TENNESSEE CRIMINAL CODE AND CODE OF CRIMINAL PROCEDURE

PROPOSED FINAL DRAFT
NOVEMBER, 1973

STATE OF TENNESSEE
LAW REVISION COMMISSION
1105 SUDEKUM BUILDING
NASHVILLE, TENNESSEE 37219

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FOREWORD

The proposed Criminal Code and Code of Criminal Procedure are the product of nine years of effort by the Law Revision Commission and some seventy-five individuals and organizations interested in the improvement of Tennessee's criminal law. The proposed codes are the first major revision of the substantive and procedural criminal law since the Code of 1858.

The recommendation of these codes by the Law Revision Commission places Tennessee among 33 other American jurisdictions that are now revising or have recently completed a major criminal law revision project. This interest in criminal law revision is long overdue in Tennessee, as in many of the United States, due to past neglect of the criminal justice system.

Throughout the preparation of these codes, the Law Revision Commission has been concerned over the often raised question of whether such massive change in the criminal law would be accepted by the bench and bar of the state. While recognizing that the transition from present law and procedure will require effort on the part of everyone connected with criminal justice, the Commission is convinced that the benefits of revision more than justify the difficulties of change. The examples of judges, district attorneys, and defense lawyers in other states who have put forth extra effort to ease the transition to a more efficient and effective criminal justice system show that Tennessee also can accomplish a major revision of its criminal law.

THE REVISION PROCESS

The Law Revision Commission is an independent, nonpolitical research agency of the state composed of nine attorneys appointed by the Governor for staggered six-year terms. The Commission serves as a link between the legislature, the executive branch, the judiciary, the bar, the law schools, and other persons interested in technical legal subjects.

Shortly after its creation in 1963, the Commission began its work in criminal law by conducting extensive comparative studies on each topic of the criminal law and procedure. These six years of research were designed to thoroughly analyze the existing Tennessee law and to determine its status in the light of the statutes and rules of practice of other states, the American Law Institute's Model Penal Code and Model Code of Pre-Arraignment Procedure, the American Bar Association's Minimum Standards for Criminal Justice, and other suggestions of scholars. Also consulted were the decisions of state and federal courts, the Federal Rules of Criminal Procedure, and the proposed Federal Criminal Code.

On the bases of these studies and the policy decisions of the Commission, draft proposals were prepared. The Criminal Code was patterned after the proposed revision of the Texas Penal Code, which the Commission selected as the jurisdiction most compatible with Tennessee in its approach to criminal law. Much of the Code of Criminal Procedure was similarly modeled after the Federal Rules of Criminal Procedure, chosen for their effective and efficient handling of criminal trials. Although for ease of reference, the Criminal Code and Code of Criminal Procedure are set forth in two distinct titles, they are designed to be read and used together. As all practitioners know, the line between substantive and procedural law is not easily drawn. In addition, these codes are interdependent in their treatment of many important subjects.

Series of discussions and consultations were held with representatives of the Judicial Conference, the Governor's office, the Attorney-General's office, the District Attorneys-General Conference, the Department of Correction, the Tennessee Bar Association, the Sheriff's Association, the Chiefs-of-Police Association, the Law Enforcement Planning Agency, and interested individuals. As a result of these deliberations, the proposed codes progressed through several drafts over a three-year period. The Law Revision Commission is grateful for the time, energy, and expertise contributed by the following individuals:

From the Tennessee Judicial Conference:
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From the Chiefs-of-Police Association:
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From the Sheriffs' Association:
Honorable Roy C. Nixon—Memphis

The proposed final drafts have been benefited greatly by the contributions of these individuals and of the numerous attorneys and judges across the state who offered written suggestions and criticisms. Ultimately, however, the responsibility for the provisions of these codes must be borne by the Law Revision Commission which, after debate and compromise, made the final policy decisions on many controversial issues.

At the time of publication, these codes are being studied by a special legislative committee which will report to the 1974 session of the General Assembly. The committee is chaired by Senator Edgar H. Gillock and composed of Senator Douglas Henry, Jr. and Representatives Frank Buck, Riley C. Darnell, and Ira H. Murphy.

THE NEED FOR REVISION

The necessity of comprehensive revision of the substantive and procedural criminal laws was officially recognized in 1963 by the General Assembly when it directed the Law Revision Commission, among other matters, to make a study of criminal practice and procedure in the state. In 1967, the Commission reported to the 85th General Assembly:

> There is a manifest crisis in the administration of criminal justice throughout this country. The need for an extensive revision of the criminal laws of Tennessee is equally manifest. The Commission recognizes the magnitude of the task and is grateful for the cooperation of those who have agreed to assist it in its consummation. It is not feasible at this time to predict the time required for this project. However, it will take from four to six years.

The time spent in the revision process may appear protracted unless it is viewed in the context of the history of Tennessee's criminal law.

When the land that is now Tennessee was ceded to the United States Territory Southwest of the Ohio River in 1790, the needs of its people for criminal law were adequately served by the English common law as was then in force in the state of North Carolina. Although the territorial government enacted some statutes on criminal law and

procedure—such as Acts 1794, ch. 1, § 72, entitling every felony and misdemeanor defendant to counsel—the common law was relied upon for the proscription of criminal conduct. After the admission of Tennessee to statehood in 1796, statutes in derogation of the common law remained few until the enactment in 1829 of common-law crimes into statute. Acts 1829, ch. 23, entitled "An act to reform and amend the Penal Law of the State of Tennessee," was a masterful enumeration, in only 18 pages, of the definitions and general principles of criminal law.

The Code of 1858, while adding a great deal of original provisions, recodified most of the 1829 act and organized it, much as the proposed codes are organized, into an easy to use, comprehensive statement of criminal law and procedure. Since that time subsequent alphabetical reorganization and a century of amendments have destroyed the original code's simplicity and clarity. To date, recodifications have been limited to minor editorial changes, and no major revision of the law itself has been attempted.

The need for revision of Tennessee's substantive criminal law thus arises from its antiquity, prolixity, and growing internal and external inconsistency. The very nature of our legislative process is to blame for a good portion of this condition, since it tends to respond to immediate problems with stopgap, piecemeal solutions. There are now, for example, more than sixty separate Tennessee Code sections dealing with theft offenses. This accretion of statutes reflects the historical development of the offense of common-law larceny and the history of the state and its times. This is, however, but one example of a larger problem: a plethora of special sections dealing with narrowly defined conduct results in overlapping and sometimes contradictory treatment of what is essentially the same offense, regardless of the identity of the offender, the identity of the victim, or the nature of the interest harmed. Moreover, a host of parallel statutes in other parts of the Tennessee Code Annotated defining substantive criminal offenses adds to the problem, resulting in increased difficulty in law enforcement and prosecution and in increased confusion about the law among citizens. Another of the most obvious failings of the present criminal statutes is the absence of a coherent and uniform sentencing structure within the hundreds of statutes imposing criminal sanctions. Punishments and penalties have been authorized for each offense on an ad hoc basis, as must be the case when the statutes defining crimes are adopted in piecemeal fashion to respond to particular patterns of conduct inadequately controlled by the then existing law. The resulting range of authorized sentences not only fails to take into account the experience of modern correctional techniques but also creates logical anomalies which do not reflect the values of today's Tennessee. For example, an attempt at murder by means of explosives is punishable by imprisonment from 10-21 years while burglary by explosives is punishable by a 25-40 year term.

The statutes governing criminal procedure are in a comparable state. Although prosecutors and defense attorneys have developed a *modus vivendi* under present law, there is general consensus that criminal procedural law is in need of a major overhaul on the same scale as that recently performed in the civil area. Present criminal procedure, again the product of piecemeal legislation and court decision, too often results in unnecessary delay and expense and, more importantly, in basic unfairness to the defendant and to the public. The often criticized technicalities of criminal procedure have supplanted its basic purpose: to serve as an effective and efficient vehicle for the determination of fact and the disposition of criminal cases in light of the seriousness of the crime, the need to protect society, and the rehabilitation of the offender.

Outlined below are examples of how the Criminal Code and Code of Criminal Procedure deal with some of the problems in the creation of an intelligible framework for the operation of a modern criminal justice system in Tennessee.

FEATURES OF THE CRIMINAL CODE

1. *Unification of Criminal Law.* One of the important policies underlying the Criminal Code is that all conduct identified as criminal and punishable as a felony should be described in one area of the Tennessee Code Annotated rather than scattered throughout its many titles. This policy is implemented by the use of more generally worded statements in describing the types of conduct to be prohibited rather than the present code's enumeration of specific instances of that type of conduct. The acceptance of a bribe by a public official, for example, is defined and prohibited by one Criminal Code section rather than its present prohibition within each statute describing the duties and powers of each particular official. The proposal collects in a single code all significant criminal law, transferring to more appropriate locations in the statutes regulatory laws that merely employ a penal sanction. The unification policy also results in the completion of the process of replacing common-law crimes with statutory offenses. In addition, the Criminal Code seeks to prevent the confusion caused by the profusion of local ordinances that overlap, duplicate, and often conflict with state penal law. The code ensures against local variation from its provisions by including preemption sections in some chapters that prohibit the enforcement of local ordinances and regulations that affect certain areas of conduct covered by the code. In these ways the Criminal Code creates a comprehensive law of crimes and punishments applicable statewide.

2. *Codification of General Principles of Criminal Law.* A second major undertaking of the proposed Criminal Code is the codification of the general principles of criminal law. Explicitly defined are such previously troublesome areas as burden of proof, criminal responsibility for the conduct of another, justification excluding criminal responsibility, preparatory offenses, general defenses, and culpable mental states. The complicity provisions of present law, for example, present a bewildering conundrum of such terms as "accessory before the fact," "accessory after the fact," and "aider and abettor" to the jury attempting to decide

whether the defendant should be punished for the act of another person. The code, on the other hand, spells out in one section the criteria by which the jury is to measure vicarious responsibility.

One of the most salutary features of the code is the definition and consistent use of four culpable mental states in designating the *mens rea* distinguishing criminal from noncriminal actions. Each offense defined in the proposed Criminal Code states explicitly the degree of knowledge the actor must have as to the nature and consequences of his act to be criminally responsible. Purely accidental events do not carry criminal penalties. For a course of conduct to constitute a criminal offense, there must be an intentional, knowing, reckless, or criminally negligent act as required by the definition of the offense. For the first time these terms are functionally defined so that the distinctions between them are clear. These four terms replace a panoply of loosely defined culpability requirements in present law denoted by such imprecise terms as maliciously, feloniously, willfully, wantonly, and sundry combinations of them.

3. *Classification of Offenses and Punishments.* One short-coming is constantly apparent as one reviews the present criminal statutes in the Tennessee Code Annotated. There is no coherent and logical rationale for the setting of punishments for the various offenses. This results in apparent and actual injustices in sentencing, with the length of sentence more dependent upon chance and the age of the statute under which one is prosecuted than upon the seriousness of the offense. The reorganization of the entire criminal law offers the unique opportunity for a rational reassessment of the sentences authorized for each offense. To aid in this reassessment the proposed code adopts a classification system for all felonies and misdemeanors.

Four classes of felonies are established: capital felonies, felonies of the first degree, second degree and third degree. Misdemeanors fall into one of three classes: A, B, or C. Each class of misdemeanor designates only the maximum fine and jail sentence that may be imposed. Each felony class, however, specifies the range within which the court must set the minimum and maximum terms of imprisonment. In setting the minimum-maximum term combinations authorized for each class of felony, the court is limited by a general rule that the minimum may be no more than one-third the maximum set. The code thereby accomplishes a rational allocation of sentencing authority between the legislature, which grades the seriousness of the offense; the courts, which fit the punishment to the individual defendant and the facts of the offense; and the correctional authorities, which measure and act on the convicted person's dangerousness and rehabilitative potential. The code provides for a variety of authorized dispositions of felony offenders, thus furnishing the courts with a flexible response to the offender and his particular offense.

In addition, the code effects a significant reduction in maximum punishments authorized for the ordinary felony offender. In so doing it follows the recommendations of the American Law Institute, the

American Bar Association, the National Council on Crime and Delinquency, and the National Conference on Criminal Justice. Complementing this reduction for the ordinary offender, however, are new provisions identifying the dangerous and recidivist offender and authorizing substantial confinement to isolate him from society.

4. *Consolidation of Theft Offenses.* No part of the Tennessee criminal law has produced more confusion, more appellate litigation, and more reversals on technicalities unrelated to the actor's guilt or innocence than the multitude of offenses proscribing criminal acquisitions of another's property. Although the present theft offenses attempt to distinguish guilty from innocent acquisitions, they do so clumsily, and their effect all too often is to embroil the courts in nice questions about the appropriateness of conviction under one offense label as opposed to another. The present distinctions between the various offenses are unnecessary for establishing the point at which acquisitive conduct becomes criminal—that can be done generally—and they provide no rational basis for penalty determinations or for the provision of defenses. They do, however, place unnecessary obstacles before the conviction of the guilty. For this reason the Law Revision Commission has consolidated the theft offenses into a single, comprehensive offense aimed at the harm that accompanies the acquisitive conduct, however the acquisition is accomplished. Thus, the person who shoplifts a $20 radio commits the same offense under the code as the person who purposely writes a bad check for it. Theft under the code is a single offense with a uniform culpable mental state, a uniform result, uniform penalties, and uniform defenses, all of which focus on the culpability of the actor.

5. *Redefinition of Offenses.* Generally speaking, the proposed code treats as criminal those actions which are now deemed criminal by present statute. A major improvement is made, however, in the statutory description of that conduct. Whenever possible, the code avoids terms of legal art like the words "malice" and "premeditation" which denote more and less than is ordinarily understood by the use of those words. An attempt is made throughout the code to utilize words in their ordinary sense in describing prohibited conduct. In addition, identical words are not used with different meanings from one section to the next. A comprehensive list of code definitions is provided for those words and phrases that might be subject to multiple interpretations and the words, thus defined, are used consistently throughout both the Criminal Code and the Code of Criminal Procedure. The long-range benefits of the standardized and simplified language of the codes are not inconsiderable. It will be possible, for example, for jury instructions to be simplified and shortened without loss of clarity. In addition, the statutes governing the conduct of Tennesseans will be more intelligible to them. Increased awareness and understanding of the law should result in greater respect for the law, both in its enforcement and in its interpretation by the courts.

FEATURES OF THE CODE OF CRIMINAL PROCEDURE

1. *Pretrial Discovery and Notice.* Several provisions of the Code of Criminal Procedure promote the pretrial exchange of information in an effort to more efficiently utilize actual courtroom time and to guard against the injustice of the "trial by ambush." Both prosecution and defense are put under obligation by the code to disclose certain information before trial upon request. The defendant, for example, must give notice to the state if he intends to utilize an alibi defense and must disclose the names of witnesses upon whom he intends to rely to establish his alibi. The state in turn must disclose the names of witnesses it has to establish the defendant's presence at the scene of the alleged offense. The code also includes broadened discovery provisions that would enlarge the scope of information discoverable to include written and oral statements made by a codefendant to any law enforcement agent, the defendant's criminal record as then known to the state, the results of physical or mental tests or examinations, documents and other tangible evidence under the control of the defendant which he intends to introduce at trial, and the names and addresses of witnesses intended to be called to testify.

2. *Pretrial Admissibility Rulings.* A correlated feature of the code is a provision for pretrial testing of the admissibility of evidence. Unlike the federal rule this provision is not limited to evidence illegally seized. Such questions as the admissibility of confessions and line-up identifications can thus be settled before trial. The result should be a major savings of judicial energy and time since many cases which are now tried on precisely those issues will not be taken to trial at all.

3. *Appeal by State.* The Code of Criminal Procedure proposes a major change in Tennessee law in allowing the state as well as the defendant to appeal a ruling on an order to suppress evidence. At present an adverse ruling on the state's evidence often precludes effective prosecution even though the ruling may be erroneous. In granting the state an opportunity to appeal, however, the interests of the defendant are safeguarded. Before taking such an appeal, the district attorney must certify to the court that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a material fact. Upon the taking of appeal, the defendant is entitled to an immediate recognizance release if he is then being held in custody. Thus the appeal provisions will be used only in cases where the excluded evidence is vital to the proof of the state's case.

4. *Pretrial Release.* The inadequacies of Tennessee's present bail bond system have been the subject of recent investigations and studies by the bench, bar, and public press. It is manifest from these activities and from an independent scrutiny that the present bail bond system is an anachronism of criminal law ill-suited to meet the needs of today's Tennessee. Looking to recent activity in other jurisdictions, two plans of pretrial release were found to function with a far greater degree of success in assuring the voluntary appearance of the defendant at trial without imposing undue financial burdens on him and his family

and without an undue deprivation of liberty. Illinois has for eleven years operated under a plan in which a defendant pays ten per cent of the bail set to the court clerk rather than to a professional bondsman. Unlike the present system which provides no incentive for the defendant's return, the Illinois plan refunds ninety per cent of the deposit to the defendant, retaining ten per cent of the deposit as costs. Despite warnings of dire consequences by the bondsmen's lobby, the rate of forfeitures in Illinois has not increased under the new system. This is one plan of pretrial release adopted by the code. The other is a provision for the increased use of recognizance release. This method of pretrial release is used sparingly today because there is no provision to punish a defendant who fails to honor his promise to appear. The new Criminal Code provides for that event. In addition, a list of factors to be considered by the court in its discretionary decision to use or not use a recognizance release is included. Likewise, conditional releases, restricting the defendant's activities on release or requiring him to report periodically, are specifically approved to take advantage of supervision services where they exist. On a broad scale, the code's provisions for pretrial release of an accused person ensure that the ease of his obtaining pretrial freedom will be directly related, not to his financial liquidity, but to the likelihood that he will return for trial as directed.

5. *Bifurcated Trials and Jury Instructions.* One of the most innovative features of the proposed Code of Criminal Procedure is the increased rationality made possible in the sentencing decision. In effect, the blindfold created by exclusionary rules of evidence is removed from the eyes of the jury for the sentencing decision. This is made possible without prejudicing the jury's determination of guilt or innocence by providing for bifurcated trials, i.e., separate hearings on the issue of sentence. The code provides that, in the event of a jury trial for a felony, the jury first hear evidence and return a verdict of guilty or not guilty. This procedure should greatly simplify the jury's task and eliminate the illogical jury process so often observed where the punishment is first agreed on and the appropriate degree of offense then selected.

The major concern of those who presently oppose the use of the bifurcated trial in Tennessee has been that, although it may improve the quality of the sentencing decision, the separate hearings would require a great deal more judicial and prosecutorial time than is now expended under the unitary trial system. Inquiries directed to judges and prosecuting attorneys in Texas, where the system has been in operation for seven years, have shown this fear to be unjustified. The unanimous Texas opinion is that the bifurcated trial system has not slowed the criminal justice system. One judge operating under that system boasts to having the fastest felony docket in the United States.

More importantly, however, the sentencing decision will for the first time be an intelligent exercise of judgment rather than an uninformed and irrational response to a difficult request. The same jury that returns a guilty verdict, or the judge if jury sentencing is waived by the defendant, will immediately, and in context of the facts of the crime, hear evidence and argument relevant to the proper sentence to be im-

posed. In this hearing evidentiary rules designed to avoid prejudicing the jury's decision on the merits are not applicable. Prior convictions, or the lack of them, character, family status and community standing all are relevant to the decision of what sentence to impose. In this way the sentencing authority—judge or jury—can tailor the sentence to fit the defendant's need for rehabilitation and punishment and the public's need for protection. The sentencing decision thus made would yet fail to accurately reflect the jury's assessment of the facts were it not for the code's provision for more informative jury instructions. The code calls for the jury to be informed of the law concerning eligibility and grounds for parole. This will lead less to the imposition of longer sentences than to a greater awareness by the public of the purpose and function of parole and a greater respect for the judicial and corrective processes.

6. *Plea Negotiation.* The proposed code establishes for the first time a procedure for recognized plea negotiation. Although the existence of the "plea bargain" in Tennessee is too well known to deny, almost every day the prosecutors, defense counsel, defendants and judges pretend for the record that no promises or "deals" have been made. The defendant is told that the settlement will be honored but that he must not tell the judge that he has been promised anything. The judge asks him if his plea is free and voluntary and induced by his belief that he is guilty. Meanwhile the attorneys hold their breaths and hope that he does not blurt out the heresy that he is pleading guilty in order to prevent the jury from throwing the book at him on the more serious charges which the prosecuting attorney has promised to drop. This is an unhealthy situation at best. It must now be recognized that plea bargaining takes place and in fact is necessary unless we are willing to vastly increase the size of our judiciary and prosecutors' staffs. Case decisions state that if plea bargaining is to be done, "we should exhume the process from stale obscurantism and let the fresh light of open analysis expose both the prior discussions and agreements of the parties, as well as the court's reasons for its resolution of the matter." The proposed code makes plea negotiation discretionary between prosecution and defense but forbids judicial participation in the negotiation. If an agreement is reached, it is then explained to the judge who may accept or reject it, stating the reasons for his actions. If the agreement is rejected it is not binding on either party and not admissible as evidence of the defendant's guilt. This procedure will ensure that negotiations will be conducted in good faith and that any agreements will be honored. Moreover, an important process in our criminal justice system will be recognized and legitimized.

7. *Restoration of Citizenship Rights.* The Code of Criminal Procedure effects a much needed reform in the legal status of ex-convicts by abolishing the expensive and cumbersome procedure prescribed by present law for the restoration of a released felon's civil rights. In place of the provision requiring the ex-convict to petition the court, the code grants an automatic and complete restoration of rights upon the issuance of the certificate of final discharge at the successful completion of

parole. In addition, the infamous crime provisions of present law are replaced by a simple and direct statement of the rights lost upon imprisonment. Following the lead of the recent elections code, voting rights are removed only during actual incarceration. The right to hold public office is restored upon release from parole, allowing the public to elect an ex-felon to office if it so chooses.

CONCLUSION

The Law Revision Commission does not offer the Criminal Code and Code of Criminal Procedure as a panacea for the crisis in criminal law with which our nation and state are beset. The criminal law and procedure are but two links in the criminal justice chain, and their strengthening, while essential, is by no means sufficient. The drafts are, rather, a logical initiation of what must be a continuing process of law revision and improvement of the criminal justice system.

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ABBREVIATIONS

As amended	As amended or enacted by the Criminal Law Revision act.
ABA Appellate Review Standards	American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Approved Draft 1968).
ABA Pretrial Release Standards	American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release (Approved Draft 1968).
ABA Sentencing Standards	American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (Approved Draft 1968).
ABA Trial Disruption Standards	American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to the Judges' Role in Dealing with Trial Disruptions (Approved Draft 1968).
Cal. Prop. Pen. Code	California Joint Legislative Committee for Revision of the Penal Code (Tentative Draft Nos. 1, 2, 3, 1967, 1968, 1969).
Fed. Prop. Crim. Code	National Commission on Reform of Federal Criminal Laws, Federal Criminal Code (Study Draft 1970).
Hawaii Prop. Pen. Code	Judicial Council of Hawaii, Penal Law Revision Project, Hawaii Penal Code (Proposed Draft 1970).
Mich. Prop. Pen. Code	Michigan State Bar Committee for the Revision of the Criminal Code, Revised Criminal Code (Final Draft 1967).
Model P. C.	American Law Institute, Model Penal Code (Proposed Official Draft 1962).
Model Pre-Arraignment Code	American Law Institute, Model Code of Pre-Arraignment Procedure (Tentative Draft No. 2, 1969).
Model Sentencing Act	National Council on Crime and Delinquency, Model Sentencing Act (1963).

N. H. Prop. Crim. Code	New Hampshire Commission to Recommend Codification of Criminal Laws, Proposed Criminal Code (1969).
N. Y. Prop. Crim. Proc. Law	New York Temporary Commission on Revision of the Penal Law and Criminal Code, Proposed Criminal Procedure Law (1967).
Pa. Prop. Crim. Code	Pennsylvania Joint State Government Commission, Proposed Crimes Code (1967).
T.C.A. Title 39, as amended	The proposed Criminal Code as set out in this draft.
T.C.A. Title 40, as amended	The proposed Code of Criminal Procedure as set out in this draft.
Tex. C.C.P. Prop. Rev.	Texas Bar Committee on Revision of the Penal Code, Conforming Amendments (Final Draft 1970).
Tex. P. C. Prop. Rev.	Texas Bar Committee on Revision of the Penal Code, Texas Penal Code, A Proposed Revision (Final Draft 1970).

TABLE OF CONTENTS

TITLE 39—CRIMINAL CODE

CHAPTER 1. GENERAL PROVISIONS

CHAPTER 2. BURDEN OF PROOF

CHAPTER 3. MULTIPLE PROSECUTIONS AND DOUBLE JEOPARDY

CHAPTER 4. CULPABILITY GENERALLY

CHAPTER 5. CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

Subchapter A. Complicity

Subchapter B. Corporations and Associations

CHAPTER 6. GENERAL DEFENSES TO CRIMINAL RESPONSIBILITY

CHAPTER 7. JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY

Subchapter A. General Provisions

Subchapter B. Justification Generally

Subchapter C. Protection of Persons

Subchapter D. Protection of Property

Subchapter E. Law Enforcement

Subchapter F. Special Relationships

CHAPTER 8. PUNISHMENTS

Subchapter A. General Provisions

Subchapter B. Fines

Subchapter C. Imprisonment

Subchapter D. Exceptional Sentences

Subchapter E. Corporations and Associations

CHAPTER 9. PREPARATORY OFFENSES

CHAPTER 10. CRIMINAL INSTRUMENTS

CHAPTER 11. CRIMINAL HOMICIDE

CHAPTER 12. KIDNAPPING AND FALSE IMPRISONMENT

CHAPTER 13. SEXUAL OFFENSES

CHAPTER 14. ASSAULTIVE OFFENSES

CHAPTER 15. OFFENSES AGAINST THE FAMILY

CHAPTER 16. ARSON AND OTHER PROPERTY DAMAGE OR DESTRUCTION

CHAPTER 17. ROBBERY

CHAPTER 18. BURGLARY AND CRIMINAL TRESPASS

CHAPTER 19. THEFT

CHAPTER 20. FRAUD

Subchapter A. General Provisions

Subchapter B. Forgery

Subchapter C. Credit

Subchapter D. Other Deceptive Practices

CHAPTER 21. BRIBERY AND CORRUPT INFLUENCE

CHAPTER 22. PERJURY AND OTHER FALSIFICATION

CHAPTER 23. OBSTRUCTING GOVERNMENTAL OPERATION

CHAPTER 24. ABUSE OF OFFICE

CHAPTER 25. DISORDERLY CONDUCT AND RELATED OFFENSES

TITLE 40—CODE OF CRIMINAL PROCEDURE

CHAPTER 6. STOP, HALT, AND ARREST WITHOUT WARRANT

Subchapter A. Stopping Persons for Investigation

Subchapter B. Halt and Search at Roadblock

Subchapter C. Arrest Without Warrant

CHAPTER 7. ARREST WARRANT AND CRIMINAL SUMMONS

CHAPTER 8. SEARCH AND SEIZURE

Subchapter A. Search Warrant

Subchapter B. Seizure, Forfeiture, and Disposition of Seized Property

CHAPTER 9. PRELIMINARY EXAMINATION

CHAPTER 10. INITIATION OF PROSECUTION

CHAPTER 11. GRAND JURY FORMATION AND PROCEEDINGS

CHAPTER 12. PRETRIAL RELEASE

CHAPTER 13. ARRAIGNMENT AND PLEAS

Chapter 23. Judgment and Sentence

Subchapter A. General Provisions

Subchapter B. Commitment of Defendants Found Not Guilty by Reason of Insanity

Chapter 24. Appeal and Error

Chapter 25. Execution of Judgment

Chapter 26. Collection of Fines and Costs

Chapter 27. Suspension of Sentence

Chapter 28. Parole

Subchapter A. General Provisions

Subchapter B. Eligibility and Grounds for Parole

Subchapter C. Parole, Conditions, Violations, and Discharge

Subchapter D. The Board of Pardons and Paroles

Subchapter E. Out-of-State Supervision

Chapter 29. Executive Clemency

Chapter 30. Post-Conviction Relief

TITLE 39—CRIMINAL CODE

Introductory Provisions

General Principles of Criminal Responsibility

Punishments

Inchoate Offenses

Offense Against the Person

Offense Against the Family

Offenses Against Property

Offenses Against the State and Public Administration

Offenses Against Public Order and Decency

Offenses Against Public Health Safety, and Morals

TITLE 39

CRIMINAL CODE

CHAPTER 1

GENERAL PROVISIONS

39-101. Short title.— This title shall be known and may be cited as the "Criminal Code."

39-102. Objectives of criminal code.—The general objectives of the criminal code are:

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

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

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

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 1.02.
N.Y. Rev. Pen. Law § 1.05.
Fed. Prop. Crim. Code § 102.

Cross-References:

"Conduct" defined, see § 39-107.
Construction of code, see § 39-105.

Comment:

This section undertakes to state the most pervasive general objectives of the code. The statement is included for its own sake, as an explanation of the underlying legislative premises, and also as an aid in the interpretation of particular provisions and in the exercise of the discretionary powers vested in the courts and in the organs of correctional administration.

In subdivision (1) attention is specifically directed to the basic goal of the criminal law, the prevention of harm, without fixing any priority among the means of prevention, which include deterrence of potential criminals and reinforcement of normal instincts to refrain from harmful behavior, incapacitation of persons who are dangerously disposed to engage in criminal conduct, and correction and rehabilitation of those who have such disposition. Subdivisions (2)-(6), while related to the prevention goal, also reflect fundamental considerations of justice and fairness inherent in a society that values individual liberty. Subsection (3) points out one of the primary reasons for the revision of the Tennessee criminal statutes: no uniform system of punishment exists. A specific penalty has been provided for each offense, and the penalty for one offense might now be quite different from that for another offense which is not demonstrably different in seriousness. This problem is discussed at greater length in the comments on penalties.

39-103. Effect of criminal code.—(a) Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute.

(b) The provisions of chapters 1-8 of this title apply to offenses defined by other laws unless the criminal code provides otherwise.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsec. (a): Tex. P. C. Prop. Rev. § 1.03.

Subsec. (b): N.Y. Rev. Pen. Law § 505(2).
Model P. C. § 105(2).

Subsec. (c): T.C.A. 39-102.
Ill. Stat. Ann. ch. 38, §§ 1-3, 1-4.

Cross-References:

"Conduct" defined, see § 39-107.

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

General principles of criminal law:
- Burden of proof, see ch. 2.
- Criminal responsibility for conduct of another, see ch. 5.
- Culpability generally, see ch. 4.
- General defenses, see ch. 6.
- Justification, see ch. 7.
- Multiple prosecutions and double jeopardy, see ch. 3.
- Punishments, see ch. 8.

Justification, effect on civil liability, see § 39-705.

"Law" defined, see § 39-107.

Preemption by code:
- Arson, see § 39-160?.
- Burglary, see § 39-1805.
- Criminal instruments, see § 39-1002.
- Criminal mischief, see § 39-1607.
- Disorderly conduct, see § 39-2512.
- Drugs, see § 39-2916.
- Family offenses, see § 39-1507.
- Gambling, see § 39-2708.
- Obscenity, see § 39-2642.
- Obstructing governmental operation, see § 39-2313.
- Prostitution, see § 39-2642.
- Sexual offenses, see § 39-1310.
- Theft, see § 39-1911.
- Trespass, see § 39-1805.

Punishments, other remedies preserved, see § 39-805.

"Rule" includes regulation, see § 39-107.

Saving provisions, see § —— of code act.

Comment:

Principle of Legality.

Subsection (a) is designed to complete the process of replacing common-law crimes with statutory offenses. Present Tennessee law recognizes common-law crimes where no statute occupies the field, i.e., false imprisonment, smuggling, and lewdness and lasciviousness. Goff v. State, 186 Tenn. 212, 209 S. W. (2d) 13 (1948). The supersession of all common-law definitions of particular offenses does not mean, however, that the large mass of interpretative rules developed under the common law is superseded. The subsection recognizes that governmental bodies other than the legislature possess authority to define offenses—penal ordinances and offenses created by state regulatory agencies are examples—and that when not preempted by this code and otherwise valid these offenses are fully enforceable.

General Principles.

The general principles of criminal law, for the first time comprehensively treated and codified in this state, are designed to provide a framework for the interpretation and application of every law now in effect or later enacted that employs a penal sanction, whether or not it is located in this code. The proviso to subsection (b), excepting application of the general principles when this code so provides, accommodates provisions like § 805 (sentencing combinations), which authorizes penalties such as license revocation and injunction in addition to the punishments provided in ch. 8.

Civil Remedies.

Subsection (c) is a restatement of T. C. A. § 39-102. Tennessee case law has established a consistent rule that a judgment of acquittal in a criminal case constitutes no bar to subsequent civil actions. Gaylon v. State, 189 Tenn. 505, 226 S. W. (2d) 270 (1950).

Preemption.

Many laws employing a penal sanction enacted by governmental subdivisions and agencies, especially those enacted by municipalities, overlap, duplicate, and conflict with state criminal law. This code, however, creates a comprehensive law of crimes and punishments, uniformly applicable statewide, and preemption sections in certain chapters (see the cross references column) prohibit enforcement of existing, as well as enactment of new, ordinances, orders, and regulations that affect conduct covered (either by inclusion or omission) in this code.

When both a local ordinance and a general state law deal with the same area, there is often a question under present law whether both may coexist. Tennessee case law demands that an ordinance must not be "inconsistent with" the constitution and laws of the state. Smith v. Knoxville, 40 Tenn. (3 Head) 245 (1859). It has also been held that ordinances must be consonant with the "general provisions of the common law . . . ." Jones v. Nashville, 109 Tenn. 550, 72 S. W. 985 (1903). Because no consistent rationale has been developed for determining when state law preempts local legislation, it is essential for this code to specify when governmental subdivisions and agencies may and may not regulate conduct by criminal sanction.

Not every chapter in this code contains a preemption section. Its absence

from some chapters, e.g., 6 (general defenses), 7 (justification), 11 (criminal homicide), recognizes that governmental subdivisions and agencies have no legitimate interest in legislating on the general principles of criminal law or the serious crimes. On the other hand, its absence from other chapters, e.g., 28 (weapons), 20 (fraud), recognizes that municipalities in particular have a legitimate role to play in regulating firearms and deceptive business practices, for example, which they are free to do so long as the regulation does not conflict with any provisions of this code.

39-104. Territorial jurisdiction.—(a) This state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which he is criminally responsible if:

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

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

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

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

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 1.04.
Ill. Stat. Ann. ch. 38, § 1-5.

Cross-References:

"Act" defined, see § 39-107.
Attempt, see § 39-901.
Complicity, see ch. 5, subch. A.
"Conduct" defined, see § 39-107.
Conspiracy, see § 39-902.
Criminal homicide, see ch. 11.
Criminal responsibility for omission, see § 39-403.
Criminal responsibility of corporation or association, see ch. 5, subch. B.
Defense explained, see § 39-203.
Double jeopardy, see ch. 3.
"Element of offense" defined, see § 39-107.
Extradition of fugitive, see T. C. A. tit. 40, ch. 31, subch. A, as amended.
Jurisdiction of Mississippi River, see T. C. A. § 4-103.
"Law" defined, see § 39-107.
"Omission" defined, see § 39-107.
Presumption explained, see § 39-205.
Solicitation, see § 39-903.
Venue, see T. C. A. § 40-301, as amended.

Comment:

This section includes all jurisdictional provisions in present law and in some instances (e.g., prosecution for homicide when the body is found in the state) broadens that jurisdiction. The primary policy considerations underlying this section are (1) the state seeking to prosecute for an offense should have a substantial interest in or connection with the criminal event, and (2) law enforcement should be facilitated by plugging gaps in the existing law when a course of conduct goes beyond the boundaries of a single state. A basic tenet of § 104 is that an actor's location within or without the state when the offense is committed and his legal relation to the offense (perpetrator, non-perpetrating party, or facilitator) are immaterial for jurisdictional purposes if the formal requisites of the statute are met. The section's statement of jurisdiction is constitutionally sound, given a substantial state interest and no conflict with federal law. See Skiriotes v. Florida, 313 U.S. 69 (1941); Strassheim v. Daily, 221 U.S. 280 (1911).

Subsection (a)(1) combines subjective and objective territorial principles presently embodied in T. C. A. §§ 40-101—40-103. Jurisdiction is conferred over offenses commenced within the state but completed without (subjective) and for offenses commenced without the state but consummated within (objective).

Subsection (a)(2) makes clear that this state has jurisdiction when an actor initiates conduct elsewhere with the intention of achieving a criminal objective in Tennessee, which is an offense under Tennessee law, but fails for reasons beyond his control. No existing statute covers out-of-state attempts.

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

Subsection (a)(4) is designed to discourage persons desiring to violate the law of another jurisdiction from seeking a privileged haven in this state. It broadens the scope of existing law, T. C. A. § 40-103, by extending application to attempt, solicitation, and complicity ("criminal responsibility for the commission of") as well as to conspiracy. Furthermore, subdivision (4), applies to any offense and not just to a felony, and it adds to the present law the requirement that the offense in the other jurisdiction also constitutes an offense in this state.

Subsection (b) accords special treatment to the offense of criminal homicide, which would otherwise be controlled by subsection (a)(1), because of the serious nature of the crime, the difficulty of detection, and the fact that the act causing the death and death itself may occur far apart geographically. Present law, T. C. A. § 40-110, confers jurisdiction on this state when an injury resulting from a duel is inflicted out of state by a person without the state and the victim dies within this state. To close the jurisdictional gap that sometimes arises, subsection (b) provides that Tennessee can assume the responsibility for prosecuting a multi-jurisdictional homicide if the death or injury causing death occurs in Tennessee. Thus, when Tennessee is known to be the place of death but the location of the fatal conduct cannot be determined, the offense can be prosecuted in this state. When death within the state is the sole basis for jurisdiction, a constitutional problem might arise if the conduct causing death was not unlawful in the state where it transpired. For example, M shoots and mortally wounds his wife's paramour in state X under circumstances justifying the homicide; the victim dies in a hospital in a neighboring state which asserts jurisdiction on the basis of the death alone. Formulated as a defense, this limitation requires the defendant to introduce evidence to support an ouster of jurisdiction thereby relieving the state of the almost insuperable burden of proof in cases in which only the defendant knows where the fatal conduct took place. The statutory presumption created by subsection (b) also relieves the state of the heavy burden of establishing place of death when there is no affirmative proof of that fact and the victim's body is found in Tennessee. The presumption is of course rebuttable, see § 205, and appears to satisfy the constitutional requirement of a "rational connection" between the fact proved and the fact presumed. See Tot v. United States, 319 U. S. 463 (1943); see also Leary v. United States, 395 U.S. 6 (1969).

The usual application of subsection (c) will probably be in the field of domestic relations (e.g., criminal nonsupport), but it is not so limited.

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

39-105. Construction of criminal code.—(a) The rule that a criminal statute is to be strictly construed does not apply to the criminal code. The provisions of this title shall be construed according to the fair import of their terms, to promote justice and effect the objectives of the criminal code.

(b) The code commission shall publish with the codification of this title the commentary prepared by the law revision commission. The commentary may be used as evidence of legislative intent and as an aid in construing the provisions of this title in the event of ambiguity.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsec. (a): Tex. P. C. Prop. Rev. § 1.05.
N. Y. Rev. Pen. Law § 5.00.
Subsec. (b): Hawaii Prop. Pen. Code § 105.

Cross-References:

Code definitions, see § 39-107.
Computation of age, see § 39-106.
Effect of code, see § 39-103.
Objectives of code, see § 39-102.

Comment:

Present Tennessee law requires penal statutes to be strictly construed. Crowe v. State, 192 Tenn. 362, 241 S. W. (2d) 429 (1951); Estep v. State, 183 Tenn. 325, 192 S. W. (2d) 706 (1946); but c.f. Lovvorn v. State, 215 Tenn. 659, 389 S. W. (2d) 252 (1965). Subsection (a) expressly abolishes the rule of strict construction, a rule seldom cited and then only to support a decision already reached on other grounds.

The comments in this code are intended to explain its provisions and to aid in their interpretation. It should be noted, however, that the language of the sections themselves is intended as the authoritative statement of the law. The comments are not authoritative statements, but are evidence of the considerations which prompted the statutory text.

39-106. Computation of age.—A person attains a specified age on the day of the anniversary of his birthdate.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 1.06.

Cross-References:

Age:
Compelling prostitution, see § 39-2605.
Drugs, see ch. 29.
False imprisonment, see § 39-1202.
Firearm sale, see § 39-2804.
Kidnapping, see § 39-1201.
Obscenity, see § 39-2624.
Sexual offenses, see ch. 13.

Comment:

The victim's age sometimes determines the severity of punishment under this code, and occasionally criminal responsibility itself, so this section prescribes the method for determining a given age. Under this section, for example, a person born July 10, 1955, is legally incompetent to consent to acts amounting to kidnapping (see § 39-1201) until July 10, 1967, the date he attains his 12th year.

39-107. Criminal code definitions.—(a) In the criminal code, unless the context requires a different definition:

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

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

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

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

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

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

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

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

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

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

(11) "Court" means either the judge or the jury or both as the context may require.

(12) "Criminal episode" means all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective or scheme, even though the harm is directed or inflicted upon more than one person.

(13) "Criminal negligence" is defined in § 39-405.

(14) "Deadly weapon" means:

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

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

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

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

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

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

(16) "Element of offense" means:

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

(B) the culpable mental state required; and

(C) an exception to the offense; and

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

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

(18) "Firearm" means any weapon designed, made, or adapted to expel a projectile by the action of an explosive, or any device readily convertible to that use.

(19) "Government" means the state and any political subdivision thereof, and includes any branch or agency of the state, a county, municipality, or other political subdivision.

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

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

(22) "Intentional" is defined in § 39-405.

(23) "Knowing" is defined in § 39-405.

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

(25) "Misdemeanor" means an offense so designated by law or punishable by fine, by imprisonment for less than one year, or by both fine and imprisonment for less than one year.

(26) "Oath" includes affirmation.

(27) "Omission" means failure to act.

(28) "Peace officer" means an officer, employee, or agent of government who has a duty imposed by law:

(A) to maintain public order; and

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

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

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

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

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

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

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

(B) a juror or grand juror; or

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

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

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

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

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

(34) "Reckless" is defined in § 39-405.

(35) "Rule" includes regulation.

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

(37) "Swear" includes affirm.

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

(b) The definition of a term in subsection (a) applies to each grammatical variation of the term. Words importing the masculine gender include the feminine and neuter.

COMMENTS OF LAW REVISION COMMISSION

Comment:

The terms defined in subsection (a) are used throughout the Criminal Code and each use is cross-referenced to this section. Although most of the terms are discussed in the comment to the sections in which they are used, a few general comments about some of them are here desirable.

"Act" is defined to include speech because several offenses in the code punish certain types of speech, e.g., §§ 39-1401 (threat), 39-2501 (disorderly conduct), 39-2506 (false alarm or report).

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

The definition of "association" determines the outer reach of the application of criminal sanctions to organizations; it derives from N. Y. Rev. Pen. Law § 10.00(7). An association is criminally responsible only if the statute defining the offense clearly so provides and the association's agent commits the criminal conduct on behalf of the association and within the scope of his office or employment. See § 39-523 and comment. A "government or governmental subdivision or agency" is included within the definition of association because of the possibility that it may be necessary to impose a criminal stigma to persuade the responsible officials to prevent the commission of wrongful acts. An example is the persistent pollution of a stream by an irrigation district or small city. It is contemplated that criminal prosecution of a government or governmental subdivision or agency will be used only as a last resort to ensure compliance with applicable law. Both New York and Illinois include governmental agencies within the definition of "person" in their revised penal codes, and some courts have held that local governmental units may be held criminally responsible, e.g., Ludlow v. Commonwealth, 247 Ky. 166, 56 S. W. (2d) 958 (1933). A "joint or common economic interest" includes relations such as investment clubs, which may not precisely fit into any other legal categories. Organizations purportedly formed to raise money for some specified charities may also fall into this category. An estate is not included within the definition, even though a trust is included, on the ground that the creation of a trust is voluntary and a trust may be used to conduct a business in lieu of a corporation or a partnership.

The definition of "conviction" tracks that of present law with one exception: a successfully probated sentence is excluded from the definition, whether or not its underlying judgment of guilt was set aside, although present law appears to treat it as a conviction.

The definition of "criminal episode" must be read in context with the code sections in which the term is utilized. See § 39-301 (multiple sentences prohibited following convictions for offenses arising out of same criminal episode); § 39-302 (when prosecution barred by former prosecution for offense arising out of same criminal episode); § 39-845 (concurrent and consecutive terms

of imprisonment for felony); § 39-1908 (aggregation of amounts involved in theft). The purpose of the term is to identify the conduct of a person for which ordinarily, he may be prosecuted and punished but once, even though he has committed several separately defined offenses. The state, however, will be able to charge and try the person for all offenses which he may have committed during the criminal episode in the one criminal action. The concept of a "criminal episode" specifically includes preparatory offenses such as criminal solicitation and criminal conspiracy. See the sections referenced above and accompanying comments for the use of the criminal episode concept.

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

"Element of offense" is a shorthand expression for the issues relevant to guilt or innocence the state must prove to convict. The term does not include every issue as to which the state or defendant has a proof burden—e.g., venue, affirmative defense— because only those listed in the definition are material to the term's use in the code. Thus, although the state must prove the defendant had the required culpable mental state with respect to the proscribed act, it is not required to prove he knew the trial court would have jurisdiction over his offense—although jurisdiction is of course part of the state's burden of proof in every case, see § 39-201.

Unlike present law, "peace officer" is defined functionally, in terms of employment as a public servant and legal duty to maintain law and order. The new definition avoids the problems of enumeration and focuses instead on the nature and function of the office. Thus, park rangers are peace officers, but private citizens specially licensed by a police chief are not peace officers because they are not public servants and not obligated by law to enforce the criminal law. The same definition is used in the Code of Criminal Procedure. See T. C. A. § 40-105, as amended.

The term "person" plays a variety of roles throughout the code. It describes whose bodily, property, and other interests are protected. Beyond that, it serves as a general descriptor for operation of the code, identifying, for example, the beneficiary of a defense and subject of an exception. However, one or more of the terms "individual," "corporation," or "association" is used in the accusatory language of offenses in the code, rather than the shorthand "person," to make clear that unincorporated associations, for example, are or are not covered by the definition of the offense. "Corporation" includes profit and nonprofit corporations, professional associations, and joint stock companies.

A person's "reasonable belief" in the existence of defensive facts exonerates from criminal responsibility under this code even though the facts do not exist. Thus, a reasonable belief in the necessity for using force in self-defense justifies the force under § 39-731, and a reasonable belief that a female is older than 16 is a defense to a charge of statutory rape under § 39-1306. Because this is a penal code, however, the reasonableness of belief is not determined according to the tort law's simple negligence standard, but in terms of recklessness and criminal negligence, two of the four culpable mental states (see § 39-405) used throughout this code to define offenses. A belief is reasonable, therefore, unless the actor in forming it consciously disregarded (recklessness) or ought to have been aware of (criminal negligence) a substantial and unjustifiable risk that the bases for the belief did not exist, and his disregard of or failure to perceive the risk constituted a gross deviation from the standard of care an ordinary person would have exercised under all the circumstances as viewed from the actor's standpoint.

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

Subsection (b) ensures that the definitions set out in subsection (a) apply to

nonsubstantive variations of the defined terms. Thus, the definition of "possess" applies to "possession," that of "knowing" applies to "knows," that of "act" applies to "action," and that of "reasonable belief" applies to "reasonably believes." Subsection (b) also makes clear that references in the code to "he" or "himself" apply equally to women and men.

CHAPTER 2

BURDEN OF PROOF

39-201. State's burden of proof.—(a) No person may be convicted of an offense unless each of the following is proved beyond a reasonable doubt:

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

(2) the culpable mental state required; and

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

(4) the negation of any defense to an offense defined in this code if admissible evidence is introduced supporting the defense.

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

(c) No person may be convicted of an offense unless venue is proved by a preponderance of the evidence.

(d) If the issue is raised in defense, no person shall be convicted of an offense unless jurisdiction and the commission of the offense within the time period specified in title 40, chapter 4, as amended, are proved by a preponderance of the evidence.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 2.01.
Hawaii Prop. Pen. Code § 114.
Model P. C. §§ 1.12, 1.13.

Cross-References:

Culpable mental states defined, see § 39-405.
Defense explained, see § 39-203.
Exception explained, see § 39-202.
Limitation of prosecutions, see T. C. A. tit. 40, ch. 4, as amended.
Venue, see T. C. A. tit. 40, ch. 3, as amended.

Comment:

This section, which continues the traditional principle that a person accused of crime is presumed innocent until the state proves his guilt beyond a reasonable doubt, restates and clarifies the prosecutor's burden of proof by specifying the various issues to which it applies.

Under present law and this section, a defendant is entitled to a jury charge on the presumption of innocence, Gentry v. State, 184 Tenn. 299, 198 S. W. (2d) 643 (1947), and the reasonable doubt doctrine, Owen v. State, 89 Tenn. 698, 16 S. W. 114 (1891).

The issues of venue, jurisdiction, and limitations require a distinct burden of persuasion which must be met by the state—i.e., by a preponderance of the evidence. The burden of persuasion presently required for venue is a preponderance of the evidence. Kelly v. State, 202 Tenn. 660, 308 S. W. (2d) 415 (1957). The requirement on the defendant of

raising these issues is not altered. While proof of venue is required in every case, proof of jurisdiction and limitations is not required unless those issues are raised by the defendant. Present Tennessee law requires proof of venue by the state as a constitutional right of the accused, Tenn. Const., Art. I, § 9. Subject matter jurisdiction need not be alleged and proved at trial, but may be put in issue at any time by defendant. Personal jurisdiction, however, is waived by a plea of not guilty. Dove v. State, 50 Tenn. 348 (1872).

The treatment of an exception and defense as elements of the state's case is discussed in the comment to §§ 39-202 and 39-203.

39-202. Exception.—(a) An exception to an offense in this title is so labeled by the phrase: "It is an exception to the application of . . . ."

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 2.02.

Cross-References:

Affirmative defense explained, see § 39-204.

"Charge" defined, see T. C. A. § 40-105, as amended.

"Conduct" defined, see § 39-107.

Defense explained, see § 39-203.

Comment:

This section, in conjunction with § 39-201(a)(3), specifies the procedural and evidentiary consequences of an exception to an offense in this code. Section 39-202(a) specifies exactly the form of an exception. This reverses prior Tennessee law which requires the defendant to prove that he comes within the exception. Terrell v. State, 210 Tenn. 632, 361 S. W. (2d) 489 (1962). It is important to note, however, the distinction between the content of exceptions in present law and exceptions under this code.

When it is appropriate to require the state to allege and prove that the defendant or defendant's conduct does not fall within the scope of an exception to the offense, the code labels the identity or conduct an exception, and § 39-202(b) provides that an exception has these pleading and burden of proof consequences. On the other hand, if it is appropriate to place a production or proof burden on the defendant to establish a certain ground of defense, the device of a "defense" or "affirmative defense" is employed. Most important is the fact that burden of proof consequences are considered in the drafting process; the decision of which procedural device is appropriate is explicitly made rather than leaving the issue for a later and unpredictable determination by the courts.

Prosecutors have often found the burden of alleging and proving the nonexistence of exceptive facts too onerous. This difficulty most frequently arises with penal statutes that regulate conduct rather than generally prohibit conduct. Since most regulatory statutes are omitted from this code, the device of an exception is used very sparingly and only after careful consideration of the nature of the proof burden involved. The Commission decided, for example, that the prohibition of gifts to a public servant (see § 39-2108) should clearly not apply to a fee prescribed by law. Rather than rely on a defense that would require a public servant to produce evidence that the benefit received was a fee, the device of an exception is employed to require the prosecution to allege and prove that the benefit received was not a fee in order to make a prima facie case.

39-203. Defense.—(a) A defense to prosecution for an offense in this title is so labeled by the phrase: "It is a defense to prosecution under . . . that . . ."

(b) The state is not required to negate the existence of a defense in the charge alleging commission of the offense.

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 2.03.
Ill. Stat. Ann. ch. 38, § 3-2.
Model P. C. § 1.12.

Cross-References:

Affirmative defense explained, see § 39-204.

Exception explained, see § 39-202.

"Law" defined, see § 39-107.

Comment:

Defenses place upon the defendant a burden of proof on an exculpatory issue—usually of excuse or justification—involving facts peculiarly within the knowledge of the defendant. This section provides for labeling this type of defense and specifies its procedural and evidentiary consequences. Present Tennessee law, for example, places the burden upon the defendant to show insanity. Spurlock v. State, 212 Tenn. 132, 368 S. W. (2d) 299 (1963). However, when the presumption of sanity is overcome by sufficient proof of insanity introduced by the defendant, the burden of persuasion then devolves upon the state to show the sanity of the defendant beyond reasonable doubt. King v. State, 91 Tenn. 617, 20 S. W. 169 (1892).

Section 39-203(d) outlines the content of a jury charge on a defense, codifying present case law, King v. State, 91 Tenn. 617, 20 S. W. 169 (1892). The effect of subsection (d) is to require the state to disprove a defense beyond a reasonable doubt after the issue has been properly raised by the evidence. In other words, the defendant has the burden of producing evidence to raise a defense, but the prosecution has the final burden of persuasion to disprove it.

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

39-204. Affirmative defense.—(a) An affirmative defense in this title is so labeled by the phrase: "It is an affirmative defense to prosecution under . . . , which the actor must prove by a preponderance of evidence, that . . . ."

(b) The state is not required to negate the existence of an affirmative defense in the charge alleging commission of the offense.

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 2.04.
N. Y. Rev. Pen. Law § 25.00.
Model P. C. § 1.12.

Cross-References:

Defense explained, see § 39-203.
Exception explained, see § 39-202.

Comment:

This section prescribes the form and procedural and evidentiary consequences of an affirmative defense for which the defendant carries a burden of persuasion. Affirmative defenses are not to be so considered unless specifically designated as affirmative defenses by this code.

Although there are constitutional due process limitations on the imposition of a burden of proof on a criminal defendant, Morrison v. California, 291 U.S. 82 (1934), the imposition is justified in a few situations, e.g., Leland v. Oregon, 343 U. S. 790 (1952). Some of these are situations where the defense does not obtain at all under existing law and this code seeks to ameliorate the law—for example, the defense of renunciation of participation in a criminal conspiracy, § 39-904. Especially if there is something to be said against allowing the defense at all, it is certainly permissible to place the burden of persuasion on the defendant.

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

39-205. Presumption.—When the criminal code or another law establishes a presumption with respect to any fact that is an element of an offense, it has the following consequences:

(1) if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the judge is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact; and

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 2.05.
Fed. Prop. Crim. Code § 103.
Model P. C. § 1.12.

Cross-References:

"Element of offense" defined, see § 39-107.
"Law" defined, see § 39-107.

Comment:

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

This section continues present Tennessee law by authorizing an instruction to the jury on a statutory presumption. See Manier v. State, 65 Tenn. 595 (1872). The introductory clause applies the section not only to presumptions so labeled in this code, but to presumptions, prima facie evidence provisions, and any other language in a penal law that gives some

special significance to certain facts as evidence of an element of an offense.

Section 39-205(1) provides that the prosecutor can get an issue to the jury by presenting evidence of the facts that give rise to the presumption. The judge may, however, withhold the case from the jury, thus preserving the defendant's constitutional right to judicial responsibility for the integrity of the jury trial, see United States v. Gainey, 380 U. S. 63 (1965), and should do so when the evidence as a whole makes it impossible for a rational jury to find the presumed fact beyond a reasonable doubt. The same principles apply, of course, when the judge himself is the trier of fact, and he considers the evidence under the same guidelines as the jury.

Subdivision (2) provides the prosecution with the "bonus" of a court instruction on the relevance of the presumptive facts to the presumed fact. It also outlines the content of a proper charge, avoiding language that implies the defendant has a burden of producing evidence in rebuttal or alludes to a failure of the defendant to testify or explain away the facts that give rise to the presumption.

It should be noted that a proper instruction to the jury under this section makes no explicit reference to the statute that creates the presumption. This was deemed the "better practice" by the Supreme Court in the *Gainey* case. A proper instruction under this section simplifies the judge's task by avoiding any mention of the technical terms "presumption" or "prima facie" and thereby avoids the necessity for a court definition of these terms.

CHAPTER 3

MULTIPLE PROSECUTIONS AND DOUBLE JEOPARDY

39-301. Multiple sentences prohibited following convictions for offenses arising out of same criminal episode.—If a defendant is adjudged guilty of more than one offense arising out of the same criminal episode, he may not be sentenced for more than one offense unless:

(1) one or more of the offenses was severed from the former prosecution under § 40-1605, as amended; or

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

(3) the offenses are not within the jurisdiction of a single court; or

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 3.03.
Cf. N. Y. Rev. Pen. Law § 80.15.

Cross-References:

Aggravated rape, see § 39-1303.
Aggravated sexual abuse, see § 39-1305.
Compulsory joinder of offenses, see T. C. A. § 40-1603, as amended.

Concurrent and consecutive terms of imprisonment, see § 39-845.
"Conviction" defined, see § 39-107.
"Criminal episode" defined, see § 39-107.
Lesser included offenses, see T. C. A. § 40-2203, as amended.
Murder, see § 39-1102.
Offense severance, see T. C. A. § 40-1605, as amended.

Comment:

The Code of Criminal Procedure's compulsory joinder requirement, T.C.A. § 40-1603, as amended, contemplates disposing of all offenses arising out of the same criminal episode in a single trial. This requirement will expedite criminal trial dockets and protect the defendant from multiple prosecutions.

The concept of a "criminal episode" does not affect the determination of whether more than one offense was committed in a particular situation. Tennessee adheres to the common-law view that for a single criminal act there can be only one criminal responsibility. See Huffman v. State, 200 Tenn. 487, 292 S. W. (2d) 738 (1956); Smith v. State, 159 Tenn. 674, 21 S. W. (2d) 400 (1929). Additionally, statutory interpretations as to the number of offenses committed in a specific situation are not affected. See Morgan v. State, 220 Tenn. 247, 415 S. W. (2d) 879 (1967); Usary v. State, 172 Tenn. 305, 112 S. W. (2d) 7 (1938).

If the state secures multiple convictions this section requires with four exceptions a single sentence, presumably for the most serious offense of which the defendant was convicted, because of the principle that a defendant should be sentenced but once for what is a single course of criminal conduct. This requirement is contrary to present case law, which treats as multiple convictions for habitual criminal purposes multiple judgments of guilt obtained at the same trial, if the convictions were for separate offenses, committed at separate locations. State ex rel. Goss v. Bomar, 209 Tenn. 406, 354 S. W. (2d) 243 (1962).

The first three exceptions to the multiple convictions — single sentence requirement, subdivisions (1)-(3), track the exceptions to the compulsory joinder requirement of T. C. A. § 40-1603, as amended. The fourth exception, subdivision (4), recognizes that certain offenses are so serious that a separate sentence is justified for each.

39-302. When prosecution barred by former prosecution for offense arising out of same criminal episode.—(a) If a defendant has been prosecuted for one or more offenses arising out of a criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(1) the subsequent prosecution is for an offense that was or should have been tried under § 40-1603, as amended, in the former prosecution; and

(2) the former prosecution:

(A) resulted in acquittal; or

(B) resulted in conviction; or

(C) was improperly terminated; or

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

(b) There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of facts or in a determination that there was insufficient evidence to warrant conviction. Notwithstanding § 39-304 (3), a finding of guilty of a lesser included offense is an acquittal of the greater offense even though the conviction for the lesser included offense is subsequently reversed, set aside, or vacated.

(c) There is a conviction if the prosecution resulted in a judgment of guilt that has not been reversed, set aside, or vacated; a verdict

of guilty that has not been reversed, set aside, or vacated and that is capable of supporting a judgment; or a plea of guilty or nolo contendere accepted by the court.

(d) There is an improper termination of prosecution if the termination takes place before the verdict, is for reasons not amounting to an acquittal, and takes place after a jury has been impaneled and sworn to try the defendant, or, if jury trial is waived, after the first witness is sworn. However, termination of prosecution is not improper if the court declares a mistrial and the defendant consents to the termination or waives his right to object to the termination, or the court finds and states for the record that the termination is necessary because:

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

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

(3) prejudicial conduct in or out of the courtroom, not attributable to the state, or the failure to appear of an essential witness under subpoena, not attributable to the state, makes it impossible to proceed with the trial without injustice to the defendant or state; or

(4) the jury is unable to agree upon a verdict.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 3.04.
Ill. Stat. Ann. ch. 38, § 3-4.
N. Y. Prop. Crim. Proc. Law §§ 20.20, 20.30.

Cross-References:

Compulsory joinder of offenses, see T. C. A. § 40-1603, as amended.
"Criminal episode" defined, see § 39-107.
Former prosecution no bar to subsequent prosecution, see § 39-304.
"Law" defined, see § 39-107.
Lesser included offenses, see T. C. A. § 40-2203, as amended.
Offense severance, see T. C. A. § 40-1605, as amended.

Comment:

This section makes effective the Code of Criminal Procedure's compulsory joinder requirement (see T. C. A. § 40-1603, as amended) by barring subsequent prosecution of an offense that was or should have been joined in the former prosecution.

Situations in which more than one offense have been committed by the same conduct and for which the defense of double jeopardy is not available are the primary focus of this section. The constitutional prohibition against double jeopardy, Tenn. Const., Art. I, § 10, is not applicable if the second indictment is not precisely the same as the first indictment. Wheelock v. State, 154 Tenn. 66, 289 S. W. 515 (1926). Numerous tests are utilized to determine whether the defendant may be subsequently prosecuted for conduct which is essentially part of one criminal offense. If proof of an additional fact is required for the trial of the second offense, double jeopardy does not attach. Eager v. State, 205 Tenn. 156, 325 S. W. (2d) 815 (1959). If the criminal conduct was essentially the same and only the name of the offenses vary, then double jeopardy will prevent a subsequent prosecution. Coffey v. State, 207 Tenn. 260, 339 S. W. (2d) 1 (1959). It is clear that a verdict of guilty of a lesser included offense bars subsequent prosecution on the greater offense originally charged. King v. State, 216 Tenn. 215, 391 S. W. (2d) 631 (1965). Where the defendant's conduct consisted of unrelated substantive offenses arising out of the same conduct, the state is free to prosecute each separately. Smith v. State, 159 Tenn. 674, 21 S. W. (2d) 400 (1929). In the interests of uniformity and preventing undue harrassment of the defendant, the concept of a separate offense is broadened to include all the offenses arising out of a single "criminal episode." The concept of a "criminal

episode," defined in § 39-107, specifically includes preparatory offenses such as criminal solicitation and criminal conspiracy and extends beyond the present concept of acts arising out of one offense.

The section also describes what constitutes a former prosecution, and three of the four concepts used to describe it, which are labeled "acquittal," "conviction," and "improper termination of prosecution," are nothing new to Tennessee law.

Former Acquittal.

The concept of acquittal in subsection (b) is somewhat broader than that in present law, which distinguishes between acquittal and conviction for jeopardy purposes, because the concept of "criminal episode," as defined in § 39-107, is broader than the present law's "same evidence" concept. Under present law a former acquittal bars prosecution for a related offense only if the same evidence necessary to convict at the first trial is necessary to convict at the second, e.g., State v. Cameron, 50 Tenn. 78 (1871). Moreover, it is unclear whether an acquittal not on the merits bars subsequent prosecution, although some cases indicate it does not, e.g., Young v. State, 185 Tenn. 596, 206 S. W. (2d) 805 (1947).

This section abolishes the distinction between former acquittal and former conviction, and subsection (b) makes clear that only a former decision on the merits is material for jeopardy purposes. The second sentence of subsection (b) restates present Tennessee case law. King v. State, 216 Tenn. 215, 391 S. W. (2d) 637 (1965); see Price v. Georgia, 398 U.S. 323 (1970).

Former Conviction.

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

Under present law a defendant may not be convicted of more than one offense arising out of the same "transaction." Coffey v. State, 207 Tenn. 260, 339 S. W. (2d) 1 (1960). However, if separate offenses are committed, the defendant may be tried for one offense and upon conviction for that offense tried for the other criminal offense. Harris v. State, 206 Tenn. 276, 332 S. W. (2d) 675 (1960). The compulsory joinder rules of T. C. A. § 40-1603, as amended, and the definition of criminal episode, § 39-107, will prevent a second trial unless separate trials are authorized by the exceptions contained in the Code of Criminal Procedure. This will alter the present Tennessee law. See King v. State, 216 Tenn. 215, 391 S. W. (2d) 637 (1965); Harris v. State, 206 Tenn. 276, 332 S. W. (2d) 675 (1960).

Improper Termination of Prosecution.

Subsection (d) provides for the attachment of jeopardy short of an acquittal or conviction. Under present law, jeopardy attaches when: (1) the accused is put on trial; (2) upon a valid indictment sufficient in form and substance to sustain a conviction; and (3) the jury has been impaneled and sworn. Etter v. State, 185 Tenn. 218, 205 S. W. (2d) 1 (1947). Subsection (d) is in accord with the present Tennessee law which does not derive from an implicit constitutional provision, but is a rule adopted by the courts. State v. Malouf, 199 Tenn. 486, 287 S. W. (2d) 79 (1956). The principle of improper termination prevents continued harassment of the defendant where the state terminates the first trial for insubstantial reasons and starts over again in hopes of better success on the second trial. Thus, where a nolle prosequi is entered by leave of the court upon the grounds that the proof failed to sustain the indictment, after the jury has heard the case and has been charged by the court, then the accused may not be reindicted for the same offense. State v. Conner, 45 Tenn. 311 (1868). Federal law is consistent with subsection (d), Downum v. United States, 372 U.S. 734 (1963), and it is thus probably constitutionally required.

The exceptions listed in subsection (d), which specify when termination of a prosecution does not constitute jeopardy, generally conform to Tennessee law although the latter is not nearly so specific or precise. The consent of the accused, or a sufficient cause, is necessary for a discharge without jeopardy. State v. Conner, 45 Tenn. 311 (1868). A plea of former jeopardy is barred by sufficient cause, which includes (1) illness of one of the jurors, the defendant, or the court; (2) absence of a juror; (3) impossibility of the jurors agreeing on a verdict; (4) some untoward accident which renders a verdict impossible; and (5) extreme and overwhelming physical or legal necessity. State v. Malouf, 199 Tenn. 496, 287 S. W. (2d) 79 (1956) (dictum). Likewise, where prejudice to the defendant or state is found which is not attributable to the

conduct of the state, the court may declare a mistrial without discharging the defendant. Jones v. State, 218 Tenn. 378, 403 S. W. (2d) 750 (1966). Also, the jury may be discharged without attachment of jeopardy if they are unable to agree upon a verdict. Gang v. State, 191 Tenn. 468, 234 S. W. (2d) 997 (1950). Finally, discharge of the jury due to false statements of a juror on voir dire examination does not bar a subsequent prosecution. Helton v. State, 195 Tenn. 36, 255 S. W. (2d) 694, cert. denied, 346 U.S. 816 (1953).

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

Collateral Estoppel.

This doctrine, seldom applied in the criminal law, was recently accorded constitutional status in Ashe v. Swensen, 397 U.S. 436 (1970). Subsection (a)(2)(D) codifies the collateral estoppel doctrine. The doctrine will probably have limited application, but it could prevent the trial of a nonjoined or severed offense, see T. C. A. § 40-1603, as amended, when a fact necessary to prove that offense was found against the state in the earlier trial of a related offense.

39-303. When prosecution barred by former prosecution in another jurisdiction.—If a defendant's conduct may establish the commission of one or more offenses within the concurrent jurisdiction of this state and of another jurisdiction, federal or state, or within the concurrent jurisdiction of the state and any municipality, a prosecution in the other jurisdiction or by the municipality is a bar to subsequent prosecution in this state if either:

(1) the former prosecution resulted in acquittal, conviction, or improper termination of prosecution, as those terms are defined in § 39-302 and the subsequent prosecution is for an offense arising out of the same criminal episode unless evidence to establish probable guilt of the offense for which subsequent prosecution is sought was not known to the state at the time the first prosecution commenced; or

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 3.05.
Ill. Stat. Ann. ch. 38, § 3-4(c).
N. Y. Prop. Crim. Proc. Law § 20.30.
T. C. A. § 40-305.

Cross-References:

"Conduct" defined, see § 39-107.
"Criminal episode" defined, see § 39-107.
Former prosecution no bar to subsequent prosecution, see § 39-304.

Comment:

This section parallels § 39-302 but applies to former prosecutions in another jurisdiction. The expanded scope of a "criminal episode" also expands the protection afforded a defendant by this prohibition against prosecution for an offense prosecuted in another jurisdiction.

It is important to note here that Waller v. Florida, 397 U. S. 387 (1970), held that a person may not be tried in state court for the identical offense for which he has been tried in a municipal court. The rule in *Waller* was given full retroactive effect in a Tennessee case, Robinson v. Neil, 409 U. S. 505 (1973). The *Waller* rule was codified in T. C. A. § 40-305, which now provides that a dismissal on the merits, acquittal, or conviction of the offense in either court bars prosecution for the same offense in the other court. As pointed out in *Robinson*, "If the offense involved was a serious

one under state law . . . the defendant may have been unintentionally accorded a relatively painless form of immunity from state prosecution" by being tried previously in municipal court. To prevent this situation from arising, § 39-304 specifies that the latter prosecution is not barred if the defendant deliberately procures the former prosecution to avoid the latter.

Additionally, prior decisions allowing a trial in both state and federal courts, where jurisdiction is concurrent, are reversed by this section. Cf., State v. Rhodes, 146 Tenn. 398, 242 S. W. 642 (1922). This revision was necessitated by Benton v. Maryland, 395 U. S. 784 (1969), which applied the fifth amendment of the U. S. Constitution to the states and thus allows a plea of prior jeopardy in the event the defendant has previously been placed in jeopardy by trial in either a state or federal court.

39-304. When prosecution not barred by former prosecution.—Except as provided in § 39-302(b), a prosecution is not barred under § 39-302 or § 39-303 if:

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

(2) the former prosecution was procured by the defendant without the knowledge of the district attorney bringing the subsequent prosecution and with intent to avoid the sentence that might otherwise be imposed; or

(3) the former prosecution resulted in a judgment of guilt held subsequently invalid in a proceeding under title 40, chapter 30, as amended, or on writ of habeas corpus, coram nobis, or similar collateral attack.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 3.06.
Ill. Stat. Ann. ch. 38, 3-4(d).
Model P. C. § 1.11.

Cross-References:
Compulsory joinder of offenses, see T. C. A. § 40-1603, as amended.
Former prosecution, see § 39-302.
Former prosecution in another jurisdiction, see § 39-303.
Lesser included offenses, see T. C. A. § 40-2203, as amended.

Comment:
This section preserves traditional law in Tennessee and elsewhere that permits subsequent prosecution if the court before which the former prosecution was conducted lacked jurisdiction, State ex rel. Austin v. Johnson, 218 Tenn. 433, 404 S. W. (2d) 244 (1966); the former prosecution was fraudulently procured by defendant, see State v. Atkinson, 28 Tenn. 676 (1849); or the former conviction was set aside on collateral attack, Rivera v. State, 1 Tenn. Crim. App. 395, 443 S. W. (2d) 675 (1969).

The exception to the application of this section, which prohibits prosecution for the greater offense following conviction for the lesser included offense even though the conviction was nullified is necessitated by the decision in Price v. Georgia, 398 U. S. 323 (1970), and is explained in the comment to § 39-302.

CHAPTER 4

CULPABILITY GENERALLY

39-401. Requirement of voluntary act or omission.—(a) A person does not commit an offense unless his criminal responsibility is based on conduct that includes either a voluntary act or a conscious omission to perform a voluntary act when he is physically capable of performing it.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 6.01.
N. Y. Rev. Pen. Law §§ 15.00, 15.10.

Cross-References:
"Act" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Criminal responsibility for omission, see § 39-403.
"Omission" defined, see § 39-107.
Possession as act, see § 39-402.

Comment:
"It is a sacred principle of criminal jurisprudence that the intention to commit the crime is of the essence of the crime, and to hold that a man shall be held criminally responsible for an offense of the commission of which he was ignorant at the time would be intolerable tyranny." Duncan v. State, 26 Tenn. (7 Humph.) 148 (1846). Section 39-401 codifies this elementary rule requiring a voluntary act or omission as a predicate to criminal responsibility. This rule may now have constitutional status, see Robinson v. California, 370 U.S. 660 (1962), but in any event it has long been part of Tennessee criminal law.

Note that (a course of) conduct need only include a voluntary act or omission to sustain criminal responsibility. If a drunk operates a motor vehicle, for example, he may not successfully defend against a criminal homicide charge, on the ground he did not perform a voluntary act, by proving he was unconscious when he ran down the victim.

Subsection (b) defines "voluntary" and thus excludes involuntary and unconscious conduct such as convulsion, reflex, and coma.

39-402. Possession as voluntary act.—Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 6.02.
N. Y. Rev. Pen. Law § 15.00.

Cross-References:
"Act" defined, see § 39-107.
"Possess" defined, see § 39-107.

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

The section does not determine whether an actor must know the nature of the thing possessed or just know that he possesses a thing; this issue is determined by the definition of the specific (possessory) offense involved. Some current provisions of Tennessee law absolutely prohibit the possession of specified objects without reference to any accompanying mental state. E.g., T. C. A.

§ 39-2006 (gaming device). Others prohibit possession with intention to accomplish a specified purpose. E.g., T. C. A. § 39-1958 (possession of device for theft of telecommunication service with intent to use the device illegally).

39-403. Criminal responsibility for omission.—A person does not commit an offense if his criminal responsibility is based solely on an omission to perform a voluntary act unless:

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 6.03.
Fed. Prop. Crim. Code § 301.
N. Y. Rev. Pen. Law §§ 15.00(3), 15.10.

Cross-References:

Causation, see § 39-407.
"Law" defined, see § 39-107.
"Omission" defined, see § 39-107.

Comment:

This section codifies the criminal law's traditional reluctance to punish failure to act absent a clear imposition of duty to act on the actor. Many offenses, of course, proscribe omissions to act, and when they do, subdivision (1) permits imposition of criminal responsibility for the omission. Examples of such offenses include §§ 39-1503 (interference with child custody), 39-1504 (criminal nonsupport), 39-2308 (permitting or facilitating escape), and 39-2401 (official misconduct).

Even if the offense itself does not penalize an omission, "[i]t is a well-settled principle of the law, statutory or common, [that] whenever a duty of a public nature is cast on one, any neglect of the duty . . . is indictable." Robinson v. State, 42 Tenn. (2 Cold.) 181 (1865). Subdivision (2) codifies this common-law rule, but narrows it to encompass only duties imposed by statute. Thus, a husband who fails to feed his wife who is too ill to care for herself, or a mother who fails to feed her infant, may be convicted of criminal homicide (chapter 11), if the failure causes the death of the wife or infant, because section 39-1504 imposes a duty of support on the spouse and parent. On the other hand, a niece's failure to feed her invalid aunt, who starves to death as a result, is not guilty of criminal homicide because the niece has no statutory duty of support. Contractual duties, and those arising from a special relationship or fact situation, are thus excluded and will not support the imposition of criminal responsibility.

39-404. Requirement of culpable mental state.—(a) Except as provided in subsection (b), a person does not commit an offense unless he acts intentionally, knowingly, recklessly, or with criminal negligence, as the definition of the offense requires, with respect to each element of the offense.

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 6.04.
N.Y. Rev. Pen. Law §§ 15.10, 15.15 (2).
Cal. Prop. Pen. Code §§ 403, 406, 407.

Cross-References:

"Element of offense" defined, see § 39-107.

Comment:

Subsection (a) preserves the traditional common-law mens rea requirement. Moreover, subsection (b) imbues this requirement with the force of a presumption in accordance with the policy, if not actual practice, of Tennessee case law. Duncan v. State, 26 Tenn. (7 Humph.) 148 (1846); cf. Lambert v. California, 355 U. S. 225 (1957); Morrisette v. United States, 342 U.S. 246 (1952). Despite subsection (b), of course, the legislature is free to dispense with the requirement of a culpable mental state—as it has done in creating the so-called mala prohibita offenses, e.g., T. C. A. § 59-852 (speeding)—but the legislative purpose to provide for punishment without intent must be clear. See Pappas v. State, 135 Tenn. 499, 188 S. W. 52 (1916); compare Lambert v. California, 355 U. S. 225, at 228 (1957) with Powell v. Texas, 392 U. S. 514, at 535 (1968).

If the definition of an offense is silent about whether a culpable mental state is an element of the offense, subsection (b) presumes that one is and subsection (c) requires that it amount at least to recklessness. The better reasoned cases from other jurisdictions have reached this result in interpreting the common-law authorities, see, e.g., People v. Angelo, 246 N. Y. 451, 159 N. E. 394 (1927), although, as Professor Perkins points out, the majority of courts have not distinguished between criminal negligence (inadvertent risk creation), and recklessness (conscious risk creation). R. Perkins, Criminal Law 760-761 (2d ed. 1969). The distinction is made explicit by § 39-405, however, and, because of our traditional reluctance to brand even grossly negligent conduct as criminal, the new code refuses to imply an intent to do so when the definition of an offense is silent about the requirement of a culpable mental state.

39-405. Definitions of culpable mental states.—(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

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

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

(d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur.

The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 6.05.
N. Y. Rev. Pen. Law § 15.05.
Cal. Prop. Pen. Code § 404.
Model P. C. § 2.02.

Cross-References:

"Conduct" defined, see § 39-107

Comment:

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

Present Tennessee statutes evidence a confusing array of words and phrases describing the culpable states of mind. These range from the traditional "intentionally," "willfully," and "maliciously"; to the redundant "willfully, wantonly, and knowingly," "willfully and maliciously," and "wantonly and unnecessarily." Tennessee criminal statutes have not attempted a comprehensive and precise definition of mens rea terms used, leaving the courts to struggle with the problem in specific cases with varying degrees of success. See, e.g., Crow v. State, 136 Tenn. 333, 189 S. W. 687 (1916) (maliciously equated with feloniously); State v. Smith, 119 Tenn. 521, 105 S.W. 68 (1907) (maliciously is used in the broad, legal sense of criminal intention or that state of mind of a person who does a wrongful act intentionally or willfully, and without legal justification or excuse); McGuire v. State, 26 Tenn. (7 Humph.) 54 (1846) (knowingly denotes that state of mind wherein the person charged was in possession of facts under which he was aware he could not lawfully do the act whereof he was charged).

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

One additional aid to analysis incorporated in the new code should be mentioned before discussing the definitions of the culpable mental states set out in this section. The code distinguishes three types of offense elements: the nature of conduct, the circumstances surrounding the conduct, and the result of the conduct. Although the definitions of most offenses prescribe the same culpable mental state for each type of element, some do not, and it is necessary to distinguish the types of elements to avoid confusing the proof requirements for these offenses. For example, § 39-1803 defines criminal trespass as entering another's property knowing the entry is without the owner's consent (circumstances surrounding conduct) and reckless about whether the entry will frighten another (result of conduct). Another example is false imprisonment, § 39-1202: an intentional or knowing (nature of conduct) detention becomes a felony if it recklessly exposes the victim to a substantial risk of serious bodily injury or death (result of conduct).

Subsections 39-405(a) and (b) create a narrow distinction between acting intentionally and knowingly with respect to the nature of conduct or the result of conduct. For example, the owner who burns down his apartment building to collect the insurance doesn't desire the death of his tenants, but he is practically certain it will occur. The distinction is immaterial for many offenses—murder, kidnapping, and arson may all be committed either intentionally or knowingly—but certain offenses have traditionally required proof of a specific intent and the new code preserves this requirement.

Recklessness, as defined in subsection (c), differs markedly from knowingly. Recklessness is conscious risk creation; there is no desire that the risk occur nor an awareness that it is practically certain to occur. Thus the distinction, with respect to circumstances surrounding the conduct, is between awareness (knowledge) of the existence of those

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

Whereas recklessness requires an awareness of risk, criminal negligence, defined in subsection (d), does not require awareness, but instead inquires of the fact-finder whether the actor ought to have been aware of the risk. Criminal negligence is the least defensible basis for the imposition of criminal responsibility, and the commentators have debated for years the desirability of including it in a penal code. The Model Penal Code and every other jurisdiction recently revising its penal law includes criminal negligence, however, and homicide caused by negligence has long been an offense in Tennessee.

Subsection (d) is in line with the case law of Tennessee on the degree of negligence required for criminal culpability. The proposition that criminal liability must be based on a higher degree of negligence than that required for civil liability is well settled. Claybrook v. State, 164 Tenn. 440, 51 S. W. (2d) 499 (1932); Hiller v. State, 164 Tenn. 388, 50 S. W. (2d) 225 (1932); Copeland v. State, 154 Tenn. 7, 285 S. W. 565 (1926). The requirement of a "natural or probable result" occurring has also been articulated. Keller v. State, 155 Tenn. 633, 299 S. W. 803 (1927). Before a person may be branded either reckless or criminally negligent under the new code, the state must prove that (1) the risk he perceived or ought to have perceived was both substantial and unjustifiable, and (2) his disregard of the risk or failure to perceive it constituted a gross deviation from the ordinary standard of care. Under these definitions, for example, a surgeon would not be either reckless or criminally negligent in attempting a life-saving operation during the course of which the patient died even though the chance of success was far less than 50 per cent; the risk, although substantial, was not unjustifiable. Nor would a motorist's striking another automobile suddenly entering a freeway from an access road constitute criminal negligence: his failure to perceive the risk of the other car's presence was not a gross deviation from the ordinary standard of care.

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

> Some principle must be articulated, however, to indicate what final judgment is demanded after everything is weighed. There is no way to state this value-judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the conduct and determine whether it should be condemned. . . . This formulation is designed to avoid the difficulty inherent in defining culpability in terms of culpability, but the accomplishment seems hardly more than verbal; it does not really avoid the tautology or beg the question less.
> . . .
> The jury must find fault and find it was substantial; that is all that either formulation says or, we believe, that can be said in legislative terms. . . .
> Model P. C. § 2.02, Comment at 125-126 (Tent. Draft No. 4, 1955).

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

39-406. Application of culpable mental states.—If the definition of an offense prescribes a culpable mental state but does not specify the conduct, circumstances surrounding the conduct, or result of the conduct to which it applies, the culpable mental state applies to each element of the offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 6.06.
N.Y. Rev. Pen. Law § 15.15.
Cal. Prop. Pen. Code § 405.

Cross-References:

"Element of offense" defined, see § 39-107.

Comment:

This section resolves the ambiguity frequently encountered in criminal statutes, as to which elements of an offense the culpable mental state applies. For example, T.C.A. § 39-4502, proscribing opening packages without consent, provides a sanction for "[a]ny person who willfully cuts, tears, or otherwise opens any . . . article of trade or produce without the direction or consent of the owner . . . ." Does the culpable mental state "willfully" modify only "cut, tear, or open" or does it modify "without consent of the owner" as well so that the state must prove the actor knew he didn't have the owner's consent? Section 39-406 answers this question, when the term describing the culpable mental state does not syntactically modify the conduct, circumstances surrounding the conduct, or result of the conduct in the definition of the offense, by providing that the culpable mental state applies to each of these types of elements of the offense.

39-407. Causation: Criminal responsibility for causing a result.—(a) Subject to the additional requirements in subsections (b) and (c), an element of an offense requiring that an actor cause a result is established if the result would not have occurred as it did but for the actor's conduct.

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

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

(2) was desired or contemplated and occurred in a manner or by a means not so remote, accidental, or dependent on another's volitional act as to have no just bearing on the actor's criminal responsibility or the gravity of his offense

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

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

(2) was within the risk perceived or that which should have been perceived and occurred in a manner or by a means not so remote, accidental, or dependent on another's volitional act as to have no just bearing on the actor's criminal responsibility or the gravity of his offense.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 6.07.
Cal. Prop. Pen. Code § 408.
Hawaii Prop. Pen. Code §§ 214-217.
Model P. C. § 2.03.

Cross-References:

"Act" defined, see § 39-107.
Attempt, see § 39-901.
Complicity, see ch. 5, subch. A.
"Conduct" defined, see § 39-107.

Culpable mental states defined, see § 39-405.
Felony murder, see § 39-1102.
Party to felony murder, see § 39-1102.

Comment:

The causal connection between criminal conduct and a proscribed result (usually some harm to person or property) is clear in the great mine-run of cases. When the actor points a pistol at the victim, pulls the trigger, and the victim falls dead, there is no question of causal connection and the trial court does not charge on the causal issue.

When some agency in addition to the actor contributes to the proscribed result—for example, when the actor shoots X with intent to kill him, but wounds him instead, and X then dies in a traffic collision on the way to the hospital—a causal relation issue is sometimes presented. For the most part Tennessee courts have been forced to decide cause questions in terms of the tort doctrine of proximate causation. The objective of § 39-407 is "to free the [penal] law from the encrusted precedents on 'proximate causation,' offering a principle that will permit both courts and juries to begin afresh in facing problems of this kind." Model P.C. § 2.03, Comment at 135 (Tent. Draft No. 4, 1955).

Cause in Fact.

Section 39-407(a) states the requirement of cause in fact in terms of the universally applied "but for" test. See R. Perkins, Criminal Law 687-90 (2d ed. 1969). One rarely need look beyond subsection (a) to find the required causal relationship; in fact, common sense assumes the existence of a causal connection, because of the unbroken sequence of criminal conduct and resulting harm, in the great majority of criminal cases. In the statistically few fact situations in which the result occurs in a manner or by a means not intended, contemplated, or risked, subsections (b) and (c) focus on the judgmental factors the trier of facts must consider to determine whether the actor is criminally responsible (and the degree of his responsibility) for the result as it actually occurred. In this connection, it should be noted that the first clauses of subsections (b)(1) and (c)(1) state the obvious—if the actor desires, contemplates, or risks a specific result, and the result occurs, naturally he is criminally responsible for the result—but the clauses are necessary for a complete statement of the principle and serve as a predicate for subsections (b)(2) and (c)(2), which deal with the variance problem.

Motivational Cause.

The second clauses of subsections (b)(1) and (c)(2), although also perhaps unnecessary in light of the complicity provisions of this code, are included to make clear that one does not escape criminal responsibility for a result merely because he uses another person or some natural force to accomplish the result. The actor who uses a child unknowingly to administer poison to the actor's victim is criminally responsible under the traditional complicity theory codified in § 39-502. Likewise is the actor who sets a spring gun along a path frequented by his victim, intending to kill him or who imprisons his victim in a storm sewer during a heavy thundershower: the actor causes the death of his victim, by gunshot and drowning, and is criminally responsible for murder in each case. This code deals explicitly with one narrow but recurring causal relation problem in § 39-1102 (felony murder and complicity in felony murder).

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

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

If an actor has the requisite culpable mental state with regard to a proscribed result, but because of an additional cause the result occurs in a manner or by a means different from what he desired, contemplated, or risked, subsections (b)

(2) and (c)(2) set out the factors the trier of facts must consider in determining whether to hold the actor criminally responsible for the result as it actually occurred. Section 39-407 asks the trier of facts whether it is just to hold the actor criminally responsible for the proscribed result even though, because of an additional cause, it occurred in a manner or by a means he did not desire, contemplate, or risk. The standards for determining justness are whether the manner of occurrence was so accidental or the means of occurrence so dependent on another's conduct as to have no just bearing on the actor's culpability.

It should be noted that if an actor intentionally engages in conduct, but the proscribed result comes about in a manner or by a means he did not desire or contemplate, he will nevertheless be guilty of a lesser included offense, usually a criminal attempt under § 39-901. The phrase "gravity of his offense" in subsections (b)(2) and (c)(2) emphasizes this point and makes clear, for example, that an actor who shoots another with intent to kill, but inflicts a nonmortal wound, whereupon the other dies a week later in the hospital when it is burned to the ground by a maniac—that although the actor is not guilty of murder, he is guilty of attempted murder.

Transferred Intent.

Subsection (d) preserves a narrow version of the transferred intent doctrine now applied, although from a different statutory base, by the better-reasoned Tennessee cases, e.g., Sanders v. State, 151 Tenn. 454, 270 S. W. 627 (1925) (defendant shooting at "wrong person" from ambush guilty of attempted murder). If an actor shoots with intent to kill X, but misses and unintentionally kills Y, he is guilty of murder under subsection (d)—as he would be under the law of every American jurisdiction. The application of transferred intent in first degree murder cases has a strange history in Tennessee. Soon after the statutory distinction was drawn between first and second degree murder in 1829, Tenn. Pub. Acts 1829, ch. 23, Tennessee courts decided that the accidental death of a bystander, even though the intended victim's death would have been first degree murder, was murder in the second degree only. Bratton v. State, 29 Tenn. (10 Humph.) 103 (1849). "That this principle [of transferred intent] is correct in reference to murder at common law, is conceded, and that it is equally so, as respects murder in the second degree, and all the inferior grades of homicide, under the statute, is not to be questioned. But that it is wholly inapplicable and directly opposed to both the letter and spirit of the statute as regards murder in the first [degree], we think is clear beyond all doubt." Bratton v. State, 29 Tenn. (10 Humph.) 103, 105 (1849). The legislature eventually rectified this apparent anomaly by adding, in 1932, "any murder in the first degree" to the list of felonies in the perpetration or attempted perpetration of which a homicide would be first degree murder under the felony murder rule. Subsection (d) obviates the need for the application of the felony murder rule, allowing the doctrine of transferred intent to operate logically in this area.

The common-law doctrine of constructive or implied malice, is for the most part emphatically rejected by this code. The only features of the doctrine retained are the felony murder rule, § 39-1102, and the rule of transferred intent, § 39-407(d).

CHAPTER 5

CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

Subchapter A. Complicity

Subchapter B. Corporations and Associations

Subchapter A. Complicity

39-501. Parties to offenses.—(a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 7.01.
Ill. Stat. Ann. ch. 38, § 5-1.
Model P. C. § 2.06(1).

Cross-References:

Complicity, see § 39-502.
Criminal responsibility of corporation and association, see subch. B.
Facilitation of felony, see § 39-503.
Hindering apprehension or prosecution, see § 39-2305.

Comment:

This section abolishes the present distinctions between "principals," "accessories before the fact," and "aiders and abettors." See T.C.A. §§ 39-107—39-112. The reason for the distinctions at common law was probably to mitigate the extraordinary severity of penalties with respect to nonperpetrating parties to crime. The distinctions proved elusive, however, and were abolished in England in 1848. Tennessee, in effect, followed suit by providing the same punishment for accessories before the fact and aiders and abettors as for principals. T. C. A. §§ 39-108, 39-109; but see T. C. A. § 39-2407 (providing maximum life sentence for accessory to first degree murder). T.C.A. § 39-110 provides for the conviction of such parties to stand independently from the conviction or lack thereof of the alleged principal. The verbal distinction, therefore, is virtually without significance and creates unnecessary burdens for the prosecution and jury.

This code does not employ the terms "principal" or "accessory before the fact," or "aider and abettor." Section 39-501 instead provides that one may be charged as a party to the commission of an offense if he is criminally responsible for the conduct of another who perpetrates the offense. Sections 39-502 and 39-503 then provide the standards for determining this vicarious responsibility.

It should be noted that "accessories after the fact" are not included as parties, as in T. C. A. § 39-112. Accessorial criminal conduct is considered interference with the administration of justice and dealt with as a separate offense in § 2305 (hindering apprehension or prosecution).

39-502. Criminal responsibility for conduct of another.—(a) A person is criminally responsible for an offense committed by the conduct of another if:

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

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

(3) having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit

in the proceeds or results of the offense, or to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 7.02.
Ill. Stat. Ann. ch. 38, § 5-2.

Cross-References:
Causation, see § 39-407.
Conspiracy, see § 39-902.
Criminal responsibility of corporation and association, see subch. B.
Facilitation of felony, see § 39-503.
Felony murder, see § 39-1102.

Comment:

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

Subsection (a)(1) is a codification and clarification of present law regarding complicity in an offense committed by an innocent or irresponsible agent. It is a specific application of one of the several general principles of causation set out in § 39-407, and is included here to provide a broader range of culpability than that provided, in subsections (a)(2) and (a)(3), when responsible persons are involved in the commission of the offense. Thus, when an offense may be committed recklessly or with criminal negligence, one who acts recklessly or with criminal negligence through the agency of an innocent or irresponsible person is criminally responsible for that person's conduct. See State v. Morris, 224 Tenn. 437, 456 S. W. (2d) 840 (1970) (defendant's allowing drunken companion to operate defendant's car is proper aider and abettor grounds for conviction of either drunken driving or manslaughter).

Subsection (a)(2) sets out the basic test of complicity and replaces T. C. A. §§ 39-107—39-112, which designate perpetrators and nonperpetrators either "principals" or "accessories before the fact" or "aiders and abettors." It does not substantially change the present complicity test; rather, it specifies that complicitous conduct must be accompanied by intent to benefit in the proceeds or results of the offense, or promote or assist the commission of the offense, whereas the present statutes enumerate a few circumstances and situations from which it is reasonable to infer such an intent.

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

Subsection (b) is included to distinguish clearly between complicity as a basis of criminal responsibility and the inchoate offense of criminal conspiracy.

The present Tennessee law is usually stated to be:

> [A]ll those who assemble themselves together with an intent to commit a wrongful act, the execution whereof makes probable, in the nature of things, a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. Irvine v. State, 104 Tenn. 132, 56 S. W. 845 (1900).

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

In this code criminal conspiracy is defined as an inchoate offense and is punishable as one grade less than the object felony of the conspiracy—e.g., conspiracy to commit a first degree felony is a second degree felony; see § 39-902. However, if the conspiracy results in a completed offense, the criminal responsibility of nonperpetrators for the completed offense must be determined according to the complicity test of this section. Mere membership in a conspiracy is not the basis of responsibility for all substantive offenses committed pursuant to the conspiracy, although a member's conduct pursuant to the conspiracy may in many cases satisfy the requirements of this section.

A cofelon's criminal responsibility for felony murder is specially dealt with in § 39-1102 (murder), and explained in the comment to that section.

39-503. Criminal responsibility for facilitation of felony.—(a) An individual, corporation, or association is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, he knowingly furnishes substantial assistance in the commission of the felony.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 7.03.
N.Y. Rev. Pen. Law §§ 115.00, 115.05.

Cross-References:
"Association" defined, see § 39-107.
"Capital murder" defined, see § 39-1105.
Complicity, see § 39-502.
Criminal responsibility of corporation and association, see subch. B.
Lesser included offenses, see T. C. A. § 40-2203, as amended.

Comment:

This section recognizes a lesser degree of criminal responsibility than that of a party under § 39-502. Although formulated as a substantive offense, the section states a theory of vicarious responsibility because it applies to a person who facilitates criminal conduct of another by knowingly furnishing substantial assistance to the perpetrator of a felony, but who lacks the intent to promote or assist in the felony's commission. The section is new to Tennessee law. In practice a facilitator will probably be charged as a party, but his conviction as a facilitator will be authorized by T. C. A. § 40-2203, as amended (conviction of lesser included offense), if his degree of complicity is insufficient to warrant conviction as a party.

Lacking a lesser degree of complicity, juries and courts have had to choose between full responsibility or none at all. The stepped-down penalties for facilitation reflect the lesser culpability of the facilitator as compared with that of a full-fledged party.

39-504. Defenses excluded.—In a prosecution in which an actor's criminal responsibility is based on the conduct of another, the actor may be convicted on proof of commission of the offense and that he was a party to or facilitated its commission, and it is no defense:

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 7.04.
N.Y. Rev. Pen. Law § 20.05(2), (3).

Cross-References:
Complicity, see § 39-502.
Criminal responsibility of corporation and association, see subch. B.
Facilitation of felony, see § 39-503.

Comment:

Subdivision (1) of this section restates well-established Tennessee law. A person may be guilty of an offense he could not commit personally if he procures or aids another to commit it. Thus, a woman was convicted of rape when she aided and abetted in the offense committed by two men. Bryson v. State, 195 Tenn. 313, 259 S. W. (2d) 535 (1953).

Subdivision (2) clarifies an apparent contradiction in Tennessee law and makes a substantive change. Although T. C. A. § 39-110 provides for trial and conviction of an aider and abettor "whether the principal felon has or has not been previously convicted," case law demands a finding, where the principal has not yet been tried and convicted, that his guilt be proved as an essential element of the case against the accomplice. Givens v. State, 103 Tenn. 648, 55 S. W. 1107 (1899); Self v. State, 65 Tenn. 244 (1873). In fact, Pierce v. State, 130 Tenn. 24, 168 S. W. 851 (1914), held that an accessory before the fact cannot be convicted where the principal has been acquitted. This is similar to the common-law rule on conspiracy that where two are charged and one is acquitted, the conviction of the other cannot stand. Delaney v. State, 164 Tenn. 432, 51 S. W. (2d) 485 (1932). This code rejects the rationale of both rules. See § 39-902(b)(2) (criminal conspiracy) and comment. For this section, the change is the result of the policy determination that a failure of proof in one case should not prevent conviction in another where there is sufficient evidence to sustain the conviction. For the crime of conspiracy the change is much more difficult to justify in terms of legal theory. For further discussion on that point see comment to § 39-902.

39-505. Defenses available.—(a) Unless otherwise provided by law, it is a defense to a prosecution in which an actor's criminal responsibility is based on the conduct of another:

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

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

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

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

(1) by circumstances not present or apparent at the inception of the actor's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal objective; or

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 7.05.
Ill. Stat. Ann. ch. 38, § 5-2(c).

Cross-References:

Affirmative defense explained, see § 39-204.
Complicity, see § 39-502.
Criminal responsibility of corporation and association, see subch. B.
Defense explained, see § 39-203.
Facilitation of felony, see § 39-503.
"Law" defined, see § 39-107.

Comment:

Section 39-505(a)(1) limits certain applications of the complicity principles set out in §§ 39-502 and 39-503. The consenting female in statutory rape, a business man who yields to the extortion of a racketeer, and the parent who pays ransom to a kidnapper either promote or facilitate the commission of the offense, but their status as victims, even though they be "willing" victims, should bar application of the complicity principles.

For other offenses which necessarily require the conduct of at least two parties, this code occasionally makes distinctions between the criminal responsibility of the complicitous parties. Thus the conduct of prostitutes is inevitably incident to the offenses of pandering and managing a whorehouse, but the promotion of prostitution offenses in this code, §§ 39-2603—39-2605, do not contemplate holding the prostitute criminally responsible for those offenses. Similarly, the responsibility of a purchaser of narcotics for the unlawful sale, of the previously unmarried party to a bigamous marriage, and of the woman who has an illegal abortion, is dealt with in the provisions treating those offenses. Subsection (a)(2) simply renders the general complicity provisions inapplicable to those offenses which by definition require more than one person to commit them.

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

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

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

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

Subchapter B. Corporations and Associations

39-521. Subchapter definitions.—In this subchapter, unless the context requires a different definition:

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

(2) "Managerial agent" means:

(A) a partner in a partnership;

(B) an officer of a corporation or association;

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 7.21.
N.Y. Rev. Pen. Law § 20.20.
Ill. Stat. Ann. ch. 38, § 5-4(c).

Cross-References:

"Association" defined, see § 39-107.
Criminal responsibility of agent or managerial agent for his own act, see § 39-525.
Criminal responsibility of corporation or association for act of agent or managerial agent, see § 39-522.
Defense of due care by managerial agent in criminal prosecution of corporation, see § 39-524.

Comment:

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

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

39-522. Criminal responsibility of corporation.—(a) If conduct constituting an offense is performed by an agent acting in behalf of a corporation and within the scope of his office or employment, the corporation is criminally responsible for:

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

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

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

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 7.22.
Ill. Stat. Ann. ch. 38, § 5-4(a).

Cross-References:

"Agent" defined, see § 39-521.
"Law" defined, see § 39-107.
"Managerial agent" defined, see § 39-521.
Punishment authorized for corporation, see § 39-861.

Comment:

Under present Tennessee law corporations have a broad theoretical liability. "It is well settled, both in England and America, that a corporation may be indicted." Louisville & N. R. Co. v. State, 40 Tenn. (3 Head) 523 (1859). In practice, however, criminal prosecution of corporations has been limited to a very few offenses, like maintenance of a public nuisance. See Love v. Nashville Agri. & Normal Inst., 146 Tenn. 550, 243 S. W. 304 (1922). This is due in part to the absence of appropriate sanctions for many crimes. Recent years have seen a greater willingness to enforce the criminal responsibilities of corporations:

> . . . so long as the criminal act [of an agent or officer] is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also, and must be deemed to have "authorized" the criminal act. Continental Baking Co. v. United States, 281 F. (2d) 137, 149 (6th Cir. 1960).

Every state except Texas recognizes the general principle of corporate criminal responsibility. The explicit recognition of corporate criminal responsibility will improve the weapons available to law enforcement to fight economic crimes, including pollution, securities fraud, tax fraud, and antitrust violations.

Section 39-522 sets forth the basic rules determining the extent of corporate criminal responsibility. Obviously, a corporation can act only through agents, and this section defines the extent to which a corporation is criminally responsible for the acts of its agents. There are two tests for determining this responsibility.

Subsection (a).

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

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

Under § 39-524 the corporation may defend against a criminal prosecution on the ground that the managerial agent with supervisory duties over the agent in question exercised due diligence to prevent the commission of the offense.

Undoubtedly, the great bulk of offenses for which a corporation is likely to be prosecuted fall within subsection 39-522(a).

Subsection (b).

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

39-523. Criminal responsibility of partnership or other association.—(a) Except as qualified by subsection (b), a partnership or other association is criminally responsible for an offense if the law defining the offense provides for criminal responsibility of associations and the conduct constituting the offense is performed by a partner or an agent acting in behalf of the partnership or other association and within the scope of his office or employment.

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 7.23.
Model P. C. § 2.07(3).

Cross-References:

"Agent" defined, see § 39-521.
"Association" defined, see § 39-107.
"Law" defined, see § 39-107.
Liability of partnership for fine, see § 39-862.
Punishment authorized for association, see § 39-861.

Comment:

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

Unincorporated associations are criminally responsible under § 39-523(a) only when the law creating an offense so provides; their responsibility is thus considerably narrower than that of corpo-

rations. Throughout this code the term "association" appears in the definition of the offense (e.g., "An individual, corporation, or association commits an offense") when the legislature intends to impose criminal responsibility on associations. The courts must decide, in construing penal laws outside this code, if criminal responsibility of associations is provided.

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

Other jurisdictions recognize that partnerships and other forms of unincorporated associations may be criminally responsible. E.g., United States v. A & P Trucking Co., 358 U.S. 121 (1958) (partnership); United States v. United Mine Workers, 330 U.S. 258 (1947) (labor union). Although there is apparently no Tennessee case law on the criminal liability of partnerships, municipal corporations have been held criminally liable for nonfeasance of public duties, like keeping streets in repair, Chattanooga v. State, 37 Tenn. (5 Sneed) 578 (1858); State v. Murfreesboro, 30 Tenn. (11 Humph.) 217 (1850); abating public nuisances, State v. Shelbyville Corp., 36 Tenn. (4 Sneed) 176 (1856); and erecting railroad crossing signs, State v. Loudon, 40 Tenn. (3 Head) 263 (1859).

Section 39-523 does not deal with the question of whether members of a convicted association, who did not themselves commit the criminal conduct, may be personally liable for criminal fines. That subject is treated as to partnerships in § 39-862.

39-524. Defense to criminal responsibility of corporation or association.—(a) It is a defense to prosecution of a corporation or association under § 39-522(a)(1) or (a)(2) or § 39-523 that the managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 7.24.
Ill. Stat. Ann. ch. 38, § 5-4(b).

Cross-References:

Defense explained, see § 39-203.
"Law" defined, see § 39-107.
"Managerial agent" defined, see § 39-521.

Comment:

This section provides for a defense of "due diligence" in many situations. The offenses for which criminal responsibility is contemplated by §§ 39-522 and 39-523 largely involve economic regulation. The major purpose of these sections in imposing criminal responsibility on corporations or unincorporated associations is to encourage due diligence on the part of managerial personnel to prevent criminal conduct by employees. It is therefore appropriate to permit a corporation or unincorporated association to defend by proof that the criminal conduct occurred despite the exercise of due diligence on the part of supervisory personnel.

A due diligence defense is not available to prosecution under § 39-522(b) because the direct involvement of a majority of the board of directors or a managerial agent is sufficient to impose criminal responsibility even though other managerial agents may have exercised due diligence.

39-525. Criminal responsibility of person for conduct in behalf of corporation or association.—(a) A person is criminally responsible for conduct that he performs in the name of or in behalf of a corporation or association to the same extent as if the conduct were performed in his own name or behalf.

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

(c) If an individual is convicted of conduct constituting an offense performed in the name of or in behalf of a corporation or association, he is subject to the sentence authorized by law for an individual convicted of the offense without regard to the sentence authorized by law for the corporation or association.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 7.25.
N.Y. Rev. Pen. Law § 20.25.

Cross-References:

"Agent" defined, see § 39-521.
"Association" defined, see § 39-107.
"Individual" defined, see § 39-107.
"Law" defined, see § 39-107.
Liability of partners for fine, see § 39-862.
Omission, see § 39-403.
"Person" defined, see § 39-107.
Punishment authorized for corporation and association, see § 39-861.

Comment:

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

CHAPTER 6

GENERAL DEFENSES TO CRIMINAL RESPONSIBILITY

39-601. Insanity.—A person is not criminally responsible for what otherwise would be an offense if at the time of the conduct charged to constitute the offense, as a result of mental disease or defect, he lacked capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 8.01.
Ill. Stat. Ann. ch. 38, § 6-2(a).
Conn. Gen. Stat. § 53-13.
Fed. Prop. Crim. Code § 503.
Cal. Prop. Pen. Code § 530.
Model P. C. § 4.01.

Cross-References:

Admissibility of evidence, see T.C.A. § 40-1407, as amended.
Burden of proof, see § 39-203.
"Conduct" defined, see § 39-107.
Discovery of medical reports, see T. C. A. § 40-1505, as amended.
"Law" defined, see § 39-107.
Notice and pleading, see T. C. A. § 40-1410, as amended.

Comment:

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

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. Daniel M'Naghten's Case, 8 Eng. Rep. 718, 722 (H. L. 1843); see Spurlock v. State, 212 Tenn. 132, 368 S. W. (2d) 299 (1963); Wilcox v. State, 94 Tenn. 106, 28 S. W. 312 (1894).

Section 39-601, in adopting a variation on the Model Penal Code formulation of the test, represents a basic change in Tennessee law for determining mental responsibility. After 1968, however, the formulation enunciated by § 39-601 has been applied by federal courts in Tennessee since the Sixth Circuit adopted it in United States v. Smith, 404 Fed. (2d) 720 (6th Cir. 1968). In *Smith*, the first case presenting the issue to the Sixth Circuit since 1960, the court characterized the Model Penal Code test as one ". . . which a jury will readily comprehend; one which comports with and makes available modern scientific knowledge and one which may serve to aid the continuing development of the . . . law." Indeed, the Model Penal Code and its variations are leading the trend away from M'Naghten in legislatures and state and federal courts. See, e.g., Conn. Gen. Stat. Ann. § 53a-13; Ill. Ann. Stat. ch. 38, § 6-2; Md. Ann. Code Art. 59, § 25(a); Mo. Ann. Stat. §§ 552.010, 552.030; Mont. Rev. Codes Ann. § 95-501; Vt. Stat. Ann. tit. 13, §§ 4801, 4802; Wade v. United States, 426 Fed. (2d) 64 (9th Cir. 1970); Blake v. United States, 407 Fed. (2d) 908 (5th Cir. 1969); United States v. Chandler, 393 Fed. (2d) 920 (4th Cir. 1968); United States v. Smith, 404 Fed. (2d) 720 (6th Cir. 1968); United States v. Shapiro, 383 Fed. (2d) 680 (7th Cir. 1967); United States v. Freeman, 357 Fed. (2d) 606 (2d Cir. 1966); United States v. Currens, 290 Fed. (2d) 751 (3d Cir. 1961); State v. White, 93 Idaho 153, 456 P. (2d) 197 (1969); Hill v. State, 251 N. E. (2d) 429 (Ind. 1969); Terry v. Commonwealth, 371 S. W. (2d) 862 (Ky. 1963); Commonwealth v. McHoul, 226 N. E. (2d) 556 (Mass. 1967); State v. Shoffner, 31 Wis. (2d) 412, 143 N. W. (2d) 458 (1966).

