was punishable by any term of years;[51] carnal knowledge of a fourteen or fifteen year old girl by a male over eighteen was punishable by only two years in prison.[52] A person over the age of twenty who took indecent liberties with a boy or girl under sixteen could be punished by ten years at hard labor.[53] Assault with intent to commit rape upon a female over fourteen was punishable by ten years in prison,[54] and assault to commit rape upon a girl under fourteen was punishable by twenty years.[55] Other forms of sexual abuse were prohibited as "crimes against nature," without regard to the age of the parties.[56]

The Code defines offenses involving minors in four different sections, using more precise terminology than the prior laws and enumerating specific defenses. Sexual intercourse with a person under fourteen is defined as rape and is punishable by twenty years in prison.[57] Mistake of age is no defense,[58] but it is a defense that the parties were living together as husband and wife.[59] Apparently, if both parties who engage in sexual intercourse or a sexual act are under fourteen, they are both criminally liable. Engaging in a sexual act with a person under fourteen is defined as gross sexual misconduct and is also punishable by twenty years in prison.[60] Mistake of age is not a defense to gross sexual misconduct.

The defense that the parties were living together as husband and wife does not apply to the offense of gross sexual misconduct, although it does apply if the charge is rape.[61] This oversight should be corrected to provide for this defense, so that the consensual sexual conduct of persons who are living together will not be made criminal, even though one of the parties is under fourteen. The statutory exception for spouses does not apply if the crime is rape but does apply is the crime is gross sexual misconduct.[62] Another discrepancy between

51. ME. REV. STAT. ANN. tit. 17, § 3151 (1964) (repealed 1976). Imprisonment was mandatory if the attacker was armed. *Id.* § 3151-A (Supp. 1975) (repealed 1976).
52. *Id.* § 3152 (1964) (repealed 1976).
53. *Id.* § 1951 (Supp. 1975) (repealed 1976).
54. *Id.* § 3153 (1964) (repealed 1976).
55. *Id.*
56. *Id.* § 1001 (1964) (repealed 1976).
57. ME. REV. STAT. ANN. tit. 17-A, §§ 252(1)(A), (3), 1252(2)(A) (Supp. 1975).
58. *Compare id.* § 252(1)(A) *with id.* § 254(2). This is in accord with prevailing American case law. *See, e.g.*, People v. Lewellyn, 314 Ill. 106, 145 N.E. 289 (1924); Farrell v. State, 152 Tex. Crim. 488, 215 S.W.2d 625 (1948); Manning v. State, 43 Tex. Crim. 302, 65 S.W. 920 (1901). *See also* Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L.REV. 105 (1965).
59. ME. REV. STAT. ANN. tit. 17-A, § 252(2) (Supp. 1975).
60. *Id.* § 253(1)(B).
61. *Id.* §§ 253, 252(2).
62. *Id.* §§ 252(1)(A), 253(1)(B). This may be largely insignificant in view of the fact

these sections of the Code is the fact that if the victim in a statutory rape case was a voluntary social companion of the defendant and had at that time permitted some sexual contact, then the offense is reduced to a Class B crime, punishable by ten years in prison.[63] If the offense involves a sexual act with a person under fourteen, rather than sexual intercourse, this mitigating defense is unavailable, and the penalty is twenty years in prison.[64] The result is that a person who attempts sexual intercourse with a willing partner under fourteen but fails may receive a longer sentence than one who completes the act. This inconsistency should be corrected. If the predominant policy favors absolute liability for sexual acts or intercourse with a person under fourteen not married to the actor, then the defense should be unavailable in both instances; if the policy in favor of the defense is stronger than the policy for protecting young persons, then this defense should be included in both sections.[65]

Both the statutory rape provision and the gross sexual misconduct provision are designed to protect the immature juvenile who is likely to have poor judgment about the nature of sexual activity. However, the closer in age the parties are, the more difficult it becomes to assign culpability to the actor. The state may well desire to discourage adolescent sexual experimentation when one party is under fourteen, but the penalty should not be so severe when there is little or no difference in the ages of the persons involved. Some sort of age differential requirement could be included in these sections of the Code in order to retain the Class A penalty for an adult who sexually exploits a young person and to lessen the penalty when the defendant is also a juvenile.

A separate section of the Code deals with consensual sexual acts or intercourse with a person who is fourteen or fifteen years old when the offender is at least eighteen and is also five years older than the victim. This offense is labelled "sexual abuse of minors."[66] The Code expressly provides for the defense of mistake as to age for this offense.[67] Thus, once the defendant raises the issue of a reasonable belief that the victim was sixteen, the burden is on the prosecution

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that it is an affirmative defense to rape that the defendant and the victim were living together as husband and wife at the time of the crime.

63. *Id.* § 252(3).

64. *Id.* §253(4).

65. It may be that the Commission and the Legislature were concerned with homosexual seduction of persons under 14 and wished to impose a higher penalty upon homosexual seduction than upon heterosexual seduction. For a discussion of homosexual seduction, see notes 173-94 and accompanying text *infra*.

66. ME. REV. STAT. ANN. tit. 17-A, § 254 (Supp. 1975). In the Proposed Code, only a three-year age difference was required, and the age of the protected minor was 14 through 17 years old. L.D. No. 314, 107th Legis., § 1, ch. 11, § 254(1) (1975). Under the Code as enacted, it would be impossible for an 18 year old to commit the crime. The age of the actor should either be raised to 19 or the age differential lowered from five to four years.

67. ME. REV. STAT. ANN. tit. 17-A, § 254(2) (Supp. 1975). *See also id.* § 52(1).

to disprove this belief beyond a reasonable doubt.[68] In contrast to the severe penalty provided for sexual acts or intercourse with a person under fourteen, this offense is punishable by less than one year in prison.[69] This section is drafted in a sexually neutral manner, as are the other sex offenses sections of the Code.

The spousal exception, the "voluntary social companion" defense, and the defense that the parties were living together as husband and wife are excluded from the section on sexual abuse of minors. No reason is given for omitting these defenses, and this omission is inconsistent with the provisions of the sections previously discussed. The result is that it is a crime for a twenty year old husband to have intercourse with his fifteen year old wife. The Code should be amended to include these defenses in this section in order to achieve uniformity and logic in the laws pertaining to sexual activity with minors.

One further section dealing specifically with minors prohibits intentional sexual contact with a person under fourteen when the actor is three years older than the victim.[70] The offense is punishable by five years in prison;[71] all other forms of unlawful sexual contact are punishable by less than one year.[72] "Sexual contact" is defined elsewhere in this Chapter of the Code,[73] and the offense in general will be considered in the next part of this Article. It is sufficient to note here that none of the defenses discussed above, including the defense of mistake of age, is available under this section. The spousal exception, however, is included.[74] Also, the provision dealing with minors is perhaps overly severe to the extent that it applies to consensual sexual conduct where both parties are juveniles.

E. Sexual Contact

Unlawful sexual contact was encompassed by the prior statute pertaining to indecent liberties.[75] The offense was defined as indulging in an "immoral practice" with the sexual parts or organs of another, male or female, with or without consent, and it was punishable by ten years in prison.[76] Such conduct was criminal only if the complainant was under sixteen and the defendant was over twenty. The courts construed the offense to include sexual intercourse and other physical contact with the sex organs; touching another's private parts through

68. *Id.* § 5(2).
69. *Id.* §§ 254(3), 1252(2)(D).
70. *Id.* § 255(1)(C).
71. *Id.* § 255(2), 1252(2)(C).
72. *Id.* § 255(2), 1252(2)(D).
73. *Id.* § 251(1)(D).
74. *Id.* § 255(1).
75. ME. REV. STAT. ANN. tit. 17, § 1951 (Supp. 1975) (repealed 1976).
76. *Id.* If the crime was committed by one armed with a firearm, the sentence was up to 25 years in prison. *Id.* § 1952 (Supp. 1975) (repealed 1976).

the clothing constituted at most an attempt.[77]

The Code defines sexual contact as "any touching of the genitals, directly or through clothing," other than a "sexual act, for the purpose of arousing or gratifying sexual desire."[78] The new law is not limited to certain age groups, as was the prior statute; rather, the law is designed to protect against particularly annoying sorts of impositions upon persons of all ages.[79] The Code lists five situations in which sexual contact is unlawful,[80] and some of these are similar to the circumstances under which other types of sexual activity will constitute gross sexual misconduct.[81] Thus sexual contact is unlawful if the other person has not consented or acquiesced, if the other person is physically incapable of resisting, if the other person suffers from a mental abnormality which is apparent or known to the actor and which renders the person incapable of understanding the conduct involved, or if the other person is a prisoner, hospital patient or probationer and the actor is in a position of authority over him or her. Sexual contact is also unlawful if the complainant is under the age of fourteen and the actor is three years older.[82]

Although the spousal exception is included in the section on unlawful sexual contact,[83] it is no defense to the crime that the parties were living together as husband and wife though not legally married. Nor is the penalty reduced if the victim was a voluntary social companion who had permitted prior sexual contact on that occasion. This section could be amended to include these defenses in order to be consistent with other sections in this Chapter. However, the omission is relatively insignificant since, unless the victim is under fourteen, the offense is only a Class D crime punishable by less than one year in prison.[84]

II. Prostitution

The Code's Chapter on prostitution criminalizes three types of activities: engaging in prostitution, promotion of prostitution, and aggravated promotion of prostitution. This Chapter simplifies and clarifies the prior law by clearly articulating the proscribed activities and by eliminating the diverse specialized statutes which previously dealt with this conduct. The penalties generally have been reduced, the most severe punishment being a maximum of five years in prison for

77. State v. Stoddard, 289 A.2d 33, 35 (Me. 1972); State v. Lindsey, 254 A.2d 601 (Me. 1969).

78. Me. Rev. Stat. Ann. tit. 17-A, § 251(D) (Supp. 1975). The contact is limited to genitals. The touching of any other private part of the body would not be considered a sexual contact.

79. *Id.* § 255, Comment.

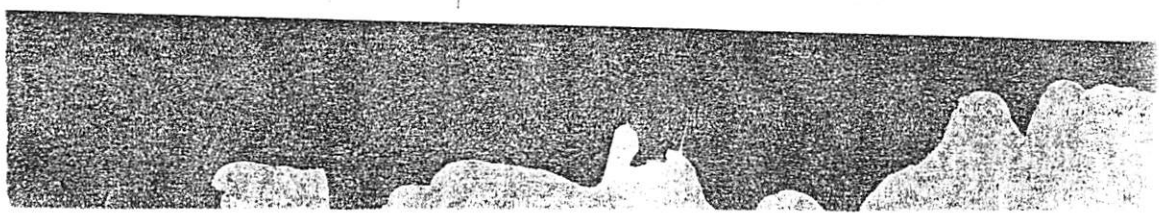
80. *Id.* § 255(1)(A)-(E).

81. *Id.* § 253(2)(A)-(E).

82. *Id.* § 255(1)(C).

83. *Id.* § 255(1).

84. *Id.* §§ 255(2), 1252(2)(D).



aggravated promotion of prostitution. The sentence structure is more logical under the Code because punishment is geared to the degree of social harm involved. Thus, the most severe penalties are imposed on those who compel others to engage in prostitution or those who exploit minors.[85] Those who profit from or facilitate prostitution are subject to less severe punishment,[86] and merely engaging in prostitution, without more, receives the least penalty.[87]

A. Engaging in Prostitution

Prior Maine law defined prostitution as offering one's body or receiving another's body for sexual intercourse for hire or for indiscriminate sexual intercourse not for hire.[88] Both prostitute and patron were subject to imprisonment for up to three years.[89] Homosexual prostitution was not within this definition. However, "lewdness," which included homosexual acts, was prohibited by the same statute, and was also punishable by up to three years in prison.[90]

Section 851(1) of the Code defines "prostitution" as "engaging in, or agreeing to engage in, or offering to engage in sexual intercourse or a sexual act . . . in return for a pecuniary benefit. . . ." This definition encompasses both homosexual and heterosexual prostitution. The patron is no longer liable, however, and mere indiscriminate sexual intercourse is no longer prohibited.

The drafters of the Code proposed decriminalizing prostitution in its simplest form because of the relatively harmless nature of such activity. The Legislature, however, was unwilling to allow this activity without payment of some price to the state.[91] Therefore, the Code as enacted imposes a fine of $250 or a higher amount of up to twice the pecuniary gain derived from the crime.[92] The penalty provision differs from that of the prior statute by not authorizing imprisonment and by not providing specially for medical treatment for those offenders infected with venereal disease.[93] The Code's treatment of simple

85. *Id.* § 852.
86. *Id.* § 853.
87. *Id.* § 853-A.
88. *Id.* tit. 17, § 3052 (1964) (repealed 1976).
89. *Id.* § 3051(6).
90. *Id.* §§ 3051, 3052. Prior to the Code, homosexual acts were also felonies prohibited by *id.* § 1001. See notes 173-77 and accompanying text *supra*.
91. *Compare* L.D. 314, 107th Legis., § 1, ch. 35 (1975), *with* Chapter 35 of ME. REV. STAT. ANN. tit. 17-A (Supp. 1975). The enacted version adds a section 853-A penalizing simple prostitution.
92. ME. REV. STAT. ANN. tit. 17-A, §§ 853-A(2), 1301(1)(C), (D) (Supp. 1975).
93. Under prior Maine law, probation or parole could be ordered for a person infected with venereal disease only on condition that she receive medical treatment. The court could also order any convicted defendant to be examined for venereal disease. ME. REV. STAT. ANN. tit. 17, § 3051(6) (1964) (repealed 1976). Such action is probably ineffective and unnecessary. National figures show that prostitution only accounts for five percent of the nation's cases of venereal disease. The professional prostitute's livelihood depends on sex, and she is not likely to let venereal disease go

prostitution thus results in one of the more blatant inconsistencies in the new law: prostitution is not sufficiently threatening to warrant the imprisonment sanction, but it is morally blameworthy enough for the state to label it criminal and to attempt to reduce the profits from this activity. Such ambivalent treatment is unlikely to foster respect for the law; it will neither deter the activity itself nor provide any meaningful way of coping with the underlying causes of prostitution, and it is inconsistent with the spirit of the Code.[94]

By eliminating such archaic terms as "lewdness" and "indecent or obscene act," the Code avoids the vagueness problems which inhered in the prior law. Thus, less leeway is left to the imagination of the prosecutor or the courts. The new law is sexually neutral on its face, since theoretically both males and females could engage in criminal prostitution; therefore the law is nondiscriminatory.[95]

Laws prohibiting prostitution suffer from many of the same problems as laws prohibiting other private sexual acts between consenting adults. The practice of prostitution has endured through the ages and has survived all types of attack, and there appears to be no widespread public aversion to men associating with prostitutes.[96] These facts indicate that laws prohibiting prostitution, like similar laws prohibiting other consensual sexual activity, have very little deterrent effect.[97] While there is some evidence that criminal liability

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untreated too long. *See* Interview with Roy E. Tripp, Communicable Disease Caseworker, in Portland Evening Express, Nov. 4, 1975, at 1 and 14. *See also* MODEL PENAL CODE § 207.12, Comment (Tent. Draft No. 9, 1959) and the statistics there collected.

94. Section 4 of the Code classifies statutes outside the Code which prohibit conduct without providing an imprisonment penalty as civil violations, not criminal offenses. ME. REV. STAT. ANN. tit. 17-A, § 4 (Supp. 1975).

95. *See* United States v. Moses, 339 A.2d 46, 55 (D.C. Ct. App. 1975), *petition for certiorari filed*, 44 U.S.L.W. 3430; *cf.* United States v. Garrett, 521 F.2d 444, 446 (8th Cir. 1975).

96. Kinsey estimated that in the United States 69% of the white males will have experience with prostitutes during their lives. A. KINSEY, W. POMEROY, & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 597 (1948).

97. THE WOLFENDEN REPORT, *supra* note 2, ¶ 225, at 132. Criminal law enforcement appears not to have deterred prostitution, but rather to have changed its mode of operation. It appears that prostitution is no longer organized by syndicates, and houses of prostitution are no longer so common, prostitution having become an itinerant trade. The labor force includes the whole social and economic spectrum. H. PACKER, *supra* note 2, at 328. *See generally* Decker, *A Case for Recognition of an Absolute Defense or Mitigation in Crimes Without Victims*, 5 ST. MARY'S L.J. 40 (1973); Morris, *Overcriminalization and Washington's Revised Criminal Code*, 48 WASH. L. REV. 5 (1972). *But see* George, *Medical and Psychiatric Considerations in Control of Prostitution*, 60 MICH. L. REV. 717, 719 n. 6 (1962).