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

Section 39-601 identifies the disorder (mental disease or defect) and then requires the trier of facts to determine if the disorder is present and whether as a result the person lacked capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. This test permits the expert to testify in terms of the "whole man" and frees him from the necessity of making moral judgments. It focuses squarely and honestly on what the commission believes is the appropriate legal policy.

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

Other valid criticisms of the M'Naghten Rules are: (1) the concept of "right and wrong" is essentially an ethical or moral concept which forces the witnesses and decision-maker to make moral, rather than medical, social, and legal judgments; (2) the rules evolved at a time when "faculty psychology" held sway, and today the mind is known not to be neatly compartmentalized; and (3) the rules may well have been intended to apply only to one type of illness, that characterized by delusions. For a complete listing of the various criticisms see The Mentally Disabled and the Law 336 (Lindman & McIntyre ed. 1961).

In its last comprehensive treatment of the subject, the Tennessee Supreme Court stated that "[u]ntil a definitely superior law is presented and enacted by the Legislature, perhaps Tennessee will . . . 'trudge along the now well-traveled pike blazed more than a century ago by M'Naghten.'" Spurlock v. State, 212 Tenn. 132, 368 S. W. (2d) 299 (1963). Since that time the increased implementation of the rule set forth in § 39-601 attests to the advent of a "definitely superior law."

Burden of Proof.

Present Tennessee law places the burden upon the defendant to show insanity. Spurlock v. State, 212 Tenn. 132, 368 S. W. (2d) 299 (1963). However, when the presumption of sanity is overcome by sufficient proof of insanity introduced by the defendant, the burden of persuasion then devolves upon the state to show the sanity of the defendant beyond reasonable doubt. King v. State, 91 Tenn. 617, 20 S. W. 169 (1892). The use of the "defense" device (see § 39-203) retains this type of proof procedure for the issue of insanity.

Disposition of Criminally Insane.

One of the most obdurate of objections to the adoption of a new definition of the insanity defense—and justifiably so—is that no provision is made for safeguarding the public from the irresponsible defendant. In fact, Tennessee is the only state not providing by statute for the commitment of defendants who have in fact committed criminal acts but are not criminally culpable due to insanity. Under those conditions it is reasonable to be circumspect of any change in definition that might result in an increased possibility that dangerous individuals would be summarily released into society.

The Code of Criminal Procedure, however, has virtually eliminated this concern. Subchapter B of T. C. A. tit. 40, ch. 23, as amended, establishes comprehensive provisions for the commitment of defendants found not guilty by reason of insanity. Under those provisions individuals found at trial to have committed or attempted acts that, but for lack of mental capacity, are defined as crimes by chs. 11-18 of this code are automatically committed to the custody of the commissioner of mental health with adequate safeguards to prevent his release while he poses a threat to society. See T. C. A. tit. 40, ch. 23, subch. B, as amended, and accompanying comment.

39-602. Ignorance or mistake of fact or law.—(a) It is a defense to prosecution that the actor was in fact ignorant or mistaken about a matter of fact or law if his ignorance or mistake negated the intent, knowledge, recklessness, or criminal negligence required to establish an element of the offense charged.

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

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

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

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 8.02.
Ill. Stat. Ann. ch. 38 §§ 4-8(a), (b)(4), (c).
Kan. Stat. Ann. § 21-3203(1), (3).

Cross-References:

"Agency" defined, see § 39-107.
Causation, see § 39-407.
Claim of right defense to theft, see § 39-1910.
"Conduct"defined, see § 39-107.
Defense explained, see § 39-203.
"Element of offense" defined, see § 39-107.
Ignorance or mistake about age, see §§ 39-1309, 39-2624.
"Law" defined, see § 39-107.
Lesser included offense, see T. C. A. § 40-2203, as amended.
"Public servant" defined, see § 39-107.
"Reasonable belief" defined, see § 39-107.

Comment:

Subsection (a)—Ignorance or Mistake of Fact.

Subsection (a) restates a principle of present Tennessee law. McGuire v. State, 26 Tenn. (7 Humph.) 54 (1846). Insofar as mistake of fact negatives intent it is a defense to criminal prosecution. Since, with few exceptions, the commission of an offense requires a culpable mental state as well as a proscribed act or omission, ignorance or mistake of any fact that negates the existence of the mental element would require acquittal without the invocation of this section. In other words, ignorance or mistake has only evidential import; it is significant whenever it is logically relevant to negate the required mode of culpability. Subsection (a) is included, then, not to make an addition to the law, but to treat ignorance or mistake as a defense, for which a defendant has the burden of producing evidence and which the prosecution does not have to negate unless raised.

Subsection (a)—Ignorance or Mistake of Law.

Present Tennessee case law states unequivocally, however, that ignorance or mistake of *law* is no defense. Moore v. Lawrence County, 190 Tenn. 451, 230 S. W. (2d) 666 (1950); Adkins v. State, 95 Tenn. 474, 32 S. W. 391 (1895). This apparently simple distinction belies the complexity of the problem. The thrust of the case law statement is directed toward mistake as to the existence or meaning of a criminal law. For example, it is no defense to a charge of criminal homicide that the actor honestly believed that a landowner had legal authority to shoot trespassers on sight. This is still the case under § 39-602. The narrow exception to this proposition is set out in subsection (b) and discussed below. Mistake or ignorance of a noncriminal law, however, may negative the required mental state and thus constitute a defense. In most cases this type of mistake of law could also be characterized as a mistake of fact. The most frequent occurrences of this problem involve legal questions of agency and status (e.g., ownership). It is a defense therefore to a charge of theft that the actor honestly believed that he stood in the legal relationship of owner to the property in question. This defense, assertable under present law and under this section as negating the required intent for theft, is the type of mistake of law defense allowed by subsection (a).

The case of McGuire v. State, 26 Tenn. (7 Humph.) 54 (1846), presents a clear illustration of the mistake of fact and mistake of law defenses. In a prosecution for illegal voting, requiring a "knowing" act, the court stated:

> If the voter believe himself to be 21 years of age, when he is not, and vote, he does not know the existence of the disqualifying fact, and may, on that ground be excused. But if he know that he is only twenty years of age, yet believes he is old enough, in point of law, to vote, such ignorance of the law will not excuse him.

This illustration is still applicable under subsection (a). If, however, the law describing the offense had qualified voters on the basis of ownership of real property, and the defendant reasonably believed that, as a matter of real property law, he was qualified to vote, a contrary finding of law would not criminalize his good faith act.

In effect, then, the explicit recognition of mistake of law as a defense will not change Tennessee law as it is applied. The explicit recognition should, however, help to clear up the confusion in this area of the law.

Subsection (b)—Ignorance or Mistake of Law.

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

Subsection (c)—Lesser Included Offenses.

Subsection (c) makes clear that an actor whose defense of ignorance or mistake is successful may nevertheless be convicted of a lesser included offense that he would have committed had the facts or law been as he believed. If, however, he would have committed an offense other than one included in the offense charged, he must be charged and tried again. See T. C. A. § 40-2203, as amended.

39-603. Intoxication.—(a) Except as provided in subsection (c), intoxication itself is not a defense to prosecution for an offense. However, intoxication, whether voluntary or involuntary, is admissible in evidence if it is relevant to negate an element of the offense.

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

(c) Intoxication itself does not constitute mental disease or defect within the meaning of § 39-601. However, involuntary intoxication is a defense to prosecution if as a result of the involuntary intoxication the actor lacked capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law he allegedly violated.

(d) For purposes of this section:

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 8.03.
Fed. Prop. Crim. Code § 502.
Hawaii. Prop. Pen. Code § 230.
Model P. C. § 2.08.

Cross-References:

"Conduct" defined, see § 39-107.
Defense explained, see § 39-203.
Duress, see § 39-604.
"Element of offense" defined, see § 39-107.
Ignorance or mistake of fact or law, see § 39-602.
Insanity, see § 39-601.
"Law" defined, see § 39-107.
Public intoxication, see § 39-2508.

Comment:

The common-law rule is that intoxication is no defense to crime. It is undisputed that the fact of intoxication does not excuse crime—§ 39-603 retains this rule—but because the commission of a

crime requires both an act and a culpable mental state and because the fact of intoxication is relevant to whether or not an accused acted with the requisite mental state (for example, whether he intended the act or the result), the jury should be able to consider evidence of the accused's intoxication in determining whether he committed a crime. Otherwise, one accused of theft, for example, could be convicted even though at the time of the taking he was so drunk that he could not possibly have been aware of his act and the surrounding circumstance. Cf. Thomas v. State, 210 Tenn. 645, 301 S. W. (2d) 358 (1957). The case of Pirtle v. State, 28 Tenn. (9 Humph.) 663 (1849), stated the rule in succinct terms:

> If the mental status required by law to constitute crime be one of deliberation and premeditation, and drunkenness or other cause excludes the existence of such mental state, then the crime is not excused by drunkenness or such other cause, but has not in fact been committed.

This rule has been followed for over a century. See Baggett v. State, 220 Tenn. 592, 421 S. W. (2d) 629 (1967) (robbery); Bradford v. State, 208 Tenn. 500, 347 S. W. (2d) 33 (1961) (burglary); Walden v. State, 178 Tenn. 71, 156 S. W. (2d) 385 (1941) (rape).

Section 39-603(a) retains the common-law rule disallowing intoxication as a defense but treating it as material when relevant to the determination of whether an offense was committed. Voluntary intoxication, however, cannot negate awareness of a risk, if recklessness is sufficient to establish the offense (subsection (b)), and since criminal negligence is an objective standard, see § 39-405(d), intoxication cannot negate criminal negligence.

Involuntary intoxication, a subject largely overlooked by present law, is treated differently. Like voluntary intoxication, the fact of involuntary intoxication is no excuse for crime, but because the actor is not responsible for his intoxicated condition, it may be introduced not only for any purpose for which voluntary intoxication is admissible, but also to negate recklessness and, under subsection (c), to establish a mental incapacity that would, if the result of mental disease or defect, constitute insanity under § 39-601.

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

Subsection (d)(1) defines intoxication to include any mental or physical imbalance induced by the introduction of any substance into the body. The trier of facts will, of course, consider the degree of imbalance in determining its effect on the conduct; obviously one who drinks to screw up his courage before committing a crime, for example, the intoxication defense cannot avail. The substances that may cause intoxication are not limited, as in present law, to alcohol and drugs, so that future discoveries of substances that alter the personality or otherwise affect conduct will be covered without the need for amendment.

39-604. Duress.—(a) It is a defense to prosecution, except under chapter 11 and § 39-1402, that the actor engaged in the conduct charged to constitute an offense because he reasonably believed he was compelled to do so by the threat or use of unlawful force against his person or the person of another, which threat or use of unlawful force a person of ordinary firmness of will in the actor's situation would not have resisted.

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

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

(d) If the actor's conduct is otherwise justifiable under § 39-721, this section does not preclude that justification.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 8.04.
N. Y. Rev. Pen. Code § 35.35.
Ill. Stat. Ann. ch. 38 § 7-11(b).
Cal. Prop. Pen. Code § 520.
Model P. C. § 2.09.

Cross-References:

Complicity, see ch. 5, subch. A.
"Conduct" defined, see § 39-107.
Defense explained, see § 39-203.
Necessity, see § 39-721.
"Reasonable belief" defined, see § 39-107.
"Unlawful" defined, see § 39-107.

Comment:

Subsection (a) restates the substance of the common-law duress defense, labeling it a defense, which clarifies the procedural and evidentiary consequences of the issue. As in present law, duress is limited to compulsion resulting from another's threat or use of unlawful force against the person, whether the actor or another, but the danger must be of such severity that "a person of ordinary firmness" would not resist. As at common law, Tennessee has held that duress is not a defense to the taking of the life of an innocent person. Leach v. State, 99 Tenn. 584, 42 S. W. 195 (1897). This limitation on the availability of the defense is retained by this section and, in fact, logically extended to exclude the offense of aggravated assault, which often differs from homicide only by fortuity.

Because the mistake defense, § 39-602, operates only to negate a culpable mental state, subsection (a) includes in duress instances where the actor mistakenly, but reasonably, believes he is compelled.

Duress is a favorite defense of one of two or more parties to crime. Subsection (b) resolves the complicity problem by denying the duress defense to one who recklessly subjected himself to compulsion. The prosecution can thus negate duress by proving that the actor recklessly put himself in a situation where compulsion was probable.

Although Tennessee has repudiated the doctrinal underpinning of the common-law presumption that a wife acting in the presence of her husband is coerced, Morton v. State, 141 Tenn. 357, 209 S. W. 644 (1919), subsection (c) makes clear that married women are to be treated no differently than anyone else. There is no presumption of duress; the defense is available only when the husband uses or threatens sufficient force to overcome the resistance of a person of ordinary firmness in the wife's situation.

The defense of justification by necessity, § 39-721, will overlap with duress in some cases. Subsection (d), which provides that the availability of the duress defense does not preclude justification, the necessity defense, is necessary because § 39-721 provides that necessity cannot be raised when another defense is available unless specifically authorized.

39-605. Entrapment.—(a) It is a defense to prosecution that a peace officer, or a person directed by a peace officer, induced the commission of an offense, in order to obtain evidence of the commission for prosecution, by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. However, there is no defense under this section if the peace officer, or person directed by him, merely afforded the actor an opportunity to commit the offense.

(b) The defense provided by this section is available regardless of whether the actor admits commission of the conduct charged to constitute the offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 8.05.
Subsec. (a): N.Y. Rev. Pen. Law § 35.40.
Fed. Prop. Crim. Code § 702.
Cal. Prop. Pen. Code § 550.
Mich. Prop. Crim. Code § 640.
N.H. Prop. Crim. Code § 571:5.
Subsec. (b): New.

Cross-References:

"Conduct" defined, see § 39-107.
Defense explained, see § 39-203.
"Peace officer" defined, see § 39-107.

Comment:

With few exceptions, police methods of detecting crime are invisible, unconfined, unstructured, and unchecked. On some occasions crime detection methods have involved the encouragement or promotion of criminal conduct, occasionally by methods calculated to induce even the innocent to commit a crime. Many courts long ago recognized that some overly zealous police encouragement might constitute a ground of defense, but Tennessee has refused to apply the doctrine of entrapment. See, e.g., Roden v. State, 209 Tenn. 202, 352 S. W. (2d) 227 (1961); Thomas v. State, 182 Tenn. 380, 187 S. W. (2d) 529 (1945); Warden v. State, 214 Tenn. 398, 381 S. W. (2d) 247 (1945). It has been asserted that Tennessee courts have not been faced with a clear-cut case of entrapment. See Parker & Kendrick, 1964 Tennessee Survey, 18 Vand. L. Rev. 1131, 1136 (1964). Moreover, in State v. Goins, 192 Tenn. 32, 237 S. W. (2d) 8 (1950), the Supreme Court noted that ". . . there can be no conviction of the crime of burglary where the owner, by word or act, has encouraged or induced the commission of the crime." This theory was applied in Hagemaker v. State, 208 Tenn. 565, 347 S. W. (2d) 488 (1961), which, although stating that Tennessee does not recognize the defense of entrapment, held as follows:

> [Where the] defendants were lured into the commission of the offense by the informer and the superintendent of the cement plant . . . the defendants were in no sense trespassers on the property of the cement company [and therefore not guilty of burglary].

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

If the causation or inducement element is decided in defendant's favor, subsection (a) focuses on the nature of the inducement methods. This second standard changes the focus of the entrapment defense, as presently recognized in some jurisdictions, which looks to the defendant's criminal proclivities. The defendant's predisposition to commit the crime and, for purposes of the entrapment defense his prior criminal record, are rendered by this section immaterial and thus inadmissible. Rather, § 39-605 focuses on whether, objectively considered, the inducement methods used created a substantial risk of inducing one with innocent intentions to commit the crime. If the inducement attained that intensity, a determination of whether the defendant would have committed the crime with less or no encouragement ordinarily involves unsatisfactory and highly prejudicial (to the defendant) evidence, and is thus rejected as an element of entrapment by this section.

The rationale of this section, looking objectively to the conduct of the peace officers rather than to the actor's criminal predisposition, was recently adopted by the Ninth Circuit in United States v. Russell, 459 Fed. (2d) 671 (9th Cir. 1972), rev'd, — U. S. — (1973). In that case a government agent volunteered to furnish the defendant with an essential and otherwise unobtainable ingredient for the manufacture of an illicit drug. Although the defendant was predisposed to commit the offense, the court found that the agent's actions constituted an intolerable degree of governmental participation in criminal enterprise. The court mentioned as a second ground for its holding that when the government becomes so enmeshed in the criminal enterprise there is a possible violation of due process. It should be noted, however, that § 39-605 requires a further test of the government's activities; it must be such as to create a substantial risk that the offense would be committed by one not otherwise ready to commit it.

Subsection (a) proscribes entrapping methods by persons directed by a peace officer as well as by the peace officer himself. The promotion of crime by anyone for the purpose of enforcing the law is questionable, and it certainly should not be permitted by agents over whom the police have control. Thus the police should, at the very least, apprise their agents of methods not to be used.

Subsection (b) allows the apparent inconsistent pleading of innocence and entrapment. Although the two defenses are ordinarily inconsistent, they are not always. Moreover, other defenses that are logically inconsistent with a denial of guilt, such as insanity, duress, and justification, are permitted.

The treatment of entrapment as a defense is in accord with federal case law. See Robison v. United States, 379 Fed. (2d) 338 (9th Cir. 1967); Notaro v. United States, 363 Fed. (2d) 169 (9th Cir. 1966).

CHAPTER 7

JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY

Subchapter A. General Provisions

39-701. Chapter definitions.—In this chapter, unless the context requires a different definition:

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

(2) "Escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole.

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

39-702. Justification a defense.—It is a defense to prosecution that the conduct of the actor is justified under this chapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P.C. Prop. Rev. § 9.02.
Ill. Stat. Ann. ch. 38, § 7-14.

Cross-References:

"Conduct" defined, see § 39-107.
Defense explained, see § 39-203.

Comment:

By making justification a defense, this section obviates the need for the state to negate in the accusation the existence of justification and places the burden on the defendant to produce some evidence of the justification claimed (if it was not produced as part of the state's case) to raise the issue and merit an instruction to the jury. Once some evidence is produced, however, the state must disprove the existence of the claimed justification beyond a reasonable doubt. See § 39-203 and comment.

This section is consistent with present Tennessee law which requires the defendant to raise the issue of justification and then requires the state to disprove justification beyond a reasonable doubt. See May v. State, 20 Tenn. 541, 420 S. W. (2d) 647 (1967); Young v. State, 30 Tenn. 200 (1850) (self-defense).

39-703. Confinement as justifiable force.—Confinement is justified when force is justified by this chapter if the actor takes reasonable measures to terminate the confinement as soon as he knows he can do so safely, unless the person confined has been arrested for an offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P.C. Prop. Rev. § 9.03.

Cross-References:

Arrest, see § 39-751; T. C. A. tit. 40, chs. 6, 7, as amended.

Arrest for theft of goods held for sale, see T. C. A. § 40-637, as amended.

Comment:

This section is analogous to present Tennessee law which relieves merchants, employees, and officers from both civil and criminal liability for false arrest, false imprisonment, or unlawful detention if the arrest or detention was based on probable cause. T. C. A. §§ 40-824—40-826. Section 39-703 is intended to authorize reasonable alternatives to the use of force. Confinement is recognized as a variety of justifiable force in every provision in this chapter which justifies the use of force.

Restrictions on the use of force imposed elsewhere in the chapter also apply to the use of confinement. For example, confinement in response to verbal provocation alone is not justified because § 39-731 so provides. Because confinement may be a continuing status, § 39-703 conditions the justification on the actor's terminating the confinement as soon as he knows he safely can—he may not throw away the key. However, if the person confined is arrested he may test the legality of this confinement by habeas corpus so the last clause of § 39-703 excepts the termination requirement in the arrest situation.

39-704. Reckless injury of innocent third person.—Even though an actor is justified under this chapter in threatening or using force or deadly force against another, if in doing so he recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in a prosecution for the reckless injury or killing of the innocent third person.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P.C. Prop. Rev. § 9.04.
Wis. Stat. Ann. § 939.48(3).

Cross-References:

"Deadly force" defined, see § 39-701.
Manslaughter, see § 39-1103.
"Reckless" defined, see § 39-405.

Comment:

This section alters the general rule that an injury to an innocent bystander is justified if the actor had been justified in so harming his intended victim. See Caraway v. State, 263 S. W. 1063 (Tex. Crim. App. 1924); C. J. S., Homicide § 112. The actor's culpability is to be measured independently as to each of his victims, whether intended or unintended. If the circumstances are such that the risk created towards a third person is outweighed by the risk created to the actor, or another, and his conduct was not unreasonable, then no liability exists. Nevertheless, there are situations in which the risk to third persons outweighs the risks to one's self or another—for example, shooting at a fleeing robber on a crowded street—and in these situations § 39-704 will hopefully deter the creation of highly unreasonable risks to third persons.

This section is consistent with Tennessee tort law. Reasonable care must be exercised in the use of force. Where the defendant hit a bystander, while shooting at a "peeping tom," she was held to that degree of care exercised by reasonable men. Goodrich v. Morgan, 40 Tenn. App. 342, 291 S. W. (2d) 610 (1956).

39-705. Civil remedies unaffected.—The fact that conduct is justified under this chapter does not abolish or impair any remedy for the conduct that is or may be available in a civil suit.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.05.
Model P. C. § 3.01(2).

Cross-References:

Civil penalty in sentence, see § 39-805.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.

Comment:

This section ensures that chapter 7 will not create privileges in the law of torts. Section 39-705 prohibits the court in a civil suit from expanding the scope of privilege to equal the scope of justification created by chapter 7. Section 39-705 does not, however, speak to the converse—that is, the question of whether, if the justification created in chapter 7 is narrower than current tort privilege, a court may or ought to contract the privilege and thus create liability for conduct heretofore privileged but made unjustifiable by this code.

One of the basic policy decisions embodied in this chapter—that simple (tort) negligence in appraising necessity for using force exculpates the actor because he does not possess sufficient *mens rea* for criminal condemnation—does not speak to the issue of whether the same force should support an award of damages based on the same negligence. Nor does the chapter speak to the issue of who should bear the injury (monetary loss) resulting from the use of force against person or property. In light of these and other differences between tort law and criminal law, § 39-705 permits Tennessee courts on a case-by-case basis to incorporate into the common law of torts those principles of justification found in this chapter that comport with the general principles of tort law. The absence of § 39-705, on the other hand, would leave the law of privilege as is and could result in retention in tort law of the very principles of justification the Commission rejected in revising the criminal law.

Subchapter B. Justification Generally

39-721. Necessity.—Conduct is justified if:

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.21.
Ill. Stat. Ann. ch. 38, §§ 7-13.
N.Y. Rev. Pen. Law § 35.05(2).
Model P. C. § 3.02.

Cross-References:

"Conduct" defined, see § 39-107.
Duress defense, see § 39-604.
"Reasonable belief" defined, see § 39-107.

Comment:

This section enunciates a general principle of necessity justifying conduct that would otherwise be criminal. Necessity is a traditional common-law defense, R. Perkins, Criminal Law 956-61 (2d ed. 1969), and most of the recently enacted penal law revisions have codified it. Although § 39-721 derives generally from the Illinois, New York, and Model Penal Code provisions, it also departs from them in significant detail, especially phraseology, and hopefully represents an improvement in those codes' statement of the principle.

T. C. A. §§ 38-101—38-103 presently authorize a variety of the necessity defense, but only when the threatened harm constitutes an offense to the actor or another. This code's self-defense provision (§ 39-731) distinguishes the self-defense theory from the necessity theory. Also, a few provisions in the present Tennessee Code affirm the necessity principle in application to specific fact situations, e.g., T. C. A. § 59-808 (exceptions to speed laws for emergency vehicles). Tennessee case law appears to follow the rule of necessity justification. However, only one case on point has been discovered, State v. Knoxville, 80 Tenn. 146 (1883), where it was held that the city could burn blankets with no liability in order to prevent the spread of smallpox.

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

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

It is not the actor's personal moral code or ethical standards that determine whether his choosing one harm over another is justified. Rather, subdivision (2) requires the trier of facts to measure his choice according to "ordinary standards of reasonableness." Moreover, subdivision (3) makes the necessity defense unavailable if a legislative purpose to exclude it is expressed elsewhere in the law. Thus, homicide committed by a private citizen to effect an arrest is not justified because § 39-751 so provides.

39-722. Public duty.—(a) Except as qualified by subsections (b) and (c), conduct is justified if the actor reasonably believes the conduct is required or authorized by law, by the judgment or order of a competent court or other tribunal, or in the execution of legal process.

(b) The succeeding sections of this chapter control when force is threatened or used against a person to protect persons (§§ 39-731—39-734), to protect property (§§ 39-741—39-743), for law enforcement (§§ 39-751—39-754), or by virtue of a special relationship (§§ 39-761—39-763).

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

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.22.
Minn. Stat. Ann. § 609.06(1)(b)-(d).

Cross-References:

"Conduct" defined, see § 39-107.
"Deadly force" defined, see § 39-701.
"Law" defined, see § 39-107.
Official misconduct, see § 39-2401.
Official oppression, see § 39-2402.
"Public servant" defined, see § 39-107.
"Reasonable belief" defined, see § 39-107.
Retreat duty:
Crime prevention, see § 39-754.
Law enforcement, see §§ 39-751, 39-753.
Self-defense, see § 39-732.

Comment:

The present Tennessee Code creates some justification for officers by express authorization to commit acts which might otherwise be criminal, e.g., T. C. A. § 40-509, authority to break into house to execute a search warrant; § 40-807, authority to break into house to make an arrest. Section 39-722 restates, expands, and clarifies present law by justifying conduct that is required or authorized by law or by the judgment or order of a competent court or other tribunal.

"Law" is defined in § 39-107 (code definitions) to mean "the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, or a rule authorized by and lawfully adopted under a statute." As stated by Herbert Wechsler, chief reporter for the Model Penal Code, "The law is simply full of public duties of various sorts imposed on officers ranging from game wardens to executioners, and one cannot articulate this law [in a penal code]; therefore, one must accept it." This is as true of Tennessee jurisprudence as any other.

Subsection (a) is formulated in terms of conduct, rather than force against the person, because many laws require or authorize damage to, seizure, or destruction of property. E.g., T. C. A. § 40-509 (authority to break in to execute a search warrant). "Tribunal" is included in addition to "court" to justify acting pursuant to the order or judgment of, for example, an arbitration commission or other official adjudicatory body.

Subsection (b) requires a reasonable belief that the conduct is required or authorized by law; the reasonable belief standard is of course used throughout this chapter. Present law requires an officer executing process to see that it is valid, at his peril. Poteete v. State, 68 Tenn. 261 (1878). This is reversed in order to protect public servants who hold a reasonable belief in the validity of the process. On the other hand, a public servant who knowingly disregards the law or exceeds his authority forfeits his justification under both present law and this section and can be prosecuted for official misconduct or oppression under chapter 24 of this code.

A public servant who is not de jure is nevertheless protected under subsection (a) so long as he operates under a reasonable belief in the lawfulness of his office and authority. Finally, subsection (d)(2) gives the private citizen aiding a public servant in performing his duty the same justification afforded the public servant.

The remainder of chapter 7 deals specifically with problems concerning the use of force and deadly force against a person to protect persons, to protect property, for law enforcement, and in special relationships. Section 39-722(b) therefore refers to these other provisions for controlling effect even though the conduct in question may also involve performance of a public duty. For example, before using force against a person to effect an arrest, a peace officer must comply with the identification requirements of § 39-751.

Section 39-722 does not by itself justify the threat or use of deadly force. Rather, as subsection (c) makes clear, deadly force must be specifically authorized by statute. Thus, before a peace officer may justifiably kill to effect an arrest he must comply with § 39-751.

Subchapter C. Protection of Persons

39-731. Self-defense.—(a) Except as provided in subsection (b), a person is justified in threatening or using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force.

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

(1) in response to verbal provocation alone; or

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

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

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

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

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

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

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

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

Comments of Law Revision Commission

Derivation:

Tex. P.C. Prop. Rev. § 9.31.
Ill. Stat. Ann. ch. 38, §§ 7-1, 7-4, 7-7.
N.Y. Rev. Pen. Law §§ 35.15(1), 35.27.

Cross-References:

Arrest, see § 39-751; T. C. A. tit. 40, chs. 6, 7, as amended.
Consent as defense to assaultive conduct, see § 39-1404.
Deadly force in self-defense, see § 39-732.
Halt at roadblock, see § 39-752.
Identification by peace officer, see §§ 39-751, 39-752.
"Peace officer" defined, see § 39-107.
"Reasonable belief" defined, see § 39-107.
Resisting stop, frisk, halt, arrest, or search, see § 39-2303.
Search and seizure, see T. C. A. tit. 40, ch. 8, as amended.
Stop and frisk, see § 39-752; T. C. A. §§ 40-601—40-606, as amended.
"Unlawful" defined, see § 39-107.

Comment:

This section sets out the basic rules justifying the use of force in self-defense. The formulation employed, which is used throughout the chapter to describe the test of justification, focuses on the existence of necessity, the occasion on which force was used, the degree of force used, and the nature of the conduct to which the force responded. The formulation contemplates a sliding scale of necessity, justifying instant and severe retaliation at the higher end, but only hesitant and mild response at the lower end. Section 39-731 tightens existing law by adding the immediacy requirement to emphasize that the necessity for using force must be exigent.

"Threatening" is included within the terms of the section's justification because many threats constitute offenses. "Unlawful" is defined in § 39-107 to cover, generally, conduct that is either criminal or tortious or both.

Under § 39-731 if other reasonable means are available, e.g., confinement, the use of force would not be immediately necessary for protection and thus not justifiable. Retreat has never been required as a prerequisite to the use of nondeadly force, however, and this section does not require it.

Existence of Necessity.

This section justifies the use of force, and the degree of force used, when the actor reasonably believes it is immediately necessary. "Reasonable belief" is defined in § 39-107 as a belief not formed recklessly or with criminal negligence; and these standards, which include the requirement of viewing the circumstances from the actor's standpoint, are discussed in the comment to § 39-107. Although never defining the terms used, Tennessee courts have consistently applied the reasonable belief standard to the use of both nondeadly and deadly force. Allen v. State, 2 Tenn. Crim. App. 382, 454 S. W. (2d) 171 (1970) ("genuine and well-founded fear"); Hull v. State, 74 Tenn. 249 (1880) ("reasonably believes").

Restrictions on Self-Defense.

Like the present law, § 39-731(b)(1) denies justification to the use of force in response to verbal provocation, however violent or offensive. Freddo v. State, 127 Tenn. 376, 155 S. W. 170 (1913); Williams v. State, 50 Tenn. (3 Heisk.) 376 (1872). Provocative words will not justify even a simple assault. Whitlock v. State, 187 Tenn. 522, 216 S. W. (2d) 22 (1948).

Section 39-731(b)(2) is a revision of the Tennessee law relating to the justification of self-defense for an unlawful arrest. Resistance of unlawful arrest as a justification should not be confused with the allowance of an unlawful arrest as sufficient provocation to reduce murder to manslaughter. See Long v. State, 223 Tenn. 238, 443 S. W. (2d) 476 1969). This reverses prior Tennessee law which allowed the use of force to resist an unlawful arrest. Id. The right of resistance to an unlawful arrest, under prior Tennessee law, did not include the use of deadly force unless the defendant was threatened with great bodily harm or death by the arrest whether lawful or unlawful. Reichman v. Harris, 252 Fed. 371 (1918); Hurd v. State, 119 Tenn. 583, 108 S. W. 1064 (1907). Thus under the present case law of Tennessee a citizen may resist arrest when that arrest is unlawful but he is limited in the force he uses in resistance. Sections 39-731(b)(2) and 39-732 forbid any resistance to a lawful or unlawful arrest unless the officer uses or attempts to use greater force than necessary to make the arrest and the actor has offered no resistance, as set out in § 39-731 (c)(1) and (c)(2).

The Commission believes that the street is not the proper forum for determining the legality of arrest. If the suspect knows it is a peace officer who is trying to arrest him— and §§ 39-751 and 39-752 complement this section by requiring the peace officer to identify himself and manifest his purpose to arrest or stop and frisk—respect for the rule of law requires the suspect to submit to apparent authority. Should a peace officer, before any resistance is offered, use greater force than necessary to arrest, the suspect's self-defense justification is restored by subsection (c) and he may use that degree of force against the peace officer which is immediately necessary to protect himself. A citizen acting in the presence and at the direction of a peace officer is treated the same as a peace officer, and search, stop and frisk, and halt at a roadblock are equated with arrest so that their illegality is also immaterial.

If a person enters into mutual combat with another without any intent to do great bodily harm, and thereupon his adversary resorts to a deadly weapon, he will have the right of self-defense. Gill v. State, 134 Tenn. 591, 184 S. W. 864 (1916). The general rule is that if both adversaries agree upon and willfully engage in mutual combat then they may not invoke self-defense, unless one party utilizes force superior to what was agreed upon. Id. If, however, the actors mutually agreed to settle the difficulty with dangerous or deadly weapons, neither may successfully invoke the law of self-defense.

In order to plead self-defense, an aggressor must withdraw from the controversy and notify his adversary of such withdrawal, unless the assault on him is so fierce and deadly that no time to withdraw is presented. Murphy v. State, 188 Tenn. 583, 221 S. W. (2d) 812 (1949); Smith v. State, 105 Tenn. 305, 60 S. W. 145 (1900). Subsections (b)(4)(A) and (b)(4)(B) continue this

present law. The provocation doctrine, also called the doctrine of imperfect self-defense, has primarily developed in the justifiable homicide setting and is accordingly discussed in more detail in the comment to § 39-732.

39-732. Deadly force.—A person is justified in threatening or using deadly force against another:

(1) if he would be justified in threatening or using force against the other under § 39-731; and

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.32.
Wis. Stat. Ann. § 939.48(1).
La. Rev. Stat. § 14:20(1).

Cross-References:

"Deadly force" defined, see § 39-701.
Deadly force justified:
Law enforcement, see §§ 39-751—39-754.
Public duty, see § 39-722.
"Reasonable belief" defined, see § 39-107.
Retreat not required:
Law enforcement, see §§ 39-751—39-754.
Public duty, see § 39-722.
"Serious bodily injury" defined, see § 39-107.
"Unlawful" defined, see § 39-107.

Comment:

Justification for threatening or using deadly force is treated separately because of the many problems peculiar to it. Nevertheless, the initial determination of whether deadly force is justified is made in terms of whether the use of nondeadly force would have been justified under § 39-731. For example, a person is not justified in using deadly force to resist an illegal arrest unless, under the terms of § 39-731(c), the peace officer used unnecessary deadly force in attempting the arrest. Again, the provoker is not justified in using deadly force, except in the abandonment situation, because § 39-731(b)(4) denies him justification for using nondeadly force.

Deadly Force.

Section 39-107 defines "deadly force" both subjectively and objectively. Thus, force intended to cause death or serious bodily injury is deadly force, as is force, although not so intended, that is nevertheless capable of causing death or serious bodily injury. An example of the latter variety of deadly force is shooting into an occupied automobile. Cf. T. C. A. § 39-613.

Section 39-732 employs the same sliding-scale-of-force formulation found throughout this chapter: only that degree of deadly force immediately necessary to protect is justified.

"The right to kill in self-defense begins where the necessity begins and ends where the necessity ends and one cannot go further than is reasonably necessary in defense of his person." May v. State, 220 Tenn. 541, 420 S. W. (2d) 647 (1967).

Section 39-732 (3) retains the present law of excessive deadly force: if the actor can protect himself short of killing, he must do so on penalty of forfeiting his justification for the unnecessary portion of the deadly force used. Thus, where the defendant followed and administered a third shot to the already twice wounded deceased, he does so without any apprehension of great bodily harm and therefore without justification. Nance v. State, 210 Tenn. 328, 358 S. W. (2d) 327 (1962).

Imperfect Self-Defense.

"Where the defendant, by his conduct, challenges or provokes the fight, and has gone to it armed, with the purpose to use his arms upon his adversary if the emergency occurs, he cannot, after having slain him, say he acted in self-defense. A man may not, under such conditions, provoke a quarrel, and then taking advantage of it, excuse homicide. In such a case, in order for the right of self-defense to arise, the party whose wrongful aggression has brought on the difficulty must not only desist from it, but he must give the adversary notice that he has desisted." Smith v. State, 105 Tenn. 305, 60 S. W. 145 (1900); Irvine v. State, 104 Tenn. 132, 56 S. W. 845 (1900). This statement of Tennessee law on imperfect self-defense is modified by the rule that withdrawal and notification need not be made if the assault is ". . . so fierce and deadly that no time to withdraw is presented." Murphy v. State, 188 Tenn. 583, 221 S. W. (2d) 812 (1949). The underlying rationale of the doctrine of imperfect self-defense is that a person may not take advantage of a necessity he has brought upon himself unless the person whom he attacks responds with a disproportionate degree of force. The Tennessee courts have stressed the fact that justification for the use of deadly force does not exist where the defendant began the assault. However, analysis of the fact situations show that in the great majority of cases, the defendant impliedly expected deadly force to be used or did not withdraw. Sections 39-731 and 39-732 retain present Tennessee law as stated in Murphy v. State, 188 Tenn. 583, 221 S. W. 2d 812 (1949).

When an actor provokes a difficulty and then threatens or uses deadly force, Section 39-732 contemplates that the fact-finder will weigh the respective fault of the parties—the nature of the actor's provocation against the nature of the victim's reaction and the actor's response to that reaction—and resolve the justification issue in terms of the culpable mental state required for the offense allegedly committed by the actor. For example, if a person provokes a difficulty with intent to kill his opponent, and does so, he would be guilty of murder under § 39-1102 of this code. On the other hand, if his provocative conduct does not evidence an intent to kill, or even if it does if the victim reacts with the excessive use of deadly force, the actor may be guilty of manslaughter, aggravated or simple assault, or acquitted, depending on the actor's culpability, if any, in the encounter.

Retreat.

Section 39-732(2) requires retreat before using deadly force if an ordinary person in the actor's situation would have done so. It is difficult to determine the impact of this revision on the present Tennessee case law due to the fact that the word "retreat" is seldom used. Clearly, the present rule that there is no duty to retreat from one's house will be modified to include retreat where ordinary men would have retreated. See State v. Foutch, 96 Tenn. 242, 34 S. W. 1 (1896). However, this rule has never been phrased in absolute terms in that the actor must have reasonable grounds to fear death or great bodily injury and an overt act must have been made by the aggressor. M'Dain v. State, 445 S. W. (2d) 942 (Tenn. Cr. App. 1969). Furthermore, reasonable men, in all probability, will seldom retreat from their own house. The duty to retreat before using deadly force, other than in the confines of one's habitation, has not been the rule in Tennessee and, in fact, the "retreat" terminology has not been utilized by the courts. An actor who initiates an affray, however, before he can excuse himself on the grounds of self-defense must use ". . . all means in his power to escape before resorting to the fatal blow. . . ." Hull v. State, 74 Tenn. 249, 260 (1880).

Retreat is but one of many factors relevant to deciding whether an actor used more force than was justified under the circumstances. Cf. Brown v. United States, 256 U.S. 335 (1921). The Commission firmly believes a person ought to retreat, if he can do so safely, before taking human life; and this duty is set out in § 39-732(2). By measuring the existence and extent of the retreat obligation in terms of the ordinary person in the actor's situation, the Commission contemplates that the fact-finder will make a moral judgment on whether a defendant in a specific case ought to have retreated before threatening or using deadly force. Some would deal expressly with failure to retreat when required, for example, providing that a person who kills is guilty of manslaughter if the fact-finder determines he should have retreated but did not. Because retreat is but one of many factors involved, however, the Commission rejects this approach and intends for the fact-finder to include in its assessment of defendant's culpability his failure to retreat when he should have.

39-733. Defense of third person.—A person is justified in threatening or using force or deadly force against another to protect a third person if:

(1) under the circumstances as the actor reasonably believes them to be the actor would be justified under §§ 39-731 or 39-732 in threaten-

ing or using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.33.
La. Rev. Stat. § 14.22.
Wis. Stat. Ann. § 939.48(4).

Cross-References:

"Deadly force" defined, see § 39-701.
Deadly force in self-defense, see § 39-732.
"Reasonable belief" defined, see § 39-107.
Retreat, see § 39-732.
Self-defense, see §§ 39-731, 39-732.
"Unlawful" defined, see § 39-107.

Comment:

This section assimilates the law of defense of another to that of self-defense. Subdivision (1) refers the fact-finder to §§ 39-731 and 39-732 for the initial determination of whether the actor would have been justified in using force or deadly force to protect himself. If he would have been, and if he reasonably believed his intervention was immediately necessary to protect the third person, he is exonerated.

This section alters the present Tennessee law on defense of a third person. Although the present statute, T. C. A. § 38-103, does not speak to this issue, the Tennessee courts have stated: "[A] person who [intervenes in a defense of another] will not be allowed the benefit of the plea of self-defense, unless such plea would have been available to the person whose part he took in case he himself had done the killing. . . ." Murphy v. State, 188 Tenn. 583, 221 S. W. (2d) 812 (1949). The general rule has been that one who intervenes in a difficulty between others, stands with, and must accept all the responsibilities and liabilities of the party for whom he intervenes. Cooper v. State, 123 Tenn. 37, 138 S. W. 826 (1911). Justification under this section will be based upon the reasonable belief by the actor as to the other's right of self-defense, and not contingent upon the existence of such a right.

39-734. Protection of life or health.—(a) A person is justified in threatening or using force, but not deadly force, against another when and to the degree he reasonably believes the force is immediately necessary to prevent the other from committing suicide or inflicting serious bodily injury on himself.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.34.
N.Y. Rev. Pen. Law § 35.10(4).
Wis. Stat. Ann. § 939.48(5).

Cross-References:

Civil remedies, effect of chapter on, see §§ 39-103, 39-705.
"Deadly force" defined, see § 39-701.
Guardian—incompetent, see § 39-763.
"Serious bodily injury" defined, see § 39-107.

Comment:

This section is essentially new to Tennessee law.

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

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

Subchapter D. Protection of Property

39-741. Protection of own property.—(a) A person in lawful possession of land or tangible, moveable property is justified in threatening or using force, but not deadly force, against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property.

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-742.

39-742. Protection of third person's property.—A person is justified in threatening or using force, but not deadly force, against another to protect land or tangible, moveable property of a third person if:

(1) under the circumstances as he reasonably believes them to be the actor would be justified under § 39-741 in threatening or using force to protect his own land or property; and

(2) the actor reasonably believes:

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.42.
Ill. Stat. Ann. ch. 38, § 7-3.

Cross-References:

Claim of right, see § 39-1910.
Crime prevention, see § 39-754.
"Deadly force" defined, see § 39-701.
"Reasonable belief" defined, see § 39-107.
"Unlawful" defined, see § 39-107.

Comment:

Section 39-741(a) covers defense of one's own possession and subsection (b) reentry or repossession after unlawful dispossession. Section 39-742 justifies force to protect property belonging to specified third persons in certain circumstances. Both sections employ the standard sliding-scale-of-force formulation—only that degree of force reasonably believed to be immediately neces-

sary to protect possession is justified—and both make clear that deadly force is not justified. Present T. C. A. § 38-102 similarly authorizes resistance sufficient "to prevent an illegal attempt by force to take or injure property in [the actor's] lawful possession."

Who May Protect Property.

Under § 39-741(a) a person may use force against another to protect his own property if it is in his "lawful possession." Thus one dispossessed of land by a court order could not forcibly defend it, but one leasing land from lawful claimants to the title could forcibly bar a trespasser.

A person is justified in using force against another to protect a third person's property, under § 39-742, if under the circumstances he would be justified in using the force to protect his own property under § 39-741 and he has a legal duty to protect the property, the third person requested his protection, or the third person is a family member. Clearly a person acting for the owner should be justified in using force to protect the owner's property.

Force may be used only to protect property which falls within the three categories of third persons described in § 39-742(2). These limitations have not previously been applied in Tennessee and there is no case law on the subject.

Nature of Interference and Type of Property.

It is to prevent or terminate a "trespass on the land or unlawful interference with the property" that a person is justified in using force under §§ 39-741 (a) and 39-742.

The prohibition on the use of deadly force in defense of property is consistent with present Tennessee law. Brown v. State, 1 Tenn. Crim. App. 294, 441 S. W. (2d) 485 (1969). Protection of property is no defense to a deadly assault if the wounded party was a mere trespasser. Marks v. Borum, 60 Tenn. 87 (1873).

The term "trespass" used in § 39-741 (a) is not synonymous with, but considerably broader than, the offense of criminal trespass defined in § 39-1803.

By using the terms "land" and "tangible, moveable property," §§ 39-741 and 39-742 apply to both real and corporeal personal property.

Reentry and Recapture.

> . . . If force is allowed to defend possession, it is only a small extension to allow similar force to be used to regain possession immediately after its loss. The ordinary citizen would regard a rule as unjust which attached legal consequences to a momentary advantage obtained by a thief or other wrongful taker. Moreover, it is an ancient principle of the common law, commended by common sense, that when property is retaken on fresh pursuit it is deemed to be taken at the beginning of the pursuit. The retaking is not any the less immediate because the fresh pursuit turns out to be a protracted chase.
> Model P. C. § 3.06, Comment at 44 (Tent. Draft No. 8, 1958).

Section 39-741(a) justifies the use of force to reenter or recover property if the possessor was unlawfully dispossessed of it. The dispossession requirement prevents a chattel mortgagee from forcibly repossessing the chattel from the mortgagor on the latter's default, even though the mortgage so provides, because the mortgagee was not dispossessed of the property. In addition, to justify the use of force to reenter or recover property under § 39-741(b), the force must be used "immediately or in fresh pursuit after the dispossession." This restriction will encourage resort to legal process to recover property except when the immediacy of the dispossession makes resort to self-help likely anyway.

39-743. Use of device to protect property.—The justification afforded by §§ 39-741 and 39-742 applies to the use of a device to protect land or tangible, moveable property if use of the device is reasonable under all the circumstances as the actor reasonably believes them to be when he installs the device.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.43.
Model P. C. § 3.06(5).

Cross-References:

"Deadly force" defined, see § 39-701.
"Reasonable belief" defined, see § 39-107.

Comment:

This section is new to Tennessee law, although its provisions are substantially consistent with the common-law tort rule. See Whirley v. Whiteman, 38 Tenn. (1 Head) 610 (1858). The section contemplates devices such as spike fences and barbed wire whose use may evidence a conditional intent to injure a trespasser and thus without the section constitute an offense.

Note that § 39-743 incorporates the restrictions on the use of force to protect property set out in §§ 39-741 and 39-742. For example, use of a spring gun or mantrap is not justified, because each threatens deadly force, and one is not justified in installing a device on a third person's property unless the third person occupies one of the categories specified in § 39-742(2).

Section 39-743 measures the reasonableness of the use of a device in terms of circumstances apparent at the time of installation. This is contrary to the tort rule—reasonableness is determined according to circumstances extant at the time of injury—which the Commission, however, rejects for the purpose of criminal law.

Subchapter E. Law Enforcement

39-751. Arrest and search.—(a) A peace officer, or a person acting in a peace officer's presence and at his direction, is justified in threatening or using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest or search, or to prevent or assist in preventing escape after arrest, if:

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

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

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

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

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.51.

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

Cross-References:

Arrest, see T. C. A. tit. 40, chs. 6, 7, as amended.

"Deadly force" defined, see § 39-701.

Escape from custody, see § 39-2307.

Evading arrest, see § 39-2304.

Justification to resist arrest or search, see §§ 39-731—39-733.

"Law" defined, see § 39-107.

"Peace officer" defined, see § 39-107.

"Reasonable belief" defined, see § 39-107.

Reckless injury of innocent third person, see § 39-704.

Resisting arrest or search, see § 39-2303.

Search and seizure, see T. C. A. tit. 40, ch. 8, as amended.

"Serious bodily injury" defined, see § 39-107.

Comment:

Whether one is justified in using force to effect an arrest or search turns, in the first instance, on whether he is authorized to make the arrest or search. The law of arrest and search determines who may arrest and search and under what circumstances. Section 39-751 does not of course set out the law of arrest or search, but presumes a lawful arrest or search (whether with or without warrant) or, in the case of a peace officer, one reasonably believed to be lawful.

The section employs the standard sliding-scale-of-force formulation, under which only that degree of force reasonably believed to be immediately necessary to arrest, search, or prevent escape is justified, and this formulation is consistent in substance with present law, T. C. A. § 40-808. In Love v. Bass, 145 Tenn. 522, 238 S. W. 94 (1922), the court stated: "If after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest." However, this rule has been modified in State v. National Surety Co., 162 Tenn. 547, 39 S. W. (2d) 581 (1931) where the court said that "[e]xercise of the power of arrest for a misdemeanor in such manner as to be directly perilous of human life is not authorized by law."

Subsection (a) clarifies existing law on whether force is justified on the basis of a peace officer's reasonable belief in the legality of an arrest or search. Th section reverses the common-law r that an officer acts at his peril if had no right to make an arrest witho a warrant, or if his warrant was n valid. See Poteete v. State, 68 Tenn. 2 (1878); Galvin v. State, 46 Tenn. 2 (1869). Peace officers ought not to ha to determine the legality of an arre or search at their peril, however, sin courts often disagree about legali years after the event.

A private citizen (not acting at peace officer's direction), on the oth hand, determines legality at his per The Commission would frankly disco age citizen arrests, and subsection (requires an arrest lawful in fact and law before a private citizen is justifi in using force to effect it. Note also th the subsection does not mention searc es, thus forbidding a private citizen use force to effect a search.

Both subsections require one about use force to identify himself, and su section (b) requires the private citize to inform the suspect of the reason f the arrest. The present law, T. C. §§ 40-806, 40-818 requires the officer identify himself and state the cause the arrest while the private citizen nee only state the cause of the arrest. T requirement of notification of the cau for arrest by the police officer is elim nated, but retained for the private citize and ratification of identity is require of both. However, if identity and t purpose to arrest and search are ready known to the suspect, Lewis State, 40 Tenn. 127 (1859) (presum to be known), or if making them know was futile, Love v. Bass, 145 Tenn. 52 238 S. W. 94 (1922), neither notice required under present law or und subsection (a) or (b).

The present law does not authori deadly force solely to effect the arres or prevent the escape of a misdemeanan State v. Dunn, 39 Tenn. App. 190, 2 S. W. (2d) 203 (1943); Reneau v. Stat 70 Tenn. 720 (1879), or to prevent th escape of a felon, or effectuate the arre of a felon if there is no reasonab necessity. Scarbrough v. State, 168 Ten 106, 76 S. W. (2d) 106 (1934). Lat cases require the use of deadly force i the arrest of a felon to be absolutel necessary to be justified. Cathey v. Stat 191 Tenn. 617, 235 S. W. (2d) 6 (1951). In those cases no distinction drawn between arrests by private cit zens and peace officers. Subsection (affords peace officers (but not priva citizens, not even those acting at t

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1 OF 6

direction of a peace officer) a narrow justification to use deadly force to arrest or prevent the escape of highly dangerous suspects whose remaining at large create a substantial risk of death or serious bodily injury to another. Cf. Scarbrough v. State, 168 Tenn. 106, 76 S. W. (2d) 106 (1934) (allowing citizens to use deadly force). The justification of this subsection does not extend to searches, and subsection (c) applies the prerequisites of subsection (a) to the use of deadly force: the peace officer must reasonably believe in the legality of the arrest and, before threatening or using deadly force, he must manifest his purpose and identify himself as a peace officer unless his purpose and identity are already known or cannot reasonably be made known.

The necessity of the use of force in those instances where it is authorized is governed by the reasonable belief standard. Although no warning before the use of deadly force ("Stop or I'll shoot") is explicitly required, in most circumstances, such a warning would be required to establish the peace officer's reasonable belief in the necessity of the use of force.

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

39-752. Stop and frisk, halt at roadblock.—A peace officer is justified in threatening or using force, but not deadly force, against another when and to the degree the actor reasonably believes the force is immediately necessary to make a stop or frisk or halt at a roadblock, or to prevent escape after stop or halt, if:

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.52.

Cross-References:

Halt at roadblock, see T. C. A. §§ 40-621, 40-622, as amended.

Justification to resist stop, frisk, or halt, see §§ 39-731—39-733.

"Law" defined, see § 39-107.

"Peace officer" defined, see § 39-107.

"Reasonable belief" defined, see § 39-107.

Reckless injury of innocent third person, see § 39-704.

Resisting stop, frisk, or halt, see § 39-2303.

Stop and frisk, see T. C. A. §§ 40-601—40-606, as amended.

Comment:

This section parallels § 39-751 and affords peace officers justification to use force to effect a stop and frisk or halt at a roadblock. The section has no counterpart in present law, which does not authorize a stop and frisk or halt as such. See chapter 6 of the Code of Criminal Procedure for the circumstances in which such law enforcement tactics are authorized.

The prerequisites for using force under this section are the same as under § 39-751: the peace officer must reasonably believe the stop and frisk or halt is lawful and he must manifest his purpose and identity before using force. The standard sliding-scale-of-force formulation is also employed, but note that the justification of this section is restricted to peace officers and does not authorize deadly force.

39-753. Prevention of escape from penal institution.—(a) A peace officer, or guard employed by a penal institution, is justified in threaten-

ing or using force against a person in the custody of a penal institution when and to the degree the actor reasonably believes the force is immediately necessary to prevent the person's imminent escape from the penal institution, or from custody while away from the penal institution, or while being transported to or from the penal institution.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 9.53.
Ill. Stat. Ann. ch. 38, § 7-9(b).
N.Y. Rev. Pen. Law § 35.30(5).

Cross-References:
"Custody" defined, see § 39-701.
"Deadly force" defined, see § 39-701.
"Escape" defined, see § 39-701.
"Peace officer" defined, see § 39-107.
"Penal institution" defined, see § 39-107.
"Reasonable belief" defined, see § 39-107.
Reckless injury of innocent third person, see § 39-704.

Comment:
This section justifies both force and deadly force to prevent escape from a penal institution; it complements § 39-751, which deals with escapes from arrest, and both sections dovetail with § 39-2307, which creates the offense of escape from custody.

Only peace officers and guards employed by penal institutions are covered by § 39-753, the Commission believing it unlikely that private citizens will attempt to prevent escapes from penal institutions, and undesirable for them to do so in any event. "Penal institution" is defined in § 39-107 (code definitions) as "a place designated by law for the confinement of persons arrested for, charged with, or convicted of an offense;" "custody" is defined in similar terms in § 39-701, both definitions thus excluding juveniles, mental patients, and others confined pursuant to non-criminal proceedings. The legality of the custody is immaterial, cf. § 39-2309, and "escape" is defined to exclude violation of probation or parole conditions.

This section is new to Tennessee law. Title 39, ch. 38 of the present Tennessee Code, contains numerous laws relating to escape, but the degree of force to be utilized in preventing escapes is not mentioned. Note that deadly force may only be threatened or used when that degree of force is immediately necessary to prevent an imminent escape from a penal institution or while being transported to or from the same. Thus, deadly force may not be used or threatened against a felon who has already escaped and is at large unless it is permitted by one of the justifications contained in this chapter.

39-754. Crime prevention.—(a) A person is justified in threatening or using both force and deadly force against another when and to the degree he reasonably believes the force or deadly force is immediately necessary to prevent the other's imminent commission of arson, burglary, kidnapping, manslaughter, murder, rape or aggravated rape, or aggravated robbery.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 9.54.
Cf. Ill. Stat. Ann. ch. 38, § 7-1.
Cf. La. Rev. Stat. § 14:20(1).

Cross-References:
Aggravated rape, see § 39-1303.
Aggravated robbery, see § 39-1703.
Arrest, see § 39-751.
Arson, see § 39-1602.
Burglary, see § 39-1802.
"Deadly force" defined, see § 39-701.
Defense of another, see § 39-733.
Escape, see §§ 39-751, 39-753.
Kidnapping, see § 39-1201.
"Reasonable belief" defined, see § 39-107.
Self-defense, see §§ 39-731, 39-732.

Comment:
The present Tennessee law justifies the use of force to prevent the commission of a forcible felony, or a felony accomplished by surprise. Brown v. State, 1 Tenn. Crim. App. 294, 441 S. W. (2d) 485 (1969); Marks v. Borum, 60 Tenn. 87 (1873). However, the term "forcible felony" has not been delineated by case law in Tennessee. See 40 C. J. S., Homicide § 101. Section 39-754 focuses on those crimes whose potential for serious violence to the person, although perhaps not sufficiently immediate to invoke self-defense or defense of another justifications, nevertheless poses a great enough risk to justify a deadly response. Section 39-754 is consistent with Tennessee law in requiring the deadly force to be immediately necessary to prevent the commission of the felony. See Brown v. State, 1 Tenn. Crim. App. 294, 441 S. W. (2d) 485 (1969). For example, if it is reasonable under the circumstances first to club a robber or threaten a burglar with a pistol, shooting first is not justified. Section 39-754 justifies deadly force only when immediately necessary to prevent the imminent commission of one of the listed felonies and the use of deadly force to prevent escape is not justified under this section. This is consistent with Tennessee law which justifies deadly force only for the prevention of the forcible felony. See Marks v. Borum, 60 Tenn. 87 (1873). Section 39-754(b) expressly negates any duty to retreat before threatening or using deadly force justified under subsection (a).

Subchapter F. Special Relationships

39-761. Parent—Child.—The threat or use of force, but not deadly force, against a minor is justified:

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 9.61.
Ga. Stat. Ann. § 26-901(c).
Wis. Stat. Ann. § 939.45(5).

Cross-References:
Computation of age, see § 39-106.
"Deadly force" defined, see § 39-701.
"Reasonable belief" defined, see § 39-107.

Comment:
Section 39-761 preserves the traditional parental right to use moderate force in restraint or correction of one's child and terminates it when the parent's custody rights in the child terminate. The term "in loco parentis" is well understood in the courts of other jurisdictions. See, e.g., Eitel v. State, 182 S. W. 318 (Tex. Crim. App. 1916); 67 C. J. S. Parent and Child §§ 71-77 (1950).

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

punishment of his child, and what constitutes excess is a question for the jury. Johnson v. State, 21 Tenn. (2 Humph.) 283 (1837).

Deadly force obviously is not justified in the parent-child situation, either under this section or the present law.

39-762. Educator—Minor student.—The threat or use of force, but not deadly force, against a minor is justified:

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.62.
Model P. C. § 3.08(2).

Cross-References:

"Deadly force" defined, see § 39-701.
"Reasonable belief" defined, see § 39-107.

Comment:

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

> The variation [between the parent and teacher formulations] is designed to make clear the distinction between the position of the person charged with the general care of a minor and that of one performing a more limited protective function. The distinction is especially important in the case of teachers who may or may not have a general responsibility with respect to the child and its moral and material welfare but who are likely to have independent duties of maintaining discipline within the class or school . . . . Model P. C. § 3.08, Comment at 72-73 (Tent. Draft No. 8, 1858).

Camp counselor, dormitory manager, study hall prefect, and baby-sitter are all included within the terms of the relationship defined by this section. This inclusiveness is probably consistent with present law, although an explicit determination of this issue has not been found. See generally Jacob v. State, 22 Tenn. 493 (1842).

39-763. Guardian—Incompetent.—The threat or use of force, but not deadly force, against a mental incompetent is justified:

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

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

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 9.63.
Minn. Stat. Ann. § 609.06(8).

Cross-References:

"Deadly force" defined, see § 39-701.

Comment:

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

The justification provided in this section may overlap to some extent that provided in § 39-734 (protection of life or health). For example, forcibly disarming an incompetent during his suicide attempt as well as strait-jacketing and confining him in a padded cell during a fit will be justified under § 39-734 as well as under this section. Note finally that this section does not speak to protecting one's self or another from harm threatened by the mental incompetent; this justification is afforded by subchapter C (protection of persons).

CHAPTER 8

PUNISHMENTS

COMMENTS OF LAW REVISION COMMISSION

Comment:

The Criminal Code creates a new sentencing structure for Tennessee. The new structure for the first time rationally allocates sentencing authority between the legislature, which grades an offense's seriousness; the court, which fits the punishment to the individual offender and facts of his offense; and the correctional authorities, who measure and act on the convict's dangerousness and rehabilitative potential. Unlike present law, which includes a specific penalty with the definition of each offense, the new structure allots all offenses into one of four categories of felony or into one of three categories of misdemeanor. All authorized punishments, and the standards to guide their imposition, are then collected in a single place, chapter 8.

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

Sentencing, under tit. 40, as amended, may be by either the judge or jury, T. C. A. § 40-1901, as amended, but in either case before sentencing the court must conduct a separate trial-type sentencing hearing, at which the state and the defendant may offer relevant evidence, T. C. A. § 40-1902, as amended. Presentence reports, where available, are

to be considered by a judge before the imposition of sentence, T. C. A. § 40-2301, as amended.

The new structure, again for the first time in Tennessee, sets out detailed standards to guide the sentencing authority in the exercise of its discretion. And to ensure that the standards are followed and sentences assessed even-handedly throughout the state, the Court of Criminal Appeals is authorized to review the appropriateness and procedural and informational bases, as well as the legality, of sentences. See T. C. A. § 40-2410, as amended.

Subchapter A. General Provisions

39-801. Sentence in accordance with criminal code.—(a) A person adjudged guilty of an offense under this title shall be sentenced in accordance with this chapter.

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

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.01.
N.Y. Rev. Pen. Law §§ 55.10(1)-(2), 60.00(1).
Fed. Prop. Crim. Code § 3007.

Cross-References:

Effect of code, see § 39-103.
"Felony" defined, see § 39-802.
Felony punishments, see §§ 39-822, 39-831.
"Law" defined, see § 39-107.
"Misdemeanor" defined, see § 39-802.
Misdemeanor punishments, see §§ 39-823, 39-832.

Comment:

Chapter 8 contains all of the authorized punishments and the standards for their imposition, and § 39-801(a) directs the court and counsel to this chapter for the sentencing law.

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

Subsection (c) conforms the penalty provisions of the many regulatory laws using criminal sanctions to the sentencing structure of this code. Subsection (c) reflects the Commission's judgment that an offense authorizing punishment more severe than that authorized for a third-degree felony should be in this code.

39-802. Types of offenses.—(a) Offenses are designated as felonies or misdemeanors.

(b) An offense is a felony if it is so designated by law or if a person adjudged guilty of the offense may be sentenced to death or imprisonment for more than one (1) year.

(c) An offense is a misdemeanor if it is so designated by law or if a person adjudged guilty of the offense may be sentenced to imprisonment for not more than one (1) year.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-804.

39-803. Classification of felonies.—(a) Felonies are classified according to the relative seriousness of the offense into four (4) categories:

(1) capital felonies;
(2) felonies of the first degree;
(3) felonies of the second degree;
(4) felonies of the third degree.

(b) An offense designated a felony, either in this title or in another law, without specification as to category is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-804.

39-804. Classification of misdemeanors.—(a) Misdemeanors are classified according to the relative seriousness of the offense into three (3) categories:

(1) class A misdemeanors;
(2) class B misdemeanors;
(3) class C misdemeanors.

(b) An offense designated a misdemeanor, either in this title or in another law, without specification as to punishment or category is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

§ 39-802: T. C. A. § 39-103.
§§ 39-803, 39-804:
Tex. P. C. Prop. Rev. § 12.04.
N.Y. Rev. Pen. Law §§ 55.05, 55.10.
Fed. Prop. Crim. Code § 3003.

Cross-References:

Capital murder, see § 39-1105.
"Conviction" defined, see § 39-107.
Exceptional sentences, see subch. D.
"Felony" defined, see § 39-802.
Felony punishments, see §§ 39-822, 39-831.
"Misdemeanor" defined, see § 39-802.
Misdemeanor punishments, see §§ 39-823, 39-832.

Comment:

Section 39-802 alters the felony-misdemeanor distinction and definition of present law, T. C. A. § 39-103. The present test is whether the confinement authorized for the offense is in the state penitentiary or the county jail. This code uses the length of possible sentence authorized to distinguish between felonies (more than one year) and misdemeanors (not more than one year). The recent proposal of regional correctional facilities to confine felons and to treat some misdemeanants render the present custodial test unreliable. No practical change is wrought by the definitional change itself; it merely facilitates future changes in correctional treatment of convicted persons.

Each offense in the code is labeled a felony or misdemeanor and, within those classifications, is further labeled, to reflect the offense's seriousness, one of three categories of misdemeanor or four categories of felony. Sections 39-803(a) and 39-804(a) break sharply with present law, which affixes a specific penalty to each offense in the statute defining the offense itself. The purpose is to produce a rational grading structure for the code and, hopefully, for offenses added by future legislatures.

Sections 39-803(b) and 39-804(b) speak primarily to offenses outside this code and parallel §§ 801(c) and 801(d). Present T. C. A. §§ 39-104 and 39-105 provide one to ten year sentences for felonies and 11 months, 29 days and/or $1,000 fine for misdemeanors for which punishments are not specifically provided.

Once the decision is made to utilize a classification system, the question becomes how many classes to provide. New York and New Mexico currently recog-

nize five classes of felonies; the proposed Kentucky Penal Code (1971) uses four classes; Pennsylvania and Hawaii use three classes. The Texas proposal uses three classes plus a capital offense class. The American Bar Association Project on Minimum Standards for Criminal Justice recommends that "All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number." Standards Relating to Sentencing Alternatives and Procedures at 15 (App. Draft 1968).

Almost every state classifying misdemeanors uses three categories. New York, for example, uses class A and class B misdemeanors and "violations," which is also the system proposed in the Kentucky Penal Code revision. Hawaii's proposed code and the Model Penal Code use "Misdemeanor," "Petty Misdemeanor," and "Violation" categories. The common ground of all is that the lowest class of misdemeanor—whatever it is called—does not carry a jail sentence and is punishable only by fine. The commission rejected this provision on the theory that activities not serious enough to merit some incarceration should be regulated by means other than the criminal law.

39-805. Sentencing combinations.—(a) Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentencing combinations:

(1) to pay a fine; or

(2) to probation; or

(3) to pay a fine and to probation; or

(4) to pay a fine and to imprisonment not to exceed thirty (30) days, the imprisonment either contemporaneous with or followed by probation; or

(5) to imprisonment; or

(6) to pay a fine and to imprisonment; or

(7) to death.

(b) This chapter does not deprive a court of authority conferred by law to forfeit property, dissolve a corporation, suspend or cancel a license or permit, remove a person from office, cite for contempt, or impose any other civil penalty. The civil penalty may be included in the sentence.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.05.
Fed. Prop. Crim. Code § 3001.

Cross-References:

Capital murder, see § 39-1105.
Corporations and associations, see subch. E.
Death penalty for minors prohibited, see § 39-846.
Dissolution of corporation, see T. C. A. § 48-1012.
Effect of code, see § 39-103.
Exceptional sentences, see subch. D.
Fines, see subch. B.
Imprisonment, see subch. C.
Probation, see T. C. A. tit. 40, ch. 27, as amended.
Sentencing hearing, see T. C. A. § 40-2301, as amended.
Suspension of sentence, see T. C. A. § 40-2702, as amended.
Work-release, see T. C. A. § 41-1237.

Comment:

Subsection (a) sets out an exhaustive list of penal sanctions the sentencing authority may invoke following an adjudication of guilt; in doing so it restates and expands T. C. A. tit. 40, ch. 27. It provides, for example, for a sentence including both short-term imprisonment and continuing probation. The section does not, however, impinge on a court's civil remedies. Subsection (b) makes clear that, either in addition to or together with the criminal sanction, a court may cancel a liquor license, enjoin the operation of a house of prostitution, or order destruction of gambling paraphernalia, to mention but a few examples.

39-806. General principles of sentencing.—(a) A court in sentencing a defendant shall impose the minimum amount of custody or confinement that is consistent with the protection of the public, the prevention of offenses, the gravity of the offense, and the rehabilitative needs of the defendant.

(b) Total confinement in a penal institution is the least preferred sentence, and if the judge or jury determines to impose total confinement, it shall fashion the minimum and maximum terms in light of the criteria set out in subsection (a).

(c) A court in sentencing shall grant a defendant probation unless, considering the criteria set out in subsection (a), it determines:

(1) there is a great risk the defendant will not make a good faith effort to comply with the conditions of probation or will commit another offense while on probation; or

(2) the defendant needs correctional treatment most effectively afforded in a penal institution; or

(3) that granting probation will significantly depreciate the gravity of the defendant's offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.06.
Model Sentencing Act § 1.
ABA Sentencing Standards §§ 2.2, 2.3.
Model P. C. § 7.01(1).

Cross-References:

Appellate review of sentence, see T. C. A. § 40-2410, as amended.
Credit against sentence, see T. C. A. § 40-2501, as amended.
Fine guidelines, see § 39-821.
Parole guidelines, see T. C. A. § 40-2841, as amended.
"Penal institution" defined, see § 39-107.
Probation, see T. C. A. tit. 40, ch. 27, as amended.
Work-release, see T. C. A. § 41-1237.

Comment:

This section, which has no counterpart in present law, provides guidelines for exercising sentencing discretion. It has three primary objectives: furnishing the sentencing authority with at least a sense of direction; bringing consistency to the wildly variant sentences now imposed across the state; and, perhaps most importantly, providing the Court of Criminal Appeals with a foundation for fashioning standards to review the appropriateness of sentences. See T. C. A. § 40-2410, as amended.

The section also furnishes the defense and prosecution with a set of perimeters for the proper performance of their roles.

Finally, the section makes clear that the judge or jury is to approach the sentencing decision from the standpoint of first considering probation, and only if there is good reason not to grant probation is the judge or jury to work from the point of least deprivation of liberty to the point of maximum deprivation. In addition the jury will for the first time be allowed to impose probation in those cases in which the jurors are presently faced with the either-or proposition of sentencing a defendant who does not deserve a prison term or rendering a not guilty verdict they believe to be false.

Subchapter B. Fines

39-821. Criteria and methods for imposing fines.—(a) In determining the amount of a fine, the court shall consider:

(1) a defendant's ability to pay the amount of the fine; and

(2) a defendant's ability to pay the fine at the time and by the method directed; and

(3) the hardship likely to be imposed on a defendant's dependents by the amount of the fine and the time and method of paying it; and

(4) the impact the amount of the fine and the time and method of paying it will have on a defendant's ability to make reparation or restitution to the victim; and

(5) the amount of a defendant's gain, if any, derived from commission of the offense.

(b) When imposing a fine a court may direct a defendant:

(1) to pay the entire fine when sentence is pronounced; or

(2) to pay the entire fine at some later date; or

(3) to pay a specified portion of the fine at designated periodic intervals.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.21.
Subsec. (a): Fed. Prop. Crim. Code § 3302(1).
Model P. C. § 7.02.
T. C. A. § 40-3207.
N.Y. Prop. Crim. Proc. Law § 215.10(1).

Cross-References:

Collection of fines, see T. C. A. tit. 40, ch. 26, as amended.
Corporations and associations, see subch. E.
Fine for felony, see § 39-822.
Fine for misdemeanor, see § 39-823.
Gain fine, see § 39-841.
Restitution, see T. C. A. § 40-2304, as amended.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:

Because criminal fines are sometimes counterproductive—for example, a fine sometimes harms the defendant's dependents more than the defendant, and it sometimes prevents restitution—subsection (a) lists these and other relevant factors for the court's consideration in determining whether and how much to fine a defendant. Subsection (a) has no present counterpart in Tennessee law, except a recent consent order entered by the U.S. District Court for the Middle District in Harding v. Doyle, Civ. Act. No. 6397 (M.D. Tenn. Dec. 21, 1971), which substantially parallels subsection (a).

Article 6, § 14 of the Tennessee Constitution limits the utility of the fine as a criminal sanction by requiring all fines in excess of $50 to be imposed by jury.

Once a fine has been imposed, subsection (b) authorizes a variety of payment method alternatives, thus introducing additional flexibility into the sentencing decision.

Subsection (b) appears almost verbatim in the 1972 enactment of T. C. A. § 40-3207 which further provides that: "Where the defendant is sentenced to a period of probation as well as a fine, that payment of the fine be a condition of the sentence." The remainder of the section deals with enforcement of fines imposed, properly treated in tit. 40, ch. 26.

39-822. Ordinary fine for felony.—A court may sentence a defendant adjudged guilty of any category of felony to pay a fine, in an amount fixed by the jury, not to exceed five thousand dollars ($5,000).

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-823.

39-823. Ordinary fine for misdemeanor.—(a) A court may sentence a defendant adjudged guilty of a class A misdemeanor to pay a fine, in an amount fixed by the jury, not to exceed one thousand dollars ($1,000).

(b) A court may sentence a defendant adjudged guilty of a class B misdemeanor to pay a fine, in an amount fixed by the jury, not to exceed five hundred dollars ($500).

(c) A court may sentence a defendant adjudged guilty of a class C misdemeanor to pay a fine, in an amount fixed by the judge or jury, not to exceed fifty dollars ($50).

(d) If a law outside this title defines a misdemeanor and specifies the amount of fine, a judge or jury shall fix the amount of fine in accordance with that law.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.23.
Fed. Prop. Crim. Code § 3001(1).

Cross-References:

Collection of fines, see T. C. A. tit. 40, ch. 26, as amended.
"Felony" defined, see § 39-802.
Felony outside code, see §§ 39-801, 39-803.
Gain fine, see § 39-841.
"Law" defined, see § 39-107.
"Misdemeanor" defined, see § 39-802.
Misdemeanor outside code, see §§ 39-801, 39-804.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:

The maximum fines authorized by these sections for felonies and misdemeanors are essentially arbitrary. This section would generally increase maximum fines for most felonies. It would decrease the maximum fine authorized in only six cases: T. C. A. §§ 39-4405—39-4408 (sedition and sabotage); § 39-4409 (defects in war material production); § 39-5004 (failure of race relations lobbyist to register); § 45-1118 (fraud in banking); § 60-113 (gas regulations); § 18-205 (embezzlement by clerk or master).

Section 39-823(d) speaks to the hundreds of laws outside the code that provide a (misdemeanor) fine penalty.

Subchapter C. Imprisonment

39-831. Ordinary term imprisonment for felony.—(a) A court may sentence a defendant adjudged guilty of a felony of the first degree:

(1) to life imprisonment; or

(2) to a term of imprisonment the minimum of which the court shall fix at not less than three (3) years nor more than fifteen (15) years and the maximum at not more than life imprisonment; or

(3) to a term of imprisonment the minimum of which the court shall fix at not less than three (3) years nor more than ten (10) years and the maximum at not more than thirty (30) years.

(b) A court may sentence a defendant adjudged guilty of a felony of the second degree to a term of imprisonment the minimum of which the court shall fix at not less than two (2) years nor more than four (4) years and the maximum at not more than twelve (12) years.

(c) A court may sentence a defendant adjudged guilty of a felony of the third degree to a term of imprisonment the minimum of which the court shall fix at not less than one (1) year nor more than two (2) years and the maximum at not more than six (6) years.

(d) Except as provided in subsection (e), no sentence may be imposed under this section in which the minimum term is longer than one-third (⅓) of the maximum term.

(e) Subsection (d) does not apply when this section authorizes a sentence to life imprisonment. Subsection (d) does not prohibit a court from sentencing a defendant adjudged guilty of a felony of the third degree to a term of imprisonment the minimum of which equals one (1) year and the maximum of which equals two (2) years.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.31.
N.Y. Rev. Pen. Code § 70.00.
Model P. C. § 6.07.

Cross-References:

Capital murder, see § 39-1105.
Concurrent or consecutive term of imprisonment, see § 39-845.
Credit against sentence, see T. C. A. § 40-2501, as amended.
Death penalty prohibited for minor defendant, see § 39-846.
Extended term imprisonment for felony, see §§ 39-842, 39-843.
"Felony" defined, see § 39-802.
Good time credit, see T. C. A. §§ 41-331—41-335.
No parole for life sentence, see T. C. A. § 40-2822, as amended.
Parole eligibility, see T. C. A. tit. 40, ch. 28, subch. B, as amended.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:

The minimum-maximum term combination authorized by this section is new to Tennessee law and for the first time makes a rational allocation of sentencing authority between the legislature, which grades the offense's seriousness; the court, which fits the punishment to the individual defendant and facts of his offense; and the correctional authorities, who measure and act on the convict's dangerousness and rehabilitative potential. Section 39-831 provides a variety of authorized prison terms for felony offenses, thus furnishing the sentencing court with a flexible response to the offender and his particular offense. Because parole eligibility is tied to service of the minimum term, the trial court is given a means to reflect the community's condemnation of a particular offense and offender, and it is anticipated that high minimums will be reserved for the more aggravated offenses. Subsection (d) prohibits the trial court's encroaching on the correctional authority's discretion by preventing, for example, assessing a minimum of four years and a maximum of five years for a third-degree felony. Subsection (e) excepts from this prohibition the life sentence and a special minimum punishment for the lowest felony.

The one-year mandatory minimum sentence serves the need of the department of correction for a minimum period in which to process, classify, and perhaps begin rehabilitating a convict. Once the minimum term assessed is served, however, the board of pardons and paroles determines whether the convict is sufficiently rehabilitated to justify release on parole. See tit. 40, ch. 28.

Section 39-831 effects a significant reduction in maximum punishments authorized for the ordinary felony offender. In doing so it follows the recommendation of the American Law Institute's Model Penal Code, the American Bar Association, the National Conference on Criminal Justice, and the National Council on Crime and Delinquency. Complementing this reduction for the ordinary offender, this chapter identifies the dangerous offender and authorizes substantial confinement to isolate him from society.

Present law does not distinguish between the ordinary and dangerous offender. In addition to the incredible variety of sentencing combinations available, present law offers a similar variety of maximum punishments: life, any number of years, 25 years, 20 years, 15 years, 12 years, 10 years, 7 years—to mention fewer than half. But, when it is noted that 79.5% of all felony inmates in Tennessee were discharged in less than three years in 1960, this chapter's distinction between ordinary and dangerous offenders is much closer than present law to the reality of our penocorrectional system.

This section is adopted from the proposed revision of the Texas Penal Code. Other jurisdictions using three classes of felony sentences provide as follows:

Hawaii Penal Code (Prop. Draft 1970):
Class A—No minimum; 20 year maximum
Class B—No minimum; 10 year maximum
Class C—No minimum; 5 year maximum
Pennsylvania Proposed Crimes Code (1967):
Class A—Minimum up to ½ maximum; 20 year maximum
Murder: minimum up to 10 years; life maximum
Class B—Minimum up to ½ maximum; 10 year maximum
Class C—Minimum up to ½ maximum; 7 year maximum
Model Penal Code (§ 6.06):
1st Degree—1-10 minimum; life maximum
2nd Degree—1-3 minimum; 10 year maximum
3rd Degree—1-2 minimum; 5 year maximum
(Alternate § 6.06):
1st Degree—1-10 minimum; 20 year or life maximum
2nd Degree—same as above
3rd Degree—same as above

39-832. Imprisonment for misdemeanor.—(a) A court may sentence a defendant adjudged guilty of a class A misdemeanor to imprisonment for a term less than one (1) year.

(b) A court may sentence a defendant adjudged guilty of a class B misdemeanor to imprisonment for a term not to exceed ninety (90) days.

(c) A court may sentence a defendant adjudged guilty of a class C misdemeanor to imprisonment for a term not to exceed ten (10) days.

(d) The court may, in its discretion, provide in the order of judgment suitable provisions and directions to the officer to whose custody the prisoner is committed as will ensure that a defendant adjudged guilty will be allowed to serve his sentence on nonconsecutive days, and between specified hours, as may be stated in the judgment. The order may specify time limits beyond which a continued absence shall be considered an escape. The order may be revoked, suspended, or amended by the judge of the committing court at any time until the convicted person is lawfully released at or prior to the expiration of his sentence. The convicted person may elect at any time to serve his sentence on consecutive days.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.32.
N.Y. Rev. Pen. Law § 70.15(1), (2).

Cross-References:

Credit against sentence, see T. C. A. § 40-2501, as amended.
Extended term imprisonment for habitual petty thief, see § 39-844.
Good time credit, see T. C. A. §§ 41-331—41-335.
"Misdemeanor" defined, see § 39-802.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:

Although again essentially arbitrary, the maximum jail terms for class A and B misdemeanors prescribed by this section are similar to those in the present law, which often prescribes a year or six months. The class C misdemeanor carries the minimum fine and jail time. Subsection (d) retains the provisions of present T. C. A. § 40-2719.

Subchapter D. Exceptional Sentences

39-841. Fine based on gain.—(a) If a defendant has gained money or property by committing any category of felony, a court may sentence

the defendant to pay a fine, in an amount fixed by the jury, not to exceed double the amount of the defendant's gain from committing the felony.

(b) If a defendant has gained money or property by committing a class A or class B misdemeanor, a court may sentence the defendant to pay a fine, in an amount fixed by the jury, not to exceed double the amount of the defendant's gain from committing the misdemeanor.

(c) For purposes of this section, "gain" means the amount of money or value of property derived from the commission of an offense, less the amount of money or value of property returned to the victim or seized by or surrendered to lawful authority before the sentencing hearing begins.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 12.41.
N.Y. Rev. Pen. Law § 80.00.

Cross-References:
Collection of fines, see T. C. A. tit. 40, ch. 26, as amended.
Corporations and associations, see § 39-861.
Ordinary fines, see subch. B.
Restitution, see T. C. A. § 40-2304, as amended.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:
A fine based on the defendant's gain from committing an offense is a novelty in Tennessee law, but should prove useful in requiring those who have profited from their offenses to disgorge. The definition of "gain" in subsection (c) encourages the return of money or property to the victim.

39-842. Extended term imprisonment for habitual offender.—(a) A court may sentence a defendant adjudged guilty of a felony of the second or third degree to an extended term of imprisonment if the court determines under subsection (c) that the defendant is an habitual offender.

(b) The extended term of imprisonment for an habitual offender consists of:

(1) a minimum term the court shall fix at not less than three (3) years nor more than ten (10) years and a maximum at not more than thirty (30) years, if defendant stands adjudged guilty of a felony of the second degree;

(2) a minimum term the court shall fix at not less than two (2) years nor more than six (6) years and a maximum at not more than thirty (30) years, if defendant stands adjudged guilty of a felony of the third degree.

(c) To determine that a defendant is an habitual offender, the court must find:

(1) that the defendant previously has been convicted two (2) or more times of any category of felony; and

(2) that extended term imprisonment of the defendant is necessary to protect the public.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 12.42.
N.Y. Rev. Pen. Law § 70.10.

Cross-References:
"Conviction" defined, see § 39-107.
"Felony" defined, see § 39-802.
First degree felony punishment, see §§ 39-822, 39-831.
Habitual petty thief, see § 39-844.
Notice of exceptional sentence, see T. C. A. § 40-1411, as amended.
Ordinary felony imprisonment, see § 39-831.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:
This section changes the present habitual offender law, T. C. A. tit. 40, ch. 28, in that: (1) a reasonable variety of punishments is authorized and the court is afforded wide discretion in tailoring the punishment to the individual habitual offender and his pattern of conduct. Present law provides only one penalty, life imprisonment, which results in infrequent use of the sanction. (2) A prediction of dangerousness is required. (3) Section 39-842 eliminates the requirement that the offenses be within designated categories, see present T. C. A. § 40-2801, and changes the number of required prior offenses from three to two. The net effect of these changes along with (1) above should be an increased utilization of the habitual offender sanction. Section 39-842 does not apply to the repeater misdemeanant, whose most irritating manifestation, the habitual petty thief, is instead treated separately under § 39-844.

It should be noted that the first degree felony is not included as a "trigger" offense in this section because it authorizes a sentence of life imprisonment in every case. The definition of "felony" in § 39-802 also alters the present habitual offender statute by allowing an increased availability of foreign and federal felony convictions for enhancement purposes, regardless of whether the act is a felony in domestic law. Meanwhile, the definition of "conviction" in § 39-107 insures the equitable imposition of the sanction with regard to criminal episodes.

39-843. Extended term imprisonment for organized criminal offender.—(a) A court may sentence a defendant adjudged guilty of a felony of the second or third degree to an extended term of imprisonment if the court determines under subsection (c) that the defendant is an organized criminal offender.

(b) The extended term of imprisonment for an organized criminal offender consists of:

(1) a minimum term the court shall fix at not less than three (3) years nor more than ten (10) years and a maximum at not more than thirty (30) years, if defendant stands adjudged guilty of a felony of the second degree;

(2) a minimum term the court shall fix at not less than two (2) years nor more than six (6) years and a maximum at not more than thirty (30) years, if the defendant stands adjudged guilty of a felony of the third degree.

(c) To determine that a defendant is an organized criminal offender, the court must find:

(1) that the defendant stands adjudged guilty of a felony under § 39-1102; § 39-1201; § 39-1602; chapter 19; chapter 20; § 39-2102 or 39-2105; § 39-2203; § 39-2604 or 39-2605; § 39-2704; chapter 28; or chapter 29; and

(2) that the felony of which the defendant stands adjudged guilty is part of a pattern of conduct:

(A) constituting one or more offenses under the law of this state or another jurisdiction; and

(B) continuing over a protracted period of time not less than three (3) months; and

(C) carried on in concert by the defendant and five (5) or more other persons; and

(3) that extended term imprisonment of the defendant is necessary to protect the public.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.43.
Fed. Prop. Crim. Code § 3203.

Cross-References:

First-degree felony punishment, see §§ 39-822, 39-831.
Gain fine, see § 39-841.
"Law" defined, see § 39-107.
Notice of exceptional sentence, see T. C. A. § 40-1411, as amended.
Ordinary felony imprisonment, see § 39-831.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:

In attempting to identify the participant in organized crime, this section employs the three definitional elements generally believed to evidence such participation: selected offenses committed in concert with others as part of a criminal enterprise continuing over a long period of time. The three-month requirement applies to both the "pattern of conduct" and the defendant's personal participation in the conduct. This section tracks the proposed Federal Organized Crime Control Act of 1969, S. 30, 91st Cong., 2d Sess., § 1001, as well as a similar provision in the Proposed Federal Criminal Code.

The designated offenses are murder (§ 39-1102), kidnapping (§ 39-1201), arson (§ 39-1602), theft (ch. 19), fraud (ch. 20), bribery (§ 39-2102), tampering with a witness (§ 39-2105), aggravated perjury (§ 39-2203), aggravated promotion of prostitution (§ 39-2604), compelling prostitution (§ 39-2605), aggravated gambling promotion (§ 39-2704), weapons (ch. 28), and drugs (ch. 29).

39-844. Extended term imprisonment for habitual petty thief.—(a) A court may sentence a defendant adjudged guilty of misdemeanor theft under chapter 19 to an extended term of imprisonment if the court determines under subsection (c) that the defendant is an habitual petty thief.

(b) The extended term of imprisonment for an habitual petty thief consists of a minimum the court shall fix at not less than one (1) year nor more than two (2) years and a maximum at not more than six (6) years.

(c) To determine that a defendant is an habitual petty thief, the court must find:

(1) that defendant previously has been convicted two (2) or more times of misdemeanor theft; and

(2) that extended term imprisonment of the defendant is necessary to protect the public.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.44.
Conn. Gen. Stat. § 53-42(a).

Cross-References:

"Conviction" defined, see § 39-107.
Gain fine, see § 39-841.
"Misdemeanor" defined, see § 39-802.
Notice of exceptional sentence, see T. C. A. § 40-1411, as amended.
Ordinary misdemeanor imprisonment, see § 39-832.
Sentencing hearing, see T. C. A. § 40-2301, as amended.
Theft, see ch. 19.

Comment:

This section elevates to third-degree felony level for punishment purposes the third misdemeanor theft conviction. It is aimed primarily at the misdemeanor bad check writer and shoplifter, but of course applies to all theft offenses.

39-845. Concurrent and consecutive terms of imprisonment for felony.—(a) If a defendant has been adjudged guilty of more than one felony offense, the judge shall determine whether to impose concurrent or consecutive sentences for the offenses, subject to the limitations in subsections (b)-(e). Sentences are deemed to run concurrently unless the judge states in the sentence that they run consecutively.

(b) The judge shall consider the gravity and circumstances of the offenses and the history, character, and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

(c) The judge may not impose consecutive sentences for offenses arising out of a single criminal episode.

(d) If the judge lawfully determines to impose consecutive sentences, the aggregate minimum of all sentences imposed may not exceed ten (10) years' imprisonment and the aggregate maximum of all sentences imposed may not exceed thirty (30) years' imprisonment unless an offense for which the defendant is sentenced authorizes life imprisonment.

(e) The limitation in subsection (d) applies:

(1) if a defendant is sentenced at the same time for more than one offense; or

(2) if a defendant is sentenced at different times for one or more offenses all of which were committed prior to imposition of sentence for any one or more of them; or

(3) if a defendant has already been sentenced by a court of this state, other than the present sentencing court, or by a court of another state or federal jurisdiction.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 12.45.
Fed. Prop. Crim. Code § 3206.

Cross-References:

"Criminal episode" defined, see § 39-107.
Joinder of multiple offenses, see T. C. A. §§ 40-1602, 40-1603, as amended.
Multiple sentences prohibited, see § 39-301.
Notice of exceptional sentence, see T. C. A. § 40-1411, as amended.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:

T. C. A. § 40-2711 presently vests the trial court with discretion to decide whether or not to cumulate sentences when a defendant is adjudged guilty of two or more offenses. This discretion is unconfined and unstructured, and the Supreme Court has reviewed its exercise according to the abuse-of-discretion standard that, of course, nearly always results in upholding the trial court. See, e.g., Britt v. State, 2 Tenn. Crim. App. 581, 455 S. W. (2d) 625 (1969).

The rationale for authorizing consecutive sentences is that the multiple offender, like the habitual offender, may be dangerous and require long-term imprisonment for the protection of society. This rationale is but dimly recognized in present law, which appears to sentence offenses rather than offenders, and § 39-845 revises this law to accomplish the proper objectives of the consecutive sentence authorization.

Subsection (a) continues the present law's authorization for consecutive sentences, and subsection (b) provides

standards to guide the trial court in deciding when to impose consecutive rather than concurrent terms.

Subsection (c) conforms to the compulsory joinder—multiple convictions—single sentence policy of ch. 3 (multiple prosecutions and double jeopardy) and tit. 40, ch. 16, as amended, (joinder, severance, and consolidation); offenses arising out of a single criminal episode are treated as one unit throughout this code and consecutive sentences are thus inappropriate for them. The definition of "criminal episode" is discussed in the comments to § 39-107 and ch. 3.

Subsection (d) limits the aggregate of all consecutive terms lawfully imposed to that already prescribed for the most dangerous offenders, §§ 39-842 (habitual offender) and 39-843 (organized criminal offender), with exceptions, of course, for the capital and first-degree felon.

The application of the aggregate term limitation in subsection (d) is spelled out in the three subdivisions of subsection (e). The defendant convicted of multiple offenses in a single trial is the most common occasion for choosing between concurrent or consecutive terms, and is described by subdivision (1). Subdivision (2) contemplates a defendant who is sentenced for offenses A and B after he has committed undiscovered offenses X and Y. When he is later sentenced for offenses X and Y, the total term for those offenses, when added to the already imposed term for offenses A and B, may not exceed the minimum 10—maximum 30-year limitation of subsection (d); and subsection (d) applies whether, at the time defendant is sentenced for offenses X and Y, he is serving his sentence for offenses A and B or has completed serving that sentence. On the other hand, if defendant commits a new offense *after* being sentenced, either for offenses A and B or X and Y, for example, while on bail or probation or parole or in the penitentiary, the limitation of subsection (d) does not apply and defendant may be sentenced to the maximum term authorized for the new offense.

Subdivision (3) describes the final application of the limitations in subsection (d) and covers, for example, a defendant already serving a sentence imposed in one county who is subsequently convicted and sentenced in another county. The court in the second county must add the first county term to whatever term it assesses and the sum may not exceed the minimum 10—maximum 30-year limitation.

39-846. Capital felony penalty for minor defendant.—A defendant adjudged guilty of a capital felony who was younger than eighteen (18) years at the time he committed the felony shall not be sentenced to death, but shall be sentenced for a felony of the first degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 12.46.

Cross-References:
Capital murder, see § 39-1105.
Computation of age, see § 39-106.
First-degree felony punishments, see §§ 39-822, 39-831.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:
This section is new to Tennessee law.

39-847. Reduction of third-degree felony to misdemeanor.—A court may set aside a judgment of guilt of a felony of the third degree, and enter a judgment of guilt and sentence a defendant for a class A misdemeanor, if the court finds, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, that it would be unduly harsh to sentence the defendant for the felony of which he was adjudged guilty.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 12.47.
Fed. Prop. Crim. Code § 3004.

Cross-References:
Misdemeanor punishments, see §§ 39-823, 39-832.

Notice of exceptional sentence, see T. C. A. § 40-1411, as amended.
Sentencing hearing, see T. C. A. § 40-2301, as amended.
Third-degree felony punishments, see §§ 39-822, 39-831.

Comment:
Section 39-847 essentially retains present law. It preserves the trial court's discretion to deal appropriately with, for example, a first offender who does not merit even a year in the penitentiary. Reduction to misdemeanor also avoids the collateral consequences of a felony conviction—e.g., loss of voting rights, a serious criminal record.

T. C. A. § 40-2703 authorizes the jury to take similar action in commuting a one-year minimum prison sentence to a workhouse term of less than one year. Since third-degree felonies carry a minimum of 1-2 year imprisonment, the reduction of that sentence to a misdemeanor term is only a slight change from present law.

39-848. Admission of unadjudicated offense.—(a) A defendant may admit during the sentencing hearing his guilt of one or more unadjudicated offenses and request the court to take each into account in determining sentence for the offense or offenses of which he stands adjudged guilty. The court may not take into account an admitted offense of a higher category than any of the offenses of which defendant stands adjudged guilty.

(b) Before the court may take into account an admitted offense, the court must obtain consent from the district attorney with jurisdiction and venue over the offense.

(c) If the court takes into account an admitted offense, subsequent prosecution of the defendant is barred for the admitted offense.

(d) An admission by a defendant made or attempted to be made under this section shall not be admissible as evidence in any subsequent prosecution.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 12.48.
Hawaii Prop. Pen. Code § 607.
Model P. C. § 7.05(4).

Cross-References:
Detainers, see T. C. A. tit. 40, ch. 31, subch. B, as amended.
Notice of exceptional sentence, see T. C. A. § 40-1411, as amended.
Offense categories, see §§ 39-803, 39-804.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:
This novel provision permits a defendant, if the district attorney and trial court agree, to "clean the slate" of uncharged offenses by having the judge or jury take them into account in assessing a sentence for the instant offense of which the defendant stands convicted. The appropriate application of this section will help prison morale and encourage rehabilitative efforts by removing the threat of future prosecution and restrict to some extent the current widespread use of detainers. It will also improve law enforcement's clearance rate and permit the prosecution to dispose of many offenses in a single criminal action.

The type of offense a defendant may successfully admit is limited—for example, he may not in a theft case admit murder and bar subsequent prosecution for that offense—and subsection (b) prevents one court from wiping out charges before another court without first obtaining the prosecutor's permission.

Subchapter E. Corporations and Associations

39-861. Authorized punishments for corporation and association.—(a) If a corporation or association is adjudged guilty of an offense

that provides a penalty consisting of a fine only, a court may sentence the corporation or association to pay a fine, in an amount fixed by the judge or jury, not to exceed the fine provided by the offense.

(b) If a corporation or association is adjudged guilty of an offense that provides a penalty including imprisonment, or that provides no specific penalty, a court may sentence the corporation or association to pay a fine, in an amount fixed by the judge or jury, not to exceed:

(1) ten thousand dollars ($10,000) if the offense is a felony of any category; or

(2) two thousand dollars ($2,000) if the offense is a class A or class B misdemeanor; or

(3) fifty dollars ($50) if the offense is a class C misdemeanor.

(c) In lieu of the fines authorized by subsections (a) and (b)(1) and (b)(2), if a court finds that the corporation or association gained money or property through the commission of a felony or class A or class B misdemeanor, the court may sentence the corporation or association to pay a fine, in an amount fixed by the judge or jury, not to exceed double the amount gained, in accordance with the criteria set out in § 39-841.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 12.51.
N.Y. Rev. Pen. Law §§ 60.25, 80.10.

Cross-References:
"Association" defined, see § 39-107.
Criminal responsibility of corporation and association, see ch. 5, subch. B.
Criminal responsibility of agent for own act, see § 39-525.
Criteria for imposing fines, see § 39-821.
Dissolution of corporation, see T. C. A. § 48-1012.
Effect of fine on corporation and association, see § 39-862.
"Felony" defined, see § 39-802.
"Gain" defined, see § 39-841.
Probation, see T. C. A. tit. 40, ch. 27, as amended.
Sentencing hearing, see T. C. A. § 40-2301, as amended.

Comment:
All authorized punishments for a corporation or association convicted of an offense (whether under this code or another law) are set out in this section. If the offense itself (outside this code) prescribes the fine, the amount prescribed controls under subsection (a). If the offense authorizes imprisonment, either exclusively or in combination with a fine, or if it contains no penalty, subsection (b) lists the authorized punishments based on the classification of the offense. Offenses contemplated by subsection (b) may be located either in or out of this code.

Subsection (c) authorizes the gain fine alternative for all but class C misdemeanors; see the comment to § 39-841.

Heretofore, Tennessee courts have been hampered in dealing with corporate offenders by the lack of appropriate sanctions. This section should rectify that situation.

39-862. Effect of fine on corporation and association.—A fine imposed as punishment for commission of a crime by a corporation, partnership or other association may be collected only from the assets of the defendant corporation, partnership or other association and not from the individual assets of the stockholders, partners, or members thereof who are not individually criminally responsible for the conduct forming the basis of the conviction.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
"Association" defined, see § 107.
Collection of fines, see T. C. A. tit. 40, ch. 26, as amended.
Criminal responsibility of agent for his own act, see § 39-525.

Comment:
This section ensures that the imposition of a fine on a partnership, for example, will have the same effect as a fine imposed on a corporation. The fine may be paid out of the assets of the organization but partners, stockholders, and members of the organization not individually responsible for the crime are not independently liable for the fine.

CHAPTER 9

PREPARATORY OFFENSES

39-901. Criminal attempt.—(a) An individual, corporation, or association commits criminal attempt if, acting with the kind of culpability otherwise required for the offense:

(1) he intentionally engages in action or causes a result that would constitute the offense if the circumstances surrounding his conduct were as he believes them to be; or

(2) he acts with intent to cause a result that is an element of the offense, and he believes his conduct will cause the result without further conduct on his part; or

(3) he acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding his conduct as he believes them to be, and his conduct constitutes a substantial step toward commission of the offense.

(b) Conduct does not constitute a substantial step under subsection (a)(3) unless the actor's entire course of action is corroborative of his intent to commit the offense.

(c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

(d) Criminal attempt to commit a capital felony is a felony of the first degree. Criminal attempt to commit a felony of the first degree is a felony of the second degree. Criminal attempt to commit a felony of the second degree is a felony of the third degree. Criminal attempt to commit a felony of the third degree is a class A misdemeanor. Criminal attempt to commit a class A misdemeanor is a class B misdemeanor. Criminal attempt to commit a class B or C misdemeanor is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 15.01.
Model P. C. § 5.01.

Cross-References:
"Act" defined, see § 39-107.
"Association" defined, see § 39-107.

Attempt as lesser included offense, see T. C. A. § 40-2203, as amended.

"Conduct" defined, see § 39-107.

"Element of offense" defined, see § 39-107.

Facilitation, see § 39-503.

Multiple sentences for inchoate and object offenses prohibited, see § 39-301.

Renunciation defense, see § 39-904.

Comment:

This general attempt statute is not new to Tennessee law. See T. C. A. § 39-603. However, the separate attempt statutes accompanying several offenses in the present law, e.g., T. C. A. § 39-503 (attempt to burn property), T. C. A. § 39-4410 (attempt to commit sabotage), T. C. A. § 39-3305 (attempt to suborn perjury), are combined into this one section. The offense of criminal attempt, as defined in § 39-901, applies in conjunction with all of the offenses defined in the Criminal Code. Furthermore, under this general statute the elements necessary to establish criminal attempt, and the penalties for its commission, are uniform, whereas under present law the elements of and penalties for an attempt vary widely depending upon the particular offense attempted. See generally Model P. C. § 5.01, Comment at 24-25 (Tent. Draft No. 10, 1960).

Criminal attempt is an inchoate offense directed at the single actor whose intent is to commit an offense, but whose actions, while strongly corroborative of his criminal intent, fail to achieve the criminal objective intended. Accordingly, the offense is basically one of criminal intent coupled with acts that clearly demonstrate the actor's proclivity toward criminality.

Subsection (a): Elements of Offense.

Subsection (a) defines three varieties of the offense of criminal attempt; all three varieties retain the traditional requirement of specific intent to commit an offense. Thus, an actor must either intentionally engage in criminal acts or intend to accomplish a criminal result. This requirement is consistent with present law, see Clark v. State, 86 Tenn. 511, 8 S. W. 145 (1888); State v. Johnson, 2 Shannon's Cases 539 (1877).

Subdivisions (1)-(3) are not intended to define mutually exclusive kinds of criminal attempt, however. Rather, these three subdivisions set out alternative statutory tests for determining if a course of conduct that does not produce a proscribed harm can be classified as an attempt to commit an offense. Subdivision (1) is directed at a completed course of conduct, while subdivisions (2) and (3) focus on conduct that is incomplete in the sense that it is cut short at some point in time before accomplishment of the intended criminal objective. Thus, a completed course of conduct constituting a criminal attempt under subdivision (1) could also include conduct sufficient to establish attempt responsibility under subdivisions (2) and (3).

In addition to the elements required by subdivision (1), (2) or (3), to be convicted of criminal attempt the actor must act "with the kind of culpability otherwise required" for the object offense. Usually this culpability element will apply to circumstances surrounding conduct that are included as an element in the definition of the object offense. To illustrate, assume the object offense is sale of a firearm to an intoxicated person, § 39-2704, for which recklessness with respect to the intoxication of the buyer (a circumstance surrounding conduct) suffices to establish guilt. An actor could be convicted of attempted sale of a firearm to an intoxicated person if he was reckless about whether the buyer were intoxicated (culpability otherwise required for the offense) and intentionally offered to sell the firearm in a manner constituting a "substantial step" toward committing the offense.

One objective of § 39-901 is to eliminate what are commonly labeled the legal and physical or factual impossibility defenses from the law of attempt. The distinction sometimes made by courts between legal and physical impossibility is nebulous, and in applying § 39-901 the difference is immaterial. The present law in this regard is complex and confusing, and no doubt this section criminalizes some conduct that would not be an offense under existing law. In this connection it should be recalled that there must be an object offense before there can be a criminal attempt; an actor's belief that his conduct is criminal when there is no such offense cannot constitute a criminal attempt.

Subsection (a)(1) prevents exoneration of a person who intentionally engages in a course of conduct that, under the surrounding circumstances as perceived by the actor, would constitute a completed offense but does not because the actual circumstances make commission of the offense impossible. Thus under subsection (a)(1) an actor could be convicted of criminal attempt to receive stolen property under § 39-1903 (theft) if he accepted goods he believed to have been stolen, intending to deprive the owner of their value, which were not actually stolen goods.

Subsection (a)(2) is a codification of the generally accepted "last proximate act" doctrine as a basis for imposing attempt responsibility. If an offense is defined in terms of causing a certain result, an actor commits an attempt at the point when he has done everything he believes is necessary to accomplish the intended criminal result. For example, a wife commits attempted murder under § 39-1102 when she replaces her husband's nightly sleeping pill with a cyanide tablet, intending to cause his death and believing he will take the tablet and die as a result. The fact that the husband does not take the tablet, or that he does not die following its ingestion, does not alter the wife's responsibility for attempted murder, since she believed her conduct would cause her husband's death without further conduct on her part.

Subsection (a)(3) formulates a general standard to determine at what point acts performed in the course of a criminal enterprise become punishable as a criminal attempt. This is the most difficult task in defining attempt responsibility, and, although courts use various tests to resolve the question, the basic element traditionally required is that the actor's conduct must proceed beyond "mere preparation." See Dupuy v. State, 204 Tenn. 624, 325 S. W. (2d) 238 (1959). Subsection (a)(3) provides that the point of attempt responsibility, beyond mere preparation but short of the completed offense, is reached when an actor's intentional acts constitute a "substantial step toward the commission of the offense." Because of the infinite variety of factual situations that can arise, subsection (a)(3) leaves the issue of what constitutes a substantial step for determination in each particular case. As in subsection (a)(1), the phrase "under the circumstances as he believes them to be" is included to prevent impossibility from being raised as a defense.

Subsection (b): Corroboration.

In addition to the substantial step requirement of subsection (a)(3), subsection (b) prescribes an additional element to distinguish attempt from preparation: the actor's "entire course of action" must be corroborative of his intent to complete the offense. The substantial step approach, which focuses on what has already been done rather than on what remains to be done, will probably expand attempt responsibility by drawing the line of criminality farther back from the completed offense. To exclude innocent acts, therefore, subsection (b) requires proof of acts corroborative of criminal intent, and if an act standing alone appears innocuous or ambiguous, there is no attempt responsibility regardless of how close to completing an offense the actor had come.

Subsection (c): Completion No Defense.

Subsection (c) expressly eliminates the defense that the offense has in fact been committed. This alters prior Tennessee law which allowed such a defense. McGowen v. State, 221 Tenn. 442, 427 S. W. (2d) 555 (1968); Gervin v. State, 212 Tenn. 653, 371 S. W. (2d) 449 (1963).

Subsection (d): Penalties.

Subsection (d) standardizes the punishments authorized for all attempt offenses, punishing criminal attempt at the next lower grade than the object offense attempted.

39-902. Criminal conspiracy.—(a) An individual, corporation, or association commits criminal conspiracy if, with intent that an offense be committed:

(1) he agrees with one or more persons that they or one or more of them engage in conduct that, under circumstances surrounding his conduct as the actor believes them to be, would constitute the offense; and

(2) he or one or more of them performs an overt act in pursuance of the agreement.

(b) A coconspirator's criminal responsibility for the offense committed in furtherance of the conspiracy is determined under chapter 5, subchapter A.

(c) It is no defense to prosecution for criminal conspiracy:

(1) that one or more of the coconspirators is not criminally responsible for the object offense; or

(2) that one or more of the coconspirators has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution; or

(3) that the agreement of a purported coconspirator was feigned; or

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

(5) that the object offense was actually committed.

(d) Unless otherwise provided by law, it is a defense to prosecution for criminal conspiracy:

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

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

(e) Criminal conspiracy to commit a capital felony is a felony of the first degree. Criminal conspiracy to commit a felony of the first degree is a felony of the second degree. Criminal conspiracy to commit a felony of the second degree is a felony of the third degree. Criminal conspiracy to commit a felony of the third degree is a class A misdemeanor. Criminal conspiracy to commit a class A misdemeanor is a class B misdemeanor. Criminal conspiracy to commit a class B or class C misdemeanor is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 15.02.
Model P. C. §§ 5.03(1), 5.04(1).

Cross-References:

"Act" defined, see § 39-107.
"Association" defined, see § 39-107.
Complicity, see ch. 5, subch. A.
"Conduct" defined, see § 39-107.
Defense explained, see § 39-203.
Facilitation, see § 39-503.
Jurisdiction over out-of-state conspiracy, see § 39-104.
Multiple sentences for inchoate and object offenses prohibited, see § 39-301.
Renunciation defense, see § 39-904.

Comment:

Criminal conspiracy, a common-law crime, has become firmly established as an offense that serves dual roles in modern criminal jurisprudence. Functioning as an inchoate offense, criminal conspiracy fixes the point of legal intervention at agreement to commit a crime coupled with an overt act. Thus, it reaches further back into preparatory conduct than criminal attempt, § 39-901, but not as far back as criminal solicitation, § 39-903. In its second role criminal conspiracy provides a means of striking against the special danger incident to group criminal activity and facilitates prosecution of the group by providing extraordinary evidentiary and procedural advantages. Section 39-902 is essentially a clarification of the present Tennessee law of conspiracy, T. C. A. §§ 39-1101—39-1107, emphasizing the inchoate aspect of the offense without interfering with the procedural and evidentiary advantages of the group prosecution aspect of the offense.

The present definition of conspiracy is cast in terms of "two or more persons" agreeing to commit any indictable offense, T. C. A. § 39-1101, reflecting the common-law notion of conspiracy as a multilateral relationship. Section 39-902 adopts a unilateral approach, directing the inquiry to each individual's culpability by formulating the offense in terms of conduct sufficient to establish the responsibility of a given actor rather than the conduct of a group. The major consequence of the unilateral approach is that the disposition of persons with whom an actor allegedly conspired will not necessarily determine the actor's responsibility for criminal conspiracy.

For example, under § 39-902 a single actor can be indicted, tried, and convicted alone.

Subsection (a): Elements of Offense.

Subsection (a) prescribes the elements of criminal conspiracy in terms that clarify present law without substantial alteration. The mens rea required, "intent that an offense be committed," explicates present law, which specifies that the agreement must be positive and that neither mere knowledge, acquiescence or approval of the act without cooperation or agreement to cooperate is sufficient to constitute an actor as a party to the crime of conspiracy. Solomon v. State, 168 Tenn. 180, 76 S. W. (2d) 331 (1934). This section alters present Tennessee law, in that (1) the previous requirement of conspiracy to commit "an indictable offense," T. C. A. § 39-1101(1), is changed to conspiracy to commit an offense, and (2) the other listed offenses, including a conspiracy to ". . . commit any act injurious to public health, public morals, trade or commerce . . .", T. C. A. § 39-1101(7), is eliminated if such acts are not criminal offenses. See McKennie v. State, 214 Tenn. 195, 379 S. W. (2d) 214, rev'd on other grounds, 360 U. S. 449 (1960); Owens v. State, 178 Tenn. 32, 154 S. W. (2d) 529 (1941).

Subsection (a)(1) requires that the actor agree with another to engage in conduct that would constitute the offense "under the circumstances surrounding his conduct as the actor believes them to be." This language parallels that used in criminal attempt to foreclose raising impossibility as a defense.

In addition to the agreement required by subdivision (1), to establish conspiracy the actor or another coconspirator must perform "an overt act in pursuance of the agreement" under subdivision (2). The express overt act requirement is not new to Tennessee law. See T. C. A. § 39-1102. However, this section requires an overt act for all offenses, and thus eliminates certain exceptions to the requirement of proof of an overt act, i.e., felony on the person of another, arson, or burglary, presently contained in T. C. A. § 39-1102. See State v. Smith, 197 Tenn. 350, 273 S. W. (2d) 143 (1954). The overt act element is included to require proof beyond the bare agreement that a socially dangerous combination exists.

Subsection (b): Conspiracy Not Complicity.

Subsection (b) is a precautionary statement to make clear that criminal conspiracy is an inchoate offense and not a theory of complicity. In the Criminal Code the complicity provisions are the exclusive method of determining criminal responsibility for the conduct of others. This subsection continues the present Tennessee law which holds conspiracy to be a separate offense in itself. Owens v. State, 178 Tenn. 32, 154 S. W. (2d) 529 (1941).

Subsection (c): Defenses Excluded.

Subsection (c) expressly rejects certain defenses often raised in conspiracy prosecutions. Subdivisions (1)-(3) emphasize the section's unilateral approach to criminal conspiracy, providing that an actor's responsibility for criminal conspiracy does not depend upon the responsibility of his coconspirators. Accordingly, under subdivision (1), a coconspirator's insanity or juvenile status, for example, will not affect the actor's responsibility for criminal conspiracy. Likewise, under subdivisions (2) and (3) the acquittal or insincerity of a coconspirator is not a defense; this changes present law, under which the acquittal of one of two conspirators necessarily requires acquittal of the other, Delaney v. State, 164 Tenn. 432, 51 S. W. (2d) 485 (1932), and the feigning of one conspirator negates the element of a positive agreement necessary for the offense. Id. On the other hand, the fact that one of two conspirators secured immunity from prosecution by becoming a prosecution witness does not bar conviction of the other, see Cline v. State, 204 Tenn. 251, 319 S. W. (2d) 227 (1959), and this policy is preserved in subdivision (2). Subdivision (4) tracks § 39-504 (complicity) to ensure the same responsibility for coconspirators that is shared by parties to crime. Subdivision (5) parallels § 39-901(c) (criminal attempt).

Subsection (d): Defenses Available.

Subsection (d) is identical with § 39-505 (complicity) and exonerates an actor from responsibility for criminal conspiracy when the legislature has excluded the actor from responsibility for the object offense.

Subsection (e): Penalties.

The present statutes punish conspiracy as a misdemeanor, T. C. A. § 39-1103, or if the conspiracy falls within the provisions of T. C. A. §§ 39-1104—39-1107, the penalties range from 2 to 21 years. This section punishes conspiracy as a crime of one grade less than that of the object crime.

39-903. Criminal solicitation.—(a) An individual, corporation, or association commits criminal solicitation if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

(b) An individual, corporation, or association may not be convicted of criminal solicitation:

(1) upon the uncorroborated testimony of the person allegedly solicited; and

(2) unless the solicitation is made under circumstances corroborative of both the solicitation itself and the actor's intent that the other person act upon the solicitation.

(c) It is no defense to prosecution for criminal solicitation:

(1) that the person solicited is not criminally responsible for the felony solicited; or

(2) that the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution; or

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

(4) that the felony solicited was actually committed.

(d) Criminal solicitation of a capital felony is a felony of the first degree. Criminal solicitation of a felony of the first degree is a felony of the second degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 15.03.

Cross-References:

"Association" defined, see § 39-107.
Complicity, see ch. 5, subch. A.
"Conduct" defined, see § 39-107.
Facilitation, see § 39-503.
Multiple sentences for inchoate and object offenses prohibited, see § 39-301.
Renunciation defense, see § 39-904.

Comment:

Section 39-903 introduces a new offense to Tennessee penal law, punishing a person who solicits another to commit a capital or first-degree felony. Solicitation has been recognized in Tennessee as a common-law offense. See Gervin v. State, 212 Tenn. 653, 371 S. W. (2d) 449 (1963). The conduct proscribed by § 39-903 would not establish the actor's responsibility as a party to an offense, under §§ 39-501, 39-502, because a completed offense is required for complicity responsibility. Nor would the actor be amenable to punishment as a conspirator since the offense of criminal conspiracy, § 39-902, requires an agreement and overt act. Although in some cases the solicitous conduct might constitute a criminal attempt under § 39-901, the usual solicitation would not. Hence criminal solicitation applies to a narrow area of conduct very close to the beginning of a criminal enterprise and may be thought of as an "attempted" conspiracy.

The nature and scope of § 39-903 may be illustrated by a case in which A solicits B to kill C. If B agrees to do so, and either A or B acts in furtherance of the agreement, both A and B are guilty of conspiracy. If A shoots at C but misses, both A and B are guilty of attempted murder. If, however, B refuses to undertake the homicidal project, the conduct of A is not criminal under existing law, but A is guilty of criminal solicitation under § 39-1503.

Present law contains several offenses punishing specified types of solicitation, e.g., T. C. A. § 39-3505 (solicitation of prostitution); T. C. A. § 39-805 (bribery of court officials or jurors), covered in the definition of the new object offense, e.g., § 39-2102, which punishes an offer to bribe. Thus, when considered appropriate because of the nature of the object offense, solicitation of offenses lower than first-degree felony is included in the definition of the offense, whereas under § 39-903, the solicitation of any capital or first-degree felony is an offense.

The general solicitation offense of § 39-903 applies only to the most serious crimes because it reaches so far back into preparatory conduct. The acts prohibited by subsection (a) are of an active, positive nature, and the culpable mental state required is specific intent. Moreover, the solicitation must be of specific conduct thus excluding, for example, a political speech, however inflammatory.

As in criminal attempt, the phrase "under the circumstances surrounding his conduct as the actor believes them to be" precludes impossibility as a defense. The last phrase of subsection (a), "or would make the other party to its commission," ensures that a person who requests another to engage in complicitous conduct, rather than perpetrate the offense, can be convicted of criminal solicitation.

Subsection (b) reflects the same considerations that underlie the corroboration requirement for the general attempt offense, § 39-901. Since solicitation criminalizes a communication that is likely to occur under circumstances of low visibility, subsection (b) requires more evidence than just the testimony of the person allegedly solicited. Furthermore, there must be circumstances corroborating both the making of the solicitation and that its making was in earnest.

Subsection (c) is the counterpart to § 39-504 (complicity), § 39-901(c) (criminal attempt), and § 39-902(c) (criminal conspiracy), and rules out possible technical defenses immaterial to a solicitor's blameworthiness. Since criminal solicitation is limited to capital and first-degree felonies, subsection (c)(3) will apply primarily to ch. 13 (sexual offenses)—for example, to a man who solicits another to commit aggravated rape of his wife. The husband is a party to the consummated rape, both under § 39-502 (complicity) and present law, and subdivision (3) ensures that he is responsible for the solicitation as well. See Bryson v. State, 195 Tenn. 313, 259 S. W. (2d) 535 (1953) (woman convicted of rape for aiding rape of another woman).

39-904. Renunciation defense.—(a) It is an affirmative defense to prosecution under §§ 39-901(a)(2) and (a)(3), which the actor must prove by a preponderance of the evidence, that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor avoided commission of the offense attempted by abandoning his criminal conduct or, if abandonment was insufficient to avoid commission of the offense, by taking further, affirmative action that prevented the commission.

(b) It is an affirmative defense to prosecution under §§ 39-902 and 39-903, which the actor must prove by a preponderance of the evidence, that under circumstances manifesting a voluntary and complete renunciation of his criminal objective the actor countermanded his solicitation or withdrew from the conspiracy before commission of the object offense and made a substantial effort to prevent commission of the object offense.

(c) Renunciation is not voluntary and complete if it is motivated in whole or part:

(1) by circumstances not present or apparent at the inception of the actor's course of conduct that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal objective; or

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 15.04.
Model P. C. §§ 5.01(4), 5.02(3), 5.03(6).

Cross-References:
Affirmative defense explained, see § 39-204.
Attempt, see § 39-901.
Conspiracy, see § 39-902.
Solicitation, see § 39-903.

Comment:
Section 39-904 changes present law by providing a defense to inchoate criminal responsibility analogous to the renunciation defense to party responsibility provided in § 39-505 (complicity). The defense is a limited one, requiring a "voluntary and complete renunciation," and the burden of persuasion is placed on the defendant.

Subsection (a) applies to "last proximate act," § 39-901(a)(2), and "substantial step," § 39-901(a)(3), varieties of criminal attempt, and somewhat offsets this code's extension of attempt responsibility. To avail himself of the renunciation defense, subsection (a) requires the actor to actually avoid commission of the offense attempted. Renunciation is apparently not recognized as a defense to attempt in present law, although no law on the point has been found.

Subsection (b) applies to criminal solicitation and conspiracy and, as in § 39-505 (complicity), requires a "substantial effort to prevent" the object offense rather than actual prevention. Subsection (b) changes the general rule that the offense of conspiracy is completed with the agreement and no subsequent action can exonerate the conspirator. No Tennessee law on this issue has been discovered.

Subsection (c) is identical with § 39-505(c) (complicity).

39-905. No offense.—Attempt or conspiracy to commit, or solicitation of, a preparatory offense defined in this chapter is not an offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 15.05.

Cross-References:
Attempt, see § 39-901.
Conspiracy, see § 39-902.
Multiple sentences for inchoate and object offenses prohibited, see § 39-301.
Solicitation, see § 39-903.

Comment:
Section 39-905 states the traditional policy barring the use of an inchoate offense as the object offense, e.g., prosecuting for an attempted conspiracy to commit an offense. There appears to be no present law on this issue, which admittedly will seldom arise.

CHAPTER 10
CRIMINAL INSTRUMENTS

39-1001. Unlawful use of criminal instrument.—(a) An individual, corporation, or association commits an offense if:

(1) he manufactures or possesses a criminal instrument with intent to employ it in the commission of an offense; or

(2) he intentionally or knowingly sells or manufactures for the purpose of sale a criminal instrument.

(b) For purposes of this section, "criminal instrument" means anything, the possession, manufacture, or sale of which is not otherwise an offense, that is specially designed, made, or adapted for use in the commission of an offense.

(c) An offense under subsection (a)(1) is a class A misdemeanor; an offense under subsection (a)(2) is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 16.01.

Cross-References:
"Association" defined, see § 39-107.
Disposition of criminal instruments, see T. C. A. tit. 40, ch. 8, subch. B, as amended.
Possession as voluntary act, see § 39-402.
"Possess" defined, see § 39-107.
Possession of forged instrument, see § 39-2021.
Posession of gambling paraphernalia, see §§ 39-2705, 39-2706.
Possession of incomplete credit cards, see § 39-2031.
Possession of narcotics paraphernalia, see § 39-2912.
Possession and sale of weapons, see ch. 28.
Seizure of contraband, see T. C. A. tit. 40, ch. 8, subch. B, as amended.

Comment:
Section 39-1001 aims at terminating incipient criminal activity, the existence of which is indicated by conduct involving a "criminal instrument." The mere possession of things specially designed for the purpose of accomplishing a criminal objective is strong evidence of criminal intent and constitutes sufficient basis for intervention by law enforcement. On the other hand, things frequently used in crime, but which have common, lawful uses, are excluded from the purview of § 39-1001 because possession of such things, alone, is conduct too ambiguous for imposition of the criminal sanction. In addition, the section requires proof of specific intent to use the instrument possessed in committing an offense.

Subsection (b) defines criminal instrument functionally without regard to the object offense, whereas present law proscribes possession in terms of a particular offense in which the instrument is used. See, e.g., T. C. A. § 39-908 (burglarious instruments); T. C. A. § 39-909 (explosives for burglarious purposes); T. C. A. §§ 39-1713 — 39-1715 (counterfeiting instruments). The phrase "the possession, manufacture, or sale of which is not otherwise an offense" excludes things that are specifically treated elsewhere in the code, such as gambling and narcotics paraphernalia, and forged instruments.

The grading of the offense places heavier penalties on the sale and manufacture for sale of criminal instruments.

39-1002. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 16.02.

Cross-References:
"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:
Municipal ordinances presently conflict with and overlap state law in the area of possession of criminal instru-

ments. The Memphis Code of Ordinances (1967), for example, proscribes possession of burglary tools, § 22-6. Such ordinances exist even though state law clearly covers possession of burglary tools. T. C. A. § 39-908. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, § 39-1002 makes clear the state intends to preempt the area of possession of criminal instruments and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

The more common criminal instruments are specifically dealt with in the chapters defining offenses in the commission of which they are commonly used, e.g., § 39-2705 (gambling device or record), § 39-2912 (drug paraphernalia). This chapter is a catchall, and together with the specific criminal instrument possessory offenses deals comprehensively with the area, thus preempting enforcement or enactment of laws by governmental subdivisions and agencies, for example, that proscribe possession of a specific criminal instrument, as well as laws that conflict with any provisions of this chapter, e.g., impose strict liability for possession.

CHAPTER 11

CRIMINAL HOMICIDE

39-1101. Types of criminal homicide.—(a) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of another.

(b) Criminal homicide is capital murder, murder, manslaughter, or criminally negligent homicide.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 19.01.
Cal. Prop. Pen. Code § 1410.
Model P. C. § 210.1.

Cross-References:

Capital murder, see § 39-1105.
Causation, see § 39-407.
Criminally negligent homicide, see § 39-1104.
Culpable mental states, see § 39-405.
General defenses, see ch. 6.
Justification, see ch. 7.
Lesser included offenses, see T. C. A. § 40-2203, as amended.
Manslaughter, see § 39-1103.
Murder, see § 39-1102.

Comment:

Criminal homicide is currently differentiated into four categories: murder in the first degree, murder in the second degree, voluntary manslaughter, and involuntary manslaughter. T. C. A. §§ 39-2401—39-2411. Chapter 11 alters these classifications, but retains much of the present Tennessee case law on criminal homicide.

The four culpable mental states defined in § 39-405—intentional, knowing, reckless, criminal negligence—are the key to this chapter's much simplified definition of the types of criminal homicide. After a homicide is determined to be criminal, it is the actor's culpable mental state that determines whether it is murder, manslaughter, or criminally negligent homicide.

39-1102. Murder.—(a) Except as provided in § 39-1103(a)(2), an individual, corporation, or association commits murder if:

(1) he intentionally or knowingly causes the death of another; or

(2) he intends to cause serious bodily injury to any person and commits an act clearly dangerous to human life that causes the death of another; or

(3) he commits or attempts to commit a felony, other than manslaughter or criminally negligent homicide, and in the course of and in furtherance of the felony, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of another; or

(4) he is a party to a felony and another party to the felony commits murder as defined in subdivision (3), and the actor:

(A) solicits, directs, aids, or attempts to aid the homicidal act; or

(B) is armed with a deadly weapon; or

(C) is reckless with regard to whether the other party is armed with a deadly weapon; or

(D) is reckless with regard to whether the other party intends to commit an act clearly dangerous to human life.

(b) Murder is a felony of the first degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 19.02.
Subsec. (a)(1), (2): Ill. Stat. Ann. ch. 38, § 9-1.
Subsec. (a)(3), (4): N.Y. Rev. Pen. Law § 125.-25(3).

Cross-References:

"Association" defined, see § 39-107.
Attempt, see § 39-901.
Causation, see § 39-407.
Criminally negligent homicide, see § 39-1104.
"Deadly weapon" defined, see § 39-107.
Death penalty, see § 39-846.
"Felony" defined, see § 39-107.
General defenses, see ch. 6.
"Intentionally" defined, see § 39-405.
Justification, see ch. 7.
"Knowingly" defined, see § 39-405.
Manslaughter, see § 39-1103.
Party to offense, see ch. 5, subch. A.
"Reckless" defined, see § 39-405.

Comment:

Definition of Murder.

Section 39-1102 considerably simplifies the definition of murder. Together with § 39-1103 (manslaughter), it clearly distinguishes between the unprovoked intentional or knowing killing, which has traditionally been treated as murder, and the reckless killing, which the common law designated involuntary manslaughter. This section substantially changes Tennessee law in that the separate categories of murder in the first degree and murder in the second degree are combined under the general term, "murder." See T. C. A. §§ 39-2401—39-2403. At common law there was but one type of murder; the division into two degrees is statutory. Farmer v. State, 201 Tenn. 107, 296 S. W. (2d) 879 (1956); see T. C. A. § 39-2401. The merger of the two degrees of murder is accomplished by elimination of the term "premeditation" which previously distinguished the separate degrees. This elusive term of art has been defined as a design to kill which must be formed before the act by which the death is produced is performed. However, the design or intention to kill may be conceived and deliberately formed in an instant. Lewis v. State, 40 Tenn. (3 Head) 127 (1859). A real distinction exists between the murder that is coolly and deliberately planned and the murder that is a result of passion not sufficient to constitute a legal provocation. Attempts to distinguish between the two types of murder solely on the basis of the nebulous term "premeditation," however, have proven meaningless. See Wharton, The Law of Homicide § 82 (3rd ed). The Commission is of the opinion that such a determination of culpability should be made in the sentencing portion of the trial and not confined by prior determination that the murder is of a designated degree.

The concept of malice, which has become virtually meaningless, is deleted, and § 39-1102(a)(1) instead uses two carefully defined terms (see § 39-405), "intentional" and "knowing," to describe

the culpable mental state necessary to establish murder. It is this concept of malice which has been the distinguishing factor between murder and the other categories of criminal homicide. Malice has been defined as "an evil design in general, the dictates of a wicked, depraved, and malignant heart and not necessarily directed toward a particular individual." Warren v. State, 44 Tenn. (4 Cold.) 130 (1867). Under present law, malice may be implied or presumed from the circumstances of the homicide. See Lewis v. State, 202 Tenn. 328, 304 S. W. (2d) 322 (1957) (malice presumed from the use of a deadly weapon). In all probability, elimination of the issue of malice, presumed or implied, will prevent a verdict of murder for the offense of drunken driving and other grossly reckless conduct. E.g., Stallard v. State, 209 Tenn. 13, 348 S. W. (2d) 489 (1961); Eager v. State, 205 Tenn. 156, 325 S. W. (2d) 815 (1959); Edwards v. State, 202 Tenn. 393, 304 S. W. (2d) 500 (1957). However, the doctrine of provocation sufficient to negative malice and constitute voluntary manslaughter is preserved, but with a different terminology and rationale by § 39-1103. See Smith v. State, 212 Tenn. 510, 370 S. W. (2d) 543 (1963). As under present law, intent or knowledge may be inferred from the nature of the killing, the actor's conduct, and the weapon used, but statutory "presumptions" such as T. C. A. § 39-2402 (poison, lying in wait) are not retained in this code. See Floyd v. State, 50 Tenn. 342 (1871).

The general defenses and justification, which may exculpate one charged with murder, apply to the entire code and are thus located elsewhere, in chapters 6 and 7, respectively. Finally, the present law's requirement that one must be born and alive to be a victim of criminal homicide ("a reasonable creature in being," T. C. A. § 39-2401; see Morgan v. State, 148 Tenn. 417, 256 S. W. 433 (1923)), is preserved in the definition of "another"—a person other than the actor—which includes "individual," i.e., a human being who is born and alive, see § 39-107 (code definitions).

Section 39-1102(a)(2) may expand present murder law, to reach a theoretically unintended killing, although the various "presumptions" of intent and malice currently applied probably produce this result in practice. See Bostick v. State, 210 Tenn. 620, 360 S. W. (2d) 472 (1962) (proof of the use of a deadly weapon raises a presumption of malice sufficient to sustain a charge of murder unless it is rebutted by other facts or circumstances). Additionally, present Tennessee law considers deliberate and conscious acts, the probable consequence of which is death, to be murder even though a death was not intended. Rogers v. State, 196 Tenn. 263, 265 S. W. (2d) 559 (1954).

Felony Murder.

Section 39-1102(a)(3) greatly expands the felony murder concept currently existing in Tennessee. The present statute considers any homicide committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, or larceny, to be first-degree murder. T. C. A. § 39-2402. Such a homicide must have been committed in pursuance of an enumerated felony and not collaterally to it. Smith v. State, 209 Tenn. 499, 354 S. W. (2d) 450 (1961). Proof of malice and premeditation are not essential to a conviction of first-degree murder under the present felony murder statute. Phillips v. State, 2 Tenn. Crim. App. 609, 455 S. W. (2d) 637 (1970). Under § 39-1102(a)(3), the mere attempt or commission of a felony does not imply intent or knowledge: the actor must kill while attempting or committing an act clearly dangerous to human life in the course or furtherance of the felony or in immediate flight therefrom.

Section 39-1102(a)(4) is a special theory of complicity under which one felon is held criminally responsible for felony murder committed by his cofelon. The general complicity test, § 39-502, would not impose responsibility on the nonperpetrating felon unless he acted with intent to promote or assist the killing. But the effect of the felony murder rule in subsection (a)(3) is to impose responsibility for murder despite the absence of the felon's intent to kill, and subsection (a)(4) extends this responsibility to all parties to the underlying felony if one or more of the factors enumerated in subdivisions (4)(A)-(4)(D) is present.

Present law reaches the same result for killings occurring in the course of a felony. When actors enter into a common design to commit a felony, the natural and probable consequences of which involve the contingency of taking human life, all are responsible for the acts of each committed in furtherance of such design even though the killing was not specifically contemplated. Dupes v. State, 209 Tenn. 506, 354 S. W. (2d) 453 (1962); Williams v. State, 164 Tenn. 562, 51 S. W. (2d) 482 (1932). Murder convictions in these and similar cases were affirmed on a theory of complicity to the effect that all parties to a felony are

responsible for conduct that was or ought to have been foreseen by the parties as a natural or probable consequence of the intended felony. This simple negligence standard for vicarious responsibility was rejected generally in the complicity provisions and is rejected in the felony murder context as well.

To hold a nonperpetrating cofelon for felony murder, subdivisions (4)(A)-(4)(D) require the state to prove either that he aided, etc., in the homicide (i.e., was a party to it) or that he was conscious of the risk that homicide might result but disregarded it (i.e., acted recklessly). Singling out homicides caused in the course of committing violent felonies as an occasion for broadening (although not as far as present law) the general test of vicarious responsibility, and equating recklessness with being armed with a deadly weapon, appear justified to the Commission because of the great danger accompanying most violent felony commissions and the absence of social utility in this type of conduct.

39-1103. Manslaughter.—(a) An individual, corporation, or association commits manslaughter if:

(1) he recklessly causes the death of another; or

(2) he causes the death of another under circumstances that would constitute murder under § 39-1102 except that he causes the death under the influence of extreme emotional disturbance, which disturbance is not the result of his own intentional, knowing, reckless, or criminally negligent act, and for which disturbance there is an adequate explanation.

(b) For purposes of subsection (a)(2), the adequacy of the explanation for the disturbance shall be determined from the viewpoint of an ordinary person in the actor's situation under the circumstances as the actor reasonably believes them to be.

(c) Manslaughter is a felony of the second degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 19.03.
Fed. Prop. Pen. Code § 1602.

Cross-References:

"Association" defined, see § 39-107.
Causation, see § 39-407.
Criminally negligent homicide, see § 39-1104.
General defenses, see ch. 6.
Justification, see ch. 7.
Murder, see § 39-1102.
"Reasonable belief" defined, see § 39-107.
"Recklessly" defined, see § 39-405.

Comment:

Section 39-1103(a)(1) narrows and refines the common-law concept of involuntary manslaughter as codified in T. C. A. § 39-2409. Death caused by commission of an unlawful act or a lawful act in an unlawful manner, the common law's "misdemeanor-manslaughter" doctrine, is not manslaughter under subsection (a)(1). See Manier v. State, 65 Tenn. 595 (1873). Nor is a negligent, even a criminally or grossly negligent, killing manslaughter. See Brown v. State, 201 Tenn. 50, 296 S. W. (2d) 848 (1956). The actor must cause death recklessly, as that term is defined in § 39-405, to constitute manslaughter under subsection (a)(1). Criminally negligent killings are covered by § 39-1104.

The analogue to common-law voluntary manslaughter, killing on legal provocation as codified in T. C. A. § 39-2409, is contained in subsection (a)(2). The present Tennessee test for voluntary manslaughter is: an unlawful and intentional killing without malice, but upon a sudden heat or passion adequate to obscure the reason of an ordinary man and thus negate malice. Smith v. State, 212 Tenn. 510, 370 S. W. (2d) 543 (1963). The definition of legal provocation in subsection (a)(2) differs considerably from the common law, however, and from the present Tennessee law.

"Extreme emotional disturbance" replaces the archaic "sudden heat" of T. C. A. § 39-2409. The modifier "sudden" is deleted in recognition of the fact that brooding may intensify rather than di-

minish passion. See Whitsett v. State, 201 Tenn. 317, 299 S. W. (2d) 2 (1957) (recognition that passion may be suppressed for a lengthy period of time). The disturbance must influence the killing, of course—the traditional cause and effect requirement is preserved—but the legal provocation concept of subsection (a)(3) recognizes better than either the common law or Tennessee case law the infinite variations in personalities that produce the infinite variety of responses to provocation.

Subsections (a)(2) and (b) avoid the common law's rigidity in listing factors that as a matter of law do or do not constitute legal provocation. For example, mere language is not presently considered provocation. Freddo v. State, 127 Tenn. 376, 155 S. W. 170 (1913). The disturbance must be adequately explained, but what is adequate depends (with a single exception) on all the circumstances of the particular case. The single exception is a disturbance produced by the actor's own culpable act that is inadequate as a matter of law.

The test of adequacy set out in subsection (b) is both objective and subjective: it views the situation from the actor's standpoint but according to the value system of the ordinary person. This code's definitions of recklessness and criminal negligence, § 39-405, formulate a similar (but incompletely stated) test: "an ordinary person . . . under all the circumstances as viewed from the actor's standpoint." Present Tennessee law contains a similar standard. See Freddo v. State, 127 Tenn. 376, 155 S. W. 170 (1913); Seals v. State, 62 Tenn. 459 (1874).

39-1104. Criminally negligent homicide.—(a) An individual, corporation, or association commits criminally negligent homicide if he causes the death of another by criminal negligence.

(b) Criminally negligent homicide is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 19.04.
Fed. Prop. Crim. Code § 1603.
N.Y. Rev. Pen. Law § 125.10.

Cross-References:

Assault, see §§ 39-1401, 39-1402.
"Association" defined, see § 39-107.
Capital murder, see § 39-1105.
Causation, see § 39-407.
Criminal negligence, see § 39-405.
General defenses, see ch. 6.
Justification, see ch. 7.
Manslaughter, see § 39-1103.
Murder, see § 39-1102.

Comment:

Section 39-1104 both simplifies and narrows the present law of negligent homicide.

If death is caused by criminal negligence, as that term is defined in § 39-405, it is criminally negligent homicide under § 39-1104 without regard to whether the actor's homicidal conduct violated a traffic law, for example. See Cordell v. State, 209 Tenn. 219, 352 S. W. (2d) 234 (1961). Additionally, the present distinction between acts malum in se and lawful acts done in an unlawful manner is eliminated. Compare Bowers v. State, 208 Tenn. 507, 347 S. W. (2d) 35 (1961) with Roe v. State, 210 Tenn. 282, 358 S. W. (2d) 308 (1962). The only apparent substantive change in the present law of involuntary homicide is that reckless homicide is not contained in § 39-1104, but is removed to § 39-1103(a)(1).

Criminal negligence requires the same culpability as the present law. See Copeland v. State, 154 Tenn. 7, 285 S. W. 565 (1926). It is akin to the gross negligence of tort law, and requires a substantial and unjustifiable risk of death the failure to perceive which constitutes a gross deviation from the standard of care an ordinary person would exercise. The fact-finder must view the circumstances from the actor's standpoint, but the standard of care is objective, that of the ordinary man, and this element of the definition of criminal negligence is similar to the tort definition of negligence. The risk of death must be both substantial and unjustifiable to constitute criminal negligence.

39-1105. Capital murder. — (a) An individual commits a capital murder if:

(1) he commits an offense under § 39-1102(a)(1) and:

(A) the victim is an employee of the department of correction having custody of the actor; or

(B) the victim is known to the actor to be a peace officer acting in the course of his employment; or

(C) the offense is committed for hire.

(2) he hires another to commit an offense under § 39-1102(a)(1), and the offense is committed.

(3) he commits an offense under § 39-1102(a)(1) in the course of the commission of an offense under § 39-1201, or § 39-1303, or § 39-1703, or § 39-1802.

(b) As used in subsection (a), "in the course of the offense" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of the offense.

(c) A capital murder is punishable by death.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

New.

Cross-References:

Death penalty for capital felony, see § 39-846.
Execution of judgment, see T. C. A. § 40-2506, as amended.
Felony murder, see § 39-1102.
"Peace officer" defined, see § 39-107.

Comment:

This section has been carefully drawn to comply with the recent Supreme Court ruling in Furman v. Georgia, 408 U. S. 238 (1972). No discretion is allowed in the imposition of the death penalty for the commission of the enumerated offenses.

Subsection (1) classifies certain deliberate killings as capital felonies. Three circumstances are designated as aggravating the crime of murder to this level: where the victim is a prison guard, warden, or employee having custody of the actor; where the victim is known to the actor to be a peace officer acting in the line of duty; and where the homicide is a contract killing, done for hire.

Subsection (2) reaches the employer of a hired assassin.

It is important to note that subsection (3) does not deal with felony murders. Instead it punishes deliberate, calculated killings, § 1102(a)(1), that coincide with the commission of the enumerated offenses (kidnapping, aggravated rape, aggravated robbery, and burglary). Subsection (a)(3) is designed to cover those situations in which the actor must choose, during the course of the object crime, whether to leave his victim alive as a potential witness. In those situations, where the actor makes a conscious and deliberate decision as to the fate of his victim, the deterrent effect of the capital penalty should have its greatest impact.

In its deliberations the Commission attempted to define the capital felony crime so as to apply to only the most heinous, deliberate murders in which a deterrent might be of value.

CHAPTER 12

KIDNAPPING AND FALSE IMPRISONMENT

39-1201. Kidnapping.—(a) An individual, corporation, or association commits kidnapping if by force, threat, or fraud he intentionally or knowingly detains another, or intentionally or knowingly moves another from the vicinity where he is found, with intent:

(1) to hold the other for ransom or reward or as a shield or hostage; or

(2) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(3) to inflict serious bodily injury or death on the victim or another; or

(4) to terrorize the victim or another.

(b) A detention or moving is deemed to be the result of force, threat, or fraud if the victim is mentally incompetent or younger than twelve (12) years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(c) Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place before arraignment, in which event kidnapping is a felony of the second degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 20.01.
Minn. Stat. Ann. § 609.25.

Cross-References:

"Association" defined, see § 39-107.
Computation of age, see § 39-106.
"Effective consent" defined, see § 39-107.
False imprisonment, see § 39-1202.
Federal kidnapping offenses, see 18 U.S.C.A. §§ 801, 802.
"Felony" defined, see § 39-107.
Interference with child custody, see § 39-1503.

Comment:

As in present law, T. C. A. § 39-2601 (kidnapping) and § 39-2603 (kidnapping for ransom), § 39-1201 defines kidnapping essentially as false imprisonment coupled with a specific criminal intent. See generally Model P. C. § 212.1, Comment at 11-20 (Tent. Draft No. 11, 1960).

The scope of the offense is expanded, however, by covering cases in which the actor's conduct is accompanied by the specific intent described in subsections (a)(2)-(a)(4). The traditional ransom and hostage cases are covered by subsection (a)(1), which substantially restates T. C. A. § 39-2603.

T. C. A. § 39-2601 has been held to proscribe the detention-type kidnap dealt with by subsection (a). Cowan v. State, 208 Tenn. 512, 347 S. W. (2d) 37 (1961) (detention of two teen-age couples at pistol point for the purpose of coercing the girls to have sexual relations).

T. C. A. § 39-2602 dealing with the kidnapping of children is treated as an aggravated form of false imprisonment under § 39-1202(c)(1).

Reflecting a primary concern for the victim's safety, subsection (c) provides an incentive for the kidnapper to voluntarily return the victim alive.

39-1202. False imprisonment.—(a) An individual, corporation, or association commits false imprisonment if by force, threat, or fraud he intentionally or knowingly detains another or intentionally or knowingly moves another from the vicinity where he is found.

(b) A detention or moving is deemed to be the result of force, threat, or fraud if the victim is mentally incompetent or younger than twelve (12) years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(c) Except as provided in subdivisions (1) and (2), false imprisonment is a class B misdemeanor. False imprisonment is a felony of the third degree if:

(1) the victim is younger than twelve (12) years; or

(2) the actor recklessly exposes the victim to a substantial risk of serious bodily injury or death.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 20.02.
Model P. C. §§ 212.2, 212.3.

Cross-References:

Arrest without warrant, see T. C. A. §§ 40-631, 40-636, 40-637, as amended.
Assault, see §§ 39-1401, 39-1402.
Computation of age, see § 39-106.
"Effective consent" defined, see § 39-107.
Interference with child custody, see § 39-1503.
Justification of confinement, see §§ 39-702, 39-703.
Kidnapping, see § 39-1201.
Reckless conduct, see § 39-1403.

Comment:

Section 39-1202 basically clarifies and simplifies the present Tennessee common law on false imprisonment. Section 39-1201(a) includes the forcible detention aspect and expressly covers the forced movement of a person as well.

Subsection (b) recognizes that certain persons are legally incapable of giving consent. Twelve is the age chosen for the limit of this principle.

The aggravating circumstances in subsection (c) provide an intermediate step between false imprisonment and kidnapping. Subsection (c)(1), dealing specifically with children, replaces T. C. A. § 39-2602. These sections are primarily aimed at abduction of children by one parent after award of custody to the other. See Harris v. Turner, 329 Fed. (2) 918 (6th Cir.), cert. denied, 379 U. S. 907, rehearing denied, 379 U. S. 985 (1964).

CHAPTER 13

SEXUAL OFFENSES

39-1301. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Deviant sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person.

(2) "Sexual contact" means any touching of the anus or any part of the genitals of another person, or the breast of a female twelve (12) years or older, with intent to arouse or gratify the sexual desire of any person.

(4) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 21.01.
N. Y. Rev. Pen. Law § 130.00.
Cal. Prop. Pen. Code § 1600.

Cross-References:

Attempt, see § 39-901.
Computation of age, see § 39-106.
Conspiracy, see § 39-902.

Comment:

The definition of "deviant sexual intercourse" must be read with the sections proscribing sexual abuse (§§ 39-1304, 39-1305, 39-1307), which replace the "crime against nature" statute, T. C. A. § 39-707. The only change the definition makes in present law is to omit bestiality, which, however, if committed in public is covered by § 39-2641 (public lewdness). It should be noted that "deviant sexual intercourse" requires only "any contact" and not penetration.

Subdivision (3) defines "sexual contact," a term used in § 39-1308, dealing with fondling. "Sexual contact" is limited to touching of the anus or genitals of any person, or the breast of a female 12 years of age or older.

The definition of "sexual intercourse" contained in subdivision (4) does not change Tennessee law, and retains, for example, the requirement of penetration, however slight. T. C. A. § 39-3701; see, e.g., Walker v. State, 197 Tenn. 452, 273 S. W. (2d) 707 (1954).

39-1302. Rape.—(a) A male commits rape if he has sexual intercourse with a female not his wife without the female's consent.

(b) The intercourse is without the female's consent under one or more of the following circumstances only:

(1) he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

(2) he compels her to submit or participate by any threat that would prevent resistance by a woman of ordinary resolution; or

(3) she has not consented and he knows she is unconscious or physically unable to resist; or

(4) he knows that as a result of mental disease or defect she is at the time of intercourse incapable either of appraising the nature of the act or of resisting it; or

(5) she has not consented and he knows that she is unaware that sexual intercourse is occurring; or

(6) he knows that she submits or participates because she erroneously believes that he is her husband; or

(7) he has intentionally impaired her power to appraise or control her conduct by administering any substance without her knowledge.

(c) Rape is a felony of the second degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 21.02.
La. Rev. Stat. § 14:42.
Cal. Prop. Pen. Code § 1602.

Cross-References:

Cohabitation, see § 39-1309.
"Consent" defined, see § 39-107.
Corroboration, see § 39-1309.
Rape of child, see § 39-1306.
"Sexual intercourse" defined, see § 39-1301.

Comment:

Subsection (a) is substantially similar to present law, T. C. A. § 39-3701, which defines rape as "unlawful carnal knowledge of a woman, forcibly and against her will. Carnal knowledge is accomplished by the commencement of a sexual connection, and proof of emission is not required."

Subsection (b) is an exclusive enumeration of the circumstances under which sexual intercourse between male and female is without the female's consent. The enumeration does not significantly alter present law, but for the most part codifies case decisions defining non-consent.

Subsection (b)(1) in defining force that negates consent codifies Tennessee case law. "The degree of force required to constitute rape is relative depending upon the particular circumstances but in any case it must be sufficient to subject and put the dissenting woman within the power of the man and thus enable him to have carnal knowledge of her. . . ." King v. State, 210 Tenn. 150, 155, 357 S. W. (2d) 42, 46 (1962). Under present law and subsection (b)(1), therefore, the amount of force necessary to negate consent is a relative matter to be judged under all the circumstances the most important of which is the resistance of the female.

Subsection (b)(2) deals with threats and basically preserves Tennessee law. "It is no difference, if the person abused consented through fear . . . if she were . . . forced against her will." Wright v. State, 23 Tenn. (4 Humph.) 194, 198 (1843).

Subsection (b)(3) covers the female unable to resist because asleep or physically disabled.

Subsection (b)(4) slightly changes the present law. Although mental incompetence would logically preclude effective consent by the woman if her condition is known to the perpetrator, an 1872 Tennessee case held that a gross fraud of pretended marriage to obtain intercourse with a "very weak-minded woman" would not constitute rape absent actual force. Bloodworth v. State, 65 Tenn. (6 Baxt.) 614 (1872). The Commission believes subsection (b)(4) to be the better rule of law, broadening the law's protection to cover mental defectives and focusing the test on the cognitive and physical elements to determine if the female consented.

Subsection (b)(5) is new to Tennessee law and contemplates intercourse performed under the pretense of making a medical examination or performing an operation.

A recurring problem involves the female who submits or participates because she erroneously believes that the male's entering the female's bedroom either from a "sham" marriage ceremony arranged by the male, or by the male's entering the female's bedroom in the dark pretending to be her husband. T. C. A. § 39-3703 presently speaks to this second variety of fraud and covers the male's impersonation of the female's husband.

T. C. A. § 39-3704 filled a breech in the rape statutes by punishing as rape intercourse obtained through the administration of drugs or other substances (including whiskey, Melton v. State, 160 Tenn. 273, 23 S. W. (2d) 662 (1930)) to prevent effectual resistance. Subsection (b)(7) restates and broadens this provision by focusing on the effect of the substance, whatever it may be.

39-1303. Aggravated rape.—(a) A male commits aggravated rape if he commits rape as defined in § 39-1302 or rape of a child as defined in § 39-1306, and:

(1) he causes serious bodily injury or death to another in the course of the same criminal episode; or

(2) he compels submission to the rape by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone; or

(3) the female is an inmate in a hospital licensed by the state department of health and he knows that as a result of mental disease or defect she is at the time of the intercourse incapable either of appraising the nature of the act or of resisting it.

(b) Aggravated rape is a felony of the first degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 21.03.
Minn. Stat. Ann. § 609.29.
Cal. Prop. Pen. Code § 1601.

Cross-References:

Corroboration, see § 39-1309.
"Criminal episode" defined, see § 39-107.
Kidnapping, see § 39-1201.
"Serious bodily injury" defined, see § 39-107.

Comment:

Rape becomes aggravated rape and a felony of the first degree if committed under any of the three circumstances enumerated in this section. This concept significantly differs from present law, which has only one degree of rape.

Note that the threatened harm of subsection (a)(2) must be "imminent;" hence a threat to harm someone at an indeterminate time in the future does not aggravate. Whether or not the threat is "imminent" is, of course, a fact question.

"Criminal episode" is used in this section and the sexual abuse offense, § 39-1305, to require a reasonably close connection between one of the aggravating factors and the rape or sexual abuse. The concept of criminal episode, which resembles the "transaction" concept of present law, was devised primarily for use in the joinder and severance provisions (chapter 3) and is defined in the comment to § 39-107.

39-1304. Sexual abuse.—(a) An individual commits sexual abuse if, without the other person's consent and with intent to arouse or gratify the sexual desire of any person:

(1) the actor engages in deviant sexual intercourse with the other person, not his spouse, whether the other person is of the same or opposite sex; or

(2) the actor compels the other person to engage in sexual intercourse or deviant sexual intercourse with a third person, whether the other person is of the same sex as or opposite sex from the third person.

(b) The intercourse is without the other person's consent under one or more of the following circumstances only:

(1) the actor compels the other person to submit or participate by force that overcomes such earnest resistance as might be reasonably expected under the circumstances; or

(2) the actor compels the other person to submit or participate by any threat that would prevent resistance by a person of ordinary resolution; or

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist; or

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the deviant sexual intercourse incapable either of appraising the nature of the act or of resisiting it; or

(5) the other person has not consented and the actor knows the other person is unaware that deviant sexual intercourse is occurring; or

(6) the actor knows that the other person submits or participates because of the erroneous belief that he is the other person's spouse; or

(7) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge.

(c) Sexual abuse is a felony of the second degree.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-1305.

39-1305. Aggravated sexual abuse.—(a) An individual commits aggravated sexual abuse if he commits sexual abuse as defined in § 39-1304 or sexual abuse of a child as defined in § 39-1307, and:

(1) he causes serious bodily injury or death to another in the course of the same criminal episode; or

(2) he compels submission to the sexual abuse by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone; or

(3) the other person is an inmate of a hospital licensed by the state department of health and the actor knows that as a result of mental disease or defect the other person is at the time of the sexual intercourse or deviant sexual intercourse incapable either of appraising the nature of the act or of resisting it.

(b) Aggravated sexual abuse is a felony of the first degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. § 21.05.
Cal. Prop. Pen. Code § 1064.

Cross-References:

Cohabitation, see § 39-1309.
"Consent" defined, see § 39-107.
Corroboration, see § 39-1309.
"Criminal episode" defined, see § 39-107.
"Deviant sexual intercourse" defined, see § 39-1301.
Kidnapping, see § 39-1201.
"Serious bodily injury" defined, see § 39-107.
Sexual abuse of child, see § 39-1307.
"Sexual intercourse" defined, see § 39-1301.

Comment:

The form of § 39-1304 follows that of § 39-1302 (rape). However, the acts can be heterosexual or homosexual. Section 39-1304(a)(1) covers an individual who compels another (not his spouse) to perform or submit to an act of deviant sexual intercourse; subsection (a)(2) covers one who compels two other people, one of whom may be his spouse, to engage in an act of sexual intercourse or deviant sexual intercourse. Subsection (b) repeats the list of facts negating consent set out in § 39-1302 (rape).

This code punishes public acts of sexual intercourse, bestiality, and deviant sexual intercourse in § 39-2641 (public lewdness).

Section 39-1305 (aggravated sexual abuse) tracks the factors aggravating rape in § 39-1303. See the comment following that section for an explanation of the single criminal episode concept.

39-1306. Rape of a child.—(a) A male commits rape of a child if he has sexual intercourse with a female not his wife, and:

(1) she is younger than sixteen (16) years and he is at least three (3) years older than she; or

(2) she is younger than twelve (12) years.

(b) It is a defense to prosecution under this section that the female was at the time of the alleged offense twelve (12) years or older and had, prior to the time of the alleged offense, engaged promiscuously in sexual intercourse or deviant sexual intercourse.

(c) Rape of a child under subsection (a)(1) is a felony of the third degree; rape of a child under subsection (a)(2) is a felony of the first degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 21.09.
Ill. Stat. Ann. ch. 38, § 11-4.
La. Rev. Stat. §§ 14:42, 14:80.

Cross-References:

Aggravated rape, see § 39-1303.
Computation of age, see § 39-106.
Defense explained, see § 39-203.
"Deviant sexual intercourse" defined, see § 39-1301.
Ignorance or mistake of age, see § 39-1309.
Prompt complaint, see § 39-1309.
Rape, see § 39-1302.
"Sexual intercourse" defined, see § 39-1301.

Comment:

The female legally incapable of consenting to sexual intercourse is the subject of the offense created by this sec-

tion, which is often called statutory rape. Rape by force, threat, or fraud, it should be noted, is proscribed by §§ 39-1302 (rape) and 39-1303 (aggravated rape), so this section, 39-1306, deals only with consensual (in fact) sexual intercourse.

Age of Consent.

Determining the age below which the victim is legally incapable of consent is the most difficult problem encountered in defining sexual offenses involving children. Sections 39-1306 — 39-1308, which define sexual offenses involving minors, consistently employ ages 12 and 16 to mark out the age of consent. Moreover, these sections include a three-year age differential designed to exclude from the talons of the criminal law children in the same age bracket; this differential, pioneered by the Model Penal Code and included in the 1971 Tennessee Drug Control Act and in recent penal law revisions of most other jurisdictions, reinforces the objective of the incapable-of-consent offense, which is to prevent imposition by the older and presumably more experienced.

Under §§ 39-1306—39-1308 there is no defense to rape, sexual abuse, or indecency involving a child younger than 12. This retains the non-defensible age at 12 years as stated in T. C. A. § 39-3705. Between 12 and 16, however, reasonable ignorance or mistake of age is a defense under § 39-1309(a), and the actor must be at least three years older than the "victim" (e.g., a 17 year old boy does not commit an offense if he has consensual sexual intercourse with a 15 year old girl in private).

Despite the consistent employment of these ages and the age differential, however, the Commission readily concedes that they are essentially arbitrary, as is any attempt to prescribe a uniform age for coming of sexual and emotional maturity. At the same time, the Commission believes age 16 is a more realistic measure of maturity today than the 18 of present law, and that the three-year differential better focuses these offenses on the true offender, he who takes advantage of a child's immaturity.

Promiscuity Defense.

The present law, T. C. A. § 39-3706, denies "statutory rape" protection to a female over 14 who has a reputation "for the want of chastity." Mangrum v. State, 1 Tenn. Crim. App. 155, 432 S. W. (2d) 497 (1968). The present law also denies protection to a female over 12 who is "a bawd, lewd, or kept female." Jamison v. State, 117 Tenn. 58, 94 S. W. 675 (1906).

Section 1306(b) revises the unchastity defense of present law to better identify those least in need of its protection, the sexually promiscuous female. "Promiscuity" connotes a variety of consensual sexual conduct with a variety of partners, and clearly excludes, for example, a single prior act of sexual intercourse.

39-1307. Sexual abuse of a child.—(a) An individual commits sexual abuse of a child if, with intent to arouse or gratify the sexual desire of any person, he engages in deviant sexual intercourse with a child, not his spouse, whether the child is of the same or opposite sex, and:

(1) the child is younger than sixteen (16) years and the actor is at least three (3) years older than the child; or

(2) the child is younger than twelve (12) years.

(b) It is a defense to prosecution under this section that the child was at the time of the alleged offense twelve (12) years or older and had, prior to the time of the alleged offense, engaged promiscuously in sexual intercourse or deviant sexual intercourse.

(c) Sexual abuse of a child under subsection (a)(1) is a felony of the third degree; sexual abuse of a child under subsection (a)(2) is a felony of the first degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 21.10.
Ill. Stat. Ann. ch. 38, § 11-4.

Cross-References:

Aggravated sexual abuse, see § 39-1305.

Computation of age, see § 39-106.
Defense explained, see § 39-203.
"Deviant sexual intercourse" defined, see § 39-1301.
Ignorance of mistake of age, see § 39-1309.
Prompt complaint, see § 39-1309.
Sexual abuse, see § 39-1304.
"Sexual contact" defined, see § 39-1301.
"Sexual intercourse" defined, see § 39-1301.

Comment:

This section tracks § 39-1304 (sexual abuse), but applies to victims legally incapable of consent. Present law does not treat this conduct separately; T. C. A. § 39-707 proscribes all sodomy, whether performed with an adult or child.

The ages of consent, age differential, and promiscuity defense are the same as in § 39-1306 (rape of a child) and are explained in the comment to that section.

39-1308. Indecency with a child.—(a) An individual commits indecency with a child if the child is not his spouse and, without the child's consent the actor engages in sexual contact with the child.

(b) The sexual contact is without the child's consent if:

(1) the child is younger than sixteen (16) years and the actor is at least three (3) years older than the child; or

(2) the child is younger than twelve (12) years.

(c) It is a defense to prosecution under this section that the child was at the time of the alleged offense twelve (12) years or older and had, prior to the time of the alleged offense, engaged promiscuously in:

(1) sexual intercourse; or

(2) deviant sexual intercourse; or

(3) sexual contact.

(d) Indecency with a child under subsection (b)(1) is a class A misdemeanor; indecency with a child under subsection (b)(2) is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 21.11.
Ill. Stat. Ann. ch. 38, §§ 11-4, 11-5.

Cross-References:

Assault, see § 39-1401.
Computation of age, see § 39-106.
Defense explained, see § 39-203.
"Deviant sexual intercourse" defined, see § 39-1301.
Ignorance or mistake of age, see § 39-1309.
Prompt complaint, see § 39-1309.
"Sexual contact" defined, see § 39-1301.

Comment:

This section, and §§ 39-1306 and 39-1307, establish uniform ages of consent for the definition of sexual offenses involving children, and introduce a three-year age differential to exclude consenting partners in the same age group. See the comment to § 39-1306.

The promiscuity defense set out in § 39-1308(c) is explained in the comment to § 39-1306 (rape of a child).

39-1309. General provisions.—(a) If the criminality of conduct defined in this chapter to constitute an offense depends on a child's being younger than sixteen (16) years, it is a defense to prosecution for the conduct that the actor reasonably believed the child to be sixteen (16) years or older. However, if criminality depends on the child's being younger than twelve (12) years, it is no defense that the actor did not know the child to be younger than twelve (12) years, or reasonably believed the child to be twelve (12) years or older.

(b) The exclusion of conduct with a spouse from the definitions of offenses in §§ 39-1302—39-1305 extends to the conduct of persons

while cohabiting, regardless of the legal status of their relationship and of whether they hold themselves out as husband and wife.

(c) No prosecution may be instituted or maintained under this chapter unless the alleged offense was reported to or discovered by a peace officer:

(1) within one (1) month after its occurrence; or

(2) within one (1) month after a parent, guardian, or other competent person specially interested in the victim and who is not a party to or facilitator of the offense learns of it, if the alleged victim was younger than sixteen (16) years, incompetent, or unable to make complaint.

(d) A person may not be convicted of an offense under §§ 39-1302—39-1308 upon the uncorroborated testimony of the alleged victim unless the victim made an outcry at the first reasonable opportunity. Corroboration may be circumstantial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 21.12.
Conn. Gen. Stat. §§ 53-70—53-72.

Cross-References:

Bigamy, see § 39-1501.
Complicity, see ch. 5, subch. A.
Computation of age, see § 39-106.
Defense explained, see § 39-203.
Facilitation, see § 39-503.
Ignorance or mistake generally, see § 39-602.
"Peace officer" defined, see § 39-107.
"Reasonable belief" defined, see § 39-107.

Comment:

Ignorance or Mistake of Age.

Section 39-1309(a) changes Tennessee law by providing a defense for reasonable ignorance or mistake about the age of the child between 12 and 16 in a prosecution under § 39-1306 (rape of a child), § 39-1307 (sexual abuse of a child), or § 39-1308 (indecency with a child). As pointed out in the comment to § 39-1306, however, ignorance or mistake about the age of a child younger than 12 is no defense.

Although ignorance or mistake of fact is universally recognized as a general defense to criminal responsibility, when the fact is age in sexual offenses involving children, Tennessee and most American jurisdictions have denied the defense. But see People v. Hernandez, 61 Cal. (2d) 529, 393 P. (2d) 673 (1964).

There is no distinction in principle between ignorance or mistake of age and ignorance or mistake about, say, whether an adult female consented to sexual intercourse, the existence of necessity justifying homicide in self-defense, or whether a capsule contained heroin, ignorance or mistake about each of which is a defense in present law and under this code. More importantly, the reasonably mistaken or ignorant actor lacks the culpability this code posits as a prerequisite to criminal responsibility and punishment, and this lack is especially significant, the Commission believes, in the context of consensual sexual conduct.

Spousal Relationship.

Adults cohabiting may terminate their relationship if one dislikes the other's sexual conduct, and there is no justification for the criminal law's intrusion into the relationship. Section 39-1309(b) restates and expands the present law's recognition of this common-sense notion. See T. C. A. § 39-3706 (excluding "cases in which the defendant and female in question occupy the relation of husband and wife").

Prompt Complaint.

This doctrine derives from the common law, under which the absence of a prompt complaint created a presumption that no offense had, in fact, occurred. See Greenfield, Prompt Complaint: A Developing Rule of Evidence, 9 Crim. L.Q. 286 (1967). This is especially true for sexual offenses in which, for example, "pregnancy might change a willing participant in the sex act into a vindictive complainant . . . ." Model P. C. § 207.4, Comment at 265 (Tent. Draft No. 4, 1955).

Section 39-1309(c) requires that an offense under this chapter be reported to or discovered by a peace officer within

one month after its occurrence as a prerequisite to its prosecution. However, if a child is the victim, the month does not begin to run until a parent or some other competent and uninvolved person learns of the offense. The notice need not be written or in any particular form; clearly a sworn complaint is not required. These requirements make little change in present common law except to make it more certain.

Corroboration.

The truth and logic of Lord Hale's dictum, equally applicable to all sex offenses, that accusations of rape are "easily made, hard to be proved, and still harder to be disproved by one ever so innocent" justifies the corroboration requirement of § 39-1309(d). The corroboration requirement of present law is somewhat confusing. T. C. A. § 39-3701 does not require corroboration in rape cases, but relies instead on the "reasonable doubt" rule to prevent sham charges. T. C. A. § 39-3706 requires corroboration for "statutory rape" although evidence may suffice that is indirectly corroborative. Sturgis v. State, 199 Tenn. 558, 288 S. W. (2d) 434 (1956). T. C. A. § 39-3705, carnal knowledge of child under 12, requires no corroboration at all. This section requires corroboration for all sexual offenses, both forcible and consensual.

By identifying the sexual offenses to which the corroboration requirement applies, and specifying the elements and application of the requirement, § 39-1309(d) brings certainty to the heretofore confusing and sometimes contradictory evidentiary rules in this area.

39-1310. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 21.13.

Cross-References:

"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:

Municipal ordinances presently conflict with and overlap state law in the area of sexual offenses. The Metropolitan Government of Nashville and Davidson County Code (1967), for example, prohibits improper liberties with minors, § 29-1-39. To eliminate the conflict and confusion between state and local law, and to prevent future conflict and confusion, § 39-1310 makes clear that the state intends to preempt the area of criminal sexual conduct and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Chapter 13 purposely excludes from the penal law several forms of sexual conduct proscribed by present law. Bestiality in private and consensual deviant conduct in private are no longer offenses, and § 39-1310 ensures that no governmental subdivision or agency may punish or otherwise regulate this or any other sexual conduct not proscribed by this or some other chapter of the Criminal Code. In addition, of course, conflicting local laws, e.g., changing the incapable-of-consent age or the age differential, are prohibited.

CHAPTER 14

ASSAULTIVE OFFENSES

39-1401. Assault.—(a) An individual, corporation, or association commits assault if:

(1) he intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) he intentionally or knowingly causes another to fear imminent bodily injury; or

(3) he intentionally or knowingly causes physical contact with another and he knows the other will regard the contact as offensive or provocative.

(b) Assault is a class B misdemeanor unless the offense is committed under subsection (a)(3), in which event assault is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-1402.

39-1402. Aggravated assault.—(a) An individual, corporation, or association commits aggravated assault if he commits assault as defined in § 39-1401, and:

(1) he causes serious bodily injury to another; or

(2) he uses a deadly weapon.

(b) Aggravated assault is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

§ 39-1401: Tex. P. C. § 22.01.
Ill. Stat. Ann. ch. 38, §§ 12-1, 12-3.
§ 39-1402: Tex. P. C. § 22.02.
Ill. Stat. Ann. ch. 38, §§ 12-2, 12-4.

Cross-References:

Attempt, see § 39-901.
"Bodily injury" defined, see § 39-107.
Consent as defense to assaultive conduct, see § 39-1404.
Criminal homicide, see ch. 11.
"Deadly weapon" defined, see § 39-107.
Justification for use of force, see ch. 7.
"Peace officer" defined, see § 39-107.
Reckless conduct, see § 39-1403.
Resisting arrest or search, see § 39-2303.
"Serious bodily injury" defined, see § 39-107.
Sexual offenses, see ch. 13.
Terroristic threat, see § 39-1405.

Comment:

In Tennessee certain types of assaults are condemned by statute, but simple assault and battery are punished at common law, and no definition of those misdemeanors appears in the Tennessee Code Annotated. See Saunders v. State, 208 Tenn. 347, 345 S. W. (2d) 899 (1961). T. C. A. § 39-602 does, however, specifically designate one special form of simple assault, "wife beating," as a misdemeanor.

Section 39-1401 codifies common-law assault and battery, prohibits attempts to commit battery, and actual battery in one statute. Violence is not necessary, and there is no requirement of intent to injure. It is sufficient for conviction that bodily injury is recklessly inflicted, that fear is knowingly induced, or that the offensive nature of physical contact is known.

Several Tennessee statutes prohibit true aggravated assault. E.g., T. C. A. § 39-601 (assault with a deadly weapon); § 39-614 (assault from ambush with a deadly weapon); and § 39-2803 (authorizing death penalty for assault with a deadly weapon while in disguise). Most of Tennessee's assault statutes, however, are "assault-with-intent" provisions. E.g., T. C. A. § 39-605 (assault with intent to commit rape); § 39-603 (assault with intent to commit felony). A perusal of the elements of attempts, see § 39-901, makes it apparent that any activity punishable as an assault-with-intent can also be punished as an attempt. For this reason the assault-with-intent crimes are abolished.

Section 39-1402 encompasses the true aggravated assault and the common-law crime of mayhem. See T. C. A. § 39-609.

The penalty structure for assault grades the offenses according to the severity of the harm caused. Offensive or provocative contacts that do not cause fear are relatively minor offenses, but causing fear or injury is a more serious offense. Moreover, if the bodily injury is serious, or the assault is committed with a deadly weapon, it is aggravated to a third-degree felony.

39-1403. Reckless conduct.—(a) An individual, corporation, or association commits an offense if he acts recklessly and places another in imminent danger of death or serious bodily injury.

(b) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 22.04.
Ill. Stat. Ann. ch. 38, § 12-5.
Model P. C. § 211.2.

Cross-References:

Aggravated assault, see § 39-1402.
Assault, see § 39-1401.
"Association" defined, see § 39-107.
"Serious bodily injury" defined, see § 39-107.

Comment:

Sections 39-1401 and 39-1402 provide that reckless acts that cause bodily injury constitute assault, but reckless acts that fall short of injuring another are excluded. This section covers those reckless acts that, although no harm results, are highly dangerous, i.e., create a substantial risk of death or serious bodily injury.

39-1404. Consent as defense to assaultive conduct.—The victim's effective consent, or the actor's reasonable belief that the victim consented, to the actor's conduct is a defense to prosecution under §§ 39-1401, 39-1402, or 39-1403 if:

(1) the conduct did not threaten or inflict serious bodily injury; or

(2) the victim knew the conduct was a risk of:

(A) his occupation or sport; or

(B) recognized medical treatment; or

(C) a scientific experiment conducted by recognized methods.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 22.04.
Fed. Prop. Crim. Code § 1619.

Cross-References:

"Conduct" defined, see § 39-107.
Defense explained, see § 39-203.
"Effective consent" defined, see § 39-107.
"Reasonable belief" defined, see § 39-107.
"Serious bodily injury" defined, see § 39-107.

Comment:

Football players, boxers, medical doctors, and many others commit assaultive-type offenses regularly, but these consensual "injuries" are not properly a concern of the criminal law. Thus the victim's consent is made a defense, but only to assault, aggravated assault, and reckless conduct and only (with three exceptions) if the harm is petty. Consent is a defense to serious harm if the victim knew it was a risk of medical treatment, scientific experiment, or an occupation.

Reasonable belief in consent establishes the defense just as reasonable mistake of fact exonerates under general principles, see § 39-602. Special provision must here be made for mistake because consent is not an element of the assaultive offenses and § 39-602 applies only to mistake about an element of the offense.

39-1405. Terroristic threat.—(a) An individual, corporation, or association commits terroristic threat if he threatens to commit any offense involving violence with intent:

(1) to cause action of any sort by an official or volunteer agency organized to deal with emergencies; or

(2) to prevent or interrupt the occupation of a building; room; place of assembly; place to which the public has access; or aircraft, motor vehicle, or other form of conveyance.

(b) Terroristic threat is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 22.06.
Fed. Prop. Crim. Code § 1614.
Model P. C. § 211.3.

Cross-References:

"Agency" defined, see § 39-107.
Assault, see §§ 39-1401, 39-1402.
"Association" defined, see § 39-107.
Coercion of public servant, see § 39-2103.
Disrupting meeting or procession, see § 39-2505.
False alarm, see § 39-2506.
Harassment, see § 39-2507.
"Serious bodily injury" defined, see § 39-107.
Threats to obtain property, see § 39-1903.

Comment:

This section is directed toward those who seek to cause terror or public inconvenience by threatening to commit crimes of violence. The conduct resembles that proscribed by § 39-2506 (false alarm or report), except that the actor does not necessarily know his threat is false; indeed, he may intend to carry it out.

The section is broad enough to cover threats to commit any crime of violence if the actor's intent is to cause fear, emergency action, or substantial inconvenience. It also covers threats that cause public terror or inconvenience.

The present Tennessee Code has an entire chapter devoted to masked hoodlums, night-riders, and terrorism, T. C. A., tit. 39, ch. 28. The object of such laws, according to the Tennessee Supreme Court, was to make acts committed while in masquerade more highly penal because of the inherent difficulty of identifying offenders who wore masks. Walpole v. State, 68 Tenn. 370 (1878). The Tennessee intimidation statute and those that follow it in the chapter were added after the turn of the century, most likely due to the influence and power enjoyed by the KKK and related groups during that era.

CHAPTER 15

OFFENSES AGAINST THE FAMILY

39-1501. Bigamy.—(a) An individual commits bigamy if:

(1) he is married; and he purports to marry a person other than his spouse in this state under circumstances that would, but for the actor's prior marriage, constitute a marriage; or

(2) he knows that a married person other than his spouse is married; and he purports to marry that person in this state under circumstances that would, but for that person's prior marriage, constitute a marriage.

(b) It is a defense to prosecution under subsection (a)(1) that the actor reasonably believed that his marriage was void or had been dissolved by death, divorce, or annulment.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 25.01.

Cross-References:

Defense explained, see § 39-203.
Rape by fraud, see § 39-1302.
"Reasonable belief" defined, see § 39-107.

Comment:

Subsection (a) restates the traditional bigamy offense now contained in T. C. A. § 39-701. The state must prove a valid, subsisting marriage. Bashaw v. State, 9 Tenn. 177 (1829). The state must also prove beyond a reasonable doubt that the former wife of the accused was living at the time of the bigamous marriage. Dunlap v. State, 126 Tenn. 415, 150 S. W. 86 (1912).

A single person marrying another he knows is already married is dealt with under the present law as a separate offense: knowingly marrying husband or wife of another. T. C. A. § 39-704. The extreme variance in the penalties which may be given one who knowingly marries the husband or wife of another (up to 5 years) and the wife or husband of another who bigamously marries (2-21 years) lacks a rational justification: both offenses are designed to protect the sanctity of legal marriage. Section 39-1501(a)(2) includes the offense of knowingly marrying the spouse of another in the offense of bigamy and prescribes the same punishment for both.

Subsection (b) creates a special category of mistake defense. The general defense of ignorance or mistake, § 39-602 of this code, is not relied on for bigamy because the general defense distinguishes between mistakes of law and fact in some contexts, a distinction now often ignored, and by this code rejected, in the bigamy area. The defense provided by subsection (b) greatly expands defenses available to a prosecution for bigamy. The present Tennessee law only allows for an honest belief in the death of the first spouse after a five-year absence. T. C. A. § 39-702; Jones v. State, 182 Tenn. 60, 184 S. W. (2d) 167 (1944); White v. State, 157 Tenn. 446, 9 S. W. (2d) 702 (1928). Honest belief in a valid divorce from the first spouse is not a defense under the present statute. Jones v. State, 182 Tenn. 69, 184 S. W. (2d) 167 (1944).

Subsection (b) changes the present law's belief standard. To negate a defense under subsection (b), the state must prove that the defendant's belief in divorce, for example, was formed recklessly or with criminal negligence.

39-1502. Incest.—(a) An individual commits incest if he engages in sexual intercourse or deviant sexual intercourse with a person he knows to be, without regard to legitimacy:

(1) his ancestor or descendant by blood or adoption; or

(2) one with which an in loco parentis relationship exists; or

(3) his brother or sister of the whole or half-blood or by adoption.

(b) For purposes of this section:

(1) "Deviant sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person with intent to arouse or gratify the sexual desire of any person.

(2) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

(c) Incest is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 25.02.
Ill. Stat. Ann. ch. 38, § 11-11.
N. Y. Rev. Pen. Law § 255.25.

Cross-References:

Prohibited marriages, see T. C. A. § 36-401.

Comment:

This section adopts a new rationale for the incest offense: protection of family solidarity by preventing harmful interference with relations between family members. The present incest statute, T. C. A. § 39-705, seeks to achieve two goals: the prevention of sexual imposition by family members in a relative position of power over the victim and the prevention of the genetic problems inherent in intermarriage and inbreeding. The second objective is not pursued by this section, but left to the regulation of the marriage statute, T. C. A. § 36-401. Since genetic problems arise only in successively inbred generations, the criminal sanction was deemed to be an inappropriate remedy.

The first objective of the present incest statute, however, is adopted as the better rationale for this section. Consequently, the prohibited relationships are not extensively enumerated by this section, but broadly defined to include anyone with parental authority which may be abused to sexual ends. Similarly, the legitimacy of the two relationships designated is declared immaterial, and the conduct prohibited is broadened to include deviant sexual intercourse.

Several new penal codes include a corroboration requirement for the incest offense. Tennessee law, however, has long recognized that the consenting partner to incest is an accomplice witness whose uncorroborated testimony is insufficient to convict, e.g., Scott v. State, 207 Tenn. 151, 338 S. W. (2d) 581 (1960); Shelley v. State, 95 Tenn. 152, 31 S. W. 492 (1895). However, if the actor did not consent, he or she is not an accomplice and the testimony does not need corroboration. *Id.* This judicial policy is deemed preferable to a blanket corroboration statute in the incest area, which includes both consensual and nonconsensual relationships. Nonconsensual relationships, of course, can be prosecuted as sexual offenses. See ch. 13.

39-1503. Interference with child custody.—(a) An individual, corporation, or association commits an offense if he takes or retains a child younger than eighteen (18) years out of this state when:

(1) he knows that his taking or retention violates a temporary or permanent judgment or order disposing of the child's custody; or

(2) he knows that he has not been awarded custody of the child by a court of competent jurisdiction and knows that a suit seeking to dispose of or litigate the child's custody has been filed.

(b) It is a defense to prosecution under subsection (a)(2) that the actor voluntarily returned the child to this state within seven (7) days from the date of the commission of the offense, or that the actor voluntarily returned the child to this state within five (5) days after receiving a certified order of a court demanding the return of the child.

(c) An offense under this section is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 25.03.
Wis. Stat. Ann. § 946.71.

Cross-References:

"Association" defined, see § 39-107.
Computation of age, see § 39-106.
Defense explained, see § 39-203.
Extradition of fugitive, see T. C. A. tit. 40, ch. 31, subch. A, as amended.
False imprisonment, see § 39-1202.
Unlawful flight to avoid prosecution, see 18 U. S. C. A. § 1073.

Comment:

This section adds a new offense to Tennessee criminal jurisprudence, one designed primarily to deal with the parental kidnapper but formulated broadly enough to cover anyone knowingly interfering with a court's custodial jurisdiction over children.

This section prohibits both taking and retaining a child outside the state either in violation of a custody award, subsection (a)(1), or to defeat the court's jurisdiction in a custody case, subsection (a)(2). The custody award need not originate with a Tennessee court to come within the purview of this section; if suit is filed in this state to enforce a Georgia custody judgment, for example, the noncustodial parent's taking the child out of Tennessee violates subsection (a)(2) if the parent knows the suit has been filed. Age 18 is used for the offense because under Tennessee law parental custody rights in a child terminate at that age.

Subsection (b) highlights the chief objective of this offense: to encourage the child's return to the jurisdiction of the Tennessee court whose contempt power can then be used to enforce its custody award.

The Commission reluctantly graded this offense a felony to assist in invocation of the extradition and federal fugitive felon provisions.

39-1504. Criminal nonsupport.—(a) An individual commits criminal nonsupport if he intentionally or knowingly fails to provide support that he can provide and that he knows he is legally obligated to provide to his spouse who is in needy circumstances or to his child younger than eighteen (18) years.

(b) Except as provided in subsection (c), criminal nonsupport is a class A misdemeanor.

(c) Criminal nonsupport is a felony of the third degree if:

(1) the actor has been convicted one or more times before under this section; or

(2) the actor committed the offense while residing in another state.

(d) For purposes of this section, "child" includes an illegitimate child whose paternity has been established by a court of competent jurisdiction.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 25.07.
T. C. A. §§ 39-201, 39-202.

Cross-References:

Aid from department of public welfare to locate parent and enforce support order, see 42 U. S. C. A. § 602(a)(17) and (a)(18).
Civil remedies:
Enforcement of child support, see T. C. A. § 36-822.
Reciprocal enforcement of support, see T. C. A. tit. 36, ch. 9.
Support of dependent or neglected child, see T. C. A. § 37-256.
"Conviction" defined, see § 39-107.
Extradition, see T. C. A. tit. 40, ch. 31, subch. A, as amended.
Territorial jurisdiction, see § 39-104.
Venue, see T. C. A. § 40-301, as amended.

Comment:

This section provides the deserted spouse and children with the services of a public prosecutor and law enforcement personnel to enforce the husband's (or wife's) duty to support his family.

Subsection (a) defines the elements of the offense in terms derived from existing Tennessee law; however, desertion or neglect alone is no longer an offense. Cf. T. C. A. §§ 39-201, 39-202.

If the prosecution is for nonsupport of a spouse, the state has the burden of proving his or her needy circumstances. But if the prosecution is for nonsupport of a child, the state does not have to prove his needy circumstances. The state must continue to prove that the defendant is able to provide support, and the presumption that the defendant is able to so provide is eliminated. See T. C. A. §§ 39-201, 39-202.

Grading criminal nonsupport a class A misdemeanor recognizes the serious societal interest in coercing compliance with the duty of support and gives the judge a wide range of sentencing discretion. Long-term imprisonment is clearly unwarranted, however, since it is usually far more effective to place a convicted spouse on probation under orders to support his family. The felony grade for the offense of nonsupport by a spouse who is out of state facilitates extradition and expands present law to include nonsupport of a spouse, T. C. A. § 39-217. The felony grade for a subsequent offense also continues present law. See T. C. A. § 39-219 (penalty for leaving state after a court order for support).

A prosecution under this section should not be the vehicle for litigating a contested paternity; therefore, only if the defendant's paternity has been established in a civil suit, can he be prosecuted under this section for failure to support. See T. C. A. tit. 36, ch. 2.

39-1505. Criminal abortion.—(a) An individual, corporation, or association commits an offense if he intentionally terminates another's pregnancy otherwise than by live birth of a viable fetus.

(b) It is an exception to the application of this section that the abortion is performed under the following circumstances:

(1) during the first twelve (12) weeks of pregnancy, if the abortion is performed with the pregnant woman's consent and pursuant to the medical judgment of the pregnant woman's attending physician who is licensed or certified under title 63, chapter 6 of the Tennessee Code; or

(2) after twelve (12) weeks, but before viability of the fetus, if the abortion is performed with the pregnant woman's consent and in a hospital as defined in § 53-1301, licensed by the department of public health, or a hospital operated by the state of Tennessee or a branch of the federal government, by the pregnant woman's attending physician, who is licensed or certified under title 63, chapter 6, of the Tennessee Code, pursuant to his medical judgment; or

(3) during viability of the fetus, if the abortion is performed with the pregnant woman's consent and by the pregnant woman's attending physician, who is licensed or certified under title 63, chapter 6 of the Tennessee Code; and if all the circumstances and provisions required for a lawful abortion during the period set out in subdivision (2) are adhered to; and if prior to the abortion the physician shall have certified in writing to the hospital in which the abortion is to be performed that in his best medical judgment, after proper examination, review of history, and such consultation as may be required by either the rules and regulations of the state hospital licensing board promulgated pursuant to § 53-1310, or the administration of the hospital involved, or both, the abortion is necessary to preserve the life or health of the woman, and shall have filed a copy of the certificates with the district attorney of the judicial circuit wherein the abortion is to be performed.

(c) No physician shall be required to perform an abortion and no person shall be required to participate in the performance of an abortion. No hospital shall be required to permit abortions to be performed therein or to receive a patient for an abortion operation.

(d) Criminal abortion is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Pub. Acts 1973, ch. 235.

Cross-References:
Aiding self-abortion, see § 39-1506.
"Association" defined, see § 39-107.
Computation of age, see § 39-106.
Defense explained, see § 39-203.
Exception explained, see § 39-202.
"Reasonable belief" defined, see § 39-107.

Comment:

This section follows the recently enacted abortion statute. The new offense reflects both recent developments in constitutional law and enlightened concern for women and physicians who often suffer extreme hardship because of the archaic rigidity of the old statute.

The recent Supreme Court decision in Roe v. Wade, 410 U. S. 113 (1973), held unconstitutional a Texas abortion statute which, like old T. C. A. §§ 39-301—39-302, prohibited all abortions except those necessary to save the life of the woman. This section complies with that decision which stated: A state criminal abortion statute of the current Texas type, that exempts from criminality only a *life saving* procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

Following the dicta of the Supreme Court decision, the new statute, restated here, leaves the decision of whether to terminate pregnancy to the woman and the sound medical judgment of her physician during the first 12 weeks of pregnancy. Subdivision (2) of subsection (b) requires hospitalization for the abortion operation performed after that point in the pregnancy. When the fetus becomes viable, the abortion operation may be performed only for the purpose of preserving the life or health of the woman and only under safeguards set forth in subdivision (3) of subsection (b).

Section 39-1505 continues the present law that self-abortion is not an offense, and the woman abortee is neither an accomplice, nor a principal, to abortion. Smartt v. State, 112 Tenn. 539, 80 S. W. 586 (1903). The provision of the new statute on attempted abortion, "attempt to procure a miscarriage," is included in § 39-901 on criminal attempt. See Dupuy v. State, 204 Tenn. 624, 325 S. W. (2d) 238 (1959).

39-1506. Aiding self-abortion.—(a) An individual, corporation, or association commits an offense if in return for anything of value he knowingly aids a woman to use any means to intentionally terminate her own pregnancy otherwise than by live birth of a viable fetus.

(b) It is an exception to the application of this section that the termination is aided under the following circumstances:

(1) during the first twelve (12) weeks of pregnancy, if the abortion is performed with the pregnant woman's consent and pursuant to the medical judgment of the pregnant woman's attending physician who is licensed or certified under title 63, chapter 6 of the Tennessee Code; or

(2) after twelve weeks (12), but before viability of the fetus, if the abortion is performed with the pregnant woman's consent and in a hospital as defined in § 53-1301, licensed by the department of public health, or a hospital operated by the state of Tennessee or a branch of the federal government, by the pregnant woman's attending physician, who is licensed or certified under title 63, chapter 6 of the Tennessee Code, pursuant to his medical judgment; or

(3) during viability of the fetus, if the abortion is performed with the pregnant woman's consent and by the pregnant woman's attending physician, who is licensed or certified under title 63, chapter 6 of the Tennessee Code; and if all the circumstances and provisions required for a lawful abortion during the period set out in subdivision (2) are adhered to; and if prior to the abortion the physician shall have certified in writing to the hospital in which the abortion is to be performed that in his best medical judgment, after proper examination, review of history, and such consultation as may be required by either the rules and regulations of the state hospital licensing board promul-

gated pursuant to § 53-1310, or the administration of the hospital involved, or both, the abortion is necessary to preserve the life or health of the woman, and shall have filed a copy of the certificates with the district attorney of the judicial circuit wherein the abortion is to be performed.

(c) An offense under this section is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Pub. Acts 1973, ch. 235.
Tex. P. C. Prop. Rev. § 25.05.

Cross-References:
Abortion, see § 39-1505.
"Association" defined, see § 39-107.
Computation of age, see § 39-106.
Defense explained, see § 39-203.
Exception explained, see § 39-202.
"Reasonable belief" defined, see § 39-107.

Comment:
As stated in the comment to § 39-1505 (criminal abortion), self-abortion is not a crime under present law, so it is necessary, again to deter the criminal abortionist, to prevent aiding a woman to abort herself. The concept of aiding in producing an abortion covers, for example, assisting the woman abortee who supplies for herself the means used.

The phrase "in return for anything of value" in subsection (a) aims at the professional criminal abortionist and is designed to exclude nonprofessionals such as the sympathetic roommate or frightened boyfriend.

Subsections (b) and (c) parallel §§ 39-1505(b) and (c) (criminal abortion). See comment following that section.

39-1507. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 25.08.

Cross-References:
"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:
Although governmental subdivisions and agencies have not legislated widely in the area of family offenses, municipalities have enacted ordinances in the overlapping area of sexual conduct and family support. The Metropolitan Government of Nashville and Davidson County Code (1967), for example, prohibits nonsupport of his family by an habitual drunkard (§ 29-1-24). Most of this conduct is an offense under present state law, and that not proscribed was no doubt intentionally omitted. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, this section makes clear the state intends to preempt the area of offenses against the family and thereby prevent governmental subdivision and agencies from enacting or enforcing laws in this area.

CHAPTER 16

ARSON AND OTHER PROPERTY DAMAGE OR DESTRUCTION

COMMENTS OF LAW REVISION COMMISSION

Comment:
The present law on damage or destruction of property consists of more than 60 sections scattered through five titles of the Tennessee Code Annotated. Some of the existing statutes are general, e.g., T. C. A. § 39-4501 (destroying or injuring another's chattels), but most are incredibly specific—directed at damage of a particular type of property or at damage by a specific method, e.g., T. C. A. § 39-4804 (injury to bridges), § 39-1402 (injury to personal property with explosives), § 39-4535 (injury to caverns). Most of these offenses are redundant, contradictory or obsolete, e.g., T. C. A. § 39-4513 (injury of products of another's land), § 39-4518 (injury to another's timber), § 39-4505 (destroying ornamental shrub), § 39-4534 (damaging property of another). They require a bewildering array of culpable mental states, e.g., T. C. A. § 39-4534 (maliciously), § 39-4515 (willfully), § 39-4512 (unlawfully, knowingly, willfully, and corruptly), § 39-4507 (wantonly), and they contain irrational penalty variations, e.g., T. C. A. § 39-4513 (up to one year for injury to products of another's land), § 39-4515 (up to ten years for destruction of tobacco beds), § 39-4534 ($2 to $50 fine for destroying property of another).

This chapter replaces this plethora of offenses with four general property damage offenses. These four offenses proscribe all property damage, however it is inflicted and whatever the property damaged, except damage inflicted negligently, a state of mind the Commission feels can be handled more efficiently and more appropriately by civil law than by penal sanctions. The penalty structure, which parallels the theft penalties in ch. 19, ties the punishment for destructive conduct, and thus the blameworthiness of the actor, to the actor's state of mind and to the extent of the harm his conduct threatens or causes.

39-1601. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Habitation:"

(A) means any structure including buildings, modular units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons; and

(B) includes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of the offense; and

(C) includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle.

(2) "Owner" means a person other than the actor who has possession of property, or any interest other than a mortgage, deed of trust, or security interest in property, even if the possession or interest is unlawful.

(3) "Property" means:

(A) real property; or

(B) tangible personal property including anything severed from land; or

(C) a document, including money, that represents or embodies anything of value.

39-1602. Arson.—(a) An individual, corporation, or association commits arson if he starts a fire or causes an explosion:

(1) without the effective consent of the owner and with intent to destroy or damage the owner's building or habitation; or

(2) with intent to destroy or damage any building or habitation to collect insurance for the damage or destruction.

(b) Arson is a felony of the second degree unless it was committed against an occupied habitation in which event it is a felony of the first degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 28.02.
Pa. Prop. Crim. Code § 1301(a).

Cross-References:

Actor's interest in property, see § 39-1605.
"Association" defined, see § 39-107.
Criminal mischief, see § 39-1603.
"Effective consent" defined, see § 39-107.
"Habitation" defined, see § 39-1601.
Hindering secured creditors, see § 39-2033.
Necessity to destroy property, see § 39-721.
"Owner" defined, see § 39-1601.
"Property" defined, see § 39-1601.

Comment:

This section retains the substance of the present Tennessee law on arson, but it includes several alterations which are designed to clarify the offense. First, this section retains the present limitation of the offense to the use of fire or explosives, T. C. A. §§ 39-501, 39-1401; see also T. C. A. § 39-5106 (fire bomb). Although there are other methods of destruction, they apparently either are employed so infrequently that they are inconsequential or lack the rapidity, and thus the danger to the person, that accompanies fires and explosions.

Secondly, this section clarifies the point at which the offense becomes complete. As under present law, the structure need not be destroyed or seriously damaged, and there is sufficient burning to constitute arson if the combustible to which fire is set is charred or changed in nature. Crow v. State, 136 Tenn. 333, 189 S. W. 687 (1916). The offense is complete whenever the actor starts a fire or causes an explosion with the requisite intent, whether or not damage of any kind actually ensues.

Intent.

The mental element required under this section is intent: the actor must act intentionally and must desire a particular result. This changes the nomenclature of present law, which requires a "willful and malicious" state of mind, T. C. A. §§ 39-501, 39-1401, 39-5106, but retains the substance. The result intended may be damage as well as destruction, which also is apparently the existing law. Under subsection (a)(2), the actor must also intend to collect insurance for the damage or destruction.

"Building or Habitation."

Presently, arson requires the burning of "any house or outhouse, or any building, or other structure." T. C. A. §§ 39-501, 39-1401. "Buildings" will include some structures that are not "houses," such as a stadium or a pavilion, and "habitation," which § 39-1601 defines as structures and vehicles adapted for the overnight accommodation of persons, and the adjacent buildings, will include some enclosures, such as boats, railroad cars, and tents, that are probably not "houses." The definition of habitation used here and in § 39-1801 (burglary and criminal trespass) is designed to include self-propelled campers only when in actual use as a habitation. Thus, an arsonist or burglar whose target is a Volkswagen camper-bus commits the greater offense—arson rather than criminal mischief, burglary rather than theft—only if his conduct endangers people occupying the vehicle.

Owner's Interest or Consent.

The criminal responsibility of an owner for arson is slightly modified. Subsection (a)(1) requires a firing of another's building, but § 39-1601 defines "owner" as anyone other than the actor who has possession of or any other interest in the property, and § 39-1605 provides that an actor who is an owner may be guilty of arson if there are other owners with interests he is not entitled to infringe. Present law includes the actor's own property in the protection of the general statutes, T. C. A. §§ 39-501, 39-1401, and the arson statute has been applied to owners who set fires to collect insurance. Thompson v. State, 171 Tenn. 156, 101 S. W. (2d) 467 (1937). Another section of the Criminal Code, specifically designed for the debtor—secured creditor relationship, governs the destruction of secured property, see § 39-2033 (hindering secured creditors). If no one else has an interest, however, the owner is not responsible under subsection (a)(1); instead his responsibility, if any, is determined by subsection (a)(2).

Subsection (a)(2) makes it arson to make a fire or cause an explosion with intent to collect insurance for the resulting damage or destruction. Current Tennessee law allows prosecution under the arson statute, Thompson v. State, 171 Tenn. 156, 101 S. W. (2d) 467 (1937), or under T. C. A. § 39-506, specifically prohibiting the burning of insured property with intent to injure insurer. Under § 39-1602 burning insured property is arson only if the property is the kind that would make the burning arson if it belonged to another. The burning of other insured property with intent to collect insurance, poses less danger to persons, and consequently is not included in arson. It does constitute theft or attempted theft under § 39-1903, however, as does any other destruction of property to defraud insurers.

The effect of an owner's consent to the burning is uncertain in present law. Logically, the responsibility of one who burns with the owner's consent should be determined under general complicity principles in terms of the owner's responsibility. Whether one who burns with the owner's consent commits arson even in circumstances in which the owner would not be guilty has never been determined, but subsection (a)(1) makes it clear that one who burns with the owner's "effective consent" is guilty only in circumstances in which the owner is guilty.

Penalties.

Arson is graded a second degree felony, a serious offense, primarily because of the danger to the person. Otherwise, the use of fire or explosives does not make assault, manslaughter, or attempted murder more reprehensible than other methods of committing those offenses, and if murder was the intent and result the actor may be prosecuted for the more serious offense.

39-1603. Criminal mischief.—(a) An individual, corporation, or association commits criminal mischief if, without the effective consent of the owner, he intentionally or knowingly damages, destroys, or tampers with the property of the owner and thereby causes:

(1) pecuniary loss or substantial inconvenience to the owner or a third person; or

(2) significant risk to arise that death or serious bodily injury to any person will occur.

(b) Criminal mischief is:

(1) a class C misdemeanor if:

(A) the amount of pecuniary loss was fifty dollars ($50) or less; or

(B) it involved no pecuniary loss, but caused substantial inconvenience to others, except as provided in subdivisions (3)(B) and (3)(C); or

(2) a class A misdemeanor if the amount of pecuniary loss was more than fifty dollars ($50) but less than two hundred fifty dollars ($250); or

(3) a felony of the third degree if:

(A) the amount of pecuniary loss was two hundred fifty dollars ($250) or more; or

(B) regardless of the amount of pecuniary loss, the actor caused impairment or interruption of public communications, public transportation, public water, gas, or power supply, or other public service for a substantial number of persons.

(C) regardless of the amount of pecuniary loss, the actor causes a significant risk to arise that death or serious bodily injury to any person will occur.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 28.03.
N. Y. Rev. Pen. Law §§ 145.00, 145.05.

Cross-References:

Actor's interest in property, see § 39-1605.
Amount of pecuniary loss, see § 39-1606.
"Association" defined, see § 39-107.
Destruction of records, see §§ 39-2046, 39-2211.
"Effective consent" defined, see § 39-107.
Fraud in insolvency, see § 39-2034.
Fraudulent destruction of insured property, see § 39-1903 (theft).
Fraudulent destruction, removal, or concealment of writing, see § 39-2046.
Hindering secured creditors, see § 39-2033.
"Owner" defined, see § 39-1601.
"Property" defined, see § 39-1601.

Comment:

This section is the central offense in this chapter and replaces the bulk of the present property damage offenses. It is, essentially, a combination of T. C. A. §§ 39-4501 and 39-4534, the general property damage offenses in present law, with some clarifications and expansions.

Generally speaking, property damage offenses in present law proscribe destructive conduct only if it is committed without the owner's consent. This section proscribes conduct committed without the owner's "effective consent," a concept that clarifies the type of consent required by negating consent given because of coercion or deception or given for the detection of the commission of an offense. See § 39-107 (code definitions). As in present law, the actor is not guilty of criminal mischief if he has the owner's effective consent, although both might be guilty as parties to some other offense, such as destroying secured property with intent to defraud creditors, § 39-2033.

Tampering.

Subsection (a)(1) prohibits conduct that destroys or damages property and expands present law to include "tampering" with property, conduct that falls short of damaging the property but nevertheless interferes with the owner's proprietary rights or abuses the property in a way that diminishes its value. This provides a general proscription of conduct now covered by a few specific statutes, e.g., T. C. A. § 44-1726 (leaving open fence gate).

Subsection (a)(2) reaches conduct that, while it may in fact result in no damage or even inconvenience, potentially creates a grave risk of physical harm to others. For example, putting sugar in an automobile gas tank creates some property damage; putting sugar in a private airplane's gas tank, on the other hand, creates a substantial danger of death to some people. Increased penalties are authorized to discourage that type of criminal mischief.

Definitions.

The owner of property is defined in § 39-1601 to include anyone other than the actor who has possession of the property or an interest other than a security interest in the property. Thus, an actor can commit criminal mischief upon his own property if others also own the property, see § 39-1605. A holder of a security interest, however, is not an owner as against the debtor, even if he has legal title pursuant to a conditional sales contract or other security agreement, because relationships between debtors and creditors present unique problems which are separately treated in ch. 20 (fraud).

Property is defined broadly in § 39-1601. This section and § 39-1604 exclude intangible property; otherwise, they include anything that, if damaged, destroyed, or tampered with, might cause pecuniary loss or inconvenience.

Penalties.

The grading scheme for criminal mischief parallels that for theft. Minor mischief—pecuniary loss of $50 or less or substantial inconvenience without loss when tampering is involved—is a class C misdemeanor. It is a class A misdemeanor if the pecuniary loss is greater than $50 and less than $250, and a third-degree felony if the pecuniary loss is substantial ($250 or greater), or if the actor impairs or interrupts a public service for a substantial number of persons, or if the actor's conduct creates a substantial danger of serious injury to persons. Mischief against public services is a felony regardless of pecuniary loss if it causes widespread damage because the amount of damage to the public ordinarily will exceed $250, but being widespread, it may be difficult to prove. The impairment must affect a "substantial" number of persons. This is intended to preclude felony treatment of one whose conduct affects only one home or a small neighborhood and clearly does not cause great harm. If the impairment is not widespread, the offense is a class C misdemeanor unless the state proves pecuniary loss greater than $50. Injuring, interrupting or interfering with communication or power lines and gas fixtures is proscribed by T. C. A. § 39-4533. That crime has recently been changed from a misdemeanor to a felony. Tenn. Pub. Acts 1973, ch. 560.

39-1604. Reckless damage or destruction. — (a) An individual, corporation, or association commits an offense if, without the effective consent of the owner, he recklessly damages or destroys property of the owner.

(b) An offense under this section is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 28.04.
N. Y. Rev. Pen. Law §§ 145.00, 145.05.

Cross-References:

"Association" defined, see § 39-107.
Criminal mischief, see § 39-1603.
"Effective consent" defined, see § 39-107.
"Owner" defined, see § 39-1601.
"Property" defined, see § 39-1601.

Comment:

This section expands present law to cover destructive conduct that is committed recklessly. Presently, except for statutes proscribing negligent burning, T. C. A. §§ 39-510—39-518, the property damage offenses require a "willful" act or some similar mental state implying at least a "knowing" act as defined in § 39-405(b). The Commission concluded that, although penal sanctions are generally inappropriate where conduct is negligent, they are a helpful method of controlling reckless damage or destruction, and this section expands Tennessee law to proscribe that conduct.

This section applies only when damage or destruction is inflicted recklessly; otherwise, its elements and the scope of its application are identical to those of criminal mischief, § 39-1603. Because the mental state accompanying the conduct is less reprehensible, however, the Commission made this offense a class C misdemeanor regardless of the amount of loss.

39-1605. Actor's interest in property.—It is no defense to prosecution under this chapter that the actor has an interest in the property damaged or destroyed if another person also has an interest that the actor is not entitled to infringe.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 28.05.
Ill. Stat. Ann. ch. 38, § 16-4.
Cal. Prop. Pen. Code § 2900(5).
Model P. C. § 223.0(7).

Cross-References:

Hindering secured creditors, see § 39-2033.
"Owner" defined, see § 39-1601.
"Property" defined, see § 39-1601.
Security agreement, see T. C. A. § 47-9-105.

Comment:

Under the definition of "owner," § 39-1601(2), the person who inflicts damage under this chapter frequently will be an owner. If others are also "owners," however, this section provides that the actor is still subject to conviction under this chapter.

39-1606. Amount of pecuniary loss.—(a) The amount of pecuniary loss under this chapter, if the property is destroyed, is:

(1) the fair-market value of the property at the time and place of the destruction; or

(2) if the fair-market value cannot be ascertained, the cost of replacing the property within a reasonable time after the destruction.

(b) The amount of pecuniary loss under this chapter, if the property is damaged, is the cost of repairing or restoring the damaged property within a reasonable time after the damage occurred.

(c) The amount of pecuniary loss under this chapter for documents, other than those having a readily ascertainable fair-market value, is:

(1) the amount due and collectible at maturity less any part that has been satisfied, if the document constitutes evidence of a debt; or

(2) the greatest amount of economic loss that the owner might reasonably suffer by virtue of the destruction or damage, if the document is other than evidence of a debt.

(d) If the amount of pecuniary loss cannot be ascertained pecuniarily by the criteria set forth in subsections (a)-(c), the amount of loss is deemed to be less than fifty dollars ($50).

(e) To determine the amount of pecuniary loss if the actor has a legal interest in the property involved, the value of the interest shall be:

(1) deducted from the amount of pecuniary loss, if the property is destroyed; or

(2) deducted from the amount of pecuniary loss to the extent of an amount equal to the ratio the value of the interest bears to the total value of the property, if the property is damaged.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 28.06.
Subsecs. (a)-(d): N. Y. Rev. Pen. Law § 155.20.
Subsec. (e): Wis. Stat. Ann. § 943.20 (2)(c).

Cross-References:

Actor's interest in property, see § 39-1605.
"Property" defined, see § 39-1601.
Value of stolen property, see § 39-1907.

Comment:

This section establishes standards for valuing loss caused by conduct proscribed by this chapter; it tracks a similar provision in the theft chapter, § 39-1907. Subsection (a) adopts fair-market value or, if fair-market value cannot be determined, replacement cost for destroyed property, but if the property is only damaged and can be repaired, subsection (b) requires determination of repair cost. Subsection (c) provides valuation standards for documents that have no easily determined market value, and subsection (d) ensures some penal sanction in the rare instances where the amount of loss cannot be determined, but limits it to the lowest misdemeanor level. Subsection (e) provides for crediting the actor with the value of his own interest in property he damages or destroys. Under subsection (e)(2), for example, if the actor has a $500 equity in a car worth $1,000 and he intentionally damages it requiring repairs costing $250, the pecuniary loss resulting from his criminal mischief is $125—the repair cost, $250, less an amount equalling the ratio his equity bears to the value of the car ($500:$1,000 or 1:2; $250—$125=$125)—and the actor is guilty of a class A misdemeanor under § 39-1603.

39-1607. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 28.07.

Cross-References:

"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:

Municipal ordinances presently conflict with and overlap state law in the area of criminal mischief and reckless damage to or destruction of property. For example, the Code of the Metropolitan Government of Nashville and Davidson County (1967) prohibits defacing or damaging unoccupied buildings, § 29-1-5, defacing buildings under construction, § 29-1-5, and malicious mischief, § 29-1-37. All of the conduct covered by these ordinances is made criminal by present law, e.g., T. C. A. §§ 39-4501 and 39-4534. To eliminate the present conflict and confusion, and prevent future conflict and confusion between state and local law, this section makes clear the state intends to preempt the area of arson and other property damage or destruction and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

In light of this section governmental subdivisions and agencies may not enact or enforce laws punishing destruction of particular kinds of property (e.g., flowers, fountains), for example, or laws proscribing a particular type of damage or destruction (e.g., flooding, explosion). And, of course, an ordinance punishing negligent burning is prohibited because in conflict with the minimum culpable mental state required by this chapter, recklessness. On the other hand, requiring a permit before burning scrap, for example, or prohibiting littering, are permissible laws because neither regulates conduct punished by this chapter.

CHAPTER 17

ROBBERY

39-1701. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.

(2) "Property" means tangible or intangible personal property including anything severed from land.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-1703.

39-1702. Robbery.—(a) An individual, corporation, or association commits robbery if, in the course of committing theft as defined in chapter 19 and with intent to obtain or maintain control of the property:

(1) he intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) Robbery is a felony of the second degree.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-1703.

39-1703. Aggravated robbery.—(a) An individual, corporation, or association commits aggravated robbery if he commits robbery as defined in § 39-1702, and:

(1) he causes serious bodily injury to another; or

(2) he uses a deadly weapon.

(b) Aggravated robbery is a felony of the first degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 29.01, 29.02, 29.03.
N. Y. Rev. Pen. Law § 160.00.
Wis. Stat. Ann. § 943.32.

Cross-References:

Assault, see §§ 39-1401, 39-1402.
"Association" defined, see § 39-107.
"Bodily injury" defined, see § 39-107.
Claim of right, see § 39-1910.
"Deadly weapon" defined, see § 39-107.
Extortion, see § 39-1903.
"Property" defined, see § 39-1701.
"Serious bodily injury" defined, see § 39-107.
Theft by threat, see § 39-1903.
Theft from person, see § 39-1903.
Theft, see ch. 19.

Comment:

Presently, robbery consists of the felonious and forcible taking from the person of another, goods or money of any value, by violence or by putting the person in fear. T. C. A. § 39-3901. Section 39-1702 restates the T. C. A. § 39-3901 elements with some expansion. Robbery may be committed by causing bodily injury, even if it is only recklessly inflicted, subsection (a)(1), or by knowingly or intentionally threatening or otherwise causing fear of bodily injury, subsection (a)(2). As in present law, the violence used or threatened must be for the purpose of compelling acquiescence to the theft or of preventing or overcoming resistence to the theft. Violence used or threatened for some purpose unrelated to the theft is a separate offense against the person, e.g., assault under §§ 39-1401, 39-1402.

Section 39-1702 is broader in scope than the present robbery offense, however, because it applies to violence used or threatened "in the course of committing theft," which is defined in § 39-1701 to include not only violent conduct antecedent to a completed theft, but also violence accompanying an unsuccessful attempted theft and violence acompanying an escape immediately subsequent to a completed or attempted theft. This factor adds two new methods of committing robbery. The first, use or threat of violence in an attempted theft, simply combines into the robbery offense the present separate offense of assault with intent to commit robbery, T. C. A. § 39-607. The practical effect is to provide an identical penalty range, which the Commission feels is justified because the conduct is equally dangerous whether or not the theft is completed and it is usually fortuitous that the theft falls short of completion. The second, use or threat of force in escaping, broadens the scope of robbery. Here, too, the conduct is as dangerous as force or threats antecedent to the theft. The expansion is limited to assaults to effect an immediate escape so that a thief who uses force to resist apprehension a week after the theft does not commit robbery, but an assaultive-type offense.

Unlike present law, § 39-1702 does not limit robbery to the taking of property from "the person of another." T. C. A. § 39-3901. This section eliminates the distinction between actual and constructive taking in the event the property is taken in the presence of the party robbed and not from his person. See Morgan v. State, 220 Tenn. 247, 415 S. W. (2d) 879 (1967). The requirement of an assault, subsections (a)(1), (a)(2), however, implies presence of the victim and thus limits the scope of this expansion. It will apply, for example, when an offender threatens a victim "in order to compel him to telephone directions for the disposition of property located elsewhere." Model P. C. § 222.1, Comment at 70 (Tent. Draft No. 11, 1960).

The claim of right defense to theft, § 39-1910, is applicable to robbery also. Thus one who forcibly acquires property he believes he has a right to acquire does not commit robbery. The Commission feels he is less reprehensible than the person who acquires property he knows he has no right to acquire, and that he can be handled satisfactorily under the assault offenses in ch. 14, to which the claim of right defense is inapplicable. The claim of right defense to robbery is new to Tennessee law. See Elliot v. State, 2 Tenn. Crim. App. 418, 454 S. W. (2d) 187 (1970).

This section aggravates robbery as defined in § 39-1702, to a more serious offense if the bodily injury the offender inflicts under § 39-1702(a)(1) is "serious," or if the offender threatens or otherwise causes fear of imminent bodily injury or death under § 39-1702 (a)(2) by using a deadly weapon. Here, too, the injury must be inflicted or the weapon used for the purpose of effecting the theft; otherwise, it is an offense against the person and not robbery.

Presently, Tennessee law considers a robbery which is attempted or accomplished with the use of a deadly weapon as sufficient aggravation to allow application of greatly increased penalties for robbery and assault with intent to commit robbery. T. C. A. §§ 39-3901, 39-607. See Turner v. State, 201 Tenn. 562, 300 S. W. (2d) 920 (1957). The definition of "deadly weapon," § 39-107 (12), is in accord with present Tennessee law which distinguishes between weapons which are deadly per se and deadly by reason of the manner in which they are used. See Morgan v. State, 220 Tenn. 247, 415 S. W. (2d) 879 (1967). Thus, use of a toy pistol in the commission of robbery will not allow conviction of defendant for aggravated robbery, but will allow conviction for robbery, § 39-1702. See Cooper v. State, 201 Tenn. 149, 297 S. W. (2d) 75 (1956).

CHAPTER 18

BURGLARY AND CRIMINAL TRESPASS

39-1801. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Habitation:"

(A) means any structure including buildings, modular units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons; and

(B) includes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the actor; and

(C) includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle.

(2) "Occupied" means the condition of the lawful physical presence of any person at any time while the actor is within the habitation or other building.

(3) "Owner" means a person in lawful possession of property, whether the possession is actual or constructive.

COMMENTS OF LAW REVISION COMMISSION

Comment:
See comment following § 39-1802.

39-1802. Burglary.—(a) An individual, corporation, or association commits burglary if, without the effective consent of the property owner:

(1) he enters a habitation, or a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony or theft; or

(2) he remains concealed, with intent to commit a felony or theft, in a building or habitation; or

(3) he enters a building or habitation and commits or attempts to commit a felony or theft.

(b) For purposes of this section, "enter" means:

(1) intrusion of any part of the body; or

(2) intrusion of any object in physical contact with the body.

(c) Burglary is a felony of the second degree unless it was committed in an occupied habitation, in which event it is a felony of the first degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

§ 39-1801(1): Tex. P. C. Prop. Rev. § 30.01(1).
Minn. Stat. Ann. § 609.58, subd. 1(2).
Model P. C. § 221.0(1).
N. H. Prop. Crim. Code § 630:1(III).

§ 39-1802(2): Tex. P. C. Prop. Rev. § 30.01(2).

§ 39-1802(a)(1), (2): Tex. P. C. Prop. Rev. § 30.01(a)(1), (2).
Wis. Stat. Ann. § 943.10.
Minn. Stat. Ann. § 609.58, subd. 2.

§ 39-1802(a)(3): Tex. P. C. Prop. Rev. § 30.02(a)(3).

§ 39-1802(b): Tex. P. C. Prop. Rev. § 30.02(b).

§ 39-1802(c): Tex. P. C. Prop. Rev. § 30.02(c).

Cross-References:

Aggravated trespass, see § 39-1804.
"Association" defined, see § 39-107.
Attempt, see § 39-901.
Claim of right, see § 39-1910.
Criminal trespass, see § 39-1803.
Damage or destruction of property, see §§ 39-1603, 39-1604.
"Effective consent" defined, see § 39-107.
Possession of burglary tools, see § 39-1001.
Theft, see ch. 19.

Comment:

With this code's addition of a general criminal trespass offense, §§ 39-1803, 39-1804, and a general attempt offense, § 39-901, all conduct covered by the various burglary offenses in present law is punishable as a trespass, aggravated trespass, as an attempt if the offense intended is not completed, or as the intended, completed offense. Thus burglary as a separate offense could be eliminated without eliminating penal sanctions for any conduct now criminal. A separate burglary offense, however, does perform an important criminological function in addition to its trespassory and attempt functions; it protects against intrusion in places where people, because of the special nature of the place, expect to be free from intrusion. The provision of this protection is the rationale underlying this section.

Elements of Offense.

The central elements of the offense are entry or concealment in a building with intent to commit a felony or theft. Intrusion with intent to commit misdemeanor theft is included in burglary because of the practical impossibility of proving that a trespasser intended to steal property of sufficient value to constitute felony theft. This inclusion of intrusion with intent to commit a misdemeanor theft expands Tennessee law. See T. C. A. §§ 39-901—39-903. Intrusions with intent to commit a misdemeanor other than theft are not burglary. Those intrusions are now punishable as attempts or trespasses if the intended offense is not completed.

The types of intrusions made burglarious by this section are more varied than in present law. The present distinctions between burglary, burglary in the second degree and burglary in the third degree, are dispensed with. See T. C. A. §§ 39-901—39-903. A burglarious intrusion may consist either of a prohibited "entry" or of a concealment subsequent to a legal entry. The definition of entry is expanded to cover clearly the introduction of instruments to clear the way for further entry. Otherwise, the concept of entry is unchanged: the intrusion of any part of the body or of an instrument held by the actor constitutes an entry. See Claiborn v. State, 113 Tenn. 261, 83 S. W. 352 (1904).

More significant, however, in expanding the scope of burglarious intrusions is the change in the manner and time an intrusion must be made to be a burglary. The day and night distinction which is now used for gradation is abandoned because it does not appear to be based on a significant difference in the risks created by the offender. The types of intrusions proscribed are the same, whether made in daylight or at night. The requirement of a breaking, T. C. A. §§ 39-901—39-903, is also discarded. Cf. Adkinson v. State, 64 Tenn. 569 (1875) (entry without breaking and concealment in the mansion house—not burglary). All intrusions made without the owner's effective consent are burglarious if accompanied by the requisite intent.