According to the Chief of Criminal Investigation for the Portland Police Department, there is no indication that local prostitutes are organized to any degree. Portland Evening Express, Nov. 4, 1975, at 1 and 14. When acts of female or male prostitution are symptomatic of a deepseated personality disorder, arrest and imprisonment are not likely to cure the underlying personality disorder or to discourage like manifestations in others similarly situated. *See* George, *supra*, at 744-53.

might deter the patron,[98] the Code eliminates all liability for patronizing prostitutes.[99] Reports indicate that the existence of laws prohibiting prostitution in fact encourages prostitution,[100] and that levying fines for this activity actually causes prostitutes to increase business and to pass the cost along to the customers.[101]

Laws prohibiting acts of prostitution are often discriminatorily enforced.[102] Frequently the manner of enforcement demonstrates no concern for the lot of the prostitute as an individual or any interest in her rehabilitation.[103] Limiting the crime of solicitation to public, as opposed to private, solicitation may eliminate some undesirable enforcement practices;[104] however, undesirable police practices can be

98. *See* AMERICAN BAR FOUNDATION, LAW ENFORCEMENT IN THE METROPOLIS 85-86, 89 (D. McIntyre, Jr. ed. 1967). The drafters of the *Model Penal Code* made patronization a civil infraction punishable by a fine. MODEL PENAL CODE, § 251.2(5) (Proposed Official Draft, 1962); *id.* § 207.12, Comment (Tent. Draft No. 9, 1959). If the prostitute is fulfilling a psychopathic need of the customer, deterrence may be less effective. *See* George, *supra* note 97, at 759-60.

99. ME. REV. STAT. ANN. tit. 17-A, § 851(1), (2)(A), (G) (Supp. 1975).

100. Margo St. James, ex-prostitute, ex-law student, and founder and chairmadam of COYOTE (Call Off Your Old Tired Ethics), the first prostitute's union, observed that she started "hooking" "just to earn some bucks," was arrested for soliciting, and then with a record could not get a job so she "took up the life." Haft, *Hustling for Rights*, 1 CIVIL LIBERTIES REV. 8, 15 (Winter/Spring 1974). Ms. Haft concluded that "the laws, in effect, help to sever any normal relationships that prostitutes have with the legitimate world and drive them into the underworld for protection and friendship where they may become involved in other crime." *Id.* at 15.

101. The fines are paid by increasing business and passing these costs along to the customer. *See* THE WOLFENDEN REPORT, *supra* note 2, ¶ 276, at 151. Pimps and panderers gain control of the prostitute when they post her bail and pay her fines. These facts are particularly significant in view of the assessment of the Portland Police Department that most young ladies who are active around Portland might be classified as "part-time" prostitutes. Portland Evening Express, Nov. 4, 1975, at 1 and 14.

102. Prostitutes range economically from streetwalking narcotics addicts to call-girls and party girls. Those at the lower end of the economic spectrum are most frequently prosecuted, and these include a disproportionate number of the urban poor. H. PACKER, *supra* note 2, at 328; Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157, (1967).

103.

> As the courts become increasingly strict about the evidence that will satisfy a charge of prostitution or solicitation, the brunt of enforcement falls ever more heavily on those women who are so desperate that they will take the greatest risk . . . . [J]udges . . . rarely give convicted prostitutes severe sentences. A short term in the county jail is the normal maximum. More often, a suspended jail sentence or a fine is imposed. The woman may soon be back in court again. The law is caught between unrealistic severity and triviality, with triviality winning the day. The whole tedious, expensive, degrading process of enforcement activity produces no results: no deterrence, very little incapacitation, and certainly no reform.

H. PACKER, *supra* note 2, at 329.

104. The Portland Police Department has acknowledged that it has had difficulty in monitoring the private conversations of prostitutes. Portland Evening Express, Nov. 4, 1975, at 1 and 14. Presumably, this will no longer be necessary with the crime of solicitation limited to public solicitation.

expected to continue in enforcement of the Code's prohibition of public solicitation.[105] Penal sanctions may be useful as a deterrent when the authorities use these sanctions to require the prostitute to consult with social service agencies as a condition of probation. This remedy is particularly appropriate for deterring younger prostitutes.[106] If rehabilitation resources are unavailable, however, the goal of deterrence is an impractical one. In this respect, the Code's elimination imprisonment and probation sanctions for simple prostitution recognizes the futility of rehabilitation when resources are limited.

In summary, the new prostitution law represents an improvement over prior Maine law. It is drafted with greater specificity and the penalty for simple prostitution is reduced to comport with the degree of social harm involved. However, imposition of a mere fine and elimination of liability for the patron are likely to weaken any deterrent effect of the law and may in fact encourage prostitution. Retaining the prohibition against public solicitation ignores the problem of undesirable enforcement techniques. Authorizing imprisonment for public solicitation, however, serves a useful function in those cases where rehabilitative social services are available for the prostitute.

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105. Decoys and various entrapment devices are widely used. H. PACKER, *supra* note 2, at 329; J. SKOLNICK, JUSTICE WITHOUT TRIAL 96-103 (1966); Kadish, *supra* note 102, at 161. Harassment arrests are frequently made. AMERICAN BAR FOUNDATION, LAW ENFORCEMENT IN THE METROPOLIS 84-87 (D. McIntyre, Jr. ed. 1967); Kadish, *supra* note 102, at 160. Efforts at vice control often lead to extortion and bribery of those on the "fringes of prostitution," the owners of bars and hotels where prostitutes congregate. H. PACKER, *supra* note 2, at 329.

106. The drafters of *The Wolfenden Report* recommended progressively higher sentences for subsequent offenses beginning with a $75.00 fine for the first offense and three months imprisonment for the third and subsequent offenses as a means of deterrence. They felt that a short term of imprisonment would be unlikely to effect reform where fines have failed but believed that the presence of imprisonment as a possible means of punishment would encourage the courts to use and prostitutes to accept probation in suitable cases. They believed that the advice and treatment of the probation service could be of benefit in deterring the young prostitute and may be of help to individual older more hardened prostitutes. They further felt that imprisonment might deter repeaters. THE WOLFENDEN REPORT, *supra* note 2, ¶¶ 275-80 at 151-55. According to another authority,

> If a cure for the causes of prostitution and related offenses is to be found and applied, it will most probably be through active ties which can best be classified as administrative: the efforts of social workers to prevent the rupture of family relationships and to aid children of broken homes and those who are physically or mentally handicapped, the control measures against disease taken by public health officers, the therapy administered by staff members of mental hospitals and outpatient clinics and the supervisory functions of probation and parole officers. The maximum justifiable scope of penal sanctions is to enforce indirectly the preventive and remedial activities of administrative organs, to bring with the least overt coercion possible those who should and can be helped into contact with those who can help them . . . . Application of penal law for other than these purposes is either a neutral factor in the solution of the underlying problem or an affirmative hindrance to such solution.

George, *supra* note 97, at 760.

B. *Promotion of Prostitution*

Section 853 of the Code makes the knowing promotion of prostitution a Class D crime, with possible penalties of imprisonment, probation or fine. Penalizing such activity is rational in view of the exploitation of other members of society which is commonly involved. For example, pandering, pimping and procuring often involve the coercion of immature or incompetent persons.[107] Available data indicate that substantial numbers of streetwalkers are mentally deficient[108] and that drug addiction is a recurrent problem among prostitutes.[109] Prostitution is closely allied with conditions of poverty;[110] prostitutes are frequently victims of physical abuse,[111] and their children are often lacking in normal care.[112] Therefore, promotion of prostitution is an appropriate subject for criminal sanctions. Section 851(2) describes a number of ways in which a person commits the offense of promoting prostitution, and these will be discussed in turn.