The concept of effective consent makes burglarious not only intrusions without consent but also those made with apparent consent if given because of force, threat, or fraud, if given by one whom the actor knows lacks capacity to consent, or if given to detect the commission of an offense. See § 39-107 (code definitions). This concept broadens burglary to cover, for example, one who enters through an open door, held not a burglarious entry in Adkinson v. State, 64 Tenn. 569 (1875), or one who enters with consent of the owner or law enforcement officers given to detect an offense. As in present law, however, one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother-in-law, commits no burglary and can be prosecuted only for the commission or attempted commission of the offense he intended, unless he remains concealed after consent to his presence has terminated. Private offices and other portions of a building not open to the public are covered, however; one who, with the requisite intent, enters a storeroom closed to the public in a store otherwise open to the public commits burglary. The present statutory extension of burglary to include a breaking after entry is rendered useless by the elimination of the breaking requirement. See T. C. A. § 39-902.

The concealment feature, subsection (a)(2), covers, for example, one who, with the requisite intent, enters a business while it is open to the public and hides until it closes. Subsection (a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts a felony or theft. This provision dispenses with the need to prove intent at the time of entry when the actor is caught in the act.

The types of enclosures that, if entered without effective consent and with the requisite intent, may be the subject of burglary differ somewhat from those described in present law. Under this section a burglary may occur only in a "building or habitation." "Habitation" is broader than "building" in that it includes vehicles and structures other than buildings, such as modular units, mobile homes, trailers, campers and

tents, that are "adapted for the overnight accommodation of persons," § 39-1801(1). The Commission is of the opinion that a self-propelled vehicle must in fact be occupied for the offense of burglarly to take place. This is to prevent the theft of an unoccupied vehicle, or the theft of an article from that vehicle as being punished as burglary. A vehicle is a type of habitation which can easily be examined for occupancy but the actor assumes the risk that his examination may fail to correctly identify the situation. Thus, theft of a Volkswagen camper-bus is not burglary unless the vehicle is occupied. See comment following § 39-1601 (arson). Mobile homes, to be distinguished from the self-propelled vehicle camper, fall within the "structure" category of "habitation" and do not require occupancy to come within the protection of this section.

"Habitation" also includes garages and other outbuildings, § 39-1801(1)(B), and "separately secured and occupied portions" of a habitation, to cover those who, while legally in an apartment building or hotel, for example, enter another's room, § 39-1801(1)(A). This section retains the present distinction between entry into a habitation and entry into a building. See T. C. A. §§ 39-901—39-904. However, both offenses are contained in one section, § 39-1802, and only the penalty differs. Entries into railroad cars and vehicles, T. C. A. § 39-905, if they are not adapted for the overnight accommodation of persons, are excluded from burglary; also excluded are coin-operated machines. See Fox v. State, 214 Tenn. 694, 383 S. W. (2d) 25 (1964) (burglary of a pay-phone). Although presently labeled "burglary," entries with the requisite intent into railroad cars, vehicles and coin-operated machines are treated differently from traditional burglary; the above sections provide different elements and different penalties and are, in reality, different offenses. This code also treats them as separate offenses, but it changes the labels. For example, presently one who "burglarizes" a coin-operated machine may be punished as a felon (with a maximum of 21 years' imprisonment). Under this code the identical conduct may be punished as theft, § 39-1903, or as criminal mischief, § 39-1602, and the actor may be punished as either a misdemeanant or a felon (with a maximum imprisonment of six years), depending on the value of the property stolen or the extent of the damage done to the property. Similarly, intrusions into vehicles, railroad cars, and other structures not adapted for overnight accommodation of persons may be punished as criminal mischief if property is damaged, as a trespass, or for commission or attempted commission of the intended offense, with penalties more appropriate to the harm and more in line with present penalties.

Penalties.

Because the need for security is most exigent in an "occupied habitation," the Commission graded burglary of an occupied habitation a first-degree felony. Other burglaries are second-degree felonies. Other aggravating factors in the present law, such as use of explosives, T. C. A. § 39-906, are excluded on the ground that the penalty structure is flexible enough to permit the sentencing authority to weigh all aggravating and mitigating factors in assessing a proper penalty. See T. C. A. § 40-2301 as amended (sentencing hearing).

Whether a defendant may be punished for both burglary and for offenses committed subsequent to entry, is determined under ch. 3 (multiple prosecutions and double jeopardy).

39-1803. Criminal trespass.—(a) An individual, corporation, or association commits criminal trespass if, knowing he does not have the owner's effective consent to do so, he enters or remains on property as to which notice against entering is given by:

(1) personal communication to the actor by the owner or by someone with apparent authority to act for the owner; or

(2) fencing or other enclosure obviously designed to exclude intruders; or

(3) posting reasonably likely to come to the attention of intruders.

(b) It is a defense to prosecution under this section:

(1) that the property was open to the public when the actor entered or remained; and

(2) that the actor's conduct did not substantially interfere with the owner's use of the property; and

(3) that the actor immediately left the premises on request.

(c) For purposes of this section, "enter" means intrusion of the entire body.

(d) Criminal trespass is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 30.03.

Cross-References:

Aggravated criminal trespass, see § 39-1804.
"Association" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Defense explained, see § 39-203.
"Effective consent" defined, see § 39-107.
"Habitation" defined, see § 39-1801.
"Owner" defined, see § 39-1801.

Comment:

The present criminal law contains no general trespass offense, although most cities have adopted trespass ordinances. Although the Commission believes that most intrusions are more appropriately dealt with by civil law, criminal sanctions are desirable for two particularly offensive types of intrusions: those causing fear for the safety of person and those threatening the normal serenity of premises.

The present Tennessee offenses of: moving into a tent or building of a religious assembly without permission, T. C. A. § 39-4508; taking illegal possession of a school house or charitable institution, T. C. A. § 39-4509; and trespassing on the premises of a health resort or mineral springs after notice, T. C. A. § 39-4510, are adequately covered by this section.

This section covers the more typical trespass, that which is annoying or offensive, but not necessarily frightening. Subsections (a)(1)-(a)(3) establish the methods of giving notice, one of which the owner must utilize before criminal sanctions apply.

Subsection (b) seeks to eliminate two abuses of the trespass offense that have occurred in other jurisdictions: (1) use of the offense to enforce a private policy of discrimination in public places, see Bell v. Maryland, 378 U. S. 226 (1964); and (2) use of the offense to stifle free expression, see Amalgamated Food Employees v. Logan Valley Plaza, 391 U. S. 308 (1968). Subdivision (3), however, conditions this defense upon the actor's departure upon request.

Subsection (c) is designed to distinguish a trespassory entry from a burglarious entry. "Entry" for purposes of the burglary offense applies to buildings and habitations, but a trespassory entry applies to all property and ordinarily will occur well before the actor nears a building. Thus, entry is more narrowly defined to exclude from trespass one who reaches through a fence to retrieve his hat, for example.

39-1804. Aggravated criminal trespass.—(a) An individual, corporation, or association commits aggravated criminal trespass if he enters or remains on property when:

(1) he knows that he does not have the property owner's effective consent to do so; and

(2) he intends, knows, or is reckless about whether his presence will cause fear for the safety of another.

(b) For purposes of this section, "enter" means intrusion of the entire body.

(c) Aggravated criminal trespass is a class B misdemeanor unless it was committed in a habitation, in which event it is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 30.03.

Cross-References:
"Association" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Criminal trespass, see § 39-1803.
Defense explained, see § 39-203.
"Effective consent" defined, see § 39-107.
"Habitation" defined, see § 39-1801.
"Owner" defined, see § 39-1801.

Comment:
This section supplements the burglary offense. It is based on the belief that an intrusion is rendered no less frightening when the intruder has no felonious intent. If fright is the likely consequence of an intrusion, it should be punished even though the intruder did not intend to commit a felony or theft. This section is broader than the burglary offense in that its coverage begins with an intrusion on property rather than into a building. It is narrower than burglary, however, in that the intruder must be reckless about whether his intrusion will cause fear. Because of the latter element, this section ordinarily will apply only to trespassers near a habitation, particularly nocturnal trespassers.

It has long been the policy of the law to afford the utmost protection and security to a man's habitation. Like burglary, the most serious trespassory intrusions are those that occur in a home. For this reason, aggravated trespass is treated more harshly if it occurs in a habitation.

39-1805. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 30.04.

Cross-References:
"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:
Because the criminal law does not now contain a general trespass offense, municipalities have enacted ordinances prohibiting it and various forms of suspicious loitering. E.g., The Code of the Metropolitan Government of Nashville and Davidson County (1967) prohibits trespass, § 29-1-63, occupying a house, § 29-1-64, and loitering at schools, § 29-1-56. Section 39-1803 (criminal trespass) makes these ordinances unnecessary, and this section makes clear the state intends to preempt the area of burglary and trespass and thereby prevent governmental subdivision and agencies from enacting or enforcing laws in this area.

The Commission purposely excluded loitering-type offenses from the Criminal Code, and this section ensures that loitering-type conduct may no longer be punished. In all probability, the present Tennessee statutes on vagrancy, T. C. A. §§ 39-4701, 39-4702, and municipal ordinances on loitering, e.g., The Code of the Metropolitan Government of Nashville and Davidson County (1967), § 29-1-56, are unconstitutional on the grounds of vagueness and overbreadth. See Papachristou v. City of Jacksonville, 405 U. S. 156 (1972); Kirkwood v. Ellington, 298 Fed. Supp. 461 (W.D. Tenn. 1969). Furthermore, it is highly unlikely that a statute can be drafted which will have the requisite preciseness. In addition, of course, the section prohibits local laws conflicting with this chapter, e.g., proscribing trespass on particular types of property.

CHAPTER 19

THEFT

39-1901. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Coercion" means a threat, however communicated:

(A) to commit any offense; or

(B) to inflict non-imminent bodily injury on the person threatened or another; or

(C) to accuse any person of any offense; or

(D) to expose any person to hatred, contempt, or ridicule; or

(E) to harm the credit or business repute of any person; or

(F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

(2) "Deception" means:

(A) creating or confirming by words or conduct an impression of law or fact that is false, that the actor does not believe to be true if the false impression is likely to affect the judgment of another in the transaction; or

(B) failing to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct, that the actor does not now believe to be true if the false impression is likely to affect the judgment of another in the transaction; or

(C) preventing another from acquiring information likely to affect his judgment in the transaction; or

(D) selling or otherwise transferring or encumbering property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid, or is or is not a matter of official record, if the actor knew or had reason to know of its existence; or

(E) promising performance that is likely to affect the judgment of another in the transaction and that the actor does not intend to perform or knows will not be performed, except that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

(3) "Deprive" means:

(A) to withhold property from the owner permanently or for so extended a period of time as to substantially diminish the value or enjoyment of the property to the owner; or

(B) to restore property only upon payment of reward or other compensation; or

(C) to dispose of property in a manner that makes recovery of the property by the owner unlikely.

(4) "Effective consent" includes consent by any person legally authorized to act for the owner. Consent is not effective if:

(A) induced by deception or coercion; or

(B) given by a person the actor knows is not legally authorized to act for the owner; or

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

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

(5) "Obtain" means to bring about a transfer or purported transfer of a nonpossessory interest in property, whether to the actor or another.

(6) "Owner" means a person other than the actor who has possession of property, or any interest other than a mortgage, deed of trust, or security interest in property, even if the possession or interest is unlawful.

(7) "Property" means:

(A) real property; or

(B) tangible or intangible personal property including anything severed from land, or a trade secret.

(8) "Service" includes:

(A) labor, skill, and professional service; and

(B) telecommunication, public utility, and transportation service; and

(C) lodging, restaurant service, and entertainment; and

(D) the rental of a motor vehicle or other property.

(9) "Steal" means to acquire property or service by theft.

(10) "Trade secret" means any scientific or technical information which is secret and of value. Secrecy shall be presumed when the owner takes precautions to prevent the information's becoming available to persons other than of his choosing.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subdiv. (1): Tex. P. C. Prop. Rev. § 31.01.
Ill. Stat. Ann. ch. 38, § 15-5.
Cal. Prop. Pen. Code § 2904.

Subdiv. (2): Tex. P. C. Prop. Rev. § 31.01.
Ill. Stat. Ann. ch. 38, §§ 15-3, 15-4.
Cal. Prop. Pen. Code § 2903.

Subdiv. (3): Tex. P. C. Prop. Rev. § 31.01.

Subdiv. (4): Tex. P. C. Prop. Rev. § 31.01.
Model P. C. § 206.1(6) (Tent. Draft No. 1, 1953).

Subdiv. (5): Tex. P. C. Prop. Rev. § 31.01.
N. Y. Rev. Pen. Law § 155.00(2).
Cal. Prop. Pen. Code § 2900(3).

Subdiv. (6): Tex. P. C. Prop. Rev. § 31.01.
Ill. Stat. Ann. ch. 38 § 15-2.

Subdiv. (7): Tex. P. C. Prop. Rev. § 31.01.

Subdiv. (8): Tex. P. C. Prop. Rev. § 31.01.
N. Y. Rev. Pen. Law § 165.10(1).

Subdiv. (9): Tex. P. C. Prop. Rev. § 31.01.

Subdiv. (10): T. C. A. § 39-4238.

Cross-References:

"Bodily injury" defined, see § 39-107.
"Consent" defined, see § 39-107.
"Harm" defined, see § 39-107.
"Law" defined, see § 39-107.
"Public servant" defined, see § 39-107.
Security agreement, see T. C. A. § 47-9-105.

Comment:

This section contains definitions of terms used throughout the theft chapter. For a discussion of subdivisions (1)-(7), see the comment to § 39-1903. For a discussion of subdivision (8), see the comment to § 39-1904.

39-1902. Consolidation of theft offenses.—Theft as defined in § 39-1903 constitutes a single offense superseding such previously separate offenses known as larceny, larceny by false pretense, larceny from the person, shoplifting, appropriation by a person having custody, embezzlement, extortion, fraudulent breach of trust, receiving or concealing stolen property, and the like.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Model P. C. § 223.1(1).
Tex. Prop. Pen. Code § 31.02.

Cross-References:

Actor's interest in property, see § 39-1909.
Claim of right, see § 39-1910.
Presumption for theft by check, see § 39-1905.
Theft, see § 39-1903.
Theft of service, see § 39-1904.
Unauthorized use of motor vehicle, see § 39-1906.

Comment:

No part of the Tennessee criminal law has produced more confusion, more appellate litigation, and more reversals on technicalities unrelated to the actor's guilt or innocence than the multitude of offenses proscribing criminal acquisitions of another's property. Although the present theft offenses attempt to separate guilty from innocent acquisitions, they do so clumsily, and their effect all too often is to embroil the courts in nice questions about the appropriateness of conviction under one offense label as opposed to another. The present distinctions between the various offenses are unnecessary for establishing the point at which acquisitive conduct becomes criminal—that can be done generally—and they provide no rational basis for penalty determinations or for the provision of defenses; they do, however, place unnecessary obstacles before the conviction of the guilty.

For this reason the Commission decided to consolidate most of the theft offenses into a single, comprehensive offense aimed at the harm that accompanies the acquisitive conduct, however the acquisition is accomplished. Thus, a person who shoplifts a $20 radio commits the same offense as the person who writes a bad check for it or the person who writes a bad check to settle an account in order to obtain the radio on credit. This section serves merely to explain and emphasize the intent of the theft section: theft is a single offense with a uniform culpable mental state, a uniform result, uniform penalties, and uniform defenses, all of which focus on culpability rather than, as under present law, whether the state is pursuing the defendant under the appropriate offense label.

Theft of service, still a novelty in the criminal law, is for this reason treated separately in § 39-1904. Driving a motor vehicle without the owner's consent, § 39-1906, is also treated separately because it covers conduct that does not constitute theft.

39-1903. Theft.—(a) An individual, corporation, or association commits theft if, with intent to deprive the owner of property:

(1) he obtains the property unlawfully; or

(2) he exercises control over the property, other than real property, unlawfully.

(b) Obtaining or exercising control over property is unlawful if:

(1) the actor obtains or exercises control over the property without the property owner's effective consent; or

(2) the property is stolen and the actor obtains or exercises control over the property knowing it was stolen by another.

(c) Theft is:

(1) a class C misdemeanor if the value of the property stolen was fifty dollars ($50) or less;

(2) a class A misdemeanor if the value of the property stolen was more than fifty dollars ($50) but less than two hundred fifty dollars ($250);

(3) a felony of the third degree if:

(A) the value of the property stolen was two hundred fifty dollars ($250) or more but less than ten thousand dollars ($10,000); or

(B) regardless of value, the property was stolen from the person of another; or

(C) regardless of value, the property stolen was a trade secret;

(4) a felony of the second degree if the value of the property stolen was ten thousand dollars ($10,000) or more.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Model P. C. § 206.1 (Tent. Draft No. 1, 1953).

Tex. P. C. Prop. Rev. § 31.03.

Cross-References:

Actor's interest in property, see § 39-1909.

Aggregation of amounts stolen, see § 39-1908.

Attempt, see § 39-901.

Claim of right, see § 39-1910.

Credit card abuse, see § 39-2031.

Criminal simulation, see § 39-2022.

Deceptive business practices, see § 39-2041.

"Deprive" defined, see § 39-1901.

"Effective consent" defined, see § 39-1901.

"Obtained" defined, see § 39-1901.

"Owner" defined, see § 39-1901.

Presumption for theft by check, see § 39-1905.

"Property" defined, see § 39-1901.

Theft of service, see § 39-1904.

"Trade secret" defined, see § 39-1901.

Unauthorized use of motor vehicle, see § 39-1906.

Value, see § 39-1907.

Comment:

This section creates a new offense, which, in general terms, encompasses all acquisitive conduct presently made unlawful in several separate offenses. The offense is denominated "theft" primarily because that label is not encrusted with the commonlaw connotations of larceny, and, secondarily, because it is more descriptive of the proscribed conduct than the other traditional labels.

The new theft offense consists of the following elements: (1) with intent to deprive (2) the owner (3) of property, the actor (4) obtains the property or exercises control over the property (other than real property) (5) unlawfully.

Intent to Deprive.

To constitute theft, the actor, at the time he acquires the property, must intend to deprive the owner of the property. The definition of deprive is broad enough to encompass all the dispositional motives recognized in present law. It is not necessary, for example, that the actor intend to benefit himself or another; the only motive necessary is to withhold the benefits from the owner whether or not the actor or another benefits.

"Deprive" is defined in § 39-1901 to include either a permanent withholding or a prolonged withholding. This changes present law, which requires an intent to withhold permanently. See Poster v. Andrews, 183 Tenn. 544, 194 S. W. (2d) 337 (1946). If the property is still in existence and in the actor's possession, a burden on the state to prove intent never to return it may be too onerous, particularly since the harm to the owner is similar if the benefits of ownership are lost for a substantial period. The length of time necessary to deprive of a "major portion of the value or enjoyment" will, of course, vary according to the property, its useful life and the nature of its usefulness. The meaning of this clause is best left to case-by-case adjudication, but a temporary withholding that does not seriously harm ownership rights will not support a theft conviction.

The definition of "deprive" includes loss of "enjoyment" as well as "value" to cover the situations where the value of the property increases while in the thief's possession and where the value is personal to the owner.

"Deprive" also includes a withholding of property "with intent to restore it only upon payment of reward or other compensation." T. C. A. § 39-4223 presently treats as larceny the personal use of property by a finder who knows the identity of the owner.

The definition of "deprive" includes a disposal in a manner that makes the owner's recovery of the property unlikely. This provision relieves the state of the burden of proving that the actor knew the owner would not recover the property, for example, if abandoned. The likelihood of recovery will, of course, depend upon the type of property and the manner of its disposal. An automobile abandoned across the state might present a strong likelihood of recovery, but a sack of money abandoned across town might not.

Owner.

Section 39-1901 defines "owner" broadly so that the new theft offense protects a deprivation of another's "interest" in the property, whether or not that interest is possessory. This changes present law, which except for offenses involving conversion, is directed primarily toward interference with rights to possession. See Owen v. State, 25 Tenn. 330 (1845). An "owner" may be one whose interest is unlawful; a thief is no less culpable because he stole from another thief. The definition of "owner," however, does not preclude justification to use force to retake one's own property, see § 39-1910 (claim of right defense).

The new theft offense, by requiring deprivation from the "owner," and defining owner broadly, will expand the theft responsibility of joint owners and others with part interests in property, see § 39-1909 (actor's interest in property) and comment.

The definition of owner excludes, however, those who have a security interest in property in possession of the debtor, even if legal title is in the secured creditor pursuant to a conditional sales contract or other security agreement. Because a debtor or vendee of secured property usually regards himself as the owner subject only to the obligation to pay the debt, even when the security agreement makes the creditor the owner for civil law purposes, the behavior of debtors and vendees of secured property is not readily amenable to control by theft laws. Their conduct with respect to secured property and the concomitant protection of secured creditors is accordingly governed by the fraud chapter, e.g., § 39-2023 (hindering secured creditors).

Property.

The property subject to theft is defined generally in § 39-1901 to encompass all the specific items now listed as subject to being stolen in T. C. A. §§ 39-4207, 39-4211, 39-4214, 39-4215, 39-4216, and 39-4223. It includes anything capable of being possessed or owned, whether tangible or intangible, and whether inherently valuable or merely representative of something of value.

The only significant change in present law is that property subject to theft under this section is expanded to include real property. Because realty is immobile and indestructible, present law does not cover its theft, although fixtures and other things severed from land may be stolen. This section, however, limits the theft of realty to conduct that involves the transfer of title or other interest in land; possession or other exercise of control over land is not theft. It is believed that unauthorized use, occupation, or other control of realty is not so compelling a problem that the civil remedies cannot adequately handle it. When a trustee or guardian controls another's realty or when an actor acquires an interest by deception or intimidation, however, disposition to a good faith transferee defeats the victim's civil remedies and the actor is no less culpable because he chose to deal in land instead of personalty.

The definition of "property" defines personal property to include both tan-

gible and intangible property and "anything severed from land." Thus, fixtures and other things severable but still attached to the land are subject to theft only to the extent the land itself may be stolen, but if they are severed, they become personal property subject to theft in either possessory or nonpossessory transactions. Thus, it is not theft if the actor alters boundary markers to include another's building on his land, but it is if he hauls off a truckload of gravel from another's gravel pit.

Tennessee's 1967 legislation on theft of trade secrets, T. C. A. §§ 39-4238—39-4240, is rendered unnecessary by the definition of theft in this section. Since the offense is defined in terms of exercising control and applies to intangible as well as tangible property, the theft or embezzlement of a trade secret would be punishable under this section.

Finally, "property" includes money, checks, credit cards, promissory notes, wills, and other documents or writings representing or embodying something of value.

Obtain or Exercise Control.

Consolidation of the theft offenses renders too narrow most of the common-law and legislative terms that describe the nature of the acquisition necessary to constitute the various theft offenses. This section therefore adopts the terms "obtain" and "exercise control," which, together, are broad enough to embrace all the present terms—"take," "receive," "misapply," "embezzle," or "convert"—although their application is not limited to conduct described by the present terms.

"Obtain," as defined in § 39-1901 is directed at transactions in any legally recognized interest other than possessory interests in property. Although an actor may have possession, he need never actually control the property to commit theft if he causes a transfer or purported transfer of an interest in the property, whether to himself or another. Thus a guardian or trustee commits theft if he transfers or encumbers property he controls for a beneficiary "with intent to deprive" the beneficiary and in violation of his authority, i.e., without the beneficiary's "effective consent." It is also theft if an actor induces another to transfer or encumber his property by deception or intimidation, although he may never exert control over it.

"Exercising control," on the other hand, is directed primarily at those thefts that involve possession. Thus it covers not only purse snatching, shoplifting, and other thefts by strangers, but also receiving or concealing stolen property and the conduct of persons who possess another's property with consent but exercise this possesory right in a manner that deprives the owner of the property. A tenant who sells topsoil, for example, exerts control, as does an employee who takes or a bailee who converts, whoever benefits by the bailment. "Exercising control," however, also encompasses conduct that does not involve possession. A shipping clerk who re-routes a package to a friend by substituting a new address label might not have possession, but his conduct constitutes an exercise of control. Anyone who is in a position to take some action that deprives the owner of property is in a position to exercise control.

The distinction between "obtaining" and "exercising control" is imprecise and some thefts will involve both. It is necessary to make the distinction, however, to ensure that transactions involving title and other nonpossessory interests, in addition to possessory transactions, will constitute theft. It also operates to exclude from theft those transactions involving the possession of real estate, such as adverse possession or the tenant who remains after the lease expires but does not pay the rent, transactions that are minutely regulated by civil law.

Unlawfully.

Few property transactions do not involve the acquisition of another's property with intent to deprive him of it. Therefore, the central element of the theft offense, the element that separates lawful acquisitive conduct from theft, is the requirement that the acquisition be "unlawful." Subsection (b) covers this element.

1. Effective Consent.

An actor who obtains or exercises control over the property of another with intent to deprive does so unlawfully if he acts without the owner's "effective consent." The concept of "effective consent" is the most far reaching change in present law; it is the concept that unifies the conduct presently covered in several separate offenses. Several theft offenses presently require the absence of the owner's consent, e.g., T. C. A. §§ 39-4224, 39-4225, but "effective consent," which is defined in § 39-1901(4) operates to negate consent in some transactions now considered consensual.

a. Deception.

The definition of "effective consent" in § 39-1901(4) provides that the victim's consent is vitiated if it is "induced by deception," a term defined in § 39-1901 (2). As in the present common-law crime of theft by false pretenses, the victim's consent must result from his reliance on the deception when he would not have consented if he knew the truth. Roberts v. State, 191 Tenn. 602, 235 S. W. (2d) 595 (1951). Thus it is not theft if the victim knows the truth and knows the actor is lying, for example, but nevertheless agrees to the transaction. Moreover, the deception must be intentional and for the purpose of inducing consent, see § 39-406 (application of culpable mental state).

Conduct that constitutes deception and therefore vitiates consent is defined broadly in § 39-1901(2), because, if the actor intentionally deceives with intent to induce consent, any successful method should be covered. Despite the breadth of the conduct defined as deceptive, however, the definition, with one narrow exception, requires a material deception—one "likely to affect the judgment of another in the transaction"—and imposes no affirmative duty to disclose. Ordinarily, an actor may take advantage of another's misimpression if he did nothing to create or reinforce it. The one exception requires disclosure of liens, security interests, adverse claims, and other legal impediments to enjoyment before transferring or encumbering property, whether or not their existence may affect the other's judgment. Otherwise, an actor deceives only if he takes some affirmative action that conveys a material false impression.

The definition focuses on the most frequent form of deception, a false "impression" intentionally created, rather than any particular misrepresentation. Thus an actor may deceive by disclosing selected truths and omitting others, without a single lie; he may also deceive by his conduct as well as by words, and by reinforcing pre-existing misconceptions as well as by creating them. Moreover, the actor need not know that the impression he conveys is false; it is sufficient if he believes it to be untrue, and he cannot escape conviction by refusing to verify the falsity of information he believes to be false.

The definition is limited, however, to false impressions "of law or fact," although it is immaterial whether the law or fact is past, present, or future. Communications of opinion are excluded to avoid criminalizing the common sales practice of "puffing," a practice the public generally expects and discounts. One cannot escape, however, by misrepresenting known facts in opinion form, conduct that is, in reality, misstatement of fact.

The remaining subdivisions of the definition of "deception" are more specific. Subdivision (B) provides that it is deception when an actor, having created or confirmed a false impression in good faith, subsequently acquires information that leads him to believe the impression false and fails to inform the victim. Although this creates an affirmative duty to disclose, it applies only when the actor previously created or confirmed the victim's misimpression.

Subdivision (C) covers affirmative action to prevent the victim from acquiring relevant knowledge.

Subdivision (D) creates a special disclosure rule for transactions involving the transfer or encumbrance of property. If the actor is aware of a lien, security interest, adverse claim, or other legal impediment to enjoyment, whether valid or not and whether a matter of official record or not, he deceives if he fails to disclose it with intent to induce consent.

The final subdivision creates a special rule for false promises. It is deception to induce consent to a transaction by promising performance the actor does not intend to perform or knows will not be performed. A special evidentiary rule, designed to prevent abuse of this rule in everyday contractual relations, provides that failure to perform the promise in question, without other evidence of intent not to perform, will not support a conviction for theft.

b. Coercion.

Section 39-1901(4) also provides that consent "induced by . . . coercion" is ineffective. As in the case of deception, consent must result because of the coercion, and the coercive conduct must be intentional and with intent to induce the victim to surrender property. An owner who is not frightened and consents to a transaction for other reasons is not a victim of theft; nor is a person who is frightened by an unintended threat. On the other hand, the definition of "coercion," § 39-1901(1), does not require a material threat, so that an actor cannot avoid conviction by selecting victims who, because of particular sensibilities, are frightened when most people would not be.

The provision that coercion negates consent replaces present T. C. A. § 39-4301 (threats for purpose of extortion or obtaining action), malicious prose-

cution, and related extortion-type offenses. It is considerably broader than T. C. A. § 39-4301, however, in that the threat clearly need not be explicit, but may be implied or communicated in any other effective manner; the harm threatened need not be against the victim, but may be against anyone if it is intended to induce consent; and the threatened harm need not be unlawful, the actor may even have a duty to inflict the harm, but if he threatens it to obtain property he commits theft. The new theft offense is also broader than malicious prosecution and other extortion offenses in that it covers several threatened harms and any means of communicating them. Unlike the new offense, however, the present extortion offenses are complete when the threat is made and the property does not necessarily have to be delivered. Furlotte v. State, 209 Tenn. 122, 350 S. W. (2d) 72 (1961). A threat that is intended to induce a transfer of property that does not occur, however, will constitute attempted theft under § 39-901 (criminal attempt).

The types of harm that, if threatened, constitute coercion as defined in § 39-1901(1) cover a broad range of conduct. The first subdivision, (A), provides that it is coercion to threaten commission of "any offense." This, of course, overlaps with robbery, §§ 39-1702 and 39-1703, but it is broader, a threat to commit an offense not involving violence is not robbery. If robbery is applicable, however, the state can elect to prosecute for either robbery or theft. Subdivision (B) applies to threats to inflict bodily injury "in the future," to distinguish it from robbery. It overlaps the preceding subdivision, but covers conduct that may not be an offense, such as a threat to expose another to a communicable disease.

Subdivision (C) covers the traditional "blackmail" situation, and indicates clearly that the victim's guilt or innocence is irrelevant if the actor's purpose is to compel a transfer of property. This preserves present Tennessee law. State v. Needham, 147 Tenn. 50, 245 S. W. 527 (1922). Subdivisions (D) and (E) cover threats to defame or to harm business or credit reputation, whether truthful or not, and subdivision (F) applies to threats by a public official to take or withhold action or threats to cause an official to take or withhold action, such as refusal to grant a qualified person a license. Subdivision (F) to the extent it applies to threats by public servants, overlaps official misconduct, § 39-2402, and bribery, § 39-2102, but if the threat is made for the purpose of acquiring property, the state can elect to prosecute under either offense. If, for example, an official demands $20,000 before acting, the theft penalties may be more appropriate.

The claim of right defense, § 39-1910, excludes some coercive but acceptable conduct, such as a merchant who threatens to report a defaulting debtor to the credit bureau if he refuses to pay his debt.

c. Lack of authority or capacity.

Section 39-1901(4)(B) provides that consent is ineffective if the person giving it lacked authority to do so and the actor knew it. Similarly, § 39-1901(4)(C) negates consent by drunks who are so intoxicated that their ability to make reasonable decisions is impaired, or by children and incompetents, if the actor knows of the incapacity.

d. Detecting the commission of offense.

Section 39-1901(4)(D) preserves present law, which provides that an owner who takes steps to encourage a thief for the purpose of detecting the offense does not consent, e.g., McAdams v. State, 76 Tenn. 456 (1881). See § 39-605 (entrapment) and comment.

Receiving Stolen Property.

Section 1903(b)(2) provides that it is "unlawful" to obtain or exercise control over property the owner knows is stolen; thus the receiver is guilty of theft under § 39-1903. "Receiving" is included out of an abundance of caution rather than out of necessity, because one who obtains or exercises control over property he knows is stolen does so without the owner's effective consent as clearly as when he physically steals the property himself.

Penalties for Theft.

The grading scheme for theft is governed primarily by the value of property. The greater the value of property a thief acquires, the greater degree of disrespect for property rights he evidences. Petty thefts, less than $50, are graded a class C misdemeanor. A special sentencing provision, however, authorizes more serious penalties for the habitual petty thief, see § 39-844, and § 39-1908 provides for aggregating amounts stolen, under certain circumstances that constitute separate thefts under present law, so that felony penalties are available.

The grading structure departs from the value standard in two situations. Theft from the person, presently described in T. C. A. § 39,4206, involves risk of injury to the person and is therefore a third-degree felony regardless of the amount stolen. Because of the extreme difficulty if not impossibility of correctly placing a pecuniary value on "trade secrets," the theft of property falling under that definition is made a third-degree felony.

39-1904. Theft of service.—(a) An individual, corporation, or association commits an offense if, with intent to avoid payment for service he knows is provided only for compensation:

(1) he secures performance of the service; or

(2) having control over the disposition of services of others to which he is not entitled, he diverts their services to his own benefit or to the benefit of another not entitled to them.

(b) For purposes of this section, intent to avoid payment is presumed if the actor absconds without paying for the service in circumstances where payment is ordinarily made immediately upon rendering of the service.

(c) An offense under this section is:

(1) a class C misdemeanor if the value of the service stolen was fifty dollars ($50) or less;

(2) a class A misdemeanor if the value of the service stolen was more than fifty dollars ($50) but less than two hundred fifty dollars ($250);

(3) a felony of the third degree if the value of the service stolen was two hundred fifty dollars ($250) or more but less than ten thousand dollars ($10,000);

(4) a felony of the second degree if the value of the service stolen was ten thousand dollars ($10,000) or more.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Cal. Prop. Pen. Code § 2907.
Model P. C. § 223.7.
Tex. P. C. Prop. Rev. § 31.04.

Cross-References:

"Association" defined, see § 39-107.
Credit card abuse, see § 39-2031.
Presumption explained, see § 39-205.
Presumption for theft by check, see § 39-1905.
"Service" defined, see § 39-1901.
Theft, see § 39-1903.
Value, see § 39-1907.

Comment:

This section replaces that portion of the present larceny by trick offense that proscribes the acquisition of "services" by fraudulent representation as well as scattered offenses covering specific services; e.g., T. C. A. § 39-4215 (tapping water main), § 39-1916 (fraudulent operation of coin machines). "Service" is defined broadly in § 39-1901 to include almost anything that is ordinarily provided for compensation but that was traditionally excluded from theft because it is not classified as "property." Thus, in addition to the services presently protected, such as the provision of food, lodging, entertainment, transportation, communications, and public utilities, the definition includes the provision of labor and professional services and the rental of property.

Subsection (a)(1) contemplates the normal theft of services situation where the actor "walks" the bill at a restaurant, uses a slug in a pay telephone, or leaves a rented trailer where it will be found but fails to pay for its rental. Subsection (a)(2) covers a rarer situation, where a construction foreman, for example, uses employees under him to build a fence around his home on his employer's time.

Subsection (b) creates a presumption of intent not to pay if the actor leaves without paying for a service that is ordinarily paid for immediately, such as hotel or restaurant services.

39-1905. Presumption for theft by check.—(a) If the actor obtains property or secures performance of service by issuing a check or similar sight order for the payment of money, his intent to deprive the owner of property under § 39-1903 or to avoid payment for service under § 39-1904 is presumed if:

(1) he has no account with the bank or other drawee at the time he issues the check or order; or

(2) on presentation within thirty (30) days after issue, payment is refused by the bank or other drawee for lack of funds, insufficient funds, or account closed after issuance of the check or order, and the issuer fails to make good within five (5) days after receiving notice of that refusal.

(b) For purposes of subsection (a)(2), notice shall be in writing, and, if the address is known, sent by registered mail with return receipt requested, and addressed to the issuer at his address shown:

(1) on the check or order if given; or

(2) if not shown on the check or order, on the records of the bank or other drawee; or

(3) if not available, on the records of the person to whom the check or order has been issued or passed. If no address is known or available under subsections (b)(1)—(b)(3), notice may be given by posting in a public place within the county of issuance for five (5) consecutive days.

(c) If notice is given in accordance with subsection (b), it is presumed that the notice was received no later than five (5) days after it was mailed, or if posted no later than five (5) days after the first day of posting.

(d) For purpose of this section:

(1) the "records of the person to whom the check or order has been issued or passed" include the telephone directory for the county in which the check or order was issued or passed.

(2) if the check or order is dated, the date shown is the "date of issue."

(e) This section shall not be construed to prevent the state from establishing the requisite intent by direct evidence.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 31.05.

Cross-References:

"Deprive" defined, see § 39-1901.
Forgery, see § 39-2021.
"Obtain" defined, see § 39-1901.
Presumption explained, see § 39-205.
"Property" defined, see § 39-1901.
"Service" defined, see § 39-1901.
Theft, see § 39-1903.
Theft of service, see § 39-1904.

Comment:

This section creates a presumption of intent when theft is accomplished by passing a worthless check, rather than creating a separate offense as in present law, T. C. A. § 39-1960, to preserve the policy underlying theft consolidation, see § 39-1902 and comment. As in present T. C. A. § 39-1960, the presumption arises when payment of the check is refused by the drawee for insufficient funds and, after receiving notice, the actor fails to make the check good. A presumption is added to cover the cases where the actor has no account, in which case notice is not necessary to invoke the presumption.

Receipt of notice, which must be established to invoke the presumption, will be presumed under subsection (c) only if notice is sent by registered mail.

The presumption created by this section applies only when a worthless check is used to commit theft. The issuance of a bad check to obtain credit is treated by § 39-2032. A separate, less serious offense, § 39-2048 (issuance of bad check), covers other instances of passing worthless checks.

39-1906. Unauthorized use of automobile or other vehicle.—(a) An individual, corporation, or association commits an offense if he intentionally or knowingly operates another's watercraft, aircraft, or self-propelled land vehicle without the effective consent of the owner.

(b) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

N. Y. Rev. Pen. Law § 165.05(1).
Cal. Prop. Pen. Code § 2909.
Tex. P. C. Prop. Rev. § 31.06.

Cross-References:

"Association" defined, see § 39-107.
Claim of right, see § 39-1910.
"Effective consent" defined, see § 39-1901.
"Owner" defined, see § 39-1901.
Theft of automobile, see § 39-1903.

Comment:

This section combines and restates present T. C. A. §§ 59-504 and 59-505 (using car without consent) and adds airplanes, which may soon become a problem. It proscribes the use of property without the owner's consent when the actor has no intent to deprive and thus is not guilty of theft. This is a change of present Tennessee law which punishes unauthorized temporary use of a vehicle with intent to return it to the owner as a felony carrying the same penalty as petty larceny.

Watercraft and aircraft are included, in addition to motor-driven land vehicles in general, to cover sailboats and gliders, for example, which do not depend upon a motor for propulsion.

Although the offense defined by this section is not actually a theft offense, it is placed in the theft chapter for ease of reference and clarity.

39-1907. Value.—(a) Subject to the additional criteria of subsections (b)-(d), value under this chapter is:

(1) the fair-market value of the property or service at the time and place of the offense; or

(2) if the fair-market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the theft.

(b) The value of documents, other than those having a readily ascertainable fair-market value, is:

(1) the amount due and collectible at maturity less any part that has been satisfied, if the document constitutes evidence of a debt; or

(2) the greatest amount of economic loss that the owner might reasonably suffer by virtue of loss of the document, if the document is other than evidence of a debt.

(c) If property or service has value that cannot be ascertained by the criteria set forth in subsections (a) and (b), the property or service is deemed to have a value of less than fifty dollars ($50).

(d) If the actor gave consideration for or had a legal interest in the property or service stolen, the amount of the consideration or value of the interest shall be deducted from the value of the property or service ascertained under subsection (a), (b), or (c) to determine value for purposes of this chapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsecs. (a)-(c): Tex. P. C. Prop. Rev. § 31.07.
N. Y. Rev. Pen. Law § 155.20.

Subsec. (d): Wis. Stat. Ann. § 943.20(2)(c).
Tex. P. C. Prop. Rev. § 31.07.

Cross-References:

"Owner" defined, see § 39-1901.
"Property" defined, see § 39-1901.
"Service" defined, see § 39-1901.
"Steal" defined, see § 39-1901.

Comment:

The present statutes contain no standards for determining the value of stolen property or services, and case law has not provided any set guidelines. See generally, Busler v. State, 181 Tenn. 675, 184 S. W. (2d) 24 (1944); Osborne v. State, 115 Tenn. 717, 92 S. W. 853 (1903).

A Texas case has demonstrated the practical impossibility of utilizing market value or cost of replacement to establish satisfactorily a value for some written instruments. Hancock v. State, 402 S. W. (2d) 906 (Tex. Crim. App. 1966) (computer program). To remedy this inadequacy, subsection (b)(1) applies to documents evidencing a debt, such as checks, drafts, and promissory notes, and subsection (b)(2) applies to other valuable documents, such as maps, computer programs, and other industrial or commercial information.

Subsection (c) is also new to Tennessee law. It is designed to ensure some criminal sanction in the rare case in which a victim obviously is deprived of value, but it is impossible to set a satisfactory valuation. The Commission determined, however, that if the value cannot be determined the thief should not be branded a felon. Thus, the value is deemed to be less than $50.

Subsection (d) changes the present Tennessee law which denies credit, in determining the grade of theft, for the consideration the thief gave for the property in question.

39-1908. Aggregation of amounts involved in theft.—Amounts stolen in one criminal episode may be aggregated in determining the value of the property for classification of the offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 31.08.
Conn. Gen. Stat. § 53-123(b).
Cal. Prop. Pen. Code § 2901(2)(e).

Cross-References:

"Conduct" defined, see § 39-107.
Counts, see T. C. A. §§ 40-1003, 40-2202, as amended.
"Criminal episode" defined, see § 39-107.
Multiple sentences prohibited, see § 39-301.
"Owner" defined, see § 39-1901.
"Steal" defined, see § 39-1901.
Value, see § 39-1907.

Comment:

The common law restricted the scope of a theft to a single victim and a single time and place; if more than one victim or more than one time was involved, more than one theft was committed.

This section represents a substantial departure from the common law. It provides that, if an actor adopts and pursues "a single criminal objective or scheme, even though the harm is directed or inflicted upon more than one person," (definition of criminal episode in § 39-107) for acquiring property or services in a manner that constitutes theft, he may be convicted of a felony even though he was careful to limit the theft from each individual to a misdemeanor amount. This provision reflects the Commission's determination that the reprehensibility of an actor, and thus the appropriate penal sanction, is not necessarily determined by the amount he steals at a single moment from a single person. A swindler who sells a thousand one-dollar tickets to a nonexistent charitable function, for example, evidences the same disrespect for property rights as the embezzler who takes $1,000 from his employer or the car thief who steals a $1,000 automobile. Each intends to acquire valuable property illegally, and although the swindler harms no individual victim significantly, his harm to society is as great as that of the embezzler and the car thief.

This section also uses the term "criminal episode" for another purpose. This invokes the provisions of ch. 3 (multiple prosecutions and double jeopardy), which ordinarily require the state to join each offense of a single criminal episode in a single prosecution. The concept of a "criminal episode" is discussed in the comment to §§ 39-107 and 39-301.

39-1909. Actor's interest in property.—It is no defense to prosecution under this chapter that the actor has an interest in the property or service stolen if another person also has an interest that the actor is not entitled to infringe.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Ill. Stat. Ann. ch. 38, § 16-4.
Cal. Prop. Pen. Code § 2900(5).
Tex. P. C. Prop. Rev. § 31.09.

Cross-References:

Hindering secured creditors, see § 39-2033.
"Owner" defined, see § 39-1901.
"Property" defined, see § 39-1901.
"Service" defined, see § 39-1901.
"Steal" defined, see § 39-1901.
Value, see § 39-1907.

Comment:

Section 39-1901 defines "owner" for purposes of this chapter to include any interest, including possessory interests, but excluding nonpossessory security interests, that a person may have in property. Under this definition, many people, including the thief, will frequently be "owners" of the property stolen. This section seeks to clarify the theft responsibility of an owner when others also have an interest in the property. It declares that one of several owners cannot obtain or exercise control over the property without the other owner's consent and with intent to deprive them of their interests if their interests are of a type he has no right to infringe.

Section 39-1909 expands the present theft protection of multiple interests, which under present law is fragmented and inconsistent. Embezzlement and conversion protect specified owners against the conduct of others with an interest; crimes governing the conduct of possessors of secured property protect others; but generally the criminal law protects one with a joint interest in property from the conduct of other joint owners only if he alone has the right to possession. Thus some conduct by a joint owner can escape criminal sanction even though he deprives other owners of valuable interests. This section removes any doubt about the penal responsibility of partners, tenants-in-common, and owners of joint bank accounts, for example. It will also apply, for example, to an actor who surreptitiously takes his automobile from a mechanic who is holding it subject to a lien for repairs.

39-1910. Claim of right.—It is a defense to prosecution under this chapter that the actor:

(1) acted under an honest claim of right to the property or service involved; or

(2) acted in the honest belief that he had the right to obtain or exercise control over the property or service as he did; or

(3) obtained or exercised control over property or service honestly believing that the owner, if present, would have consented.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Cal. Prop. Pen. Code § 2901(3).
Tex. P. C. Prop. Rev. § 31.10.
Model P. C. § 206.10.

Cross-References:

Defense explained, see § 39-203.
Ignorance or mistake of fact or law, see § 39-602.
"Obtain" defined, see § 39-1901.
"Owner" defined, see § 39-1901.
"Property" defined, see § 39-1901.
Robbery, see ch. 17.
Secured creditor's right to recover on default, see T. C. A. § 47-9-503.
"Service" defined, see § 39-1901.

Comment:

The object of the theft offense is to deter those who would acquire something of value knowing that they have no right to it. "Persons who take only what they

believe themselves entitled to constitute no significant threat to our property system and manifest no character trait worse than ignorance." Model P. C. § 206. 10, Comment at 99 (Tent. Draft No. 2, 1954). This position is reflected in the common law, which has established that genuine belief in one's legal right to acquire something of value or an honest intent to pay for it is a defense to prosecution for theft insofar as it negatives the required intent.

Subdivision (1) provides a defense for persons who believe that they own the property, that the owner or person they believe to be the owner consented, or that no one owns the property. Subdivision (2) exonerates a person who believes he has the right to acquire something as he does, such as taking property to satisfy or secure an unsecured debt. Subdivision (3) applies, for example, when a person takes something displayed for sale with intent to pay for it.

The claim of right defense is included in addition to the general ignorance or mistake defense, § 39-602, because mistake may not negate intent, particularly the kind contemplated by subsection (2).

Although the claim of right defense will exculpate one who believes he has a right to the property from a charge of theft, it does not apply to other offenses committed to acquire the property. Thus, one who uses force or threats of force may be guilty of assault, and one who enters private property may be guilty of trespass.

39-1911. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 31.11.

Cross-References:

"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:

Municipal ordinances presently conflict with and overlap state law in the theft area. The Memphis Code of Ordinances (1967), for example, prohibits shoplifting, § 22-43.2, and picking pockets, § 22-49. These ordinances exist even though state law prohibits the same conduct. See T. C. A. §§ 39-4206 and 39-4235. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, this section makes clear that the state intends to preempt the area of theft and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws punishing shoplifting and larceny from the person, for example. Local laws changing the value cut-off between felony and misdemeanor theft, or redefining joyriding, are, of course, also prohibited because of conflict with the provisions of this chapter.

CHAPTER 20

FRAUD

Subchapter A. General Provisions

39-2001. Chapter definitions.—In this chapter, unless the context requires a different definition:

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

(2) "Owner" means a person other than the actor who has possession of property, or any interest other than a mortgage, deed of trust, or security interest in property, even if the possession or interest is unlawful.

(3) "Property" means:

(A) real property; or

(B) tangible or intangible personal property including anything severed from land.

(4) "Service" includes:

(A) labor, skills, and professional service; and

(B) telecommunication, public utility, and transportation service; and

(C) lodging, restaurant service, and entertainment; and

(D) the rental of a motor vehicle or other property.

(5) "Steal" means to acquire property or service by theft.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-2003.

39-2002. Value.—(a) Subject to the additional criteria of subsections (b)-(d), value under this chapter is:

(1) the fair-market value of the property or service at the time and place of the offense; or

(2) if the fair-market value of property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense.

(b) The value of documents, other than those having a readily ascertainable fair-market value, is:

(1) the amount due and collectible at maturity less any part that has been satisfied, if the document constitutes evidence of a debt; or

(2) the greatest amount of economic loss that the owner might reasonably suffer by virtue of loss of the document, if the document is other than evidence of a debt.

(c) If property or service has value that cannot be ascertained by the criteria set forth in subsections (a) and (b), the property or service is deemed to have a value of less than two hundred fifty dollars ($250).

(d) If the actor gave consideration for or had a legal interest in the property or service stolen, the amount of the consideration or the value of the interest shall be deducted from the value of the property or service ascertained under subsection (a), (b), or (c) to determine value for purposes of this chapter.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-2003.

39-2003. Aggregation of amounts involved in fraud.—Amounts obtained in violation of this chapter in one criminal episode may be aggregated in determining the value of the property for classification of the offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. §§ 32.01—32.03.
§ 39-2001(1): Model P. C. § 223.0(2).
(2): Ill. Stat. Ann. ch. 38, § 15-2.
(3): Tex. P. C. Prop. Rev. § 32.01(3).
(4): N. Y. Rev. Pen. Law § 165.10(1).
(5): Tex. P. C. Prop. Rev. § 32.01(5).
§ 39 2002(a)-(c): N. Y. Rev. Pen. Law § 155.20.
(d): Wis. Stat. Ann. § 943.20 (2)(a).
39-2003: Cal. Prop. Pen. Code § 2901 (2)(e).

Cross-References:

Compulsory joinder, see T. C. A. § 40-1603, as amended.
Counts, see T. C. A. §§ 40-1003, 40-2202, as amended.
"Criminal episode" defined, see § 39-107.
"Property" defined, see § 39-2001.
Separate verdict for each count, see T. C. A. § 40-2202, as amended.
"Service" defined, see § 39-2001.
Theft, see ch. 19.
Value, see § 39-2002.

Comment:

Except for "financial institution," all the terms in § 39-2001 have the same definitions as those set out in ch. 19 (theft) and are discussed in the comments to § 39-1901. The definition of "financial institution" should be read in the context of the sections in which it is used, e.g., § 39-2035 (receiving deposit in failing financial institution) and § 39-2044 (misapplication of property of financial institution).

Section 39-2002 (value) and this section (aggregation of amounts involved in fraud) track their counterparts in the theft chapter and are explained in the comments to §§ 39-1907 and 39-1908.

Subchapter B. Forgery

39-2021. Forgery.—(a) An individual, corporation, or association commits an offense if he forges a writing with intent to defraud or harm another.

(b) For purposes of this section:

(1) "Forge" means:

(A) to alter, make, complete, execute, or authenticate any writing so that it purports:

(i) to be the act of another who did not authorize that act; or

(ii) to have been executed at a time or place or in a numbered sequence other than was in fact the case; or

(iii) to be a copy of an original when no such original existed; or

(B) to issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of subdivision (A); or

(C) to possess a writing that is forged within the meaning of subdivision (A) with intent to utter it in a manner specified in subdivision (B).

(2) "Writing" includes printing or any other method of recording information; money, coins, tokens, stamps, seals, credit cards, badges, trademarks; and symbols of value, right, privilege, or identification.

(c) Except as provided in subsections (d) and (e), an offense under this section is a class A misdemeanor.

(d) An offense under this section is a felony of the second degree if the writing is or purports to be part of an issue of money, securities, postage or revenue stamps, or other such instruments or documents issued by a state or national government or by a subdivision of either, or part of an issue of stock, bonds, or other such instruments representing interest in or claims against any other person.

(e) An offense under this section is a felony of the third degree if the writing is or purports to be a will, codicil, deed, deed of trust, mortgage, security instrument, security agreement, credit card, check or similar sight order for payment of money, promissory note or other negotiable instrument, contract, release, or other commercial instrument.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 32.31.
N. Y. Rev. Pen. Law §§ 170.05-170.30.
Model P. C. § 224.1.

Cross-References:

"Act" defined, see § 39-107.
"Association" defined, see § 39-107.
Credit cards, see § 39-2031.
Criminal simulation, see § 39-2022.
"Government" defined, see § 39-107.
"Harm" defined, see § 39-107.
Theft, see ch. 19.

Comment:

This section consolidates a number of provisions covering forgery of different kinds of documents, e.g., T. C. A. §§ 39-1705—39-1708, 39-4812, 69-507—69-508. The new section also includes counterfeit-

ing, presently in T. C. A. §§ 39-1709—39-1722. The broad definition of writing in subsection (b)(2) achieves these results as well as coverage of miscellaneous items such as drug prescriptions, serial numbers on boats, see T. C. A. § 39-4812; Foosheev v. United States, 223 Fed. (2d) 261 (6th Cir. 1955), and trademarks, see T. C. A. §§ 69-507—69-508, 69-511.

Subsection (b)(1) retains the three kinds of criminal acts in the present law: (1) altering or making, (2) uttering, and (3) possessing with intent to utter. However, the separate offenses of uttering (passing forged paper) and forgery are combined into the one offense of forgery. See Baldwin v. State, 213 Tenn. 49, 372 S. W. (2d) 188 (1963). The scienter requirement of intent to defraud (T. C. A. §§ 39-1701, 39-1704) is carried forward, but an alternative scienter requirement is added in terms of intent to harm. The alternate scienter requirement is broader than the present law (prejudice of another's rights, T. C. A. § 39-1701) in that "harm" is not confined to legal rights, but includes nonmonetary and nonproperty injuries. See State v. Smith, 16 Tenn. 150 (1835). Intent to defraud or harm must be proved and not imputed from ignorance of the law. See Ratliff v. State, 175 Tenn. 172, 133 S. W. (2d) 470 (1939); State ex rel. Barnes v. Stillwell, 165 Tenn. 174, 54 S. W. (2d) 978 (1932).

The most severe penalties are applied by subsection (d) to the counterfeiting of money and government and corporate securities. The latter are included because of their wide circulation and potentially high value. The middle penalties are provided by subsection (c) for documents of commerce and property transfer. This range of penalties is similar to the present law which punishes forgery of instruments representing monetary values as larceny (T. C. A. §§ 39-1721, 39-4204) and other forgeries as felonies with 2-15 year penalties (T. C. A. § 39-1721).

Forgery is a traditional offense which should remain in the criminal code. But it is a form of deception which partially overlaps § 39-1903 (theft) if the forgery is used to obtain property, and § 39-1906 (theft of services) if used to obtain services. Generally speaking, the distinction between theft and forgery, and all other fraud offenses, is in the success of the deception. At the time a forger indorses the payee's name on a check, for example, he commits forgery; when he successfully passes the check and obtains money, or other property or service, he commits theft.

39-2022. Criminal simulation.—(a) An individual, corporation, or association commits an offense if:

(1) with intent to defraud or harm another:

(A) he makes or alters an object, in whole or part, so that it appears to have value because of age, antiquity, rarity, source, or authorship that it does not have; or

(B) he possesses an object so made or altered, with intent to sell, pass, or otherwise utter it; or

(C) he authenticates or certifies an object so made or altered as genuine or as different from what it is.

(2) with intent to sell, cause to be sold, or to be used for profit through public performance, and without consent of the owner of the master recording, he:

(A) knowingly transfers, by any means, any sounds recorded on a phonograph record, disc, wire, tape, film or other recording article to another such recording article; or

(B) knowingly manufactures, distributes, or wholesales any article transferred under subdivision (2)(A); or

(C) knowingly retails any article transferred under subdivision (2)(A).

(b) Criminal simulation under subsection (a)(1), (a)(2)(A), or (a)(2)(B) is a felony of the third degree; under subsection (a)(2)(C) is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subdiv. (1): Tex. P. C. Prop. Rev. § 32.22.
N. Y. Rev. Pen. Law § 170.45.
Model P. C. § 224.2.

Subdiv. (2): T. C. A. §§ 39-4244—39-4250.

Cross-References:

"Associate" defined, see § 39-107.
Fine based on gain, see § 39-841.
Forgery, see § 39-2021.
"Harm" defined, see § 39-107.
Theft, see ch. 19.

Comment:

There is presently no specific criminal statute applicable to the forgery of paintings, sculptures, archaeological objects, antiquities, or modern art objects. Nor are they covered by § 39-2021, which is limited to forgery of "writings," even though that term is broadly defined. The proliferation of fake art indicates the need for a provision like subsection (a)(1), which comprehensively extends to ancient and modern works of art or rarity. This subsection parallels § 39-2021 (forgery) in its scienter requirements and in its delineation of the offense as (1) altering or making, (2) uttering, or (3) possessing with intent to utter. Moreover, in subsection (a)(4), it reaches the "expert" on whose authentication major art works are customarily sold.

Honest repairs and restorations of art objects are not covered by the section since the necessary intent is lacking. Appropriate disclosure of the repairs or restorations will protect restorers and dealers from possible charges under this subsection. Like forgery of a writing, forgery of an art object may also constitute theft under § 39-1903.

Subsection (a)(2) is taken from Tennessee's recent "record piracy" statute, T. C. A. § 39-4244. Wholesaling or manufacturing "bootlegged" tapes and records is a third-degree felony and retail selling is a class A misdemeanor, approximating the penalty breakdown of the present law.

Subchapter C. Credit

39-2031. Credit card abuse.—(a) An individual, corporation, or association commits an offense if:

(1) with intent to obtain property or service, he uses a credit card with knowledge that:

(A) the card, whether or not expired, has not been issued to him and is not used with the effective consent of the cardholder; or

(B) the card has been revoked or canceled; or

(2) with intent to obtain property or service, he uses the pretended number or description of a fictitious credit card; or

(3) with intent to defraud or harm any person, he uses an expired credit card to obtain property or service; or

(4) he receives property or service that he knows has been obtained in violation of subsection (a)(1), (a)(2), or (a)(3); or

(5) he steals a credit card or, with knowledge that it has been stolen, receives a credit card, with intent to use it, or to sell it, or to transfer it to a person other than the issuer or the card holder; or

(6) he buys a credit card from a person whom he knows is not the issuer; or

(7) not being the issuer, he intentionally or knowingly sells a credit card; or

(8) he intentionally or knowingly uses or induces the cardholder to use the cardholder's credit card to obtain property or service for

the actor's benefit for which the cardholder is financially unable to pay; or

(9) not being the cardholder, and without effective consent of the cardholder, he signs or writes his name or the name of another on a credit card with intent to use it; or

(10) he possesses two or more incomplete credit cards that have not been issued to him with intent to complete them without the effective consent of the issuer. For purposes of this subdivision, a credit card is "incomplete" if part of the matter that an issuer requires to appear on the credit card before it can be used (other than the signature of the cardholder) has not yet been stamped, embossed, imprinted, or written on it.

(b) It is presumed that a person who uses a revoked or canceled credit card has knowledge that the card has been revoked or canceled if he has received notice of revocation or cancellation from the issuer. For purposes of this subsection, "notice" includes either notice given orally in person or by telephone, or in writing by mail. If written notice was sent by registered or certified mail with return receipt requested addressed to the cardholder at the last address shown by the records of the issuer, it is presumed that the notice was received by the cardholder no later than five (5) days after sent.

(c) For purposes of this section:

(1) "Cardholder" means the person named on the face of a credit card to whom or for whose benefit the credit card is issued.

(2) "Credit card" means an identification card, plate, coupon, book, number, or any other device authorizing a designated person or bearer to obtain property or service on credit. It includes the number or description of the device if the device itself is not produced at the time of ordering or obtaining the property or service.

(3) "Expired credit card" means a credit card bearing an expiration date on it, after that date has passed.

(d) Except as provided in subsections (e), (f), and (g), an offense under this section is a class A misdemeanor.

(e) An offense under subsection (a)(1), (a)(2), or (a)(3) is a felony of the third degree if the value of the property or service obtained was two hundred fifty dollars ($250) or more.

(f) An offense under subsection (a)(5) or (a)(6) is a felony of the third degree if the state alleges and proves that during any consecutive twelve (12) month period the actor stole or received, under subsection (a)(5), or bought, under subsection (a)(6), two or more credit cards issued in the names of two (2) or more other persons.

(g) An offense under subsection (a)(10) is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 32.31.
Ill. Stat. Ann. ch. 38, § 17-1.
Wis. Stat. Ann. § 943.41.
Ga. Code Ann. § 26-1705.
Model P. C. § 224.6.

Cross-References:
"Association" defined, see § 39-107.
"Benefit" defined, see § 39-107.
Criminal instruments, see § 39-1001.
"Effective consent" defined, see § 39-107.
Forgery, see § 39-2021.
Presumption explained, see § 39-205.
"Steal" defined, see § 39-2001.
Theft, see ch. 19.

Comment:

This section is largely a restatement of T. C. A. §§ 39-1948—39-1951, 39-1968—39-1978 with the following changes:

(1) The general mental state presently utilized in Tennessee, "knowingly" (T. C. A. §§ 39-1948, 39-1968—39-1978), is replaced by carefully prescribed mental states for each specific situation covered by this section.

(2) Subsection (a)(2) covers the use of fictitious credit cards. This is in accord with the present Tennessee law, T. C. A. §§ 39-1948, 39-1971.

(3) Forgery of credit cards, see T. C. A. §§ 39-1948, 39-1971, is covered by § 39-2021 (forgery).

(4) Under present Tennessee law, use of a forged, expired, or revoked credit card with intent to defraud the issuer is a separate offense. T. C. A. § 39-1972. A person who is authorized by an issuer to honor credit cards and who does so, knowing that the card is forged, expired, revoked, or canceled, is a party to an offense under this section by virtue of ch. 5, subch. A (complicity).

(5) A person who is authorized to honor credit cards and who knowingly fails to furnish property or services which he represents to the issuer have been furnished has committed theft under ch. 19. Presently, misrepresenting the amount of money, goods or services furnished on a credit card is a separate offense under the credit card statute. T. C. A. § 39-1973.

(6) Possession of machinery, plates, or any other contrivance designed to reproduce instruments purporting to be the credit cards of an issuer who has not consented to the preparation of such credit cards is covered by § 39-1001 (criminal instruments).

(7) Subsection (b) creates a presumption of knowledge that the credit card has been revoked or canceled if notice is given in fact, or by use of registered or certified mail. A similar presumption currently exists in Tennessee. T. C. A. §§ 39-1948, 39-1972.

(8) Subsection (f) is aimed at "dealers" in credit cards issued by others. The greater punishment for "dealers" is clearly justified, and receipt during a 12-month period of two or more cards issued in the names of other persons is appropriate evidence of "dealing." Present Tennessee law has an analogous provision, T. C. A. § 39-1971.

39-2032. False statement to obtain credit. — (a) An individual, corporation, or association commits an offense if he intentionally, knowingly, or recklessly makes a materially false or misleading written statement to obtain credit for himself or another.

(b) For purposes of this section, "credit" includes:

(1) a loan of money; and

(2) furnishing property or service on credit; and

(3) extending the due date of an obligation; and

(4) comaking, indorsing, or guaranteeing a note or other instrument for obtaining credit; and

(5) a line or letter of credit; and

(6) a credit card, as defined in § 39-2031.

(c) If the written statement is a check or similar sight order for the payment of money, the issuer's intent to make a false statement to obtain credit is presumed if:

(1) he has no account with the bank or other drawee at the time he issues the check or order; or

(2) on presentation within thirty (30) days after issue, payment is refused by the bank or other drawee for lack of funds, insufficient funds, or account closed after issuance of the check or order,

and the issuer fails to make good within five (5) days after receiving notice of that refusal.

(d) For purposes of subsection (c)(2), notice shall be in writing, and if the address is known, sent by registered mail with return receipt requested, and addressed to the issuer at his address shown:

(1) on the check or order if given; or

(2) if not shown on the check or order, on the records of the bank or other drawee if available; or

(3) if not available, on the records of the person to whom the check or order has been issued or passed. If no address is known or available under subsections (d)(1)-(d)(3), notice may be given by posting in a public place within the county of issuance for five (5) consecutive days.

(e) If notice is given in accordance with subsection (d), it is presumed that the notice was received no later than five (5) days after it was mailed or, if posted, no later than five (5) days after the first day of posting.

(f) For purposes of this section:

(1) the "records of the person to whom the check or order has been issued or passed" include the telephone directory for the county in which the check or order was issued or passed.

(2) if the check or order is dated, the date shown is the "date of issue."

(g) This section shall not be construed to prevent the state from establishing the requisite intent by direct evidence.

(h) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 32.32.

Cross-References:
"Association" defined, see § 39-107.
"Property" defined, see § 39-2001.
Theft, see ch. 19.

Comment:
T. C. A. § 39-1970 presently creates criminal liability for making false statements to obtain a credit card. Additionally, T. C. A. § 39-1906 covers the making of false financial statements to obtain credit or an extension of credit. This section applies to any materially false statement, financial or otherwise, for obtaining credit and includes a check written to satisfy an account in order to obtain more credit. The new section, like T. C. A. § 39-1970, is limited to statements in writing. Credit is broadly defined in subsection (b). Subsection (b)(4) includes the act of a comaker, indorser, or guarantor who gives a form of credit by signing the borrower's note. If his signature has been procured by a false or misleading statement, he is exposed to loss much like the primary creditor, and deserves similar protection.

The offense may be committed by making a statement about oneself or about another. There is no requirement that the statement be given directly to the prospective creditor. Thus, a statement to a financial reporting agency or to a credit rating agency would be covered if shown to be for the purpose of obtaining credit or property. It is not an element of the offense that property or credit be obtained; if property is obtained the offense is theft under ch. 19.

The false or misleading statement must be material. The proper test of materiality is what would be important to a reasonable person in granting credit. There is no requirement of reliance.

39-2033. Hindering secured creditors.—(a) An individual, corporation, or association who claims ownership of or interest in any property which is the subject of a security interest, security agreement, deed of trust, mortgage, attachment, judgment or other statutory or equitable lien commits an offense if, with intent to hinder enforcement of that interest or lien, he destroys, removes, conceals, encumbers, transfers, or otherwise harms or reduces the value of the property.

(b) For purposes of this section:

(1) "Remove" means transport, without the effective consent of the secured party, from the state or county in which the property was located when the security interest or lien attached.

(2) "Security interest" means an interest in personal property or fixtures that secures payment or performance of an obligation.

(c) For purposes of this section, a person is presumed to intend to hinder enforcement of the security interest or lien if he fails, when any part of the debt secured by the security interest or lien is due either:

(1) to pay the part then due; or

(2) to deliver possession of the property on demand by the secured party if at the time of demand the secured party is entitled to possession of the property.

(d) Except as provided in subsection (e), an offense under this section is a class A misdemeanor.

(e) If the actor removes the property from the state, the offense is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 32.33.
Ga. Stat. Ann. § 26.1707.
Model P. C. § 224.10.

Cross-References:
"Association" defined, see § 39-107.
Criminal mischief, see § 39-1603.
"Effective consent" defined, see § 39-107.
"Harm" defined, see § 39-107.
Extradition, see T. C. A. tit. 40, ch. 31, subch. A, as amended.
Presumption explained, see § 39-205.
"Property" defined, see § 39-2001.
Reckless damage, see § 39-1604.

Comment:
This section is a compilation of numerous Tennessee statutes on hindering secured creditors. See T. C. A. §§ 39-1932—39-1938, 39-1954—39-1957, 64-1209. Removal of the property from the state (without the creditor's consent) remains an offense, and is a felony subject to extradition.

Mortgaged crops are included in the new section because of the definition of "property" in § 39-2001. Indeed, the definition is broad enough to include a house removed from mortgaged land.

A parallel offense, intended primarily to protect unsecured creditors, appears as § 39-2034.

39-2034. Fraud in insolvency.—(a) An individual, corporation, or association commits an offense if, when proceedings have been or are about to be instituted for the appointment of a trustee, receiver, or other person entitled to administer property for the benefit of creditors, or when any other assignment, composition, or liquidation for the benefit of creditors has been or is about to be made:

(1) he destroys, removes, conceals, encumbers, transfers, or otherwise harms or reduces the value of the property with intent to defeat or obstruct the operation of a law relating to administration of property for the benefit of creditors; or

(2) he intentionally falsifies any writing or record relating to the property, or any claim against the debtor; or

(3) he intentionally misrepresents or refuses to disclose to a trustee or receiver, or other person entitled to administer property for the benefit of creditors, the existence, amount, or location of the property, or any other information that the actor could legally be required to furnish in relation to the administration.

(b) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 32.34.
N. Y. Rev. Pen. Law § 185.00.
Model P. C. § 224.11.

Cross-References:
Assignments for benefit of creditors, T. C. A. tit. 47, ch. 13.
"Association" defined, see § 39-107.
"Harm" defined, see § 39-107.
"Law" defined, see § 39-107.
Liquidation of bank, see T. C. A. §§ 45-901—45-939.
Liquidation of corporation, see T. C. A. §§ 48-511—48-516.
Liquidation of insurance company, see T. C. A. §§ 56-1301—56-1336.
Petition for bankruptcy adjudication, see 11 U. S. C. A. § 95.
"Property" defined, see § 39-2001.
Receiver, see T. C. A. § 23-102.
Receiver for building and loan association, see T. C. A. §§ 45-1704—45-1710.
Trustee in bankruptcy, see 11 U. S. C. A. § 72.

Comment:
This section is new to the state's criminal law although there have long been civil statutes voiding fraudulent conveyances, see T. C. A. tit. 64, ch. 3. Broader criminal provisions, roughly comparable to this section, operate in federal bankruptcy proceedings by virtue of 18 U. S. C. A. § 152.

The offenses created by this section may be committed by the debtor or anyone else who does one of the specified acts. There are three broad classes of prohibited acts in subsection (a): (1) disposition of or injury to the debtor's property, (2) falsification of property records or claims against the debtor, and (3) suppression of information. The prohibitions relating to property do not apply to property which is exempt from claims of creditors. This is explicit in subsection (a)(3) since the property is not subject to administration. And it is implicit in subsection (a)(2) where "the property" refers back to property subject to administration in subsection (a).

The cross-references column lists a number of Tennessee statutes on receivers and liquidations. The list is not all-inclusive. Moreover, it does not include federal provisions which apply to various federally insured or otherwise federally regulated institutions. A receivership or liquidation under any of these laws is within the contemplation of this section.

Section 39-2033, dealing with secured or mortgaged property, parallels subsection (a)(1) of this section.

39-2035. Receiving deposit, premium, or investment in failing financial institution.—(a) An officer, manager, or other person directing or participating in the direction of a financial institution commits an offense if he receives or permits the receipt of a deposit, premium payment, or investment in the institution knowing that, due to the financial condition of the institution:

(1) it is or will be unable to make payment of the deposit on demand, if it is a deposit ordinarily payable on demand; or

(2) it is about to suspend operations or go into receivership.

(b) It is a defense to prosecution under this section that the person making the deposit, premium payment, or investment was adequately informed of the financial condition of the institution.

(c) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 45-1102.
Tex. P. C. Prop. Rev. § 32.35.
Ill. Stat. Ann. ch. 38, § 17-1(b).
Model P. C. § 224.12.

Cross-References:
"Association" defined, see § 39-107.
Defense explained, see § 39-203.
"Financial institution" defined, see § 39-2001.
Receiver, see T. C. A. § 23-102.
Receiver for building and loan association, see T. C. A. §§ 45-1704—45-1710.

Comment:
T. C. A. § 45-1102 is analogous to this section, but applies only to banks; there is no penal provision of this nature governing the great majority of other financial institutions.

The purpose of the section is to protect the public by deterring the acceptance of depositors', policyholders', or investors' money by financial institutions on the brink of insolvency, when the risk of loss of the money is unusually high. The offense is limited to managerial personnel with the specified knowledge, and does not extend to ministerial employees such as tellers. There is a defense if the depositor, policyholder, or investor is adequately informed and nonetheless chooses to proceed, for example, as a stockholder seeking to shore up the institution.

The cross-references column lists a number of Tennessee statutes on receivers. The list is not all-inclusive. Moreover, it does not include federal provisions which apply to various federally insured or otherwise federally regulated institutions. A receivership under any of these laws is within the contemplation of this section.

Subchapter D. Other Deceptive Practices

39-2041. Deceptive business practices.—(a) An individual, corporation, or association commits an offense if in the course of business he intentionally, knowingly, recklessly, or with criminal negligence commits one or more of the following deceptive business practices:

(1) using, selling, or possessing for use or sale a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or

(2) selling less than the represented quantity of a property or service; or

(3) taking more than the represented quantity of property or service when as a buyer the actor furnishes the weight or measure; or

(4) selling an adulterated or mislabeled commodity; or

(5) passing off property or service as that of another; or

(6) representing that a commodity is original or new if it is deteriorated, altered, rebuilt, reconditioned, reclaimed, used, or secondhand; or

(7) representing that a commodity or service is of a particular style, grade, or model if it is of another; or

(8) advertising property or service with intent:

(A) not to sell it as advertised, or

(B) not to supply reasonably expectable public demand, unless the advertising adequately discloses a time or quantity limit; or

(9) representing the price of property or service falsely or in a way tending to mislead; or

(10) making a materially false or misleading statement of fact concerning the reason for, existence of, or amount of a price or price reduction; or

(11) conducting a deceptive sales contest; or

(12) making a materially false or misleading written statement in connection with the sale of securities, or omitting information required by law to be disclosed in written documents relating to securities; or

(13) making a materially false or misleading statement:

(A) in an advertisement for the purchase or sale of property or service; or

(B) otherwise in connection with the purchase or sale of property or service.

(b) For purposes of this section:

(1) "Adulterated" means varying from the standard of composition or quality prescribed by law or set by established commercial usage.

(2) "Business" includes trade and commerce and advertising, selling, and buying service or property.

(3) "Commodity" means any tangible or intangible personal property.

(4) "Contest" includes sweepstake, puzzle, and game of chance.

(5) "Deceptive sales contest" means a sales contest:

(A) that misrepresents the participants' chances of winning a prize; or

(B) that fails to disclose to participants on a conspicuously displayed permanent poster (if the contest is conducted by or through a retail outlet) or on each card, game piece, entry blank, or other paraphernalia required for participation in the contest (if the contest is not conducted by or through a retail outlet):

(i) the geographical area or number of outlets in which the contest is to be conducted; and

(ii) an accurate description of each type of prize; and

(iii) the minimum number and minimum amount of cash prizes; and

(iv) the minimum number of each other type of prize; or

(C) that is manipulated or rigged so that prizes are given to predetermined persons or retail establishments. A sales contest is not deceptive if the total value of prizes to each retail outlet is in a uniform ratio to the number of game pieces distributed to that outlet.

(6) "Mislabeled" means varying from the standard of truth or disclosure in labeling prescribed by law or set by established commercial usage.

(7) "Prize" includes gift, discount, coupon, certificate, gratuity, and any other thing of value awarded in a sales contest.

(8) "Sales contest" means:

(A) a contest in connection with the sale of a commodity or service; and

(B) by which a person may, as determined by drawing, guessing, matching, or chance, receive a prize; and

(C) which is not regulated by the rules of a federal regulatory agency.

(9) "Sell" and "sale" include offer for sale, advertise for sale, expose for sale, keep for the purpose of sale, deliver for or after sale, solicit an offer to buy, and every disposition for value.

(c) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 32.42.
Model P. C. § 224.7.

Cross-References:

"Association" defined, see § 39-107.
Criminal usury, see § 39-2047.
Food, Drug, and Cosmetic Act, see T. C. A. § 52-101 et seq.
"Law" defined, see § 39-107.
"Property" defined, see § 39-2001.
Securities law, see T. C. A. tit. 48, ch. 16.
"Service" defined, see § 39-2001.
Weights and measures, see T. C. A. tit. 71, ch. 2.

Comment:

Most of ch. 20 is designed to protect businesses against customers who cheat. Section 39-2041 strikes a balance by protecting customers against businesses that cheat.

Many of the offenses in this section now appear in scattered corners of the Tennessee statutes. Some examples of existing Tennessee laws on deceptive business practices are: false weights and measures, T. C. A. § 71-238; fraudulent advertising, T. C. A. § 39-1910; pretended auction sales, T. C. A. § 39-1911; sale by false weight, T. C. A. §§ 39-1917—39-1919; fraudulent packing of articles of trade, T. C. A. § 39-1922; advertising merchandise with intent not to sell, T. C. A. § 39-1945; sale by false numerical count, T. C. A. §§ 39-1920—39-1921; plugging the ends of logs, T. C. A. § 39-1931; security sales, T. C. A. § 48-1644; false representation of pedigree, T. C. A. § 39-1915. Without disturbing the regulatory statutes, there is a need for a comprehensive criminal provision on deceptive business practices. This will serve to guide the honest business, and to permit local prosecution of the dishonest business as a supplement to the enforcement activities of the several regulatory agencies.

The deceptive practices proscribed by this section are those which primarily victimize consumers. Other provisions, for example, those in the Trade Practices Law (T. C. A. tit. 69), are aimed primarily at unfair competition among businesses; this aim is better left to the civil statutes. However, it should be noted that this section has a secondary effect of protecting honest businesses against dishonest competition.

Under subsection (a), the offense must be committed in the course of business. Even though business is broadly defined in subsection (b)(2), it does not encompass casual personal transactions. Someone engaging in business assumes certain responsibilities to his customers, which are partially codified here.

Deceptive practices in the sale of land are generally not covered in present law but are included here, along with those in the sale of tangible and intangible personal property. Also included are deceptive practices in the sale of services. Finally, in some instances, e.g., subsections (a)(3) and (a)(13), deception in purchases is covered if part of a business transaction.

Adulterated and mislabeled commodities in subsection (a)(4) are defined in subsection (b)(6) by reference to other laws (e.g., the Food, Drug, and Cosmetic Act) or by reference to established commercial usage if there is any. See T. C. A. §§ 52-103—52-119.

Some of the offenses, particularly subsections (a)(8) and (a)(13)(A), deal specifically with advertising. See T. C. A. § 39-1910. However, the definition of sale in subsection (b)(10) includes advertising, so that an offense described in terms of sale, like subsection (a)(4), may be committed by advertising. So may offenses of representation, like subsections (a)(6), (a)(7), and (a)(9), or of statement, like subsections (a)(10) and (a)(12).

A newspaper or other publisher of advertising is not within the section unless it acts intentionally, knowingly, recklessly, or with criminal negligence.

39-2042. Commercial bribery.—(a) An individual, corporation, or association who is a fiduciary commits an offense if he intentionally or knowingly solicits, accepts, or agrees to accept any benefit as consideration:

(1) for violating a duty to a beneficiary; or

(2) for otherwise causing harm to a beneficiary by act or omission.

(b) An individual, corporation, or association commits an offense if he offers, confers, or agrees to confer, any benefit the acceptance of which is an offense under subsection (a).

(c) For purposes of this section:

(1) "Beneficiary" means a person for whom a fiduciary is acting.

(2) "Fiduciary" means:

(A) an agent or employee; or

(B) a trustee, guardian, custodian, administrator, executor, conservator, receiver, or similar fiduciary; or

(C) a lawyer, physician, accountant, appraiser, or other professional adviser; or

(D) an officer, director, partner, manager, or other participant in the direction of the affairs of a corporation or association.

(d) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 32.43.
Model P. C. § 224.8.

Cross-References:

"Association" defined, see § 39-107.
"Benefit" defined, see § 39-107.
Bribery, see § 39-2102.
"Harm" defined, see § 39-107.
Official misconduct, see § 39-2401.
Rigging publicly exhibited contest, see § 39-2043.

Comment:

Except for T. C. A. §§ 39-821—39-822 on bribery of officers or employees of common carriers, there is no general Tennessee criminal law on commercial bribery.

This section does not reach a simple breach of fiduciary duty; it covers only corrupt breaches that involve a bribe. Briber and bribee are then equally guilty. The expansive definition of fiduciary in subsection (c) encompasses a number of relationships in which loyalty or impartiality is expected, and which thus deserve protection from corruption. Some quasi-fiduciaries, e.g., arbitrators, referees, are defined as public servants, however, and thus covered by § 39-2102 (bribery) and § 39-2401 (official misconduct).

The section is aimed principally at kickbacks. If the beneficiary expressly or impliedly consents to the kickback, as is customary in some trades, there is no violation of duty and hence no violation of subsection (a)(1). Nonetheless, if harm to the beneficiary can be shown, there is still a violation of subsection (a)(2).

More than half the states have commercial bribery statutes. See Note, Control of Nongovernmental Corruption by Criminal Legislation, 108 U. Pa. L. Rev. 848 (1960); Annot., 1 A. L. R. (3d) 135 (1965).

Bribery of an athlete or other public contestant is covered by § 39-2043.

39-2043. Rigging publicly exhibited contest.—(a) An individual, corporation, or association commits an offense if, with intent to affect the outcome (including the score) of a publicly exhibited contest:

(1) he offers, confers, or agrees to confer any benefit upon, or threatens harm to:

(A) a participant in the contest to induce him not to use his best efforts; or

(B) an official or other person associated with the contest; or

(2) he tampers with a person, animal, or thing in a manner contrary to the rules of the contest.

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2 OF 6

(b) An individual, corporation, or association commits an offense if he intentionally or knowingly solicits, accepts, or agrees to accept any benefit the conferring of which is an offense under subsection (a).

(c) Except as provided in subsection (d), an offense under this section is a class A misdemeanor.

(d) An offense under this section is a felony of the third degree if the actor's conduct is in connection with betting or wagering on the contest.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 32.44.
Model P. C. § 224.9.

Cross-References:
"Association" defined, see § 39-107.
"Benefit" defined, see § 39-107.
Commercial bribery, see § 39-2042.
Gambling, see ch. 27.
"Harm" defined, see § 39-107.
"Rule" includes regulation, see § 39-107.

Comment:
Bribery in athletic and sporting events is currently covered by T. C. A. §§ 39-824—39-826. This section expands the present law to include non-athletic contests which are publicly exhibited, e.g., animal races, quiz shows and musical auditions. The offense embraces bribes to lose a contest, or to narrow the margin of victory. As under present law, this section does not prohibit the giving or offering of any honors to encourage the participant to a higher degree of skill. See T. C. A. § 39-826. Briber and bribee are equally guilty. Tampering and threatening are included as offenses and "benefit" is to be broadly construed. See T. C. A. § 39-825.

Subsection (a)(2) includes the present Tennessee statutes prohibiting the injuring of the front legs or hooves of horses, T. C. A. §§ 39-420—39-422, as well as other forms of tampering.

Knowing participants in, or producers of, a rigged contest are adequately covered by the complicity and criminal facilitation provisions, see ch. 5, subchapter A.

More than half the states have penal laws against sports bribery. See Note, Control of Nongovernmental Corruption by Criminal Legislation, 108 U. Pa. L. Rev. 848 (1960); Annot., 49 A. L. R. (2d) 1234 (1956).

Bribery in commercial contexts is covered by § 39-2042.

39-2044. Misapplication of fiduciary property or property of financial institution.—(a) An individual, corporation, or association commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary, or property of a financial institution, in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

(b) For purposes of this section:

(1) "Fiduciary" includes:

(A) trustee, guardian, administrator, executor, conservator, and receiver; and

(B) any other person acting in a fiduciary capacity, but not a commercial bailee; and

(C) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

(2) "Misapply" means deal with property contrary to:

(A) an agreement under which the fiduciary holds the property; or

(B) a law prescribing the custody or disposition of the property.

(c) An offense under this section is a class B misdemeanor unless the value of the property misapplied was two hundred fifty dollars ($250) or more, in which event the offense is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 32.45.
Mich. Prop. Pen. Code § 4155.
Model P. C. § 224.13.

Cross-References:
Aggregation of amounts involved in fraud, see § 39-2003.
"Association" defined, see § 39-107.
"Financial institution" defined, see § 39-2001.
"Law" defined, see § 39-107.
Official misconduct, see § 39-2401.
"Owner" defined, see § 39-2001.
"Property" defined, see § 39-2001.
Theft, see ch. 19.
Value, see § 39-2002.

Comment:
Criminal sanctions are currently prescribed for the misapplication of the proceeds of a loan for the improvement of real property, T. C. A. § 64-1139, and for the misapplication of contract payments for improvement of real property, T. C. A. § 64-1140. Additionally, fraudulent appropriation or disposition of specific property, by an actor who is in a position of trust is made an offense by T. C. A. §§ 39-4226—39-4228. Finally, conversion of a trust fund is presently a criminal offense, T. C. A. § 39-4229. This present Tennessee law is continued and expanded by this section.

The section deals with misapplication of property which belongs to a financial institution or is held by anyone as a fiduciary. Fiduciary relations are identified in subsection (b)(1). Misapplication is defined in subsection (b)(2). In addition, to violate subsection (a) the misapplication must involve substantial risk of loss, and at least reckless misapplication.

Only a person who is a fiduciary, as defined, can violate the first clause of subsection (a). But any person can violate the second clause, for example, an employee of a financial institution.

It is not an element of the offense that the actor or anyone else receive a benefit from the misapplication. If he does receive a benefit, there may also be a violation of ch. 19 (theft). If a third person gives a benefit to procure the misapplication, there may also be a violation of § 39-2042 (commercial bribery).

39-2045. Securing execution of document by deception.—(a) An individual, corporation, or association commits an offense if, with intent to defraud or harm any person, he causes another to sign or execute any document affecting property or service or the pecuniary interest of any person.

(b) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 32.46.
Model P. C. § 224.14.

Cross-References:
"Association" defined, see § 39-107.
"Harm" defined, see § 39-107.
"Property" defined, see § 39-2001.
Theft, see ch. 19.

Comment:
While this section is new to Tennessee law, many of the deceptive practices which are within its purview are contained in the present statute on false pretense, T. C. A. § 39-1901. See Austin v. State, 143 Tenn. 300, 228 S. W. 69 (1921).

39-2046. Fraudulent destruction, removal, or concealment of writing.—(a) An individual, corporation, or association commits an offense if, with intent to defraud or harm another, he destroys, removes, conceals, or otherwise impairs the verity, legibility, or availability of a writing, other than a governmental record.

(b) For purposes of this section, "writing" includes printing or any other method of recording information; money, coins, tokens, stamps, seals, credit cards, badges, trademarks; and symbols of value, right, privilege, or identification.

(c) Except as provided in subsection (d), an offense under this section is a class A misdemeanor.

(d) An offense under this section is a felony of the third degree if the writing:

(1) is a will or codicil of another, whether or not the maker is alive or dead, and whether or not it has been admitted to probate; or

(2) is a deed, mortgage, deed of trust, security instrument, security agreement, or other writing for which the law provides public recording or filing, whether or not the writing has been acknowledged.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 32.47.
Model P. C. §§ 224.3, 224.4.

Cross-References:
"Association" defined, see § 39-107.
Criminal mischief, see § 39-1603.
Governmental record, see §§ 39-2201, 39-2211.
"Harm" defined, see § 39-107.
Reckless damage, see § 39-1604.

Comment:
This section is largely new law, although T. C. A. § 39-1943 presently covers the destruction or concealment of a will or codicil thereto, and T. C. A. § 39-1942 currently prescribes criminal sanctions for the destruction or theft of any public records or valuable papers. This section outlaws a variety of injuries to documents which may result in financial harm or which may prevent public recording or filing. The section is analogous to criminal mischief, § 39-1603, which is limited to tangible property. Similar injury to governmental records is treated by § 39-2211; "governmental record" is defined in § 39-2201 to include certain private records.

The higher penalty is reserved for damage to documents which may be irreplaceable (e.g., a will whose removal is not discovered before the maker's death), or whose loss or destruction is likely to have a substantial effect on the rights of others (e.g., a mortgage or financing statement which, without recording or filing, is ineffective against third persons).

Alteration of the documents described in this section may be forgery under § 39-2021. Sometimes results similar to forgery can be achieved by removal or destruction of a writing. Hiding a will may favor the heirs at law as effectively as a forged will naming them as beneficiaries. This section therefore complements the forgery provision.

39-2047. Criminal usury.—(a) An individual, corporation, or association commits an offense if he knowingly charges, takes, or receives any money or other property as interest on the loan of any money or other property, at a rate exceeding that authorized by law.

(b) Criminal usury is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
Rate authorized by law, see T. C. A. § 47-14-104.

Comment:
Present T. C. A. § 39-4601 defines as usury the taking of interest at a rate greater than six per cent except when otherwise authorized. Numerous Code sections, e.g., T. C. A. §§ 45-1412, 47-14-

104, provide for special interest rates for specified types of debts. This section continues the present law but without the virtually meaningless six per cent provision. As in present law, criminal usury is a misdemeanor offense.

39-2048. Issuance of bad check.—(a) An individual, corporation, or association commits an offense if he issues or passes a check or similar sight order for the payment of money knowing that the issuer does not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders outstanding at the time of issuance.

(b) For purposes of this section, the issuer's knowledge of insufficient funds is presumed if:

(1) he has no account with the bank or other drawee at the time he issues the check or order; or

(2) on presentation within thirty (30) days after issue, payment is refused by the bank or other drawee for lack of funds, insufficient funds, or account closed after issuance of the check or order, and the issuer fails to make good within ten (10) days after receiving notice of that refusal.

(c) For purposes of subsection (b)(2), notice shall be in writing, and, if the address is known, sent by registered mail with return receipt requested, and addressed to the issuer at his address shown:

(1) on the check or order if given; or

(2) if not shown on the check or order, on the records of the bank or other drawee if available; or

(3) if not available, on the records of the person to whom the check or order has been issued or passed. If no address is known or available under subsections (c)(1)-(c)(3), notice may be given by posting in a public place within the county of issuance for five (5) consecutive days.

(d) If notice is given in accordance with subsection (c), it is presumed that the notice was received no later than five (5) days after it was mailed or, if posted, no later than five (5) days after the first day of posting.

(e) For purposes of this section:

(1) the "records of the person to whom the check or order has been issued or passed" include the telephone directory for the county in which the check or order was issued or passed.

(2) if the check or order is dated, the date shown is the "date of issue."

(f) This section shall not be construed to prevent the state from establishing the requisite knowledge of the actor by direct evidence.

(g) An offense under this section is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 32.41.
Model P. C. § 224.5.

Cross-References:
"Association" defined, see § 39-107.
False statement to obtain credit, see § 39-2032.
Presumption explained, see § 39-205.
Theft by check, see §§ 39-1903, 39-1905.

Comment:

Underlying this provision is the belief that the issuance or passing of a known bad check is, in itself, not only harmful to the recipient but also injurious to the community at large and is, therefore, a proper subject for criminal sanction without regard to the purpose for which the check was given. For example, even if the immediate recipient gives up nothing in return for the check and, therefore, is not defrauded in the strict sense of that term, he may further negotiate the check, or deposit it and draw against it. This possibility places him in a precarious position and creates a threat of harm to the general public. Another important function of the provision is the encouragement of prompt payment of dishonored checks.

If property, services, or credit is obtained by the use of a bad check, the offense is theft (§ 39-1903). Section 39-1905 (presumption for theft by check) creates a similar presumption if a bad check is used to obtain property or service. Section 39-2032 similarly treats the issuance of a bad check to obtain credit. Present Tennessee law proscribes the issuance or delivery of a check with knowledge that insufficient funds exist to cover it. T. C. A. § 39-1959.

CHAPTER 21

BRIBERY AND CORRUPT INFLUENCE

39-2101. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Coercion" means a threat, however communicated:

(A) to commit any offense; or

(B) to inflict bodily injury on the person threatened or another; or

(C) to accuse any person of any offense; or

(D) to expose any person to hatred, contempt, or ridicule; or

(E) to harm the credit or business repute of any person; or

(F) to take or withhold action as a public servant, or to cause a public servant to take or withhold action.

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

(3) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant authorized by law to take statements under oath.

(4) "Party official" means a person who holds any position or office in a political party, whether by election, appointment, or employment.

(5) "Vote" means to cast a ballot in an election regulated by law.

39-2102. Bribery.—(a) An individual, corporation, or association commits bribery if he offers, confers, or agrees to confer any benefit upon a public servant, party official, or voter:

(1) with intent to influence the public servant or party official in a specific exercise of his official powers or a specific performance of his official duties; or

(2) with intent to influence the voter not to vote or to vote in a particular manner.

(b) A public servant or party official commits bribery if he solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will be influenced in a specific exercise of his official powers or a specific performance of his official duties.

(c) A voter commits bribery if he accepts or agrees to accept any benefit on the representation or understanding that he will not vote or will vote in a particular manner.

(d) Bribery is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 36.02.

Cross-References:
"Association" defined, see § 39-107.
"Benefit" defined, see § 39-107.
"Party official" defined, see § 39-2101.
"Public servant" defined, see § 39-107.
"Vote" defined, see § 39-2101.

Comment:
Bribery subverts the impartial functioning of government to the benefit of a private person, economic interest, or class since the choices of a bribed public servant are made in response to the opportunity for personal gain rather than legitimate considerations.

This section follows the traditional definition of the offense, see Wells v. State, 174 Tenn. 552, 129 S. W. (2d) 203 (1939), and is essentially like present T. C. A. §§ 39-801—39-826. However, the present law includes numerous separate articles proscribing bribery of specific officials—e.g., T. C. A. § 39-803 (bribery of peace officer). This section applies broadly to all classes of officials now covered, and in addition, to arbitrators acting under private written agreement, notaries, political candidates, and party officials. The expanded definition of "public servant" allows the consolidation of many overlapping provisions presently existing, see T. C. A. § 39-805 (bribery of court officials or jurors), T. C. A. § 39-809 (bribing officer summoning or selecting jury). However, the present statute penalizing bribery of an officer or employee of a common carrier is not included in this section, see T. C. A. §§ 39-821—39-823. Instead, it is covered in § 39-2042 (commercial bribery).

The section applies to both parties to a bribe and to both the offer and solicitation as well. A voter, however, is not guilty of solicitation of a bribe since his solicitation is not significantly harmful. "Vote" is defined to exclude purely private elections, those in which the public interest is insufficient to warrant regulation by law.

There are instances of bribery that are so petty that a felony conviction is inappropriate. No attempt is made to define the less serious forms of bribery for misdemeanor grading; rather, the court must exercise its discretion under § 39-847 (reduction of third-degree felony to misdemeanor) to reduce a conviction for petty bribery to the appropriate grade of misdemeanor.

39-2103. Coercion of public servant or voter.—(a) An individual, corporation, or association commits an offense if by means of coercion:

(1) he influences or attempts to influence a public servant in a specific exercise of his official power or a specific performance of his official duty; or

(2) he influences or attempts to influence a voter not to vote or to vote in a particular manner.

(b) An offense under this section is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 36.03.

Cross-References:
"Association" defined, see § 39-107.
"Coercion" defined, see § 39-2101.
"Public servant" defined, see § 39-107.

Comment:
This section has no counterpart in present Tennessee law except for the statutes dealing with intimidation of voters, T. C. A. § 2-2211, and intimidation of the family of a juror, T. C. A. § 39-2809. The new offense is analogous to theft by coercion, § 39-1903; a threat is employed to extort favorable governmental action (or a favorable vote) instead of money. The conduct is at least as reprehensible as extortion since the integrity of the governmental process is corrupted.

"Coercion" is carefully defined to exclude legitimate threats, e.g., a threat of reprisal at the ballot box. The use of coercion is forbidden only if intended to induce specific conduct by the official; thus, a threat to expose or prosecute a corrupt official is not an offense if the intent is to induce the official to act according to law.

39-2104. Improper influence.—(a) An individual, corporation, or association commits an offense if he privately addresses a representation, entreaty, argument, or other communication to any public servant who exercises or will exercise official discretion in an adjudicatory proceeding with intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law.

(b) For purposes of this section, "adjudicatory proceeding" means any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.

(c) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 36.04.
Model P. C. § 240.2.

Cross-References:
"Agency" defined, see § 39-107.
"Association" defined, see § 39-107.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
"Public servant" defined, see § 39-107.

Comment:
The fairness of adjudicatory proceedings can be seriously jeopardized by ex parte communication with the decision-making officials. Pressures can be exerted on these officials that do not constitute bribery or coercion but may materially impair the impartial administration of justice.

This provision is new to Tennessee law. Federal law, however, has long made it a felony to "corruptly . . . influence, obstruct, or impede the due and proper administration of the law" under which a proceeding is being had before a department or agency of the United States, 18 U. S. C. A. § 1505.

39-2105. Tampering with witness.—(a) An individual, corporation, or association commits an offense if he offers, confers, or agrees to confer any benefit upon a witness or prospective witness in an official proceeding, or coerces a witness or prospective witness in an official proceeding, with intent to influence the witness:

(1) to testify falsely; or

(2) to withhold any testimony, information, document, or thing; or

(3) to elude legal process summoning him to testify or supply evidence; or

(4) to absent himself from an official proceeding to which he has been legally summoned.

(b) A witness or prospective witness in an official proceeding commits an offense if he solicits, accepts, or agrees to accept any benefit on the representation or understanding that he will do any of the things specified in subsection (a).

(c) An offense under subsection (b) is a felony of the third degree; an offense under subsection (a) is a felony of the third degree unless the coercion is a threat to inflict death or a serious bodily injury on another, in which event the offense is a felony of the second degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 36.05.
Hawaii Prop. Pen. Code §§ 1070-1072.

Cross-References:

"Association" defined, see § 39-107.
"Benefit" defined, see § 39-107.
"Coercion" defined, see § 39-2101.
Compounding, see § 39-2306.
Failure of witness to appear, see § 39-2311.
"Official proceeding" defined, see § 39-2101.
"Serious bodily injury" defined, see § 39-107.
Subornation of perjury, see § 39-2204.
Tampering with evidence, see § 39-2210.

Comment:

T. C. A. §§ 39-835, 39-836 prohibit bribery and coercion of a witness (or one who is about to be a witness, or a person with knowledge of any matter under official investigation) to be absent from, or to not give information pertinent to, an official investigation. This section replaces those sections and also covers a wider range of criminal conduct that impairs the integrity or availability of a witness who may be called to offer evidence in an official proceeding.

The purpose of this section is to prevent the risks of unreliable, false, and unavailable testimony induced by bribery or threats. It focuses on steps prior to perjury that create those risks. Subsection (b) extends criminal sanctions to any witness or prospective witness who solicits or agrees to accept any benefit for conduct prohibited by subsection (a). This is consistent with the existing Tennessee law, T. C. A. § 39-836.

Note that the person whom the actor attempts to influence need not actually be a witness. Tampering with a prospective witness creates a risk of interference with an official proceeding even if the person bribed or threatened has not been officially called to offer evidence. This is in accord with present Tennessee law, see T. C. A. §§ 39-835, 39-836.

39-2106. Retaliation for past official action.—(a) An individual, corporation, or association commits an offense if he harms a public servant or former public servant by any unlawful act in retaliation for anything the public servant did in his official capacity.

(b) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 36.06.
Model P. C. § 240.4.

Cross-References:

Assault, see §§ 39-1401, 39-1402.
"Association" defined, see § 39-107.
"Harm" defined, see § 39-107.
"Public servant" defined, see § 39-107.
Resisting arrest, see § 39-2302.
"Unlawful" defined, see § 39-107.

Comment:

This section will aggravate the penalty for misdemeanor assaultive-type offenses against a public servant in retaliation for his official acts. For example, a simple assault, § 39-1401 (class B misdemeanor), could be prosecuted under this section as a class A misdemeanor.

The aggravation of the lesser grades of misdemeanors is warranted because retaliatory unlawful acts jeopardize public administration as well as the rights of the individual public servant.

This section extends its application to all public servants and all class B and C misdemeanors committed against them in retaliation for their official acts.

39-2107. Compensation for past official behavior.—(a) An individual, corporation, or association commits an offense if he offers, confers, or agrees to confer any benefit upon a public servant for the public servant's having exercised his official powers or performed his official duties in favor of the actor or another.

(b) A public servant commits an offense if he solicits, accepts, or agrees to accept any benefit for having exercised his official powers or performed his official duties in favor of another.

(c) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 36.07.
N.Y. Rev. Pen. Law §§ 200.30, 200.35.

Cross-References:

"Association" defined, see § 39-107.
"Benefit" defined, see § 39-107.
Bribery, see § 39-2102.
Exceptions and defenses, see § 39-2110.
"Public servant" defined, see § 39-107.

Comment:

New to Tennessee law, this section covers the offer, solicitation, or acceptance of compensation for the past actions of public servants. Such "gifts" may imply a promise of similar compensation for future favor. Apart from this implied bribery, when some "clients" of a public servant undertake to pay him for favors, others who deal with the same public servant are pressured to make similar contributions or risk disfavor.

This offense is a lesser included offense of bribery since the accused may be suspected of bribery but the state unable to prove that there was any direct relationship between anticipation of compensation and the official action. See T. C. A. §§ 39-802, 39-804, 39-806, 39-836. On the other hand, assuming that the official action has not been influenced in advance by promise of gain, the consequence of a violation of this section is less serious than the harm of bribery and the misdemeanor penalty is therefore appropriate.

39-2108. Gift to public servant by person subject to his jurisdiction.—(a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

(b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.

(c) A public servant in an agency carrying on civil or criminal litigation on behalf of government commits an offense if he solicits,

accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by the public servant or his agency.

(d) A public servant who exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions of government commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any contract, purchase, payment, claim, or transaction involving the exercise of his discretion.

(e) A public servant who has judicial or administrative authority, or who is employed by or in a tribunal having judicial or administrative authority, or who participates in the enforcement of the tribunal's decisions, commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows is interested in or likely to become interested in any matter before the public servant or tribunal.

(f) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-2110.

39-2109. Offering gift to public servant.—(a) An individual, corporation, or association commits an offense if he offers, confers, or agrees to confer any benefit upon a public servant that he knows the public servant is prohibited by law from accepting.

(b) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-2110.

39-2110. Exceptions and defenses.—(a) It is an exception to the application of §§ 39-2107, 39-2108, and 39-2109 that the benefit involved is a fee prescribed by law to be received by a public servant or any other benefit to which the public servant is lawfully entitled.

(b) It is a defense to prosecution under §§ 39-2107, 39-2108, and 39-2109 that the benefit involved was:

(1) a trivial benefit incidental to personal, professional, or business contacts, which involves no substantial risk of undermining official impartiality; or

(2) a contribution made under the election laws for the political campaign of an elective public servant when he is a candidate for nomination or election to public office.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 36.10.
Hawaii Prop. Pen. Code § 1042.
Model P. C. § 240.5.

Cross-References:

"Agency" defined, see § 39-107.
"Association" defined, see § 39-107.
"Benefit" defined, see § 39-107.
Bribery, see § 39-2102.
"Custody" defined, see § 39-2101.
Defense explained, see § 39-203.
Exception explained, see § 39-202.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
"Public servant" defined, see § 39-107.

Comment:

Although giving gifts to public servants may be innocent, it casts grave doubts on the integrity of the governmental process when the servant makes decisions that affect the donor. Moreover, it is often quite difficult to distinguish between a "gift" and a bribe or other illicit compensation. T. C. A. §§ 39-801—39-804 proscribes the giving of any benefit to peace officers with intent to influence their actions. These sections do not require proof of a specific intent; the conferring of the benefit plus the requisite knowledge is all that need be proven. Additionally, the class of public servants who are prevented from accepting gifts is greatly expanded by § 39-2108.

Section 39-2109 applies to the person who is the donor of the illicit gift if he knows the public servant is prohibited by law from accepting the gift.

Subsection (a) of this section creates an exception for the receipt of a benefit (e.g., a fee) prescribed by law. Subsection (b) provides defenses for those instances of giving and receiving gifts where the relationship between the donor and recipient would normally involve such exchanges and therefore not corrupt public administration.

CHAPTER 22

PERJURY AND OTHER FALSIFICATION

39-2201. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Governmental record" means anything:

(A) belonging to, received, or kept by government for information; or

(B) required by law to be kept by others for information of government.

(2) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant authorized by law to take statements under oath.

(3) "Statement" means any representation of fact.

39-2202. Perjury.—(a) An individual, corporation, or association commits perjury if, with intent to deceive and with knowledge of the statement's meaning:

(1) he makes a false statement under oath, or swears to the truth of a false statement previously made and the statement is required or authorized by law to be made under oath; or

(2) he makes a false statement, not under oath, but on a document stating on its face that a false statement thereon is subject to the penalties of perjury.

(b) Perjury is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-2205.

39-2203. Aggravated perjury.—(a) An individual, corporation, or association commits aggravated perjury if he commits perjury as defined in § 39-2202, and:

(1) the false statement is made during or in connection with an official proceeding; and

(2) the false statement is material.

(b) Aggravated perjury is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-2205.

39-2204. Subornation of perjury.—(a) An individual, corporation, or association commits subornation of perjury if, with intent to deceive and knowledge of the statement's meaning, he induces another to make a false statement constituting perjury under § 39-2202 or aggravated perjury under § 39-2203.

(b) Subornation of perjury is a class A misdemeanor; subornation of aggravated perjury is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-2205.

39-2205. Materiality.—(a) A statement is material, regardless of the admissibility of the statement under the rules of evidence, if it could have affected the course or outcome of the official proceeding.

(b) It is no defense to prosecution for aggravated perjury that the declarant mistakenly believed the statement to be immaterial.

(c) Whether a statement is material in a given factual situation is a question of law.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. §§ 37.01-37.04.
§ 39-2202: Mich. Prop. Pen. Code § 3910.
§ 39-2203: N. Y. Rev. Pen. Law § 210.15.
§ 39-2204: New.
§ 39-2205: Mich. Prop. Pen. Code § 4901(2).

Cross-References:

"Association" defined, see § 39-107.
Attempt, see § 39-901.
"Oath" includes affirmation, see § 39-107.
"Official proceeding" defined, see § 39-2201.

Subornation of perjury as complicity in committing perjury, see ch. 5, subch. A.

"Statement" defined, see § 39-2201.
"Swear" includes affirm, see § 39-107.
Tampering with witness, see § 39-2105.

Comment:

Sections 39-2202 and 39-2203 restate the present law on perjury, T. C. A. §§ 39-3301--39-3306. The law has traditionally required an oath for the receipt of information the truthfulness of which is essential to the administration of justice and has punished those who lie under oath. These sections provide two grades of punishment depending on the presence of the aggravating elements of materiality and an official proceeding. Perjury is a lesser included offense of aggravated perjury. T. C. A. § 40-2203, as amended.

Subornation is recognized as a distinct offense in § 39-2204 despite the availability of action under ch. 5, subch. A (complicity), because of the problem of attempt. Under this code one may not be prosecuted for an attempt to be a party to a crime that is not committed. It is therefore essential to include a separate subornation offense so that the solicitation of perjury is punishable under the attempt provision, § 39-901.

Authorized punishments for the present offense of perjury (1-5 years) is lowered in the belief that many defendants who are clearly guilty of the offense are not found guilty because of the harsh punishments. In promulgating a Model Act on Perjury, the National Conference of Commissioners on Uniform State Laws mentioned this problem:

> . . . a great difficulty in administering the law of perjury has been the severity of the penalties specified by the statutes. In the less aggravated forms of perjury, much could be gained in effectiveness and respect by making penalties less severe in the books and more frequently applied in the courtrooms. Model P. C., Comment at 102-03 (Tent. Draft No. 6, 1957).

Therefore, the offense of "simple" perjury is a class A misdemeanor and aggravated perjury is a third-degree felony. Additional punishment, as a result of a contempt of court charge, is not encouraged by this section, and is, in all probability, prohibited by § 39-302 on multiple sentences. Contra, Ricketts v. State, 111 Tenn. 380, 77 S. W. 1076 (1903).