Under prior Maine law it was a crime to permit any place or building owned or under one's control to be used for purposes of prostitution, lewdness or assignation, if one knew or had reason to know that the place was to be used for that purpose.[113] Such activity was penalized by a maximum of three years in prison. Similarly, under the Code it is a crime, alone or in association with others, to lease or otherwise permit a place under one's control to be regularly used for prostitution.[114] The penalty, however, has been reduced to one year in prison, and there are changes in the intent requirement and in the kinds of activities prohibited.

There was no requirement under prior law that the premises be regularly used for prostitution; rather, a single incident of prostitution or lewdness of which the defendant should have been aware sufficed for criminal liability.[115] The Code, on the other hand, requires that the premises be knowingly and regularly used for prostitution. The term "regularly" is defined nowhere in the Code; therefore,

107. George, *supra* note 97, at 760.

108. *Id.* at 746. *See also* MODEL PENAL CODE § 207.12, Comment (Tent. Draft No. 9, 1959).

109. One study asserted that 50% of all American prostitutes were drug addicts. Decker, *supra* note 97, at 48 n. 52, citing U.N. DEPARTMENT OF ECONOMICS AND SOCIAL AFFAIRS, STUDY OF TRAFFIC IN PERSONS AND PROSTITUTION 25 (1959). Another estimate was 10% to 25%. Thornton, *Organized Crime in the Field of Prostitution*, 46 J. CRIM. L.C. & P.S. 775, 776 (1956).

110. MODEL PENAL CODE § 207.12, Comment (Tent. Draft No. 9, 1959).

111. George, *supra* note 97, at 719.

112. Lindsay, *Prostitution—Delinquency's Time Bomb*, 16 CRIME AND DELINQUENCY 151, 153 (1970).

113. ME. REV. STAT. ANN. tit. 17, § 3051(1) (1964) (repealed 1976). "Assignation" was defined as including "the making of any appointment or engagement for prostitution or lewdness or any act in furtherance of any such appointment or engagement;" "lewdness" meant "any indecent or obscene act." *Id.* § 3052.

114. *Id.* tit. 17-A, § 851(1)(D) (Supp. 1975).

115. *Id.* tit. 17, § 3051(1) (1964) (repealed 1976).

whether a place is regularly used for illicit purposes will have to be determined on a case by case basis. Permitting indecent or obscene acts to occur on one's premises is no longer illegal. The actor may be punished, however, if the obscene activity falls within the definition of public indecency.[116] To "knowingly" promote prostitution the defendant must have been actually aware of the illicit activity taking place on the premises.[117] Thus, unlike under the prior law, the State must prove subjective knowledge on the part of the defendant, and "reasonable cause to know" may be insufficient.

Prior Maine law also made it a crime to occupy, reside, enter or remain in a place for the purpose of prostitution and to receive, offer or agree to receive any person into any place for the purpose of prostitution.[118] Such activity is now covered under the Code under the general headings of engaging in prostitution or promotion of prostitution.[119]

Prior Maine law made it a felony punishable by three years in prison to publicly or privately solicit or offer to solicit an act of prostitution, lewdness or assignation.[120] The Code narrows this offense to public solicitation for the purpose of prostitution, and the penalty is reduced to one year in prison.[121] Thus, merely offering to solicit, private solicitation, and soliciting indecent or obscene acts which do not involve prostitution or public indecency are no longer criminal. The Code's prohibition applies to persons soliciting on behalf of prostitutes as well as solicitation by the prostitutes themselves.[122]

Although the penalty for engaging in prostitution itself is reduced to a fine, most prostitutes will risk a penalty of imprisonment since public solicitation will constitute the offense of promoting prostitution. This result can be rationalized as an effort to protect against public affrontery. However, imposing a greater penalty on public solicitation than on the act of prostitution discriminates against persons at the lower end of the economic spectrum—bar girls and prostitutes who walk the streets rather than call girls who use a more sophisticated private means of communication.

Prior law made it a crime punishable by three years in prison to aid or abet prostitution or lewdness in any manner, and this prohibition encompassed those who patronized prostitutes as well as pimps

116. *Id.* tit. 17-A, § 854 (Supp. 1975).
117. *Id.* §§ 10(2), 853.
118. *Id.* tit. 17, § 3051(2), (5) (1964) (repealed 1976).
119. These activities might fall within the Code's prohibitions on operating a house of prostitution or a prostitution business, *id.* tit. 17-A, § 851(2)(E) (Supp. 1975), causing or aiding another to engage in prostitution, *id.* § 851(2)(A), or public solicitation, *id.* § 851(2)(B).
120. *Id.* tit. 17, § 3051(4) (1964) (repealed 1976).
121. *Id.* tit. 17-A, §§ 851(2)(B), 853(2), 1252(2)(D) (Supp. 1975).
122. *Id.* § 851(2)(B).

and others who facilitated or profited from prostitution.[123] The Code narrows the prohibition to those who knowingly cause or aid another to engage in prostitution, and the penalty is reduced to less than one year in prison.[124] Patrons are specifically exempted, and aiding or abetting lewdness is no longer criminal.[125] The Comments give no reason for exempting patrons from criminal liability, and it seems inconsistent to penalize only one party to an activity which clearly involves two willing partners. Furthermore, if deterrence is to play any part in the operation of the statute, exempting the patron will not serve the purposes of deterrence and may in fact encourage potential customers who may have been intimidated previously by the possibility of criminal liability.

Another mode of unlawfully promoting prostitution under the Code is receiving or agreeing to receive the profits of prostitution.[126] Prior law broadly prohibited the receipt of anything of pecuniary value from a prostitute without consideration, whether or not pursuant to an agreement; the patron's role in this activity was not mentioned, and the penalty was two to twenty years in prison.[127] The new Code reduces the penalty to one year in prison, and the prohibition applies only to receipt of or agreement to receive a pecuniary benefit from the proceeds of prostitution, pursuant to an agreement with someone other than a patron.[128] The term "pecuniary benefit" is not defined in this section. In an unrelated chapter, however, the term is defined as any economic advantage in the form of money, property, or anything else.[129] Thus, if this definition is incorporated in the prostitution chapter, one will be liable for promotion of prostitution if one accepts jewelry or other valuables as part of the proceeds of prostitution. The prohibition does not apply to receipt of money or valuables by the prostitute from a patron, since an agreement to accept pecuniary benefits directly from the patron is specifically excluded.[130] Rather, the law is aimed at the profiteering pimp and any others who might exploit prostitution by participating in its proceeds.

Knowingly transporting a person into or within the state for the purpose of prostitution is criminalized under the Code as a form of promoting prostitution.[131] Prior Maine law covered this activity in two separate sections, one of which prohibited transporting or aiding in transporting persons for prostitution or any other immoral purpose,[132] and the other of which prohibited transporting or offering or

123. *Id.* tit. 17, §3051(6) (1964) (repealed 1976).
124. *Id.* tit. 17-A, §§ 851(2)(A), 853, 1252(2)(D) (Supp. 1975).
125. *Id.* § 851(2)(A).
126. *Id.* § 851(2)(G).
127. *Id.* tit. 17, § 3057 (1964) (repealed 1976).
128. *Id.* tit. 17-A, §§ 851(2)(G), 853, 1252(2)(D) (Supp. 1975).
129. *Id.* § 602(2)(C).
130. *Id.* § 851(2)(G).
131. *Id.* §§ 851(2)(F), 853.
132. *Id.* tit. 17, § 3059 (1964) (repealed 1976).

agreeing to transport a person with knowledge or reasonable cause to know that the purpose was prostitution, lewdness or assignation.[133] The new law reduces the penalty for such activity and narrows the prohibition to those who actually transport a person with the intent that that person engage in prostitution.[134] Mere lewdness and assignation are not prohibited purposes. Activity not covered by this definition of transporting, such as offering or agreeing to transport, may of course be criminal as an attempt or as accomplice activity or as some other form of promoting prostitution.[135]

Under prior Maine law, it was a felony punishable by three years in prison to procure or offer to procure another for the purpose of lewdness, prostitution or assignation, or to make an appointment on behalf of another for such purposes.[136] Under the Code it is a crime punishable by up to one year in prison to knowingly provide persons for prostitution, or to cause or aid another to engage in prostitution other than as a patron.[137] It is no longer a crime merely to offer to procure someone for prostitution unless public solicitation is involved,[138] or to procure persons other than for the purpose of prostitution. Thus, one may without criminal liability arrange a private party where indiscriminate but gratuitous sexual activity occurs, provided that the acts are performed by consenting adults and are not seen by the public.