This section restates existing law on the nature of materiality as an element of perjury, T. C. A. § 39-3301; Woods v. State, 82 Tenn. 460 (1884); McLarin v. State, 23 Tenn. 381 (1843). Elimination of the requirement of materiality in § 39-2202 is to assure the increased flexibility and effectiveness of the criminal sanction in the event the statement is not material, or not so proved.

The Commission is of the opinion that the offenses of perjury (§ 39-2202) and aggravated perjury (§ 39-2203) will adequately cover the numerous offenses designated as perjury throughout the entire Tennessee Code. Consolidation of the scattered perjury offenses will allow an equitable and cohesive enforcement of the perjury law.

39-2206. Retraction.—It is a defense to prosecution for aggravated perjury that the actor retracted his false statement:

(1) before completion of the testimony at the official proceeding; and

(2) before it became manifest that the falsity of the statement would be exposed.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-2208.

39-2207. Inconsistent statements.—A charge of perjury or aggravated perjury that alleges that the declarant has made two (2) or more statements under oath, any two (2) of which cannot both be true, need not allege which statement is false. At the trial the prosecution need not prove which statement is false.

COMMENTS OF LAW REVISION COMMISSION

Comment:
See comment following § 39-2208.

39-2208. Irregularities no defense.—(a) It is no defense to prosecution for perjury or aggravated perjury that the oath was administered or taken in an irregular manner, or that there was some irregularity in the appointment or qualification of the person who administered the oath.

(b) It is no defense to prosecution for perjury or aggravated perjury that a document was not sworn to if the document contains a recital that it was made under oath, the declarant was aware of the recital when he signed the document, and the document contains the signed jurat of a public servant authorized to administer oaths.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. §§ 37.05-37.07.
§ 39-2206: N. Y. Rev. Pen. Law § 210.25.
§ 39-2207: N. Y. Rev. Pen. Law § 210.20.
§ 39-2208: Model P. C. § 241.1.
T. C. A. § 39-3302.

Cross-References:
Defense explained, see § 39-203.
"Oath" includes affirmation, see § 39-107.
"Official proceeding" defined, see § 39-2201.
Presumption explained, see § 39-205.
"Public servant" defined, see § 39-107.
"Statement" defined, see § 39-2201.
"Swear" includes affirm, see § 39-107.

Comment:
Section 39-2206 provides a defense of retraction. The purpose of allowing the defense is to encourage a witness to correct his misstatement and tell the truth before the end of the proceeding. A danger in allowing the retraction defense is that perjury may be encouraged by the perjurer's belief that he can give false testimony and protect himself by retraction if the falsity is discovered. To prevent this abuse, the defense is allowed only if the misstatement is corrected before the completion of testimony in the official proceeding and before it becomes clear that the falsity will be exposed.

Section 39-2207 continues present Tennessee law which presumptively establishes the falsity of the testimony by proof of contrary statements, T. C. A. § 39-3303. Under this section, the prosecution does not have to allege or prove which statement is false.

Subsection (a) of this section disallows a defense to perjury based on irregularities in administration of the oath. Presently, a rebuttable presumption is established that the defendant had been duly sworn to testify, T. C. A. § 39-3302. Subsection (b) prevents the perjurer from denying having sworn to a document that is signed and notarized; such a defense is clearly specious where the declarant signed a document that contains a completed jurat.

39-2209. False report to peace officer.—(a) An individual, corporation, or association commits an offense if:

(1) he reports to a peace officer an offense or incident within the officer's concern knowing that the offense or incident did not occur; or

(2) he makes a report to a peace officer relating to an offense or incident within the officer's concern knowing that he has no information relating to the offense or incident.

(b) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 37.08.
N.Y. Rev. Pen. Law § 240.50.
Model P. C. § 241.5.

Cross-References:
"Association" defined, see § 39-107.
False alarm, see § 39-2506.
"Peace officer" defined, see § 39-107.

Comment:
There is no comparable offense under present Tennessee law. Subsection (a)(1) of this section deals with reports of fictitious crimes, while subsection (a)(2) reaches the person who, when a real crime receives publicity, impedes law enforcement by volunteering fictitious leads. Reports of "incidents" cover matters that may not be offenses in themselves, but are nevertheless within the scope of police investigation, e.g., suicide or drowning. Subsection (a)(2) does not apply, however, to anyone who makes a report in good faith, even if the report is based on unreliable hearsay.

39-2210. Tampering with or fabricating physical evidence.—(a) An individual, corporation, or association commits an offense if, knowing that an investigation or official proceeding is pending or in progress:

(1) he alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

(2) he makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

(b) An offense under this section is a class A misdemeanor unless the actor's intent is to defraud or harm another, in which event the offense is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 37.09.
N.Y. Rev. Pen. Law § 215.40.

Cross-References:
"Association" defined, see § 39-107.
"Official proceeding" defined, see § 39-2201.
Tampering with witness, see § 39-2105.

Comment:
No specific protection from this type of conduct exists in present Tennessee law, although in some cases the forgery statute, T. C. A. tit. 39, ch. 17, may apply. This section makes it an offense both to conceal true evidence and to offer false evidence, since to do either misrepresents the truth which it is the object of the proceeding to determine.

An offense under subsection (a)(1) requires an intent to render the evidence false or unavailable. An offense under subsection (a)(2) requires an intent to affect the course or outcome of the proceeding and is analogous to the concept of materiality in the perjury offenses.

This section does not apply to the concealment of any record, document, or thing that is not subject to subpoena, such as records protected by the attorney-client privilege.

39-2211. Tampering with governmental record.—(a) An individual, corporation, or association commits an offense if:

(1) he knowingly makes a false entry in, or false alteration of, a governmental record; or

(2) he makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record; or

(3) he intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record.

(b) It is an exception to the application of subsection (a)(3) that the governmental record is destroyed pursuant to legal authorization.

(c) An offense under this section is a class A misdemeanor unless the actor's intent is to defraud or harm another, in which event the offense is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 37.10.
N.Y. Rev. Pen. Law §§ 175.20, 175.25.

Cross-References:

"Association" defined, see § 39-107.
Exception explained, see § 39-202.
"Governmental record" defined, see § 39-2201.
"Harm" defined, see § 39-107.

Comment:

This section replaces T. C. A. §§ 39-4207 (stealing public records), 39-4209 (stealing or withdrawing public papers), 39-4210 (stealing records in judicial proceeding). Subsection (a)(1) broadens Tennessee law to include a prohibition against making false entries in governmental records. See T. C. A. §§ 39-3307, 60-112, 59-1010, 49-605, 53-453. Subsection (a)(2) prohibits the making, presenting, or using of fabricated government records. All court records and legal processes are included in the definition of "government record"—"anything belonging to, received, or kept by government for information."

The second half of the definition—"anything required by law to be kept by others for information of government"—expands the number of protected records to certain privately held records. The Model Penal Code comments explain:

> Although public record statutes do not generally cover records which private persons are compelled to maintain for official inspection, the integrity of such records is often backed by criminal sanctions in special legislation requiring the record to be kept, or by general provisions against false entries in corporate books of record . . . [and thus] fall within the principle that requires the government's own records to be kept inviolate. Model P. C. § 208.27, Comment at 123 (Tent. Draft No. 8, 1958).

Subsection (a)(3) prohibits impairment of the truth or availability of records by intentional destruction, concealment, or any other means, and is similar to T. C. A. § 39-4209.

A wide range of punishments is available under the class A misdemeanor, third-degree felony grading of subsection (c). Intent to defraud or harm another must be established to warrant felony conviction, although the definition of "harm" is broad enough to subject most offenders to felony punishment. Destruction of public records or valuable papers with intent to defraud is presently accorded higher penalties, T. C. A. § 39-1942.

39-2212. Impersonating public servant.—(a) An individual, corporation, or association commits an offense if he impersonates a public servant with intent to induce another to submit to his pretended official authority or to rely upon his pretended official acts.

(b) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Comment:

See comment following § 39-2213.

39-2213. Impersonating peace officer.—(a) An individual, corporation, or association commits an offense if he impersonates a peace officer with intent to deceive another.

(b) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. §§ 37.11, 37.12.
Wis. Stat. Ann. §§ 946.69, 946.70.
Mich. Prop. Pen. Code §§ 4545, 4550.

Cross-References:

"Association" defined, see § 39-107.
"Peace officer" defined, see § 39-107.
"Public servant" defined, see § 39-107.

Comment:

These sections replace present T. C. A. § 39-1503 (falsely assuming official character). The object of these sections is to prevent imposition by the pretense of authority.

There are two offenses of impersonation. Section 39-2212 applies to impersonation of any public servant with intent to induce submission or reliance upon pretended authority and is a class B misdemeanor. This section applies specifically to impersonation of a peace officer with intent to deceive another and carries a higher authorized punishment. These sections have no specific requirement of an "act" in addition to the false pretense, but it will ordinarily be necessary to show some act in order to prove the required intent.

An impersonator violates these sections even if the acts he proposed to do are beyond the legal power of the office he purports to fill. A person who honestly believes he is entitled to act as a public servant does not violate the law if it turns out he was in error. See State v. Withers, 66 Tenn. 16 (1872).

Since the definition of public servant includes peace officer, § 39-2212 overlaps this section, but § 39-2212 is not a lesser included offense since it requires a different intent than this section.

CHAPTER 23

OBSTRUCTING GOVERNMENTAL OPERATION

39-2301. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Complaining witness" means a person who signs a criminal complaint.

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

(3) "Escape" means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole.

(4) "Governmental function" includes any activity that a public servant is lawfully authorized to undertake on behalf of government.

39-2302. Failure to identify as witness.—(a) An individual commits an offense if he intentionally refuses to report or gives a false report of his name and present or last address to a peace officer who

has lawfully stopped him at the scene of an offense and demanded the information.

(b) An offense under this section is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 38.02.

Cross-References:
False alarm, see § 39-2506.
Perjury and other falsification, see ch. 22.
Stop, see T. C. A. § 40-601, as amended.

Comment:
This section imposes on citizens a limited duty to identify themselves to peace officers. It authorizes a maximum $50 fine and 10-day sentence for refusing to identify or giving a false identification to the stopping officer. See Code of Criminal Procedure, § 40-601, for circumstances in which a peace officer is authorized to stop a person for questioning.

39-2303. Resisting stop, frisk, halt, arrest, or search.—(a) An individual, corporation, or association commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer, or a person acting in a peace officer's presence and at his direction, from effecting a stop, frisk, halt, arrest, or search of the actor or another by using force against the peace officer or another.

(b) It is no defense to prosecution under this section that the stop, frisk, halt, arrest, or search was unlawful.

(c) Except as provided in subsection (d), an offense under this section is a class A misdemeanor unless the actor resists a stop or frisk, in which event the offense is a class B misdemeanor.

(d) An offense under this section is a felony of the third degree if the actor uses a deadly weapon to resist the stop, frisk, halt, arrest, or search.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 38.03.
Mich. Prop. Pen. Code § 4625.

Cross-References:
Arrest under warrant, see T. C. A. § 40-703, as amended.
Arrest without warrant, see T. C. A. tit. 40, ch. 6, subch. C, as amended.
Assault, see §§ 39-1401, 39-1402.
"Association" defined, see § 39-107.
"Deadly weapon" defined, see § 39-107.
Force justified in law enforcement, see ch. 7, subch. E.
Frisk, see T. C. A. § 40-603, as amended.
Halt at roadblock, see T. C. A. § 40-621, as amended.
"Peace officer" defined, see § 39-107.
Search, see T. C. A. tit. 40, ch. 8, as amended.
Stop, see T. C. A. § 40-601, as amended.

Comment:
This section replaces T. C. A. §§ 39-3104 and 39-3107, which prohibit opposing or resisting execution of a warrant of arrest, and is expanded to cover searches, stops, halts, and frisks as well.

The section applies only to resistance by the use of force. One who runs away or makes an effort to shake off the officer's detaining grip may be guilty of evading arrest under § 39-2304, but he is not punishable under this section. Unlike present law, see State v. Wright, 164 Tenn. 56, 46 S. W. (2d) 59 (1932), this section covers an arrest or search with and without warrant.

As under present law the actor must know the person he is resisting is a peace officer, or someone working with a peace officer. See T. C. A. § 39-3107; Sparks v. United States, 90 Fed. (2d) 61 (6th Cir. 1937).

Under this section the unlawfulness of the stop, halt, frisk, arrest, or search is no defense, but if the peace officer (or another acting under his direction) initially uses unnecessary force to effect the stop, arrest, etc., the actor is justified in responding with reasonable force under § 39-731. However, the place to challenge the lawfulness of a stop, arrest, etc., is in the courtroom and not on the street. For that reason the illegality of the arrest or search is no defense.

The use of a deadly weapon to resist so endangers peace officers (and perhaps bystanders) that felony punishment is authorized.

39-2304. Evading arrest.—(a) An individual commits an offense if he intentionally flees from a person he knows is a peace officer who he knows is attempting to arrest him.

(b) It is an exception to the application of this section that the attempted arrest is unlawful.

(c) An offense under this section is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 38.04.

Cross-References:
Arrest, see T. C. A. tit. 40, ch. 6, subch. C; ch. 7, as amended.
Exception explained, see § 39-202.
"Peace officer" defined, see § 39-107.

Comment:
This section is new to Tennessee law. It provides a misdemeanor sanction for evading arrest by flight. Section 39-2303 (resisting arrest) does not apply to flight if no force is used against the peace officer, and § 39-2307 (escape) does not apply to a flight prior to arrest. If flight from arrest can be deterred by the threat of an additional penalty, there should be fewer instances in which peace officers resort to force to effect an arrest.

The exception in subsection (b) provides that flight from an unlawful arrest is not an offense. This approach differs from § 39-2303 (resisting arrest) and § 39-2309 (effect of unlawful custody) under which the unlawfulness of an arrest or custody is no defense to the offenses of resisting arrest or escape. The effect of the exception is that the state must prove the attempted arrest lawful.

39-2305. Hindering apprehension or prosecution.—(a) An individual, corporation, or association commits an offense if, with intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense:

(1) he harbors or conceals the other; or

(2) he provides or aids in providing the other with any means of avoiding arrest or effecting escape; or

(3) he warns the other of impending discovery or apprehension.

(b) It is a defense to prosecution under subsection (a)(3) that the warning was given in connection with an effort to bring another into compliance with the law.

(c) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 38.05.
N. Y. Rev. Pen. Law §§ 205.50-205.65.

Cross-References:
"Association" defined, see § 39-107.
Defense explained, see § 39-203.
"Escape" defined, see § 39-2301.
Escape offense, see § 39-2307.
Permitting or facilitating escape, see § 39-2308.

Comment:
This section replaces the present provision relating to accessories after the fact, T. C. A. § 39-112. The new offense

is defined in terms of hindering public law enforcement; this approach avoids the complications that arise from the use of a complicity theory. For example, this section omits the requirement that the offender know a crime has been committed or that the accused is liable to arrest. Instead, the section requires an intent to hinder apprehension, prosecution, conviction, or punishment. Furthermore, the prosecution or conviction is not dependent upon the prosecution or conviction of the person aided, as required by present law.

Hindering is graded a class A misdemeanor.

This section omits the present law's exemption for relatives of the accused following the Model Penal Code's suggestion to leave this factor to prosecutorial discretion or for consideration in sentencing.

39-2306. Compounding.—(a) An individual, corporation, or association commits an offense if he solicits, accepts, or agrees to accept any benefit in consideration of refraining from reporting to a peace officer the commission or suspected commission of an offense.

(b) A complaining witness commits an offense if he solicits, accepts, or agrees to accept any benefit in consideration of abstaining from, discontinuing, or delaying the prosecution of another for an offense.

(c) It is a defense to prosecution under this section that the benefit was solicited or accepted by the victim and did not exceed an amount the victim believed to be due as restitution or indemnification for economic loss caused by the offense.

(d) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 38.06.
Hawaii Prop. Pen. Code § 1013.
Model P. C. § 242.5.

Cross-References:

"Association" defined, see § 39-107.
"Benefit" defined, see § 39-107.
"Complaining witness" defined, see § 39-2301.
Defense explained, see § 39-203.
"Peace officer" defined, see § 39-107.
Subornation of perjury, see § 39-2204.
Tampering with witness, see § 39-2105.

Comment:

The crime of compounding is aimed at deterring or punishing the witness or victim who is "bought off" by the perpetrator of a crime. The law does not go so far as to punish the mere failure to report a crime, but does here punish such failure if secured by a bribe.

Subsection (b) applies to the complaining witness who has already reported the crime, but then solicits or accepts a bribe to refuse to cooperate with the state in prosecuting the accused.

T. C. A. §§ 39-3101—39-3103 presently proscribe the same conduct as subsections (a) and (b) but graduate punishment according to the seriousness of the crime concealed.

Subsection (c) provides a defense to a victim who violates this section if the consideration amounts to no more than restitution for the loss caused by the offense. It should be noted, however, that the defense applies only to the offense of compounding, not to the primary offense. The state may choose to prosecute the latter even though it has been compromised by the accused and his victim.

39-2307. Escape.—(a) An individual arrested for, charged with, or convicted of an offense commits an offense if he escapes from custody.

(b) Except as provided in subsections (c) and (d), an offense under this section is a class A misdemeanor.

(c) An offense under this section is a felony of the third degree if:

(1) the actor was charged with or convicted of a felony; or

(2) the actor was confined in a penal institution.

(d) An offense under this section is a felony of the second degree if the actor used or threatened to use a deadly weapon to effect his escape.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 38.07.
Ill. Stat. Ann. ch. 38, § 31-6.

Cross-References:

Complicity in escape, see ch. 5, subch. A.
"Custody" defined, see §§ 39-2301, 39-2309.
"Deadly weapon" defined, see § 39-107.
"Escape" defined, see § 39-2301.
Evading arrest, see § 39-2304.
Hindering apprehension or prosecution, see § 39-2305.
"Penal institution" defined, see § 39-107.

Comment:

This substantially restates T. C. A. §§ 39-3802, 39-3806, and 39-3807. Escape from custody undermines the effectiveness of the system of criminal correction and punishment. It often creates danger to the captors and bystanders, disrupts prison routine, and requires allocation of police resources to effect recapture. Moreover, when a question is raised concerning the legality of the detention, it is desirable to encourage reliance on legal proceedings rather than self-help.

"Custody" is defined as restraint by a public servant pursuant to court order or arrest by a peace officer. This definition enlarges the scope of the present escape law which does not apply to escape from arrest. "Escape" is defined as unauthorized departure from custody or failure to return to custody following a temporary leave for a specific purpose of limited period, but violations of probation or parole are not escapes. "Penal institution" is defined to include jails and penitentiaries but to exclude detention facilities for juveniles or mental patients who are not accused of an offense. Therefore, escape from such a detention facility is not a violation of this section.

The offense is aggravated to a third-degree felony if the escapee was charged with or convicted of a felony, or was confined in a penal institution. If he used or threatened to use a deadly weapon, the offense is serious enough to warrant second-degree felony treatment.

39-2308. Permitting or facilitating escape.—(a) An official or employee of an institution, which is responsible for maintaining persons in custody, commits an offense if he intentionally, knowingly, or recklessly permits or facilitates the escape of a person in custody.

(b) An individual, corporation, or association commits an offense if he intentionally or knowingly causes or facilitates the escape of one who is in custody pursuant to:

(1) an allegation or adjudication of delinquency; or

(2) a statutory procedure authorizing involuntary commitment for mental illness, alcoholism, or drug addiction.

(c) Except as provided in subsection (d), an offense under this section is a class A misdemeanor.

(d) An offense under this section is a felony of the third degree if:

(1) the person in custody was charged with or convicted of a felony; or

(2) the person in custody was confined in a penal institution; or

(3) the actor used or threatened to use a deadly weapon to effect the escape; or

(4) the offense under subsection (a) was committed intentionally or knowingly.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 38.08.

Cross-References:
"Association" defined, see § 39-107.
Complicity in escape, see ch. 5, subch. A; § 39-2307.
"Custody" defined, see §§ 39-2301, 39-2309.
"Deadly weapon" defined, see § 39-107.
"Escape" defined, see § 39-2301.
Hindering apprehension or prosecution, see § 39-2305.
"Penal institution" defined, see § 39-107.

Comment:
This section follows generally the present Tennessee law and that of other recent revising states in defining this offense. Subsection (a) replaces T. C. A. §§ 39-3214 and 39-3215; subsection (b) replaces T. C. A. §§ 39-3801, 39-3804, 39-3808, 39-3809, and 39-3812.

Most forms of aiding escape constitute complicity in the escape. This section enlarges the scope of complicity in the escape to include reckless conduct by an official or employee of a jail, penitentiary, insane asylum, etc., which results in an escape. Causing or facilitating the escape of a person whose escape is not itself a crime—e.g., a juvenile delinquent or involuntary hospital inmate—is also covered by this section, but not under the complicity theory, since complicity in a noncrime is not an offense.

Aiding an escapee who was charged with or convicted of a felony, or confined in a penal institution, aggravates the offense to a felony, as do the use or threatened use of a deadly weapon by the aider and the intentional aiding by an institution employee.

It should be noted that the present statutes punish either escape or attempt while this section proscribes only escape, leaving § 39-901 (criminal attempt) to cover unsuccessful efforts.

39-2309. Effect of unlawful custody.—It is no defense to prosecution under § 39-2307 or § 39-2308 that the custody was unlawful.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 38.09.
Model P. C. § 242.6(3).

Cross-References:
"Custody" defined, see § 39-2301.
"Unlawful" defined, see § 39-107.

Comment:
Most of the present Tennessee escape statutes require the custody to be lawful, e.g., T. C. A. §§ 39-3801 (lawful arrest), 39-3807 (lawfully confined), and 39-3809 (lawfully detained). However, the harm to be prevented by an escape offense is the same regardless of the lawfulness of the detention. Moreover, when a person is in official custody, there are legal remedies to challenge his confinement; and resort to these remedies, rather than self-help, is encouraged by this section.

39-2310. Implements for escape.—(a) An individual, corporation, or association commits an offense if, with intent to facilitate escape, he introduces into a penal institution, or provides an inmate with, a deadly weapon or anything that may be useful for escape.

(b) An offense under this section is a class A misdemeanor unless the actor introduced or provided a deadly weapon, in which event the offense is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 38.09.
N. Y. Rev. Pen. Law §§ 205.20, 205.25.

Cross-References:
"Association" defined, see § 39-107.
"Deadly weapon" defined, see § 39-107.
"Escape" defined, see § 39-2301.
"Penal institution" defined, see § 39-107.

Comment:
This section replaces portions of T. C. A. § 39-3804 (aiding and abetting escape or attempt to escape from penitentiary). Although the category of "implement" is very broad—anything that may be useful for escape—the required culpable mental state—intent to facilitate escape—is stringent enough to narrow the scope of this offense to reach what is a form of attempting to facilitate an escape.

Unlike § 39-2308 (permitting or facilitating escape), this offense is complete regardless of whether the escape is accomplished.

The offense is a class A misdemeanor unless the implement is a deadly weapon. The aggravating factor is thus the nature of the implement rather than the charge against the recipient as under present law.

39-2311. Bail jumping and failure to appear.—(a) An individual, corporation, or association commits an offense if he intentionally or knowingly fails to appear as directed if:

(1) he has been lawfully served with a subpoena under title 40, chapter 18, as amended; or

(2) he has been lawfully served with a criminal summons under § 40-701 or § 40-1007, as amended; or

(3) he has been lawfully issued a citation in lieu of arrest under § 40-632, as amended; or

(4) he has been lawfully released from custody, with or without bail, on condition that he subsequently appear at a specified time and place.

(b) It is an exception to the application of this section that the appearance is required as an incident of probation or parole.

(c) It is a defense to prosecution under this section that the actor had a reasonable excuse for his failure to appear at the specified time and place.

(d) If the offense for which the actor's appearance is required is a misdemeanor:

(1) an offense under subsection (a)(1) is a class C misdemeanor.

(2) an offense under subsections (a)(2)-(a)(4) is a misdemeanor of the same class.

(e) If the offense for which the actor's appearance is required is a felony:

(1) an offense under subsection (a)(1) is a class A misdemeanor.

(2) an offense under subsections (a)(2)-(a)(4) is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
"Association" defined, see § 39-107.
"Custody" defined, see § 39-2301.
Defense explained, see § 39-203.
Exception explained, see § 39-202.
Pretrial release, see T. C. A. tit. 40, ch. 12, as amended.

Comment:
This section comprehensively treats the failure to answer to legal process. Subsections (a)(1)-(a)(4) specify the types of process used in criminal proceedings to which the application of this section is limited.

Subsection (a)(1) significantly departs from the present sanction for failure to appear after being served with a sub-

poena. T. C. A. § 40-2406 presently authorizes only a fine of $250. The effective administration of justice requires a stronger enforcement provision so that, for example, a witness will be less likely to accept a $1000 bribe knowing he will net $750 even if prosecuted for failing to appear as directed. This code also provides significant penalties for tampering with witnesses (§ 39-2105) and subornation of perjury (§ 39-2204). The new penalty structure depends upon the seriousness of the offense being tried. This section should prove effective in combating organized criminal activity in which cases witnesses are often intimidated or influenced by bribery.

Subsections (a)(2)-(a)(4) deal uniformly with persons accused of crime. Regardless of the legal process used to require his presence, the seriousness of the offense under this section is related to the seriousness of the object offense. This section replaces the 1963 bail jumping statutes, T. C. A. §§ 39-3813—39-3815. However, the objective of this section goes beyond the present law by providing a sanction for failure to appear by one released on personal bond or recognizance; hopefully this will encourage the use of alternative methods of pretrial release.

The present law defines the offense as intentionally incurring a forfeiture of bail and willfully leaving the state. Under this section the offense is committed by an intentional or knowing failure to appear at the time and place specified. This is currently an alternative provision of T. C. A. § 39-3815 prohibiting bail jumping by witnesses, who incidentally are also covered by this section. The defense in subsection (c) places the burden of producing evidence on the defendant to show an excuse for his failure to appear.

There are administrative sanctions for failure to appear in connection with probation or parole requirements, and such failures are therefore excepted from this section.

39-2312. Barratry.—(a) An individual, corporation, or association commits barratry if, with intent to obtain a benefit for himself or to harm another:

(1) he institutes any suit or claim in which he knows he has no interest; or

(2) he institutes any suit or claim that he knows is false; or

(3) he solicits employment to prosecute or defend a suit or to collect a claim.

(b) Barratry, when committed by an attorney at law, is unprofessional conduct for purposes of § 29-308.

(c) Barratry is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 38.12.
T. C. A. § 39-3410.

Cross-References:

"Association" defined, see § 39-107.
"Benefit" defined, see § 39-107.
Disbarment of attorney guilty of barratry, see T. C. A. §§ 29-308—29-311.
"Harm" defined, see § 39-107.

Comment:

This section restates in simpler terms the offense of barratry now found in T. C. A. §§ 39-3405—39-3410. Barratry is defined to prohibit conduct which tends to foment litigation, for purposes other than the pursuit of justice, in situations where litigation might not otherwise arise. Litigation so fomented imposes a burden on the judicial institutions and allows them to be employed as instruments of oppression or private aggrandizement rather than for the orderly resolution of bona fide disputes. Furthermore, a lawsuit instituted for the purposes proscribed in this section, unjustifiably vexes those forced to defend the suit.

The present statute defines barratry generally without the requirement of intent to obtain benefit or to harm another. Consequently numerous exceptions specified in the present statute are unnecessary under this section.

Barratry by an attorney is punishable by disbarment under T. C. A. § 29-308. Present T. C. A. § 39-3410 designates barratry as unprofessional conduct as does subsection (b). The tort remedy for malicious prosecution is also available for a suit filed maliciously and without probable cause. This section maintains the criminal sanction to supplement these remedies. The authorized punishment is the same as that of the present law, a class A misdemeanor.

39-2313. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 38.13.

Cross-References:

"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:

Municipal ordinances presently conflict with and overlap state law in the area of offenses against obstructing governmental operation. The Code of the Metropolitan Government of Nashville and Davidson County (1967), for example, prohibits resisting or interfering with officers, § 34-1-1, aiding escape of persons in custody, § 34-1-2, and rescuing persons in custody, § 34-1-3. These ordinances exist even though state law clearly proscribes the conduct they cover, T. C. A. §§ 39-3104, 39-3801. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, this section makes clear the state intends to preempt the area of offenses against obstructing governmental operation and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Refusal to aid a peace officer, although now an offense under T. C. A. § 39-3105, was purposely omitted from this code, and governmental subdivisions and agencies are thus prohibited by this section from penalizing or otherwise regulating this conduct. See T. C. A. § 40-634, as amended (assisting peace officer). This section also forbids, for example, local laws punishing failure to report an offense, fleeing after being stopped for investigation, or malicious prosecution. In addition, of course, laws conflicting with the provisions of this chapter are forbidden, e.g., making unlawfulness of an arrest a defense to its resistance, criminalizing escape from a juvenile detention home.

CHAPTER 24

ABUSE OF OFFICE

39-2401. Official misconduct.—(a) A public servant commits an offense if, with intent to obtain a benefit for himself or to harm another, he intentionally or knowingly:

(1) commits an act relating to his office or employment that constitutes an unauthorized exercise of his official power; or

(2) commits an act under color of his office or employment that exceeds his official power; or

(3) refrains from performing a duty that is imposed on him by law or that is clearly inherent in the nature of his office or employment; or

(4) violates a law relating to his office or employment.

(b) For purposes of subsection (a)(2), a public servant commits an act under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 39.01.
N. Y. Rev. Pen. Law § 195.00.

Cross-References:
"Act" defined, see § 39-107.
"Benefit" defined, see § 39-107.
Bribery and corrupt influence, see ch. 21.
Commercial bribery, see § 39-2042.
"Harm" defined, see § 39-107.
Impersonating public servant, see § 39-2212.
"Law" defined, see § 39-107.
Misuse of official information, see § 39-2403.
Official oppression, see § 39-2402.
"Public servant" defined, see § 39-107.

Comment:
This section replaces a large number of Tennessee statutes, most of which apply to violations of specific duties by specified public servants. E.g., T. C. A. §§ 39-3209 (court officer buying property sold through court); 39-3213 (jailer refusing to receive committed person into custody); 39-3220 (legislator absenting self for purpose of obstructing legislature); 67-1714 (county offices failing to observe requirements of tax law); 40-510 (peace officer exceeding authority). It proscribes generally misfeasance and nonfeasance in public office and provides a uniform mens rea requirement and penalty structure.

Unlike some of the present statutes, this section requires intentional and knowing violations before the criminal sanction is available. Simple negligence and incompetence are not appropriate concerns of the criminal law.

This section broadens the coverage of present law to embrace the comprehensive category of public servant, which includes, in addition to officers and employees of government, jurors and notaries public.

The four subdivisions of this section describe the different ways in which the offense can be committed. The public servant is responsible for unauthorized exercise of his power, acts beyond his power, failure to perform a mandatory duty, and violation of a law relating to his office.

39-2402. Official oppression.—(a) A public servant acting under color of his office or employment commits an offense if:

(1) he intentionally subjects another to mistreatment or to arrest, detention, stop, frisk, halt, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or

(2) he intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.

(b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(c) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 39.02.
Model P. C. § 243.1.

Cross-References:
Arrest, see T. C. A. tit. 40, chs. 6, 7, as amended.
Frisk, see T. C. A. § 40-603, as amended.
Halt, see T. C. A. §§ 40-621, 40-622, as amended.
Impersonating public servant, see § 39-2212.
Official misconduct, see § 39-2401.
Public duty justification, see § 39-722.
"Public servant" defined, see § 39-107.
Search, see T. C. A. tit. 40, ch. 8, as amended.
Seizure, see T. C. A. § 40-823, as amended.

Comment:
Section 39-2402 is a restatement of the present statute on official oppression, T. C. A. § 39-3203, and provides the same penalty.

In order to convict a public servant of official oppression under this section, the state must prove that he intentionally acted in one of the ways specified with knowledge that his doing so was unlawful. The state must also prove that the public servant was acting or purporting to act in his official capacity or taking advantage of such actual or purported capacity, i.e., acting under color of his office or employment.

A public servant may be guilty of official oppression although he takes no aggressive or affirmative action against the victim; his denying or impeding the victim in securing his legal rights or privileges, for example, violates subsection (a)(2).

The inclusion of this offense to deter and punish official oppression is especially important in view of the code's denial of the traditional defense of illegality to charges of resisting or escaping from arrest, search, stop and frisk, and custody.

39-2403. Misuse of official information. — (a) A public servant commits an offense if, in reliance on information to which he has access in his official capacity and which has not been made public:

(1) he acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information; or

(2) he speculates or aids another to speculate on the basis of the information.

(b) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 39.03.
N. H. Prop. Crim. Code § 588.2.
Mich. Prop. Pen. Code § 4810.

Cross-References:
"Public servant" defined, see § 39-107.

Comment:
This offense is new to Tennessee law, but it is analogous to several statutes in the present law, e.g., T. C. A. §§ 12-401 (personal interest in public contracts) and 12-226 (purchase of state property offered for sale).

The fiscal integrity of the State may be undermined if public servants are permitted to profit from confidential information acquired by virtue of their positions. Enrichment of insiders will also disadvantage citizens who deal with the insiders in ignorance, and the temptation to profiteer may motivate public servants to delay, slant, or even falsify information concerning governmental transactions.

This section does not apply to investment or speculation based on information available to the public, even though the information is not generally known.

CHAPTER 25

DISORDERLY CONDUCT AND RELATED OFFENSES

COMMENTS OF LAW REVISION COMMISSION

Comment:

The ideal of certainty in the criminal law has sometimes been quietly abandoned in offenses at the lower level of the criminal spectrum. In some states statutes forbid "disorderly conduct" or "breaches of the peace" without defining those terms. In other states statutes are more elaborate but no more precise. In Texas, for example, it has been illegal to assemble for "any illegal object," to behave in a "boisterous and tumultuous" way and thereby create a danger of "illegitimate" alarm, or to be a person "leading an idle, immoral or profligate life" who has no property to support him and who is able to, but does not, work.

Modern draftsmen have commonly given no more precision to their definitions of disorderly conduct offenses than did the authors of nineteenth century penal codes. In the 1961 revision of the Illinois Criminal Code, for example, offenses against public order were largely encompassed in the following language: "A person commits disorderly conduct when he knowingly . . . [d]oes any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." Ill. Stat. Ann. ch. 38, § 26-1(1).

This sacrifice of certainty is, in part, a product of necessity. The varieties of human mischief are so great that no draftsman can anticipate them all, and limitations of language prevent the precise description of some mischief that can be anticipated. Neither the Commission's proposal nor any other can, for example, precisely define the point at which noise in a neighborhood becomes so loud that criminal remedies are required.

The requirement that crimes be precisely defined in advance serves at least three separate policies, all of which are as applicable to minor as well as more serious offenses. First, a man should have fair warning; he should know the consequences of his conduct before he acts. Second, he should be able to prepare a defense when a charge is brought against him. And third, his liberty should not be subject to the unconfined discretion of those who enforce the law; the criminal law should be formulated in advance by a democratic law-making body.

This last policy may have special importance in defining minor offenses for two reasons. Arrest is itself a major sanction for disorderly conduct, and the policeman's need for guidance in this increasingly sensitive area is unusually great. Moreover, persons charged with offenses against public order are commonly tried in municipal and general sessions courts—where representation by counsel is exceptional; where judges are not always trained in the law; where, at least in urban areas, large caseloads are commonplace; and where appeals to higher courts are rare. Paradoxically, the law applied by lower judicial officers has left more to their personal, subjective discretion than that applied by judges who must meet more stringent legal qualifications, who are more carefully reviewed, and who are more rigorously confined by procedural safeguards.

The draftsman's principal goal in this chapter has been to apply the usual principles of criminal draftsmanship to minor offenses—offenses that have traditionally been regarded as "catch-alls" and that have sometimes been defined with an almost deliberate imprecision.

The results of the Commission's efforts should, of course, be evaluated in the context of the entire Criminal Code. Disorderly conduct and related offenses cover a narrower field in this chapter than in current Tennessee law, but the principal reason is not that the Commission has legalized much previously outlawed behavior. Instead, the Commission has

chosen to treat many problems traditionally regarded as disorderly conduct problems under other sections of the Criminal Code.

Similarly, this code includes statutes concerning criminal trespass, criminal mischief, obstructing highways and other passageways, and disrupting meetings or processions. In each instance, the attempt has been to provide a more precise mechanism for resolving problems that, in the past, have been treated under broad-gauged disorderly conduct provisions.

The possibility remains, of course, that despite the Commission's best efforts some unanticipated forms of disorder may fall outside the scope of this chapter. On occasion, certainty in the criminal law inevitably involves a cost to law enforcement. This chapter proceeds on the view that the cost is worth paying, for to underpenalize rather than overpenalize has always been the course of liberty.

39-2501. Disorderly conduct.—(a) An individual, corporation, or association commits disorderly conduct if he intentionally or knowingly:

(1) creates, by chemical means, a noxious and unreasonable odor in a public place; or

(2) abuses or threatens a person in a public place in a manner offensive to a person of reasonable sensibilities; or

(3) makes unreasonable noise in a public place, or near a private residence that he has no right to occupy; or

(4) fights with another in a public place; or

(5) discharges a firearm in a public place; or

(6) displays a deadly weapon in a public place in a manner calculated to alarm.

(b) It is a defense to prosecution under subsection (a)(2) that the actor had reasonable provocation for his abusive or threatening conduct.

(c) For purposes of this section, "public place" means any place to which the public or a substantial portion of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops. An act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near the private residence.

(d) An offense under subsections (a)(1)-(a)(4) is a class C misdemeanor; an offense under subsection (a)(5) or (a)(6) is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 42.01.

Cross-References:

Assault, see § 39-1401.
"Association" defined, see § 39-107.
Criminal mischief, see § 39-1603.
Criminal trespass, see § 39-1803.
"Deadly weapon" defined, see § 39-107.
Defense explained, see § 39-203.
Defense when conduct consists of speech or other expression, see § 39-2504.
Disrupting meeting or procession, see § 39-2505.
"Firearm" defined, see § 39-107.
Obstructing highway, see § 39-2503.
Prohibited weapons, see § 39-2803.
Public intoxication, see § 39-2508.
Riot, see § 39-2502.

Comment:

Except in cases involving the use or display of a deadly weapon, this section treats disorderly conduct as a class C misdemeanor, which is punishable by a maximum of 10 days and a $50 fine. The present Tennessee statute for disturbing the peace authorizes a fine of $50 to

$500 and, in the discretion of the court, imprisonment in the workhouse for 90 days, T. C. A. § 39-1213. Offenses defined in subsections (a)(1)-(a)(4) are not serious enough to justify such imprisonment. The utilization or display of a firearm or deadly weapon in a public place is of sufficient danger to justify three months' imprisonment. Also, note that the conduct proscribed by subsection (a)(3) may give rise to a charge of assault if the conduct is such as to cause the person threatened to fear imminent bodily injury. See § 39-1401.

The Public Place Concept.

The requirement that disorderly conduct occur in a public place is new to Tennessee: the Tennessee common law on breach of the peace required a disruption of public tranquility. State ex rel. Thompson v. Reichman, 135 Tenn. 653, 188 S. W. 225 (1916), and the present statute, T. C. A. § 39-1213, requires a disturbance of the peace of others. This requirement reflects the view that a disorderly conduct statute is not a suitable instrument for regulating what the Model Penal Code draftsmen have called "intramural or intrafamilial disputes." Unlike the Model Penal Code, however, this section recognizes one exception to its requirement that disorderly conduct occur in a public place. Unreasonable noise near a private residence, however isolated, should not be viewed as private or intramural behavior. This behavior should remain subject to sanction as disorderly conduct, as it is under existing law.

Types of Disorderly Conduct.

Throughout ch. 25 the view that disorderly behavior should be punished only when it is likely to provoke a breach of the peace has been rejected. The offensive character of the behavior itself—what the actor did—provides the occasion for punishment under this chapter, and the anticipated reaction of victims and bystanders is immaterial.

Subsection (a)(1), which outlaws the creation of noxious and unreasonable odors in a public place, is the code's "stink bomb" provision. This offense is new to the law of Tennessee, although it possibly was included in T. C. A. § 39-1213.

Subsection (a)(2), which concerns threats and verbal abuse in a public place, is broader than existing law. Current law, T. C. A. § 39-1213, does not specifically prohibit any form of threat, and it requires that verbal abuse be reasonably calculated to provoke a breach of the peace before it can be punished. The standard to be used in this subsection is close enough to the reasonable prudent man test of tort law to be easily applied by judge or jury.

Subsection (b) provides a defense to prosecution under subsection (a)(2) if the actor has reasonable provocation for his threatening or abusive behavior. The reasonableness of the provocation must, of course, be measured in terms of the seriousness of the threat or abuse that followed.

Subsection (a)(3), which prohibits unreasonable noise in a public place or near a private residence, is new to the law of Tennessee. See T. C. A. § 39-1207 (disturbing a cemetery by noise). It is an offense under this section to disturb a private residence, but only when the actor has no legal right to occupy the residence. It was deemed inappropriate to punish a man for making excessive noise in or near his own house, at least when only his fellow occupants are disturbed.

Subsection (a)(4), prohibits fighting in a public place and is new to Tennessee law. It should be noted, however, that self-defense and other principles of justification (see ch. 7) apply to offenses against public order.

Subsections (a)(5) and (6) prohibit the "alarming" or "frightening" display of firearms in a public place, and the firing of firearms in a public place.

The first clause in present T. C. A. § 39-1213, and a similar clause in the original section (Tenn. Pub. Acts 1961, ch. 236) prohibiting "violent, profane, indecent, offensive or boisterous conduct or language" have been declared unconstitutional. The original section was declared unconstitutional because it failed to give fair warning to the public as required by the due process clause of the fourteenth amendment and because it was overboard in limiting speech protected by the first amendment. The Original Fayette County Civic and Welfare League, Inc. v. Ellington, 309 Fed. Supp. 89 (W.D. Tenn. 1970). The present section, as amended by Tenn. Pub. Acts 1970, ch. 581, was also declared unconstitutional due to overbreadth. Barter v. Ellington, 318 Fed. Supp. 1079 (E.D. Tenn. 1970). The Commission is of the opinion that the prohibition of such speech and conduct is inherently an abridgement of constitutional liberties. Therefore, no such provision is included in the chapter.

39-2502. Riot.—(a) An individual, corporation, or association commits an offense if he intentionally joins with three (3) or more other persons in a violent course of disorderly conduct.

(b) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 42.02.

Cross-References:

Aggravated assault, see § 39-1402.
Arson, see § 39-1602.
"Association" defined, see § 39-107.
Criminal responsibility for conduct of another, see § 39-502.
Disorderly conduct, see § 39-2501.
Disrupting meeting, see § 39-2505.
Incitement to riot, see ch. 5, subch. A; ch. 9.
Obstructing highway, see § 39-2503.
Parties to offenses, see § 39-501.

Comment:

This section continues much of the present Tennessee law on rioting. Title 39, ch. 51 of the Tennessee Code proscribes participation in a riot: ". . . a public disturbance involving an act or acts of violence by one or more persons who is or are part of an assemblage of three (3) or more persons. . . ." T. C. A. §§ 39-5101, 39-5102. The sections on criminal responsibility for the conduct of another (§ 39-502) and parties to offenses (§ 39-501) make it clear that all parties participating in a riot are responsible for the conduct of others whom they aided or caused to riot, even though the persons so led or aided are innocent or irresponsible. See T. C. A. § 39-5114. Furthermore, the actions proscribed by T. C. A. §§ 39-5101—39-5116 are either made criminal offenses by this section or other sections in the Criminal Code. For example, T. C. A. § 39-5107, causing the fire of a building by the use of a fire bomb, is covered by the offense of arson (§ 39-1603) which prescribes similar penalties. Additionally, causing injury to a person by use of a fire bomb, T. C. A. § 39-5108, is within the offense of aggravated assault (§ 39-1402). The remaining offenses in the present T. C. A. §§ 39-5101—39-5116 are dealt with in other sections of the Criminal Code in a more precise fashion. See, e.g., § 39-2503.

The Commission recognizes that behavior by a group is often more alarming, more dangerous, and more difficult to control than behavior by an individual. Because the penalties provided for disorderly conduct in this draft are highly restricted, it was felt desirable to authorize a wider range of sentencing alternatives in cases of group activity.

39-2503. Obstructing highway or other passageway.—(a) An individual, corporation, or association commits an offense if without legal privilege he intentionally, knowingly, or recklessly:

(1) obstructs a highway; street; sidewalk; railway; waterway; elevator, aisle, or hallway to which the public or a substantial portion of the public has access; or any other place used for the passage of persons, vehicles, or conveyances, whether the obstruction arises from his acts alone or from his acts and the acts of others; or

(2) disobeys a reasonable request or order to move issued by a person he knows to be a peace officer, a fireman, or a person with authority to control the use of the premises:

(A) to prevent obstruction of a highway or passageway; or

(B) to maintain public safety by dispersing those gathered in dangerous proximity to a fire, riot, or other hazard.

(b) For purposes of this section, "obstruct" means to render impassable or to render passage unreasonably inconvenient or potentially injurious to persons or property.

(c) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 42.03.

Cross-References:
"Association" defined, see § 39-107.
Criminal trespass, see § 39-1803.
Defense when conduct consists of speech or other expression, see § 39-2504.
Disrupting meeting, see § 39-2505.
"Peace officer" defined, see § 39-107.
Public intoxication, see § 39-2508.
Riot, see § 39-2502.

Comment:
The current Tennessee Code proscribes the throwing of sharp objects (glass) or banana peels on the streets or sidewalks (T. C. A. § 39-2302), obstructing roads, alleys, and commons (T. C. A. § 39-2303), obstructing railroad tracks (T. C. A. § 39-3604), and obstructing roads (T. C. A. § 54-925). These statutes do not adequately define the offense of an unprivileged obstruction of any place used for the passage of persons or vehicles so as to include protection of all such passages, e.g., a hallway, a campus building.

The phrase "without legal privilege" would, of course, be redundant if it referred only to the principles of justification set forth in ch. 7. Its primary function, however, is to incorporate privileges from the civil law. For example, the manager of a supermarket is surely privileged to close one of the store's shopping aisles, although the same act by a customer might constitute an illegal obstruction of the passageway. The store manager's closing of the aisle is not specifically justified under ch. 7, however, and this section therefore incorporates the applicable privilege from the law of property and agency. It should be emphasized that although the phrase "without legal privilege" authorizes courts to "borrow" existing privileges from other branches of law, it does not allow them to create new privileges whenever they believe that conviction would be unjust.

Some of the language of this section was derived from Model Penal Code § 250.7. The section is, however, broader than the Model Penal Code in that it applies to private as well as public passageways, and in that it requires members of a crowd to obey "unofficial" orders to disperse under certain circumstances. The Model Penal Code also contains special provisions to prevent the arrest of a speaker for obstructing a highway or passageway when the police could remedy the obstruction by controlling the size or location of his audience. Under this chapter the problem of the obstructing audience is treated in the next section, § 39-2504.

39-2504. Defense when conduct consists of speech or other expression.—(a) If conduct that would otherwise violate § 39-2501(a)(4) or § 39-2503 consists of speech or other communication, or of gathering with others to hear or observe such speech or communication, or of gathering with others to picket or otherwise express in a nonviolent manner a position on social, economic, political, or religious questions, the actor must be ordered to move, disperse, or otherwise remedy the violation prior to his arrest if he has not yet intentionally and substantially harmed the interest of others.

(b) The order required by this section may be given by a peace officer or, when a peace officer is not immediately available, by any person affected by the violation.

(c) It is a defense to prosecution under § 39-2501(a)(3) or § 39-2503:

(1) that in circumstances in which this section requires an order, no order was given; or

(2) that an order, if given, was manifestly unreasonable in scope or content; or

(3) that an order, if given, was obeyed.

(d) For purposes of subsection (c)(2):

(1) an order to move, addressed to a person whose speech or other communication attracts an obstructing audience, is manifestly

unreasonable if the obstruction can be effectively remedied by police control of the size or location of the audience;

(2) an order to move, disperse, or otherwise remedy a violation is manifestly unreasonable if measures less restrictive of freedom of communication and assembly are readily available.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 42.04.

Cross-References:
Defense explained, see § 39-203.
Disorderly conduct, see § 39-2501.
"Harm" defined, see § 39-107.
Obstructing highway, see § 39-2503.

Comment:
This section establishes general guidelines for resolving certain problems of speech and communication that often arise in the area of offenses against public order.

Despite the use of some undeniably vague language, this section represents an advance in specificity over the law currently in effect throughout the United States. The problems with which it deals have, in the main, been handled by general disorderly conduct provisions, which, in turn, have been qualified by general constitutional guarantees. The problem of ensuring free expression in public places has thus been relegated to the uncertain course of adjudication under the first amendment.

The section may diminish the role of first amendment litigation by giving speakers and demonstrators specific warning when they begin to impinge on interests that are properly protected by the criminal law. At the same time, the section is flexible, and obviously does not attempt to resolve all the constitutional issues that may arise in demonstration cases, or, for example, to perform the tasks of a municipal parade ordinance.

The section's chief function is to express two basic legislative policies: first, that in cases involving the expression of a political or social viewpoint, the use of on-the-spot directives is preferable to the immediate use of criminal sanctions; and second, that on-the-spot directives should be designed to restrict freedom of communication and assembly to the smallest extent practicable.

As suggested, the section is little more than an expression of policy. It does contain an escape valve. Once a court has concluded that a defendant has violated some section of the code, it may conclude that he has also harmed the interests of others in a substantial and intentional way. In that event, on-the-spot correction is not required. This exemption is, of course, meant to be construed in a limited spirit, to dispense with the requirement of on-the-spot correction only when deliberate and serious harm has already occurred.

It should be noted that this section does not provide a defense when the actor's crime consists of the use of coarse and obviously offensive language, or of other forms of language that are deliberately designed to harass; nor does the section apply when the actor has engaged in violence of any sort, even if he maintains that the violence was a form of social protest.

39-2505. Disrupting meeting or procession. — (a) An individual, corporation, or association commits an offense if, intending to prevent or disrupt a lawful meeting, procession, or gathering, he substantially obstructs or interferes with the meeting, procession, or gathering by physical action, verbal utterance, or any other means.

(b) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 42.05.

Cross-References:
"Association" defined, see § 39-107.
Disorderly conduct, see § 39-2501.
Obstructing highway, see § 39-2503.
Public intoxication, see § 39-2508.
Riot, see § 39-2502.

Comment:
The purpose of this section is to penalize offensive utterances which may not be sufficient to constitute disorderly con-

duct but which are clearly inappropriate and purposely directed at a disruptive goal. The present Tennessee statutory provisions only protect the tranquility of certain types of gatherings: religious, educational, literary, or temperance assemblies, T. C. A. § 39-1204. This section is a restatement of the statutory and common-law limitations on disrupting meetings. See State v. Watkins, 123 Tenn. 502, 130 S. W. 839 (1910).

39-2506. False alarm or report.—(a) An individual, corporation, or association commits an offense if he intentionally initiates or circulates a report of a present, past, or impending bombing, fire, offense, or other emergency, knowing that the report is false or baseless and intending or knowing:

(1) that it will cause action of any sort by an official or volunteer agency organized to deal with emergencies; or

(2) that it will place a person in fear of imminent serious bodily injury; or

(3) that it will prevent or interrupt the occupation of any building, room, place of assembly, place to which the public has access, or aircraft, automobile, or other form of conveyance.

(b) An offense under this section is a class B misdemeanor unless the actor's intent is to prevent or interrupt the occupation of a building, a place to which the public has access, or a facility of public transportation operated by a common carrier, in which event the offense is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 42.06.

Cross-References:
"Agency" defined, see § 39-107.
Assault, see § 39-1401.
"Association" defined, see § 39-107.
"Serious bodily injury" defined, see § 39-107.
Terroristic threat, see § 39-1405.

Comment:
This section proscribes not only false alarms to agencies of public safety but, in addition, false alarms to members of the public. It is, in several respects, broader than existing Tennessee law. T. C. A. § 39-1411 prohibits any false and malicious report that a bomb has been placed in or near any building or structure. Subsections (a)(2)—(a)(3) cover similar threats and those which place any person in fear of imminent serious bodily injury whether or not that person is in or near a structure or building. Subsection (a)(1) extends the present law on false fire alarms, T. C. A. § 39-2215, to cover false alarms for ambulances and other emergencies of the type dealt with by official or volunteer agencies organized for that purpose.

This section is not intended to reach situations in which a person causes terror or public inconvenience by threatening to commit a crime himself; those situations are the subject of § 39-1405 (terroristic threat). The two sections largely complement each other, however, since the Commission's object is to ensure that no form of misconduct falls into a "no man's land" between the two provisions. Similar considerations prompted the inclusion of both "official" alarms and alarms to members of the public in a single section. Both this section and § 39-1405 will simplify pleading and prevent the development of technical distinctions between closely similar situations.

39-2507. Harassment.—(a) An individual, corporation, or association commits an offense if he intentionally:

(1) communicates by telephone or in writing in a manner coarse and offensive to a person of reasonable sensibilities, and by this action

intentionally, knowingly, or recklessly annoys or alarms the recipient; or

(2) threatens, by telephone or in writing, to take unlawful action against any person, and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient; or

(3) places one or more telephone calls anonymously, or at an inconvenient hour, or in an offensively repetitious manner, or without a legitimate purpose of communication, and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient.

(b) For purposes of subsection (a)(3), a person places a telephone call as soon as he dials a complete telephone number, whether or not a conversation ensues.

(c) An offense under this section is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 42.07.
Mich. Prop. Pen. Code § 5535.
Model P. C. § 250.4.

Cross-References:
Assault, see § 39-1401.
"Association" defined, see § 39-107.
False alarm or report, see § 39-2506.
Terroristic threat, see § 39-1405.

Comment:
This section, which is concerned primarily with obscene or harassing telephone calls, is a restatement of the present Tennessee law, T. C. A. § 39-3002. The only significant change in the existing law is the extension of criminal sanctions to include harassment by writing.

39-2508. Public intoxication.—(a) An individual commits an offense if he appears in a public place under the influence of alcohol or any other substance, to the degree that, under the circumstances then existing, it is likely that he may endanger himself or another.

(b) For purposes of this section, "public place" means any place to which the public or a substantial portion of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(c) A peace officer or magistrate may release from custody an individual arrested under this section if he believes imprisonment is unnecessary for the protection of the individual or another.

(d) An offense under this section is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 42.08.
Cal. Pen. Code Ann. § 849.
Model P. C. § 250.5.

Cross-References:
Defense explained, see § 39-203.
Disorderly conduct, see § 39-2501.
"Magistrate" defined, see T. C. A. § 40-105, as amended.
"Peace officer" defined, see § 39-107.

Comment:
There were two million arrests for the offense of public intoxication in 1965, one for every three arrests in America. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness Offenses 1 (1967). There is evidence that a large number of those arrested had a lengthy history of prior drunkenness arrests, and that a disproportionate num-

ber were poor persons living in slums. The result is that alcoholics become part of the "revolving door" system in which they are arrested, convicted, fined and, unable to pay the fine, jailed for several days.

The chronic alcoholic should be treated as a sick person rather than a criminal, but adequate treatment facilities are not currently available. Model legislation designed to treat alcoholism as a medical-social problem has been proposed, see Alcoholism and Intoxication Treatment Act, National Institute of Mental Health (Final Draft: 1969). When treatment facilities become available, the Commission recommends that the legislature consider implementing this model act.

Some courts have held that a chronic alcoholic cannot be constitutionally convicted under a drunkenness statute, e.g., Easter v. District of Columbia, 361 Fed. (2d) 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 Fed. (2d) 761 (4th Cir. 1966); State v. Fearon, 283 Minn. 90, 166 N. W. (2d) 720 (1969). However, the Supreme Court in Powell v. Texas, 392 U. S. 514 (1968), rejected the argument that the eighth amendment's prohibition against cruel and unusual punishment automatically prevented the conviction of a chronic alcoholic for being drunk in a public place. Accord, Seattle v. Hill, 72 Wash. (2d) 786, 435 P. (2d) 692 (1967); People v. Hoy, 380 Mich. 597, 158 N. W. (2d) 436 (1968); Vick v. State, 453 P. (2d) 342 (Alaska 1969).

This section alters the present Tennessee common-law offense of public drunkenness. Smith v. Fielden, 205 Tenn. 313, 326 S. W. (2d) 476 (1959). The present offense merely requires that an individual be publicly intoxicated, whether or not he is a danger to himself or others as required by subsection (a)(1), Inman v. State, 195 Tenn. 303, 259 S. W. (2d) 531 (1953).

Two statutory prohibitions of intoxication on passenger conveyances and hospital premises, T. C. A. §§ 39-2518 and 39-2519, were recently repealed by Tenn. Pub. Acts 1972, ch. 599. That act provided for suspended sentences and probationary release for treatment at a state or community treatment facility with the imposition of the original sentence of up to 60 days and $50 as incentive for the probationer to complete the rehabilitative treatment.

Although the Commission does not believe public intoxication serious enough to warrant imprisonment, the offense has been reluctantly graded a class C misdemeanor to allow the regular probation and suspended sentence provisions to accomplish the commendable purposes of the recent act where such rehabilitative services are available.

Subsection (c) is derived from California law and validates present police practice.

39-2509. Desecration of venerated object.—(a) An individual, corporation, or association commits an offense if he intentionally desecrates:

(1) a place of worship or burial; or

(2) a state or national flag.

(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will offend a person of reasonable sensibilities likely to observe or discover his action.

(c) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 42.09.
Model P. C. § 250.9.

Cross-References:

"Association" defined, see § 39-107.
Criminal mischief, see § 39-1603.
Criminal trespass, see § 39-1803.

Comment:

This section, although derived from the Model Penal Code, is somewhat broader than that code in several respects. It requires only that the actor's conduct be known to be offensive to a man of reasonable sensibilities.

Although the section is broader than the Model Penal Code, its flag-desecration provisions are less stringent than those of present law. T. C. A. § 39-1603 declares that any person who ". . . shall publicly mutilate, deface, defile, defile, trample upon, or by word or act cast contempt upon . . ." any flag or standard of the State of Tennessee or the United States shall be punishable by a fine of not more than $3000 or 3 years imprisonment, or both. Additionally, destruction of the United States flag is punishable by imprisonment of 1-3 years or a $500-$1000 fine or both, T. C. A. § 39-1607. In a rarely enforced provision, Tennessee law also prohibits advertising with, or on, the flag of this state or the United States, T. C. A. §§ 39-1602, 39-1604, 39-1605. The depiction of a flag without any words thereon and disconnected with any advertisement, as well as acts permitted by the statutes of the United States are exempt from criminal sanctions, T. C. A. § 39-1604.

In prohibiting desecration of the flag "by word" the current statute is unconstitutional. Street v. New York, 394 U. S. 576 (1969). Moreover, although the Commission concluded that the psychological affront involved in flag desecration justifies its treatment as a crime, the present law's 3-year and/or $3000 fine penalty is excessive. Restraint, the Commission believes, is often a sign, not of weakness, but of self-confidence. While the use of our state and national flags for commercial advertising is not condoned, such actions should not be the subject of criminal sanctions. Furthermore, this heretofore seldom enforced prohibition, has a great potential for inequitable and discriminatory application.

The present statutory provisions on the desecration of graves, T. C. A. §§ 39-2101, 39-4506, 46-118, are continued as offenses under this section or fall within the provisions of § 39-1603 (criminal mischief). Additionally, subsection (a)(2) extends the protection of law to places of worship.

39-2510. Abuse of corpse.—(a) An individual, corporation, or association commits an offense if without legal privilege he intentionally or knowingly:

(1) physically mistreats a corpse in a manner offensive to a person of reasonable sensibilities; or

(2) disinters or dissects a corpse that has been buried or otherwise interred.

(b) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 42.10.

Cross-References:

"Association" defined, see § 39-107.
Criminal mischief, see § 39-1603.
Desecration of a venerated object, see § 39-2509.
Theft, see ch. 19.
"Without legal privilege," see § 39-2503 comment.

Comment:

This section is a compilation of the present criminal law relating to graves and dead bodies, T. C. A. §§ 39-2101—39-2107. The present section on opening graves with intent to steal therefrom, T. C. A. § 39-2104, has been treated in ch. 19 (theft). Likewise, the contemporary section on destruction or injury to cemetery property, T. C. A. § 39-2101, has been covered by the sections on criminal mischief, § 39-1603 and desecration of venerated objects, § 39-2509. The remainder of tit. 39, ch. 21 of the Tennessee Code has been consolidated in this section, which expands the existing law by making any offensive treatment of a corpse an offense. The offensive treatment is the same whether the abuse of the corpse takes the form of gross neglect, mutilation, or sexual abuse.

39-2511. Cruelty to animals.—(a) An individual, corporation, or association commits an offense if he intentionally or knowingly:

(1) tortures or grossly overworks an animal; or

(2) fails unreasonably to provide necessary food, care, or shelter for an animal in his custody; or

(3) abandons unreasonably an animal in his custody; or

(4) transports or confines an animal in a cruel manner; or

(5) causes one animal to fight with another; or

(6) inflicts burns, cuts, lacerations, or other injuries or pain, by any method, including blistering compounds, to the legs or hooves of horses in order to make them sore for the purpose of competition in horse shows and similar events.

(b) It is a defense to prosecution under this section that the actor was engaged in accepted veterinary practices or bona fide experimentation for scientific research.

(c) For purposes of this section, "animal" means a domesticated living creature or a wild living creature previously captured. "Animal" does not include an uncaptured wild creature or a wild creature whose capture was accomplished by conduct at issue under this section.

(d) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 42.11.

Cross-References:
"Association" defined, see § 39-107.
Criminal mischief, see § 39-1603.
Defense explained, see § 39-203.
"Effective consent" defined, see § 39-107.
Game laws, see T. C. A. tit. 51.
Theft, see ch. 19.
"Without legal privilege," see § 39-2503 comment.

Comment:
This section is substantially simpler than existing law. Presently, T. C. A. § 39-402 proscribes the willful killing of any horse, mare, gelding, etc. of another. Such killing has been deleted from this section as it is adequately covered by the section on criminal mischief, § 39-1603. T. C. A. §§ 39-403—39-406, 39-408, 39-423, 39-424, are completely covered by subsections (a)(1)-(a)(5). Subsection (a)(6) is a restatement of T. C. A. § 39-420 which proscribes the intentional or knowing soring of the hooves and legs of horses for competition purposes.

The squabbles and disputes of a frontier society come to life in the present Tennessee Code's provisions on animals, but the Code's elaboration has not yielded precision. By contrast, this section describes in simple, understandable terms the conduct that virtually all statutes in this area seek to proscribe.

This section does not contain many sections currently found in T. C. A. §§ 39-401—39-424 relative to the powers and privileges of societies for the prevention of cruelty to animals. The Commission was of the opinion that these sections were not amenable to inclusion in this code.

The protection of this section is limited to domesticated animals (pets and livestock) and to captured wild animals, as is that of present law. See T. C. A. § 39-401. Inhumane methods of hunting, trapping, or capturing other wild animals are properly the subject of the game laws rather than the Criminal Code.

39-2512. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 42.12.

Cross-References:
"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:
Municipal ordinances presently conflict with and overlap state law in the area of disorderly conduct and related offenses against public order. The Code of the Metropolitan Government of Nashville and Davidson County (1967), for example, prohibits disorderly conduct, § 29-1-15; drunkenness or intoxication, § 29-1-20; assembling to disturb citizens or travelers, § 29-1-4; false alarms, § 29-1-21; and indecent acts, gestures or language, § 29-1-32. These offenses and others are covered by the present state law. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, § 39-2512 makes clear the state intends to preempt the area of disorderly conduct and related offenses against public order and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

This chapter deals comprehensively with disorderly conduct and related offenses against public order, and forms of disorderly-type conduct omitted from this chapter (and not covered elsewhere in the code) are purposely exempted from criminal sanction. Thus, a governmental subdivision or agency may not enact or enforce a law criminalizing vagrancy or loitering, for example, or directing abusive language at a peace officer, or wearing a mask in public. In addition, of course, laws conflicting with the provisions of this chapter—e.g., redefining the public place concept, prohibiting drunkenness in a private residence, punishing negligent or reckless desecration of a flag, are prohibited.

CHAPTER 26

PUBLIC INDECENCY

Subchapter A. Prostitution

39-2601. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Deviant sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person.

(2) "Prostitution" means the offense defined in § 39-2602.

(3) "Sexual contact" means any touching of the anus or any part of the genitals of another person, or of the breast of a female ten (10) years or older, with intent to arouse or gratify the sexual desire of any person.

(4) "Sexual conduct" includes deviant sexual intercourse, sexual contact, and sexual intercourse.

(5) "Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

39-2602. Prostitution.—(a) An individual commits prostitution if:

(1) he offers to engage, agrees to engage, or engages in sexual conduct for hire; or

(2) he hires another to engage in sexual conduct with him; or

(3) he solicits another in a public place to engage with him in sexual conduct for hire.

(b) An offense is established under subsection (a)(3) whether the actor solicits a person to hire him or offers to hire the person solicited.

(c) For purposes of subsection (a)(3), "public place" means any place to which the public or a substantial portion of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(d) Prostitution is a class C misdemeanor unless the actor has been convicted one or more times before under this section, in which event prostitution is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 43.02.
N.Y. Rev. Pen. Law § 230.00.

Cross-References:

Aggravated promotion of prostitution, see § 39-2604.
Compelling prostitution, see § 39-2605.
Construction of statute: gender, see T. C. A. § 1-304.
"Conviction" defined, see § 39-107.
Disorderly conduct, see § 39-2501.
Promotion of prostitution, see § 39-2603.
"Sexual conduct" defined, see § 39-2601.

Comment:

Subsection (a)(1) applies only to the prostitute and redefines the offense of prostitution currently found in T. C. A. §§ 39-3501, 39-3502. The elements of a fee or "hire" in subsection (a) assure that only commercialized sex will be penalized by this section. Thus, the present extension of prostitution to "licentious sexual intercourse without hire," T. C. A. § 39-3501, is omitted from the offense of prostitution. Since the pronoun "he" includes both male and female, see T. C. A. § 1-304, both homosexual and heterosexual prostitution is covered. In addition, subsection (a)(2) treats the patron and the prostitute equally.

Subsection (a)(3) focuses on the public nuisance aspect of prostitution. It reflects the notion that citizens ought to be able to go about in public places without being exposed to offensive solicitation. Since this interest is violated whether the solicitation comes from a potential customer or from a prostitute, subsection (b) makes clear that the offense is committed if either a prostitute or would-be customer solicits another in a public place.

The classifications of the offense in subsection (d) is in keeping with the policy of T. C. A. § 39-3504 which uses a similar graduated penalty for repeating offenders.

39-2603. Promotion of prostitution.—(a) An individual, corporation, or association commits an offense if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he receives money or other property pursuant to an agreement to participate in the proceeds of prostitution.

(b) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 43.03.
N.Y. Rev. Pen. Law § 230.20.

Cross-References:

Aggravated promotion of prostitution, see § 39-2604.
"Association" defined, see § 39-107.
Compelling prostitution, see § 39-2605.
Prostitution, see § 39-2602.
"Prostitution" defined, see § 39-2601.

Comment:

This section applies to persons other than prostitutes, such as the pimp and procurer, who profit from prostitution. This section is similar to T. C. A. § 39-3503 which proscribes the procuring of female inmates for houses of prostitution and receiving money from prostitution. Of course, a person who aids in the commission of prostitution, whether or not for pecuniary gain, is responsible as a party under ch. 5, subch. A (complicity). Use of the complicity theory obviates the necessity for separate sections on assignation and aiding and abetting prostitution. See T. C. A. §§ 39-3501, 39-3502.

39-2604. Aggravated promotion of prostitution.—(a) An individual, corporation, or association commits an offense if he owns, invests in, finances, controls, supervises, or manages a continuing prostitution enterprise that uses two (2) or more prostitutes.

(b) An offense under this section is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 43.04.
N.Y. Rev. Pen. Law § 230.25.

Cross-References:

"Association" defined, see § 39-107.
Compelling prostitution, see § 39-2605.
Promotion of prostitution, see § 39-2603.
Prostitution, see § 39-2602.
"Prostitution" defined, see § 39-2601.

Comment:

This section creates the new offense of aggravated promotion of prostitution in order to more effectively deter maintenance of houses of prostitution. The operation must be a continuing one using at least two prostitutes before a conviction can be obtained under this section.

39-2605. Compelling prostitution.—(a) An individual, corporation, or association commits an offense if:

(1) he causes another by force or threat to commit prostitution; or

(2) he causes a person younger than sixteen (16) years to commit prostitution.

(b) An offense under this section is a felony of the second degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 43.05.

Cross-References:

Aggravated promotion of prostitution, see § 39-2604.
"Association" defined, see § 39-107.
Computation of age, see § 39-106.
False imprisonment, see § 39-1202.
Promotion of prostitution, see § 39-2603.
Prostitution, see § 39-2602.
"Prostitution" defined, see § 39-2601.
Rape, see §§ 39-1302, 39-1306.
Sexual abuse, see §§ 39-1304, 39-1307.

Comment:

This section is in keeping with the new T. C. A. § 39-3505 which prescribes more serious punishments for the most reprehensible forms of procuring and promoting prostitution.

Subchapter B. Obscenity

39-2621. Definition of obscene.—(a) In this subchapter, unless the context requires a different definition, "obscene" means having as a whole a dominant theme:

(1) that appeals to a prurient interest in sex or excretion; and

(2) that is patently offensive because it affronts contemporary community standards relating to the description or representation of sex or excretion; and

(3) that is utterly without redeeming social value.

(b) For purposes of subsection (a)(2), "community" may not encompass an area less than the territory of this state.

(c) In determining whether material is obscene under subsection (a), the trier of facts shall consider the following factors among others:

(1) the character of the audience for which the material was designed or to which it was directed;

(2) the predominant appeal of the material for ordinary adults or any special audience to which it was directed;

(3) the degree of acceptance of the material in the United States;

(4) the purpose and reputation of the author, creator, publisher, or distributor;

(5) any artistic, literary, scientific, educational, or other merit of the material.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 39-3006, 39-3007.
Tex. P. C. Prop. Rev. § 43.21.
Ill. Stat. Ann. ch. 38, § 11-20.
Model P. C. § 251.4.

Cross-References:
Harmful material, see § 39-2624.
Obscene display, see § 39-2622.
Obscenity offense, see § 39-2623.
Public lewdness, see § 39-2641.

Comment:
The definition of obscene tracks that in present law, T. C. A. §§ 39-3006, 39-3007, and is the current constitutional standard. See Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966); ABC Books, Inc. v. Benson, 315 Fed. Supp. 695 (M.D. Tenn. 1970). Each of the three elements must be considered independently. Robert Authur Management Corp. v. State ex rel. Canale, 220 Tenn. 101, 414 S. W. (2d) 638, rev'd, 389 U. S. 578 (1967). The element of excretion is included because of §§ 39-2622 and 39-2624 on obscene and harmful displays.

Although T. C. A. § 39-3007 does not define community, T. C. A. § 39-3006 refers to the degree of acceptance in the United States. Justice Brennan expressed the view in Jacobellis v. Ohio, 378 U. S. 184 (1964), that the appropriate standard was that of the national community. See also Newman v. Conover, 313 Fed. Supp. 623 (N.D. Tex. 1970).

The evidentiary rules are derived from the Tennessee law, T. C. A. § 39-3006. These rules will guide the trier of facts in determining whether material is obscene, and expert testimony is admissible if relevant to the rules.

39-2622. Obscene display.—(a) An individual, corporation, or association commits an offense if he knowingly displays an obscene photograph, drawing, or similar visual representation and is reckless about whether a person is present who will be offended or alarmed by the display.

(b) An offense under this section is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 43.22.
Mich. Prop. Pen. Code § 6320.

Cross-References:
"Association" defined, see § 39-107.
Harmful material, see § 39-2624.

"Obscene" defined, see § 39-2621.
Obscenity offense, see § 39-2623.
Public lewdness, see § 39-2641.

Comment:
This section creates a new offense in Tennessee. The Supreme Court has suggested that obtrusive publication may be an element of obscenity if it is impossible for an unwilling individual to avoid exposure to it. Redrup v. New York, 386 U. S. 767 (1967). The use of the phrases "knowingly" and "reckless" constitute a requirement of a finding of specific scienter as is constitutionally required. See ABC Books, Inc. v. Benson, 315 Fed. Supp. 695 (M.D. Tenn. 1970). This section recognizes that the public is acutely sensitive to public breaches of sexual and scatological taboos. The public place concept in this section, which parallels that in section 39-2641 (public lewdness) depends on the nature of the audience rather than the location.

39-2623. Obscenity.—(a) An individual, corporation, or association commits an offense if, knowing the matter is obscene:

(1) he sells, commercially distributes, or possesses for sale or commercial distribution an obscene writing, picture, recording, or other representation or embodiment of the obscene; or

(2) he presents or directs an obscene play, dance, or performance or participates in that portion of the play, dance, or performance that makes it obscene.

(b) It is an exception to the application of this section:

(1) that the obscene material is possessed by a person having scientific, educational, governmental, or other similar justification; or

(2) that the obscene matter is distributed or presented to personal associates of the actor.

(c) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 39-3003.
Tex. P. C. Prop. Rev. § 43.23.

Cross-References:
"Association" defined, see § 39-107.
Exception explained, see § 39-202.
Harmful material, see § 39-2624.
"Obscene" defined, see § 39-2621.
Public lewdness, see § 39-2641.

Comment:
The main purpose of this section and the present Tennessee law is to prohibit commercial distribution of obscenity. See T. C. A. § 39-3003. Possession of obscene material for private consumption is protected by the first amendment. Stanley v. Georgia, 394 U. S. 557 (1969); Stein v. Batchelor, 300 Fed. Supp. 602 (N.D. Tex. 1969).

"Knowing" is used because the actor must have scienter, Smith v. California, 361 U.S. 147 (1959); ABC Books, Inc. v. Benson, 315 Fed. Supp. 695 (M.D. Tenn. 1970). If a sei could be convicted because he is reckless about whether matter is obscene, he would tend to restrict the matter sold, and the state would be proscribing the sale of some constitutionally protected matter.

Performers who are not involved in the obscene act and those who assist with the production are not punishable under subsection (a)(2), but persons who control or direct the performance are.

In a classic case the Kinsey Institute was allowed to import obscene photographs for scientific investigation, United States v. 31 Photographs, 156 Fed. Supp. 350 (S.D.N.Y. 1957), and subsection (b)(1) continues this exception. The exception for noncommercial distribution to personal associates of the actor, subsection (b)(2), is consistent with the section's purpose of prohibiting commercial dissemination and with Stanley v. Georgia, 394 U.S. 557 (1969), and probably continues the present Tennessee law, T. C. A. § 39-3003.

39-2624. Sale, distribution, or display of harmful material to juvenile.—(a) In this section, unless the context requires a different definition:

(1) "Juvenile" means an individual younger than sixteen (16) years.

(2) "Harmful material" means material whose dominant theme taken as a whole:

(A) appeals to the prurient interest of a juvenile in sex or excretion; and

(B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for juveniles; and

(C) is utterly without redeeming social value for juveniles.

(b) For purposes of subsection (a)(1)(B), "community" may not encompass an area less than the territory of this state.

(c) An individual, corporation, or association commits an offense if, knowing the material is harmful:

(1) he sells, distributes, or possesses for sale or distribution harmful material to a juvenile; or

(2) he displays harmful material and is reckless about whether a juvenile is present who will be offended or alarmed by the display.

(d) It is an exception to the application of this section:

(1) that the harmful material is distributed by a juvenile to his personal associates; or

(2) that the sale or distribution is by a person having scientific, educational, governmental, or other similar justification.

(e) It is a defense to prosecution under this section:

(1) that the sale or distribution was to a juvenile who the actor reasonably believed was sixteen (16) years or older; or

(2) that the sale or distribution was to a juvenile who was accompanied by his parent, guardian, or spouse, or by an adult who the actor reasonably believed was the juvenile's parent, guardian, or spouse.

(f) An offense under this section is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 43.24.
T. C. A. §§ 39-1012—39-1016.
N.Y. Rev. Pen. Law §§ 235.21, 235.22.

Cross-References:

"Association" defined, see § 39-107.
Computation of age, see § 39-106.
Defense explained, see § 39-203.
Exception explained, see § 39-202.
Obscene display, see § 39-2622.
Public lewdness, see § 39-2641.
"Reasonable belief" defined, see § 39-107.

Comment:

It has long been recognized that the state has a valid special interest in the well-being of its children. Prince v. Massachusetts, 321 U.S. 158 (1944). A state may regulate the materials that juveniles view and read even if they could not be proscribed for adults.

The definition of harmful material is substantially the same as present law, T. C. A. § 39-1012, and is the current constitutional standard. Ginsberg v. New York, 390 U.S. 629 (1968). Each of the three elements must be considered independently.

By defining "community" as an area not less than the territory of this state, the section avoids problems that might be created by Justice Brennan's statement in Jacobellis v. Ohio, 378 U.S. 184 (1964), to the effect that the appropriate standard was the national community.

Knowledge is the required mental element because the actor must have scienter. Smith v. California, 361 U.S. 147 (1959). This retains the requirement of present T. C. A. § 39-1012.

Subsection (c)(2) retains the offense of harmful display to a minor, now in T. C. A. §§ 39-1012—39-1018 paralleling the obscene display offense in § 39-2622.

The exception for distribution of harmful material by a minor to his personal associates recognizes that young people may share harmful material with their friends and that this conduct is not deserving of criminal sanction. Subsections (d)(2) and (e) preserve exemptions in present law, T. C. A. §§ 39-1012, 39-1014.

39-2625. Injunctive relief.—(a) If the district attorney-general is of the opinion that § 39-2623 or § 39-2624 is being violated, he may file a petition in a circuit, chancery, or criminal court relating his opinion, and request the court to issue a temporary restraining order or a temporary injunction enjoining the individual, corporation, or association named from selling, distributing, displaying, or exhibiting the material or removing it from the jurisdiction of the court pending an adversary hearing on the petition.

(b) If a temporary restraining order or after notice a temporary injunction is so issued, the person enjoined shall answer within the time set by the court not to exceed sixty (60) days. The adversary hearing shall be held within two (2) days after the joinder of issues. At the conclusion of said hearing, or within two (2) days thereafter, the court will determine whether the material is, in fact, obscene.

(c) On a finding of obscenity, the court shall grant a temporary injunction or continue its injunction in full force and effect for a period not to exceed forty-five (45) days or until the matter has been submitted to the grand jury. If forty-five (45) days elapse and the grand jury has taken no action, the injunction terminates. The injunction also terminates on the grand jury's return of a not true bill. On the return of a true bill of indictment, the court shall order the obscene material delivered into the hands of the court clerk or district attorney-general, there to be held as evidence in the case.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 39-1015, 39-3003.

Cross-References:

"Association" defined, see § 39-107.
Grand jury proceedings, see T. C. A. tit. 40, ch. 11, as amended.
"Indictment" defined, see T. C. A. § 40-105, as amended.
Not true bill, see T. C. A. § 40-1114, as amended.
"Obscenity" defined, see § 39-2621.

Comment:

The Tennessee legislature has reworked the procedures for injunctive relief against obscenity on numerous occasions, demonstrating a belief that this procedure merits the labor necessary to save it from constitutional attack. The present Tennessee statutes meet the requirements set out in A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964). That case held unconstitutional a statute allowing seizure and ex parte search warrants without an adversary hearing. Tennessee's statutes on injunctions against obscenity, T. C. A. §§ 39-3003—39-3007 were upheld in ABC Books, Inc. v. Benson, 315 Fed. Supp. 695 (M.D. Tenn. 1970). See Comment, 23 Vand. L. Rev. 1352 (1970). Since that time the relief against continued dissemination of obscene materials previously available only under the "civil injunction" statute, T. C. A. § 39-3005, has been included in the "criminal injunction" section, T. C. A. § 39-3003, from which this section was drawn.

Subchapter C. Miscellanecus

39-2641. Public lewdness.—(a) An individual commits public lewdness if he engages in any of the following acts and he is reckless about whether another is present who will be offended or alarmed by his act:

(1) an act of sexual intercourse;

(2) an act of deviant sexual intercourse;

(3) any act involving contact between the person's mouth or genitals and the genitals or anus of an animal or fowl;

(4) the exposure of his anus or any part of his genitals, with intent to arouse or gratify the sexual desire of any person.

(b) A person may not be convicted of an offense under this section upon the uncorroborated testimony of the alleged victim or complainant. Corroboration may be circumstantial.

(c) Public lewdness is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. §§ 21.07, 21.08.
Ill. Stat. Ann. ch. 38, § 11-09.

Cross-References:

Assault, see § 39-1401.
"Deviant sexual intercourse" defined, see § 39-2601.
Disorderly conduct, see § 39-2501.
"Sexual contact" defined, see § 39-2601.
"Sexual intercourse" defined, see § 39-2601.

Comment:

Like the common law in Tennessee, this section punishes lewd or indecent acts performed in public, and the concept of "publicness" in this section, which depends on the nature of the audience rather than the location, clarifies present law. Section 39-2641 defines "publicness" in terms of the perceived likelihood of another person's being present who will be offended or alarmed by the lewd act. Under this definition a public park could be a private place, and excluded from § 39-2641, at 3 a.m.; but a private residence may have people present whom the actor perceives are likely to be offended or alarmed, thus coming within the terms of § 39-2641. In Grisham v. State, 10 Tenn. (2 Yerg.) 589, 596 (1831), the court stated that "open and notorious lewdness" required that the act be "done in such a manner, or under such circumstances as necessarily to become public, or generally known in the neighborhood." See Abbott v. State, 163 Tenn. 384, 43 S. W. (2d) 211 (1931).

Section 39-2641 does not proscribe exposure of the buttocks or female breast, two areas of the anatomy not traditionally included within the term "genitals," because to do so would criminalize half those present at any time at a public swimming pool. In any event, most prosecutions under existing law have involved either total nudity or exposure of the male genital organ, conduct clearly covered by § 39-2641.

Subsection (c) applies the corroboration requirement of the sexual offenses chapter (see § 39-1309) to public lewdness offenses. It is a safeguard to the prosecution of noncriminal conduct at little cost to the efficiency of the section.

39-2642. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 43.31.

Cross-References:

"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:

Municipal ordinances presently conflict with and overlap state law in the area of public indecency. Prostitution and obscenity ordinances are found in many municipal codes. For example, the Code of the Metropolitan Government of Nashville and Davidson County (1967), prohibits prostitution and lewdness, §§ 29-1-49—29-1-50; indecent, vulgar, or obscene pictures or other matters that are inimical to the public health, including ridicule or attack on any religious or racial group, § 29-1-43; and, indecent exhibitions in public places including unseemly and indecent acts, § 29-1-45. These ordinances were enacted despite the existence of state law proscribing most of the same conduct. To eliminate this conflict and confusion between state and local law and prevent future conflict and confusion, § 39-2642 makes clear the state intends to preempt the area of public indecency and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Even without § 39-2642, most current obscenity ordinances are invalid in light of recent U.S. Supreme Court decisions. Subchapter B of this chapter for the most part codifies these recent decisions, and together with this section prohibits local laws, for example, that authorize seizure of allegedly obscene material.

Many of the state's prostitution statutes have also fallen victim to constitutional attack in recent years. Subchapter A comprehensively prohibits all forms of prostitution, however, so there is no need (and in light of this section, no state constitutional authorization) for local law on the subject.

Local law conflicting with the provisions of this chapter is of course also prohibited, e.g., redefining the public place concept, raising the age of minority, deleting the scienter element of the offense of obscenity.

CHAPTER 27

GAMBLING

COMMENTS OF LAW REVISION COMMISSION

Comment:

This chapter comprehensively proscribes gambling with only a narrow exemption in the form of a defense for purely noncommercial gambling in a private place. Class A misdemeanor and third-degree felony penalties are provided for gambling promotion, usually conducted by organized crime, with class C misdemeanor treatment reserved for customers of gambling enterprises and others whose social gambling does not fall within the narrow defense. The sections prohibiting gambling promotion, along with the gambling paraphernalia possession offenses and seizure authorization, and nuisance abatement provisions, provide full statutory authority for the prevention of commercialized, exploitative gambling in this state.

Unhappily, these prohibitions apply literally to various forms of gambling that are usually condoned, e.g., matching coins in a coffee shop, church bingo games, and charity raffles. The difficulty in framing exemptions for socially accepted forms of gambling lies in the facility with which they may be used as loopholes by professional gambling promoters who are the primary target of

the prohibition. The present law's exemptions, therefore, for tax exempt organizations are retained as the least abusable form of exception to the gambling prohibition statutes.

39-2701. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Gambling" means risking anything of value for a profit whose return is to any degree contingent on chance, but does not include:

(A) a lawful business transaction; or

(B) playing an amusement device that confers only an immediate and unrecorded right of replay not exchangeable for value.

(2) "Gambling bet" means anything of value risked in gambling.

(3) "Gambling device or record" means anything specially designed for use in gambling, or used primarily for gambling.

(4) "Lottery" means the selling for anything of value of chances on a prize or stake.

(5) "Private place" means a place to which the public does not have access, and excludes, among other places: streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transport facilities, and shops.

(6) "Profit" means anything of value in addition to the gambling bet.

COMMENTS OF LAW REVISION COMMISSION

Cross-References:

Contraband seizure, see T. C. A. § 40-823, as amended.

Gambling device as contraband, see T. C. A. § 40-821, as amended.

Comment:

The definition of gambling derives from N.Y. Rev. Pen. Law § 225.00 and greatly improves upon the 174 year old definition in T. C. A. § 39-2001. The delineation of transactions excluded gives much-needed certainty to the gambling law. The first exception to the definition of gambling, subdivision (1)(A), excludes insurance, indemnity contracts, stock market and futures speculation, etc., all of which involve money risked on chance. The exception for nonpaying pinball-type machines clarifies present law, which often is confusing due to conflict between state law and local ordinances.

39-2702. Gambling.—(a) An individual, corporation, or association commits an offense if he knowingly engages in gambling.

(b) It is a defense to prosecution for gambling:

(1) that the actor engaged in gambling in a private place; and

(2) that no individual, corporation, or association received any economic benefit other than personal winnings; and

(3) that, except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) An offense under this section is a class C misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 47.02.

Cross-References:

"Association" defined, see § 39-107.
Defense explained, see § 39-203.
Exception for charities, see § 39-2707.
"Gambling" defined, see § 39-2701.
"Private place" defined, see § 39-2701.
Seizure of gambling device, see T. C. A. § 40-823, as amended.

Comment:

This section prohibits every form of gambling, but provides a defense for the "friendly poker game." The application of the section depends on the comprehensive definition of gambling in § 39-2701: "risking anything of value for a profit whose return is to any degree contingent on chance," with exceptions for business transactions and certain amusement devices. Section 39-2707 also provides an exception for tax exempt organizations.

The elements of the defense are designed to exclude any form of exploitative or commercialized gambling. The evidence must show that no participant received an economic benefit other than winnings; therefore, if one party gets a special cut from each pot or charges for the privilege of using the facilities, none of the participants can rely on the defense.

If the "odds" of the game are stacked in favor of one party, subsection (b)(3) excludes the defense. However, the equal risks and chances requirement of subsection (b)(3) refers only to the rules of the game, not to the advantages that accrue to a skilled player. Therefore, a game which ensures a profit to the house or banker, regardless of the luck or skill involved, is not a "friendly" game to which the defense applies; but the presence of a superior, even professional player, who relies on skill and luck, does not vitiate the defense.

Finally, the requirement of presence in a private place effects the Commission's concern to prohibit social gambling in public places. Of course, if a private residence or hotel room is converted to a gambling casino, the promoters are criminally responsible under the gambling promotion and paraphernalia possession offenses of this chapter. The defense is not extended to clubs and other locations that are only nominally private and to which, in fact, the public has access.

39-2703. Gambling promotion.—(a) An individual, corporation, or association commits gambling promotion if he induces or aids another to engage in gambling, and:

(1) he intends to derive or derives an economic benefit other than personal winnings from the gambling; or

(2) he participates in the gambling and has, other than by virtue of skill or luck, a lesser risk of losing or greater chance of winning than one or more of the other participants.

(b) Gambling promotion is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 47.03.

Cross-References:

"Association" defined, see § 39-107.
Aggravated gambling promotion, see § 39-2704.
Exception for charities, see § 39-2707.
Gain fine, see § 39-841.
"Gambling" defined, see § 39-2701.
Rigging contest, see § 39-2043.
Seizure of gambling device, see T. C. A. § 40-823, as amended.

Comment:

Section 39-2703 defines and prohibits exploitative gambling. It reaches the professional gambler, one who solicits or aids others to gamble and profits from the gambling by playing with advantageous odds or by charging the other participants for use of the facilities or equipment. These are the elements which distinguish social gambling, in which the only possibility of exploitation arises from the superior skill of a player, from commercial gambling, in which the promoter is ensured a profit regardless of his skill or luck in playing the game. This form of gambling exploits human weakness and attracts organized crime and is therefore punishable as the highest class of misdemeanor.

Present law, T. C. A. § 39-2002, attempts to control the same behavior, but with less precision. Section 39-2703 adds to it the requirement of an advantageous position by the promoter. In addition, present prohibitions of a variety of promotional activities will be made unnecessary by this comprehensive section. E.g., T. C. A. § 39-2003 (keeping gambling house); § 39-2004 (keeping room or table for certain gambling); § 39-2014 (promoting betting on horse race); § 39-2015 (keeping place for betting on horse race); § 39-2031 (solicitation to engage in gambling). See generally Fugate v. State, 21 Tenn. 397 (1841).

Inducing or aiding others to gamble includes soliciting or taking bets, furnishing facilities and paraphernalia, and staging games or contests for the purpose of gambling. Of course, any form of gambling requires that someone initiate the game and thus induce another to gamble; but it is the exploitative element of subsection (a)(1) or (a)(2) that distinguishes the gambling promoter from the social gambler and establishes criminal responsibility under this section.

39-2704. Aggravated gambling promotion. — (a) An individual, corporation, or association commits aggravated gambling promotion if he knowingly invests in, finances, owns, controls, supervises, manages, or participates in a gambling enterprise.

(b) For purposes of this section, "gambling enterprise" means two (2) or more persons regularly engaged in gambling promotion as defined in § 39-2703.

(c) Aggravated gambling promotion is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 47.04.

Cross-References:

"Association" defined, see § 39-107.
Exception for charities, see § 39-2707.
Gain fine, see § 39-841.
Gambling, see § 39-2702.
Rigging contest, see § 39-2043.
Seizure of gambling device, see T. C. A. § 40-823, as amended.

Comment:

This section provides a felony penalty for organized gambling promotion by two or more persons. The prohibition against owning, financing, managing, or participating in a gambling enterprise reaches all persons involved in the business, whether directly as game operators or dealers, or indirectly as promoters. A gambling enterprise is defined in terms of a continuing operation involving two or more persons, all of whom are violating § 39-2703 (gambling promotion). The gambling promotion enterprise is the most profitable means for gambling exploitation and is therefore graded a felony. A 1-5 year term is currently authorized for professional gambling, T. C. A. § 39-2032.

39-2705. Possession of gambling device or record.—(a) An individual, corporation, or association commits an offense if he knowingly possesses a gambling device or record with intent to use it in gambling.

(b) It is a defense to prosecution under this section that the gambling device or record was possessed for use only in connection with gambling in a private place where no participant received any economic benefit other than personal winnings and where, except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.

(c) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

N.Y. Rev. Pen. Law §§ 225.00, 225.15, 225.30.
Tex. P. C. Prop. Rev. § 47.05.

Cross-References:

Defense explained, see § 39-203.
Exception for charities, see § 39-2707.
"Gambling device or record" defined, see § 39-2701.
Nuisance, see § 39-2707.
"Possess" defined, see § 39-107.
"Private place" defined, see § 39-2701.
Seizure of gambling device, see T. C. A. § 40-823, as amended.

Comment:

This section employs the functional definition of "gambling device or record" in § 39-2701 to prohibit knowing possession with intent to use for gambling. Present T. C. A. § 39-2006 imposes only a 3-month misdemeanor sentence for possession of a gaming table or device but does not include the intent required in this section. Section 39-2705 provides uniform class A misdemeanor punishment for possessing any gambling device or record.

Subsection (b) allows the same "friendly poker game" defense as the basic gambling offense, § 39-2702.

39-2706. Lotteries, chain letters, and pyramid clubs.—(a) An individual, corporation, or association commits an offense if he knowingly makes or aids in the making of any lottery.

(b) For purposes of this section "making a lottery" includes the organization of, membership in, or solicitation of persons for membership in any chain letter club, pyramid club, or other group organized under any plan whereby anything of value to be given by members thereof is to be given to any other member thereof, which plan includes any provision for the increase in membership through a chain process of new members securing other new members and thereby advancing themselves in the group to a position where such members in turn receive things of value from other members.

(c) An offense under this section is:

(1) a class C misdemeanor if the aggregate amount of money involved in the lottery, chain letter, or pyramid club was fifty dollars ($50) or less;

(2) a class A misdemeanor if the aggregate amount of money involved in the lottery, chain letter, or pyramid club was more than fifty dollars ($50) but less than two hundred fifty dollars ($250);

(3) a felony of the third degree if the aggregate amount of money involved in the lottery, chain letter, or pyramid club was two hundred fifty dollars ($250) or more but less than ten thousand dollars ($10,000); or

(4) a felony of the second degree if the amount of money involved in the lottery, chain letter, or pyramid club was ten thousand dollars ($10,000) or more.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 39-2017.

Cross-References:

"Association" defined, see § 39-107.
Exception for charities, see § 39-2707.
Fine based on gain, see § 39-841.
Theft, see ch. 19.

Comment:

Although the exploitative nature of pyramid schemes arguably brings them within the definition of gambling in § 39-2701, the Commission felt it necessary to include a special prohibition. The difficulty in defining the offense is evident, but in essence the definition in subsec-

tion (b) restates the one presently in use in T. C. A. § 39-2017. The present statute allows a penalty of $1,000 fine and/or 3 months' imprisonment. Because of the close relationship of the offense to theft, ch. 19, the offense has here been graded in accordance to the aggregate amount of money involved.

39-2707. General provisions.—(a) If the acts constituting gambling are bingo games, lotteries, or similar games of chance, it is an exception to the application of any section in this chapter that no part of the gross receipts from such game is used for other than benevolent, charitable, or religious purposes and that no part of the gross receipts from the game inure to the benefit of any member or employee of the organization and no part of such receipts is used for the purpose of constructing, renting, or maintaining a building to be occupied by the organization if the game is conducted by:

(1) an organization exempt from tax under paragraph (3) of subsection (c) of § 501 of the Internal Revenue Code of 1954, as amended; or

(2) a labor organization exempt from tax under paragraph (5) of subsection (c) of § 501 of the Internal Revenue Code of 1954, as amended, if all receipts after deduction of necessary expenses are placed in a special account to be used for charitable purposes and an annual accounting of such fund is filed with the secretary of state not later than July first of each year.

(b) Gambling devices and any building, room, or premise used for a gambling enterprise, as defined in § 39-2704, are public nuisances and subject to abatement as such.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 39-2033—39-2036.

Cross-References:
Abatement of public nuisance, see T. C. A. tit. 23, ch. 3.
"Exception" explained, see § 39-202.
"Gambling device" defined, see § 39-2701.
"Gambling enterprise" defined, see § 39-2704.
Seizure of gambling devices, see T. C. A. § 40-823, as amended.

Comment:
Subsection (a) retains the present law's exception for charitable purpose raffles, bingos, and lotteries conducted by certain organizations. Reference to the Internal Revenue Code appears to be the best method of closely defining the categories of organizations exempted. The use of funds collected by such means is restricted and accounting is required as in the present statute.

Subsection (b) provides nuisance treatment for gambling devices and premises in addition to the seizure of gambling devices authorized by the contraband seizure provision of the Code of Criminal Procedure. See T. C. A. § 40-823, as amended.

39-2708. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 47.08.

Cross-References:
"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:
Municipal ordinances presently conflict with and overlap state law in the area of gambling. For example, the Code of the Metropolitan Government of Nashville and Davidson County (1967) has an entire chapter devoted to gambling which prohibits, among others: gambling, § 18-1-2; promoting gambling, § 18-1-3; keeping gambling house, § 18-1-4; possession of gambling devices, § 18-1-5; pay-offs on amusement devices, § 26-2-10. These and similar ordinances exist despite the existence of elaborate prohibitions against all forms of gambling in T. C. A. tit. 39, ch. 20. To eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, § 39-2708 makes clear the state intends to preempt the area of gambling and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

Chapter 27 consolidates and simplifies the state's antigambling prohibitions, and in some instances expands the prohibitions of present law. There is no need, consequently, for local law in the area, and § 39-2708 specifically prohibits its enactment and enforcement. Thus, local laws prohibiting dart games, for example, or any other special form of gambling, are invalid, as are, of course, local laws conflicting with the provisions of this chapter, e.g., contracting the private place defense, redefining gambling device or record.

CHAPTER 28

WEAPONS

39-2801. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Club" means any instrument that is specially designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with the instrument.

(2) "Explosive" includes dynamite, nitroglycerin, or any other explosive.

(3) "Explosive weapon" means any explosive, incendiary, or poison gas:

(A) bomb;

(B) grenade;

(C) rocket;

(D) mine;

(E) shell, missile, or projectile that is designed, made, or adapted for the purpose of inflicting serious bodily injury, death, or substantial property damage.

(4) "Firearm" means any weapon designed, made, or adapted to expel a projectile by the action of an explosive, or any device readily convertible to that use.

(5) "Firearm silencer" means any device designed, made, or adapted to muffle the report of a firearm.

(6) "Handgun" means any firearm with a barrel length of less than twelve (12) inches that is designed, made, or adapted to be fired with one hand.

(7) "Knife" means any bladed hand instrument that is capable of inflicting serious bodily injury or death by cutting or stabbing a person with the instrument.

(8) "Knuckles" means any instrument that consists of finger rings or guards made of a hard substance and that is designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with a fist enclosed in the knuckles.

(9) "Machine gun" means any firearm that is capable of shooting more than two (2) shots automatically, without manual reloading, by a single function of the trigger.

(10) "Rifle" means any firearm designed, made, or adapted to be fired from the shoulder and to use the energy of the explosive in a fixed metallic cartridge to fire a projectile through a rifled bore by a single function of the trigger.

(11) "Short barrel" means a barrel length of less than sixteen (16) inches for a rifle and eighteen (18) inches for a shotgun, or an overall firearm length of less than twenty-six (26) inches.

(12) "Shotgun" means any firearm designed, made, or adapted to be fired from the shoulder and to use the energy of the explosive in a fixed shotgun shell to fire through a smooth-bore barrel either a number of ball shot or a single projectile by a single function of the trigger.

(13) "Switchblade knife" means any knife that has a blade that folds or closes into the handle or sheath, and:

(A) that opens automatically by pressure applied to a button or other device located on the handle; or

(B) that opens or releases a blade from the handle or sheath by the force of gravity or by the application of centrifugal force.

39-2802. Unlawful possession of weapon.—(a) An individual, corporation, or association commits an offense if:

(1) he possesses what he knows to be a firearm, a knife with a blade length exceeding four (4) inches, or a club; or

(2) he possesses any deadly weapon with intent to employ it in the commission of an offense.

(b) It is a defense to prosecution under subsection (a) (1) that the actor's possession:

(1) was incident to the performance of his official duty as a peace officer, a member of the armed forces or national guard, or as a guard

employed by a penal institution, a member of a municipal fire department trained to carry weapons during emergencies and authorized to do so by the mayor and chief of police of the municipality; or

(2) occurred at his:

(A) place of residence; or

(B) place of business; or

(C) premises; or

(3) was incident to engaging in lawful hunting, trapping, fishing, camping, or other lawful sporting activity, and:

(A) the weapon is a type reasonably necessary for or commonly used in the activity; and

(B) if the possession occurred in the course of proceeding to or from the activity, the conditions of subdivisions (4) (B) (i) and (4) (B) (ii) or (4) (C) are satisfied; or

(4) was incident to transporting the weapon:

(A) in the course of business as a commercial carrier; or

(B) from one place or circumstance of lawful possession to another under the following conditions:

(i) the weapon was not concealed on or about the person; and

(ii) if the weapon is a firearm, it was unloaded; and

(iii) if the weapon is a handgun, knife, or club, the actor proceeded directly from his point of departure to his destination; or

(C) that was broken down in a nonfunctioning condition and could not be readily reassembled; or

(5) was incident to displaying the weapon in a public museum, exhibition, or to using it in a dramatic performance; or

(6) was brief and occurred as a consequence of having found or been given the weapon or having taken it from an aggressor.

(c) Unless otherwise provided by law, it is a defense to prosecution under subsection (a) (1) for possession of a firearm or club that the actor's possession was incident to engaging in a private patrol or guard service licensed by a governmental agency authorized by law to license the service, if the possession occurred under the following conditions:

(1) the firearm or club was not concealed on or about the person, and, if worn, was in plain view; and

(2) the actor wore a distinctive uniform indicating that he was performing services as a guard or patrolman; and

(3) the possession occurred in the course of performance of the actor's duties as a guard or patrolman at his place of work.

(d) The defenses described in subsections (b) (2) (B) and (C), (b) (3), (b) (4) (B) and (C), and (c) are not available to an actor identified in subsections (e) (3) (A)-(C).

(e) Except as provided in subdivisions (1)-(3), an offense under subsection (a) (1) is a class B misdemeanor. An offense under subsection (a) (1) is:

(1) a class A misdemeanor if the actor's possession of a handgun occurred at a place open to the public where five (5) or more persons were gathered or assembled; or

(2) a felony of the third degree if the actor's possession of a handgun occurred at a place open to the public where alcoholic beverages were served; or

(3) a felony of the third degree if:

(A) the actor possessed a handgun; and

(B) the actor has been convicted of a felony involving the intentional or knowing use or attempted use of force or a deadly weapon; and

(C) the handgun's possession occurred within five (5) years after his:

(i) release from a penal institution; or

(ii) discharge from probation; or

(iii) conviction, if neither subdivision (i) nor (ii) applies.

(f) An offense under subsection (a)(2) is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 46.02.

Cross-References:

"Agency' defined, see § 39-107.
"Association" defined, see § 39-107.
"Club" defined, see § 39-2801.
"Conviction" defined, see § 39-107.
Criminal instruments, see § 39-1001.
"Deadly weapon" defined, see § 39-107.
Defense explained, see § 39-203.
Disposition of weapons, see § 39-2807.
"Firearm" defined, see § 39-2801.
Fireworks regulations, see T. C. A. § 53-3001 et seq.
"Government" defined, see § 39-107.
"Handgun" defined, see § 39-2801.
Hunting regulations, see T. C. A. tit. 51.
Interstate purchase, see § 39-2805.
"Knife" defined, see § 39-2801.
"Peace officer" defined, see § 39-107.
"Penal institution" defined, see § 39-107.
Possession as voluntary act, see § 39-402.
"Possess" defined, see § 39-107.
Prohibited weapons, see § 39-2803.
Unlawful sale of firearm, see § 39-2804.

Comment:

Section 39-2802 regulates the possession of weapons that have lawful as well as unlawful uses. Tennessee has historically treated this area in the Criminal Code, though some aspects of regulation could be more effectively administered through nonpenal legislation (e.g., registration and licensing laws). Section 39-2802 adopts the present Tennessee regulatory scheme of outright prohibition with statutory exemptions and supersedes T. C. A. tit. 39, ch. 49.

Subsection (a) defines two distinct types of offenses with respect to possession of weapons. Subsection (a)(1) is a regulatory penal statute that proscribes possession of three kinds of weapons most commonly used unlawfully—firearms, knives, and clubs. Because unusual weapons, such as ice picks and sword canes (enumerated in T. C. A. § 39-4901), are only rarely involved in serious crime, possession of such weapons is controlled by subsection (a)(2). The present Tennessee statute is a mixture of subsections (a)(1) and (a)(2) in that it proscribes the carrying of certain enumerated weapons with the intent "to go armed." T. C. A. § 39-4901. The intent to go armed is the gravamen of the present offense. Hill v. State, 201 Tenn. 299, 298 S. W. (2d) 799 (1957). Under subdivision (2) the possession of any deadly weapon is an offense if accompanied by the required criminal intent. Subdivision (1), being essentially a regulatory measure requires no intent to use the weapon unlawfully.

Subsection (a)(1) alters T. C. A. § 39-4901 in three respects. First, knives and clubs are functionally defined in §§ 39-2801(1) and 39-2801(6) rather than by listing as in T. C. A. § 39-4901. The word "specially" in the definition of club is significant in that it excludes such ordinary items as a baseball bat, rolling pin, broom, etc., from the offense. Of course, possession of such things, as well as various kinds of knives listed in T. C. A. § 39-4901 but not covered by subsection (a)(1), is an offense under subsection (a)(2) if the required criminal intent is present.

Second, the offense is defined in terms of "possession" rather than "carrying." This change, although not a significant expansion of present law, will alter the outcome of such cases as Heaton v. State, 130 Tenn. 163, 169 S. W. 750 (1914) (carrying pistol in one's home does not constitute "carrying"). The change will not offend Tenn. Const., Art. I, § 26 (right to bear arms). Aymette v. State, 21 Tenn. (2 Humph.) 154 (1840).

Third, subsection (a)(1) covers all firearms rather than just "pistols," see T. C. A. § 39-4901. Read together with subsections (b) and (c), which provide exemptions for legitimate uses of weapons, broadening the offense to cover all firearms is not a substantial change, but will prevent a person from possessing a loaded rifle or shotgun in public without justification.

Subsections (b) and (c) provide exemptions from responsibility under subsection (a)(1) by delineating the circumstances under which a person may legally possess a weapon. Subsection (b)(1) restates existing Tennessee statutory exemptions found in T. C. A. § 39-4902. "Peace officer" is to be construed as including the various officials authorized by present law to carry weapons, e.g., state park rangers, T. C. A. § 11-307; conservation officers, T. C. A. § 51-115; and agents of the Tennessee Bureau of Criminal Identification, T. C. A. § 52-1439. The remaining exemptive provisions are all new as a matter of statutory law, though several are derived from judicial opinion.

Subsection (b)(3) grants express approval to legitimate sporting uses of weapons; present law is changed by legalizing possession of handguns for such use and by requiring that firearms being transported incident to sporting use be unloaded and not concealed on the person. Subsection (b)(4) prescribes the lawful ways to transport a weapon and allows a person to take a pistol from one place of lawful possession to another; but not merely for the sake of carrying it, or habitually; or, to take it to a gunsmith for repair; or, to carry it from his business to his home.

Subsection (c) extends a defense to all private guards and special officers currently licensed and regulated by local law, e.g., the Charter of the Metropolitan Government of Nashville and Davidson County (1967), § 8.205. These persons are not peace officers, and their privilege to possess weapons is thus a limited one, subject, for example, to withdrawal by local government. Subsection (c) prescribes a uniform minimum standard upon these lightly regulated agents and thus seeks to prevent abuse of this special privilege. This is in keeping with the present law, see T. C. A. § 39-4902.

The penalty enhancement provisions of subsections (e)(1) and (e)(2) expand present law, making it a felony to possess a weapon in a public place where alcoholic beverages are served, and a misdemeanor punishable by up to 12 months in jail to possess a weapon in specified public places.

Subsections (d) and (e)(3) together expand the law regarding convicted felons. Subsection (e)(3) enhances the penalty for possession of handguns by felons and provides a five-year limitation on its application. Subsection (d) forbids possession of handguns by convicted felons except at their place of residence, but allows the convicted felons to possess them under circumstances described in subsections (b)(1), (b)(4)(A), (b)(5), and (b)(6).

39-2803. Prohibited weapons.—(a) An individual, corporation, or association commits an offense if he intentionally or knowingly possesses, manufactures, transports, repairs, or sells:

(1) an explosive or an explosive weapon;

(2) a device principally designed, made, or adapted for delivering or shooting an explosive weapon;

(3) a machine gun;

(4) a short-barrel rifle or shotgun;

(5) a firearm silencer;

(6) a switchblade knife or knuckles.

(b) It is a defense to prosecution under this section that the actor's conduct:

(1) was incident to the performance of official duty by the armed forces or national guard, a governmental law enforcement agency, or a penal institution; or

(2) was incident to engaging in a lawful commercial or business transaction with an organization identified in subdivision (1); or

(3) was incident to using an explosive or an explosive weapon in a manner reasonably related to a lawful industrial or commercial enterprise; or

(4) was incident to using the weapon in a manner reasonably related to a lawful dramatic performance or scientific research; or

(5) was incident to displaying the weapon in a public museum or exhibition.

(c) It is an affirmative defense to prosecution under this section, which the actor must prove by a preponderance of the evidence:

(1) that his conduct was incident to dealing with the weapon solely as a curio, ornament, or keepsake, and if the weapon is a type described in subsections (a)(1)-(a)(5), that it was in a nonfunctioning condition and could not readily be made operable; or

(2) that his possession was brief and occurred as a consequence of having found the weapon or taken it from an aggressor.

(d) An offense under subsections (a)(1)-(a)(5) is a felony of the second degree; and offense under subsection (a)(6) is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 46.03.
Gun Control Act of 1968, 18 U. S. C. § 921(a).

Cross-References:

Affirmative defense explained, see § 39-204.
"Agency" defined, see § 39-107.
"Association" defined, see § 39-107.
Criminal instruments, see § 39-1001.
Defense explained, see § 39-203.
Disposition of prohibited weapons, see T. C. A. § 40-826, as amended.
"Explosive" defined, see § 39-2801.
"Explosive weapon" defined, see § 39-2801.
"Firearm silencer" defined, see § 39-2801.
Fireworks regulations, see T. C. A. § 53-3001 et seq.
"Government" defined, see § 39-107.
Hunting regulations, see T. C. A. tit. 51.
Interstate purchase, see § 39-2805.
"Knuckles" defined, see § 39-2801.
"Machine gun" defined, see § 39-2801.
"Peace officer" defined, see § 39-107.
"Penal institution" defined, see § 39-107.
"Possess" defined, see § 39-107.
Possession as voluntary act, see § 39-402.
Prohibited weapons or contraband, see T. C. A. § 40-821, as amended.
"Rifle" defined, see § 39-2801.
Seizure of prohibited weapons, see T. C. A. § 40-823, as amended.
"Short-barrel" defined, see § 39-2801.
"Shotgun" defined, see § 39-2801.
"Switchblade knife" defined, see § 39-2801.
Unlawful possession of weapon, see § 39-2802.
Unlawful sale of firearm, see § 39-2804.

Comment:

Section 39-2803 concerns weapons that have little or no lawful use. Subsection (a) criminalizes possession and also manufacture, transport, sale, and repair of the specified prohibited weapons. The proscription extends to weapons and conduct now covered by T. C. A. §§ 39-5110—39-5113 (possession, manufacture, and disposal of fire bombs); T. C. A. §§ 39-1404 — 39-1410 (possession and transportation of explosives); T. C. A. § 39-4901 (knuckles and switchblades) and expands the existing state law by including "sawed-off" shotguns and rifles, silencers, machine guns, and cannons.

Subsections (b)(1) and (b)(2) provide defenses for the military and law enforcement, and subsections (b)(3)-(b)(5) create defenses for industrial, scientific and artistic uses of prohibited weapons. The two defenses provided in subsection (c) place the burden of persuasion on the defendant because allowing the defenses at all is questionable and the facts necessary to establish the defenses usually are known exclusively to the defendant.

39-2804. Unlawful sale of firearm.—(a) An individual, corporation, or association commits an offense if:

(1) he intentionally, knowingly, or recklessly sells, loans, or makes a gift of a firearm to a minor; or

(2) he intentionally, knowingly, or recklessly sells a firearm or ammunition for a firearm to a person who is intoxicated;

(3) he intentionally, knowingly, recklessly, or with criminal negligence violates the provisions of § 39-2805.

(b) It is a defense to subsection (a)(1) that:

(1) a rifle or shotgun was sold, loaned, or given to a minor for the purposes of hunting; and

(2) the actor is not required to obtain a license under § 39-2805 (a).

(c) For purposes of this section, "intoxicated" means substantial impairment of mental or physical capacity resulting from introduction of any substance into the body.

(d) An offense under this section is a class A misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsec. (a)(1): T. C. A. § 39-4905.
Subsec. (a)(2): T. C. A. § 39-4904.
Subsec. (a)(3): T. C. A. § 39-4904.
Subsec. (b): T. C. A. § 39-4905.
Subsec. (c): Tex. P. C. Prop. Rev. § 46.04(b).

Cross-References:

"Association" defined, see § 39-107.
Computation of age, see § 39-106.
"Firearm" defined, see § 39-2801.
Interstate purchase, see § 39-2805.
Prohibited weapons, see § 39-2803.
Unlawful possession of weapon, see § 39-2802.

Comment:

Section 39-2804 focuses on the weapons dealer or transferor rather than the possessor. Subsection (a)(1) implements present law, T. C. A. § 39-4905. Likewise, subsection (a)(2) is a restatement of present law, T. C. A. § 39-4904. The section applies to all firearms because an intoxicated individual is as likely to misuse a long gun as a pistol. The definition of "intoxicated" in subsection (c) is a modified version of that used in § 39-603 (intoxication defense). Subsection (a)(3) is included so that the present law on weapons registration, T. C. A. § 39-4904 may be included. The defense provided for by subsection (b) is a continuation of the present Tennessee law, T. C. A. § 39-4905. This defense does not extend to firearms other than rifles or shotguns, since pistols are seldom, if ever, used for hunting. The defense is not available to dealers since, under federal law, no firearm can be sold to a person under 18. 18 U. S. C. 922(b)(1) (1964).

Section 39-2805 is a restatement of the current Tennessee law, T. C. A. § 39-4904. This section changes only the form, not the substance, of the present law.

39-2805. Lawful sale of firearm.—(a) An individual, corporation, or association who engages in the business of selling, offering for sale, giving away, or otherwise disposing of firearms, must:

(1) obtain a permit to engage in such business from the commissioner of revenue by payment of a ten dollar ($10) fee for each calendar year ending on December 31 of that year.

(A) The petitioner for a permit shall furnish the commissioner of revenue a certificate of good moral character from the sheriff of

the county in which the licensed premises are to be located, or if the premises are within the corporate limits of a municipality, from the chief of police of the municipality; and

(B) the certificate of good moral character shall state that the petitioner is of good moral character and personally known to the official signing the certificate.

(C) The commissioner of revenue may refuse to authorize, or revoke, any permit for good cause, or on account of any violation of this chapter. Notification of such action is to be by registered mail to the permit petitioner or holder, and actions of the commissioner may be reviewable as provided for in §§ 27-901—27-914.

(D) The commissioner of revenue is authorized to make and issue all rules and regulations necessary to carry out the provisions of this section.

(2) send a certificate by registered mail to be filed with the sheriff or chief of police as designated in subsection (a) (1) (A) for each firearm purchased. The certificate shall include:

(A) the name and address and right thumb print of the applicant for a firearm; and

(B) additional information, including the race, height, weight, age, color of eyes, color of hair, and sex of the applicant; and

(C) the purpose for which the firearm is purchased; and

(D) the serial number of the firearm to be purchased.

(3) wait fifteen (15) days from the time of receipt of notice, either by personal acknowledgment or return receipt requested, from the sheriff or chief of police, as designated in subsection (a) (1) (A), before the disposition of the weapon may be consummated and the firearm delivered to the applicant. If the sheriff or chief of police, as designated in subsection (a) (1) (A), states that the applicant is prohibited by law from a local purchase or receipt of the weapon, no further disposition of the weapon may be made by the licensed dealer.

(b) It is a defense to prosecution under § 39-2804 (a) (3) that the licensed dealer's conduct:

(1) was incident to engaging in a lawful commercial or business transaction with a licensed dealer, manufacturer, importer, or collector who meets the requirements of subsection (a) (1); or

(2) was incident to engaging in a lawful commercial or business transaction with government officials, as designated by § 39-2802 (b) (1).

(c) If the conduct falls within subsection (b), the requirements of subsections (a) (2) and (a) (3) are dispensed with.

(d) Nothing in this section shall preclude any person eligible to lawfully purchase a firearm from making an occasional sale of a used or second-hand firearm legally purchased by him without being licensed to do business as such.

(e) All sales under subsection (d) shall comply with the requirements of subsections (a) (2) and (a) (3).

COMMENTS OF LAW REVISION COMMISSION

Comment:

This is the present Tennessee law, T. C. A. § 39-4904, with the addition of the serial number requirement. Penalties for violations of the regulations are provided in § 39-2804.

39-2806. Interstate purchase.—(a) If not otherwise prohibited by law, a Tennessee resident may purchase from a licensed importer, manufacturer, dealer, or collector a rifle or shotgun in a state contiguous to Tennessee.

(b) If not otherwise prohibited by law, including the law of the contiguous state, any dealer or collector licensed under § 39-2805 may sell a rifle or shotgun in a state contiguous to Tennessee.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsec. (a): T. C. A. § 39-4915.
Subsec. (b): T. C. A. § 39-4916.

Cross-References:

Gun Control Act of 1968, 18 U. S. C. § 922(b).
"Law" defined, see § 39-107.
Prohibited weapons, see § 39-2803.
"Rifle" defined, see § 39-2801.
"Shotgun" defined, see § 39-2801.
Unlawful sale of firearm, see § 39-2804.

Comment:

Section 39-2806 preserves T. C. A. §§ 39-4915, 39-4916, which were enacted in 1969 in order to implement § 722(b)(3)(A) of the Federal Gun Control Act of 1968.

39-2807. Disposition of prohibited weapons and weapons unlawfully possessed.—(a) All weapons seized from an individual, corporation, or association which are found to be prohibited weapons, as defined in § 39-2803, shall be destroyed pursuant to § 40-826, as amended.

(b) All weapons seized from an individual, corporation, or association which are found to be unlawfully possessed, as that offense is defined in § 39-2802, shall not be returned to the individual, family or friends of the individual, corporation, or association found guilty of that offense.

(c) The judge presiding over the case shall, upon the final disposition of the case, order the unlawfully possessed weapons to be destroyed or to be sold by the sheriff on public bids to business concerns who handle similar items in their normal course of business and the moneys derived from such a sale shall be paid into the county general fund. The sheriff may contract with any licensed firearm dealer, not holding elective or appointive office or employ with any government agency, to act as broker or dealer on behalf of the county in order to conduct the public sale in accordance to federal and state laws regulating sale of firearms. The dealer's commission shall not exceed twenty per cent (20%) of the gross sales price.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 39-4911, 39-4912.

Cross-References:

Prohibited weapon as contraband, see T. C. A. § 40-821, as amended.
"Prohibited weapon" defined, see § 39-2803.
Seizure of prohibited weapon, see T. C. A. § 40-823, as amended.
Stolen property, see T. C. A. § 40-828, as amended.

Unlawful possession of weapon, see § 39-2802.

Use as evidence, see T. C. A. § 40-827, as amended.

Comment:

Subsection (a) is a new provision dictating that all prohibited weapons be destroyed. The procedure for seizure and disposition of prohibited weapons is found in the procedural section treating contraband, T. C. A. tit. 40, ch. 8, subch. B, as amended. Subsections (b) and (c) are a restatement of T. C. A. §§ 39-4911, 39-4912 and continue the present law regarding the disposition of illegally possessed weapons. The only change is that the judge is given the option of causing the weapons to be destroyed rather than sold at auction.

CHAPTER 29

DRUGS

COMMENTS OF LAW REVISION COMMISSION

Comment:

The drug offenses included in this chapter deal mainly with mind and mood-altering drugs, such as narcotics, hallucinogens, stimulants, depressants, and marihuana. Generally, this chapter restates the criminal provisions of the Tennessee Drug Control Act of 1971, T. C. A. §§ 52-1408—52-1448. Unlike that act, however, this chapter is not concerned with the regulation of authorized distributions and possessions, and, in fact, is dependent upon the comprehensive regulatory scheme found in title 52 of the Tennessee Code to state what trafficking and possession is authorized and what unauthorized. The provisions of chapters 12, 13 and 14 of title 52 are well designed to regulate legitimate use of "legend drugs," narcotics, and "controlled substances" and much of the organization of that title is reflected here.

For purposes of penal treatment, however, this chapter does not distinguish between narcotics and so-called dangerous drugs per se and does not directly utilize the six schedules of controlled substances in the 1971 act. The factor of whether a particular drug has an accepted medicinal use, for example, is not as relevant to criminal prohibitions as it is to the regulation of authorized manufacture and distribution.

Classification of drugs in this chapter is based on an assessment of the potential for harm and abuse presented by a given drug and also on a consideration of the social costs of a particular criminal treatment. Moreover, a three-class structure is more amenable to the sentencing structure of this code. Three classes of drugs are thus established: dangerous drugs, abusable drugs, and restricted drugs. Here "dangerous drugs" include "hard narcotics," LSD, and injectable amphetamines. "Abusable drugs" include barbiturates, oral amphetamines, marihuana and peyote. "Restricted drugs" include nonprescription medications, such as cough syrups and the remaining prescription drugs not included in the first two categories. Illicit transactions in dangerous drugs carry the highest penalties; illicit transactions in abusable drugs carry lower penalties; and those in restricted drugs the least severe penalties. The resulting gradation of offenses is very similar to the six-schedule scheme of the 1971 act, with the enumerated drugs and penal sanctions of schedules I, II, and part of III being covered by the dangerous drug category, those of schedules IV, VI and part of III being treated as abusable drugs, and the illicit transfer of schedule V drugs and "legend drugs" constituting the restricted drug offense.

This chapter does not contain all penal provisions dealing with mind and mood-altering drugs. Rather, it contains only those basic provisions dealing with the illicit drug traffic. Penal provisions involving regulatory matters (e.g., violation of recordkeeping requirements) and obtaining drugs by misrepresentation or deception are better handled in the regulatory law, and such provisions are contained in the present T. C. A. tit. 52. This chapter does not affect those regulations. However, except in the case of "restricted" drugs, obtaining drugs by misrepresentation is reached under this chapter on the theory that the person who so obtains drugs unlawfully possesses them, see § 39-2911. If a person obtains them for the purpose of sale or distribution, however, he would unlawfully possess with intent to distribute and be subject (even in the case of "restricted" drugs) to the high penalties prescribed for trafficking, see §§ 39-2902 (3), 39-2904, 39-2906, 39-2908.

The sentencing structure of this chapter differs somewhat from that of present law. In part, these differences are due to the fact that, unlike present law, this chapter discriminates between those offenders whose conduct warrants the imposition of severe penalties and those offenders whose conduct does not; and, in part, they reflect reassessment of the risks presented by different drugs. In addition, however, the entire sentencing structure of the new code differs radically from that of present law, and this chapter of course reflects that difference.

The chapter derives from these sources: (1) the recent Tennessee Drug Control Act of 1971; (2) the Texas Penal Code Proposed Revision (1970); (3) the drug control provisions of the United States Code (21 U. S. C. § 812); and (4) the Study Draft of a New Federal Criminal Code prepared by the National Commission on Reform of Federal Criminal Laws (1970). Despite the diverse sources, the grading of offenses in this chapter reflects the decisions of the Commission.

39-2901. Legislative policy.—(a) It is the policy of this state, as reflected by enactment of this chapter, to employ penal sanctions to control the dissemination of dangerous, abusable, and restricted drugs without undue restrictions on practitioners of the healing arts, research, or legitimate manufacture or distribution, and with a view to facilitating medical, psychiatric, and social rehabilitation of addicts and other victims.

(b) It is also the policy of the state to ensure by this chapter that all agencies of the criminal justice system distinguish between those engaged in commercial exploitation, on the one hand, and those who engage in noncommercial distribution or who are experimenters or users, on the other hand, and that the courts in particular so distinguish in sentencing offenders under this chapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.01.
Cf. Fed. Prop. Crim. Code, Introductory Note at 242-43.

Cross-References:

Construction of code, see § 39-105.
Objectives of code, see § 39-102.
Principles of sentencing, see § 39-806.

Comment:

The Commission believes that a declaration of policy is desirable because of the great controversy as to the proper role of the criminal law in dealing with drugs and drug offenders. The declaration will help guide agencies of the criminal justice system at all levels (e.g., police, prosecutors, courts, corrections) in the performance of their duties, aid the courts in construction of the chapter, and guide the courts and correctional authorities in the exercise of their discretion in sentencing and treating offenders.

Subsection (a) stresses control of the illicit drug traffic while at the same time emphasizing the importance of rehabilitating addicts and other victims of illicit traffic and not unduly restricting legitimate drug uses. Subsection (b) distinguishes between those engaged in commercial exploitation, on the one hand, and experimenters and users, on the

other, because the Commission believes that the commercial exploiter both presents a greater menace to control efforts and is more blameworthy.

39-2902. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) opium and opiate;

(B) any compound, manufacture, salt, derivative, or preparation of opium or opiate;

(C) any substance (and any compound, manufacture, salt, derivative, or preparation thereof) that is chemically identical with any of the substances specified in subdivisions (A) and (B).

(2) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having such addiction-forming or addiction-sustaining liability. It does not include the dextronotatory isomer of 3-methozy-n-methylmorphinan and its salts (dextromethorphan). It does not include its racemic and levorotatory forms.

(3) "Trafficks" means:

(A) transfer or administer a drug to another; or

(B) prescribe a drug not in the course of professional practice; or

(C) possess a drug with intent to transfer or administer it to another; or

(D) produce a drug.

(4) "Production" means the manufacture, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:

(A) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or

(B) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Prop. Crim. Code § 1829.
T. C. A. § 52-1409.
Tex. P. C. Prop. Rev. § 48.02.

Cross-References:

"Abusable drug" defined, see § 39-2907.
Addition of drugs to chapter by regulation, see § 39-2903.

"Dangerous drug" defined, see § 39-2905.
Drug paraphernalia, see § 39-2912.
"Restricted drug" defined, see § 39-2909.

Comment:

This chapter utilizes the definitions of the 1971 Tennessee Act, found at T. C. A. § 52-1409, that are relevant to the criminal law. In addition, subdivision (3) treats all distribution, conduct preparatory to distribution, and all manufacturing under the new term "trafficking." Trafficking means transferring or administering a drug to another; prescribing a drug "not in the course of professional practice;" possessing a drug with intent to transfer or administer it to another; or producing a drug. This approach is derived from the federal code study draft and is substantially the same in content as the present Tennessee law.

Subdivision (3)(B), by including prescribing a drug "not in the course of professional practice" as trafficking, refers to prescriptions that go beyond the bounds of proper medical practice, e.g., issuing a prescription for a narcotic to an addict without regard to whether it is medically warranted. The subdivision does not purport to state when a prescription goes beyond the bounds of proper medical practice, but leaves that question to the regulatory law and the medical profession. The language "not in the course of professional practice" appears in the present Tennessee and federal drug laws. The subdivision does not include as trafficking all unlawful prescribing, because it is possible that under the regulatory laws a prescription may be unlawful on account of having no date or address. Transgressions such as these should not be treated as stringently as "trafficking," but should be handled as minor infractions of the regulatory law itself.

Subdivision (3)(C) includes as trafficking possession of a drug with intent to transfer or administer it to another. This offense is the same as the present law's possession with intent to deliver or sell, T. C. A. § 52-1432. This definition proves useful in cases where the quantities possessed are large enough to warrant an inference of possession with intent to distribute and in other situations where there is evidence that the defendant possessed with intent to distribute.

39-2903. Addition of drug by regulation.—A drug made subject to this chapter by regulation is deemed to be a restricted drug.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.03.

Cross-References:

Authorization defense, see § 39-2913.
"Restricted drug" defined, see § 39-2909.
"Rule" includes regulation, see § 39-107.

Comment:

This section is necessary because the regulatory law, T. C. A. § 52-1410, gives the commissioner of mental health, with the agreement of the commissioner of public health, authority to designate for inclusion in that title's schedules drugs that are not enumerated in this chapter. Because this section subjects designated drugs to penal sanction without legislative action, all drugs so included are penalized at the lowest level. If the legislature believes that the restricted drug category is not stringent enough for a particular drug, it can then amend the chapter to place the drug in a more stringent category. The criminal law should be the product of legislative decision by duly elected representatives of the public. The regulation of the pharmaceutical industry, on the other hand, is properly the province of the department of mental health. The commissioner's power to issue and enforce such regulations is not affected by this section. It merely ensures that changes in regulatory law will not be construed as affecting the criminal law without proper legislative action.

39-2904. Trafficking in dangerous drug.—(a) An individual, corporation, or association commits an offense if he intentionally or knowingly trafficks in a dangerous drug.

(b) Except as provided in subsection (c), an offense under this section is a felony of the second degree unless the actor has been con-

victed one or more times before of a felony of the first or second degree under this chapter, in which event the offense is a felony of the first degree.

(c) The court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a felony of the second degree if the actor has been convicted one or more times before of a felony under this chapter, or for a felony of the third degree if the actor has never before been convicted of a felony under this chapter, if the actor proves by a preponderance of the evidence at the sentencing hearing:

(1) that he did not act for profit or to further commercial distribution; and

(2) that he did not transfer or administer, or possess with intent to transfer or administer, the drug involved to a minor:

(A) when he knew or was reckless or criminally negligent in ascertaining the minor's age; and

(B) when he was at least three (3) years older than the minor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.04.
Fed. Prop. Crim. Code §§ 1822, 1823.

Cross-References:

"Association" defined, see § 39-107.
Computation of age, see § 39-106.
"Conviction" defined, see § 39-107.
"Dangerous drug" defined, see § 39-2905.
"Felony" defined, see § 39-107.
Lesser offense charged, see § 39-2915.
Organized criminal offender, see § 39-843.
"Possess" defined, see § 39-107.
Sentencing hearing, see T. C. A. § 40-2301, as amended.
"Trafficks" defined, see § 39-2902.

Comment:

Subsection (a) makes it an offense to knowingly traffick in a dangerous drug. "Knowingly" is the culpable mental state required under present narcotics law.

Subsection (b) states the basic penalty for the offense. In addition, it should be noted that § 39-843 permits extended term imprisonment for organized criminal operations violating this chapter. The stepped-up penalty for repeat offenders in this section and in the sections setting out penalties for trafficking in abusable and restricted drugs accomplishes the same purpose as present T. C. A. § 52-1434, which authorizes double penalties for second offenses.

Subsection (c) mitigates transfers and potential transfers to persons 18 or older which are not for profit or to further commercial distribution. Gifts and other noncommercial distributions, although serious, do not present the same threat of illicit traffic as do commercial distributions and the commercial distributor is more culpable than the noncommercial distributor. It should be noted that a gift made to prove to a potential buyer that the donor sells high quality LSD, for example, or otherwise as a "loss leader," is a transfer to further commercial distribution.

In addition to mitigating the penalty for gifts and other noncommercial transfers, subsection (c) also mitigates some conduct which, although it comes within the meaning of the word "trafficks," amounts only to possession for personal use. Thus, producing for one's own use or prescribing for oneself amounts only to possession, i.e., is not for profit or to further commercial distribution. This same result is achieved by the present law's restricted definition of "manufacture" which specifically excludes preparation for personal use.

The mitigation determination is made at the sentencing hearing, rather than during the trial on the merits, to avoid problems of self-incrimination which might arise if a defendant were required to admit guilt of a lesser offense in order to avoid conviction of a greater. In order to ensure that trafficking does not masquerade as possession, the burden of coming forward with and persuading the judge or jury of the existence of the mitigating facts is on the defendant. However, under § 39-2915 the prosecutor is given discretion to charge the lesser offense in the first instance.

39-2905. Dangerous drug defined.—For purposes of this chapter, "dangerous drug" means:

(1) Any of the following substances, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation:

(i) acetylmethadol;
(ii) allylprodine;
(iii) alphacetylmathadol;
(iv) alphameprodine;
(v) alphamethadol;
(vi) benzethidine;
(vii) betacetylmethadol;
(viii) betameprodine;
(ix) betamethadol;
(x) betaprodine;
(xi) clonitazene;
(xii) dextromoramide;
(xiii) dextrorphan;
(xiv) diampromide;
(xv) diethylthiambutene;
(xvi) dimenoxadol;
(xvii) dimepheptanol;
(xviii) dimethylthiambutene;
(xix) dioxaphetyl butyrate;
(xx) dipipanone;
(xxi) ethylmethylthiambutene;
(xxii) etonitazene;
(xxiii) etoxeridine;
(xxiv) furethidine;
(xxv) hydroxypethidine;
(xxvi) ketobemidone;
(xxvii) levomoramide;
(xxviii) levophenacylmorphan;
(xxix) morpheridine;
(xxx) noracymethadol;
(xxxi) norlevorphanol;
(xxxii) normethadone;
(xxxiii) norpipanone;
(xxxiv) phenadoxone;
(xxxv) phenampromide;
(xxxvi) phenomorphan;
(xxxvii) phenoperidine;
(xxxviii) piritramide;
(xxxix) proheptazine;
(xl) properidine;
(xli) racemoramide;
(xlii) trimeperidine.

(2) Any of the following opium derivatives, their salts, isomers, and salts of isomers, whenever the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(i) acetorphine;
(ii) acetyldihydrocodeine;
(iii) benzylmorphine;
(iv) codeine methylbromide;
(v) codeine-n-oxide;
(vi) cyprenorphine;
(vii) desomorphine;
(viii) dihydromorphine;
(ix) etorphine;
(x) heroin;
(xi) hydromorphinol;
(xii) methyldesorphine;
(xiii) methylhydromorphine;
(xiv) morphine methylbromide;
(xv) morphine methylsulfonate;
(xvi) morphine-n-oxide;
(xvii) myrophine;
(xviii) nicocodeine;
(xix) nicomorphine;
(xx) normorphine;
(xxi) pholcodine;
(xxii) thebacon.

(3) Any material, compound, mixture, or preparation containing any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, whenever the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(i) 3, 4-methylenedioxy amphetamine;
(ii) 5-methoxy-3, 4-methylenedioxy amphetamine;
(iii) 3, 4, 5-trimethoxy amphetamine;
(iv) bufotenine;
(v) diethyltryptamine;
(vi) dimethyltryptamine;
(vii) 4-methyl-2, 5-dimethoxyamphetamine;
(viii) ibogaine;
(ix) lysergic acid diethylamide;
(x) mescaline;
(xi) n-ethyl-3-piperidyl benzilate;
(xii) n-methyl-3-piperidyl benzilate;
(xiii) psilocybin;
(xiv) psilocyn.

(4) Any of the following substances, other than those narcotic drugs included in the definitions of abusable and restricted drugs, whether produced directly or indirectly by extraction from substances

of vegetable origin, independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(i) opium and opiate;
(ii) any salt, compound, derivative, or preparation of opium or opiate;
(iii) any salt, compound, isomer, derivative, or preparation thereof that is chemically equivalent or identical with any of the substances specified in subdivisions (i) and (ii), other than the isoquinoline alkaloids of opium;
(iv) opium poppy and poppy straw.

(5) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation:

(i) alphaprodine;
(ii) anileridine;
(iii) bezitramide;
(iv) dihydrocodeine;
(v) diphenoxylate;
(vi) fentanyl;
(vii) isomethadone;
(viii) levomethorphan;
(ix) levorphanol;
(x) metazocine;
(xi) methadone;
(xii) methadone-intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;
(xiii) moramide-intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid;
(xiv) pethidine;
(xv) pethidine-intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;
(xvi) pethidine-intermediate-B, ethyl-4-phenylpiperdine-4-carboxylate;
(xvii) pethidine-intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;
(xviii) phenazocine;
(xix) piminodine;
(xx) racemethorphan;
(xxi) racemorphan.

(6) Any of the following substances, other than those included in the definitions of abusable and restricted drugs, whether produced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(i) coca leaves;
(ii) any salt, compound, derivative, or preparation of coca leaves;

(iii) any salt, compound, derivative, or preparation thereof that is chemically equivalent or identical with any of the substances specified in subdivisions (i) and (ii), other than decocainized coca leaves or extractions of coca leaves, or extractions which do not contain cocaine or ecgonine.

(7) Any material, compound, mixture, or preparation, other than that described in § 39-2907(1) (five (5) or fewer pills), containing any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(i) amphetamine, its salts, optical isomers, and salts of its optical isomers;

(ii) phenmetrazine and its salts;

(iii) methylphenidate.

(8) Any material, compound, mixture, or preparation, other than that described in § 39-2907(1) (five (5) or fewer pills), containing any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(i) any substance that contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid, other than those substances described in § 39-2907;

(ii) chorhexadol;

(iii) glutethimide;

(iv) lysergic acid;

(v) lysergic acid amide;

(vi) methyprylon;

(vii) phencyclidine;

(viii) sulfondiethylmethane;

(ix) sulfonethylmethane;

(x) sulfonmethane.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 52-1413, 52-1415, 52-1417.
Fed. Prop. Crim. Code § 1829.
Tex. P. C. Prop. Rev. § 48.05.

Cross-References:

"Abusable drug" defined, see § 39-2907.
"Restricted drug" defined, see § 39-2909.

Comment:

Under this section dangerous drugs include particularly harmful opioids and opiates (e.g., heroin and morphine); most hallucinogens (e.g., LSD and psilocybin); cocaine and its derivatives; and amphetamines and similar stimulants and most barbiturates and similar depressants except when they appear in the limited quantity of five or fewer tablets or capsules of limited strength, which are included in subsection 39-2907(4). With the exception of these substances and of nalorphine and peyote, which are here classified as abusable drugs, and the limited quantities of narcotics in subsection 39-2907(4), the drugs listed are identical with those in present law's schedules I, II, and III. See T. C. A. §§ 52-1413, 52-1415, and 52-1417.

39-2906. Trafficking in abusable drug.—(a) An individual, corporation, or association commits an offense if he intentionally or knowingly trafficks in an abusable drug.

(b) Except as provided in subsections (c) and (d), an offense under this section is a felony of the third degree unless the defendant has been convicted one or more times before of a felony under this chapter, in which event the offense is a felony of the second degree.

(c) The court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a felony of the third degree if the actor has been convicted one or more times before of a class A misdemeanor or felony under this chapter, or for a class A misdemeanor if the actor has never before been convicted of a class A misdemeanor or felony under this chapter, if the actor proves by a preponderance of the evidence at the sentencing hearing:

(1) that he did not act for profit or to further commercial distribution; and

(2) that he did not transfer or administer, or possess with intent to transfer or administer, the drug involved to a minor:

(A) when he knew or was reckless or criminally negligent in ascertaining the minor's age; and

(B) when he was at least three (3) years older than the minor.

(d) If the actor is found guilty of prescribing or producing an abusable drug under this section, the court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a class A misdemeanor if the actor has been convicted one or more times before under this chapter of any offense, or for a class B misdemeanor if the actor has never before been convicted under this chapter, if the actor proves by a preponderance of the evidence at the sentencing hearing that he did not intend to transfer or administer the drug to another.

(e) If the actor is found guilty of violating subsection (a) by distributing a small amount of marihuana, not in excess of one-half (½) ounce, he shall be subject to the provisions of § 39-2911.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.06.
Fed. Prop. Crim. Code §§ 1822, 1823.

Cross-References:

"Abusable drug" defined, see § 39-2907.
"Association" defined, see § 39-107.
Computation of age, see § 39-106.
"Conviction" defined, see § 39-107.
"Felony" defined, see § 39-107.
Lesser offense charged, see § 39-2915.
Organized criminal offender, see § 39-843.
"Possess" defined, see § 39-107.
Sentencing hearing, see T. C. A. § 40-2301, as amended.
"Trafficks" defined, see § 39-2902.

Comment:

Trafficking in abusable drugs is the subject of this section, which parallels § 39-2904 (trafficking in dangerous drugs) except for penalty and an additional mitigation feature, subsection (d).

Subsection (d) treats production or prescription of an abusable drug for personal use the same as possession for personal use (§ 39-2911) because it is not the kind of trafficking for which a severe penalty is justified. The personal use feature may be shown by the quantity of the abusable drug involved, the nature of the transaction, or other circumstances. This retains the policy and penalty of the present law's restricted definition of manufacture which specifically excludes production for personal use. See T. C. A. § 52-1409(m).

Subsection (e) retains the mitigated treatment of noncommercial transfers of small amounts of marihuana as possession offenses. This is currently Tennessee law. T. C. A. § 52-1432(a)(3).

39-2907. Abusable drug defined. — For purposes of this chapter, "abusable drug" means:

(1) A total of five (5) or fewer tablets or capsules, or a total combination of five (5) tablets and capsules, each tablet or capsule containing not more by weight of any dangerous drug defined in §§ 39-2905(7) and 39-2905(8) than is contained in the highest dosage tablet or capsule containing such drug manufactured for oral use by a manufacturer registered pursuant to United States Code, title 21, § 822.

(2) Any material, compound, mixture, or preparation containing any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(i) barbital;
(ii) chloral betaine;
(iii) chloral hydrate;
(iv) ethchlorvynol;
(v) ethinamate;
(vi) meprobamate;
(vii) methohexital;
(viii) methylphenobarbital;
(ix) paraldehyde;
(x) petrichloral;
(xi) phenobarbital.

(3) Nalorphine.

(4) Any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(i) not more than one and eight tenths (1.8) grams of codeine, or any of its salts, per one hundred (100) milliliters or not more than ninety (90) milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(ii) not more than one and eight tenths (1.8) grams of codeine, or any of its salts, per one hundred (100) milliliters or not more than ninety (90) milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(iii) not more than three hundred (300) milligrams of dihydrocodeinone, or any of its salts, per one hundred (100) milliliters or not more than fifteen (15) milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(iv) not more than three hundred (300) milligrams of dihydrocodeinone, or any of its salts, per one hundred (100) milliliters or not more than fifteen (15) milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(v) not more than one and eight tenths (1.8) grams of dihydrocodeine, or any of its salts, per one hundred (100) milliliters or not more than ninety (90) milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vi) not more than three hundred (300) milligrams of ethylmorphine, or any of its salts, per one hundred (100) milliliters or not more than fifteen (15) milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(vii) not more than five hundred (500) milligrams of opium per one hundred (100) milliliters or per one hundred (100) grams, or not more than twenty-five (25) milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(viii) not more than fifty (50) milligrams of morphine, or any of its salts, per one hundred (100) milliliters or per one hundred (100) grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(5) Cannabis. For purposes of this chapter, "cannabis" means all parts of the plant cannabis sativa L., whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin; but does not include:

(A) the mature stalks of the plant;
(B) fiber produced from the stalks;
(C) oil or cake made from the seeds of the plant;
(D) any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake;
(E) the sterilized seed of the plant that is incapable of germination.

(6) Peyote.

(7) Tetrahydrocannabinols.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.07.
T. C. A. §§ 52-1417, 52-1419, 15-1422.
Fed. Prop. Crim. Code § 1829.

Cross-References:

"Dangerous drug" defined, see § 39-2905.
"Restricted drug" defined, see § 39-2909.

Comment:

The abusable drug category covers some of the less harmful opioids and opiates (essentially those treated as "Class B Narcotics" under existing federal law) such as codeine and aspirin combination drugs, five or fewer tablets or capsules of limited strength containing amphetamines or similar stimulants or those barbiturates or depressants included as dangerous drugs, other less harmful depressants in any form, cannabis (marihuana and its derivatives), peyote, and tetrahydrocannabinols, which was classified with marihuana by Tenn. Pub. Acts 1972, ch. 597. Peyote and nalorphine appear in this section rather than with other schedule I drugs in the dangerous drug section due to the different rationale of the classification systems. This placement follows the federal code proposal.

Five or fewer capsules of limited strength containing amphetamines or similar stimulants or those barbiturates or depressants treated as dangerous drugs are included as abusable drugs because transactions in these limited quantities and strengths do not present the same risk of harm as do transactions in larger quantities or greater strengths. The definition is limited to drug forms that are generally used orally, for oral use in small quantity does not generally present risks as extensive as intravenous use. By limiting the strength to the highest dosage tablet or capsule containing the drug that is manufactured for oral use by a manufacturer registered under the federal regulatory law, the definition makes it impossible for illicit laboratories to escape dangerous drug treatment by stuffing high dosages in tablets or capsules. In addition, the limitation to a small number of tablets or capsules (or any combination thereof) makes it impossible for users or traffickers to purchase a great quantity without prescription and suffer only abusable drug treatment: they are guilty of trafficking in or possessing, as the

case may be, a dangerous drug. Moreover, these drugs do have medical use, and treating limited quantities as an abusable drug spares the housewife who obtains a few pills for personal use from her pharmacist without prescription, and the person who gives a few tablets to a friend in the common practice of self-medication, from serious penal sanction. While such self-medication is extremely undesirable, it should not occasion the same penalties provided for transactions in dangerous drugs.

39-2908. Trafficking in restricted drug.—(a) An individual, corporation, or association commits an offense if he knowingly trafficks in a restricted drug.

(b) It is an affirmative defense to prosecution under this section, which the actor must prove by a preponderance of the evidence, that he did not intend to transfer or administer the drug to another.

(c) Except as provided in subsection (d), an offense under this section is a class A misdemeanor.

(d) The court shall set aside the judgment of guilt, and enter judgment and sentence the actor for a class B misdemeanor, if the actor proves by a preponderance of the evidence at the sentencing hearing:

(1) that he did not act for profit or to further commercial distribution; and

(2) that he did not transfer or administer, or possess with intent to transfer or administer, the drug involved to a minor:

(A) when he knew or was reckless or criminally negligent in ascertaining the minor's age; and

(B) when he was at least three (3) years older than the minor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 48.08.
Fed. Prop. Crim. Code § 1823.

Cross-References:
Affirmative defense explained, see § 39-204.
"Association" defined, see § 39-107.
Computation of age, see § 39-106.
Lesser offense charged, see § 39-2915.
"Possess" defined, see § 39-107.
"Restricted drug" defined, see § 39-2909.
Sentencing hearing, see T. C. A. § 40-2301, as amended.
"Trafficks" defined, see § 39-2902.

Comment:
With appropriate reduction in penalty this section treats trafficking in restricted drugs in the same manner §§ 39-2904 and 39-2906 treat trafficking in dangerous and abusable drugs. Commercial are distinguished from noncommercial transfers, and transfers to minors from those to adults, by the mitigation device of subsection (d).

Subsection (b), which is unique to this section, implements the Commission's judgment that mere possession of a restricted drug should not be an offense. See § 39-2911 and comment. The affirmative defense device is employed, however, to ensure that trafficking does not masquerade as possession.

39-2909. Restricted drug defined.—For purposes of this chapter, "restricted drug" means:

(1) Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which compound, mixture, or preparation includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(i) not more than two hundred (200) milligrams of codeine per one hundred (100) milliliters or per one hundred (100) grams;

(ii) not more than one hundred (100) milligrams of dihydrocodeine per one hundred (100) milliliters or per one hundred (100) grams;

(iii) not more than one hundred (100) milligrams of ethylmorphine per one hundred (100) milliliters or per one hundred (100) grams;

(iv) not more than two and five tenths (2.5) milligrams of diphenoxylate and not less than twenty-five (25) micrograms of atropine sulfate per dosage unit;

(v) not more than one hundred (100) milligrams of opium per one hundred (100) milliliters or per one hundred (100) grams.

(2) Any compound, mixture, or preparation not listed elsewhere in this chapter which federal law prohibits dispensing without a prescription.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. P. C. Prop. Rev. § 48.09.
Fed. 21 U. S. C. § 812.
T. C. A. §§ 52-1221, 52-1421.

Cross-References:
"Abusable drug" defined, see § 39-2907.
"Dangerous drug" defined, see § 39-2905.

Comment:
Subsection (1) covers schedule V of the present Tennessee law, T. C. A. § 52-1421, and of the present federal law, 21 U. S. C. § 812. These drugs are the less harmful opioids and opiates, which include cough syrups such as elixir of terpenhydrate with codeine. These are classified as restricted drugs because of their low potential for harm relative to the drugs in other classifications.

Subsection (2) adopts the definition of "legend drugs" now in T. C. A. § 52-1201, but specifically excludes from it all substances listed under the dangerous and abusable categories.

39-2910. Trafficking with minor.—(a) An individual, corporation, or association commits an offense if he intentionally or knowingly transfers or administers, or possesses with intent to transfer or administer, a dangerous, abusable, or restricted drug to a child younger than eighteen (18) years, and:

(1) he knows or is reckless or criminally negligent in ascertaining the minor's age; and

(2) he is at least three (3) years older than the minor.

(b) An offense under this section:

(1) is a felony of the first degree if:

(A) the offense involved a dangerous drug; or

(B) the offense involved an abusable drug and the actor has been convicted one or more times before of a felony of the first or second degree under this chapter;

(2) is a felony of the second degree if the offense involved an abusable drug and the actor has not been convicted before of a felony of the first or second degree under this chapter;

(3) is a felony of the third degree if the offense involved a restricted drug.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.10.
T. C. A. § 52-1433.

Cross-References:

"Abusable drug" defined, see § 39-2907.
"Association" defined, see § 39-107.
Computation of age, see § 39-106.
"Conviction" defined, see § 39-107.
"Dangerous drug" defined, see § 39-2905.
"Felony" defined, see § 39-107.
"Possess" defined, see § 39-107.
"Restricted drug" defined, see § 39-2909.
"Trafficks" defined, see § 39-2902.

Comment:

This section retains the aggravated offense for trafficking with a minor now found at T. C. A. § 52-1433. The penalty depends upon whether the transaction involved a dangerous, abusable, or restricted drug, and in the case of each the offense is graded one degree above trafficking which does not involve a minor recipient. The enhanced grading reflects the community's extensive interest in protecting minors from exposure to controlled drugs through seduction and imposition. The section does not distinguish between commercial and noncommercial transactions, because the concern is with the protection of minors.

Section 39-2910 also requires that the offender be at least three years older than the child. This "peer factor" is used because the element of seduction or imposition is less likely to be present if the trafficker is close in age to the recipient. The same age differential concept is employed in sexual offenses involving children, see ch. 13.

Generally, the culpable mental state required under this section is knowledge. However, if the offender is reckless or criminally negligent in ascertaining the child's age, his mistake is unavailable as a defense. This feature also follows the treatment of mistake of age in sexual offenses.

39-2911. Possession of dangerous or abusable drugs.—(a) An individual, corporation, or association commits an offense if he knowingly possesses a usable quantity of a dangerous or abusable drug.

(b) If the actor is found guilty of possession of a dangerous drug, the offense is a class A misdemeanor unless the actor has been convicted one or more times under this chapter, in which event the offense is a felony of the third degree.

(c) If the actor is found guilty of possession of an abusable drug, the offense is a class C misdemeanor unless the actor has been convicted one or more times before under this chapter, in which event the offense is a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.11.
T. C. A. § 52-1432(b).
Fed. Prop. Crim. Code §§ 1822, 1823, 1824(1).

Cross-References:

"Abusable drug" defined, see § 39-2907.
"Association" defined, see § 39-107.
"Conviction" defined, see § 39-107.
"Dangerous drug" defined, see § 39-2905.
"Felony" defined, see § 39-107.
"Possess" defined, see § 39-107.

Comment:

The usable quantity requirement of this section is new to Tennessee law and is desirable because it prevents conviction on possession of mere traces of a drug, traces that often suggest possession was unknowing and that "leave too much doubt as to the identity of the person who, presumably then in possession of usable quantities, left these evidentiary traces behind," Fed. Prop. Crim. Code § 1824, Comment at 247. A trace on a hypodermic syringe, however, is treated like possession by § 39-2912 (possession of drug paraphernalia).

Note that possession includes constructive possession, see § 39-107 (code definitions).

Under subsection (b) unlawful possession of a dangerous drug is a class A misdemeanor for a first offense and a felony of the third degree for subsequent offenses. The offense is directed at users. This is a retention of the sanction imposed by present law which treats all first possession offenses as misdemeanors. Possession of an abusable drug is graded in the same way but on a lesser scale. The Commission deems felony penalties too stringent for possession of abusable drugs for personal use.

On occasion, a person who gives away marihuana or another abusable drug is charged with possession rather than distribution. Under subsection (c) his offense is a class C misdemeanor for a first offense and a class B misdemeanor for subsequent offenses. This implements the provision for mitigation in § 39-2906 (c) if the person is charged with trafficking based on distribution of a small amount of marihuana.

The Commission classified marihuana an abusable drug because, although its use is certainly not without risk for some, it is one of the least harmful and most widely used hallucinogens and, in light of its wide use, the punishment of possession for personal use by a year's imprisonment risks criminalizing a substantial proportion of the population, especially those under age 35. This retains the present Tennessee law on possession of dangerous substances and reduces it slightly for possession of abusable substances. See T. C. A. § 52-1432(b).

Possession of a restricted drug (see §§ 39-2908 and 39-2909) is not an offense under this chapter because the restricted category contains drugs with the least potential for harm relative to the other drug categories.

39-2912. Possession of drug paraphernalia. — (a) An individual, corporation, or association commits an offense if he possesses a hypodermic syringe, needle, or other instrument that has on or in it any quantity (including a trace) of a dangerous drug with intent to use it for administration of a dangerous drug by subcutaneous injection in a human being.

(b) An offense under this section is a class A misdemeanor unless the actor has been convicted one or more times of a felony under this chapter, in which event the offense is a felony of the third degree.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.12.

Cross-References:

"Association" defined, see § 39-107.
"Conviction" defined, see § 39-107.
"Dangerous drug" defined, see § 39-2905.
"Felony" defined, see § 39-107.
"Possess" defined, see § 39-107.
Usable quantity requirement, see § 39-2911.

Comment:

This section is directed chiefly against users and is new to Tennessee law. Subsection (a) requires proof that the possessor possessed the paraphernalia for the purpose of injection in a human being, and that the instrument actually have on or in it any quantity of a dangerous drug. This element may be proved by qualitative chemical analysis, and its presence gives some assurance that the instrument was possessed for use.

This section is limited to instruments adapted for the use of dangerous drugs. Abusable and restricted drugs are excluded because the Commission believes that only dangerous drugs present risks serious enough to justify an offense which reaches even further than unlawful possession.

The section does not make it an offense to possess an opium pipe or an instrument or contrivance used in smoking a narcotic drug. Although opium is still occasionally smoked, the practice is relatively infrequent. In addition, the Commission believes that prohibiting possession of a common smoking pipe or other device that can be used to smoke marihuana or hashish extends criminal responsibility too far and circumvents the usable quantity requirement of the possession offense. The extension is justified with respect to the injection of dangerous drugs because of the much greater potential for harm in injection.

Subsection (b) grades paraphernalia possession on the same level as dangerous drug possession.

39-2913. Authorization defense.—(a) It is a defense to prosecution under this chapter that the alleged criminal conduct was authorized under title 52 of the Tennessee Code.

(b) It is an affirmative defense to prosecution under this chapter, which the actor must prove by a preponderance of the evidence, that he reasonably believed the alleged criminal conduct was authorized under title 52 of the Tennessee Code.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsec. (a): Fed. Prop. Crim. Code § 1825.

Subsec. (b): Tex. P. C. Prop. Rev. § 48.13.

Cross-References:

Affirmative defense explained, see § 39-204.

Defense explained, see § 39-203.

Comment:

Not all production, distribution, or possession of controlled drugs is unlawful. Many controlled drugs (e.g., morphine, codeine, amphetamines, barbiturates) are lawfully produced, distributed, and possessed, chiefly for medical or scientific purposes. Naturally, such lawful conduct is not subject to this chapter, and this section refers to the regulatory law for determination of what trafficking and possession is lawful and what unlawful. The authorization defense retains present law.

Section 39-2913(b) makes it an affirmative defense, to be proved by the defendant by a preponderance of the evidence, that he reasonably believed the alleged criminal conduct was authorized by the regulatory law. Thus, a licensed manufacturer whose license is invalid because undated, and a patient whose prescription is invalid because issued by an unlicensed physician, can escape criminal responsibility under this subsection.

39-2914. Household use defense.—It is a defense to prosecution under this chapter that the drug that is the subject of prosecution:

(1) was issued for the actor or for a member of his household by a practitioner, by a drug rehabilitation clinic, by a pharmacist under a prescription, or otherwise in compliance with title 52 of the Tennessee Code, and the actor transferred or administered the drug to a member of his household for use by a member of his household or possessed it for his personal use or for use of a member of his household; or

(2) was issued for an animal in the care of the actor or a member of his household by a practitioner, by a pharmacist under a prescription, or otherwise in compliance with title 52 of the Tennesse Code, and the actor transferred the drug to another for administration to an animal or possessed it for the transfer or administration to an animal.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.14.

Cross-References:

Authorization defense, see § 39-2913.
Defense explained, see § 39-203.
"Possess" defined, see § 39-107.

Comment:

Section 39-2914(1) excludes from criminal responsibility the common practice of intrafamily use of drugs legitimately prescribed, dispensed, or obtained over the counter for one member of the family. Although intrafamily use is unwise and to be discouraged, it should not be subject to criminal sanction. Most such use probably involves small quantities, and the taking of such small quantities when they are obtained legitimately does not present a significant risk of harm. In addition, the practice is both widespread and, in our society, constitutes "normal" conduct. It is questionable whether the criminal law should be used against widespread and "normal" conduct, especially when it is not clear that the conduct creates a significant risk of harm. Further, it is doubtful whether the criminal law can deter in this situation.

Because language excluding transfer, administration, and possession within a "family" might be difficult to apply, the defense created by subdivision (1) is limited to transfer, administration, and possession within a "household."

Subdivision (2) contains a similar defense for drugs legitimately made available for animals. Under it, for example, the horse owner who gives a drug prescribed for his horse to a neighbor for administration to that horse in the owner's absence, or to the neighbor's horse, can escape criminal responsibility.

39-2915. Prosecution for less severe offense.—When this chapter authorizes the court to enter judgment of guilt and sentence for a lesser category of offense, the district attorney may initially prosecute for the lesser category of offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Prop. Crim. Code §§ 1822(3), 1823 (2).

Tex. P. C. Prop. Rev. § 48.15.

Cross-References:

Mitigation reducing offense category, see §§ 39-2904, 39-2906, 39-2908.

Comment:

Under this chapter the court is, in several instances, required to enter judgment of conviction and sentence for a less severe offense than the one charged if the defendant establishes certain mitigating facts at the sentencing hearing. See §§ 39-2904(c), 39-2906 (c) and (d), 39-2908(d). There will probably be cases where it is clear to the prosecutor that on the facts the defendant is entitled to mitigation. Rather than going through a trial or plea proceeding for the greater offense and then a sentencing hearing to establish mitigation in these situations, this section explicitly authorizes the prosecutor to charge initially the less severe (mitigated) offense.

39-2916. Preemption.—The legislature by enacting this chapter intends to preempt any other regulation of the area covered by this chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this chapter an offense, a violation, or the subject of a criminal or civil penalty or sanction of any kind.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 48.16.

Cross-References:

"Agency" defined, see § 39-107.
"Conduct" defined, see § 39-107.
Effect of code, see § 39-103.
"Government" defined, see § 39-107.
"Law" defined, see § 39-107.
Preemption by code, see § 39-103 comment.

Comment:

Municipal ordinances presently conflict with and overlap state law in the drug area. The Code of the Metropolitan Government of Nashville and Davidson County (1967), for example, prohibits the sale of marihuana and cocaine, § 29-1-17, and the possession of instruments adapted for use of narcotic drugs, § 29-1-18. Most of this conduct is of course proscribed by state law, and to eliminate this conflict and confusion between state and local law, and to prevent future conflict and confusion, § 39-2916 makes clear the state intends to preempt the area of mind and mood-altering drugs and thereby prevent governmental subdivisions and agencies from enacting or enforcing laws in this area.

In light of this section, local laws punishing mere possession of restricted drugs, for example, possession of smoking pipes, or drug intoxication (see also §§ 39-2508 and 39-2512) are invalid, as are local laws conflicting with any provision of this chapter, e.g., contracting the household use defense, adding a drug to the restricted category other than by the authorized state agency.

TITLE 40—CODE OF CRIMINAL PROCEDURE

General Provisions

Investigation and Apprehension

Formal Charges

Pretrial Proceedings

Trial and Appeal

Post-Trial Proceedings

Miscellaneous Proceedings

TITLE 40
CODE OF CRIMINAL PROCEDURE

CHAPTER 1
GENERAL PROVISIONS

40-101. Short title.—This title shall be known and may be cited as the "Code of Criminal Procedure."

40-102. Objectives of code of criminal procedure.—The general objectives of the code of criminal procedure are:

(1) to embrace rules applicable to the prevention and prosecution of offenses against the laws of this state;

(2) to make the rules of procedure in respect to the prevention and prosecution of offenses intelligible to the officers who are to act under them and to all persons whose rights are affected by them;

(3) to ensure that no citizen of this state shall be deprived of life, liberty, property, privileges or immunities except by the due course of law;

(4) to provide for the just determination of every criminal proceeding.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 1.04.
Tex. C. C. P., arts. 103, 104.

Comment:
This section expresses the legislative philosophy on which the Code of Criminal Procedure is founded in the form of a statement of generally recognized objectives of procedural criminal law. The section provides an overall focus and sense of direction for those who administer and interpret the code.

40-103. Effect of code of criminal procedure.—The code of criminal procedure governs the procedure in all criminal proceedings in the criminal courts, general sessions courts, municipal courts and all other state courts.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
"Criminal court" defined, see § 40-105.
Effective date of code, see § — of code act.
Jurisdiction of:
Circuit courts, see § 40-201.
Criminal courts, see § 40-201.
General sessions courts, see § 40-202.
Justices of the peace, see § 40-203.
Juvenile courts, see T. C. A. § 37-203.
State, see T. C. A. § 39-104, as amended.
Saving provision, see § — of code act.

Comment:
This section is intended to make clear that the procedure set out in this Code of Criminal Procedure is to be used in criminal proceedings in all courts, including general sessions and municipal courts. Not all proceedings in municipal and general sessions courts are "criminal proceedings" and this statute does not change the present nature of those proceedings. Juvenile court proceedings, for example, are not criminal proceedings. See State ex rel. Jackson v. Bomar, 215 Tenn. 9, 383 S. W. (2d) 41 (1964).

40-104. Construction of code of criminal procedure.—(a) The provisions of this title shall be construed to achieve simplicity and uniformity in procedure, fairness in administration, the elimination of unjustifiable expense and delay, and the objectives of the code.

(b) The code commission shall publish with the codification of this act the commentary prepared by the law revision commission. The commentary may be used as evidence of legislative intent and as an aid in construing the provisions of this title in the event of ambiguity.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): Fed. R. Cr. P. § 2.
Ky. Rule § 1.04.
Subsec. (b): Hawaii Prop. Pen. Code § 105.

Cross-References:
Objectives of code, see § 40-102.

Comment:
The word "uniformity" is added to the federal rule in this section in order to promote uniform construction and thus help alleviate the problems created by the hodge-podge of private and public acts currently governing criminal procedure in Tennessee.

The comments in this code are intended to explain its provisions and to aid in their interpretation. It should be noted, however, that the language of the sections themselves is intended as the authoritative statement of the law. The comments are not authoritative statements, but are evidence of the considerations which prompted the statutory text.

40-105. Code of criminal procedure definitions.—In this title, unless the context requires a different definition:

(1) "Charge" includes complaint, indictment, information and presentment.

(2) "Complaint" is a written statement, upon oath before a magistrate, which alleges that a person has committed an offense.

(3) "Criminal court" includes any court with general trial jurisdiction over both misdemeanors and felonies.

(4) "Demurrer," "motion to quash," "plea in abatement," "plea in bar," "special plea in bar" or words to the same effect in any other statute of this state shall be construed to mean the motion raising a defense or objection provided in § 40-1401.

(5) "Indictment" is a written statement, by the grand jury, which alleges that a person has committed an offense. "Indictment" includes "presentment" where the context will permit.

(6) "Information" is a written statement, by a district attorney, upon oath before a magistrate, which alleges that a person has committed an offense.

(7) "Magistrate" is any state judicial officer, including the judge of a municipal court, having original trial jurisdiction over misdemeanors or felonies.

(8) "Peace officer" means an officer, employee, or agent of government who has a duty imposed by law:

(A) to maintain public order; and

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

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

(9) "Presentment" is a written statement, by the grand jury, based on their own knowledge or observation, which alleges that a person has committed an offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 3.
Fed. R. Cr. P. § 54(c).
T. C. A. § 40-1702.

Comment:
(1) The word "charge" is used throughout the code primarily as a shorthand method of saying "complaint, indictment, information, and presentment." Where reference to all methods of initiation of prosecution is not proper, the specific type of charge is designated.

(2) This is based on the "complaint" described in the federal rules. A part of the state warrant currently in use now fulfills the function of a complaint. A complaint is used to give the accused notice of the charge and may be used to prosecute misdemeanors in general sessions courts. The use, form, and sufficiency of all charges are set out in

ch. 10 (initiation of prosecution) of the code.

(3) "Criminal court" is used where the procedure is different in such courts from that used in a magistrate's court. This definition includes a specialized division of a circuit court, as found in the larger counties, and the circuit court, where that court tries both civil and criminal cases. This term does not include general sessions courts since they do not have jurisdiction over the trial of felonies and would not include the Court of Criminal Appeals since it does not have original jurisdiction.

(4) This subsection is designed to prevent any problems created by unchanged statutes elsewhere in the Tennessee Code Annotated which refer to such pleas. Such pleas are abolished and replaced by the motion to dismiss in § 40-1401 (pleadings and motions).

(5) & (6) These subsections parallel the definitions of the other charges. Likewise, the use, form, and sufficiency of an "indictment" and an "information" are set out in ch. 10 (initiation of prosecution) of the code.

(7) Conflicting definitions of "magistrate" are presently found in T. C. A. §§ 40-114 and 40-603. Other states vary in their definitions. In some states "all state judicial officers" are magistrates. However, in light of the requirement that an arrested person be taken before the nearest available magistrate, it would seem advisable to limit the definition to those judges who have some contact with criminal proceedings. This is necessary in order to avoid the incongruity of having the accused appear initially before a chancellor or appellate judge who just happened to be the "nearest available magistrate."

Another problem raised by this subsection, which is discussed in ch. 9 (preliminary examination), is whether city court judges should be included. When a person is arrested for a misdemeanor and taken to general sessions court, he has the option of waiving indictment and jury trial and going to trial before the judge alone or he can insist on having his case presented to the grand jury. If that person were taken to a municipal court for his preliminary hearing, the judge would have no other course to follow except to hold the preliminary hearing and bind the accused over to the grand jury, since the city court has no jurisdiction to try the misdemeanor. Such differential treatment should not be allowed, where the difference depends merely on before which court the arresting officer takes the defendant. However, the legislature has recently given some municipal courts the jurisdiction to try state misdemeanors. To exclude judges of these courts from the definition of "magistrate" would thus alter the recently granted jurisdiction of these courts since anyone arrested would be taken to a magistrate and not to city court. Also, where city courts can try misdemeanors in the same way as in a court of general sessions, there would be no danger of differential treatment. The provision for six-man juries in city court is an anomaly which has yet to stand the constitutional test. See Johnson v. Louisiana, 406 U. S. 356 (1971).

For these reasons magistrate here is defined to include the judges of criminal courts, general sessions courts and the judges of city courts who can try state misdemeanors.

(8) Unlike present law, "peace officer" is defined functionally, in terms of employment as a public servant and legal duty to maintain law and order. The new definition avoids the problems of enumeration and focuses instead on the nature and function of the officer. Thus, park rangers are peace officers, but private citizens specially licensed by a police chief are not peace officers because they are not public servants and not legally obligated to enforce the criminal law. The same definition is used in the Criminal Code. See T. C. A. § 39-107, as amended.

(9) This subsection also parallels the definitions of other charges. The "presentment" is seldom used today but is a necessary adjunct to the grand jury's investigative powers, allowing it to at least institute the prosecution of an offender even without the cooperation of the district attorney.

40-106. Computation of time.—(a) In computing any period of time prescribed or allowed by the code of criminal procedure, by order of court, or by any applicable statute, the date of the act, event, or default after which the designated period of time begins to run is not to be included.

(b) The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period

runs until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Rules of Civil Proc. § 6.01.

Comment:
This is taken directly from the Tennessee civil rule and provides for the same method of computation as does the F. R. Cr. P. § 45(a). This rule is broader and more explicit than T. C. A. § 1-302.

40-107. Extension of time period.—(a) If by statute or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period, permit the act to be done, where the failure to act was the result of excusable cause or neglect.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Rules of Civil Proc. § 6.02.

Comment:
This section, although similar to F. R. Cr. P. § 45(b), is taken directly from the Tennessee civil rule. This brings the criminal procedure in line with the civil.

40-108. Three days for mailed notice.—Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three (3) days shall be added to the prescribed period.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Rules of Civil Proc. § 6.05.

Comment:
This is the civil rule and, as pointed out in the comments thereto, is designed to "guard against injustice caused by loss of time required for notice to be delivered through the mails." This provides the same as F. R. Cr. P. § 45(e).

40-109. Time of issuance of process.—Any process, warrant, or precept authorized to be issued by any of the magistrates, judges, justices of the peace, or clerks of the court, in any criminal prosecution on behalf of the state, may be issued at any time and made returnable to any day of the term. If the process, warrant, or precept is issued within ten (10) days of the expiration of term, it may also be made returnable to any day of the next term.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-705.

Cross-References:
Arrest warrants, see ch. 7.
Search warrants, see ch. 8.

Comment:
This is the present Tennessee statute and is the authorization for the issuance of search and arrest warrants on Sundays. It also provides for continuity of process from one term to the next.

40-110. Contents, form, and verification of motions.—(a) An application to the court for an order shall be by motion, which shall state with particularity the grounds therefor and set forth the relief or order sought.

(b) A motion made in a criminal court, other than one made during a trial or hearing, shall be in writing unless the court permits it to be made orally.

(c) Any motion containing any averment of fact which is not on the record shall be verified as true to the movant's information and belief.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Rules of Civil Proc. § 7.02(1).
Fed. R. Cr. P. § 47.

Comment:
This section is worded to allow oral motions in general sessions courts and to allow the court to hear oral motions for such things as continuances and changes in bail.

The new civil rules do not deal with verification except to refer to the present statutes. The statutes governing the verification of pleadings and motions are found throughout chs. 7, 8, 9, and 10 of tit. 20, however, T. C. A. § 20-701 states that these chapters are to apply to all civil actions. In spite of this the cases have construed the statutes as requiring that pleas in abatement in criminal cases must be verified as in civil cases. See Chairs v. State, 124 Tenn. 630, 139 S. W. 711 (1911); Armstrong v. State, 101 Tenn. 389, 47 S. W. 492 (1898). There appears to be no general rule concerning when motions should be verified and the subject seems to be governed only by statutes without the aid of the common law. Subsection (c) is designed to effect the purpose of the requirement of verification: to ensure that statements of fact, in motions, which are dehors the record are true.

40-111. Service and filing of written motions and notice. — (a) Notices and motions which are required to be in writing, other than those which are heard ex parte, shall be served upon each of the parties and filed with the court. Service and filing shall be in the manner provided for in civil actions.

(b) A motion which is required to be in writing, other than one which may be heard ex parte, and notice of the hearing on the motion shall be served not later than five (5) days before the time specified for the hearing, unless a specified period is fixed by this title or by order of the court. Such an order may for cause shown be made on ex parte application.

(c) When a motion is supported by affidavit, the affidavit shall be served with the motion. Except as provided in § 40-2407, opposing affidavits may be served not later than twenty-four (24) hours before

the hearing, unless the court permits them to be served at some other time.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Rules of Civil Proc. §§ 5.01, 6.04.
Fed. R. Cr. P. § 49.

Cross-References:
Filing, see Tenn. Rules of Civil Proc. § 5.05.
Service, see Tenn. Rules of Civil Proc. § 5.02.

Comment:
This is basically the same as the civil rule with some rewording to make sure that motions made in general sessions do not have to be served or filed, since they do not have to be in writing.

40-112. Dismissal of prosecutions.—(a) After the complaint is filed or the indictment returned, no criminal prosecution can be dismissed, discontinued, or abandoned without leave of the court or action by the grand jury.

(b) Unless good cause is shown, the court may order the defendant released and the indictment, if any, dismissed, if:

(1) the defendant charged with an offense is not indicted at the term to which he has been bound; or

(2) except on his own motion for continuance, the defendant is not brought to trial at the next regular term of the court in which the indictment is triable after the indictment is found.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-2101.
Subsec. (b): T. C. A. § 40-2102.

Comment:
Subsection (a) is taken from the present statute which requires the assent of the court for any dismissal after the indictment is found. This section changes the present statute by requiring such assent in all cases, including misdemeanors tried in general sessions.

A complaint will be filed in all cases except where the defendant is indicted out of custody. Where the defendant has not yet been indicted and is arrested, it is required that a complaint be filed by the time he appears before the magistrate. Thus, once one is charged with an offense there can be no dismissal without the court's permission unless the grand jury discharges the accused. This would prevent any harassment by repeatedly filing complaints and dismissing them before indictment.

Subsection (b) is a rewording of the present statute. This allows the court to dismiss the charge where the accused is not indicted within the term or tried within the term to which he is bound so long as the delay is not on his motion.

40-113. Continuance.—(a) Upon good cause shown, either before or after the indictment, the court may order the action to be continued from term to term and, in the meantime, may discharge the defendant from custody on his own recognizance or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued.

(b) A continuance shall be granted by the court at any stage of the action if it is shown that an attorney or material witness in a criminal prosecution is a member of the general assembly and that, if a continuance were not granted, the attorney or witness would be required to be absent during all or part of the legislative session or to

be absent from a meeting of a legislative committee of which he is a member.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2503.

Cross-References:
Pretrial release, see ch. 12.

Comment:
Subsections (a) and (b) are the present Tennessee statute as amended in 1971 to provide for an automatic continuance where a party is a state legislator.

40-114. Presence of defendant.—(a) Unless excused by the court on defendant's application, the defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, at the imposition of sentence, and at the time his motion for new trial is made, except:

(1) where defendant has been excluded under § 40-115, in which case he shall be present by counsel; or

(2) where the maximum possible sentence is a fine not in excess of fifty dollars ($50) and no incarceration is possible, in which case defendant may appear by counsel for all purposes.

(b) The defendant shall have the right to be present at the taking of any depositions taken at the instance of the prosecution, under such orders as may be required to protect the public and the defendant's right of confrontation and examination of the witness.

(c) In prosecutions not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.

(d) In any case a corporation may appear by counsel for all purposes.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 43.

Cross-References:
Death penalty, see T. C. A. § 39-1105, as amended.
Depositions, see ch. 17.
Exclusion of defendant, see § 40-115.
Motion for new trial, see § 40-2407.

Comment:
This section does not change the present Tennessee procedure substantially. Tenn. Const., Art. I, § 9, gives the defendant the right to be present during his trial and has been interpreted to mean from the impaneling of the jury onward. Tate v. State, 219 Tenn. 698, 413 S. W. (2d) 366 (1967); Logan v. State, 131 Tenn. 75, 173 S. W. 443 (1915).

Presently, the defendant is required to be present at the arraignment in some courts and not so required in others. This section uniformly requires that the defendant be present except in petty offenses and except where he is excluded from the courtroom pursuant to § 40-115. This should help to make the criminal process more visible to the semi-literate defendant who is not really sure what his lawyer and the courts are doing while he is in jail.

Subsection (b) regarding the defendant's right to be present at the taking of any deposition by the state is a corollary to the requirement in chapter 17 (depositions) that the defendant's right to confrontation be preserved.

Subsection (c) allowing the trial and return of the verdict if the defendant voluntarily absents himself is contrary to present Tennessee law, Clark v. State, 23 Tenn. 254 (1843), but that provision is the majority and federal rule.

40-115. Exclusion of defendant.—(a) In all criminal prosecutions a defendant may be held outside of the courtroom and his trial may proceed without his physical presence if:

(1) his conduct is such that the trial cannot continue in his presence; and

(2) he has already been found to be in contempt of court for disruptive conduct; and

(3) he has been expressly warned that further such misconduct will result in his being excluded from the courtroom.

(b) If a defendant is excluded from the courtroom under this section, he must be represented in court by competent counsel and given reasonable opportunities to communicate with him during the trial.

(c) The defendant must be brought into open court, out of the presence of the jury, at the beginning of each session and, at any time, allowed to return to and remain in court if he signifies his willingness to avoid creating a disturbance.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.
ABA Trial Disruption Standards.

Cross-References:
Right to counsel, see § 40-3202.

Comment:
Hopefully, the situation with which this section deals will occur very rarely in Tennessee. The common law authorizes the exclusion of an unruly defendant. See United States v. Davis, 25 Fed. Cas. 773 (C.C.S.D. N.Y. 1869). However, § 40-115 is needed for two reasons. First, § 40-114 requires the defendant's presence at the trial and this could be construed to restrict the court's power to remove an unruly defendant. Second, this section clarifies the prerequisites and safeguards which were ill-defined at common law.

The case of Illinois v. Allen, 397 U. S. 337 (1970), sanctions the exclusion of the defendant under certain circumstances. The court there stated:

> [W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. *Id.* at 343.

The standards in this section do afford protection to the defendant while, at the same time, allowing the court to protect the judicial system. One prerequisite before exclusion is that the conduct of the defendant must be such that it will totally prevent the trial. Relatively minor outbursts and disturbances which may prejudice the defendant but which will not prevent a trial do not justify such extreme measures.

Another prerequisite is designed to insure that exclusion is a last resort measure. The Supreme Court, in Allen, set out three possible methods of dealing with an obstreperous defendant: (1) bind and gag him, (2) cite him for contempt, and (3) exclude him. Justice Brennan, in his concurring opinion, found shackling and gagging the least acceptable of the alternatives. This is also the position taken in the A.B.A. Standards relating to the judge's role in dealing with trial disruptions. Thus, an attempt by that method of handling an unruly defendant is not required prior to excluding a defendant under this section. However, finding a person in contempt should certainly be preferable to the removal of the defendant. Here, a finding that the defendant is in contempt is required prior to removing the defendant. This should help insure that the exclusion of the defendant is used only as a last resort.

The requirement that the defendant be warned that he will be removed is mentioned in *Allen* and is probably necessary to comply with the standards for an

intelligent waiver of his right to be present.

The constitutional question of whether a defendant can waive his right to be present during a capital case has not yet been decided and is left unanswered in this section.

Subsections (b) and (c) are intended to lessen the effects of the defendant's removal as much as possible. It is required that the defendant be brought into open court at least at the beginning of each session. As pointed out in the A.B.A. Standards, this is to encourage his participation in the trial and promote public confidence in the judicial system.

CHAPTER 2

JURISDICTION OF COURTS

40-201. Circuit and criminal courts jurisdiction.—The circuit and criminal courts are vested with original jurisdiction of all criminal actions not exclusively conferred by law on some other tribunal.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-116.

Comment:
This is basically the present statute.

40-202. General sessions courts jurisdiction.—(a) All courts of general sessions are vested with original jurisdiction of all misdemeanor cases brought before the court by complaint or information wherein the district attorney consents and the person charged expressly waives, in writing, an indictment, presentment, grand jury investigation and jury trial.

(b) In such cases the trial shall proceed before the court without the intervention of a jury, and the court shall enter such judgment, and may sentence the defendant to any of the sentencing combinations authorized by law for the particular offense, as the court may determine proper under the peculiar circumstances of the case and the general principles of sentencing but nothing herein shall be construed to grant the court the power to impose a fine in excess of fifty dollars ($50). The court shall have no jurisdiction of the trial of misdemeanors for which the minimum punishment is a fine of more than fifty dollars ($50).

(c) Where the offense is punishable only by fine not in excess of fifty dollars ($50), no waiver of indictment, presentment, grand jury investigation, or jury trial is necessary and the court may try the case in the same manner as other misdemeanors.

(d) All courts of general sessions are also vested with jurisdiction and authority to issue any process and do all other judicial acts required of them by this title.

(e) This section shall supersede any private act dealing with the criminal jurisdiction of general sessions courts, it being intended that this section is to be a complete and comprehensive statement of such jurisdiction.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-118.

Cross-References:
General principles of sentencing, see T. C. A. § 39-806, as amended.
Sentencing combinations, see T. C. A. § 39-805, as amended.
Statement of magistrate at preliminary examination, see § 40-902.
Trial by jury or by judge alone, see § 40-1901.

Comment:
Although this section is modeled after the present T. C. A. § 40-118, it differs in three major provisions.

The first difference is that the first sentence now conditions the court's jurisdiction on the consent of the district attorney. This is a corollary to the provision that the defendant can waive jury trial only with the consent of the state. It was felt that the people have an interest in whether trials are by jury or judge alone.

The second difference is that in subsection (c) no waiver is required in order for the court to have jurisdiction over offenses punishable only by fine not in excess of $50. If incarceration or a greater fine is a possible punishment, waiver is required, but the so-called petty offenses punishable only by such a small fine are not even such criminal offenses as to guarantee the right to jury trial. See Howard v. State, 143 Tenn. 539, 227 S. W. 36 (1921). This subsection does not change general sessions courts' jurisdiction since the present statute gives them the jurisdiction of justices of the peace and the present T. C. A. § 40-408 gives the justices of the peace such small offense jurisdiction.

It should be noted that this section does not define general sessions jurisdiction in terms of the jurisdiction of the justice of the peace as the present statute does. This section is intended to be a comprehensive statement of the jurisdiction of general sessions courts in criminal cases.

The third difference is contained in subsection (d). The present statute, by referring to the jurisdiction of justices of the peace, empowers general sessions judges to hold preliminary examinations and issue warrants, etc. Since § 39-202 does not refer to justices of the peace jurisdiction it would seem advisable to be sure that the general sessions courts have express authority to do such things as hold preliminary examinations, issue warrants, set bail, etc., as required of them by this code.

Subsection (e) in contrast with T. C. A. § 16-1124, makes the general statute controlling over any private acts dealing with the criminal jurisdiction of general sessions courts. The only jurisdiction which some general session courts have by private act which is not contained in this section is jurisdiction arising by implication. Some private acts, while almost identical with the present T. C. A. § 40-118, omit the provision that the court shall have no jurisdiction where the misdemeanor is punishable by a minimum fine in excess of $50. In these counties it would seem that the court would have jurisdiction to hear the case even though the Tennessee Constitution would forbid the imposition of a fine. Thus the court would be limited to its power to incarcerate under the statute. Rather than force the court to decide, at the beginning, that incarceration would be the proper punishment, this section divests the court of jurisdiction of such misdemeanors, requiring their trial in criminal court.

40-203. Justice of the peace jurisdiction.—(a) In any county in which there is a general sessions court, the justice of the peace shall have no jurisdiction over any criminal matter.

(b) In any county in which there is no general sessions court, the justice of the peace, in criminal cases, shall have the same jurisdiction and be governed by the same procedure as a general sessions court.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
"Magistrate" defined, see § 39-105.

Comment:
Presently an entire chapter of tit. 40 (ch. 4) is devoted to "Proceedings Before Justices." T. C. A. § 19-312 divests the justices of the peace of all jurisdiction exercised by the general sessions courts in counties which have general sessions courts. Since all but three counties have general sessions courts, the justice of the peace in Tennessee actually has very little criminal jurisdiction at present.

In the interest of uniformity, this section requires the remaining justices of the peace to follow the same procedure as a general sessions court. Thus the procedure should be basically the same in every county, regardless of whether it has a general sessions court or justice of the peace.

T. C. A. § 19-312 restricts the jurisdiction of justices of the peace in counties where there are general sessions courts but allows the justice to issue criminal and search warrants in all counties. Thus the justice in most counties can issue warrants but cannot hold preliminary examinations or try misdemeanors. This is inconsistent with this code since it provides that warrants shall be issued and signed by magistrates. The definition of magistrate in the code is "any state judicial officer, including the judge of a municipal court, having original trial jurisdiction over misdemeanors or felonies." Justices of the peace, not having any original trial jurisdiction in criminal cases in counties in which there are general sessions courts, are not magistrates within this definition and cannot issue warrants. In order to be consistent with this policy, the words "may issue criminal and search warrants against and accept appearance bonds for any person charged with an offense committed in the county, and" should be stricken from T. C. A. § 19-312. Of course, in counties in which there is no general sessions court the justice will have the jurisdiction of a general sessions court to issue warrants and try misdemeanors.

CHAPTER 3

VENUE

SECTION.
40-301. Venue generally.
40-302. Offenses in two or more counties.
40-303. Offenses on county boundaries.
40-304. Offenses committed outside the state.
40-305. Change of venue.
40-306. County to which venue changed.
40-307. Transfer of cause.

40-301. Venue generally.—Except as otherwise provided in this chapter, offenses shall be prosecuted in the county where the offense was committed.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-104.
Tenn. Const., Art. I, § 9.

Comment:
This section retains present law.

40-302. Offenses in two or more counties.—If one or more elements of an offense are committed in one county and one or more elements in another, the offense may be prosecuted in either county.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-105.

Cross-References:
"Element of offense" defined, see T. C. A. § 39-107, as amended.

Comment:
This section restates present law.

40-303. Offenses on county boundaries.—Offenses committed on the boundary of two (2) or more counties may be prosecuted in either county.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-106.

Comment:
This section retains present law.

40-304. Offenses committed outside the state.—Offenses committed wholly or in part outside this state, under circumstances that give this state jurisdiction to prosecute the offender, may be prosecuted in any county in which an element of the offense occurs, or in the case of an offense committed wholly outside this state in any county in which the offender is found.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-102, 40-103.

Cross-References:
Element of offense, see T. C. A. § 39-107, as amended.
Territorial jurisdiction, see T. C. A. § 39-104, as amended.

Comment:
This section preserves the intent of both current statutes while changing the language to be compatible with the Criminal Code.

40-305. Change of venue.—(a) In all criminal prosecutions the venue may be changed upon the motion of the defendant, or upon the court's own motion with the consent of the defendant, when it appears to the court that, from undue excitement against the defendant in the county where the offense was committed, or any other cause, a fair trial probably could not be had.

(b) All objections to improper venue are waived if not made before trial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2201, 40-2202.

Cross-References:
County jurisdiction over boundary waters, see T. C. A. § 5-102.

Comment:
This section is substantially the same as the present statutes. Tennessee Const., Art. I, § 9, prohibits the change of venue without the consent of the defendant. Kirk v. State, 41 Tenn. 344 (1860).

40-306. County to which venue changed.—(a) The venue shall be changed to the nearest county, either in or out of the judicial circuit in which the prosecution is pending, where the same cause for change of venue does not exist.

(b) The defendant may elect to which county the venue shall be changed, when in the opinion of the court, there are two (2) or more adjoining counties, or counties about equidistant, to which the case might be removed under the provisions of § 40-305. If the defendant fails or refuses to make such election, the court shall determine to what county the cause shall be removed.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2203—40-2205.

Comment:
This section is substantially the same as the present statutes.

40-307. Transfer of cause.—(a) Upon making an order for the change of venue, the clerk shall make out a full and complete transcript of the record and proceedings in the cause, and transmit the same, together with the indictment and all other papers on file, to the clerk of the receiving court, which transcript shall be entered on the minutes of the receiving court.

(b) The sheriff of the county, if the defendant is in his custody, shall, on the order of the court, transfer and deliver such defendant to the sheriff of the county to which the venue is changed, who shall receive and detain the defendant in custody until legally discharged.

(c) The receiving court may release the defendant on bail or upon his own recognizance.

(d) The receiving court shall take cognizance of the cause, and proceed therein to trial, judgment, and execution, in all respects as if the indictment had been found in that court.

(e) The receiving court may also enforce the attendance of the prosecutor and witnesses, both on behalf of the state and of the defendant, by recognizance or undertaking of bail, as in other cases.

(f) All fines and forfeitures in such cases go to the county in which the indictment was found, and judgment must be rendered accordingly; and the fees of all jurors and witnesses, on being properly certified by the clerk of the receiving court, are a charge on the county in which the indictment was found, in like manner as if the trial had not been removed.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2206—40-2211.

Cross-References:
Costs, see ch. 34.
Fees of officers, see § 40-3404.
Fines, see T. C. A. §§ 39-822—39-823, as amended.
Pretrial release, see ch. 12.

Comment:
This section combines the present statutes.

CHAPTER 4

LIMITATION OF PROSECUTIONS

40-401. Felonies.—Except as provided in § 40-403, felony charges shall be presented within these limits, and not afterward:

(1) no limitation: murder and capital murder.

(2) six (6) years from the date of the commission of the offense:

(A) theft of any estate, real, personal or mixed, by an executor, administrator, guardian or trustee, with intent to defraud any creditor, heir, legatee, ward, distributee, beneficiary or settlor of a trust interested in such estate;

(B) theft by a public servant of government property over which he exercises control in his official capacity;

(C) forgery or the uttering, using, or passing of forged instruments.

(3) one (1) year from the date of the commission of the offense: any felony in chapter 13 of title 39, except where the alleged victim was younger than sixteen (16) years or incompetent.

(4) three (3) years from the date of the commission of the offense: all other felonies.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. C. C. P. Prop. Rev., art. 1201.

Cross-References:
Capital murder, see T. C. A. § 39-1105, as amended.
"Felony" defined, see T. C. A. § 39-107, as amended.
Forgery, see T. C. A. § 39-2021, as amended.
Murder, see T. C. A. § 39-1102, as amended.
Theft, see T. C. A. § 39-1903, as amended.

Comment:
Present T. C. A. § 40-201 utilizes the limitless prosecution for all offenses punishable by death or life imprisonment. Subdivision (1) generally narrows the class of offenses without a limit on prosecutions to those involving the death of another.

Subdivision (2) has no counterpart in Tennessee law and is designed to allow a greater period of limitation for those crimes least likely to be quickly discovered.

Subdivision (3) implements the Commission's opinion that fair and just proceedings in most sexual offense cases are not possible after long delays.

Subdivision (4) sets the general limitation at three years.

40-402. Misdemeanors.—A charge for any misdemeanor shall be presented within one (1) year from the date of the commission of the offense, and not afterward.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-204.

Cross-References:
"Misdemeanor" defined, see T. C. A. § 39-107, as amended.

Comment:
This retains the general misdemeanor limitation of T. C. A. § 40-204, but excludes the special six-month limit for gambling offenses.

40-403. Attempt, conspiracy, facilitation, solicitation. — (a) The limitation period for criminal attempts is the same as that of the offense attempted.

(b) The limitation period for criminal conspiracy is the same as that of the object offense of the conspiracy.

(c) The limitation period for facilitation of a felony is the same as that of the felony facilitated.

(d) The limitation period for criminal solicitation is the same as that of the felony solicited.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. C. C. P. Prop. Rev., art. 12.03.

Cross-References:
Attempt, see T. C. A. § 39-901, as amended.
Conspiracy, see T. C. A. § 39-902, as amended.
Facilitation, see T. C. A. § 39-503, as amended.
Solicitation, see T. C. A. § 39-903, as amended.

40-404. Absence from state, concealment of crime, and time of pendency of charge not computed.—(a) The time during which the accused is absent from the state shall not be computed in the period of limitation.

(b) The time during which the party charged conceals the fact of the crime shall not be computed in the period of limitation.

(c) The time during the pendency of the charge shall not be computed in the period of limitation.

(d) The term "during the pendency," as used in this section, means that period of time beginning with the day the charge is filed in a court of competent jurisdiction, and ending with the day such charge is, by an order of a trial court having jurisdiction thereof, determined to be invalid for any reason.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-205, 40-207, 40-208.

Cross-References:
"Charge" defined, see T. C. A. § 40-105, as amended.

Comment:
This section preserves present law.

40-405. Presentation of charges.—For purposes of this chapter:

(1) An indictment or presentment is "presented" when it is duly acted upon by the grand jury and received by the court.

(2) An information or complaint is "presented" when it is filed in the proper court.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. C. C. P. Prop. Rev., arts. 12.06, 12.07.

Comment:
This section is included to assure the correct computation of time for §§ 40-401 and 40-402.

CHAPTER 5

REWARDS FOR APPREHENSION

40-501. Offer of reward by governor.—Whenever the governor of the state is of the opinion that the public good requires it, he is authorized to offer by proclamation, or in such other manner as he may in his discretion deem advisable, such reward as he may think the nature of the case requires, not exceeding ten thousand dollars ($10,000), for the apprehension and conviction of any person who has committed any high and atrocious offense against the criminal laws of the state, whether he is known or not.

40-502. Limitations on reward offer.—(a) No person is entitled to a reward unless the offender is apprehended within five (5) years from the date of the governor's proclamation and before the prosecution of the offense is barred by lapse of time.

(b) No person is entitled to a reward until the offender is delivered to the civil authority.

40-503. Payment of reward.—The reward will be paid by the treasurer of the state, upon the warrant of the director of accounts, by order of the governor, drawn in favor of the person who may, in the opinion of the governor, be entitled to the same.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-901—40-905.

Comment:
This chapter combines present statutes.

CHAPTER 6

STOP, HALT, AND ARREST WITHOUT WARRANT

Subchapter B. Halt and Search at Roadblock

Subchapter C. Arrest Without Warrant

Subchapter A. Stopping Persons for Investigation

40-601. Definition of stop.—(a) A stop is the temporary detention of a person that results when a peace officer orders the person to remain in his presence to enable the peace officer to accomplish the purposes authorized in this chapter.

(b) The stop shall:

(1) be ordered only by a peace officer who is lawfully present in any place; and

(2) be maintained only for a period of time that is reasonably necessary to accomplish the authorized purposes of the stop not to exceed ten (10) minutes, unless it is absolutely necessary to accomplish the purposes of the stop, but in no case shall the aggregate period of time exceed twenty (20) minutes; and

(3) be maintained only in the area near the original place of the stop.

40-602. Cases in which stop authorized.—(a) A peace officer may stop any person he observes in circumstances that give the peace officer reasonable cause to suspect that the person has committed, is committing, or is about to commit an offense involving the use or attempted use of force against the person or the theft, damage, or destruction of property if the stop is reasonably necessary to obtain or verify an account of the person's presence or conduct, or to determine whether to arrest the person.

(b) A peace officer may stop any person he finds near the scene of an offense that the peace officer has reasonable cause to suspect has just been committed if:

(1) the peace officer has reasonable cause to suspect that the person has knowledge of material aid to the investigation of the offense; and

(2) the stop is reasonably necessary to obtain or verify the person's identity or an account of the offense.

(c) A peace officer may stop any person in connection with an offense that the peace officer has probable cause to believe has been committed if:

(1) the offense is a felony involving the use or attempted use of force against the person or the theft, damage, or destruction of property; and:

(A) the peace officer has reasonable cause to suspect the person committed the felony; and

(B) the stop is reasonably necessary to obtain or verify the person's identity to determine whether to arrest the person for the felony; or

(2) the peace officer has reasonable cause to suspect that the person was present at the scene of the offense, and the stop is reasonably necessary to obtain or verify the person's identity.

40-603. Frisk for weapon.—(a) A frisk is a search by an external patting of a person's clothing.

(b) A peace officer who has lawfully stopped a person under § 40-602 may:

(1) frisk that person, and take other reasonably necessary steps for protection, if the peace officer has reasonable cause to suspect that the person is armed and presently dangerous to the peace officer or other persons present; and

(2) take possession of any object the peace officer feels during the course of the frisk if the peace officer has probable cause to believe the object is a deadly weapon.

(c) Nothing seized by a peace officer in a frisk conducted under this section is admissible in any criminal action, civil suit, or administrative proceeding unless the stop, frisk, and seizure were authorized under this chapter and unless the object seized was a weapon or evidence of the suspected crime for which the frisk was authorized.

40-604. Identification of person stopped.—A peace officer who has lawfully stopped a person under § 40-602 may:

(1) demand of the person his name and his present or last address; and

(2) allow the person to be viewed by others at or near the scene of the stop if the person was stopped under § 40-602(a).

40-605. Questioning person stopped.—A peace officer who has stopped a person under § 40-602 shall inform the person, as promptly as possible under the circumstances and in any case before engaging in questioning:

(1) that he is a peace officer; and

(2) that the stop is not an arrest but rather a temporary detention for investigation, and that upon completion of the investigation, or in any case within twenty (20) minutes, the person will be released unless he is arrested; and

(3) if the person was stopped under § 40-602(b) or (c)(2), that the person is detained only as a witness who is required by law to identify himself to the peace officer; and

(4) that the person has a right to remain silent, that anything he says may be used against him, and that he has a right to terminate the questioning at any time.

40-606. Action taken after stop.—After the authorized purposes of the stop have been accomplished or twenty (20) minutes have elapsed, whichever occurs first, the peace officer shall allow the person to go unless he has arrested the person.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Model Prearraignment Code § 2.02.
Tex. C. C. P. Prop. Rev., art. 14.01.

Cross-References:

Arrest under warrant, see § 40-703.
Arrest without warrant, see § 40-631.
Attempt, see T. C. A. § 39-901, as amended.
"Deadly weapon" defined, see T. C. A. § 39-107, as amended.
Disorderly conduct, see T. C. A. § 39-2501, as amended.
Failure to identify as witness, see T. C. A. § 39-2302, as amended.
Force justified in law enforcement, see T. C. A. § 39-752, as amended.
Halt at roadblock, see § 40-621.
Motion to suppress evidence, see § 40-1407.
Offenses against person, see T. C. A. tit. 39, chs. 11-14, as amended.
Offenses against property, see T. C. A. tit. 39, chs. 16-20, as amended.
Official oppression, see T. C. A. § 39-2402, as amended.
"Peace officer" defined, see § 40-105.
Resisting stop or frisk, see T. C. A. § 39-2303, as amended.

Comment:

Subchapter A authorizes a limited period of on-the-spot detention ("stop") and bodily search ("frisk") under certain conditions to facilitate the investigation of suspected criminality. Under authority of this section, a peace officer can take the intermediate step of executing a stop when he does not have at that time probable cause to make an arrest. The subchapter follows the lead of Terry v. Ohio, 392 U. S. 1 (1968), in which the Supreme Court upheld the right to frisk and suggested that some limited investigative stops on evidence insufficient to support an arrest are constitutionally permissible, but did not elaborate standards for such stops.

The purpose of § 40-601 is to establish stop as a separate and distinct investigative procedure from arrest. The authority to stop is essentially a limited authority to immobilize a person. Subsection 40-601(b)(1) makes clear that the stopping officer is not legally empowered to enter or remain on premises solely by virtue of the authority granted by § 40-601. To be constitutionally acceptable the stop must be reasonable and not entail a serious sense of constraint, hence subsections 40-601(b)(2) and (b)(3) require that the stop be maintained only for a "reasonably necessary" time, usually less than 10 minutes but even in cases of absolute necessity not to exceed 20 minutes, and "in the area near the original place of the stop."

The quantum of evidence required to justify a stop is "reasonable cause to suspect" as compared with the stricter "probable cause to believe" arrest standard. Cf. Camara v. Municipal Court, 387 U. S. 523 (1967); See v. City of Seattle, 387 U. S. 541 (1967) (less stringent standard of "probable cause" for health and safety inspection warrants approved).

Subsection 40-601(a) allows a peace officer to stop persons he observes in suspicious circumstances. This is the basic investigative stop and is limited to offenses involving force against the person or harm to property. Subsection (b) permits a peace officer coming upon the scene of a suspected offense to "freeze" the situation to obtain witness identification or an account of the event giving rise to the stop. Unlike the stops authorized by subsections (a) and (b), which are limited to the res gestae of an offense, subsection (c) provides a special authority to stop persons reasonably suspected of perpetrating or witnessing a previously committed offense. Because this form of stop can occur long after the criminal event and far from the scene, before a peace officer can stop under subsection (c) he must have probable cause to believe the offense was committed, but as to whether the person stopped was the perpetrator or was present, the officer need have only a reasonable suspicion. As to suspected perpetrators, subsection (c)(1) limits the stop to felonies involving force against the person or harm to property and for the purpose of determining whether the person stopped fits the description of the perpetrator.

Section 40-603 authorizes the stopping officer to conduct a "frisk" and take other "reasonably necessary steps," such as ordering a person out of a car, when the officer has "reasonable cause to suspect" the person is armed and dangerous. Since the sole justification for allowing this limited search is to protect the safety of the officer and others present, Terry v. Ohio, 392 U. S. 1 (1968), the officer may not seize anything he feels in the course of the frisk unless he has "probable cause to believe" the object is a deadly weapon. Cf. Tinney v. Wilson, 408 Fed. (2d) 912 (9th Cir. 1969). Anything lawfully seized may be used as evidence against the person, but subsection (c) repeats the traditional exclusionary rule to make clear that all of the requirements of this chapter must be observed before a frisk is lawful and the fruits therefrom admissible in evidence. In addition that subsection imposes an additional restraint on seizures during frisks. Objects so seized may be used as evidence only insofar as they are evidence of the crime for which the stop was authorized (e.g., stolen property) or if they are in fact weapons. Thus the effectiveness of the frisk is limited to its justifying purpose, protection of the peace officer.

Section 40-604 facilitates one of the primary functions of the investigatory stop, the identification of suspects and witnesses. Subdivision (1) authorizes an officer to demand that a person stopped identify himself, and the Criminal Code, T. C. A. § 39-2302, as amended, makes it a misdemeanor for a witness to refuse to identify himself on demand. However, if the person stopped is reasonably suspected of having committed or attempted to commit an offense, then his refusal to identify himself can be considered as a factor in the officer's determination of whether there exists probable cause to arrest the person for the offense. Subdivision (2) permits on-the-scene identification by other persons present of a person stopped under § 40-602(a) to aid the officer's investigation of the suspicious activity giving rise to the stop.

With appropriate alterations to suit the temporary, on-the-scene nature of the detention, § 40-605 sets out the warnings required prior to interrogation "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," Miranda v. Arizona, 384 U. S. 436, 444 (1966).

Subchapter B. Halt and Search at Roadblock

40-621. Circumstances in which roadblock and search authorized.—(a) A peace officer may order the driver of a vehicle to halt at a roadblock and submit to a search if:

(1) the peace officer has probable cause to believe that a capital felony or felony of the first degree involving the use or attempted use of force against the person or the theft, damage, or destruction of property has been committed; and

(2) halting all or most vehicles moving in a particular direction is reasonably necessary to permit a search for a party to or victim of the felony.

(b) Nothing in this subchapter shall prohibit the stopping of vehicles for registration inspection.

40-622. Action taken after halt.—(a) A peace officer who has lawfully halted a vehicle under § 40-621 may:

(1) search the vehicle as promptly as possible under the circumstances and to the extent reasonably necessary to locate the party or victim; and

(2) frisk each occupant as authorized by § 40-603(a), (b)(1), and (b)(2).

(b) Nothing seized by a peace officer in a search or frisk conducted under this section is admissible in a criminal action, civil suit, or administrative proceeding unless the halt, frisk, search, and seizure were authorized by this chapter and unless the object seized was a weapon or evidence of the suspected crime for which the frisk was authorized.

(c) After the authorized purpose of the halt has been accomplished or twenty (20) minutes have elapsed, whichever occurs first, the peace officer shall inform the person that he is free to go unless the peace officer has arrested the person.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Model Prearraignment Code § 2.02 (2).

Tex. C. C. P. Prop. Rev., art. 14.02.

Cross-References:

Arrest under warrant, see § 40-703.

Arrest without warrant, see § 40-631.

Attempt, see T. C. A. § 39-901, as amended.

"Deadly weapon" defined, see T. C. A. § 39-107, as amended.

Disorderly conduct, see T. C. A. § 39-2501, as amended.

Force justified in law enforcement, see T. C. A. § 39-752, as amended.

Motion to suppress evidence, see § 40-1407.

Offenses against person, see T. C. A. tit. 39, chs. 11-14, as amended.

Offenses against property, see T. C. A. tit. 39, chs. 16-20, as amended.

Official oppression, see T. C. A. § 39-2402, as amended.

"Peace officer" defined, see § 40-105.

Resisting halt, see T. C. A. § 39-2303, as amended.

Stopping person for investigation, see §§ 40-601—40-605.

Comment:

Subchapter B authorizes halting vehicles at a roadblock under certain circumstances to accomplish the limited purpose of finding a party to or victim of a serious felony; there is no specific statutory authority of this kind in present law. The power conferred is for use in emergency situations, and specific authority is necessary because officers cannot be said to have "reasonable suspicion," the evidentiary standard required for a stop under subchapter A, as to each of the hundreds of cars that might be stopped in the course of executing a roadblock. To be constitutional this power must be limited to exigent situations. Cf. Brinegar v. United States, 338 U. S. 160 (1949), in which Mr. Justice Jackson, dissenting, noted that he would strive to uphold a roadblock if it were used to terminate a kidnapping but not if it were used "to salvage a few bottles of bourbon and catch a bootlegger." Id. at 183.

Section 40-621 defines the evidentiary standard required for a lawful roadblock: first, there must be "probable cause to believe" that a serious felony has been committed, and second, "halting all or most vehicles" must be "reasonably necessary" to find the victim of or party to the felony. Accordingly, there must be some reasonable basis for believing that the person sought is traveling by motor vehicle.

Section 40-622 prescribes the lawful activity of peace officers at a roadblock. Subsection (a)(1) authorizes a search that is limited to accomplishing the sole purpose of the roadblock halt, that is, to the extent "reasonably necessary" to find a party to or victim of the felony. Officers are not authorized to search for contraband or stolen property, and such a search (e.g., of the glove compartment or under the spare tire) conducted prior to a lawful arrest is illegal and the fruits thereof excludable under Subsection (b). Subsection (a)(2) authorizes a protective frisk according to the procedure of § 40-603. Subsection (c) limits the duration of the halt to a maximum of 20 minutes, after which time the officer is required to inform the person he is free to go unless the person has been arrested.

Subchapter C. Arrest Without Warrant

40-631. Arrest by peace officer.—(a) A peace officer may arrest a person without a warrant if the peace officer has probable cause to believe that the person:

(1) committed a felony; or

(2) committed a misdemeanor, and:

(A) committed the misdemeanor in the peace officer's presence or view; or

(B) the peace officer has probable cause to believe that the person committed theft of goods held for sale in a retail or wholesale establishment.

(b) When arresting a person a peace officer shall inform him of his authority and the cause of the arrest, except when the person is in the actual commission of the offense or is pursued immediately thereafter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Model Prearraignment Code § 3.01(1).

Tex. C. C. P. Prop. Rev., art. 14.03.

T. C. A. §§ 40-806, 40-825, 40-836.

Cross-References:

Arrest by person other than peace officer, see § 40-636.

Arrest for theft of goods held for sale, see § 40-637.

Arrest under warrant, see § 40-703.

Citation in lieu of or in connection with arrest without a warrant, see § 40-632.

Force justified in law enforcement, see T. C. A. § 39-751, as amended.

Halt at roadblock, see §§ 40-261, 40-622.

Motion to suppress evidence, see § 40-1407.

"Peace officer" defined, see § 40-105.

Resisting arrest, see T. C. A. § 39-2303, as amended.

Stopping person for investigation, see §§ 40-601—40-606.

Theft, see T. C. A. § 39-1903, as amended.

Comment:

Section 40-631(a) consolidates the authority of peace officers to arrest without warrant into a single provision.

Under § 40-631 warrantless felony arrests are authorized whenever there is "probable cause to believe" the person committed a felony, the evidentiary standard required by the fourth amendment. Warrantless misdemeanor arrests are allowed only in the cases of necessity described in subdivision (2). Subdivision (2)(A) maintains the traditional "in view" requirement for nonfelony arrests without warrant; subdivision (B) retains the present nonfelony warrantless arrest power in shoplifting cases. See T. C. A. § 40-825.

Subsection (b) restates present law.

40-632. Citation in lieu of or in connection with arrest without a warrant.—(a) If a peace officer acting without a warrant has probable cause to believe that a person has committed a misdemeanor, and custody of that person is not necessary to protect the public interest, he shall issue a citation to appear in court in lieu of arresting him.

(b) If a peace officer acting without a warrant has arrested a person for the commission of a misdemeanor, he may issue a citation to appear in court in lieu of taking him before a magistrate as provided in § 40-901.

(c) In issuing a citation the peace officer shall:

(1) prepare a written citation to appear in court, containing the name and address of the cited person and the offense charged, and stating when the person shall appear in court. The citation shall give notice to the defendant that his failure to appear as ordered shall constitute a separate offense under § 39-2311, as amended. Unless the person

requests an earlier date, the time specified in the citation to appear shall be at least three (3) days after the issuance of the citation;

(2) deliver one (1) copy of the citation to appear to the person cited, who shall sign a duplicate written citation which shall be retained by the peace officer;

(3) thereupon release the cited person from any custody;

(4) as soon as practicable, file one (1) copy of the citation with the court specified therein, and deliver one (1) copy to the district attorney.

(d) If the person cited fails to appear in court at the date and time specified, the court shall issue a bench warrant requiring his arrest.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Model Prearraignment Code § 3.02.
Maine Rev. Stat. Ann. 14-5544.

Cross-References:

Arrest under warrant, see § 40-703.
Arrest without warrant, see § 40-631.
Failure to appear, see T. C. A. § 39-2311, as amended.
"Misdemeanor" defined, see T. C. A. § 39-107, as amended.
"Peace officer" defined, see § 40-105.

Comment:

This section, one of several in the code designed to reduce pre-appearance custody, gives authority to peace officers acting without warrants to issue citations rather than making arrests for misdemeanors and rather than taking an arrested person before a magistrate. The procedure is similar to that used for traffic offenses and is authorized for all misdemeanors.

No attempt has been made to enumerate the particular offense for which citations should be used. Instead, this decision is left to the discretion of the peace officer on the scene, who is best able to determine when custody is necessary to protect the public interest. The broad term public interest is employed with full realization that it can be used to justify the circumvention of the code's policy of minimizing pretrial custody. Nonetheless, a broad term is necessary to allow for the myriad situations that may render the use of a citation inappropriate. For example, a person may be arrested on a minor offense under circumstances which suggest that identification procedures might identify him as a person wanted for a more serious crime. In other cases the most effective way of avoiding a potentially explosive street situation may be to transport the arrested person quickly to a police station. In still other cases the person may be intoxicated, or wounded, or otherwise unfit to be left on the street with a citation in his hand.

The section is designed for use with the authority to stop granted in § 40-602 and takes advantage of any voluntary cooperation on the part of the suspect. Use of a citation under such circumstances avoids both detention and an arrest record for the individual and the great expense of law enforcement man-hours involved in the arrest procedure.

The citation procedure is available in some cases in which the officer is not empowered to make an arrest without a warrant. A peace officer called to the place where a petty misdemeanor has been committed, for example, may not have arrest authority even if the suspect makes no attempt to escape or conceal his identity. See § 40-631. The victim of the offense may seek to have the officer make an arrest and not understand why the officer cannot do so. In these situations now officers may respond by characterizing the offense as a felony to justify an arrest, even though they realize that nothing more than a misdemeanor is involved. The power to take the formal step of issuing a citation should reduce the pressure to arrest.

40-633. Authority to break and enter to make an arrest.—To make an arrest without a warrant, a peace officer may break open any door or window of a building or vehicle, or any part thereof, or anything therein, if after notice of his authority and purpose, he is refused admittance.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-807.

Cross-References:

Execution of arrest warrant, see § 40-703.
Force justified in law enforcement, see T. C. A. § 39-751, as amended.
Notice of authority and purpose, see § 40-631.
"Peace officer" defined, see § 40-105.

Comment:

This is basically the present statute. A similar statute cloaking private citizens with the same authority, but limited to cases of felonies, has been purposely omitted in order to encourage citizens to rely on law enforcement officials when the situation allows.

40-634. Assisting peace officer.—(a) A peace officer making an arrest may command the aid of any person.

(b) A person commanded to aid a peace officer shall have the same authority to arrest as that peace officer.

(c) A person commanded to aid a peace officer shall not be civilly liable for any reasonable conduct in aid of the peace officer or for action taken at his direct command.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Ill. Code of Crim. Proc. § 107-8.
T. C. A. § 40-805.

Cross-References:

Arrest without warrant, see § 40-631.
Force justified in law enforcement, see T. C. A. § 39-751, as amended.
"Peace officer" defined, see § 40-105.

Comment:

The present T. C. A. § 40-805 merely provides that "[e]very person shall aid an officer in the execution of a warrant, if the officer require his aid, and is present and is acting in its execution."

This section broadens the present law by allowing the officer to command assistance even when arresting without a warrant. Although no criminal sanction is imposed for failing to aid an officer as requested, protection from civil liability is afforded the citizen who does respond to the officer's request.

40-635. Power of officers from other states to arrest.—(a) Any member of a duly organized state, county or municipal peace unit of another state or jurisdiction of the United States, who enters this state in fresh pursuit of a person in order to arrest him on ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has a peace officer of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

(b) The term "fresh pursuit," as used in this section shall include the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony, and the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

(c) If an arrest is made in this state by a peace officer of another state in accordance with the provisions of this section he shall, without

unnecessary delay, take the person arrested before a magistrate pursuant to § 40-901 who shall conduct a hearing to determine the lawfulness of the arrest. If the magistrate determines that the arrest was lawful, he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state, or release him on bail or his own recognizance for such purpose. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested.

(d) It shall be the duty of the secretary of state to certify a copy of § 40-635 to the executive department of each of the states of the United States.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsec. (a): T. C. A. § 40-812.
Subsec. (b): T. C. A. § 40-811.
Subsec. (c): T. C. A. § 40-814.
Subsec. (d): T. C. A. § 40-815.

Cross-References:

Arrest by peace officer, see § 40-631.
Extradition, see ch. 31, subch. A.
"Felony" defined, see T. C. A. § 39-107, as amended.
"Magistrate" defined, see § 40-105.
"Peace officer" defined, see § 40-105.
Preliminary examination, see ch. 9.

Comment:

This section combines four T. C. A. sections comprising the Uniform Law on Fresh Pursuit. The words "or jurisdiction" have been added to subsection (a) to avoid the need to include a special section designating the District of Columbia a "state" for purposes of this section. See T. C. A. § 40-810. T. C. A. § 40-813 assuring that no lawful arrest in this state would be rendered unlawful by the Uniform Law on Fresh Pursuit has been omitted as unnecessary.

40-636. Arrest by person other than peace officer.—(a) Any person not a peace officer may arrest an offender without a warrant if the offender committed:

(1) a felony; or

(2) a misdemeanor in the presence or view of the person making the arrest.

(b) In making an arrest, such person shall inform the person to be arrested of the cause of the arrest, except when the person is in the actual commission of the offense or is pursued immediately thereafter.

(c) Such person who makes an arrest shall receive no compensation or arrest fee therefor.

(d) Such person who has arrested an offender shall take him before a magistrate pursuant to § 40-901, or to a peace officer.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 40-816, 40-820.

Cross-References:

Arrest by peace officer, see § 40-631.
Arrest under warrant, see § 40-703.
Felony and misdemeanor distinguished, see T. C. A. § 39-802, as amended.
Force justified in law enforcement, see T. C. A. § 39-751, as amended.
Motion to suppress evidence, see § 40-1407.
"Peace officer" defined, see § 40-105.
Reward for apprehension, see ch. 5.

Comment:

This section retains the authority for a citizen's warrantless arrest, but changes the scope of the authority. Present law allows citizen's arrests "where a felony has been committed, and the citizen has reasonable cause to believe that the person arrested committed it." T. C. A. § 40-816. In order to discourage citizen's arrests when law enforcement authorities are available, this provision has been deleted.

40-637. Arrest for theft of goods held for sale.—(a) A peace officer, merchant, or merchant's employee may take a person into custody and detain him in a reasonable manner for a reasonable length of time, if the actor has probable cause to believe:

(1) that the person has stolen goods held for sale by the merchant; and

(2) that the goods can be recovered by taking the person into custody.

(b) Custody and detention pursuant to subsection (a) shall not render the actor civilly or criminally liable for false arrest or false imprisonment.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 40-824, 40-826.