Under the prior law certain other acts of procurement not involving the use of force were specifically prohibited. These included causing a female to be a prostitute by enticing, inveigling, persuading, encouraging by promise or scheme, or by giving things of value.[139] These acts were punishable by up to twenty years in prison. These activities are now generally prohibited by the sections of the Code which forbid knowingly causing another to engage in prostitution, providing persons for the purpose of prostitution, or managing, supervising or otherwise operating a prostitution business, and they are punishable by less than one year in prison.[140]

C. Aggravated Promotion of Prostitution

The most serious crime in this Chapter is the aggravated promotion

133. *Id.* § 3051(3).
134. *Id.* tit. 17-A, §851(2)(F) (Supp. 1975).
135. *Id.* §§ 57, 152, 851(2).
Under prior Maine law, it was no defense to procuring or transportation that parts of the acts involved were committed outside of the state. *Id.* tit. 17, § 3060 (1964) (repealed 1976). This problem would now be covered by *id.* tit. 17-A, § 7 (Supp. 1975), and a person would be liable if the result which is an element of the crime occurs within the state, even if the conduct leading up to that result took place outside of the state.
136. *Id.* tit. 17, §§ 3051(4), (6), 3052 (definition of "assignation") (repealed 1976).
137. *Id.* tit. 17-A, §§ 851(2)(A), (C), 1252(2)(D) (Supp. 1975).
138. *See id.* § 851(2)(B).
139. *Id.* tit. 17, § 3055 (1964) (repealed 1976).
140. *Id.* tit. 17-A, §§ 851(2)(A), (C), (E), 853, 1252(2)(D) (Supp. 1975).

of prostitution, punishable by up to five years in prison.[141] This crime is committed by knowingly promoting the prostitution of a person under eighteen years of age or by compelling another person to engage in prostitution.[142] The Code gives as examples of the latter mode the use of a drug or intoxicating substance so as to render the other person incapable of controlling or appreciating the nature of his or her conduct, and withholding or threatening to withhold alcohol or drugs from a person who is physically or psychically dependent on those substances.[143] The term "compelling" is not further defined or illustrated. Presumably, however, such prohibited conduct includes threatening imminent death or serious bodily injury to the victim or to another person, and other kinds of force.[144] If the victim were compelled by threat to submit to sexual intercourse or to a sexual act against his or her will, the person procuring such conduct by threat could also be guilty as an accomplice to rape or gross sexual misconduct.[145]

When the offense involves the prostitution of a minor, there is apparently a defense of mistake of age available to the defendant.[146] If the rationale of this section is to prevent minors from falling into this dubious profession, then the section should be amended to exclude a defense of mistake of age. Thus anyone who undertook the promotion of prostitution would do so at the risk of being found guilty of the aggravated form of the offense if any of the subjects involved appeared to be under eighteen.

Aggravated promotion of prostitution includes the following acts which were offenses under prior Maine law: abduction of a woman to be defiled if prostitution is involved;[147] procuring a female by threats or violence for the purpose of prostitution;[148] placing one's wife in a house of prostitution through the use of force, intimidation or threats;[149] and, possibly, the detention of a female in a house of prostitution for nonpayment of a debt.[150] It is unclear whether procuring someone by fraud for prostitution purposes would constitute aggravated or simple promotion.[151] Causing a person to engage in prostitution by abuse of a position of confidence, authority or legal charge

141. *Id.* §§ 852, 1252(2)(C).
142. *Id.* § 852(1). *See also id.* § 554(1).
143. *Id.* § 852(2).
144. *Cf. id.* § 2(8), (18).
145. *Id.* §§ 57, 252, 253.
146. *Id.* §§ 852 and 853 both use the term "knowingly."
147. *Id.* tit. 17, §1 (1964) (repealed 1976). Abduction with a firearm was punishable by two to twenty-five years in prison with no suspension or probation permitted. *Id.* § 2 (Supp. 1975) (repealed 1976).
148. *Id.* § 3055 (1964) (repealed 1976).
149. *Id.* § 3056.
150. *Id.* § 3058.
151. *See id.* §§ 3054, 3055, 3056.

might constitute aggravated promotion of prostitution, depending on the circumstances.[152]

Conclusion

The Commission and the Legislature have justifiably eliminated penalties for private solicitation and for engaging in or facilitating private consensual acts between adults, not for hire. The new Code distinguishes between various activities associated with prostitution and structures the penalties according to the social harm involved. The prohibited acts are much more clearly defined than under prior law and the penalties have been reduced to comport with the degree of social culpability involved. Exempting the patron from liability for prostitution or promotion of prostitution weakens the deterrent effect of the law. However, even under the prior law patrons were rarely charged with criminal liability; therefore, this change in the law will have little practical effect. The section defining aggravated promotion of prostitution could be improved by more clearly defining the kind of compulsion required and by excluding a defense of mistake of age.

III. Public Indecency

Under prior Maine law it was a misdemeanor punishable by up to six months in prison to wantonly and indecently expose oneself.[153] The statute did not further elaborate on the elements of the offense or the meaning of the terms used, and case law on the subject is predictably sparse. The sole reported case construing this statute held that the terms "wantonly and indecently" excluded accidental exposure, but the case offered no further clarification of the intent requirement under the statute or the circumstances under which exposure would be characterized as "indecent."[154] The Code, by contrast, specifies four types of activities which constitute the offense of public indecency. These are: engaging in sexual intercourse or a sexual act in a public place;[155] knowingly exposing one's genitals in a public place to a person under the age of twelve;[156] knowingly exposing one's genitals in a public place under circumstances which in fact are likely to cause affront or alarm;[157] and exposing one's genitals in a private place with the intention of being seen from some other place.[158] The offender may be sentenced to up to six months in prison.[159]

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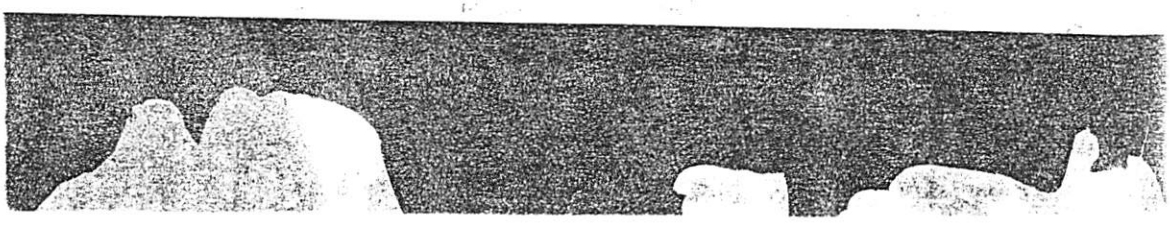
152. *See id.* § 3055.
153. *Id.* § 1901 (Supp. 1975).
154. State v. Cole, 112 Me. 56, 90 A. 709 (1914).
155. Me. Rev. Stat. Ann. tit. 17-A, § 854(1)(A)(1) (Supp. 1975).
156. *Id.* § 854(1)(A)(2).
157. *Id.* The Code does not prohibit exposing other parts of the anatomy; thus, "mooning" and topless bathing would not constitute public indecency.
158. *Id.* § 854(1)(B).
159. *Id.* §§ 854(3), 1252(2)(E).



The terms "sexual intercourse" and "sexual act" are defined elsewhere in the Code.[160] The term "public place," however, is more difficult to define. The section on public indecency states that this term "includes, but is not limited to, motor vehicles which are on a public way."[161] In other sections of the Code concerned with offenses against public order, the term "public place" means a place "to which the public at large or a substantial group has access," including public ways, public buildings, and common areas of apartment buildings.[162] Presumably this definition would apply to the public indecency section as well, since the term serves a similar purpose in both cases.