Cross-References:

Arrest without warrant, see § 40-631.
False imprisonment, see T. C. A. § 39-1202, as amended.
Justification of force, see T. C. A. § 39-751, as amended.
"Peace officer" defined, see § 40-105.
Theft, see T. C. A. § 39-1903, as amended.

Comment:

This section consolidates T. C. A. §§ 40-824 and 40-826 and retains the special exemption from possible criminal and civil liability for detention of suspected shoplifters when the merchant's suspicion meets the requirements of probable cause.

CHAPTER 7

ARREST WARRANT AND CRIMINAL SUMMONS

40-701. Issuance of arrest warrant or criminal summons.—(a) If it appears from the complaint or from an affidavit or affidavits filed with the complaint that an offense has been committed and that there is probable cause to believe that the defendant has committed it, a warrant for the arrest of the defendant shall be issued by a magistrate to any officer authorized by law to execute it, or a criminal summons for the appearance of the defendant shall issue in lieu thereof. Before ruling on a request for a warrant, the magistrate may require the complainant to appear personally and may examine under oath the complainant and any witnesses he may produce.

(b) The finding of probable cause and that an offense has been committed shall be based upon evidence, which may be hearsay in whole

or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

(c) The magistrate may issue a criminal summons instead of a warrant and shall issue a criminal summons instead of a warrant whenever requested to do so by the district attorney. More than one warrant or criminal summons may issue on the same complaint. If a defendant fails to appear in response to the criminal summons, a warrant shall issue.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 4.
Fed. Proposed amendment to F. R. Cr. P. § 4.

Cross-References:

"Complaint" defined, see § 40-105.
Execution of arrest warrant or criminal summons, see § 40-703.
Issuance of search warrant, see § 40-801.
Issuance of seizure warrant, see § 40-822.
"Magistrate" defined, see § 40-105.

Comment:

This generally is the present law in Tennessee. The provision for issuing a criminal summons rather than a warrant is new to Tennessee procedure, although a summons seems to be the only way to bring a corporation before the court. In addition, the authorization of the issuance of the summons in lieu of the arrest warrant is a major legislative step toward minimizing pretrial detention in cases where the public interest is not adversely affected. See ABA Pretrial Release Standards, §§ 3.1-3.4.

This section refers to a warrant issued by a magistrate. T. C. A. § 40-715 authorizes the clerks of general sessions courts to issue warrants. At least two states have held unconstitutional statutes allowing clerks to issue warrants and that provision is not included here. See Caulk v. Municipal Court, 243 A. (2d) 707 (Del. 1968); State v. Paulick, 277 Minn. 140, 151 N. W. (2d) 591 (1967).

As stated in the *Paulick* case:

> It occurs to us that in initiating and prosecuting charges which are misdemeanors the grave consequences to the accused resulting from a wrongful arrest far outweigh the potential harm to the community in requiring something more than the peremptory issuance of a warrant by a clerk untrained in the law.

The provision concerning hearsay is part of the proposed amendment to the federal rule, codifying the decision in Aguilar v. Texas, 378 U. S. 108 (1964). Hearsay is expressly permitted as the basis for the issuance of an arrest warrant pursuant to rule 4(a) of the Federal Rules of Procedure for United States Magistrates.

40-702. Form of arrest warrant and criminal summons.—(a) The arrest warrant shall be signed by the magistrate, shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty, and shall show the county in which the warrant was issued. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate in the county in which he is arrested.

(b) The arrest warrant may contain authorization to break and enter without notice of authority and purpose if it is issued by a court of record and the magistrate has found probable cause to believe that:

(1) such notice will endanger the life or safety of the peace officer or another person; or

(2) such notice will be a useless gesture.

(c) The criminal summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place and that it shall give notice to the defendant that his failure to appear as ordered shall constitute a separate offense under § 39-2311, as amended.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 4(b).
D. C. Code Ann. § 23-591.

Cross-References:

"Complaint" defined, see § 40-105.
"Magistrate" defined, see § 40-105.
Penalty for failure to appear, see T. C. A. § 39-2311, as amended.
Search warrant, see § 40-803.

Comment:

With the exception of some changes in terminology, subsection (a) is the present procedure in Tennessee. The warrant commands that the defendant be taken before the nearest available magistrate in the county in which he is arrested, in accordance with ch. 9 (preliminary examination.)

Subsection (b) is the authority for a type of no-knock arrest warrant. The execution of such a warrant is covered extensively in the comment to § 40-805 (authority to break and enter.)

Although this provision is based on the District of Columbia statute some changes have been made in order to correct some deficiencies in that statute. In the D. C. statute the provision corresponding to subdivision (1) above is: "such notice is likely to enable the party to be arrested to escape." The vagueness and flexibility of that provision was deemed to be a fatal weakness to the integrity of the finding of probable cause to justify the issuance of a no-knock warrant. In the view of the Commission, the impingement on traditional American freedoms inherent in the no-knock warrant is justified only in the interest of safeguarding the lives of peace officers and other individuals. For that reason this type of extraordinary process may be issued only by the judge of a court of record.

In the D. C. provision corresponding to subdivision (1), the words "is likely" are changed to "will." This has the effect of requiring a more positive showing.

The same change is made in subdivision (2). This provision is designed to cover the situation where the defendant knows of the officers' presence and purpose without their announcing it. It is hard to conceive of a situation where the magistrate can determine, at the time the application is made, that notice would be a useless gesture at the time of the arrest; however, if such a situation did exist the magistrate should be able to authorize such entry.

40-703. Execution of arrest warrant or criminal summons.—(a) The arrest warrant shall be executed by the arrest of the defendant. The peace officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the peace officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.

(b) To execute an arrest warrant, the peace officer may break open any door or window of a building or vehicle, or any part thereof, or anything therein if, after notice of his authority and purpose, he is refused admittance. Notice of authority and purpose is not required prior to such breaking open if the warrant expressly authorizes breaking and entry without such notice. When entry without notice of authority and purpose is made, such notice shall be given as soon thereafter as practicable.

(c) The criminal summons shall be served in the same manner as in civil actions by any peace officer.

(d) The warrant or criminal summons may be executed or served in any county within this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 4(c)(3).
D. C. Code Ann. § 23-591.

Cross-References:

Arrest without warrant, see § 40-631.
Issuance of warrant, see § 40-701.
"Peace officer" defined, see § 40-105.

Comment:

T. C. A. § 40-710 allows a warrant to be directed to "any lawful officer of the State," while T. C. A. § 40-712 allows a warrant to be directed to a lawful officer of another county. T. C. A. § 40-713 allows a warrant to be executed in any county. Section 40-701 allows a warrant to be directed to anyone who can execute it. This section allows any peace officer to execute it anywhere. Thus, under both present and proposed procedure, a warrant can be directed to and executed in any county.

The functional definition of peace officer in § 40-105 makes unnecessary the present statute's enumeration of "any sheriff, or his deputy, or marshal, or policeman of any city or town" or constable of the 29 enumerated counties, T. C. A. § 40-711. All qualify as peace officers under § 40-105.

Subsection (b) substantially restates and clarifies present T. C. A. § 40-807. Following this paragraph is the provision for the execution of arrest warrants without notice of authority and purpose. This is based on the District of Columbia act, but differs from it in that no authority is given to execute a normal warrant without notice even where circumstances then existing but previously unknown would have allowed the issuance of a no-knock warrant.

It has been maintained, with some degree of support, that the D. C. act is only a codification of the common law. The requirement that the officer announce his authority and purpose before breaking in is a common-law requirement which has been codified in most states. However, as Justice Traynor points out in People v. Maddox, 46 Cal. (2d) 301, 294 P. (2d) 6 (1956), "since the demand and explanation requirements . . . are a codification of the common law, they may reasonably be interpreted as limited by the common-law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose." This language was subsequently approved by the Supreme Court in Kerr v. California, 374 U. S. 23 (1963).

Generally five exceptions to the requirement of notice have been identified: (1) the destruction of evidence exception, (2) the escape exception, (3) the peril exception, (4) the unoccupied premises exception, and (5) the useless gesture exception. Of these, the second, third and fifth exceptions directly concern the execution of an arrest warrant.

The escape exception seems to be based on language in *Maddox* indicating that unannounced entry would be allowed where "the felon would escape if he demanded entrance and explained his purpose." This exception has not been incorporated in the statute since a prior determination of danger of escape would allow law enforcement officials to take steps to prevent that escape. Danger to persons and the useless gesture situation are the only exceptions to the requirement of notice before entry here recognized. The peril exception, dispensing with the requirement of notice where it would put the officer in danger, has been recognized as early as 1822 in Read v. Case, 4 Conn. 166 (1822). The useless gesture exception has its basis in the case of Allen v. Martin, 10 Wend. 300 (N. Y. Sup. Ct. of Judicature, 1833). This exception generally deals with the situation where the defendant knows of the officer's presence and purpose without notice by the officer. Common situations are "hot pursuit" and retaking an escaped prisoner.

This section allows unannounced entries in only one instance, where the officer is executing a no-knock warrant. In such a case the magistrate will have already found probable cause to believe that one of the exceptions mentioned applies to the situation.

The last sentence of subsection (b) is not a part of the D. C. act and is added to require that the officer state his authority as soon as feasible in order to afford some protection to the defendant's right to know the officer's authority.

The question has been raised as to what is the proper remedy for an illegal unannounced entry. Illegal entry would, of course, make the arrest illegal but the defendant could simply be rearrested. Habeas corpus therefore is of no assistance. The civil remedy for false imprisonment would be of dubious value in this situation. However, according to Miller v. United States, 357 U. S. 301 (1958), another remedy is to suppress any evidence seized incident to the arrest since such searches are valid only when incident to legal arrests. In *Miller* the court specifically held that "[b]ecause the petitioner did not receive that notice [of authority and purpose] before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed." Id. at 314.

40-704. **Return of arrest warrant or criminal summons.**—(a) The peace officer executing a warrant shall make return thereof to the magistrate before whom the defendant is brought pursuant to § 40-901. At the request of the district attorney, any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be canceled by him.

(b) On or before the return day the person to whom a criminal summons was delivered for service shall make return thereof to the magistrate before whom the criminal summons is returnable.

(c) At the request of the district attorney made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or a criminal summons returned unserved, or a duplicate thereof, may be delivered by the magistrate to any authorized person for execution or service.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 4(c)(4).

Cross-References:

"Magistrate" defined, see § 40-105.
Preliminary examination, see ch. 9.

Comment:

This section merely clarifies present practice.

40-705. **Telephone call before booking.**—(a) No person under arrest by any peace officer or private citizen shall have his name entered on any permanent record until he has successfully completed a telephone call to an attorney, relative, minister, or any other person that he shall choose, without undue delay.

(b) One hour shall constitute a reasonable time without undue delay.

(c) If the arrested person declines to make a telephone call, then he shall be booked or docketed immediately.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-806.

Cross-References:

Arrest by person other than peace officer, see § 40-636.
Arrest by peace officer, see § 40-631.
"Peace officer" defined, see § 40-105.
Preliminary examination, see § 40-901.

Comment:

This is the present statute.

CHAPTER 8

SEARCH AND SEIZURE

Subchapter A. Search Warrants

Subchapter B. Seizure, Forfeiture, and Disposition of Seized Property

40-801. Grounds for issuance of search warrant.—A search warrant authorized by this chapter may be issued by a magistrate on any one of the following grounds:

(1) The property sought was stolen or embezzled; or

(2) The property sought was used as the means of committing a felony; or

(3) The property sought is in the possession of any person with intent to use it as a means of committing a criminal offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its discovery; or

(4) The property sought constitutes evidence of a criminal violation of the laws of the State of Tennessee.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 41(a).
T. C. A. § 40-502.
U. S. 18 U. S. C. § 3103a.

Cross-References:

Contraband, see subch. B.
Issuance of arrest warrant, see § 40-701.
Issuance of seizure warrant, see § 40-822.
Motion to suppress evidence, see § 40-1407.

Comment:

This section is basically the same as T. C. A. § 40-502 with the addition of the fourth ground for the issuance of a search warrant. The issuance of a search warrant to search for mere evidence is provided for in 18 U. S. C. § 3103a. Other states, such as Illinois (Ill. Code of Crim. Proc. § 108-3) and New York (N. Y. Crim. Proc. Law § 690.10), have also expressly authorized the issuance of a warrant to search for evidence.

40-802. Issuance of search warrant.—(a) A warrant shall issue only on affidavit sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. Before ruling on a request for a warrant the magistrate may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce provided that any further evidence adduced shall be reduced to writing and made part of the affidavit.

(b) The finding that grounds for the application exist or that there is probable cause to believe that they exist shall be based upon evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 41(c).
Fed. Proposed amendment to F. R. Cr. P. § 41(c).
T. C. A. § 40-504.
T. C. A. § 40-505.

Cross-References:

Issuance of warrant or summons, see § 40-701.
"Magistrate" defined, see § 40-105.
Seizure warrant, see § 40-822.

Comment:

The first two sentences of subsection (a) are taken from the federal rule and are basically the same as the present Tennessee law. The provision allowing the use of hearsay as the basis of probable cause is current law. See Aguilar v. Texas, 378 U. S. 108 (1964).

40-803. Contents of search warrant. — (a) The search warrant shall be directed to and served by a peace officer. It shall command the peace officer to search forthwith the person or place named for the property specified. The magistrate shall indorse the warrant showing the hour, date, and the name of the peace officer to whom the warrant was delivered for execution, and a copy of such warrant and the indorsement thereon, shall be admissible in evidence in the courts. The warrant may be executed either in the daytime or in the nighttime. It shall designate the magistrate to whom it shall be returned.

(b) The search warrant may contain authorization to break and enter without notice of authority and purpose if it is issued by a court of record and the magistrate has found probable cause to believe that:

(1) such notice will endanger the life or safety of the officer or another person; or

(2) such notice will be a useless gesture.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 41(c).
T. C. A. § 40-507.
D. C. Code Ann. § 23-591.

Comment:

Subsection (a) is taken from the federal rule. The federal rule is basically the same as current Tennessee procedure.

Subsection (b) is the authorization for a type of no-knock search warrant. As in the case of the arrest warrant this statute is based on the District of Columbia act with some changes. The grounds for this no-knock warrant are the same as those for the no-knock arrest warrant and are discussed in the comment following § 40-703 (execution of arrest warrant or criminal summons).

40-804. Execution and return with inventory.—(a) The warrant may be executed only within five (5) days after its date. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant indorsed with a receipt for the property taken or shall leave the copy at the place from which the property was taken.

(b) The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the peace officer. The magistrate shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. 41(d).
T. C. A. § 40-507.

Cross-References:
Computation of time, see § 40-106.
"Magistrate" defined, see § 40-105.
"Peace officer" defined, see § 40-105.
Seizure of contraband, see § 40-823.

Comment:
This is substantially the same as the federal rule. Under that rule the warrant may be executed within ten days, whereas, under present Tennessee law and this section, only five days are allowed.

The requirement that the inventory be made in the presence of the applicant and the person searched or one other credible person is new to Tennessee procedure and is an additional safeguard.

The functional definition of "peace officer" in § 40-105 is broad enough to cover "sheriff . . . or any peace officer" as set out in present T. C. A. § 40-505. Constables authorized to execute search warrants are restricted to those of the 29 counties specified in T. C. A. § 8-1008 (b) since they are the only constables charged with the duty of keeping the peace.

40-805. Authority to break and enter to execute search warrant.—(a) If after notice of his authority and purpose he is not granted admittance, a peace officer may break open any door or window of a building or vehicle, or any part thereof, or anything therein, to execute a search warrant.

(b) Notice of authority and purpose is not required prior to such breaking open:

(1) if the premises are unoccupied; or

(2) if the warrant expressly authorizes breaking and entry without such notice.

(c) When entry without notice of authority and purpose is made, notice shall be given as soon thereafter as practicable.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
D. C. Code Ann. § 23-591.

Comment:
This section parallels § 40-703 (execution of arrest warrants) and provides for unannounced entry and execution of search warrants and no-knock search warrants.

One difference in this section and § 40-703 is that the fact that the place to be searched is unoccupied eliminates the requirement that an officer give notice of his authority and purpose. This is current Tennessee law. See Collins v. State, 184 Tenn. 356, 199 S. W. (2d) 96 (1947). This would seem to fall within the useless gesture exception, although that exception has developed separately.

The destruction of evidence exception, recognized in Kerr v. California, 374 U. S. 23 (1963), is omitted here. It is often provided that the destruction of evidence exception applies in search warrant cases just as the escape exception applies in arrest warrant cases. The D. C. statute makes destruction of evidence a basis for an unannounced execution of an arrest warrant as well as a search warrant. This would tend to cloud the differences between arrest warrants and search warrants and further promote making searches for evidence under an arrest warrant rather than a search warrant. Neither exception was deemed sufficient to justify the infringement of rights and the increased dangers to both suspects and peace officers inherent in no-knock entries.

Where the search warrant is improperly executed the remedy is to suppress the evidence which was illegally seized. McClure v. United States, 332 Fed. (2d) 19 (9th Cir. 1964), cert. denied; 380 U. S. 945 (1964). See § 40-1407 (motion to suppress).

40-806. Return of paper to court.—The magistrate shall, if he does not order the property restored, annex together the search warrant, the return, the inventory, and the affidavits and return them to the court having power to inquire into the offense in connection with which the search warrant was issued.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-516.

Comment:
This is the current Tennessee law and merely provides a procedure to ensure that the warrant and supporting affidavits are available for review.

Subchapter B. Seizure, Forfeiture, and Disposition of Seized Property

40-821. Subchapter definitions.—In this subchapter, unless the context requires a different definition:

(1) "Contraband" includes:

(A) criminal instruments, as defined in § 39-1001, as amended; and

(B) dangerous, abusable, and restricted drugs, as defined in §§ 39-2905, 39-2907, and 39-2909, as amended; and

(C) drug paraphernalia, as defined in § 39-2912, as amended; and

(D) gambling devices and records, as defined in § 39-2801, as amended; and

(E) prohibited weapons, as defined in § 39-2701, as amended.

(2) "Noncontraband subject to forfeiture" includes:

(A) all raw materials and equipment used or intended for use in the manufacture of any contraband; and

(B) all books and records used or intended for use in the commission of an offense involving contraband; and

(C) any money or other thing of value received in consideration for the use or possession of any contraband; and

(D) all conveyances used or intended for use with the owner's consent or knowledge in transporting contraband for sale.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Comment:
This subchapter establishes a just and efficient procedure for the seizure and disposition of property. Tennessee's present statutory provisions are unduly complex, fail to protect constitutional rights, and are scattered through numerous titles of the Tennessee Code Annotated. See, e.g., T. C. A. §§ 39-4912, 52-1443, 57-662. The procedure here established is to be applied uniformly to the most common types of seizures. Illicit drugs, prohibited weapons, gambling devices, and criminal instruments are grouped together under the label "contraband." The unifying feature of these types of property is the absolute legal prohibition of their possession.

Two types of property subject to seizure and forfeiture have purposely been omitted from the scope of this subchapter. Obscene materials have been treated separately (see T. C. A. § 39-2625, as amended) due to the peculiar problems encountered as a result of first amendment prohibition of prior restraint. The provisions relating to untaxed liquor and related contraband likewise have been retained as they presently appear in T. C. A. tit. 57. The curable nature of the "contraband" in that case (tax stamps may be purchased to legitimize the liquor) distinguishes it from the contraband categories listed in § 40-821. In addition, present T. C. A. § 57-622 adequately safeguards the interests of innocent owners and lienholders.

The present provisions on drug-related seizures, on the other hand, have recently been held to violate the dictates of the due process clause. Fell v. Armour, Civ. Act No. 6367 (M. D. Tenn. Dec. 18, 1972). The constitutional infirmities of the present statute have been cured in this subchapter. It is important to note that forfeiture of vehicles used in transporting contraband for sale ("noncontraband subject to forfeiture") is retained, but that these forfeitures are distinguished from the forfeiture of contraband and additional safeguards provided. Another change from present law is the transfer of jurisdiction from an administrative agency to the judicial branch of government. Since Tennessee has no administrative procedure statute, this return of jurisdiction to the courts should result in greater ease of administration and clarification of present procedural problems. See § 40-824 (notice of seizure and hearing).

40-822. Issuance of seizure warrant.—(a) A seizure warrant shall issue only on affidavit sworn to before the magistrate that the property sought is noncontraband subject to forfeiture.

(b) If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the property to be seized.

(c) Before ruling on a request for a warrant the magistrate may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce. Any further evidence adduced shall be reduced to writing and made part of the affidavit.

(d) The finding that grounds for the application exist or that there is probable cause to believe that they exist shall be based upon evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
Issuance of search warrant, see § 40-802.
"Magistrate" defined, see § 40-105.
"Noncontraband subject to seizure" defined, see § 40-821.

Comment:
This section creates a new judicial process, the seizure warrant. Its use will not be widespread since it authorizes seizure only of noncontraband subject to forfeiture as defined in § 40-821. That type of property poses particular problems for law enforcement agents. In the case of vehicles used to transport illicit drugs for sale, for example, it is likely that the vehicle and seller will first be identified by an undercover agent who will not arrest the offender at the time of the sale. In order to make the deterrent of the forfeiture provision effective, the seizure must be made at a later time. Present T. C. A. § 52-1443 authorizes such an after-the-fact seizure with no legal process whatever. This section retains the delayed seizure but subjects it to the scrutiny of the judicial process. In this way the needs of law enforcement and the public interest in freedom from unlawful search and seizure are protected.

The quantum of proof required and the application procedure is the same as that for search warrants. See § 40-802.

40-823. Seizure.—(a) Any peace officer may seize contraband whenever and wherever lawfully discovered.

(b) Any peace officer may seize noncontraband subject to forfeiture:

(1) in the execution of a search warrant or seizure warrant describing the property to be seized; or

(2) as an incident to a valid arrest.

(c) Upon seizure of any property the peace officer shall issue a receipt describing the property seized to the person from whom or from whose premises the property was seized.

(d) Seized property, or a detailed description of it, shall be taken immediately before a magistrate who shall proceed in accordance with this subchapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
Arrest, see §§ 40-631, 40-703.
"Contraband" defined, see § 40-821.
Execution of search warrant, see § 40-804.
"Magistrate" defined, see § 40-105.
Motion to suppress, see § 40-1407.
"Noncontraband subject to forfeiture" defined, see § 40-821.
"Peace officer" defined, see § 40-105.
Seizure warrant, see § 40-822.

Comment:
Contraband, due to its inherently illicit character, is subject to seizure upon discovery. The only limitation on the seizure of contraband is that the prohibited items be lawfully discovered. This restriction makes clear that this subchapter does not breach the wall of protection against unreasonable search and seizure erected by the Constitution. The same exclusionary rules of evidence presently applied to search and seizure remain applicable to the seizures authorized by this subchapter. See § 40-1407.

The distinction drawn between seizures of contraband and noncontraband subject to forfeiture by subsections (a) and (b) makes clear that contraband may be seized at any time (subject only to the requirement that the peace officer lawfully discover it) while noncontraband property may be seized only in conjunction with a valid arrest or execution of process.

Subsection (c) requires an inventory of seized goods in an effort to prevent disputes between peace officers and citizens over what property was actually taken into custody.

Subsection (d) requires the involvement of the judiciary in every seizure, even those without process, at the earliest possible point in time.

40-824. Notice of seizure and hearing.—(a) The magistrate before whom seized property is brought shall set a date and time for a hearing not less than five (5) days nor more than sixty (60) days from the date of the seizure

(b) The magistrate shall cause to be issued a notice of the seizure which shall include a description of the property seized, the place, date, and time of the seizure, the reason for the seizure, the time and place of the hearing, and the method and time limit in which claim for the property may be made.

(c) The notice shall be posted on the courthouse door and sent by registered mail to:

(1) the person from whom the property was seized; and

(2) each owner and lienholder of record as may appear to the court or as may appear by inquiry at the appropriate office of the state and county in which the property may be registered.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
"Magistrate" defined, see § 40-105.
Seizure, see § 40-823.

Comment:
Section 40-824 is the heart of this subchapter's provisions protecting innocent owners of property used by others in such a way as to render it subject to forfeiture. The notice required by subsection (b) includes all the information needed by an owner to initiate proceedings to recover his property. The requirements of the notice are taken from a recent case which overturned Tennessee's statutory provision for drug-related seizures. See Fell v. Armour, Civ. Act No. 6367 (M. D. Tenn. Dec. 18, 1972). That the notice include this information was deemed required by the due process clause.

Subsection (c) assures as far as possible that the notice will reach all owners and lienholders. In the case of automobiles, for example, this subsection requires that the registration of the car be traced even if it is registered in another state.

40-825. Demand for earlier hearing.—Upon application to the court by an owner or lienholder of seized property, the magistrate shall set the hearing for an earlier date not more than five (5) days from the date of application.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Comments:
Section 40-825 allows an owner to speed up the process by which he may assert his claim to the property. This was suggested in Fell v. Armour, Civ. Act. No. 6367 (M. D. Tenn. Dec. 18, 1972), and is deemed necessary especially in the case of the seizure of automobiles and other conveyances where the only issue is the knowledge of the owner required by the definition of noncontraband subject to forfeiture in § 40-821.

40-826. Hearing.—(a) Any person interested in the seized property must appear in person or by counsel before the magistrate at the hearing or forfeit any interest he may have in the property.

(b) Unless the district attorney proves by a preponderance of the evidence that the seized property is in fact contraband or noncontraband subject to forfeiture, the magistrate shall order the property restored to the owner without cost to him.

(c) If the magistrate finds that the seized property is contraband, he shall order the sheriff or chief of police to destroy the property and file with the court an affidavit certifying his actions.

(d) If the magistrate finds the seized property to be noncontraband subject to forfeiture, he shall order the property delivered to the criminal court clerk who shall sell the property at public auction, retaining five per cent (5%) as commission and delivering the proceeds and account thereof to the county in which the property was seized. The proceeds of any sale under this section shall be subject to claim by any person holding a valid lien on the property sold unless the magistrate finds that such lienholder had actual knowledge of the use of such property rendering it subject to forfeiture.

(e) Appeals from any hearings conducted under this subchapter shall be prayed as in other cases under this title.

(f) Any proceedings conducted pursuant to this subchapter shall not be admissible as evidence or commented upon in any criminal proceeding.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
Appeal, see ch. 24.
"Contraband" defined, see § 40-821.
"Noncontraband subject to forfeiture" defined, see § 40-821.

Comment:
This section sets out the procedure to be used in the adjudication of claims for seized property. The burden is placed on the state to prove by a preponderance of the evidence that the property is in fact contraband or noncontraband subject to forfeiture. Although the present Tennessee statute places no burden whatever on the state, T. C. A. § 52-1444, the U. S. District Court for the Middle District of Tennessee has held that, inasmuch as the forfeiture is a penalty for a crime, the state must prove by a preponderance of evidence that the vehicle was used in violation of the law. Fell v. Armour, Civ. Act. No. 6367 (M. D. Tenn. Dec. 18, 1972). Under the structure of the present law, however, the lack of knowledge by the owner of the illegal use of his vehicle is an exception to the law and, as such, a matter of proof for the owner. Section 40-821 treats the owner's knowledge as an element of the violation itself rather than as an exception and, consequently, it is a matter of proof for the state under subsection (b). This is the only rational use of a forfeiture provision since its purpose is to deter intentional violations of the substantive law.

Subsection (c) provides for the destruction of all property adjudged to be contraband. Noncontraband which is forfeited, however, is to be sold under subsection (d). Proceeds, as at present law, go to the county of forfeiture. The duty of holding public auctions, however, is placed upon the clerk of the circuit court having criminal jurisdiction in order to subject the sales to state audit. As in other judicial sales, innocent lienholders may recover their liens from the proceeds of the sale.

Subsection (e) allows appeals as from other criminal proceedings. Subsection (f) is necessary to prevent the utilization of the proceedings under this chapter as tools of discovery. Chapter 15 liberally provides for discovery in criminal proceedings. The possibility of later use of evidence presented at seizure hearings would serve only to impair the efficiency of those hearings.

40-827. Use as evidence.—(a) Except as provided in subsection (b), if the property seized is needed for use as evidence in a criminal proceedings, it shall be preserved by the peace officer making the seizure, or the governmental agency by whom he is employed, until its use is no longer required and then disposed of pursuant to this subchapter.

(b) If the property seized is a dangerous, abusable, or restricted drug, only a sample portion of it suitable for use as evidence shall be preserved, the remainder to be destroyed pursuant to this subchapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Comment:
Subsection (a) allows for the temporary retention of seized property needed for use as evidence in a criminal proceeding.

Subsection (b) ensures that large quantities of illicit drugs will not be kept on hand in police property rooms where they are subject to theft.

40-828. Stolen property.—(a) Following the conviction of any person for theft, or for any other criminal offense involving the illegal acquisition of property, the trial court shall order the property to be restored to the person appearing by the proof to be the owner.

(b) If a trial for theft, or any other criminal offense involving the illegal acquisition of property, is pending, the trial court may order the property restored to any person proving ownership to the court's satisfaction subject to the conditions that the property is readily identifiable by serial number, marking, or otherwise and that it be made available to the state to be used for evidentiary purposes.

(c) If there is no prosecution or conviction following seizure, the magistrate before whom the property was brought shall proceed to give notice under § 40-824 and conduct a hearing to determine ownership. The magistrate shall restore the property to any person found to be entitled to possession. If no person is awarded possession, the magistrate shall order the property delivered to the criminal court clerk who shall sell the property at public auction, retaining five per cent (5%) as commission and delivering the proceeds and account thereof to the county in which the property was seized. The proceeds of any sale under this section shall be subject to claim by any person holding a valid lien on the property sold.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Comment:
Stolen property is provided for in § 40-828. Tennessee presently has no statutory provision for the disposition of recovered stolen property. This section provides for the use of the property by the police for evidence, the return of property when the rightful owner is found, and for the public sale of the property when no such owner is found. Subsection (b) conditions the release of stolen property needed as evidence on the owner's willingness to make the property available and on the preservation of the chain of evidence.

CHAPTER 9

PRELIMINARY EXAMINATION

40-901. Initial appearance.—(a) Except as provided in § 40-632, any person arrested shall be taken without unnecessary delay before the nearest available magistrate in the county in which he is arrested.

(b) If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith.

(c) When an arrested person appears initially before a magistrate, the magistrate shall proceed in accordance with this chapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. 5(a).

Cross-References:
Arrest by person other than peace officer, see § 40-636.
Arrest without warrant, see § 40-631.
"Complaint" defined, see § 40-105.
"Magistrate" defined, see § 40-105.

Comment:
This section is similar to Rule 5 of the Federal Rules of Criminal Procedure. Presently, Tennessee law requires only private persons who make an arrest without a warrant to bring the arrested person before a magistrate "without unnecessary delay." Under present law police have been allowed to hold a person for as long as two weeks before taking him before a magistrate. See Van Zandt v. State, 218 Tenn. 187, 402 S. W. (2d) 130 (1966); Wynne v. State, 181 Tenn. 325, 181 S. W. (2d) 332 (1944).

40-902. Statement of the magistrate.—(a) The magistrate shall first inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall then explain the nature of the charge, his right to retain counsel and his right to have counsel appointed under § 40-3202.

(b) Unless the right is waived in writing in accordance with § 40-3203, the magistrate shall allow the defendant a reasonable time and opportunity to confer with counsel before proceeding further.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. 5(c).

Cross-References:
Right to counsel, see § 40-3202.
Waiver of counsel, see § 40-3203.

Comment:
Present law requires that the defendant be informed of essentially the same rights. This section requires that the defendant first be advised of his right to remain silent before the other rights are explained in order to avoid any mistaken belief on his part that he must plead to or comment on the magistrate's further statements. Present T. C. A. § 40-1101 provides for the magistrate's informing the defendant of the charge and of his right to the aid of counsel "in every stage of the proceedings."

The United States Supreme Court, in Coleman v. Alabama, 399 U. S. 1 (1970), declared that the preliminary hearing in Alabama was a "critical stage" in the criminal proceeding and that the defendant thus has a constitutional right to the aid of counsel at the preliminary examination. This right is preserved by subsection (b). This is taken from the federal rules and is similar to T. C. A. § 40-1102, which allows the defendant a reasonable time to send for retained counsel.

Harris v. Neil, 437 Fed. (2d) 63 (6 Cir. 1971), held that the preliminary examination in Tennessee is not a "critical stage" of the criminal prosecution. At page 64 of its opinion the court stated that:

> In contrast with Alabama procedure, the Tennessee preliminary hearing is not "the pretrial type of arraignment where certain rights may be sacrificed or lost." . . .
>
> We therefore conclude that *Coleman* does not make the Sixth Amendment right to counsel apply to a preliminary hearing of the type conducted in Tennessee.

It appears that the basic premise of the *Harris* decision was that the Supreme Court had held Alabama's preliminary hearing to be a "critical stage" because defenses or rights were lost if not exercised. What led the court to that belief is not clear, but it is clear that it is erroneous. The court, in *Harris*, cites *Coleman* at page 7 but the only similar language on that page is:

> Applying this test [Powell v. Alabama, 287 U. S. 45 (1932)], the Court has held that "critical stages" include the pretrial type of arraignment where certain rights may be sacrificed or lost . . . .

This was purely dicta in *Coleman* and the Court, in that case, proceeded to quote from the Alabama Court of Appeals decision to the effect that:

> At the preliminary hearing . . . the accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case.

Thus, contrary to the circuit court's belief, the United States Supreme Court did not base its decision in *Coleman* on any waiver of rights at preliminary hearing theory. In fact the Court lists four advantages in having an attorney at the preliminary hearing and then states its actual holding:

> The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the state's criminal process at which the accused is "as much entitled to such aid [of counsel] as at the trial itself."

The Supreme Court held Alabama's preliminary hearing to be a critical stage, not because rights were waived if not exercised, but in spite of the fact that no defenses were waived at the preliminary hearing.

The advantages, mentioned in *Coleman*, of having counsel at the preliminary hearing apply in Tennessee as well as Alabama. The basic premise of *Harris*, that only the waiver of defenses by nonexercise makes the preliminary hearing a critical stage, is mistaken. It would thus appear, *Harris* notwithstanding, that under the United States Supreme Court's holding in Coleman v. Alabama, 399 U. S. 1 (1970), the preliminary hearing in Tennessee is a critical stage, entitling the indigent to appointed counsel.

Presently, T. C. A. § 40-2015 provides for the appointment of counsel by the arraignment, and that section is here amended to require the appointment of counsel at the preliminary hearing, unless waived. A written waiver is presently required by T. C. A. § 40-2015; and T. C. A. § 40-2016 sets forth the circumstances under which a magistrate may accept the waiver of counsel. See § 40-3203 and comment.

40-903. Waiver of indictment and jury trial.—(a) The magistrate shall explain to the defendant that he has the right to have the charge presented to the grand jury for dismissal or indictment and that upon a return of an indictment against him he has the right to have the case tried before a jury. If the waiver of these rights will bring the trial of the offense charged within the jurisdiction of the magistrate, this shall also be explained to the defendant.

(b) If the defendant chooses to waive these rights, he shall do so in writing, and thereupon the magistrate shall proceed to try the case or transfer it to a lower court of competent jurisdiction.

(c) If the offense charged cannot be tried immediately, the defendant shall not be called upon to plead and the magistrate shall proceed under the provisions of this chapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-423.

Cross-References:

General sessions court jurisdiction, see § 40-202.

Grand jury proceedings, see ch. 11.

Jury trial, see ch. 19.

"Magistrate" defined, see § 40-105.

Waiver of right to counsel, see § 40-3203.

Waiver of right to preliminary examination, see § 40-904.

Comment:

This section provides for the rights of the accused found in Tenn. Const., Art. I, § 9. If the waiver of these rights confers jurisdiction over minor offenses, such as the general sessions misdemeanor jurisdiction under § 40-202, there would normally be no obstacle to an immediate trial and no need for a preliminary examination.

Since the judges of the criminal courts are magistrates, it is possible that a defendant may be brought before such a judge for a preliminary examination on a misdemeanor charge within the trial jurisdiction of the general sessions courts. Subsection (b) allows a criminal court judge to transfer such a case to the general sessions court.

40-904. Right to preliminary examination.—(a) The magistrate shall inform the defendant of his right to a preliminary examination.

(b) A defendant is entitled to a preliminary examination, unless the right is waived in writing, when he is charged with an offense punishable by incarceration and has not been indicted for the offense and has not elected to go to trial before the magistrate pursuant to § 40-903.

(c) If the defendant waives preliminary examination, the magistrate shall forthwith bind him over to the next meeting of the grand jury.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-1131.

Cross-References:

Grand jury proceedings, see ch. 11.

"Magistrate" defined, see § 40-105.

Waiver of indictment, see § 40-903.

Waiver of right to counsel, see § 40-3203.

Comment:

The legislature has recently provided for a preliminary hearing in all criminal cases, both misdemeanors and felonies, Tenn. Pub. Acts 1971, ch. 245. Since the purpose of a preliminary examination is to determine whether a crime has been committed and whether there is probable cause to believe that the defendant committed the crime, there is no need for an examination where the misdemeanor is punishable by fine only or where the grand jury has found probable cause to indict.

Where the defendant has elected to go to trial before the magistrate and waived the right to indictment and jury trial, he will normally have his trial quickly and before the same judge who would conduct the preliminary hearing. This would result in the state putting on proof at the preliminary examination and, possibly at the same session, putting on the same proof at the trial before the same judge. There is, therefore, no right to a preliminary examination where indictment and jury trial are waived. See § 40-903.

40-905. Time of preliminary examination.—(a) If the defendant does not waive preliminary examination, the magistrate shall proceed with the examination without unnecessary delay. The examination shall be completed at one session but may be adjourned from time to time for good cause shown. If the examination is adjourned from time to time and the offense is bailable, the magistrate may release the defendant on bail or on his own recognizance.

(b) If the delay is not at his own instance, a defendant who has not been accorded a preliminary examination without unnecessary delay as required by this chapter, upon motion, shall be given an immediate preliminary examination or be discharged from custody or from the requirement of bail or any other condition of release, without prejudice to the institution of further criminal proceedings against him for the charge upon which he was arrested.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 5.
T. C. A. § 40-1105.
Fed. 18 U. S. C. § 3060.

Cross-References:
"Bailable offense" defined, see § 40-1201.
Pretrial release, see ch. 12.
Waiver of preliminary examination, see § 40-904.

Comment:
The federal rule provides that the preliminary hearing shall be scheduled within a reasonable time not to exceed 10 days, or 20 days if the defendant is not in custody. The federal courts, unlike state courts, do not have to deal with a heavy case load or a broad range of misdemeanors for which 10 or 20 days could constitute a major portion of the maximum possible sentence. Also, a delay of 10 or 20 days between arrest and preliminary examination in counties where the grand jury meets continuously would allow more than ample time to secure an indictment and so avoid any preliminary examination. Most states that have adopted the federal rules in some form have provided for an immediate examination.

A second major difference between this section and the federal rule is that the "reasonable time" within which to hold a preliminary hearing under the federal rule may be extended only where there is both good cause shown and the defendant's consent. Section 40-905 allows adjournment from time to time only for good cause shown, regardless of the defendant's consent. The consent of the defendant and any possible prejudice to him should go to the issue of "good cause." The burden of proof would be on the person requesting the adjournment since the section directs that the examination shall be completed at one session.

The provision concerning bail and release on recognizance is similar to present T. C. A. § 40-1104 which also allows bail pending an adjourned preliminary examination.

Subsection (b) is modeled after 18 U. S. C. § 3060. There appears to be no remedy for the failure to afford the defendant his preliminary examination. After indictment he has no right to a preliminary examination, and it would be useless at that time since the grand jury's action would be determinative on the issue of probable cause. Under the proposed rule, if the examination is delayed beyond the time allowed, the defendant is discharged without prejudice to any further proceedings. The defendant may be rearrested and taken before the magistrate as soon as the state is able to show probable cause. Of course he may be indicted while out of custody. This will provide the defendant with some potential remedy at least and will prevent the preliminary examination from being deemed discretionary.

40-906. Preliminary examination.—(a) If from the evidence it appears that an offense has been committed and that there is probable cause to believe that the defendant committed it, the magistrate shall forthwith bind him over to the grand jury and:

(1) release the defendant on his own recognizance or on bail pursuant to chapter 12; or

(2) commit him to jail by a written order.

(b) The finding that an offense has been committed and that there is probable cause to believe that the defendant committed it shall be based upon evidence, which may be hearsay in whole or in part, if there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

(c) The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf.

(d) Rules excluding evidence from consideration by the magistrate on the ground that it was acquired by unlawful means are applicable. Motions to suppress evidence shall be made only as provided in § 40-1407.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 5.1.
T. C. A. § 40-1117.

Cross-References:
Disposition of seized property, see ch. 8, subch. B.
Grand jury proceedings, see ch. 11.
Motion to suppress, see § 40-1407.
Pretrial release, see ch. 12.
Subpoenas, see § 40-1801.

Comment:
This is basically the same as the proposed federal rule. It is changed in order to more closely follow the present Tennessee law. Subsection (a) is changed to require that it be shown that an offense has been committed, not just probable cause to believe that one has been committed. Probable cause to believe that the defendant committed the crime shown, however, is sufficient. This is the approach presently taken by T. C. A. § 40-1117.

The allowance of hearsay evidence in subsection (b) with restriction only as to its reliability does not deprive the defendant of an opportunity to explore the strength of the state's case before trial. Chapter 15 (discovery) provides for the broadest possible discovery and should amply compensate the loss of some discovery opportunity at the preliminary examination.

Subsection (d) allows the magistrate to exclude from his consideration evidence which is patently illegal, but specifies that § 40-1407 (motion for pretrial determination of the admissibility of evidence) shall govern the suppression of illegally seized evidence. This provision allows both sides to present their best arguments on the issue of seizure legality at a later time when they are better prepared than at the preliminary examination.

40-907. Discharge of defendant.—If it does not appear from the evidence that an offense has been committed and that there is probable cause for believing that the defendant committed it, the magistrate shall discharge the defendant. The discharge of the defendant shall not preclude the state from instituting a subsequent prosecution for the same offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1116.

Cross-References:
Probable cause determination, see § 40-906.

Comment:
This section is merely declaratory of present case law and is substantially the same as the present Tennessee statute.

40-908. Improper venue.—If, at any time before the preliminary examination is completed, it appears that venue at trial would be proper only in another county, the magistrate shall commit the defendant to the custody of the sheriff for transfer without unnecessary delay to the sheriff of a county in which venue would be proper. The sheriff of the receiving county shall forthwith take the defendant before a magistrate in that county for the preliminary examination.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 3.02.
Ark. Stat. Ann. § 43-601.
Mo. Rule of Cr. Proc. § 21.13.

Cross-References:
Change of venue, see §§ 40-305—40-307.
Venue, see §§ 40-301—40-304.

Comment:
There are two alternatives in the situation where a person is arrested in a county other than the one in which the offense took place, which is usually the only county of proper venue. The first is to hold the preliminary examination in the county in which he is arrested and the second is to hold the hearing

in the county in which the offense took place and the case will be tried. The first alternative may result in holding the hearing sooner than under the second alternative, but the second alternative will usually be more practical since all of the evidence and witnesses will normally be in the county in which the offense took place. For this reason the second alternative is adopted with appropriate judicial safeguards to the defendant.

40-909. Separation and exclusion of witnesses.—The magistrate may make such orders on the examination in respect to keeping the witnesses separate and apart or excluding them during the examination of other witnesses or of the defendant as he may think best for the attainment of justice, and he shall, on demand of either party, exclude the witnesses pursuant to § 40-2003.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1114.

Comment:
This is the current Tennessee law with the addition of the reference to the section which governs putting witnesses "under the rule."

CHAPTER 10

INITIATION OF PROSECUTION

40-1001. Indictments and presentments.—All felonies and misdemeanors may be prosecuted by indictment or presentment.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1605—40-1606.
T. C. A. §§ 40-1702—40-1703.

Cross-References:
"Felony" defined, see T. C. A. § 39-107, as amended.
Finding of indictment, see § 40-1113.
"Indictment" defined, see § 40-105.
"Misdemeanor" defined, see T. C. A. § 39-107, as amended.
"Presentment" defined, see § 40-105.

Comment:
This section restates the present law as set out in various sections in the present tit. 40.

40-1002. Complaints and informations.—(a) Misdemeanors may be prosecuted by complaint as provided in § 40-202, with the consent of the accused.

(b) Any offense may be prosecuted by an information, with the consent of the accused and of the court. Any offense which is punishable only by a fine not exceeding fifty dollars ($50) may be prosecuted by an information, without regard to consent of the accused.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-118.

Cross-References:
"Complaint" defined, see § 40-105.
"Information" defined, see § 40-105.
Misdemeanors and felonies distinguished, see T. C. A. § 39-802, as amended.
Ordinary fine for misdemeanor, see T. C. A. § 39-823, as amended.

Comment:
The only major change in the present law is the provision allowing the prosecution of any offense by information with the consent of the accused and of the court. Previously only misdemeanors could be prosecuted by information. The information is actually a complaint made by a district attorney. See § 40-105.

The constitutionality, under the Tennessee Constitution, of this method of prosecution has not been ruled upon by the courts. The right to have the grand jury consider the case can now constitutionally be waived in misdemeanor cases. See State ex rel. McMinn v. Murrell, 170 Tenn. 606, 98 S. W. (2d) 105 (1936). The cases dealing with waiver have characterized the right to grand jury investigation as a personal right, thus it appears that there could be no objection to extending the option of waiver to felony cases. The use of an information, with consent, to prosecute felonies is not barred by the United States Constitution and is allowed by Federal Rules of Criminal Procedure. The current trend in other states seems to be to interpret requirements like Tenn. Const., Art. I, § 14 as waivable. See Annot., 61 A. L. R. (2d) 837, 839 (1957).

In rural counties especially, the defendant may well wish to avoid the delay of waiting until the grand jury meets to have his case set. It should be noted that this section does not require the district attorney to prosecute by information where the defendant consents. The district attorney may want the grand jury's authorization, in many cases, before initiating a prosecution.

40-1003. Contents and sufficiency of charge.—(a) Every charge shall contain a caption setting forth the name of the court and the names of the parties. The charge shall state for each count the official or customary citation of any statute, rule, regulation or other provision of law, other than lesser included offenses, which the defendant is alleged therein to have violated. Every charge shall contain, and shall be sufficient if:

(1) it contains, a plain, concise, and definite statement of the essential facts constituting the specific offense or offenses with which the defendant is charged; and

(2) it negatives any exceptions contained in the statute creating or defining the offense charged.

(b) It need not contain a formal commencement, a formal conclusion, or any other matter not necessary to such statement, except such conclusion as is required by the Constitution of this state, nor need it negative any defense or affirmative defense contained in any statute creating or defining the offense charged. Presumptions of law and matters of which judicial notice is taken need not be stated.

(c) Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense was unknown or that he committed it by one or more specified means.

(d) Unnecessary allegations may be disregarded as surplusage and on motion of the defendant shall be stricken by the court.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 7(c).
Ky. Rule 6.10.
Uniform Rule 16.

Cross-References:
"Affirmative defense" defined, see T. C. A. § 39-204, as amended.
Amendment of charge, see § 40-1005.
Burden of proof on presumption, see T. C. A. § 39-205, as amended.
Charge defined, see § 40-105.
Effect of defect in charge, see § 40-1004.
Element of offense, see T. C. A. § 39-107, as amended.
"Exception" defined, see T. C. A. § 39-202, as amended.
"Defense" defined, see T. C. A. § 39-203, as amended.
Lesser included offenses, see § 40-2203.
State's burden of proof, see T. C. A. § 39-201, as amended.

Comment:
This section is designed to simplify the pleading in criminal matters, much the same as the simplification of pleadings in civil actions, by eliminating the necessity of formal averments of such things as qualifications of grand jurors.

Under current case law it is not clear which exceptions in a statute defining an offense must be denied in the charge. See Villines v. State, 96 Tenn. 141, 33 S. W. 922 (1896). Throughout the new Criminal Code (T. C. A. tit. 39, as amended), however, the designations "exception," "defense," and "affirmative defense" are carefully utilized to distinguish the instances in which the state must allege and carry the burden of proof on matters collateral to the elements constituting the offense. See T. C. A. §§ 39-201—39-204, as amended, and comment. Matters designated as exceptions must be proved by the state beyond a reasonable doubt and so are required to be included in the charge. Defenses must be so proved only if evidence is submitted by the defendant supporting the defense. The defendant has the burden of establishing by a preponderance of the evidence any affirmative defense.

This provision reverses prior Tennessee law which requires the defendant to prove that he comes within the exception. Terrell v. State, 210 Tenn. 632, 361 S. W. (2d) 489 (1962). For the first time, however, the burden of proof consequences have been considered in the drafting of the offenses in the Criminal Code. When it is appropriate to place this burden on the defendant, the Criminal Code definition of the offense uses the designation "defense" or "affirmative defense." When it is appropriate to require the state to charge, allege, and prove that the defendant's conduct does not fall within the scope of an exception to the offense, the Criminal Code labels the conduct an "exception." See T. C. A. tit. 39, ch. 2, as amended.

Prosecutors have often found the burden of alleging and proving the nonexistence of exceptive facts too onerous. This difficulty most frequently arises with penal statutes that regulate conduct rather than generally prohibit conduct. Since most regulatory statutes are omitted from the new Criminal Code, the device of an exception is used very sparingly and only after careful consideration of the nature of the proof burden involved. The Commission decided, for example, that a gift to a public servant (prohibited by the Criminal Code, § 39-2108, as amended) should clearly not apply to a fee prescribed by law. Rather than rely on a defense that would require a public servant to produce evidence that the benefit received was a fee, the device of an exception is employed to require the prosecution to allege and prove that the benefit received was not a fee in order to make a prima facie case.

The requirement that the citation of any applicable statute be included should not be an undue burden and will ensure that the defendant and his attorney will know exactly what offense is charged and will thus be able to discover and take advantage of any exception, defense, or affirmative defense contained in the statute.

The constitutionally required conclusion "against the peace and dignity of the State," will still be required in all indictments. See Tenn. Const., Art. VI, § 12.

40-1004. Effect of defect in charge.—(a) A motion to dismiss the indictment may be based upon objections to the array or on the lack of legal qualifications of an individual juror.

(b) No charge shall be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, arrested or in any manner affected for any defect or imperfection in the charge which does not tend to prejudice the substantial rights of the defendant upon the merits.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 6.12.
Mo. R. Cr. P. § 24.11.
Ill. Code Crim. Proc. § 111-5.

Cross-References:
Amendment of charge, see § 40-1005.
"Charge" defined, see § 40-105.
Pleadings and motions, see § 40-1401.

Comment:
Subsection (a) is basically the present law except that challenges to the array are currently made by plea in abatement. This code replaces such pleas with the motion to dismiss.

Subsection (b) is designed to make clear that formal defects not affecting substantial rights, such as misnomer, misspelling, or grammatical errors, do not affect the validity of the charge. This gives effect to the basic policy of this code, the simplification of the criminal procedure and elimination of unjustified delay and complications, while protecting the rights of the accused.

40-1005. Amendment of charge.—A charge may be amended with the consent of the defendant in all cases. The court may permit a charge to be amended, without the defendant's consent, at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1713.
Ky. Rule 6.16.
Uniform Rule 18.
Fed. R. Cr. P. § 7(e).

Cross-References:
"Charge" defined, see § 40-105.
Effect of defect in charge, see § 40-1004.

Comment:
This section allows the amendment of any charge as to matters of form which do not affect substantial rights.

The amendment of an information or complaint without the defendant's consent is current case law. See Murff v. State, 221 Tenn. 111, 425 S. W. (2d) 286 (1967). The case of McKinley v. State, 27 Tenn. 72 (1847), implies that even an indictment can be amended without the defendant's consent, at least by resubmitting it to the grand jury for amendment.

Statutes in other states allowing the prosecutor to amend an indictment as to formal matters not affecting substantial rights have been upheld against constitutional attack. See People v. Joseph, 21 Cal. App. (2d) 236, 69 P. (2d) 465 (Dist. Ct. 1937); Commonwealth v. Snow, 269 Mass. 598, 169 N. E. 542 (1930).

The policy of this section is to avoid the delay of dismissing indictments and resubmitting them. What actually prejudices a substantial right will present a question in each case but ample precedent from both state and federal cases applying identical language exists to aid in these determinations.

40-1006. Bill of particulars.—(a) Upon motion of the defendant the court for good cause shall order the filing of a bill of particulars.

(b) A motion for a bill of particulars may be made at any time prior to arraignment, or thereafter within a reasonable time after the appointment or employment of counsel and his receipt of a copy of the charge.

(c) A bill of particulars may be amended at any time subject to such conditions as justice requires.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 6.22.
Fed. R. Cr. P. § 7(f).
Uniform Rule 19.

Cross-References:
Appointment of counsel, see § 40-3204.
Arraignment, see § 40-1301.
"Charge" defined, see § 40-105.
Right to counsel, see § 40-3202.

Comment:
There is no provision for a bill of particulars in present Tennessee law. This section is substantially the same as the Kentucky rule except for the provision concerning the time for the motion. It is also similar to the federal rule although that rule does not contain the words "for cause" and states that the court "may direct" the filing of a bill rather than "shall" so "order." The time for such a motion under the federal rules is before arraignment or within ten days after arraignment or later with leave of the court. The provision in subsection (b) is designed to assure that the defendant has an opportunity to request a bill of particulars at a time when he has the effective aid of counsel. Federal decisions on issues of what may be requested in a motion for a bill of particulars indicate that while discovery of evidence is not allowed, data relevant to allegation of ultimate facts are proper subjects of the motion, i.e., identity of participants and victims of the crime, time and place of alleged acts. United States v. Smith, 16 F. R. D. 372 (W. D. Mo. 1954). See generally, United States v. Palmisano, 273 Fed. Supp. 750 (E. D. Pa. 1967).

40-1007. Issuance of capias or criminal summons.—(a) Upon request of the district attorney, the court shall direct the clerk to issue a capias or a criminal summons for each defendant named in the indictment or presentment who is not in actual custody, or who has been released on his own recognizance or on bail, or whose undertaking of bail has been declared forfeited.

(b) The clerk shall issue a criminal summons instead of a capias upon the request of the district attorney or by direction of the court. Upon like request or direction he shall issue subsequent process for the same defendant. He shall deliver the capias or criminal summons to the sheriff or other person authorized by law to execute or serve it.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 9(a).
Ky. Rule 6.54.
Uniform Rule 22(a).

Cross-References:
Arrest warrant, see § 40-702.
Execution of summons, see § 40-703.
"Indictment" defined, see § 40-105.
"Presentment" defined, see § 40-105.
Pretrial release, see ch. 12.

Comment:
Since the warrant after indictment is in fact different in form (see § 40-1008) and use, from the ordinary arrest warrant, the current nomenclature is retained and the usual process after indictment is still called the capias.

A change in present procedure is the provision for the use of the summons instead of warrant. Actually the summons is used now as the only method of acquiring jurisdiction over a corporate defendant. The prosecuting attorney can request a summons rather than a capias or he may ask for a capias and the judge may believe that a summons would be more appropriate and direct the clerk to issue a summons. The use of the summons will aid in the reduction of pretrial detention in cases where the public interest is not adversely affected. See § 40-701 (issuance of arrest warrant or criminal summons).

40-1008. Form of capias or criminal summons.—(a) The form of the capias shall be the same as that for an arrest warrant, as set out in § 40-702, except that it shall be signed by the clerk, it shall describe

the offense charged and it shall command that the defendant be arrested and brought before the court in which the charge is pending.

(b) The criminal summons shall be in the same form as the capias except that it shall summon the defendant to appear before the court at a stated time and place and shall give notice to the defendant that his failure to appear as ordered shall constitute a separate offense under § 39-2311, as amended.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 9(b).
Ky. Rule 6.54(b).
Uniform Rule 22(b).

Cross-References:
Arrest, see § 40-703.
Form of arrest warrant, see § 40-702.
Penalty for failure to appear, see T. C. A. § 39-2311, as amended.

Comment:
No form is presently provided but the form in use is substantially the same in its material provisions as that proposed here and in the federal rule on arrest warrants. The need for this section is to provide for uniformity between counties.

The new Criminal Code provides that a willful failure to appear as required by a criminal summons is punishable as a separate offense, T. C. A. § 39-2311, as amended. Penalty for such a failure to appear is geared to the object offense for which the person's presence was originally required. For any class misdemeanor, for example, the penalty is that of a misdemeanor of the same class. This penalty provision was deemed preferable to the use of the contempt power of the court and should encourage the utilization of the summons process.

40-1009. Execution and return.—(a) The capias and criminal summons shall be executed and served as provided in § 40-703.

(b) The peace officer executing a capias shall make return thereof to the court. At the request of the district attorney any unexecuted capias shall be returned and canceled.

(c) On or before the return day the person to whom a criminal summons was delivered for service shall make return thereof.

(d) At the request of the district attorney made at any time while the indictment is pending, a capias returned unexecuted and not canceled or a criminal summons returned unserved or a duplicate thereof may be delivered by the clerk to the sheriff or other authorized person for execution or service.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 9(c).
Ky. Rule 6.56.
Uniform Rule 22(c) and (d).

Cross-References:
Capias or criminal summons, see § 40-1007.
Execution of arrest warrant, see § 40-703.
"Peace officer" defined, see § 40-105.

Comment:
This section does not change the present procedure with regard to the capias. A summons is to be served in the same manner as in civil actions. See § 40-703.

40-1010. Failure to answer criminal summons.—(a) If a defendant, other than a corporation, fails to appear in response to the criminal summons, a capias shall issue.

(b) If after being summoned a corporation does not appear, a plea of not guilty shall be entered by the court having jurisdiction to try the offense for which the criminal summons was issued, and such court shall proceed to trial and judgment without further process.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Ill. Code of Crim. Proc. § 107-13.
Fed. R. Cr. P. § 9(a).
Uniform Rule 22(a).

Cross-References:

Guilty plea, see § 40-1303.
Issuance of capias, see § 40-1007.
Penalty for failure to appear, see T. C. A. § 39-2311, as amended.

Comment:

Failure to answer a criminal summons constitutes a separate offense. T. C. A. § 39-2311, as amended. For ease and speed in administration, however, the issuance of a capias on the original charge is authorized by this section.

No cases were found dealing with the situation where a corporation fails to answer a summons in a criminal matter in Tennessee and the situation seems to be a rare one. The provision covering this event in this section is taken from the Illinois statute.

CHAPTER 11

GRAND JURY FORMATION AND PROCEEDINGS

40-1101. Formation of the grand jury.—(a) The judge of the court authorized by law to charge the grand jury and to receive the report of that body shall on the first day of each term of court direct the names of all the qualified jurors in attendance upon the criminal courts of the county to be written on separate slips of paper and placed in a box or other suitable receptacle and drawn out by the judge or by a jury commissioner in the presence of at least one other jury commissioner in open court. The fourteen (14) qualified jurors whose names are first drawn shall, with the foreman, be the grand jury for the term and shall attend the court until dismissed by the judge or until the next term.

(b) The judge presiding at any special term of the court may impanel a grand jury in the same manner and of like powers as at a regular term.

(c) If the expeditious administration of justice so requires, the court may likewise impanel a second grand jury to operate concurrently with the first.

(d) Any presentment or indictment returned by any grand jury formed otherwise than in accordance with the provisions of this chapter shall be dismissed upon timely motion pursuant to § 40-1402 of any defendant against whom any indictment or presentment has been returned.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tenn. Priv. Acts 1929, ch. 633.
T. C. A. §§ 40-1501, 40-1503, 40-1505.

Cross-References:

Appointment of foreman, see § 40-1102.
Dismissal of grand jury, see § 40-1120.
"Indictment" defined, see § 40-105.
Motion to dismiss, see § 40-1402.
"Presentment" defined, see § 40-105.
Swearing of grand jury, see § 40-1103.

Comment:

The major difference between this section and the present statutes is that subsection (d) requires strict compliance with the statutory procedure for forming the grand jury. This policy conflicts with that of T. C. A. § 22-239 which states ". . . in the absence of fraud no irregularity with respect to the provisions of this chapter shall effect the validity of any selection of any grand jury . . . ." The general rule and Tennessee law now require only substantial compliance with such statutes in the absence of the defendant's showing of prejudice. It is said that a grand jury formed in another manner is at least a de facto grand jury and that, in the absence of a showing of prejudice to the defendant, indictments returned by it are valid. See Flynn v. State, 203 Tenn. 337, 313 S. W. (2d) 248 (1958) (ruling that statements to the contrary in Roberts v. State, 147 Tenn. 323, 247 S. W. 101 (1923), were dicta). This section eliminates the burden of showing prejudice to the defendant by the method of selection of the grand jury and makes this procedure uniform throughout the state.

Motion to dismiss under § 40-1402 can be made at any time prior to trial. Case law presently requires such action prior to a plea to the merits which under § 40-1403 must be made at arraignment. Chairs v. State, 124 Tenn. 630, 139 S. W. 711 (1911).

The last sentence of subsection (a) contains a second major change in the law of grand juries. Under this provision grand juries are made up of 15 persons (14 jurors and the foreman). Increasing the size of the grand jury will eliminate delay and potential for abuse.

Another change in the present law is found in subsection (c), providing for concurrent grand juries to alleviate the burden on persons serving as grand jurors. The use of this expedient presents a question of constitutional law. Both the federal and state constitutions require grand jury action in certain cases. The Tennessee Constitution requires it in all criminal cases and evidently contemplates a grand jury as it existed at common law. Under the common law the grand jury consisted of not more than 23 persons and, regardless of the number of grand jurors, at least 12 were required to concur in order to indict. It has been argued that, where there are concurrent grand juries a person could be indicted by 12 jurors out of a number larger than 23 since both grand juries together would contain at least 24 persons. If the concurrent grand juries were the same size as present grand juries (13 persons including the foreman) a defendant could be indicted by 12 out of 26 grand jurors. This would authorize indictments returned by less than even a majority of the grand jurors for the county. Such a constitutional attack on concurrent grand juries was successful in the case of Re Opinion to the Governor, 62 R.I. 200, 4 A. (2d) 487 (1939). However, the case of State v. Loveless, 142 W. Va. 809, 98 S. E. (2d) 773 (1957), discusses several authorities and reaches the conclusion that concurrent grand juries were used in England before 1776 and thus are sanctioned by the common law.

Another change for some counties would be the requirement that the first 14 jurors selected from the qualified venire would constitute the grand jury. In some counties it is common practice for the prospective grand jurors to be further questioned and qualified by the judge before they are allowed to serve as grand jurors. This would allow an

unscrupulous person to "pack" the grand jury. Present T. C. A. § 40-1501 calls for the grand jury to be composed of the 12 "whose names are first drawn." The grand jury serves as a screening device and allows the conscience of the community to affect the initiation of prosecutions and thus it should be representative of the community and not reflect the personal desires of the person selecting the jurors.

A minor change in the present law is the elimination of the provision allowing the names to be drawn by a child under the age of ten and the substitution of the provision allowing a jury commissioner to draw the names. It does not seem necessary to require a school age child to miss a day's education in order to perform this essentially mechanical act.

40-1102. Appointment of foremen.—(a) The judge of the court authorized by law to charge the grand jury and to receive the report of that body shall appoint the foremen of the grand juries in the counties of their respective jurisdictions. If concurrent grand juries are impaneled, a foreman shall be appointed for each grand jury.

(b) Every person appointed as a foreman shall possess all the qualifications of a juror.

(c) The foreman shall hold office and exercise his powers for a term of two (2) years from appointment; however, in the discretion of the presiding judge, he may be removed, relieved, or excused from office for good cause at any time.

(d) A foreman shall receive as compensation a sum to be determined by the county legislative body, to be paid out of the county treasury in the same manner as jurors are paid, and shall receive no other compensation for his services. Such compensation shall not be less than ten dollars ($10.00) per day for each day the grand jury of which he is foreman is actually in session and such sum shall not be diminished during his term of appointment.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1506, 40-1507, 40-1513.

Cross-References:
Compensation of jurors, see T. C. A. tit. 22, ch. 4.
Concurrent grand juries, see § 40-1101.
Disqualification by interest, see § 40-1118.
Formation of grand jury, see § 40-1101.
Qualification of jurors, see T. C. A. tit. 22, ch. 1.

Comment:
This section is basically a combination of the general statutes referenced above. Minor changes include the removal of a requirement that a foreman be 25 years old, and the allowance of additional compensation to be authorized by the county legislative body.

40-1103. Oath of grand jurors.—The following oath shall be administered to all members of the grand jury including the foreman: "You as members of the grand jury do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, of all offenses given you in charge, or otherwise brought to your knowledge, committed or triable within this county; that you will keep secret the state's counsel, your fellows', and your own; that you will present no person from hatred, malice, or ill will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but that you will present the truth, the whole truth, and

nothing but the truth, according to the best of your skill and understanding. So help you God."

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1508, 40-1509.

Comment:
This is taken directly from the present statutes which require the foreman to take the oath indicated and then the other jurors to take an oath to follow the oath of the foreman.

40-1104. Instructions to the grand jury.—After the grand jury has been impaneled and sworn, the judge shall instruct it concerning its powers and duties and expound the law to it as he shall deem proper. Each member of the grand jury shall be provided with a copy of the Criminal Code.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1601.

Cross-References:
"Criminal Code" defined, see T. C. A. § 39-101, as amended.
Duties of grand jury, see § 40-1105.
Powers of grand jury, see § 40-1106.

Comment:
This is essentially the same as present T. C. A. § 40-1601. The only change in present law is the omission of the requirement of numerous special charges. T. C. A. §§ 40-1602—40-1604 required the court to specially charge such things as the laws governing the operation of motor vehicles, the law protecting game and birds, the laws of food adulteration, the law of professional bondsmen, and the section requiring a buyer of timber to retain a copy of bills of sale for one year. This general section would require the judge to instruct the grand jury as to its powers and duties and leave any further special charges within his discretion.

40-1105. Duties of the grand jury.—It is the duty of the grand jury to:

(1) inquire into, consider, and act upon all criminal cases submitted to it by the district attorney; and

(2) inquire into any report of a criminal offense brought to its attention by a member of the grand jury; and

(3) inquire into the condition and management of prisons and other county buildings and institutions within the county; and

(4) inquire into the condition of the county treasury; and

(5) inquire into the correctness and sufficiency of the bonds of all county officers; and

(6) inquire into any abuse of office by state or local officers; and

(7) report the results of its actions to the court.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1606, 40-1607, 40-1609.

Cross-References:
Abuse of office, see T. C. A. tit. 39, ch. 24, as amended.
Inquisitorial powers, see § 40-1106.
Report of indictments, see § 40-1113.
Report of indictments not found, see § 40-1114.
Venue, see ch. 3.

Comment:

This is essentially the present law. T. C. A. § 40-1606 requires the grand jury to inquire into all criminal offenses committed or triable within the county. Read literally this would require the grand jury to investigate all unsolved crimes in the county even though law enforcement officials had investigated and closed the case. This section requires the grand jury to inquire into only those offenses presented by the district attorney or by a grand juror. The following section gives them the authority to inquire into any offense within the county.

40-1106. Powers of the grand jury.—(a) The grand jury shall have inquisitorial powers over and shall have authority to return a presentment of all indictable or presentable offenses found to have been committed or to be triable within the county.

(b) The grand jurors are entitled to free access, at all proper hours, to all county offices and buildings and to the examination, without charge, of all records and other papers of any of the county officers in any way connected with their duties.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 40-1605, 40-1608.

Cross-References:

Grand jury investigator, see § 40-1109.

Indictable and presentable offenses, see § 40-1001.

"Presentment" defined, see § 40-105.

Comment:

This section merely restates the present law.

40-1107. Duties of foremen.—It is the duty of the foreman to:

(1) assist and cooperate with the district attorney to the end that the laws may be faithfully enforced; and

(2) preside over meetings of the grand jury; and

(3) swear all witnesses who appear before the grand jury; and

(4) keep dockets and records of the determination of the grand jury in such a place of safekeeping as the court shall direct; and

(5) indorse each bill in accordance with §§ 40-1113 and 40-1114.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-1510.

Cross-References:

Appointment of foreman, see § 40-1102.

Powers of foreman, see § 40-1108.

Recording of grand jury actions, see § 40-1115.

Removal of foreman, see § 40-1117.

Reporting of indictments and not true bills, see § 40-1113, 40-1114.

Comment:

The duty imposed in subdivision (1) is taken directly from T. C. A. § 40-1510. Subdivision (2) merely states the present practice.

Subdivision (3) makes it the foreman's duty to swear witnesses, whereas present T. C. A. § 40-1622 merely empowers him to do so. Present T. C. A. § 40-1621 allows the witnesses to be sworn by the clerk or the foreman, but as a practical matter the witnesses are almost always sworn by the foreman.

Subdivisions (4) and (5) set forth duties corresponding with §§ 40-1105, 40-1113 and 40-1114.

40-1108. Powers of foremen.—(a) The foreman shall be the fifteenth member of each grand jury to which he is appointed during his

term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof.

(b) The foreman is authorized to administer oaths to all witnesses brought before the grand jury to testify as to violations of the criminal laws.

(c) The foreman may move the court to grant immunity pursuant to § 40-1111 and to dismiss the grand jury pursuant to § 40-1120.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 40-1506, 40-1622.

Cross-References:

Appointment of foreman, see § 40-1102.

Dismissal of grand jury, see § 40-1120.

Duties of foreman, see § 40-1107.

Witness immunity, see § 40-1111.

Comment:

This section merely restates the present law with the addition of subsection (c).

40-1109. Grand jury investigator.—(a) The court may appoint an investigator or investigators on petition showing good cause for same and signed by the foreman and eleven (11) other grand jurors.

(b) The duties and tenure of appointment of such investigator or investigators shall be determined by the court. Compensation shall be authorized by the court out of such funds, if any, as have been authorized by the county legislative body.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Ill. Code of Crim. Proc. § 112-5(b).

Cross-References:

Investigative power, see § 40-1106.

Comment:

This section is taken from the Illinois statute and provides a useful adjunct to the grand jury's inquisitorial power. While this power is seldom used, the grand jury may be the only body that can act in a particular situation. Faced with corrupt or incompetent government officials the grand jury can at least force the initiation of a prosecution and focus the attention of the public and of other government officials on the situation. An authorized and trained investigator may often be necessary to the exercise of such inquisitorial powers.

40-1110. Process for witnesses.—(a) The clerk of the court, on the application of the foreman of the grand jury or the district attorney, shall issue subpoenas and subpoenas duces tecum, under chapter 18, for any witnesses the grand jury requires to give evidence before it.

(b) Witnesses subpoenaed and failing to attend will be liable and may be proceeded against as other defaulting witnesses.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-1618.

Cross-References:

Immunity and privilege, see § 40-1111.

Penalty for failure to appear, see T. C. A. § 39-2311, as amended.

Subpoenas, see ch. 18.

Comment:

This section is basically the same as T. C. A. § 40-1618. One change is that this section allows the district attorney to request the issuance of subpoenas. T. C. A. § 40-1619 now allows the district attorneys to so request between terms. Since most cases are submitted by the district attorney's office it is proper to allow him to request subpoenas during the term as well as between terms.

40-1111. Immunity, privilege, and compulsion of testimony.—In any investigation before a grand jury, the court on motion of the district attorney or the foreman of the grand jury may order that any material witness be granted immunity and, subject to privilege, be compelled to testify as other witnesses pursuant to § 40-2004.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Ill. Code of Crim. Proc. §§ 106-1—106-3.

Cross-References:

Contempt, see § 40-2004.
Extent of immunity, see § 40-2004.
Privileges, see § 40-2004.

Comment:

This section incorporates § 40-2004 by reference. That section sets forth this code's provisions for the granting of immunity, the use of contempt to compel testimony, and the availability of privilege. This section is included in this chapter to make clear that the provisions of § 40-2004 apply to grand jury testimony as well as judicial hearings.

The provisions thus incorporated differ greatly from present T. C. A. § 40-1623 which states simply: "No witness shall be indicted for any offense in relation to which he has testified before the grand jury." Although the cases interpreting that section have somewhat narrowed its scope, it is still subject to abuse by a crafty witness since it automatically grants immunity to any witness called before the grand jury. Section 40-2004, on the other hand, requires the action of the court and the district attorney or grand jury foreman before immunity is granted. The fact that the state must decide when to move for immunity should make the grant of immunity a tool which the state can use to successfully fight organized crime.

40-1112. Attendance of district attorney.—Whenever requested by the grand jury, the district attorney shall attend before it for the purpose of giving legal advice as to any matters cognizable by them, but neither the district attorney nor any other person may be present while the grand jury is deliberating or voting.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-1610.

Cross-References:

Powers of grand jury, see § 40-1106.
Secrecy, see § 40-1116.

Comment:

This section changes only two words in the present statute. The first change is that, in the first line, the word "requested" is substituted for the word "required" in the original statute. Under the present law the district attorney seems to be the judge of whether the grand jury "requires" his presence. The use of the word "requested" should indicate that some action by the grand jury is necessary before the district attorney can appear before them. This would tend to make the grand jury more independent and strengthen its usefulness both as a screening device and as an inquisitorial body.

The other change is that the word "shall" is substituted for "may" as the tenth word of this section. It would seem appropriate to require the district attorney to appear before the grand jury, rather than merely allowing him to do so.

40-1113. Finding and reporting of indictment.—(a) An indictment cannot be found without the concurrence of at least twelve (12) grand jurors and when so found shall be indorsed "a true bill," and the indorsement signed by the foreman.

(b) The indictment shall be reported by the foreman, in the presence of the grand jury, to the court and filed by the clerk.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-1706.

Cross-References:

Indictable offenses, see § 40-1001.
"Indictment" defined, see § 40-105.
Number of grand jurors, see § 40-1101.
Report of not true bill, see § 40-1114.

Comment:

This is the present law.

40-1114. Reporting of indictment not found.—(a) If twelve (12) or more grand jurors do not concur in finding an indictment, the fact shall be made known by indorsing the words "not found," or other words of the same purport, on the papers, signed by the foreman.

(b) The foreman shall report the result to the court forthwith in writing and, if the defendant is in custody or has given bail, the court shall order a discharge of the defendant, exoneration of the bail or a refund of any money or property deposited as bail as the case may be.

(c) The charge shall not be resubmitted by the district attorney more than once to a grand jury except by order of the court for good cause shown.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 6(f).
Ky. Rule 5.22 (1).

Cross-References:

Bail, see ch. 12.
"Charge" defined, see § 40-105.

Comment:

This section requires the reporting of all not true bills whether the defendant is in custody or not. This will allow the prohibition against resubmission in subsection (c) to operate effectively since all not true bills will be reported and, under § 40-1115, recorded.

The only major change in present law is the provision concerning resubmission. As a general rule the district attorney would not resubmit the same evidence to a subsequent grand jury since it would be useless. However, since the composition of the grand jury and public passions change from term to term, a prosecutor may feel that a later grand jury would find a true bill where a previous one would not. The policy behind this section is to prevent a wearing down of the accused and to provide protection similar to that of the constitutional protection against double jeopardy. Just as permitting successive trials for the same offense would put the law of averages on the prosecutor's side, so would the allowance of successive submissions to the grand jury. An unscrupulous prosecutor could resubmit a bill over and over again until he finally received a true bill. Where the reason for the not true bill is merely the failure of a key witness to appear, the court can order the resubmission of the charge. However, in some counties it is often necessary, due to their particular situation, that indictments be submitted twice in order to adequately present all of the evidence. For that reason this section allows one resubmission without a court order.

40-1115. Action of grand jury reported in minutes of court.—(a) When reported to the court, all indictments and presentments and re-

ports of indictments and presentments not found shall be entered by the clerk, in full, on the minutes of the court, and the originals compared with the entry by the judge before he signs the proceedings of the day.

(b) A copy of the minutes certified by the clerk shall be as good and valid as the original charge if the original charge is lost, destroyed, misplaced, or otherwise unavailable.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1709, 40-1711.

Cross-References:
"Charge" defined, see § 40-105.
Indictment not found, see § 40-1114.
Report of indictment, see § 40-1113.

Comment:
This is basically the present statutes with the additional requirement that indictments not found be recorded in order that the prohibition against resubmission will be effective.

40-1116. Secrecy of grand jury proceedings and indictments.—(a) No disclosure shall be made of grand jury deliberations or the vote of any juror.

(b) Except as provided in subsection (a), a juror may disclose matters occurring before the grand jury only:

(1) when so ordered by the court preliminarily to or in connection with a judicial proceeding; or

(2) when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(c) The court may order that an indictment shall be sealed by the clerk and kept secret until the defendant is in custody or released pursuant to chapter 12. In that event no person shall disclose the findings of the indictment except when necessary for the issuance and execution of a capias or criminal summons.

(d) Violation of an obligation of secrecy under this section subjects the violator to the contempt powers of the court convening the grand jury.

(e) Except as provided in this section, no obligation of secrecy may be imposed upon any person.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 6(e).

Cross-References:
Capias, see §§ 40-1007—40-1009.
Effect of defect in charge, see § 40-1004.
Motion to dismiss, see § 40-1402.

Comment:
The present provisions corresponding to the federal rule are T. C. A. §§ 40-1611, 40-1612, 40-1714 and 40-1715. In substance the Tennessee statutes and this section differ in three ways.

The first is that T. C. A. § 40-1612 allows disclosure of testimony only "for the purpose of ascertaining whether it is consistent with that given by the witness before the court" or in cases of perjury. Section 40-1116 allows such disclosure only when so ordered by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment. This section is broader and creates a new ground for the disclosure of grand jury testimony.

The second difference is that, under the present statute, T. C. A. § 40-1715, all indictments are to be kept secret until the defendant is arrested while subsection (e) merely allows the court to order that an indictment be kept secret.

The third difference is that T. C. A. § 40-1715 makes the unauthorized disclosure of an indictment a misdemeanor while subsection (d) relies on the contempt power for sanction.

40-1117. Vacancies on grand jury.—(a) If any grand juror becomes unable from any cause to serve out the term, or is excused on any ground, the court shall fill the vacancy from the original panel, if any, or if none from other qualified veniremen selected as in § 40-1101.

(b) If for any reason the foreman of the grand jury is unable to serve or is relieved, the court shall appoint a new foreman according to § 40-1102, until such time as the foreman is able to serve or until expiration of his term.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1511, 40-1512.

Cross-References:
Appointment of foreman, see § 40-1002.
Disqualification of juror, see § 40-1118.
Qualified venire, see T. C. A. tit. 22, ch. 1.

Comment:
This is basically the same as the present statutes with the change that the court selects substitute grand jurors from the qualified venire rather than from qualified bystanders.

40-1118. Disqualification of juror by interest.—(a) No member of the grand jury shall be present during or take part in the consideration of a charge or the deliberation of his fellow jurors thereon if:

(1) he is charged with an indictable offense; or

(2) he is a prosecutor; or

(3) the offense was committed against his person or property; or

(4) he is related to the person charged or to the victim of the alleged crime by blood or marriage within the sixth degree, computing by the civil law.

(b) If due to the exclusion of an interested grand juror the jurors in the investigation of any matter are reduced below the number of fourteen (14), the vacancy shall be filled according to § 40-1117 only during such investigation.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 22-105, 40-1613, 40-1614.

Cross-References:
Indictable offense, see § 40-1001.
Vacancies on grand jury, see § 40-1117.

Comment:
This is basically the same as the present statutes with the addition of the disqualification of the relatives of the victim and a statement of the prohibited degree of relationship borrowed from the statutory provision for petit juror disqualification. Although an unbiased grand jury has not been required, State v. Chairs, 68 Tenn. 196 (1877), and the present statutory disqualification of relatives of the accused has been held merely directory and not grounds for abatement of a presentment returned in violation of it, State v.

Maddox, 69 Tenn. 671 (1878), the policy enunciated in § 40-1101, requiring strict compliance with the provisions of this chapter in attempt to ensure impartial grand juries, requires the addition of this section to be effective.

40-1119. Grand jurors as petit jurors.—(a) Except as provided in subsection (b), the grand jurors may act as petit jurors in either civil or criminal cases when not engaged in the business of the grand jury.

(b) No grand juror may sit as a petit juror for any cause involving a defendant in any criminal cause heard by the grand jury of which he is a member.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1516.

Comment:
This is the present statute, with the addition of the proviso added to ensure impartiality of petit jurors.

40-1120. Dismissal of grand jury.—The court, upon request of the foreman, may dismiss the grand jury whenever it has finished all the business before it and, in the court's opinion, performed its duty as a public inquest, subject to being reconvened when the administration of justice so requires.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1514, 40-1515.

Comments:
This provides essentially the same as the present Tennessee statutes.

CHAPTER 12

PRETRIAL RELEASE

40-1201. Bailable offenses.—All defendants shall be bailable by sufficient sureties except for capital offenses where the proof is evident or the presumption great.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Const., Art. I, § 15.
T. C. A. § 40-1201.

Cross-References:
Capital offenses, see T. C. A. § 39-1105, as amended.

Comment:
This language is taken directly from the Tennessee Constitution guaranteeing a right of pretrial release for most offenses. This section sets the scope of operation for the entire chapter but does not limit the types of pretrial release authorized.

Although this constitutional language has not been interpreted by Tennessee courts, the Illinois Supreme Court held that similar language in the Illinois Constitution did not preclude the use of any form of pretrial release designed to ensure the presence of the defendant at trial. See People ex rel. Gendron v. Ingram, 34 Ill. (2d) 623, 217 N. E. (2d) 803 (1966).

40-1202. Authority to release defendants.—(a) Any magistrate may release the defendant on his own recognizance or admit the defendant to bail at any time prior to or at the time the defendant is bound over to the grand jury.

(b) Any judge of the criminal court may release the defendant on his own recognizance, admit the defendant to bail, or alter bail or other conditions of release at any time before an appeal is perfected.

(c) Any judge of the appellate court may release the defendant on his own recognizance, admit the defendant to bail, or alter bail or other conditions of release at any time after an appeal is perfected.

(d) Nothing in this section shall be construed to impair the right of appeal by certiorari pursuant to § 40-1215.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1202—40-1204.

Cross-References:
Appeal of release decision, see § 40-1215.
Binding over to grand jury, see § 40-904.
Change in bail or conditions of release, see § 40-1207.
"Magistrate" defined, see § 40-105.
Perfection of appeal, see § 40-2406.
Release on recognizance, see § 40-1203.

Comments:
T. C. A. § 40-1202 presently allows the committing magistrate to admit the defendant to bail when he is "held to answer." Subsection (a) is somewhat broader, allowing any magistrate to set bail and making express the authority to release the defendant on his own recognizance.

The magistrate is not given the power to alter bail; thus any application for a change in bail must be made to a judge of a criminal court. This will eliminate any forum shopping among magistrates for a change in bail.

T. C. A. § 40-1203 now authorizes the criminal or circuit court judge to set bail "when the defendant is delivered into custody after indictment found." No cut-off point is established for this authority. T. C. A. § 40-1204 merely provides that the trial judge or the appellate judge can set bail on appeal. Subsections (b) and (c) adopt the perfection of an appeal as the point at which the trial judge's authority ends and the appellate judge's authority begins.

Subsection (d) makes clear that the range of authorities set forth in this section does not affect the right to appeal the bail decision. See § 40-1215.

40-1203. Release on recognizance.—(a) Any person charged with a bailable offense shall, at his appearance before a magistrate authorized to admit him to bail, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in

an amount specified by the magistrate, unless the magistrate determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required.

(b) In making that determination the magistrate shall take into account:

(1) the defendant's length of residence in the community; and

(2) his employment status and history and his financial condition; and

(3) his family ties and relationships; and

(4) his reputation, character, and mental condition; and

(5) his prior criminal record including prior releases on recognizance or bail; and

(6) the identity of responsible members of the community who will vouch for defendant's reliability; and

(7) the nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and

(8) any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

ABA Pretrial Release Standards § 5.1.
Fed. 18 U. S. C. § 3146(a).

Cross-References.

"Bailable offense" defined, see § 40-1201.

Bail jumping and failure to appear, see T. C. A. § 39-2311, as amended.

"Magistrate" defined, see § 40-105.

Preliminary examination, see ch. 9.

Comment:

This section is based on the proposition that all persons are presumed innocent until proved guilty and carries into effect the policy that, wherever possible, the accused should be released before trial. It, in effect, creates a presumption that an accused is eligible for release on his own recognizance, unless the judge determines that the defendant's appearance would not be assured by his personal recognizance. The list of factors to be considered is taken from the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release § 5.1 (Approved Draft, 1968).

The new Criminal Code allows the imposition of the penalties for bail jumping (a separate offense) to be applied to defendants who fail to appear after a recognizance release. See T. C. A. § 39-2311, as amended. The availability of adequate sanctions should increase the use of this type of release.

40-1204. Conditions on release.—(a) Upon a finding that release of the defendant on recognizance will not reasonably assure his appearance as required, the magistrate shall impose the least onerous conditions reasonably likely to assure the defendant's appearance in court.

(b) If conditions on release are found necessary, the magistrate shall impose one or more of the following conditions:

(1) release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting him in appearing in court. Such supervisor shall maintain close contact with the defendant, assist him in making arrangements to appear in court and, where appropriate, accompany him to court. The supervisor shall not be required to be financially responsible for the defendant, nor to forfeit money in the event he fails to appear in court.

(2) place the defendant under the supervision of a probation counselor or other appropriate public official.

(3) impose reasonable restrictions on the activities, movements, associations and residences of the defendant.

(4) impose any other reasonable restriction designed to assure the defendant's appearance.

(c) If a determination is made that conditions on a release on recognizance will not reasonably assure the appearance of the defendant as required, the magistrate shall, in lieu of the conditions of release set out in this section, require bail to be given in accordance with this chapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

ABA Pretrial Release Standards § 5.2.
Fed. R. Cr. P. § 46 (d).

Cross-References:

Bail jumping and failure to appear, see T. C. A. § 39-2311, as amended.

Change in bail or conditions of release, see § 40-1207.

Deposit of bail security, see § 40-1205.

Probation and paroles counselor, see § 40-2864.

Release on recognizance, see § 40-1203.

Comment:

This section follows closely the pattern of the Bail Reform Act of 1966, 18 U. S. C. § 3146. It has been remarked that courts exercising the bail-setting power have almost completely failed to use techniques of supervised release that are well known and widely used after the defendant has been convicted. Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 78 (1963).

The Pretrial Release Program operating for over a year in Memphis-Shelby County has had a remarkable appearance rate—much higher than that of defendants released on bail—utilizing such conditions on recognizance or $1 bail release as the defendant's being required to: report to the program office one or more times weekly in person or by telephone; live at a certain address and respect a curfew; avoid certain high-crime areas of the city; remain in close contact with a third-party sponsor. The use of such pretrial release supervision programs where they exist is expressly authorized by this section.

The release of the defendant into the care of a third person is, in effect, a return to the ancient practice of release into the custody of responsible nonmonetary "sureties." 2 Pollock & Maitland, The History of the English Law 589 (2d ed. 1959). It differs in that the "supervisor" is no longer expected to exercise physical control over the defendant. If closer and more authoritative supervision is necessary, the defendant may be required to report to a probation officer or a special pretrial release program empowered to impose reasonable restrictions on him.

Subsection (c) makes clear that money bail is a last resort and should be used only to assure the defendant's appearance.

40-1205. Deposit of bail security.—(a) Any defendant for whom bail has been set may execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to ten per cent (10%) of the bail, but in no event less than twenty-five dollars ($25.00). Upon depositing this sum the defendant shall be released from custody subject to the conditions of the bail bond.

(b) If the conditions of the bail bond have been performed and the defendant has been discharged from all obligations in the cause, the clerk of the court shall return to the accused, unless the court orders otherwise pursuant to subsection (d), ninety per cent (90%) of the

sum which had been deposited and shall retain as bail bond costs ten per cent (10%) of the amount deposited. In no event, however, shall the amount retained by the clerk as bail bond costs be less than five dollars ($5.00).

(c) If the defendant does not comply with the conditions of the bail bond, the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith by the clerk to the accused at his last known address. If the defendant does not appear and surrender to the court having jurisdiction within thirty (30) days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault, the court shall enter judgment for the state against the accused for the amount of the bail and costs of the court proceedings. The deposit made in accordance with this section shall be applied to payment of the judgment. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(d) If a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with this section, the balance of the deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Ill. Code of Crim. Proc. § 110-7.

Cross-References:

Bail jumping and failure to appear, see T. C. A. § 39-2311, as amended.

Collection of costs, see § 40-2605.

Ordinary fine in felony cases, see T. C. A. § 39-822, as amended.

Ordinary fine in misdemeanor cases, see T. C. A. § 39-803, as amended.

Comment:

This section is the heart of the bail reform provided by this chapter. It provides, basically, that, when bail is set, the defendant may sign the bail bond and deposit ten per cent of the amount set with the clerk of the court and be released on bail. He needs no other sureties and no professional bondsman. If the defendant fulfills the conditions of the bail bond, the clerk will return ninety per cent of the amount deposited and retain ten per cent of the amount deposited (one per cent of the total bail set) as bail bond costs. If the defendant forfeits his bail, a judgment against the defendant for the full amount set is taken and the deposit is applied to costs and the judgment. In the event the defendant complies with his bond and is convicted and a judgment is entered for a fine and/or costs, the ninety per cent of the deposit is not refunded but is instead applied to the costs and fine. A minimum deposit of $25.00 and a minimum bail bond cost of $5.00 is set.

Perhaps the most drastic effect of this provision is the elimination of professional bail bondsmen. The abolition of the professional bondsman is wrought by the allowance of release on the deposit of ten per cent without additional collateral. The professional bondsmen generally charge ten per cent, require a cosigner, and, if the bond is over $1,000, collateral in the form of real estate is generally required. Bail bondsmen could not compete with the ten per cent unsecured premium authorized by this section.

Another effect of this section is that any defendant could obtain his release for ten per cent of the bail set. His credit rating, his friends, and his net worth would not determine the price of his pretrial freedom.

Present Tennessee System.

Although this section would be a sharp break with the present law in Tennessee, there are many reasons for such a change.

A key question in this issue is the control of the key to the jail. Should a private businessman be allowed to determine whether a defendant is to be free on bail or remain in jail? Once bail is set the bail bondsman must still give his permission before most defendants can be released. An unscrupulous person can exact a fearful price for this permission.

The bondsman will first require a ten per cent yearly premium. This ten per cent is never refundable. If the defendant does everything required by the court and the bondsman he will get no part of that money back. The bail bondsman will also require that someone other than the defendant sign as his surety and promise to indemnify the bondsman for any cost or expense incurred by the bondsman in connection with the bond. If the defendant is a stranger in town or simply does not know anyone who will guarantee his bail, he is out of luck and will remain in jail unless he can post the full amount himself or find someone to guarantee his bond.

Of course there is no assurance that the ten per cent and personal surety will satisfy the bondsman. He may require the defendant to put up collateral even for a small bond. Certainly for a large bond, in excess of $1,000, he will require a deed of trust on real estate. In addition the bondsman will feel that he needs the protection of a complex contract and indemnity agreement, with a long list of conditions, the breach of one of which will result in the cancellation of the bond and return of the defendant to jail (until he posts a new bail bond). As a kind of catch-all, just to be sure, the bondsman may require the defendant to agree "to deposit promptly with the Company such collateral as it may at any time demand and to execute any collateral pledge agreements now or hereafter demanded by the Company." Of course breach of such an agreement constitutes grounds for canceling the bond and returning the defendant to jail.

It has been assumed that the bail bondsman runs a substantial risk of being forced to quickly put up vast sums of cash if the defendant fails to appear. In reality, however, very few final forfeitures are actually taken and collected. Extensions are granted in order to allow the bondsman to find the defendant and if he is found incarcerated elsewhere, as is often the case, there can be no final forfeiture and the bondsman is exonerated by the filing of a detainer.

Illinois Plan.

On the other hand the Illinois experience indicates that the retention of one per cent of the bail set yields more than current forfeitures. The amount deposited which was forfeited must be added to this and shows the government receiving more money with the ten per cent plan than under the traditional method. Of course, the cost of administering the bond program may be increased somewhat, but the present system already requires some time and expense on the part of the court clerks.

While no state other than Illinois has this particular plan (ten per cent deposit plus one per cent retention), several other states do have similar provisions. See Wisconsin Stats. §§ 969.02 (5) and 969.03 (1); Alaska Stats. § 12.30.020 (b)(4) (Supp. 1971); D. C. Code § 23-132 (a)(3) (Supp. 1971); Iowa Code Ann. § 763.16 (1)(c) (Supp. 1971). The federal government provides a ten per cent deposit plus full refund method as one way of posting bail, the choice being left to the court.

As was expected, the Illinois plan met stiff resistance from the bail bond lobby when introduced to the legislature, and, as a result, the plan was first enacted only on a tentative basis for two years as a supplement to the commercial system. Evidently the experiment worked since, after the two-year trial, the Illinois plan was made the exclusive method of posting bail in criminal cases. The forfeiture rate in that state has not substantially increased and the money collected has more than paid for the administration of the system and equalled the previous amounts collected on forfeitures.

The forfeiture rate in the municipal court of Chicago in 1962, before the new plan, was ten per cent. In 1964 the percentage of forfeitures of ten per cent deposit bonds was seven per cent; in 1965 it was ten per cent; in 1966 it was eleven per cent. Also, in 1962, $183,938 was collected in forfeitures in that court while in 1966 the one per cent retained amounted to $339,831 and the forfeited ten per cent deposits brought in an additional $312,130. Boyle, Bail Under the Judicial Article, 17 Depaul L. Rev. 267 (1968).

Under the present system in Tennessee, once a defendant pays his ten per cent and gets someone to sign his bond, he will get nothing by returning to court. True, he will prevent his personal surety from being pursued by the bondsman but the restraining effect this has on an accused is speculative. Under the Illinois plan he would have more incentive to return and face the charges since he would receive ninety per cent of his deposit back, even if he is ultimately convicted. Thus on a $1,000 bond the defendant presently would have irretrievably paid the bondsman $100 and

would have a personal surety indebted to the bondsman. If he does not return, nothing, practically speaking, happens to the defendant personally. Under the Illinois plan though, he will receive $90 back if he appears as directed (unless the deposit is applied to a judgment for a fine and costs).

The constitutionality of the Illinois plan was challenged on equal protection grounds in Schilb v. Kuebel, 404 U. S. 357, 92 S. Ct. 479 (1971). The Court found a rational basis for retaining the one per cent under the ten per cent deposit section and charging nothing for a recognizance or a full deposit of cash, stocks, bonds or real estate. There is no safekeeping cost on a recognizance and no charge had ever been made for a recognizance. As to the full deposit provision, the rational basis was that the defendant risked more and the state risked less under that section than under the ten per cent plan. The Court also found no clear indication that only the poor would use the ten per cent provision and only the rich would use the full deposit provision. The Court stated that "[t]he affluent, more aware of and more experienced in the market place, may see the advantage, in these days of high interest rates, in retaining the use of 90% of the bail amount. A 5% or greater return on this 90% in a short period of time more than offsets the 1% retention charge." The levy of the one per cent charge on those acquitted was also upheld as not in violation of due process since it was deemed to be, as the statute says it is, bail bond costs and not the cost of the prosecution.

The Illinois Constitution makes prisoners bailable by sufficient sureties in language similar to Tenn. Const., Art. I, § 15. The refusal to accept a bond posted by a solvent bail bond company was upheld against a constitutional attack based on that section in the case of People ex rel. Gendron v. Ingram, 34 Ill. (2d) 623, 217 N. E. (2d) 803 (1966). The Illinois Supreme Court said that "sufficient" means sufficient to ensure the defendant's presence and not merely financial ability to pay the forfeiture and that the commercial bail bondsman was not necessarily sufficient to accomplish the purpose of bail: to ensure the presence of the defendant.

Bail bondsmen do serve two other purposes which would not be covered by this section. The bondsman is liable for the costs of returning a defendant who forfeits and, theoretically at least, the bondsman can search out and return the defendant himself. Since bail jumping is a crime and since the bondsman will have collateral, he has little incentive to search for the bail jumper instead of allowing the law enforcement agencies to do so.

40-1206. Cash, stocks, bonds, and real estate as security for bail.—(a) In lieu of the bail deposit provided for in § 40-1205, any defendant for whom bail has been set may execute the bail bond with or without sureties, which bond may be secured:

(1) by a deposit, with the clerk of the court, of an amount equal to the required bail, in cash, or in stocks and bonds in which trustees are authorized to invest trust funds under the laws of this state; or

(2) by real estate situated in this state with unencumbered equity, not exempt, owned by the defendant or sureties worth one and one-half (1½) times the amount of bail set.

(b) If the bail bond is secured by cash or stocks and bonds, the defendant or sureties shall file with the bond a sworn schedule which shall contain:

(1) a list of the stocks and bonds deposited describing them in sufficient detail that they may be identified; and

(2) the market value of each stock and bond; and

(3) the total market value of the stocks and bonds listed; and

(4) a statement that the affiant(s) is (are) the sole owner(s) of the stocks and bonds listed and that they are not exempt from execution; and

(5) a statement that the stocks and bonds are security for the appearance of the defendant in accordance with the conditions of the bail bond.

(c) If the bail bond is secured by real estate, the defendant or sureties shall file with the bond a sworn schedule which shall contain:

(1) a legal description of the real estate; and

(2) a description of any and all encumbrances on the real estate including the amount of each and the holder thereof; and

(3) the market value of the unencumbered equity owned by the affiant; and

(4) a statement that the affiant(s) is (are) the sole owner(s) of such unencumbered equity and that it is not exempt from execution; and

(5) a statement that the real estate is security for the appearance of the accused in accordance with the conditions of the bail bond.

(d) A certified copy of the bail bond and schedule of real estate shall be filed immediately by the clerk of the court in the office of the register of the county in which the real estate is situated. The state shall have a lien on such real estate from the time such copies are filed in the office of the register. The register shall enter, index and record such bail bonds and schedules. Costs of recordation shall be paid by the defendant.

(e) If the conditions of the bail bond have been performed and the defendant has been discharged from his obligations in the cause, the clerk of the court shall return to him or his sureties the deposit of any cash, stocks or bonds. If the bail has been secured by real estate, the clerk of the court shall forthwith prepare and forward to the register a written release of the lien on the real estate. The costs thereof shall be paid by the defendant.

(f) If the defendant does not comply with the conditions of the bail bond, the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be forthwith sent by registered mail, return receipt requested, by the clerk of the court to the defendant and his sureties at their last known address. If the defendant does not appear and surrender to the court having jurisdiction within thirty (30) days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the defendant is impossible and without his fault, the court shall enter judgment for the state against the defendant and his sureties for the amount of the bail and costs of the proceedings.

(g) If judgment is entered in favor of the state on any bail bond, the district attorney shall have execution issued on the judgment and delivered forthwith to the sheriff to be executed by levy on the cash, stocks or bonds deposited with the clerk of the court or the real estate described in the bail bond schedule. The cash shall be used to satisfy the judgment and costs. The stocks, bonds or real estate shall be sold in the same manner as in execution sales in civil actions and the proceeds of such sale shall be used to satisfy the judgment and all court costs and prior encumbrances, if any. The balance shall be returned

to the owner. The real estate so sold may be redeemed in the same manner as real estate may be redeemed after judicial or execution sales in civil actions.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ill. Code of Crim. Proc. § 110.8.

Cross-References:
Bail jumping and failure to appear, see T. C. A. § 39-2311, as amended.
Court hearing jurisdiction, see § 40-1202.
Perjury, see T. C. A. § 39-2202, as amended.

Comment:
This section is taken from the Illinois plan and provides an alternative to the ten per cent deposit method of posting bail.

Basically this section provides that, in lieu of the ten per cent deposit, the defendant can deposit the entire amount of the bail set, in cash or stocks and bonds, or he may put up real estate with an unencumbered and nonexempt value of one and one-half times the amount of bail. Unlike the ten per cent deposit method, under this section the entire deposit is returned if the defendant complies with his bond. Schedules must accompany a deposit of stocks, bonds or real estate. Upon the filing of a certified copy of such a bail bond, the state acquires a lien on the land.

The matter of the sale of land forfeited is handled simply by referring to the procedure used in execution sales in civil actions. This is in contrast to the present, elaborate procedure provided by T. C. A. §§ 40-1306—40-1318. Those statutes provide a detailed method for the state to purchase land sold after forfeiture. Under present case law real estate may be forfeited on a common-law recognizance. At common law a defendant, with or without sureties, can acknowledge in open court, his debt to the state conditioned on his nonappearance at trial. This results in a common-law lien against all of the real estate owned by the defendant and his sureties. See State v. Winn, 35 Tenn. 392 (1855); State v. Magniss, 1 Haywood 100 (N. C. 1794). Since there was no guarantee that the land would bring enough at an execution sale, it was probably necessary for the state to be able to bid at the sale. Under this section, however, the unencumbered value of the land must be one and one-half times the amount of the bail and there should be no problem in getting a bid sufficient to cover the forfeiture.

40-1207. Change in bail or conditions of release.—An application for a change in bail or other conditions of release shall be by written motion, served upon opposing counsel or upon defendant himself, if he is not represented by counsel, within a time reasonable under the circumstances before the hearing on the motion.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ill. Code of Crim. Proc. § 110-6.

Cross-References:
Authority to release defendants, see § 40-1202.
Conditions of release, see § 40-1204.

Comment:
Since the application for a change in bail or conditions of recognizance release must be made in the criminal court under § 40-1202, the motion should be in writing in order to provide a better record for an appeal of the amount of bail set. Rather than require notice within a certain number of days of the hearing on the motion, this section requires that the motion be served only within a reasonable time before the hearing. This is modeled after the Illinois provision. The words "under the circumstances" are intended to make it clear that what is a reasonable time will depend on the facts of each case.

40-1208. Continuation of bail or conditions of release.—(a) Once bail has been given or conditional release granted and the charge pending is thereafter filed in or transferred to a court of competent jurisdiction, the latter court shall continue the original bail in that court subject to the provisions of § 40-1202.

(b) After conviction the court:

(1) may order that the original bail or conditions of release remain in effect pending appeal; or

(2) may deny release; or

(3) may increase or reduce bail or alter the conditions or release.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ill. Code of Crim. Proc. §§ 110-7 (c)—(d).

Cross-References:
Authority to release defendants, see § 40-1202.
"Charge" defined, see § 40-105.
Conditions on release, see § 40-1204.
Court jurisdiction, see ch. 2.

Comment:
This section is subject to § 40-1202 which determines when one may admit the defendant to bail or alter it. Thus, this section allows the trial court to let the defendant remain on his original bail ending appeal but, under § 40-1202, if no release was originally authorized or if the trial court feels that the defendant should not remain on his original release after conviction, only the appellate court can admit the defendant to bail after the appeal is perfected. If the trial court allowed the defendant to remain on his original bond after conviction, only the appellate court can alter that bail after the appeal is perfected.

40-1209. Bail for material witness.—(a) If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that the witness has refused or will refuse to respond to process, the court may require him to give bail under § 40-1205 or § 40-1206 for his appearance as a witness, in an amount fixed by the court.

(b) If the person fails to give bail, the court may commit him to the custody of the sheriff pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time, and may modify at any time the requirement as to bail.

(c) If the person does not comply with the conditions of the bail bond, the court having jurisdiction shall enter an order declaring the bail to be forfeited as provided in §§ 40-1205, 40-1206.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 46 (b).

Cross-References:
Bail jumping and failure to appear, see T. C. A. § 39-2311, as amended.
Subpoenas, see ch. 18.

Comment:
This section is taken from the federal rule. T. C. A. §§ 40-1122—40-1127 now provides for taking bail for witnesses but no indication is given as to who is a material witness and no procedure is set out for this determination. This section will require the affiant, state or defendant, to show two things before it can require the witness to post bail: (1) that his testimony is material and (2) that it may become impracticable to use a subpoena. This should eliminate the possibility of abuse which exists now since, under current procedure, the mere allegation that one is a material witness results, in effect, in summary punishment by either fine in the amount of the bail premium or incarceration until trial.

40-1210. Guaranteed arrest or bail bond certificate for traffic violations.—(a) A guaranteed arrest or bail bond certificate is a certificate issued by an association to any of its members, signed by the member and containing a printed statement that:

(1) the association and/or the surety company is licensed to do business in this state; and

(2) the guaranteed arrest or bail bond certificate is issued pursuant to the terms of this section; and

(3) the bond guarantees the appearance of the person whose signature appears on the certificate; and

(4) the surety company will, in the event of the failure of the person to appear in court at the time set for appearance, pay any fine or forfeiture imposed upon such person up to the maximum amount stated on the certificate, not to exceed one thousand dollars ($1,000).

(b) A guaranteed arrest or bail bond certificate presented by the person whose signature appears thereon shall be accepted in lieu of cash for the full amount of bail set up to the maximum amount stated on the certificate, not to exceed one thousand dollars ($1,000), as an arrest or bail bond to guarantee the appearance of the person in any court in this state, at the time required by such court, if:

(1) he is arrested for violation of any traffic law of the state or ordinance of any municipality relating to the operation of a motor vehicle; and

(2) the violation is committed prior to the expiration date shown on the face of the certificate.

(c) The guaranteed arrest or bail bond certificate shall be subject to all of the limitations appearing on the face thereof but, when accepted, it is subject to the same forfeiture and enforcement provisions as a bail bond or cash bond.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1241, 40-1242.

Cross-References:
Cash deposit, see § 40-1205.
Forfeiture, see § 40-1205.

Comment:
This is a combination of the present statutes and merely allows the use of guaranteed bail bond certificates issued by auto clubs, etc., to post bail not in excess of $1,000 in traffic cases. The present statutes, enacted in 1967, limit the use of guaranteed bail bond certificates to bail amounts of $200 or less. Section 40-1209 has raised this limit to $1,000 on the theory that all traffic offenses should be bailable by guaranteed certificate. This type of bail bond is not subject to the same abuses as ordinary bail bonds since the holder does not purchase them under threat of jail, and no additional collateral would be required.

40-1211. Bail for persons under disability.—Mental incompetents and minors need not personally make the deposit or execute the bail bond as may be required under this chapter but such deposit and execution may be made for them by anyone.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1218.

Comment:
This is the present statute.

40-1212. Taking of bail by peace officer.—(a) If bail has been set, any sheriff or other peace officer designated by him may also take bail in accordance with the provisions of this chapter and release the offender to appear as directed by the magistrate setting bail.

(b) The sheriff or peace officer shall give a receipt to the offender for the bail so taken and within a reasonable time deposit such bail with the clerk of the court having jurisdiction of the offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ill. Code of Crim. Proc. § 110-9.

Cross-References:
"Magistrate" defined, see § 40-105.
"Peace officer" defined, see § 40-105.

Comment:
T. C. A. § 40-1206 presently allows the sheriff to take bail set by the court.

40-1213. Issuance of warrant.—Upon an increase in the amount of bail required or upon the defendant's failure to comply with any condition of a bail bond or recognizance release, the court having jurisdiction at the time of such increase or failure may issue a warrant for the arrest of the defendant.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ill. Code of Crim. Proc. § 110-3.

Cross-References:
Arrest warrant, see ch. 7.
Authority to release defendant, see § 40-1202.
Bail jumping and failure to appear, see T. C. A. § 39-2311, as amended.
Change in bail, see § 40-1207.

Comment:
T. C. A. §§ 40-1236 and 40-1237 provide a procedure to have the defendant rearrested and committed where the court deems the amount of bail to be insufficient or where the defendant forfeits. In light of the constitutional mandate that "all prisoners shall be bailable by sufficient sureties . . . ", it would seem questionable whether a person could be committed without bail after once forfeiting bail. This section provides, therefore, for his rearrest and it is assumed that the court will reset bail in order to ensure that the defendant does not forfeit a second time.

40-1214. Relief on forfeited recognizance or bail.—(a) The judges of the criminal courts, appellate courts, and Supreme Court may receive, hear and determine the petition of any person who believes that he merits relief on any recognizance or bail forfeited and lessen or absolutely remit the same. The court may do all and everything therein as it shall deem just and right and consistent with the welfare of the state, as well as of the person praying such relief. This power shall extend to the relief of those against whom final judgment has been entered as well as to the relief of those against whom proceedings are in progress.