No culpable state of mind is defined for the offense of engaging in a sexual act in a public place. Elsewhere in the Code it is stated that when a culpable mental state is not expressly prescribed, a culpable state of mind is nevertheless required unless the statute expressly provides for guilt without culpability or a legislative intent to this effect otherwise appears.[163] Since in this section legislative intent is unclear, presumably the offender must have acted negligently, recklessly, knowingly, or intentionally with regard to attendant circumstances, in order to be guilty of public indecency in this manner.[164]

There is no requirement that persons engaging in sexual intercourse or sexual acts in a public place do so under circumstances which make it likely that a member of the public will be offended. Thus, for instance, persons would apparently be liable for public indecency if they were engaged in sexual acts in an unlit automobile in "lovers lane." This would be so even though the area had the reputation of being used for such activities and even though no members of the community frequented the area except voyeurs, persons desirous of engaging in sexual activity and police officers shining flashlights into dark automobiles. Thus, the law criminalizes conduct which may have no victim. This section of the Code in effect creates a strict liability offense based on abstract morality. Its enforcement will be sporadic because most of the prohibited conduct will be neither seen nor reported. Strict enforcement would be a needless waste of police resources. The section should be amended by adding the words "under circumstances where he is likely to be seen by a mem-

160. *Id.* § 251.

161. *Id.* § 854(2).

162. *Id.* §§ 501(5)(A) (disorderly conduct), 505(2) (obstructing public ways). It is not clear whether government-owned wilderness areas or campsites would be public places. A drive-in movie theater which charges admission may or may not be deemed "a place to which a substantial group has access." A person's back yard is not a public place if it is surrounded by an eight-foot fence; however, if it were not so fenced in, it might be considered to be public under some circumstances.

163. *Id.* § 11(5).

164. *Id.* § 10(5). Thus if a person engaged in sexual activity in an automobile on a public way and reasonably but mistakenly believed he was on private property, he might not be criminally liable under *id.* § 854(1)(A)(1).

ber of the public" and by defining these words to exclude on-duty police officers.

Public indecency is also committed when a person knowingly exposes his genitals in a public place to a person under the age of twelve.[165] Again, the statute does not require circumstances which make it likely that a member of the public will be offended. This omission is rational, however, since the child victim whose interests are protected by this subsection may not be personally offended in the same manner as other members of the public.

This subsection as enacted appears to allow a defense of mistake of age. Section 11(2) of the Code states that when a statute specifies the state of mind sufficient for the commission of a crime, that state of mind applies to all the elements of that crime unless a contrary purpose appears. Thus the word "knowingly" in section 854(1)(A)(2) applies both to the act of exposing oneself and to knowledge of the victim's age. However, when the drafters of the Code intended to provide a defense of mistake of age in other sections, they specifically stated that intention.[166] Also, when the drafters intended the term "know" to modify more than one element of an offense, they repeated the word in the statute.[167] Therefore, one could conclude that if the drafters had intended the knowledge requirement in section 854(1)(A)(2) to apply to the victim's age, they would have specifically said so. This inconsistency should be corrected by amendment.

The knowledge requirement is more clearly restricted in that part of the same subsection prohibiting exposing oneself in a public place under circumstances which are in fact likely to cause affront or alarm.[168] Section 11(4)(B) states that no culpable state of mind need be proved for any element of an offense which it is stated must in fact exist. Therefore, under section 854(1)(A)(2) a person need not be aware that his actions may in fact cause affront; it is sufficient under an objective standard that his act in fact be likely to cause affront under the circumstances. Defense attorneys should be prepared to demonstrate that the surrounding circumstances did not make it likely either that anyone else would observe the defendant or that anyone who was present would be offended by the defendant's actions. Defense attorneys might also consider challenging this standard as being unduly vague and failing to adequately inform the defendant of the circumstances under which his actions would be criminal.[169]

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165. *Id.* § 854(1)(A)(2).

166. *See id.* § 254(2).

167. *Id.* § 1103(1) provides that "[A] person is guilty of unlawful trafficking in a scheduled drug if he intentionally or *knowingly* trafficks in what he *knows* or believes to be any scheduled drug. . . ." (emphasis added).

168. *Id.* § 854(1)(A)(2).

169. This section would more easily be interpreted by the courts if it had been drafted to read "he knowingly exposes his genitals to a person and knowingly creates a substantial risk of causing that person offense or alarm." *Cf.* Coates v. Cincinnati,

The only time a person may be liable for public indecency when he exposes himself in a private place is when he does so with the intention of being seen from another place.[170] However, it is not necessary that another member of the public actually be offended by the defendant's actions. This lack of an offense requirement is inconsistent with the stated goal of prohibiting certain activities where the only victim is the "general affrontery."[171] Exposing oneself in a private place must be done with the "intention" of being seen, rather than merely "knowingly."[172] Thus, the offender must have had the conscious object of being seen from another place.

In summary, the Code's section on public indecency is a great improvement on the prior law. The Code clearly describes the activities which are deemed criminal and avoids vague terms such as "indecently." However, the section should be amended to provide that offense to the public is an element of all forms of public indecency. Such an amendment would be consistent with the spirit of the Code to eliminate victimless crimes generally and to punish only those acts which result in some measurable harm to society.

IV. Private Consensual Sexual Activity Between Adults

A. *The Crime Against Nature*

Under Maine law prior to the Code, the so-called crime against nature was punishable by up to ten years in prison.[173] The statute did not further define the offense but, with "due regard to the sentiments of decent humanity," treated it as one not fit to be named.[174] Case law construed the crime to require some sort of penetration of a natural orifice of the body.[175] However, force was not required, con-

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402 U.S. 611 (1971), where the Supreme Court declared unconstitutional an ordinance making it criminal for three or more persons to assemble on a sidewalk and to conduct themselves in a manner "annoying" to passersby because it violated due process standards of notice and the right of free assembly and association.

170. Me. Rev. Stat. Ann. tit. 17-A, § 854(1)(B) (Supp. 1975).

171. *Id.* § 854, Comment.

172. *Id.* § 10(1)(A), (2)(A). Under section 854(1)(B) it appears that burlesque shows involving total nudity and sexual conduct are permitted as long as sexual intercourse or sex acts do not occur and as long as the show is not seen from another place. Such conduct, however, may be prohibited by *id.* tit. 17, § 2905 (1964) (obscene or impure shows).

173. Me. Rev. Stat. Ann. tit. 17, § 1001 (1964) (repealed 1975).

174. State v. Cyr, 135 Me. 513, 514, 198 A. 743, at 743 (1938). *Accord*, State v. Langelier, 136 Me. 320, 321, 8 A.2d 897, at 897 (1939).

Although the court noted in *State v. White* that due process requires statutes to be sufficiently descriptive to inform the ordinarily intelligent person of the prohibited activity, the court pointed out that the crime against nature had been a crime for a century and a half, and that no one, prior to the defendant, had contended that the statute should be more specific. State v. White, 217 A.2d 212, 214 (Me. 1966). *See* Rose v. Locke, ___ U.S. ___, 96 S.Ct. 243, 244 (1975). *But cf. id.* at 247-8 (Brennan, J., dissenting).

175. State v. Pratt, 151 Me. 236, 238, 116 A.2d 924, 925 (1955). *See* State v. Pratt, 309 A.2d 864, 865 (Me. 1973); State v. Viles, 161 Me. 28, 29, 206 A.2d 539, at 539 (1965).

sent of the victim was no defense, and the age of the parties was irrelevant.[176] Therefore the statute encompassed all "unnatural" but private sexual activity between competent consenting adults, heterosexual or homosexual. This broad prohibition is no longer necessarily representative of any widely-held community judgment, in view of the fact that these forms of sexual expression are encouraged by best-selling manuals commonly sold in Maine bookstores.[177]

This statute is now repealed, and the Code, while prohibiting sexual activity involving force, minors or incompetents, does not prohibit such activity in private between competent consenting adults. Repeal of this statute is unlikely to have any effect on law enforcement resources, since few, if any, officers were involved in enforcing this law, at least as it applied to private sexual conduct between consenting adults of opposite sexes.[178] In practical effect therefore the law was informally but properly limited to protecting the immature, incompetent or helpless from sexual exploitation and preventing conduct which would offend innocent bystanders.

The Commission and Legislature faced a more difficult issue when they considered repeal of this statute as it pertained to private consensual homosexual acts between adults. Although homosexuality is far more widespread than is generally realized,[179] it is unclear whether decriminalization of homosexual conduct is representative of widely and strongly held community sentiments. However, the drafters of the Code were less concerned with morality than with practical enforcement problems and respect for the legal system generally.[180]

Statistics show that laws prohibiting private consensual homosexual acts between adults are sporadically and discriminatorily enforced.[181] Roughly 6,000,000 homosexual acts occur for every twenty

176. State v. Langelier, 136 Me. 320, 322, 8 A.2d 897 at 897-8 (1939) (force not required, consent no defense); State v. Pratt, 151 Me. 236, 237, 116 A.2d 924, 925 (1955) (age immaterial).

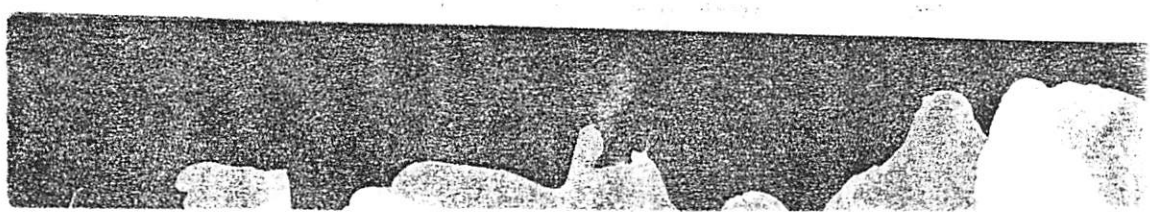
177. *See, e.g.*, THE JOY OF SEX (A. Comfort ed. 1972). Approximately 3.8 million people have purchased this book. NEWSWEEK, Oct. 27, 1975, at 78, col. 3.

178. *See* H. PACKER, *supra* note 2, at 303.

179. As a result of his survey, published in 1948, Kinsey estimated that "30% of all males have at least incidental homosexual experience or reactions . . . over at least a three-year period between the ages of 16 and 55." A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 650 (1948) [hereinafter cited as KINSEY]. Lesbianism "has been studied much less intensely than male homosexuality, but it too is far more widespread than is generally realized." MODEL PENAL CODE § 207.5, App. A (Tent. Draft No. 4, 1955), quoting M. PLOSCOWE, SEX AND THE LAW 206-07 (1951). While estimates have ranged from 4% to 16%, there are no completely reliable statistics on the number of persons who are exclusively homosexual. *See* E. SHUR, CRIMES WITHOUT VICTIMS 75 (1965).

180. See note 2 *supra*.

181. Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROB. 217, 221 (1960) (sporadic enforcement). Discriminatory enforcement is evidenced by the nearly total failure to prosecute lesbians. A ten-year Kinsey study of New York City's enforcement of sex laws established that only three females were arrested for homosexual activity and that all three cases were dismissed. By contrast,



convictions of sodomy.[182] Knowledge that the law is largely unenforced causes disrespect for the law; strict enforcement, on the other hand, is impractical and may simply force homosexuals into an alienated subculture.[183] When the law is enforced, unsavory techniques are often used which degrade and demean law enforcement officials and the law as an institution. Because of the private nature of the offense, surreptitious techniques, such as decoys and clandestine observation, are employed.[184] As one British police expert has stated the problem:

> . . . [T]he term *agents provacateurs* is a justly pejorative name for young police decoys, whose squalid hunting ground is the public urinal. . . . I should have thought it apparent that the time had now come to discontinue this miserable stratagem in importuning cases, rather than go on denying that it exists. If the importuning is as difficult to detect as all that, it can't matter much to 'public decency.'[185]

Frequently homosexuals are harassed or are the helpless victims of blackmail, and the existence of the criminal sanction precludes them from seeking police protection.[186]

Most commentators conclude that laws prohibiting private homosexual acts have little deterrent effect.[187] These laws, however, do perhaps deter homosexuals from seeking counseling when it is necessary.[188] Moreover, conviction and imprisonment are not conducive to

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"tens of thousands" of males were arrested and successfully prosecuted for homosexual activity. A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 485 (1953) [hereinafter cited as KINSEY & GEBHARD].

182. This estimate results in a ratio of 300,000 acts for each conviction. Fisher, *Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?*, 30 MD. L. REV. 91, 95 (1970), citing COMM. ON FORENSIC PSYCHIATRY OF THE GROUP FOR ADVANCEMENT OF PSYCHIATRY, REP. NO. 9. PSYCHIATRICALLY DEVIATED SEX OFFENDERS 2 (1950).

183. *See* E. SCHUR, CRIMES WITHOUT VICTIMS 85 (1965); H. PACKER, *supra* note 2, at 304-05. The psychological impact of the social stigma accompanying criminal sanctions against homosexuality is discussed in Note, *Homosexuality and the Law—An Overview*, 17 N.Y.L. FORUM 273, 292 (1971).

184. S. Mosk, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 686 (1966).

185. Rolph, *The Problem for the Police*, NEW STATESMAN June 25, 1960, at 945, cited in E. SCHUR, *supra* note 183, at 80.

186. Mosk, *supra* note 184, at 723. *See also* Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967); Note, 17 N.Y.L. FORUM 273, 291 (1971). Removal of the criminal sanction, however, will not necessarily remove the potential for blackmail. The blackmailer can still raise the specter of community disapproval. *See* Comment, *Sex Offenses and Penal Code Revision in Michigan*, 14 WAYNE L. REV. 934, 957 (1966). *See also* H. PACKER, *supra* note 2, at 305.

187. *See, e.g.*, Glueck, *An Evaluation of the Homosexual Offender*, 41 MINN. L. REV. 187, 206-07 (1957); Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588, 624-26 (1968); Note, *Private Consensual Homosexual Behavior: The Crime and its Enforcement*, 70 YALE L.J. 623, 629 (1961).

188. MODEL PENAL CODE § 207.5, Comment (1) (Tent. Draft No. 4, 1955).

cures when emotional problems are involved.[189] The very existence of the criminal sanction necessitates concealment and alienation, which in turn exacerbate any existing emotional problems.[190]

The Wolfenden Report stated that its authors found no evidence that homosexual behavior menaces the health of society.[191] On the contrary, studies show that many homosexuals are law-abiding citizens who hold regular jobs and lead productive lives.[192] Furthermore, there is no evidence that decriminalizing homosexual activity will result in the corruption of young people, a common fear held by those who support laws prohibiting homosexual conduct.[193] For these reasons, the American Psychiatric Association recently eliminated the designation of homosexuality per se as a mental disorder.

From the foregoing data and observations, it is clear that the Commission's decision to decriminalize private consensual homosexual acts between adults is in accord with its goal of distinguishing behavior that is merely undesirable from that which "is sufficiently threatening to society to require the specialized effort of the criminal law to prevent it."[194] The Code properly invokes the criminal sanction only where it is necessary to protect young, incompetent or helpless members of society from sexual exploitation. The Commission's decision furthers respect for the law, allows for judicious use of enforcement resources, and recognizes deterrence as a factor only when deterrence is effective and necessary. This approach to law revision enjoys wide support and represents a commendable effort to tailor the criminal law to the needs of society.

B. Cohabitation, Fornication and Adultery

Three Maine statutes now repealed by the Code addressed themselves to heterosexual intercourse. In combination these laws made it illegal for two persons to have sexual intercourse unless they were married to each other. The fornication statute prohibited sexual in-

189. Perkins v. North Carolina, 234 F. Supp. 333, 339 (W.D.N.C. 1964).

> . . . [I]f the homosexual conduct for which the arrest has been made appears early in the career of one who is still a latent homosexual, ensuing imprisonment which denies him the opportunity to have heterosexual relations may prove a further impetus toward homosexuality, since frustration often activates such latent tendencies. The chief role which the criminal law machinery can play is to provide opportunities for psychiatric assistance, preferably while the individual is on probation, and to provide special treatment facilities for adolescents in danger of becoming homosexuals.

George, *supra* note 97, at 756 (footnotes omitted).

190. Comment, *Homosexuality and the Law—An Overview*, 17 N.Y.L. FORUM 273, 292 (1971).

191. THE WOLFENDEN REPORT, *supra* note 2, ¶ 54, at 44.

192. E. SCHUR, *supra* note 183, at 76.

193. *Id.* at 71. "The chief malefactors, if any, in the creation of a homosexual personality are the child's parents. . . ." Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code*, 30 MD. L. REV. 91, 97 (1970).

194. *Introduction to Proposed Code* XX.

The very existence of
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rs found no evidence
of society.[191] On the
are law-abiding citi-
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tercourse between two unmarried persons;[195] the adultery statute prohibited sexual intercourse when either or both parties were married but not to each other;[196] and the cohabitation law penalized persons who lived together and who were not married to each other.[197]

These laws suffered from many of the same vagueness and enforcement problems as the law prohibiting the crime against nature, discussed above. Statutory language such as "lewdness," "lascivious," and "open and gross" proved difficult to define.[198] The laws were ineffective as deterrents and could not be enforced without widespread invasions of privacy. That the imposition of a criminal sanction for such activity was no longer representative of community sentiments is shown by the prevalent disregard of these laws.[199] The predominant use of these statutes was not to protect the physical and moral health of the community; rather the statutes served as tools for a deserted spouse to embarrass the wayward spouse or to coerce support payments.[200] No secular aims of society were served thereby,[201] and the impractability of enforcement undermined respect for the law as an institution. The repeal of these laws therefore comports with the Commission's goal of streamlining the criminal law and of imposing the criminal sanction only where such sanction is capable of efficient enforcement and deters socially harmful conduct.

C. Incest

Under prior law, marriage, fornication or adultery between related persons as to whom marriage was forbidden was punishable by up to ten years in prison.[202] The Code retains the prohibition against incest but with severe modifications. Only when both parties are over the age of eighteen is incest criminal; ignorance of consanguinity is an absolute defense, and the penalty is reduced to less than one year in prison.[203]

195. ME. REV. STAT. ANN. tit. 17, § 1551 (1964) (repealed 1976).
196. *Id.* § 101.
197. *Id.* § 2151.
198. *See, e.g.*, State v. Mulhern, 133 Me. 351, 177 A. 705 (1935); State v. Tuttle, 129 Me. 125, 150 A. 490 (1930).
199. Kinsey noted the high incidence of extra-marital and pre-marital sex among males, KINSEY 549-57, 584-89, and among females, KINSEY & GEBHARD 286-89, 416-21.
200. Israel, *The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code*, 14 WAYNE L. REV. 772, 824 (1968). It has been noted that in states where adultery provides the only basis for divorce, fictitious adulteries are staged. MODEL PENAL CODE § 207.1, Comment (1) (Tent. Draft No. 4, 1955).
201. *See* MODEL PENAL CODE §207.1, Comment (1) (Tent. Draft No. 4, 1955).
202. ME. REV. STAT. ANN. tit. 17, § 1851 (1964) (repealed 1976). *Id.* tit. 19, § 31 (1964) provides that no one shall marry within certain degrees of consanguinity, and this section also prohibits marriage between in-laws in analogous degrees.
203. ME. REV. STAT. ANN. tit. 17-A, § 556 (Supp. 1975). The State would be required to allege knowledge and prove it beyond a reasonable doubt because the knowledge requirement is not expressly designated a "defense" or an "affirmative defense." *Id.* § 5(2), (3); *cf. id.* § 551, Comment.

The purpose of limiting the prohibition to persons over eighteen is to prevent overlapping with the sections prohibiting sexual intercourse with minors.[204] However, the latter sections, as amended and enacted by the Legislature, provide a loophole in the law protecting minors. Under section 252, intercourse with a person under the age of fourteen constitutes rape. However, section 254, which originally prohibited intercourse with a person between the ages of fourteen and eighteen,[205] now prohibits sexual activity only with fourteen and fifteen year olds and only when the offender is at least five years older than the victim. Through oversight, therefore, incest is permitted with persons who are sixteen or seventeen years old or when the victim is fourteen or fifteen but the defendant is not five years older. The minimum and maximum ages in both sections 254 and 556 need to be amended to fill this gap.

The Code and its Comments fail to articulate the rationale behind the incest law, and the scope of the new law does not comport with the reasons usually given for such laws. For instance, one common rationale for prohibiting incest is to prevent genetically deficient offspring. The Code, however, and the civil marriage prohibition to which it refers outlaw relations between those who are related by marriage as well as those who are related by blood. No clear biological risk exists in sexual activity between in-laws, and a modern incest statute based on the genetic rationale should not encompass such relationships or relationships which are not likely to produce offspring. Another goal of incest laws is to promote family solidarity by preventing sex rivalries and jealousies. This goal would be better served if the Code outlawed incest regardless of age and also prohibited sexual activity other than intercourse, since homosexual relations and deviate sexual behavior cause equal trauma to the family unit.[206]

Most prosecution under incest statutes involves sexual imposition of adult males upon young dependent females.[207] The Code as enacted will not apply to the typical situation since it is restricted to relationships between adults. This law will be difficult to enforce against adults without intruding into their private lives, and therefore it will have little practical value.

If the law is to be effective in promoting family welfare and in preventing genetically deficient offspring, the incest section of the Code should be amended to delete the minimum age of eighteen for the victim. This change would also rectify the inconsistency, discussed above, between sections 556 and 254. The Code should further

204. *Id.* §§ 252, 254, 556.

205. L.D. No. 314, 107th Legis., § 1, ch. 11, § 254 (1975).

206. Incestuous "sexual acts" between adults are not prohibited. See ME. REV. STAT. ANN. tit. 17-A, § 251(1)(C) (Supp. 1975) for definition of "sexual acts." *Id.* § 556 prohibits only "sexual intercourse" between certain related persons.

207. MODEL PENAL CODE § 207.3, Comment (Tent. Draft No. 4, 1955).

be amended to confine the criminal sanction to those who are related by blood in a specified degree and to broaden the prohibition to sexual activities other than intercourse. In this manner the scope of the law will more exactly conform to social needs.

D. *Bigamy*

Bigamy was defined under prior Maine law as the marriage of a person whose first spouse was still living, unless the person was legally divorced from the first spouse or the first spouse had been continually absent for seven years and was presumed dead.[208] The second spouse was also liable if he or she knew of the other person's marital status at the time of the second marriage. The offense was punishable by five years in prison. The Code, in much clearer language, provides that a person is guilty of bigamy if he already has a spouse and he intentionally marries or purports to marry another, knowing that he cannot legally do so.[209]

The new law eliminates the liability of the second spouse and extends liability to the "sham marriage" situation, so that the offense does not depend on the formality of the second ceremony. The Code reduces the penalty for bigamy to six months in prison, and it eliminates the requirement that the first spouse be absent for seven years. If the defendant believed his first spouse to be deceased, however long the first spouse had been absent and however reasonable his belief, he is not guilty of bigamy under the new statute.[210] The crime of bigamy is thus restricted to those deliberate and deceptive acts which present some distinct harm to the community. This restriction is in keeping with the Code's emphasis on the limited use of the criminal sanction.[211]

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208. ME. REV. STAT. ANN. tit. 17, § 351 (1964) (repealed 1976).

209. *Id.* tit. 17-A, § 551 (Supp. 1975).

210. The State must prove the absence of good faith belief beyond a reasonable doubt. *Id.* § 551, Comment. Permitting an exception for lengthy absences may be an anachronism which is inappropriate under today's law where divorces can be readily obtained through service by publication, *see, e.g.*, ME. R. CIV. P. 4, 80(b); and for grounds other than adultery, *see, e.g.*, ME. REV. STAT. ANN. tit. 19, § 691 (Supp. 1975).

211. Professor Packer suggests that bigamy should not be criminally sanctioned:

> [T]he [bigamy] law is in practice enforced only sporadically, and then usually against members of minority groups or low-income people who are either culturally insensitive to the legal formalities attendant on family relationships or economically incapable of invoking them. There is substantial reason to believe that most bigamists ended their prior marriage with an informal "divorce by consent." The typical pattern is that the deserted second wife complains to a welfare agency about the absconder's nonsupport, and the ensuing investigation reveals that in addition to being a deserter he is a bigamist. The resulting mess is hardly helped by invocation of the criminal sanction. The offense is one we could do without.

H. PACKER, *supra* note 2, at 314. Certain societal interests, however, are promoted by the law of bigamy. These include prevention of public affrontation, protection of the first spouse against desertion and nonsupport, and maintaining respect for the divorce laws. *See* MODEL PENAL CODE § 207.2, Comment (Tent. Draft No. 4, 1955).