(b) Money paid into the treasury by virtue of a judgment of the criminal court upon a forfeited recognizance or bail shall be refunded

to the party paying the same upon the reversal of the judgment by the appellate courts on appeal or writ of error duly prosecuted and the director of accounts shall give the party his warrant for the money upon the production of an attested copy of the judgment of reversal certified by the clerk to be final.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-1304, 40-1305.

Cross-References:
Forfeiture, see § 40-1205.

Comment:
This is a combination of the present statutes.

40-1215. Review of release decision.—The actions of a magistrate or trial judge in granting, denying, setting, or altering conditions of the defendant's release shall be reviewable by the Court of Criminal Appeals upon writ of certiorari.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
Authority to release defendants, see § 40-1202.

Comment:
This section codifies the present Tennessee procedure for the appeal of bail decisions.

40-1216. Exclusive methods of posting bail.—The provisions of this chapter are the exclusive methods for the giving, taking or enforcement of bail in criminal cases.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ill. Code of Crim. Proc. § 110-15.

CHAPTER 13

ARRAIGNMENT AND PLEAS

40-1301. Arraignment required.—(a) Except as provided in § 40-114, before any person is tried for the commission of an offense, he shall be called into open court and arraigned.

(b) The arraignment shall consist of reading the charge to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the charge upon his request to the clerk at any time and, in any case, before he is called upon to plead.

(c) Defendants who are jointly charged may be arraigned separately or together in the discretion of the court.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 8.02.
Fed. R. Cr. P. § 10.
Ill. Code of Crim. Proc. §§ 113-1, 113-2.

Cross-References:
"Charge" defined, see § 40-105.
Joinder of defendants, see § 40-1604.
Presence of defendant, see § 40-114.
Right to counsel, see § 40-3202.

Comment:
Tennessee currently has no arraignment statute although a chapter of T. C. A. title 40 is entitled "Arraignment and Pleas." Case law in Tennessee makes the arraignment dispensable but no conviction can stand in the absence of a plea. See State ex rel. George v. Bomar, 216 Tenn. 82, 390 S. W. (2d) 232 (1965); Lynch v. State, 99 Tenn. 124, 41 S. W. 348 (1897). The *Bomar* case also states that the purpose of an arraignment is to take the defendant's plea.

This section requires that the defendant be present at the arraignment except as provided in § 40-114, which allows the defendant to appear by counsel in certain cases. The present procedure is unclear on this point with some judges requiring the defendant's presence and others allowing him to appear by counsel.

This section allows the defendant to request and receive a copy of the charge at any time and, in any event, before he pleads. If the defendant has employed counsel before the arraignment he may waive certain objections to the initiation of the prosecution by pleading and thus should have an opportunity to examine the charge thoroughly before the arraignment. Where counsel is appointed at the arraignment, he will receive a copy of the charge then if the defendant does not already have a copy, and objections will still be allowed for a certain time thereafter under § 40-1404 (time for making motion).

40-1302. Effect of defect in arraignment.—Neither a failure to arraign nor an irregularity in the arraignment shall affect the validity of any proceeding in the cause if the defendant pleads to the charge or proceeds to trial without objecting to such failure or irregularity.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ill. Code of Crim. Proc. § 113-6.

Comment:
Since, under State ex rel. George v. Bomar, 216 Tenn. 82, 390 S. W. (2d) 232 (1965), the arraignment can be waived if a plea is entered, the only problem with this section is the possibility that in a particular case the failure to arraign might result in a lack of due process which would allow review under a writ of habeas corpus. See Merritt v. Hunter, 170 Fed. (2d) 739 (10th Cir. 1948).

40-1303. Pleas available.—(a) A defendant may plead:
(1) not guilty; or
(2) guilty; or
(3) with the consent of the court, nolo contendere.

(b) If a defendant refuses or neglects to plead, or if a guilty plea is not accepted, or if a defendant corporation or association fails to appear, the court shall enter a plea of not guilty.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed amendment to F. R. Cr. P. § 11.

Cross-References:

Rejection of guilty plea, see § 40-1306.

Comment:

This provides for essentially the same procedure as the present law with the addition of the mention of rejection of a guilty plea and nonappearance of a corporate defendant.

40-1304. Plea agreement.—(a) The district attorney and the attorney for the defendant may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the district attorney will move for dismissal of other charges, or will recommend or not oppose the suspension or imposition of a particular sentence, or will do both.

(b) The court shall not participate in any such discussions.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed amendment to F. R. Cr. P. § 11.

Cross-References:

Authorized sentences, see T. C. A. tit. 39, ch. 8, as amended.

General principles of sentencing, see T. C. A. § 39-806, as amended.

Lesser included offense, see § 40-2203.

Sentencing combinations, see T. C. A. § 39-805, as amended.

Suspension of sentence, see ch. 27.

Comment:

Section 40-1304 and those immediately following create a recognized procedure for plea bargaining. The existence of plea negotiation in Tennessee is too well known to deny, yet almost every day the prosecutor, defense counsel, defendants and judges pretend for the record that no promises or "deals" have been made. The defendant is told that his settlement will be honored but that he must not tell the judge that he has been promised anything. The judge asks him if his plea is free and voluntary and induced by his belief that he is guilty. Meanwhile, the attorneys hold their breath and hope that he does not blurt out the heresy that he is only pleading guilty in order to prevent the jury from throwing the book at him on the more serious charges which the prosecuting attorneys has promised to drop or recommend concurrent sentences for. This is an unhealthy situation at best. The cases now recognize that plea bargaining takes place and in fact is necessary unless we are willing to greatly increase the size of our judiciary and prosecutors' staffs. The cases agree that if plea bargaining is done, "we should exhume the process from stale obscurantism and let the fresh light of open analysis expose both the prior discussions and agreements of the parties, as well as the court's reasons for its resolution of the matter." People v. West, 91 Cal. Rptr. 385, 447 P. (2d) 409 (1970); see also Rigby v. Russell, 287 Fed. Supp. 325 (E. D. Tenn. 1968).

Plea bargaining is justified on several grounds besides necessity. The more optimistic people believe that one who confesses his guilt will be more easily rehabilitated. Others point out that swift and sure punishment, imposed or negotiated, serves the ends of justice. It also increases flexibility in sentencing.

This section makes plea negotiations discretionary and not mandatory. The common concessions made by the prosecuting attorney are set out and the court is forbidden to participate in these negotiations.

40-1305. Disclosure of plea agreement.—If a plea agreement has been reached by the parties, the court shall require the disclosure of the agreement in open court prior to the time a plea is offered. Thereupon, the court may accept or reject the agreement or may defer its decision as to acceptance or rejection until receipt of a presentence report.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed amendment to F. R. Cr. P. § 11.

Cross-References:

Plea agreement, see § 40-1304.

Presentence report, see § 40-2864.

Comment:

This section provides for the disclosure of any plea agreement. The court can still take the defendant's plea when he admits that he has made an agreement with the prosecuting attorney. The plea can still be free and voluntary and the court can now delve deeper into the pretrial discussions and ensure that the plea is a knowing choice between known alternatives.

40-1306. Acceptance or rejection of plea agreement.—(a) If the court accepts the plea agreement, the court shall inform the parties that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(b) If the court rejects the plea agreement, the court shall:

(1) inform the parties of this fact; and

(2) advise the defendant and district attorney personally in open court that the court is not bound by the plea agreement; and

(3) advise the defendant that if he pleads guilty the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement; and

(4) afford the defendant the opportunity to then withdraw his offer to plead guilty; and

(5) afford the district attorney the opportunity to change his recommendations; and

(6) afford the parties the opportunity to submit further plea agreements.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed amendment to F. R. Cr. P. § 11.

Cross-References:

Plea agreement, see § 40-1304.

Sentencing, see ch. 23.

Comment:

The first sentence of this section is somewhat different from the proposed federal rule. That rule would allow the judge to accept the plea agreement and give the defendant a disposition more favorable than agreed upon. This section provides that the judge must accept the agreement or reject it as it stands. He cannot accept the agreement and give a more favorable disposition.

40-1307. Advice to defendant.—The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands:

(1) the nature of the charge to which the plea is offered; and

(2) the maximum possible punishment provided by law; and

(3) that he has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and

(4) that if he pleads guilty there will not be a further trial except as provided in § 40-2302, so that by pleading guilty he waives the

right to trial by jury or otherwise and the right to be confronted with the witnesses against him.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed amendment to F. R. Cr. P. § 11.

Cross-References:

Authorized sentences, see T. C. A. tit. 39, ch. 8, as amended.
Bifurcated trial, see § 40-1902.
Fine over $50 set by jury, see § 40-2302.

Comment:

Under present procedure the court commonly advises the defendant of these same things in order to ensure that the defendant knows exactly what he is doing. The requirement that the defendant be advised that he is waiving certain rights by his guilty plea is designed to ensure that this waiver is an intelligent waiver of known rights which will satisfy constitutional requirements. See Boykin v. Alabama, 395 U. S. 238 (1969).

40-1308. Ensuring that the plea is voluntary.—Except as provided in § 40-114, the court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats nor of any promises apart from a plea agreement. The court shall also determine whether the defendant's plea of guilty results from prior discussions between the district attorney and the defendant or his counsel.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed amendment to F. R. Cr. P. § 11.

Cross-References:

Plea agreement, see § 40-1304.
Plea by counsel, see § 40-114.
Pleas available, see § 40-1303.

Comment:

Section 40-1308 is intended to ensure that guilty pleas are voluntary and, along with a complete record of the proceedings, should protect the integrity of such pleas if attacked in post-conviction proceedings.

If the plea is the result of discussions between the prosecuting attorney and the defendant, the plea may be subject to attack as a denial of the effective assistance of counsel. See Anderson v. North Carolina, 221 Fed. Supp. 930 (W. D.N.C. 1963), in which the court decided that the decision to plead guilty to a lesser charge is a "critical stage" of the proceedings and, even though defense counsel gave his permission for the discussion between his client and the prosecuting attorney, the plea was invalid since only the defendant can waive his right to the assistance of counsel.

The reference to § 40-114 is to allow pleas in absentia pursuant to that section in cases involving a maximum penalty of a fine of $50.00 or less.

40-1309. Factual basis for plea.—Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without finding that there is a factual basis for the plea.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed amendment to F. R. Cr. P. § 11.

Cross-References:

Plea agreement, see § 40-1304.

Comment:

This is current procedure in federal courts. This section prevents one who is clearly innocent or incapable of committing the crime from pleading guilty.

40-1310. Inadmissibility of plea discussions.—If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea or judgment shall be admissible against the defendant in any criminal or civil action or administrative proceeding.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed amendment to F. R. Cr. P. § 11.

Cross-References:

Appeals, see ch. 24.
Plea agreement, see § 40-1304.
Rejection of guilty plea, see § 40-1306.

Comment:

This section is designed to promote free discussions between the prosecuting attorney and defense counsel and to avoid ethical and 5th amendment problems.

40-1311. Record of proceedings.—A verbatim record of the proceedings at which the defendant enters a plea of guilty in a court of record shall be made and shall include the court's advice to the defendant, the inquiry into and the court's finding that the plea is voluntary, and the inquiry into and the court's finding of the factual basis for the guilty plea.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed amendment to F. R. Cr. P. § 11.

Cross-References:

Court reporters, see § 40-3222.
Court's advice to defendant, see § 40-1307.
Ensuring that plea is voluntary, see § 40-1308.
Factual basis for plea, see § 40-1309.

Comment:

This record is kept under current procedure and is necessary to forestall wholesale challenges to guilty pleas after conviction. In some instances this record keeping will be time consuming and inconvenient but not nearly as much as it would be to repeatedly testify in collateral proceedings challenging guilty pleas.

40-1312. Setting of trial.—If a plea of not guilty is entered to a felony charge, the trial date shall be set for not less than fourteen (14) days after the return of the charge.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

New.

Cross-References:

"Charge" defined, see § 40-105.
Continuance, see § 40-113.
"Felony" defined, see T. C. A. § 39-107, as amended.

Comment:

This provision ensures that no felony charge will be brought to trial before defense counsel has had an adequate opportunity to prepare the defendant's case. Fourteen days is the minimum period necessary for that purpose.

CHAPTER 14

PREPARATION FOR TRIAL

40-1401. Pleadings and motions.—(a) Pleadings in criminal proceedings shall be the indictment, presentment, information, and the complaint, and the pleas of not guilty, guilty, and nolo contendere.

(b) All other pleas, demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in this chapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. F. R. Cr. P. § 12.
Ky. Rule 8.12.
Uniform Rule 25.

Cross-References:
"Complaint" defined, see § 40-105.
Continuance, see § 40-113.
Double jeopardy and multiple prosecutions, see T. C. A. tit. 39, ch. 3, as amended.
General defenses, see T. C. A. tit. 39, ch. 6, as amended.
"Indictment" defined, see § 40-105.
"Information" defined, see § 40-105.
Pleas available, see § 40-1303.
"Presentment" defined, see § 40-105.
Use of complaints and informations, see § 40-1002.
Use of indictments and presentments, see § 40-1001.
When motion must be written, see § 40-110.

Comment:
Under present procedure other pleas, which are actually defenses and not answers to the charge, are available. An example is the plea of former conviction. Under this code this defense would be raised by motion to dismiss.
Current law provides for the motion to quash and the demurrer. There are ambiguous differences in the situations in which motions to quash, demurrers, and pleas in abatement can be used. This section simplifies the procedure and avoids confusing technical distinctions. This parallels the simplification of the civil procedure by Civil Rules 7.01 and 7.03.

40-1402. Defenses and objections which must be raised by motion.—(a) Defenses and objections based on defects in the institution of the prosecution or in the charge, other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial.

(b) Such a motion shall include all such defenses and objections then available to the defendant.

(c) Failure to present any defense or objection as provided in subsection (b) constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver.

(d) Lack of subject matter jurisdiction or the failure of the charge to state an offense shall be noticed by the court at any time during the pendency of the proceeding.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 12(b)(2).
Ky. Rule 8.18.
Uniform Rule 25(b)(2).

Cross-References:
"Charge" defined, see § 40-105.
Conduct constituting an offense, see T. C. A. § 39-103, as amended.
Effect of defect in charge, see § 40-1004.
Grand jury formation and proceedings, see ch. 11.
Initiation of prosecution, see ch. 10.
Jurisdiction of courts, see ch. 2.
Territorial jurisdiction, see T. C. A. § 39-104, as amended.
Venue, see ch. 3.

Comment:
Section 40-1402 requires that certain objections be made and defenses be raised by motion before trial or that they be waived. Objections to the array or to an individual grand juror or to the venue must be raised by such a motion before trial.
This section is different from the federal rule in that it adds the words "subject matter" before the word "jurisdiction." This merely expresses the accepted interpretation of the federal rule since personal jurisdiction can be waived by failure to timely object. See Hess v. United States, 254 Fed. (2d) 578 (8th Cir. 1958).
Those defenses involving objections to the institution of the prosecution must be consolidated and not made piecemeal. However, the court can allow a subsequent motion for good cause shown.
Under current law these defenses are waived if not raised at the first opportunity, usually before the plea of not guilty is entered.

40-1403. Defenses and objections which may be raised by motion.—Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 12(b)(1).
Ky. Rule 8.16.
Uniform Rule 25(b)(1).

Cross-References:
General defenses, see T. C. A. tit. 39, ch. 6, as amended.
Insanity, see T. C. A. § 39-601, as amended.
Multiple prosecution and double jeopardy, see T. C. A. tit. 39, ch. 3, as amended.
Notice of alibi defense, see § 40-1409.
Notice of insanity defense, see § 40-1410.

Comment:
This section allows any defense to be raised which does not require the trial of the general issue. Thus, such defenses as former jeopardy, former conviction or acquittal, or failure to charge an offense may be raised by motion. Under present procedure such defenses would be raised by a plea in abatement, motion to quash or demurrer. Under this section all such defenses can be raised by motion.

40-1404. Time of making motion.—Any motion which must be made before trial pursuant to § 40-1402 shall be made before the plea is entered, but the court shall permit it to be made thereafter, without withdrawal of plea, within a reasonable time after the defendant receives a copy of the charge and receives or waives the effective assistance of trial counsel.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 12(b)(3).
Ill. Code of Crim. Proc. § 114-1(b).
Ky. Rule 8.20.
Uniform Rule 25(b)(3).

Cross-References:
"Charge" defined, see § 40-105.
Entry of plea, see § 40-1301.
Receipt of charge, see § 40-1301.
Right to counsel, see § 40-3202.
Waiver of right to counsel, see § 40-3203.

Comment:
Sections 40-1404 differs from the federal rule in that it allows the motion to be made after the plea if it is made within a reasonable time after the defendant receives counsel and a copy of the charge. The federal rule merely says that the judge "may" allow it to be made after the plea, evidently restricted only by the discretion of the court. This statute is designed to assure that defense counsel has a reasonable time to analyze the charge and institution of the prosecution for any objectionable defects before he allows the defendant to plead.

40-1405. Hearing on motion.—(a) A motion made before trial pursuant to this chapter raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue.

(b) An issue of fact shall be tried by a jury if a jury trial is required under the United States or Tennessee Constitution.

(c) All other issues of fact shall be determined by the judge with or without a jury or on affidavits or in such other manner as the court may direct.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 12(b)(4).
Ky. Rule 8.22.
Uniform Rule 25(b)(4).

Cross-References:
Grand jury formation and proceedings, see ch. 11.
Search and seizure, see ch. 8.
Trial by jury or by judge alone, see § 40-1901.

Comment:
This section provides that the motion be determined before trial or may be deferred until the trial. Where the motion raises an issue better determined during the trial, it would be proper to defer the motion. For example, the question of venue may be "[one of] fact so entwined with the merits . . . that a decision should be postponed until trial." United States v. Callahan, 300 Fed. Supp. 519 (S.D.N.Y. 1969). In the *Callahan* case the defendants were charged with a conspiracy and venue was allegedly based on the planning having been done in the county of trial. In order to prove venue the planning of the crime would have to be shown. This motion was properly deferred until the trial.

On the other hand, the motion may raise only questions of law which would properly be decided by the court.

This section allows the judge to decide all issues of fact raised by the motion which are not constitutionally required to be tried by a jury. Examples of such facts would be the waiver of constitutional rights, legality of searches, the presence of unauthorized persons in the grand jury room and discrimination in the selection of the grand jurors. See United States v. Smyth, 104 Fed. Supp. 279 N.D. Cal. 1952); Shafer v. State, 214 Tenn. 416, 381 S. W. (2d) 254 (1964).

40-1406. Effect of determination.—(a) If a motion is determined adversely to the defendant, he shall plead if he has not done so previously. A plea previously entered shall stand and need not be withdrawn.

(b) If the court grants a motion based on a defect in the institution of the prosecution or in the charge, it may also order that the defendant be held in custody or that his pretrial release be continued for a specified time not to exceed five (5) days pending the filing of a new charge.

(c) Nothing in this section shall be deemed to affect the provisions of any law relating to periods of limitations.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 12(b)(5).
Ky. Rule 8.24.
Uniform Rule 25(b)(5).

Cross-References:
"Charge" defined, see § 40-105.
Grand jury formation and proceedings, see ch. 11.
Initiation of prosecution, see ch. 10.
Limitation of prosecutions, see ch. 4.
Pleas available, see § 40-1303.
Pretrial release, see ch. 12.

Comment:
If a motion to dismiss is granted due to some defect in the charge or in the institution of the prosecution, this section allows the court to ensure that the defendant will be available when the new charge is filed. At present there appears to be no comparable provision in Tennessee.

This section also indicates that one does not have to withdraw a plea previously entered before he can take advantage of a defense or objection by motion. Under present procedure a prior plea of not guilty must be withdrawn before a plea in abatement or motion to quash can be entered. See Yearwood v. State, 2 Tenn. Crim. App. 552, 455 S. W. 2d) 612 (1970).

40-1407. Motion for pretrial determination of admissibility of evidence.—(a) A person aggrieved by an unlawful search and seizure may move the criminal court for the county in which the property was seized, or the court where the trial is to be held, for the return of the property and to suppress for the use as evidence anything so obtained on the ground that:

(1) the property was illegally seized without a warrant; or

(2) the warrant is insufficient on its face; or

(3) the property seized is not that described in the warrant and was not subject to seizure during an otherwise lawful search; or

(4) there was not probable cause shown on the face of the affidavits for the issuance of the warrant; or

(5) the warrant was illegally executed.

(b) Upon motion of either party or upon its own motion, the court may order that the question of the admissibility of any specified evidence be submitted for pretrial determination as a motion to suppress.

(c) A party may move that the question of the admissibility of its own specified evidence be submitted under this section as a motion to suppress by the opposing party.

(d) The motion shall be made before trial or hearing unless an opportunity to do so did not exist or the defendant was not aware and through the exercise of due diligence could not become aware of the grounds for the motion. The court, for good cause shown, may entertain the motion during the trial or hearing.

(e) The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property seized shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsec. (a), (d), (e): Fed. R. Cr. P. 41 (e). T. C. A. § 40-519.
Subsecs. (b), (c): New.

Cross-References:

Disposition of contraband, see § 40-826.
Execution of search warrant, see § 40-804.
Probable cause determination, see § 40-802.
Search warrant, see §§ 40-801—40-803.
Seizure, see § 40-823.
Seizure warrant, see § 40-822.
Stop and frisk, see § 40-603.

Comment:

Ordinarily the motion to suppress may be used only to test the admissibility of evidence illegally seized. Subsection (a) deals with this motion. The admissibility of such evidence as confessions and line-up identifications generally could not be determined by the traditional motion to suppress and these questions were argued at trial out of the presence of the jury. Subsection (b) provides a method of dealing with such matters before trial.

Subsection (b) also allows, but does not require, the court to order a question of admissibility to be submitted. In addition, subsection (c) allows a party to ask the court to require the other party to challenge his evidence before trial or waive his right to have the evidence excluded at trial. Thus, the state could petition the court for an order submitting the question of the admissibility of a line-up identification for pretrial determination. If the court in its discretion granted the order, defense counsel would make a motion to suppress the line-up identification. If he did not move to suppress, he could not later make such a motion at trial except as provided in subsection (d).

A "due diligence" standard in subsection (d) requires any motion under this section to be made before trial unless the defendant did not or could not know of the grounds for the motion. The first sentence of subsection (d) sets out two grounds for allowing the motion at trial: lack of opportunity to know and lack of actual knowledge of the grounds. The second sentence provides a broad, third ground: good cause shown. This third ground is included less through necessity than through an abundance of caution. Although good cause would appear to be covered in the first two grounds, the possibility of the occurrence of another reason just as compelling as the two set forth dictates the use of the catch-all clause.

This section should result in an increased efficiency in the conduct of criminal trials and, with its broad grounds for allowing motion to be made at a later date, no hardship should be worked on any party.

40-1408. Appeal by state of granting of motion to suppress.—(a) An appeal by the state shall lie from a decision or order of a court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding, if the district attorney certifies to the trial court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

(b) Upon the taking of an appeal by the state, the defendant shall be absolutely entitled to immediate release upon his own recognizance.

(c) The appeal in all such cases shall be taken within thirty (30) days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

(d) The taking of an appeal by the state pursuant to this section constitutes a bar to the prosecution of the charge involving the evidence suppressed, unless and until the suppression order is reversed and vacated upon appeal.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. 18 U. S. C. 3731.
N. Y. Crim. Proc. Law § 450.50.

Cross-References:

Motion to suppress, see § 40-1407.
Release on recognizance, see §§ 40-1203, 40-1204.

Comment:

This is new to Tennessee law and reverses the rule of State v. Bonhart, 223 Tenn. 582, 448 S. W. (2d) 669 (1969), which held that such interlocutory orders are not appealable.

Of course, the defendant has an appeal if the motion is denied by simply objecting to the evidence at trial and then appealing the adverse ruling at trial. On the other hand, where such a motion is granted, in many cases it may well mean that the prosecution will have to be dropped. Drug possession cases are good examples. If the defendant successfully suppresses the drugs, there is no way to convict him. If the case were to go to trial, acquittal would result and the state has no appeal in the case of an acquittal.

Such appeals are allowed in many states and under the federal law. The reason for this change in procedure is evident. In the past, searches were not subjected to the same constitutional scrutiny they presently are and fewer searches were invalidated. Also, in recent years the drug cases have increased dramatically and, as pointed out earlier, the validity of the search is of paramount importance in such cases. All this has made the motion to suppress of extreme importance to our system of criminal jurisprudence. It would seem to be too important to leave the people without an appeal of such matters.

Subsections (a) and (c) are taken from the federal statute and the last paragraph is from the New York law. Together they should protect the defendant from being placed in double jeopardy or being deprived of his speedy trial.

Subsections (b) and (d) deter the state from continuing with the trial in the hope of obtaining a conviction without the evidence which was suppressed in spite of the fact that it had certified that the evidence was a substantial proof of a material fact. Thus there will be no incentive to appeal a granting of a motion to suppress unless it is truly essential to the state's case. Subsection (b) operates logically on the premise that, were no appeal allowed to the state, the defendant would, after successfully moving to suppress the evidence, be released. Under this subsection, however, the release could be conditioned like a pretrial release. See § 40-1204 (conditions on release). Failure to appear as required is a separate criminal offense under the Criminal Code. See T. C. A. § 39-2311, as amended.

40-1409. Notice of alibi defense.—(a) A defendant who intends to offer evidence of an alibi defense shall, not less than ten (10) days before trial or at such later time as the court shall direct, inform the district attorney of his intention and file a notice, which shall state:

(1) the specific place or places at which the defendant claims to have been at the time of the alleged offense; and

(2) the names and addresses of the witnesses upon whom he intends to rely to establish his alibi.

(b) Within five (5) days after receiving notice by the defendant or at such later time as the court shall direct, and subject to the provisions of § 40-1506(b), the district attorney shall inform the defendant of the names and addresses of those upon whom the state intends to rely to establish defendant's presence at the scene of the alleged offense and shall file such notice.

(c) Both the defendant and the state shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to their having given notice pursuant to the requirements of this section.

(d) For good cause shown, the court may grant an exception to any of the foregoing requirements of this section, subject only to the provisions of § 40-1506(b).

(e) Upon the failure of either party to comply with the requirements of this rule, the court shall exclude the testimony of any witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This section shall not limit the right of the defendant to testify in his own behalf.

(f) The notice of alibi submitted by the defendant shall not be commented upon in the presence of the jury.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed F. R. Cr. P. § 12.1.

Cross-References:

Discovery, see ch. 15.

Notice of exceptional sentence, see § 40-1411.

Notice of insanity defense, see § 40-1410.

Protection of government witnesses, see § 40-1506.

Comment:

This section requires the defendant to give notice if he intends to use the defense of alibi at trial. Reciprocally, the prosecution will have to furnish the defendant with certain specifics. This is a radical departure from the common law and current Tennessee procedure. Although this is based on the proposed amendment to the Federal Rules of Criminal Procedure, about 16 states have some sort of alibi notice requirement. The Florida rule is very similar and the time limits of the proposed federal rule and the time limits of this section are taken from the Florida rule.

Several constitutional issues are raised by the requirements of this section. It has been argued that it is a violation of due process to require the defendant to make such a disclosure. This argument was rejected by the United States Supreme Court in Williams v. Florida, 399 U. S. 78 (1970), where the Court said, "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate."

Another constitutional issue raised is whether or not this requirement would violate the privilege against self-incrimination. This argument also was rejected in the *Williams* case. The Court said, "At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information which the petitioner from the beginning planned to divulge at trial." Another factor to consider in answering the self-incrimination question is whether the defendant is really giving "evidence" or the requirement is merely a rule of pleading. Also to be considered is whether the defendant can logically claim that disclosing an honest alibi is "incriminating" when the purpose of the alibi is exculpatory.

The Court in *Williams* did not have the issue of the validity of the sanction before it. The sanction, exclusion of alibi testimony from anyone other than the defendant himself, has not yet been tested.

Likewise, not actually raised in *Williams* but mentioned, is the problem of allowing the prosecutor to comment on the notice of alibi when such notice is given but the defense is abandoned at trial. By thus impugning the veracity and honesty of the defendant, the state in effect requires the defendant to make an election, before trial, as to whether or not he will rely on an alibi defense. Thus, subsection (f) has been added in the preceding section making it clear that the notice is not to be commented upon. This may be a necessary requirement of due process.

Another factor which the Court considered in *Williams* in deciding that the requirement met due process requirements is the amount of reciprocal discovery afforded the defendant under the state procedure. The Court indicated that such discovery is needed in order to preserve the fundamental fairness of due process. Wardius v. Oregon, 93 S. Ct. 2208 (1973).

40-1410. Notice of insanity defense.—(a) If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, inform the district attorney of his intention and file notice.

(b) If a defendant intends to introduce expert testimony bearing upon the issue of whether he was not mentally responsible for the commission of the offense charged as set forth in § 39-601, as amended, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, inform the district attorney of his intention and file notice.

(c) The court, for good cause shown, may allow later filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(d) If a defendant fails to give the notice provided for in this section, as soon as the defense is raised the state shall upon motion be entitled to a continuance of such time as is reasonably necessary to prepare to rebut the defense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. Proposed F. R. Cr. P. § 12.2.

Cross-References:

Commitment upon verdict of not guilty by reason of insanity, see ch. 23, subch. B.

"Insanity" defined, see T. C. A. § 39-601, as amended.

Instructions on insanity defense, see § 40-2104.

Time of making motion, see § 40-1404.

Comment:

The proposed amendment to the federal rule contains no sanction for noncompliance. Subsection (d) allows the state additional time to prepare to meet the defense. The sanction of exclusion of all evidence on the issue of insanity is probably unconstitutional so the automatic continuance is the only realistic sanction available. This should remove most of the incentive to not disclose the defense before trial. Also, in many cases it would be to the defendant's advantage to resolve this issue before going to trial. In those cases this section will provide a means for him to raise the issue before trial.

40-1411. Notice of exceptional sentence.—(a) The requirements of this section apply if a district attorney or defendant seeks imposition of an exceptional sentence authorized by title 39, chapter 8, subchapter D, as amended.

(b) If the district attorney or defendant intends to seek imposition of an exceptional sentence, he shall file with the court a written notice of his intent and serve a copy of the notice on the opposing party. The notice must be filed and the copy served at least ten (10) days before the trial begins.

(c) If the amendment is filed with the court and a copy served on the opposing party in time to provide both the court and the opposing party with fair notice of the nature of the amendment, the notice may

be amended in writing at any time before the sentencing hearing begins.

(d) The notice shall contain detailed legal and factual allegations and copies of any documents necessary to support the imposition of an exceptional sentence.

(e) The party seeking imposition of an exceptional sentence has the burden of producing evidence and proving to the court by a preponderance of the evidence that imposition of the exceptional sentence is appropriate under the standards set out in title 39, chapter 8, subchapter D, as amended.

(f) The existence and content of the notice and any amendment may not be disclosed to the jury prior to the sentencing hearing.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsecs. (a)-(d): Tex. C. C. P. Prop. Rev., art. 42.02 § 6.
Subsec. (e): ABA Sentencing Standards § 55(b)(iv).
Subsec. (f): Tex. C. C. P. Prop. Rev., art. 42.02 § 6.

Cross-References:

Exceptional sentences:
Admission of unadjudicated offenses, see T. C. A. § 39-848, as amended.
Consecutive terms of imprisonment, see T. C. A. § 39-845, as amended.
Gain fine, see T. C. A. § 39-841, as amended.
Habitual offender, see T. C. A. § 39-842, as amended.
Habitual petty thief, see T. C. A. § 39-844, as amended.
Organized criminal offender, see T. C. A. § 39-843, as amended.
Reduction of third-degree felony to misdemeanor, see T. C. A. § 39-847, as amended.
Sentencing hearing, see § 40-2301.

Comment:

Under present law the state notifies the defendant it will seek habitual criminal treatment by alleging prior convictions in the indictment, T. C. A. § 40-2803. A prior statute which did not require an allegation in the indictment or presentment and allowed the absence of formal notice before trial was held to be a denial of due process under the United States Constitution. Rhea v. Edwards, 136 Fed. Supp. 671 (M. D. Tenn.), aff'd, 238 Fed. (2d) 850 (6th Cir. 1956). Additionally, the absence of a statement as to the facts and circumstances of the prior convictions was held to violate due process. In re Boyd, 189 Fed. Supp. 113 (M. D. Tenn. 1959), aff'd, 281 Fed. (2d) 195 (6th Cir. 1960). The United States Supreme Court subsequently held that reasonable notice of the allegations of habitual criminality and an opportunity to be heard were required by due process. However, such notice was not required prior to the fact-finding portion of the trial but only prior to the sentencing proceeding. Oyler v. Boles, 368 U. S. 448 (1962). Subsection (b) requires that notice be given prior to trial, clearly meeting the requirements of due process. Subsection (c) provides for amendment of this notice and ensures that fair notice will be observed.

Under the present law, the state must also notify the defendant of those portions of his prior criminal record it intends to offer at the punishment hearing, T. C. A. § 40-2803. Specific notice as to the prior felonies, including a statement as to the nature of each felony and the time and place of prior convictions is a constitutional requirement. In re Boyd, 189 Fed. Supp. 113 (M. D. Tenn. 1959), aff'd, 281 Fed. (2d) 195 (6th Cir. 1960). Subsection (d) requires the party seeking the benefit of the exceptional sentence to serve this specific notice. This alters present law which requires the state to give such notice upon demand, T. C. A. § 40-2803.

The burden of persuasion on the charge of habitual criminality has not been the subject of litigation. Both the United States Supreme Court and the Tennessee Supreme Court have recognized that exceptional sentences are not separate offenses. Graham v. West Virginia, 224 U. S. 616 (1912); McCummings v. State, 175 Tenn. 309, 134 S. W. (2d) 151 (1939). Thus, the requirement of proof beyond a reasonable doubt is not a constitutional mandate. Subsection (e) establishes a preponderance of the evidence standard which is imposed on the party seeking the benefit of an exceptional sentence. Subsection (f) is a codification of present Tennessee law. Harrison v. State, 217 Tenn. 31, 394 S. W. (2d) 713 (1965).

CHAPTER 15

DISCOVERY

Subchapter A. Discovery by the Defendant

40-1501. Statement of defendant.—Upon motion of the defendant, the court shall order the district attorney:

(1) to permit the defendant to inspect and copy any written or recorded statements made by the defendant, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney; and

(2) to disclose the substance of any oral statement made by the defendant before or after arrest to any law enforcement agent which the state intends to offer in evidence at the trial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 16.

Cross-References:

Arrest, see chs. 6, 7.
Continuing duty to disclose, see § 40-1541.
Notice of alibi defense, see § 40-1409.
Relief for noncompliance, see § 40-1543.
Statement of codefendant, see § 40-1502.

Comment:

This section is similar to the present Tennessee statute which requires the state to furnish the defendant with a copy of any written confession and a list of witnesses present at either an oral or written confession. It is substantially the same as present federal rule 16(a) with the addition of the last clause dealing with oral statements to a known government agent. The present federal rule states that the court "may" order this discovery, while this section says that the court "shall" do so.

An advantage of criminal discovery is that it facilitates the pretrial disposition of objections to admissibility. This applies to both any written statement and any oral statement which the state intends to introduce. Just as defense counsel may not like having to disclose an alibi defense before trial, the prosecutor may not like disclosing an oral statement he will introduce at trial. However, as pointed out in the comment to § 40-1409 (notice of alibi defense), these requirements merely accelerate the disclosure of what would be disclosed at trial.

40-1502. Statement of codefendant.—Upon motion of the defendant, the court shall order the district attorney:

(1) to permit the defendant to inspect and copy any written or recorded statements made by a codefendant which the state intends to offer in evidence at the trial; and

(2) to disclose the substance of any oral statement made by a codefendant before or after arrest to any law enforcement agent which the state intends to offer in evidence at the trial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Continuing duty to disclose, see § 40-1541.
Joinder of defendants, see § 40-1604.
Relief for noncompliance, see § 40-1543.
Severance of trials, see § 40-1606.
Statement of defendant, see § 40-1501.

Comment:
This section is new to both federal and Tennessee procedure. This section will be particularly helpful in resolving the severance issue before trial. Since the purpose of this section is to avoid any prejudice at trial by the introduction of such statements to the jury, only such statements as the state intends to introduce need be disclosed.

40-1503. Prior criminal record.—Upon motion of the defendant, the court shall order the district attorney to furnish to the defendant, before trial, such copy of his prior criminal record, if any, as is then available to the state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Continuing duty to disclose, see § 40-1541.
Notice of exceptional sentence, see § 40-1411.
Relief for noncompliance, see § 40-1543.

Comment:
This provision also is new to both federal and Tennessee procedure. It seems relatively uncontroversial and is designed to meet the situation where the defendant is not quite sure of what his record is. It should facilitate the early resolution of any disputes over the correctness of the record before it is used in any way.

40-1504. Documents and tangible objects.—Upon motion of the defendant, the court shall order the district attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or portions thereof, which are within the possession, custody or control of the state and:

(1) which are material to the preparation of his defense; or

(2) which are intended for use by the state as evidence at the trial; or

(3) which were obtained from or belong to the defendant.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.
T. C. A. § 40-2044.

Cross-References:
Continuing duty to disclose, see § 40-1541.

Relief for noncompliance, see § 40-1543.
State's discovery of documents and tangible objects, see § 40-1521.

Comment:
This section is similar to both present Tennessee law and federal rule 16(b). It again changes the federal rule to say the court "shall" order such discovery instead of "may." It adds photographs to the list of objects which may be discovered. It also adds subdivisions (2) and (3). Thus, as amended, the federal rule would require disclosure of discoverable evidence (1) where it is material to the preparation of the defense, (2) where the state intends to introduce it at trial, or (3) where the evidence was taken from the defendant.

Brady v. Maryland, 373 U. S. 83 (1963), requires the government to disclose any information it has which is favorable to the defendant. Requiring the disclosure of evidence in the state's possession which is material to the preparation of a defense seems to be an extension of this requirement of due process.

Since the defendant may not know exactly what evidence the prosecution has, it would be difficult to know whether it was material to his defense. The state is, therefore, also required to disclose evidence which it intends to introduce.

Things taken from the defendant would probably come within the "material to the preparation of his defense" provision but are also expressly discoverable.

40-1505. Reports of examinations.—Upon motion of a defendant, the court shall order the district attorney to permit the defendant to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Continuing duty to disclose, see § 40-1541.
Information not discoverable, see § 40-1507.
Notice of insanity defense, see § 40-1410.
Presentence report, see § 40-2301.
Relief for noncompliance, see § 40-1543.
State's discovery of examinations, see § 40-1522.

Comment:
The only change in the federal rule recommended here is the change from "may" to "shall." This type of evidence is particularly hard to rebut or challenge without some prior notice since it usually involves expert testimony.

40-1506. Government witnesses.—(a) Upon motion of the defendant, the court shall order the district attorney to furnish to the defendant a written list of the names and addresses of all government witnesses which the district attorney intends to call at the trial together with any criminal record of any such witness which is within the actual knowledge of the district attorney.

(b) Names and addresses of state witnesses shall not be subject to disclosure if the district attorney certifies that to do so may subject the witness or others to physical or substantial economic harm or coercion. If the district attorney so certifies, the court, upon motion of the defendant, shall order the testimony of the witness perpetuated in a hearing before the court or a magistrate, in which hearing the defendant shall have the right of cross-examination. The defendant

must be given a reasonable opportunity after the completion of the direct examination in order to prepare his cross-examination and shall be given a copy of the transcript of the perpetuation hearing before trial.

(c) A record of the testimony of the witness shall be admissible at trial as part of the state's case in chief in the event the witness has become unavailable without the fault of the state or if the witness has changed his testimony.

(d) The fact that the name of a witness is on a list furnished under this section and that the witness is not called shall not be commented upon at trial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Continuing duty to disclose, see § 40-1541.
Notice of alibi defense, see § 40-1409.
Protective orders, see § 40-1542.
Relief for noncompliance, see § 40-1543.
State's discovery of defense witnesses, see § 40-1523.

Comment:
This section is new to federal procedure and is also new to Tennessee procedure. This puts the defendant in as good a situation as the state to test the credibility of witnesses and can only aid in the search for truth at trial.

The certification by the state allows the state to keep the name of a witness secret until the perpetuation hearing, at which time the defendant's lawyer must be given time to prepare his cross-examination. Since the time needed will vary greatly, no definite time limit is set out and the standard is "reasonableness."

However, a major change from the proposed federal rule is the allowance of a motion by the defendant to perpetuate the testimony of the witness. The defendant who needs to know who the witness is in order to prepare other aspects of his defense or to determine whether a plea bargain is advisable, may find out the name of the witness before trial. The protection of the witness is provided by subsection (c), allowing the use of the record of the perpetuation hearing as substantive proof. Thus, instead of allowing the use of the record only as to the credibility of the witness, it will be substantive proof of the facts stated therein and any incentive to coerce the witness to change his testimony will be substantially reduced. If the testimony were admissible only as to credibility, the jury would be instructed as to that fact and that they were not to consider it as proof. Under this procedure the recorded testimony and any coerced testimony on the stand will stand equally as proof.

It should be noted that the transcript here would not be a deposition, but would be a record of testimony taken before a magistrate with full right of cross-examination and time to prepare cross-examination. This is designed to meet the substantial constitutional issue raised by the confrontation clause. The constitutionality of such a rule appears to have already been decided in regard to a much broader rule of evidence in California v. Green, 399 U. S. 149 (1970).

The use of a deposition to perpetuate testimony of an unavailable witness has already been approved in many states and in this code. See § 40-1706 (use of deposition and objections).

It must be remembered that this section is not as broad as the California evidence rule. This section will not make all prior inconsistent statements admissible as proof. Such statements can be so used only in a very narrowly defined situation. First, the state must certify that disclosure "may subject the witness or others to physical or substantial economic harm or coercion." Second, the defendant must move to perpetuate the testimony in a hearing before the court with a full right of cross-examination and time to prepare for the cross-examination. Then, if the witness takes the stand and changes his testimony at trial or if he is unavailable through no fault of the state, the prosecution can use the prior statement as proof.

If the testimony is changed and the prior testimony used, the defendant will have had a right of cross-examination and time to prepare for it. The witness will be in court to explain his change and

the jury can consider both stories. The context in which the section operates should be kept in mind. The cases in which the identity of a witness needs to be kept secret to provide for his safety should be rare. The potential for abuse by the state should be recognized; however, the state would be deterred from using this provision unnecessarily by the fact that they will be furnishing defense counsel with a copy of the recorded testimony which he can use to test the credibility of the witness at trial.

40-1507. Information not discoverable.—Except as provided in this chapter, the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney or by law enforcement agents in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses to agents of the state is not authorized.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.
T. C. A. § 40-2044.

Cross-References:
Information not discoverable by state, see § 40-1524.

Comment:
This section is relatively unchanged from the present federal rule and is designed to protect the work product.

Subchapter B. Discovery by the State

40-1521. Documents and tangible objects. — Upon motion of the state, the court shall order the defendant to permit the state to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Continuing duty to disclose, see § 40-1541.
Defendant's discovery of documents and tangible objects, see § 40-1504.
Relief for noncompliance, see § 40-1543.

Comment:
This section is a modification of present federal rule 16(c). It changes the rule by making the discovery unconditioned by a prior request by the defendant for discovery. It also eliminates the need for the state to prove that the objects sought are material.

40-1522. Reports of examinations.—Upon motion of the state, the court shall order the defendant to permit the state to inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, within the possession or control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial if the results or reports relate to his testimony.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Continuing duty to disclose, see § 40-1541.
Defendant's discovery of reports of examinations, see § 40-1505.
Information not discoverable, see § 40-1524.
Notice of insanity defense, see § 40-1410.
Relief for noncompliance, see § 40-1543.

Comment:
This section provides for discovery by the state similar to that allowed to the defendant in § 40-1505. The same reasoning applies. The state should have an opportunity to examine and challenge expert reports of the defendant which will be introduced into evidence.

40-1523. Defense witnesses.—(a) Upon motion of the state, the court shall order the defendant to furnish the state a written list of the names and addresses of the witnesses he intends to call at the trial.

(b) The fact that the name of a witness is on a list furnished under this section and that the witness is not called shall not be commented upon at trial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Continuing duty to disclose, see § 40-1541.
Discovery of government witnesses, see § 40-1506.
Notice of alibi defense, see § 40-1409.
Protective orders, see § 40-1542.
Relief for noncompliance, see § 40-1543.

Comment:
Section 40-1523 is new to both federal and Tennessee procedure. This disclosure has been upheld as not being a violation of the privilege against self-incrimination. See People v. Lopez, 32 Cal. Rptr. 424, 384 P. (2d) 16 (1963); Jones v. Superior Court of Nevada County, 58 Cal. (2d) 56, 22 Cal. Rptr. 879, 372 P. (2d) 919 (1962). Again, this is merely an acceleration of disclosure which would be made at trial in any event.

40-1524. Information not discoverable.—Except as to scientific or medical reports, this chapter does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by state or defense witnesses, or by prospective state or defense witnesses, to the defendant, his attorneys or agents.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Information not discoverable by defense, see § 40-1507.

Comment:
This section parallels § 40-1507 protecting the work product of the state. This is taken directly from the last sentence of present federal rule 16(c).

Subchapter C. General Provisions

40-1541. Continuing duty to disclose.—Subsequent to compliance with an order issued pursuant to this chapter and prior to or during trial, a party who discovers additional evidence or the identity of additional witnesses or decides to use additional evidence or witnesses, which information has been subject to discovery under this chapter, shall promptly notify the court of the existence of the additional evidence or the names of the additional witnesses to allow the court to modify its previous order for additional discovery or inspection.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Discovery by defendant, see subch. A.
Discovery by state, see subch. B.

Comment:
This is the present federal procedure modified to include items made discoverable by the proposed amendments and is new to Tennessee procedure.

40-1542. Protective orders.—(a) Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit a party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone.

(b) If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(c) An order of the court granting discovery under this chapter shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Comments:
This is the current federal rule with only editorial changes. It is new to Tennessee procedure. This section is designed to protect the parties against abuse of the wide discovery power granted by this chapter. The Federal Rules Advisory Committee comments on this section state that "[a]mong the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, the protection of information vital to the national security, and the protection of business enterprises from economic reprisals."

40-1543. Relief for noncompliance.—If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this chapter or with an order issued pursuant to this chapter, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such order as it deems just under the circumstances.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 16.

Cross-References:
Failure to give alibi notice, see § 40-1409.

Failure to give insanity defense notice, see § 40-1410.

Comment:

This is the current federal rule and gives the court wide discretion in fashioning relief or a sanction for noncompliance with this chapter.

CHAPTER 16

JOINDER, SEVERANCE, AND CONSOLIDATION

40-1601. Chapter definition.—In this chapter, unless the context requires a different definition, "criminal episode" means all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective or scheme, even though the harm is directed toward or inflicted upon more than one person.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 3.01.
N. Y. Prop. Crim. Proc. Law § 20.10.

Cross-References:

Attempt, see T. C. A. § 39-901, as amended.
"Conduct" defined, see T. C. A. § 39-107, as amended.
Conspiracy, see T. C. A. § 39-902, as amended.
Solicitation, see T. C. A. § 39-903, as amended.

Comment:

The definition of "criminal episode" must be read in context with the compulsory joinder of prosecutions requirement, § 40-1603. The purpose of the definition is to identify the conduct of a person for which, ordinarily, he may be prosecuted and punished but once, even though he has committed several separately defined offenses. Thus, the person will be tried and punished only once for his single criminal effort. The state, however, will be able to charge and try the person for all offenses which he may have committed in the criminal episode in the one criminal action.

The concept of a "criminal episode" does not affect the determination of whether more than one offense was committed in a particular situation. Tennessee adheres to the common-law view that for a single criminal act there can be only one criminal responsibility. See Huffman v. State, 292 S. W. (2d) 738 (Tenn. 1956); Smith v. State, 159 Tenn. 674, 21 S. W. (2d) 400 (1929). Additionally, statutory interpretations as to the number of offenses committed in a specific situation are not affected. See Morgan v. State, 220 Tenn. 247, 415 S. W. (2d) 879 (1967); Usary v. State, 172 Tenn. 305, 112 S. W. (2d) 7 (1938).

The concept of "criminal episode" specifically includes preparatory offenses such as criminal solicitation and criminal conspiracy and extends beyond the present concept of acts arising out of one offense.

40-1602. Joinder of offenses.—Two (2) or more offenses may be charged in the same indictment, presentment, information or complaint in a separate count for each offense of the offenses charged, whether felonies or misdemeanors or both, if the offenses arise out of the same criminal episode.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Ill. Code of Crim. Proc. § 111-4(a).
Fed. R. Cr. P. § 8(a).
Ky. Rule 6.18.

Cross-References:

"Complaint" defined, see § 40-105.
Compulsory joinder of offense, see § 40-1603.
"Criminal episode" defined, see § 40-1601.
"Indictment" defined, see § 40-105.
"Information" defined, see § 40-105.
Initiation of prosecution, see ch. 10.
Felonies and misdemeanors distinguished, see T. C. A. § 39-802, as amended.
Multiple sentences prohibited, see T. C. A. § 39-301, as amended.
"Presentment" defined, see § 40-105.

Comment:

Current case law allows joinder of offenses where they are charged in different counts and are of the same character. See Cash v. State, 29 Tenn. 111 (1849), where the defendant was charged with the theft of two horses from two individuals and the theft of a slave from a third individual. The court, although disapproving of the practice, upheld the indictment even though the offenses were committed at different times. The "same or similar character" joinder is omitted from this section as a matter of policy and joinder is allowed only if the offenses arise out of the same criminal episode, as that term is defined in § 40-1601.

40-1603. Compulsory joinder of prosecutions for offenses arising out of same criminal episode.—(a) A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

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

(1) the court severs one or more of the offenses pursuant to § 40-1605; or

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

(3) the offenses are not within the jurisdiction of a single court.

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

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. P. C. Prop. Rev. § 3.02.
Fed. R. Cr. P. § 14.
N. Y. Prop. Crim. Proc. Law § 20.20.
Ill. Stat. Ann. ch. 38 § 3-3.

Cross-References:

Admission of unadjudicated offenses, see T. C. A. § 39-848, as amended.
Aggregation of amounts in multiple thefts, see T. C. A. § 39-1908, as amended.
"Criminal episode" defined, see § 40-1601.
Jurisdiction of courts, see ch. 2.
Multiple and defective counts, see § 40-2202.
Multiple prosecutions prohibited, see T. C. A. § 39-302, as amended.
Severance of offenses, see § 40-1605.

Comment:

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

Section 40-1603 significantly changes Tennessee law. The problem now is one not of compulsory joinder but of permissive joinder. See, e.g., Hardin v. State, 210 Tenn. 116, 355 S. W. (2d) 105, rehearing denied, 210 Tenn. 116, 356 S. W. (2d) 595 (1962); Usary v. State, 172 Tenn. 305, 112 S. W. (2d) 7 (1938). Section 40-1603 together with the expanded concept of "criminal episode," permits the state to prosecute a defendant for all related offenses in a single trial, and at the same time protects the defendant from the harassment of separate prosecutions.

The "criminal episode" concept and this section change the present rules that allow separate prosecutions for conspiracy and the completed offense; and for a lesser included offense following conviction of the greater offense. See e.g., Wheelock v. State, 154 Tenn. 66, 289 S. W. 515 (1926) (acquittal of larceny not a bar to prosecution for accessory before the fact of the same larceny).

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

Subsection (b)(1) which derives from federal rule of criminal procedure 14, permits offense severance just as § 40-1606 permits defendant severance. Hopefully, however, the courts will construe §§ 40-1603 and 40-1605 more liberally in the defendant's favor than the federal courts have construed rule 14.

Subsection (b)(2) restates present law in recognizing the necessity for an exception to the compulsory joinder rule when the state is unaware of or cannot prove one or more offenses arising from the same criminal episode. See, e.g., Muzzall v. State, 200 Tenn. 97, 290 S. W. (2d) 647 (1956) (defendant convicted of possession of alcohol and subsequently tried and convicted of possession of alcohol which was not discovered at the time of the initial raid); McNulty v. State, 110 Tenn. 482, 75 S. W. 1015 (1903) (defendant originally prosecuted for assault with a deadly weapon with intent to murder liable to be later prosecuted for murder if the victim subsequently dies as a result of the assault). The term "state" is purposefully broad and covers, for example, a peace officer, probation or parole counselor, magistrate, and investigator employed by a prosecutor as well as the prosecutor himself.

Subsection (b)(3) prevents a defendant from escaping prosecution for a more serious offense by securing prosecution at an early date for a less serious one. However, subdivision (3) does not except from compulsory joinder offenses arising out of the same criminal episode committed in different counties: if a former prosecution for one or more of these offenses originated in a circuit or criminal court, subsequent prosecution for nonjoined offenses committed in different counties is barred.

Subsection (c) reinforces the compulsory joinder requirement by prohibiting the addition at a retrial of offenses arising out of the same criminal episode not joined in the original trial. The prohibition is also included to prevent discouragement of appeals.

40-1604. Joinder of defendants.—(a) Two (2) or more defendants may be charged in the same indictment, presentment, information, or complaint if they are alleged to have participated in the same act or transaction or in the same criminal episode constituting an offense or offenses.

(b) Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Fed. R. Cr. P. § 8(b).
Ky. Rule 6.20.
Ill. Code Crim. Proc. § 111-4(b).
Uniform Rule 20(b).

Cross-References:

"Complaint" defined, see § 40-105.
"Criminal episode" defined, see § 40-1601.
"Indictment" defined, see § 40-105.
"Information" defined, see § 40-105.
Initiation of prosecution, see ch. 10.
Multiple and defective counts, see § 40-2202.
Severance of defendants, see § 40-1606.

Comment:

As in the case of joinder of offenses there is no current statutory law on joinder of defendants in Tennessee and the case law is unclear. This section allows defendants to be joined where they have participated in the same acts or transactions, or in the same criminal episode. This type of joinder is based on the same savings of time, effort and money as the joinder of offenses discussed above. Where the defendant is prejudiced by joinder, his remedy would be a motion for severance under § 40-1606. Of course, where such a motion is denied in the face of severe prejudice to the defendant, the denial may be challenged as a denial of due process.

40-1605. Relief from prejudicial joinder of offenses.—(a) The court on written motion of the district attorney or defendant may sever one or more offenses if:

(1) the motion is filed before the trial begins and the court finds and states for the record that severance is appropriate to promote a fair determination of defendant's guilt or innocence of each offense; or

(2) the motion is filed during trial with the defendant's consent and the court finds and states for the record that severance is necessary to achieve a fair determination of defendant's guilt or innocence of each offense.

(b) In determining whether to sever offenses under subsection (a), the court shall consider whether, in view of the number of offenses joined and the complexity of the evidence offered or anticipated, the trier of facts will be able to distinguish the evidence and apply the law correctly to each offense.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. C. C. P. Prop. Rev., Art. 36.09(2).
Fed. R. Cr. P. § 14.

Cross-References:

Joinder of offenses, see §§ 40-1602—40-1603.
Severance of defendants, see § 40-1606.

Comment:

This section is intended to more carefully delineate the factors to be considered by the trial judge in granting severance of offenses. The primary emphasis of this section is on preventing prejudice to the defendant in the event the jury will be unable to distinguish the evidence and law as to the separate offenses. Subsection 40-1603(b)(1) (compulsory joinder for offenses arising out of the same criminal episode) exempts a severance granted pursuant to this section from the compulsory joinder requirements. Furthermore, severance of offenses under this section removes the bar to multiple sentences for convictions of offenses arising out of the same criminal episode. See T. C. A. § 39-301(1), as amended.

40-1606. Relief from prejudicial joinder of defendants.—(a) Two (2) or more defendants who are jointly or separately charged for the same offense or any offense growing out of the same transaction or out of the same criminal episode may be, in the discretion of the court, tried jointly or separately as to one or more defendants. In any event either defendant may testify for the other or on behalf of the state.

(b) If, upon timely motion to sever, and evidence introduced thereon, it appears to the court that a joint trial would be prejudicial to any defendant, the court shall order a severance to the defendant whose joint trial would prejudice the other defendant or defendants.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tex. C. C. P. Prop. Rev., Art. 36.09(1).
Fed. R. Cr. P. § 14.

Cross-References:
"Criminal episode" defined, see § 40-1601.
Joinder of defendants, see § 40-1604.
Severance of offense, see § 40-1605.

Comment:
Section 40-1606 places relief from prejudicial joinder or consolidation of defendants within the discretion of the court. This is consistent with present law. The prejudice which the defendant must show in order to get severance may be such misjoinder as to allow the jury to infer criminal disposition or propensity or to allow the jury to cumulate the evidence of all crimes charged.

Subsection (b) is designed to prevent prejudice to a defendant by the admission in evidence against a codefendant of a statement or confession made by that codefendant. The prejudice cannot be dispelled by cross-examination if the codefendant does not take the stand. This section provides a procedure whereby the issue of possible prejudice can be resolved on the motion for a severance. The judge may direct the disclosure of the confessions or statements of the defendants to him for in camera inspection as an aid to determining whether the possible prejudice justifies ordering separate trial. Under present procedure severance is within the sound discretion of the court and may be based on the grounds discussed above. See Davis v. State, 445 S. W. (2d) 933 (Tenn. Crim. App. 1969).

40-1607. Consolidation.—(a) The court may order two (2) or more charges to be tried together if the offenses and the defendants could have been joined in a single charge.

(b) The procedure shall be the same as if the prosecution were under a single charge.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ill. Code of Crim. Proc. § 114-7.

Cross-References:
"Charge" defined, see § 40-105.
Joinder of defendants, see § 40-1604.
Joinder of offenses, see §§ 40-1602, 40-1603.

Comment:
This section is taken directly from the Illinois rule and gives the court the power to consolidate separate charges for trial. Of course, this section may create a problem where the defendant decides to waive indictment and jury trial in order to get a trial before the magistrate on a misdemeanor while a felony indictment is pending in criminal court. The criminal court judge could order consolidation and force the defendant to be tried in criminal court. This may be disagreeable tactically to defense counsel, but it is theoretically permissible since § 40-202 merely gives general sessions courts jurisdiction where such rights are waived and does not remove such jurisdiction from the criminal courts.

CHAPTER 17

DEPOSITIONS

40-1701. Authority to take depositions.—(a) The court at any time after the return of a charge may, upon motion and notice to the parties, order that the testimony of any prospective witness be taken by deposition and that any designated books, papers, documents, photographs, or tangible objects, not privileged, be produced at the same time and place, if the testimony of the witness is necessary to prevent a failure of justice, and it reasonably appears that:

(1) the witness may be unable to attend or may be prevented from attending a trial or hearing; or

(2) the witness is or may become a nonresident of this state.

(b) If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken at the expense of the state. After the deposition has been subscribed the court may discharge the witness.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 7.10.

Cross-References:
Bail for material witness, see § 40-1209.
"Charge" defined, see § 40-105.
Manner of taking deposition, see § 40-1705.
Notice of deposition, see § 40-1703.
Privilege, see § 40-2104.
Return of charge, see § 40-1113.
Subpoena for deposition, see § 40-1805.

Comment:
This is taken directly from the Kentucky rule with only editorial changes. It differs from the federal rule in two aspects. One is that nonresidence is made a ground for the taking of a deposition and the other is that this section omits the words "of a defendant" in the federal rule and thus allows the state to take depositions. Many states now allow this and the proposed amendment to the federal rules would allow it.

Although the United States Supreme Court has not directly met the issue, the constitutionality of allowing the state to take and use depositions under these circumstances has been upheld. See West v. Louisiana, 194 U. S. 258 (1904); Noe v. Commonwealth, 396 S. W. (2d) 808 (Ky. 1965); State ex rel. Drew v. Shaughnessy, 212 Wis. 322, 249 N. W. 522 (1933).

Current Tennessee law allows the defendant to take a deposition, but the state has no such authority at present. The state cannot now take and use the deposition of their key witness if that witness is dying or is a nonresident. A common situation appears to be where a nonresident passing through the state is the victim of a crime and does not or cannot return later for the trial. This section would allow the state to preserve his testimony as long as the defendant's right to confrontation is preserved pursuant to § 40-1702.

40-1702. Confrontation of state's witnesses.—(a) The order authorizing the state to take a deposition shall contain such specifications as will fully protect the rights of personal confrontation and cross-examination of the witness by the defendant.

(b) The defendant shall be given a reasonable opportunity after the completion of the direct examination to prepare his cross-examination and shall be given a copy of the transcript of the deposition before trial.

(c) If a deposition is taken at the instance of the state, the state shall pay in advance the reasonable expenses of travel and subsistence of the defendant and his attorney in attending such examination.

(d) If a defendant is in custody, he shall be produced at the examination and kept in the presence of the witness during the examination.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 7.12.

Cross-References:
Counsel for defendant, see § 40-1704.
Discovery, see ch. 15.
Manner of taking deposition, see § 40-1705.

Comment:
This section is intended to ensure that the defendant's right to confrontation under the sixth amendment is protected. He must be allowed the right to cross-examine and object to testimony and have the aid of counsel. The provisions here parallel those of § 40-1506 (perpetuation of testimony of government witness).

The provision regarding expenses will ensure that the defendant is not hindered in the exercise of his right to confrontation by the lack of ready capital.

40-1703. Notice of taking deposition. — (a) The party at whose instance a deposition is to be taken shall give to every other party reasonable notice in writing of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined.

(b) On motion of a party upon whom the notice is served, the court for good cause shown may change the time or place of taking.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 7.14.

Cross-References:
Authority to take depositions, see § 40-1701.
Subpoena for deposition, see § 40-1805.

Comment:
Since these depositions can be taken only upon motion and with a court order, no specific time limit is set and the court is allowed to determine what is reasonable under the circumstances. An abuse of this discretion, not allowing defense counsel adequate time to prepare for a deposition to be taken by the state, could result in a deprivation of the right to confrontation and a violation of the due process clause.

40-1704. Counsel for defendant.—Upon the application for taking depositions, if a defendant is without counsel the court shall advise him of his right thereto and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 7.16.

Cross-References:
Appointment of counsel, see § 40-3204.
Notice of deposition, see § 40-1703.
Right to counsel, see § 40-3202.
Waiver of right to counsel, see § 40-3203.

Comment:
This provision is necessary in order to give the defendant the effective right to confrontation and cross-examination. In addition the taking of depositions would certainly be a "critical stage" of the proceedings, thus requiring the appointment of counsel in order to afford the defendant the effective assistance of counsel.

40-1705. Manner of taking depositions.—(a) A deposition shall be taken in the manner provided in the Tennessee rules of civil procedure.

(b) The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in the Tennessee rules of civil procedure.

(c) Whenever it is practicable to do so, the court shall direct the deposition to be taken in the county where the criminal case is pending and the attendance of witnesses may be compelled by the use of subpoena.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 7.18.

Cross-References:
Civil depositions, see T. C. A. tit. 24, ch. 9.
Subpoena, see § 40-1805.

Comment:
The method used in civil actions is adopted in order to avoid any unnecessary complications with a different procedure. The requirements of the previous sections will have to be followed in addition, to preserve the defendant's constitutional rights. Note that only the defendant can use written interrogatories since, if they were used by the state, his right to confrontation could not be protected. Present law allows the defendant to take depositions in the same manner as in civil actions.

40-1706. Use of depositions and objections.—(a) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears:

(1) that the witness is dead; or

(2) that the witness is out of the state of Tennessee, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(3) that the witness is unable to attend or testify because of sickness or infirmity; or

(4) that the party offering the deposition had been unable to procure the attendance of the witness by subpoena.

(b) Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(c) If only a part of a deposition is offered in evidence by a party, any other party may require him to introduce at that time all of it which is relevant to the part introduced or may later introduce any other parts so relevant.

(d) Objections to receiving in evidence a deposition or part thereof may be made as provided in the Tennessee rules of civil procedure.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 7.20.

Cross-References:
Civil depositions, see T. C. A. tit. 24, ch. 9.
Evidence and witnesses, see ch. 20.
Subpoena, see § 40-1805.

Comment:
This reveals the policy behind the allowance of depositions. They are to be used only where necessary. If the deponent is available his deposition cannot be used as proof. Thus, it must first be shown that the witness may be unavailable before the court can order the deposition to be taken. But at trial, in order to use the deposition as evidence, it must be shown that the witness is in fact unavailable. If the witness leaves the state after his deposition is taken but returns for trial his deposition can be used only for impeachment.

CHAPTER 18

SUBPOENAS

40-1801. Authority to issue subpoena.—The clerk of the court in which a criminal cause is pending shall issue subpoenas, at any time, to any county within the state for such witnesses as either the district attorney or the defendant may require.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2408.

Cross-References:
Penalty for failure to appear, see T. C. A. § 39-2311, as amended.
Relief on failure to appear, see § 40-1806.
Service of subopena, see § 40-1804.

Comment:
This is the present Tennessee statute. It authorizes the clerk to issue subpoenas to any part of the state as requested by either party.

40-1802. Form of subpoena.—(a) Every subpoena shall be issued by the clerk or other authorized officer, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at the time and place and for the party therein specified.

(b) The clerk or other authorized officer shall issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Rules of Civil Proc. § 45.01.
Fed. R. Cr. P. § 17(a).

Cross-References:
Subpoena duces tecum, see § 40-1803.

Comment:
This is the same as civil rule § 45.01 and, as pointed out in the committee comments to that rule, does not change present procedure drastically. It differs from F. R. Cr. P. § 17(a) in that this section omits the provision of the federal rule allowing a magistrate to issue a subpoena.

40-1803. Subpoena duces tecum.—(a) A subpoena may command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein.

(b) The court may direct that books, papers, documents, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, or objects or portions thereof to be inspected by the parties and their attorneys.

(c) The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 17(c).

Cross-References:
Authority to issue subpoena, see § 40-1801.
Discovery, see ch. 15.
Motion, see § 40-1401.

Comment:
This provision is basically the same as civil rule § 45.02, with the addition of subsection (b). Tennessee law authorizes such a subpoena now. This section is not designed as a discovery technique since ch. 15 provides for discovery. This section is to be used to inspect evidence held by witnesses and to require its production at trial.

40-1804. Service of subpoena.—Subpoenas shall be served by the same officers and in the same manner as in civil actions.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2415.

Comment:
Present law provides that the subpoena shall be served by the same officers as in civil actions. Tennessee rule of civil procedure § 45.03 permits a subpoena to be served by anyone authorized to serve process. That same rule provides the manner of service: delivering a copy to the person to whom it is directed. T. C. A. § 40-2416 provides that in criminal cases service may also be by leaving a copy at the person's residence. There seems to be no good reason to recognize such a distinction between service in criminal and civil cases so this section brings the criminal procedure in line with the civil.

40-1805. Subpoena for deposition.—(a) An order to take a deposition authorizes the issuance by the clerk of the court in which the criminal proceeding is pending of subpoenas for the persons named or described therein.

(b) A resident of this state may be required to give his deposition only in the county wherein he resides or is employed or transacts his business in person or at such other convenient place as is fixed by an order of the court.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 17(f)(1).
Tenn. Rules of Civil Proc. § 45.04(2).

Cross-References:
Authority to issue subpoena, see § 40-1801.
Authority to take deposition, see § 40-1701.
Manner of taking deposition, see § 40-1705.

Comment:
Subsection (a) is derived from the federal rule while subsection (b) is the Tennessee civil rule. This is no change in present law since T. C. A. § 40-2428 now authorizes depositions by the accused in the same manner as in civil cases.

40-1806. Failure to appear.—Upon application of a party aggrieved by the failure to appear of a material witness under subpoena, the court may in its discretion grant a continuance or a mistrial as justice requires.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

New.

Cross-References:

Bail for material witness, see § 40-1209.

Penalty for failure to appear, see T. C. A. § 39-2311, as amended.

Tampering with witness, see T. C. A. § 39-2105, as amended.

Comment:

Section 40-1806 provides that the court may grant a mistrial or continuance if a subpoenaed witness fails to appear. This provision, in conjunction with § 40-1209 allowing bail to be taken for material witnesses, should assure that the caprice of one person does not thwart the process of criminal justice.

CHAPTER 19

TRIAL

Subchapter A. General Provisions

Subchapter B. The Jury

Subchapter C. The Judge

Subchapter A. General Provisions

40-1901. Trial by jury or by judge alone.—(a) In all criminal cases the defendant has the right to a jury trial.

(b) In all criminal cases the defendant may waive the right to jury trial with the consent of the district attorney at any time before the jury is sworn.

(c) Except as provided in § 40-2302, the judge alone shall set the punishment in all cases unless the trial is by jury and, before the jury is sworn, it is requested by the defendant that the jury set the punishment.

(d) If the jury returns a verdict of guilty, the defendant may withdraw his request that the jury set punishment and submit the issue of punishment to the trial judge alone.

(e) Nothing in this section shall be construed to give the judge the power to impose a fine in excess of fifty dollars ($50.00).

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 40-2310, 40-2504, 40-2525, 40-2704.

Cross-References:

General principles of sentencing, see T. C. A. § 39-806, as amended.

Plea negotiation and agreement, see ch. 13.

Punishment set by jury on plea of guilty, see § 40-2302.

Sentencing combination, see T. C. A. § 39-805, as amended.

Sentencing hearing, see § 40-2301.

Comment:

This section seems complicated but actually contains only three main provisions. The first is that there will be a jury trial, on the question of guilt or innocence, unless it is waived by both defendant and district attorney. The second is that the judge shall set the punishment unless it is properly requested by the defendant that the jury set the punishment. The third provision is closely related to the second and is that no jury shall be impaneled merely to set punishment. In other words, the jury does not set punishment unless a jury decided the issue of guilt or innocence. The sole exception to this generalization is the pro forma procedure set up in § 40-2302 to avoid constitutional problems with a plea agreement imposing a fine in excess of $50.00.

The various circumstances and conditions under which one may obtain or waive the right to a trial by jury or the right to have punishment set by the jury are currently found among the T. C. A. sections listed as derivations. The various factors involved are: whether the charge is a felony or misdemeanor, whether the trial is to be in general sessions or criminal court, whether the plea is guilty or not guilty and whether the trial itself is by the jury. The setting of punishment by the judge or jury is treated separately from the finding of guilt or innocence by the judge or jury. See § 40-1902 (bifurcated trial for felonies).

The requirement of the district attorney's consent to waiver of jury trial ensures that a defendant may not avoid a criminal court trial by electing to be tried before a general sessions judge. The Commission believes that in some instances the state has an interest in the protections afforded by jury trial.

Allowing the defendant, by statute, to waive his right to trial by jury is constitutional in Tennessee. See Seale v. Luttrell, 221 Tenn. 548, 428 S. W. (2d) 312 (1968). It is not constitutionally required that punishment be set by a jury, except in the case of a fine greater than $50.00. See Woods v. State, 130 Tenn. 100, 169 S. W. 558 (1914).

40-1902. Bifurcated trial for felonies.—(a) In all felony cases the issue of guilt or innocence shall first be submitted to the trier of facts.

(b) If the defendant is found guilty, there shall thereupon be further proceedings on the issue of sentence pursuant to § 40-2301.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tex. C. C. P., Art. 37.07 (Supp. 1971).

Cross-References:

Discharge of jury, see § 40-1928.

Instructions for sentencing hearing, see § 40-2103.

Jury, see subch. B.

Misdemeanors and felonies distinguished, see T. C. A. § 39-802, as amended.

Notice of exceptional sentence, see § 40-1410.

Plea agreement, see § 40-1304.

Sentencing hearing, see § 40-2301.

Trial by jury or by judge alone, see § 40-1901.

Comment:

Many states have taken action in recent years to authorize separate and distinct hearings to determine the proper sentence to be imposed on a convicted defendant. While this separate hearing is often authorized only in capital cases, Texas has adopted the procedure for all felony cases. Section 40-1902 requires a separate sentencing procedure to be used in all felony cases in Tennessee.

This innovative feature makes possible increased rationality in the sentencing decision. In effect the blindfold created by exclusionary rules of evidence is removed from the eyes of the jury for the sentencing decision. See § 40-2301 (sentencing hearing). This section provides that, in the event of a jury trial for a felony, the jury first hear evidence and return a verdict of guilty or not guilty. This procedure should greatly simplify the jury's task and eliminate the illogical jury process so often observed where the punishment is first agreed on and the appropriate degree of offense then selected.

More importantly, however, the sentencing decision will for the first time be an intelligent exercise of judgment rather than an uninformed and irrational response to a difficult request. The same jury that returns a guilty verdict—or the judge, if jury sentencing is waived—will immediately, and in context of the facts of the crime, hear evidence and argument relevant to the proper sentence to be imposed. In this hearing evidentiary rules designed to avoid prejudicing the jury's decision on the merits are not

applicable. Prior convictions, or the lack of them, character, family status and community standing all are relevant to the decision of what sentence to impose. In this way the sentencing authority—judge or jury—can tailor the sentence to fit the defendant's need for rehabilitation and punishment and the public's need for protection. The sentencing decision thus made would yet fail to accurately reflect the jury's assessment of the facts were it not for § 40-2103, providing for more informative jury instructions. That section calls for the jury to be informed of the law concerning eligibility and grounds for parole. This will lead less to the imposition of longer sentences than to a greater awareness by the public of the purpose and function of parole and a greater respect for the judicial and corrective processes. Section 40-2103 also provides that the jury be instructed in the general principles of sentencing as a guideline for the decision to be made.

The major concern of those who presently oppose the use of the bifurcated trial in Tennessee has been that, although it may improve the quality of the sentencing decision, the separate hearings would require a great deal more judicial and prosecutorial time than is now expended under the unitary system. Inquiries directed to judges and attorneys in Texas, where the system has been in operation for seven years, have shown this fear to be unjustified. The unanimous Texas opinion is that the bifurcated trial system has not slowed the criminal justice system. One judge operating under that system boasts of having the fastest felony docket in the United States.

Subchapter B. The Jury

40-1921. Number of jurors.—Juries shall be of twelve (12) but at any time before verdict the parties may stipulate in writing, with the approval of the court, that the jury shall consist of any number less than twelve (12) and greater than five (5).

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 23(b).

Cross-References:
Discharge of juror, see § 40-1928.

Comment:
The United States Supreme Court found a provision for a jury of six constitutionally permissible in Williams v. Florida, 399 U. S. 78 (1970). The Tennessee Supreme Court has consistently held otherwise, interpreting "jury" in our constitution to mean a common-law jury of 12. See Grooms v. State, 221 Tenn. 243, 426 S. W. (2d) 176 (1968). However, even the right to a jury trial itself may be waived. Seale v. Luttrell, 221 Tenn. 548, 428 S. W. (2d) 312 (1968). It would seem to follow that it would be permissible to waive the common-law jury and instead consent to be tried by a statutory jury of less than 12. In *Williams* the Court indicated that six would be the minimum permissible consistent with the constitutional right to a jury and that limitation is included here.

The main purpose for this section is to avoid having to impanel a new jury where a juror is discharged without sufficient alternates being available. It would also solve the problem arising in rare cases in rural counties when the list of potential veniremen is exhausted.

40-1922. List of jurors furnished defendant.—The defendant is entitled to a list of the jurors summoned, to be furnished him a reasonable time before the formation of a jury is commenced.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2505.

Comment:
This is the present statute.

40-1923. Drawing of jurors' names.—The names of the jurors shall be written on separate scrolls and placed in a box or other receptacle

and drawn out by the judge or by some other person agreed upon by the district attorney and the defendant.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2506.

Comment:
This is the present statute with the deletion of the reference to the names being drawn by a child under the age of ten years.

40-1924. Alternate jurors.—(a) The court may direct that one or more jurors in addition to the regular panel be called and impaneled to sit as alternate jurors.

(b) Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors.

(c) Alternate jurors in the order in which they are called shall replace jurors who, before the jury retires to consider its verdict, become unable or disqualified to perform their duties.

(d) If one or more alternate jurors are called, each party is entitled to two (2) peremptory challenges for each such alternate juror. These additional peremptory challenges may be used only against an alternate juror, and the peremptory challenges allowed by law for regular jurors may not be used against the alternates.

(e) An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Rules of Civil Proc. § 47.02.

Cross-References:
Challenges, see § 40-1927.
Discharge of juror, see § 40-1928.
Voir dire, see § 40-1925.

Comment:
This is merely a restatement of the present civil rule. There appears to be no reason for a different procedure in criminal cases.

40-1925. Voir dire.—(a) The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination.

(b) In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Tenn. Rules of Civil Proc. § 47.01.

Comment:
The Tennessee civil rule provides for the same procedure as the federal criminal rule. It allows the judge to conduct the examination or he can allow the attorneys to do it. If the judge does conduct the voir dire examination, he must allow the attorneys to supplement it or allow them to request that he ask supplemental questions. The defendant has no constitutional right to have the ex-

amination conducted by his attorney. United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963).

This provision should allow the judge to speed up the jury selection process where he feels it necessary but does not require him to remove all voir dire examination from counsel. In some federal courts local rules have been adopted providing for all juror examinations to be done by the judge. Presumably the judges in each county could adopt such a local rule but it should be emphasized that neither this section nor the civil rule require that the judge conduct the voir dire examination.

40-1926. Jurors sworn together.—In impaneling a jury the court shall not swear any of the jurors until the whole number are selected for a jury.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2511.

Comment:
Current T. C. A. § 40-2511 applies only to the trial of felonies. This section provides for application to any jury.

40-1927. Challenges.—(a) In the trial of criminal cases every party may challenge any juror for cause.

(b) The peremptory challenges of jurors shall be as follows:

(1) In the trial of capital cases, the state and each defendant shall be allowed fifteen (15) peremptory challenges.

(2) In the trial of all other felonies, the state and each defendant shall be allowed eight (8) peremptory challenges.

(3) In the trial of misdemeanors, the state and each defendant shall be allowed three (3) peremptory challenges.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2510.

Cross-References:
Challenge for cause, see T. C. A. § 22-301, et seq.
Voir dire, see § 40-1925.

Comment:
This section retains the number of peremptory challenges for each defendant in capital cases and other felonies at 15 and 8 respectively. The number allowed the state in each case is increased to equalize the number in all cases. The number in misdemeanor cases remains the same as in the present statute. What constitutes a challenge for cause is governed by T. C. A. § 22-301, et seq.

40-1928. Discharge of juror.—(a) If an individual juror be discharged by the court, he may be replaced by an alternate juror.

(b) If there is no alternate, the entire jury shall be discharged unless a jury of less than twelve (12) is stipulated to pursuant to § 40-1921.

(c) A final adjournment of the court discharges the jury.

(d) In all cases where a jury is legally discharged the case may be tried again.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2513—40-2515.

Comment:
Subsection (a) is present law; however, subsection (b) changes present law

CONTINUED

4 OF 6

Where a juror is discharged due to illness, T. C. A. §§ 22-238 and 40-2513 give the court the choice of discharging the entire jury or impaneling an individual replacement juror and restarting the trial. This could allow a jury where 11 of the 12 jurors had heard different testimony than the replacment. Eleven of the 12 jurors would be in a position of having heard testimony once and would be comparing it with that given the second time. This section would require the complete discharge of the jury in such a case unless the stipulation to proceed with a smaller number is made. Of course, the court can avoid the problem by selecting enough alternates.

40-1929. Separation of jurors.—(a) In all criminal cases other than capital felonies, the trial judge, in his discretion, may permit jurors to separate at times when they are not duly engaged in the trial or deliberations of the case.

(b) In capital felonies the jury shall be kept together at all times until discharged.

(c) When a jury composed of both sexes must be kept together, the male members of the jury may be separated from the female members and each sex kept together in charge of an officer of like sex.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2526—40-2528.
Ky. Rule 9.66.

Cross-References:
Capital murder, see T. C. A. § 39-1105, as amended.

Comment:
Under the present law jurors may separate only where the offense is punishable by less than ten years. Under § 40-1929 separation is within the discretion of the court in all except capital cases.

Subchapter C. The Judge

40-1941. Disability of judge during trial.—If by reason of death, sickness, or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 25(a).

Cross-References:
Appointment of special judge by governor, see T. C. A. § 17-222.
Election of special judge by attorneys present, see T. C. A. § 17-225.
Trial by jury or judge alone, see § 40-1901.

Comment:
This section allows the substitution of judges where one is disabled after the trial begins. Presently T. C. A. § 17-225 allows the attorneys present to elect a pro tempore judge. T. C. A. § 17-222 allows the governor to appoint a special judge to fill a vacancy. This procedure would seem to be a simple and efficient method for handling temporary disabilities where the duration of the disability is uncertain. Of course, in counties having only one criminal court judge the present procedures would have to be used.

40-1942. Disability of judge after verdict or finding of guilt.—If by reason of absence, death, sickness or other disability the judge before

whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties, but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 25(b).
Ky. Rule 11.32.
T. C. A. § 17-117.

Cross-References:
Bifurcated trial for felonies, see § 40-1902.
Trial by jury or by judge alone, see § 40-1901.

Comment:
This section changes the present law. Under T. C. A. § 17-117, where the judge is permanently disabled after verdict but before the disposition of a motion for new trial the motion for new trial is automatically granted. Section 40-1942 allows another judge of the same court to either grant or deny the motion. This section and the preceding one, while rarely needed, will become more important as trials become longer. Both sections provide an opportunity to avoid a new trial where a substitute judge is available.

CHAPTER 20

EVIDENCE AND WITNESSES

Subchapter A. General Provisions

Subchapter B. Securing the Attendance of Witnesses

40-2001. Application of civil rules of evidence.—The rules of evidence and competency of witnesses are the same in criminal as in civil cases, unless otherwise provided in this title.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2401.

Cross-References:
Compensation of witnesses, see § 40-3403.
Competency of parties, see T. C. A. § 24-103.
Defendant as witness, see § 40-2002.
Penalty for failure to appear, see T. C. A. § 39-2311, as amended.
Subpoenas, see ch. 18.

Comment:
This merely restates the present law and makes it clear that the rules of evidence and competency are generally the same in criminal as in civil cases.

40-2002. Defendant as witness.—(a) In the trial of all criminal cases the defendant may, at his own request, but not otherwise, be a competent witness to testify.

(b) The failure of the defendant to make such request and to testify in his own behalf shall not create any presumption against him.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-2402.
Subsec. (b): T. C. A. § 40-2403.

Cross-References:
Exclusion of witnesses, see § 40-2003.
Witness immunity, see § 40-2004.

Comment:
Section 40-2002 combines two present statutes. There is no requirement that the defendant testify first for the defense if he chooses to testify. See comment to § 40-2003.

40-2003. Exclusion of witnesses.—(a) If either a defendant or the state requests it, the judge may exclude from the hearing or trial any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witnesses.

(b) This provision shall not apply to the defendant, the attorneys in the case, or the chief prosecuting witness so designated by the district attorney.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Ky. Rule 9.48.

Cross-References:
Defendant as witness, see § 40-2002.
Exclusion of defendant, see § 40-115.

Comment:
This section adds to statutory procedure a provision for "putting the witnesses under the rule." The "rule" in Tennessee rests on the common law. Various exceptions have been made to the rule. The parties to a lawsuit are now excepted by statute, T. C. A. § 24-106, as well as by the common law, and this section also exempts parties. This exemption raises the problem of defining "parties" in a criminal proceeding. More precisely the question is whether the district attorney is the only party other than the defendant or whether the victim or investigating officer is also a party. In the case of Hughes v. State, 126 Tenn. 40, 148 S. W. 543 (1912), the court found that a detective working for the district attorney's office was a party and was entitled to remain in the courtroom to aid the prosecuting attorney but that, if he did so, he should testify first. This was based on the court's belief that the state was entitled to the assistance of such a witness. If the state is entitled to such assistance, there is no reason to restrict it to an employee of the district attorney's office. This section, in effect, allows the state to choose the witness it desires to help with the case and designate that person chief prosecuting witness.
This section complies with the recent Supreme Court decision declaring unconstitutional T. C. A. § 40-2403, which required the defendant to testify first for the defense if at all. See Brooks v. Tennessee, 406 U. S. 605 (1972).

40-2004. Witness immunity.—(a) In any trial in a court of record, the court on motion of the district attorney may order that any material witness be granted immunity from all prosecution or punishment on account of any testimony or other evidence he may be required to produce.

(b) An order of immunity shall forever be a bar to prosecution against the witness for any offense, except for perjury committed in

the giving of such testimony, shown in whole or in part by such testimony or evidence.

(c) Except as provided in subsection (d), any witness who having been granted immunity refuses to testify or produce other evidence shall be in contempt of court and subject to proceedings in accordance to law.

(d) No witness shall be compelled by contempt proceedings to disclose communication or information protected by common-law or statutory privilege.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsecs. (a)-(c): Ill. Code of Crim. Proc. §§ 106-1—106-3.

Subsec. (d): New.

Cross-References:

Accountant-client privilege, see T. C. A. § 62-114.

Attorney-client privilege, see T. C. A. § 29-305.

Newsman's privilege, see Tenn. Pub. Acts 1973, ch. 27.

Perjury, see T. C. A. § 39-2202, as amended.

Priest-penitent privilege, see T. C. A. § 24-109.

Psychiatrist-patient privilege, see T. C. A. § 24-112.

Psychologist-patient privilege, see T. C. A. § 63-1117.

Witness immunity in grand jury proceedings, see § 40-1111.

Comment:

Present Tennessee law provides a mandatory grant of immunity for testimony before the grand jury, T. C. A. § 40-1623. This section broadens the scope of the use of immunity to include most criminal trials. As a safeguard it requires the district attorney to move for a grant of immunity and the court to concur in the judgment that the immunity is necessary. This provision should aid attempts to prosecute organized crime in Tennessee.

This type of transactional immunity statute has recently been upheld by the Supreme Court in Kastigar v. United States, 406 U. S. 441 (1972).

Section 106-4 of the Illinois Code of Criminal Procedure, omitted from this section, provides that the court shall not grant the order and immunity where it appears that the testimony could make the defendant liable to prosecution by the United States. At one time this was necessary to afford the defendant his constitutional protection against self-incrimination. This practically nullified the states' power to grant immunity since many state criminal acts are also prosecutable as federal tax evasion. However, the United States Supreme Court in the case of Murphy v. Waterfront Commission of New York Harbor, 378 U. S. 52 (1964), held that the fifth amendment protection against self-incrimination forbids the use in a federal prosecution of testimony compelled by use of a grant of immunity by the state. If Tennessee grants immunity from all prosecution by the state for a given act the person who is thus forced to testify may still be prosecuted for the act in federal court but neither his compelled testimony nor any of the fruits of such testimony can be used against him.

Subsection (d) makes clear that statutory and common-law privileges apply to grand jury investigations. Tennessee has recently provided a limited statutory privilege for the confidential sources of newsmen. Tenn. Pub. Acts 1973, ch. 27. As a matter of constitutional law, the newsman's privilege does not exist. Garland v. Torre, 259 Fed. (2d) 545 (2nd Cir.), cert. denied, 358 U. S. 910 (1958). Fourteen states, however, have provided for the privilege by statute, one as early as 1896. Ala. Code, tit. 7, § 370 (1958); Ariz. Rev. Stat. Ann. § 12-2237 (Supp. 1966); Ark. Stat. Ann. § 43-917 (1964); Cal. Evidence Code § 1070 (1966); Ind. Burns' Ann. Stat. § 2-1733; Ky. Rev. Stat. § 421.100 (1963); La. Rev. Stat. §§ 45:1451-1454 (Supp. 1965); Md. Code Ann. Art. 35, § 2 (1965); Mich. Stat. Ann. § 28.945(1) (1954); Mont. Rev. Code § 93-601-1, 93-601-2 (1964); N. J. Stat. Ann. § 2A:84A-21, 2A:84A-29 (Supp. 1966); N. M. Stat. Ann. § 20-1-12.1 (1953, Supp. 1957); Ohio Rev. Code Ann. §§ 2739.04, 2739.12 (Supp. 1966); Pa. Stat. Ann. tit. 7, § 330 (Supp. 1965). See generally, D'Alemberte, Journalists Under the Axe: Protection of Confidential Sources of Information, 6 Harv. J. Leg. 307 (1969).

Present law, T. C. A. §§ 24-109—24-112, provides privileges for communication resulting from the clergyman and

psychiatrist relationships. The lawyer-client and the accountant-client relationships are also protected by statute, T. C. A. §§ 29-305 and 62-114. The spousal privilege is deeply entrenched in case law. See Hanvy v. State, 385 S. W. (2d) 752 (Tenn. 1965). These privileges are preserved by this subsection.

40-2005. Proof of incorporation.—(a) It shall not be necessary for the state to prove the incorporation of any corporation mentioned in the charge unless the defendant controverts such incorporation by pretrial motion.

(b) If the existence of a corporation is so controverted, the charter of the corporation or a legally authenticated copy of the charter shall be prima facie evidence of the existence of the corporation.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 40-2439—40-2440.

Cross-References:

Authorized punishment for corporation, see T. C. A. § 39-861, as amended.

Criminal responsibility of corporation, see T. C. A. § 39-522, as amended.

Comment:

This is basically present law.

40-2006. Exceptions unnecessary.—(a) Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and, on request of the court, his grounds therefor.

(b) If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Tenn. Rules of Civil Proc. § 46.

Cross-References:

Appeal, see ch. 24.

Motion for pretrial determination of admissibility of evidence, see § 40-1407.

Comment:

This is the civil rule and should make the criminal procedure more consistent with the civil without adversely affecting either party's rights.

Subchapter B. Securing the Attendance of Witnesses

40-2021. Subchapter definitions.—In this subchapter, unless the context requires a different definition:

(1) "State" includes any territory of the United States and the District of Columbia.

(2) "Summons" includes a subpoena, order or other notice requiring the attendance of a witness.

(3) "Witness" includes a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2430.

Cross-References:
Subpoena, see ch. 18.

Comment:
This subchapter is the Uniform Law to Secure the Attendence of Witnesses from Within or Without a State in Criminal Proceedings and does not depart from present law.

40-2022. Hearing on summons of witness to testify in another state.—If a judge of a court of record in any state, which by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, and that a person being within this state is a material witness in such prosecution or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is found, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2431.

40-2023. Issuance of summons.—If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2432.

40-2024. Ordering witness into custody.—If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing, being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof, may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2433.

40-2025. Penalty for failure to obey summons.—If the witness, who is summoned as provided in §§ 40-2022—40-2024, after being paid or tendered by some properly authorized person the sum of ten cents (10¢) a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending, and twenty-five dollars ($25.00) for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2434.

Cross-References:
Penalty for failure to appear, see T. C. A. § 39-2311, as amended.

40-2026. Certificate recommending summons of witness from another state.—If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigation commenced or about to commence in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2435.

40-2027. Witness fees—Failure to testify after coming into state.—If the witness is summoned to attend and testify in this state, he shall be tendered the sum of ten cents (10¢) a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending, and twenty-five dollars ($25.00) for each day that he is re-

quired to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify, as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2436.

Cross-References:
Penalty for failure to appear, see T. C. A. § 39-2311, as amended.

40-2028. Immunities of witnesses entering or passing through state on summons.—(a) If a person comes into this state in obedience to a summons directing him to attend and testify in this state, he shall not, while in this state pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

(b) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state, or while returning therefrom, he shall not, while so passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2437.

40-2029. Uniformity of construction.—This subchapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2438.

CHAPTER 21

INSTRUCTIONS

40-2101. Jury instructions and requests.—(a) The parties shall be given a reasonable opportunity to submit written requests for additional

or supplemental instructions which shall be ruled upon by the court before the final argument. The judge shall indorse his decision on the request.

(b) A copy of the requests denied shall be filed with the papers in the case.

(c) In capital cases by jury, the judge shall give no instructions on the law which have not first been reduced to writing. The instructions, including any requests for instructions granted by the court, shall be read verbatim to the jury and a copy given to them which they shall take with them upon their retirement.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): New.
Subsecs. (b), (c): T. C. A. §§ 40-2516, 40-2517.

Cross-References:
Trial by jury or by judge alone, see § 40-1901.

Comment:
This section alters present procedure by requiring written instructions only in capital cases. With the advent of trial transcripts in all felony cases, the need for written instructions to preserve the record has disappeared. Requests for supplemental instructions must be written, however, and ruled on before final argument.

The word "instruction" is used instead of the traditional "charge" to avoid confusion with charge as it is used throughout this code to mean indictment, presentment, complaint and information.

40-2102. Instructions on lesser included offenses.—If the offense charged includes one or more lesser included offenses, the judge shall instruct the jury as to all of the law of each offense included in the charge and covered by the proof, without any request on the part of the defendant to do so.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2518.

Cross-References:
"Charge" defined, see § 40-105.
"Lesser included offense," defined, see § 40-2203.
Requests for special instructions, see § 40-2101.

Comment:
This is present T. C. A. § 40-2518 with only minor changes to allow its application to misdemeanors.

40-2103. Instructions for sentencing hearings.—In sentencing hearings by jury, at the conclusion of presentation of proof and argument the judge shall instruct the jury as to:

(1) the general principles in sentencing as set out in § 39-806, as amended; and

(2) possible sentencing combinations for the offense of which defendant was convicted; and

(3) the law concerning eligibility and grounds for parole as found in §§ 40-2821, 40-2822 and 40-2826.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
Bifurcated trial for felonies, see § 40-1902.

Election of jury sentence, see § 40-1901.
General principles in sentencing, see T. C. A. § 39-806, as amended.
Grounds for parole, see § 40-2826.
Parole eligibility, see §§ 40-2821, 40-2822.
Sentencing combinations, see T. C. A. § 39-805, as amended.
Sentencing hearing, see § 40-2301.

Comment:

This section is necessitated by the provision in § 40-1902 for a separate hearing for the purpose of imposing an appropriate sentence on a convicted defendant. The policy behind that provision, taking the "blindfold" off the jury as to the circumstances surrounding the offense and the offender's prior convictions, requires conversely that the jury be informed of the effects of the various sentencing alternatives available to it. The jury, when it is chosen by the defendant to impose sentence, should be given adequate information to intelligently perform this function. In effect, this provision and the relaxed evidence rules of § 40-2301 make the jury aware of the same factors a judge would weigh in making the sentencing decision.

The "general principles in sentencing" instruction is provided to give the jury a guideline for choosing among the various alternatives available to it under the "sentencing combinations" instruction.

40-2104. Instructions on insanity defense.—If evidence is admitted on the defense of insanity, the judge shall instruct the jury:

(1) as to the law governing the defense of insanity as set out in § 39-601, as amended; and

(2) as to the law governing commitment of defendants found not guilty by reason of insanity as set out in chapter 23, subchapter B of this title; and

(3) that if the jury find the defendant insane but not guilty of the acts alleged, the verdict shall be not guilty; and

(4) that if the jury find that the defendant committed the acts alleged but is not criminally responsible by reason of insanity, the verdict shall be not guilty by reason of insanity.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
Criminal commitment, see ch. 23, subch. B.
"Insanity" defined, see T. C. A. § 39-601, as amended.
Notice of insanity defense, see § 40-1410.

Comment:
This section is designed to provide the background necessary for a jury finding on the issue of insanity defense. It also clearly states a new style of verdict—not guilty by reason of insanity—to identify irresponsible individuals for custody, care, and treatment under the criminal commitment provision of ch. 23, subch. B.

CHAPTER 22

VERDICTS

40-2201. Directed verdict.—In a criminal prosecution the trial judge shall direct the jury to acquit the defendant if, at the close of the evidence for the prosecution or at the close of all the evidence, the court is of the opinion that the evidence is insufficient to warrant a conviction.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2529.

Comment:
This is a recently (1968) passed statute and corresponds with the motion for judgment of acquittal under the federal procedure.

40-2202. Multiple and defective counts.—(a) If a charge states more than one count, a verdict shall be rendered on each offense charged.

(b) A dismissal or not guilty verdict as to one or more counts in the charge shall not invalidate a guilty verdict as to any other count or counts in the charge.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
"Charge" defined, see § 40-105.
Counts, see § 40-1003.
Multiple sentences, see T. C. A. § 39-302, as amended.
State's burden of proof, see T. C. A. § 39-201, as amended.

Comment:
This section departs from the present statute, T. C. A. § 40-2519, which allowed a general verdict of guilty to be returned if any one count in the indictment is sustained by the proof. That section was declaratory of the common law. See Rice v. State, 50 Tenn. 215 (1870); Isham v. State, 33 Tenn. 111 (1853). A general verdict of guilty, however, is not sufficient for the demands of the new sentencing proceedings established by this code. A judge or jury should sentence a defendant only for those counts of which he is guilty.

In addition, the compulsory joinder of offenses provision, § 40-1603, which requires a single trial for all offenses committed in one criminal episode makes the use of general verdicts impossible. The word "charge" is substituted for "indictment" to allow the statute to apply to misdemeanors tried without indictment.

40-2203. Conviction of lesser included offense.—(a) An offense is a lesser included offense if:

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

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

(3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or

(4) it consists of an attempt to commit the offense charged or an otherwise included offense.

(b) In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense.

(c) A person charged as a party to the commission of a felony may be convicted of facilitation of the felony.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Ill. Stat. Ann. ch. 38, § 2-9.
Model P. C. § 1.07(4).
Tex. P. C. Prop. Rev. Arts. 37.08, 37.09.

Cross-References:

Attempt, see T. C. A. § 39-901, as amended.
Culpable mental states, see T. C. A. § 39-405, as amended.
"Element of offense" defined, see T. C. A. § 39-107, as amended.
Facilitation of felony, see T. C. A. § 39-503, as amended.
Judge's instructions on lesser included offense, see § 40-2102.
Parties to offenses, see T. C. A. § 39-501, as amended.

Comment:

In view of the increased number of offenses with lesser included offenses created by the Criminal Code, the enumeration of these offenses in scattered code sections, e.g., T. C. A. §§ 39-608, 39-907, is no longer adequate. Rather than list all offenses which include lesser offenses, this section functionally defines the concept of "lesser included offense." This definition does not change existing law, but rather articulates a complete statement of principles which can be inferred from the examples in present statute and which have been developed in case law. See T. C. A. § 40-2520.

Subdivision (1) of this section states the concept in terms of the proof of facts necessary to establish the greater offense also establishing the lesser offense. Therefore, in the new Criminal Code, proof of aggravated perjury includes proof of perjury since aggravated perjury is defined as perjury plus two additional elements. The same is true of robbery and aggravated robbery, and a completed theft is a lesser included offense of burglary.

Subdivision (2) defines as lesser included offenses those which differ from the greater offense only in the seriousness of the injury or risk of injury involved. For example, assault is included in aggravated assault, and both are included in murder and manslaughter. Compensation for past official behavior is included in bribery, since both involve the illicit offer or acceptance of benefits in order to corrupt public servants, but the risk of injury to the public interest is less serious in the former case.

Subdivision (3) refers to offenses which differ from a greater offense in that the actor's mental state is less culpable. For example, reckless damage or destruction of property is included in criminal mischief, the difference between the two offenses being whether the damage is caused recklessly or intentionally. Criminally negligent homicide is included in manslaughter, and both in murder, the nature of the offense depending on whether the actor killed intentionally or knowingly, recklessly, or with criminal negligence.

Subdivision (4) designates "attempt" as a lesser included offense of the offense attempted. In addition, an attempt to commit a lesser included offense is itself a lesser included offense. For example, since rape is included in aggravated rape, attempted rape is also included in aggravated rape.

This section does not change present law on the issue of whether the jury must be charged on a lesser included offense. Generally speaking, defendant is not entitled to a charge on lesser included offenses unless there is evidence raising the issue that the defendant, if guilty at all, is guilty only of a lesser included offense. T. C. A. § 40-2518; see Baker v. State, 203 Tenn. 574, 315 S.W. (2d) 5 (1958); State v. Parker, 81 Tenn. (13 Lea) 221 (1884); see also Poole v. State, 61 Tenn. (2 Baxt.) 288 (1872).

40-2204. Alternate intent or means.—Where the intent with which, the mode in which, or the means by which an act is done are essential to the commission of the offense, and such offense may be committed with different intents, in different modes, or by different means, if the trier of facts is satisfied that the act was committed with one of the intents, in one of the modes, or by either of the means charged, it shall convict, although uncertain as to which of the intents charged existed, or in which mode, or by which of the means charged, such act was committed.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-2522.

Cross-References:

Causation, see T. C. A. § 39-407, as amended.
Culpable mental states, see T. C. A. § 39-405, as amended.

Comment:

T. C. A. § 40-2522 is changed, here, by the substituting of the words "trier of facts" for the word "jury." This makes it clear that this section applies where jury trial is waived and trial is by the judge alone

40-2205. Multiple defendants.—(a) Upon a charge against several defendants, any one or more may be convicted or acquitted.

(b) If the jury cannot agree upon a verdict as to all, they shall render a verdict as to those in regard to whom they agree, on which a judgment shall be entered.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 40-2523, 40-2524.

Cross-References:

Consolidation, see § 40-1607.
Joinder of defendants, see § 40-1604.
Relief from prejudicial joinder, see § 40-1606.

Comment:

This is a combination of T. C. A. §§ 40-2523, 40-2524. In the first sentence the word "charge" is substituted for the word "indictment" to allow such a proceeding in misdemeanor cases in general sessions courts where the right to indictment must be waived and trial is on a complaint or information.

CHAPTER 23

SENTENCE AND JUDGMENT

Subchapter A. General Provisions

Subchapter B. Commitment of Defendants Found Not Guilty by Reason of Insanity

Subchapter A. General Provisions

40-2301. Sentencing hearing.—(a) Upon a verdict of guilty, the court shall conduct a sentencing hearing.

(b) Evidence may then be presented by both the defendant and the state as to any matter that the court deems relevant to the issue of sentence. Such matters may include but are not limited to the nature and circumstances of the crime, the defendant's character, background, mental and physical condition and history, and any other facts in aggravation or mitigation of the penalty. Any such evidence that the

court deems to have probative force may be received, regardless of its admissibility under the exclusionary rules of evidence.

(c) If the defendant has elected to have the jury impose sentence, the judge shall instruct the jury pursuant to § 40-2103.

(d) If the defendant has elected to have the jury impose sentence and, after the lapse of such time as the court deems reasonable, the jury report themselves unable to agree, the court shall discharge the jury and, in its discretion, shall:

(1) impose sentence without the intervention of a jury; or

(2) impanel a new jury to impose sentence. If a new jury is impaneled, it may not impose a fine greater than fifty dollars ($50.00).

(e) If the defendant has elected to have the judge impose sentence, where such services are available the court may delay the sentencing hearing until a presentence report is received.

(f) Pending sentence the court may commit the defendant or continue or alter bail or conditions of pretrial release.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Calif. Penal Code 190.1 (Supp. 1968).
Conn. Penal Code 46 (1971).
N. Y. Penal Law 125.30 (Supp. 1970).
Penn. Stat. Ann., tit. 18, 4701 (1963).
Tex. C. C. P., Art. 37.07 (Supp. 1971).
Fed. R. Cr. P. § 32(a).

Cross-References:

Bifurcated trial for felonies, see § 40-1902.
Continuation of bail or release, see § 40-1208.
Discharge of jury, see § 40-1928.
Election of judge or jury sentence, see § 40-1901.
Evidence, see ch. 21.
Exceptional sentences, see T. C. A. §§ 39-841—39-843, as amended.
Instructions for sentencing hearing, see § 40-2103.
Misdemeanors and felonies distinguished, see T. C. A. § 39-802, as amended.
Notice of exceptional sentence, see § 40-1410.
Plea agreement, see § 40-1304.
Presentence report, see § 40-2864.
Trial by jury or by judge alone, see § 40-1901.
Verdict, see ch. 22.

Comment:

Many states have taken action in recent years to authorize separate and distinct hearings to determine the proper sentence to be imposed on a convicted defendant. While this separate hearing is often authorized only in capital cases, Texas has adopted the procedure for all felony cases. Section 40-1902 requires a separate sentencing hearing to be used in all felony cases in Tennessee. This section details the procedure to be used in that hearing.

Subsection (b) is taken from the Connecticut statute and involves one of the toughest problems in the bifurcated proceeding: what evidence is admissible. The states which have answered the question of the admissibility of excludable evidence have generally provided, as does this proposed statute, that evidence is admissible during the penalty phase even if it would have been excluded during the guilt determination phase. The only basis for excluding evidence is its lack of relevance to the issue of sentence.

Under § 40-1901, the defendant has the option of a sentence by jury or by the judge alone. It is anticipated that most felony convictions will result in a sentence imposed by the judge. In those cases where the defendant selects jury sentence, however, the jury will no longer go about its task "blindfolded;" it will be apprised of the information and facts it needs to make an informed and intelligent sentencing decision, the same facts that the judge would weigh in imposing sentence. Subsection (c) ensures that the jury will be instructed as to general principles of sentencing, the sentencing options available, and the effect of any sentence they may impose. See § 40-2103.

The last sentence of subsection (d) is made necessary by Tenn. Const., Art. VI, § 14, which provides that "[n]o fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars." This problem was raised on a petition to rehear in the case of Huffman v. State, 200 Tenn. 487, 292 S. W. (2d) 738 (1956). In that case the court remanded for a new trial on the issue of punishment alone. In deciding that the defendant did not have a right to have the same jury that found guilt set punishment, the court came to the conclusion that no fine greater than $50 could be imposed by the second jury although the jury was not restricted as to sentence of imprisonment.

Subsections (e) and (f) are taken from present law relating to presentence reports and commitment pending sentence. Under this section, if presentence reports are available, the judge may delay sentencing pending the report. He may prefer to have the report available at the time of the sentencing hearing. Under present law, T. C. A. § 40-2904, the judge is required to consider the report only before granting probation. This section delays not just sentence but the sentencing hearing in order to allow both state and defendant the opportunity to rebut the content of the report.

40-2302. Punishment set by jury on plea of guilty.—(a) If a plea agreement imposing a fine in excess of fifty dollars ($50.00) is accepted by the judge, a jury shall be impaneled. A resume of the facts of the case shall be related to the jury by the judge and stipulated to by the state and the defense as being the substantial facts and evidence in the case, to be considered by the jury as such facts and evidence, and the jury may then approve the recommendation and be sworn to fix the punishment.

(b) In such pleas of guilty by stipulation and agreement, the judge shall not be required to charge the jury in writing or otherwise.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 40-2310.

Cross-References:

Acceptance or rejection of plea agreement, see § 40-1306.
General principles of sentencing, see T. C. A. § 39-806, as amended.
Plea agreement, see § 40-1304.
Sentencing combinations, see T. C. A. § 39-805, as amended.

Comment:

This section is retained solely because of the provision of Tenn. Const., Art. VI, § 14, limiting judge-imposed fines to $50. If the state could not negotiate with fines over $50 on such offenses as driving while intoxicated and could offer only jail time, it is possible that more defendants would demand jury trials and punishment, with a resulting increase in the backlog of cases set for trial. In order to avoid that result, this practical anomaly is retained.

Like the present law this proposed section limits the procedure to guilty pleas based on a plea agreement. This should cover the vast majority of guilty pleas; however, the rare defendant who wishes to plead guilty and take his chances on the sentence will be forced to accept imposition of sentence by the judge or plead not guilty, demand a jury trial and that the jury set the penalty. This should be constitutionally permissible since the defendant has no constitutional right to have punishment set by the jury. See Woods v. State, 130 Tenn. 100, 169 S. W. 558 (1914).

40-2303. Judgment after verdict.—(a) If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(b) If the defendant is found not guilty by reason of insanity, the court shall proceed in accordance with subchapter B.

(c) If the defendant is found guilty and sentence set, the court shall pronounce judgment unless judgment is arrested or a new trial granted.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2701.
Fed. R. Cr. P. § 32(b).

Cross-References:
Criminal commitment, see subch. B.
Motion in arrest of judgment, see § 40-2409.
Motion for new trial, see § 40-2407.

Comment:
Subsection (a) is taken from the federal rule and directs that judgment be entered where the defendant is to be discharged. Subsection (b) provides for the insanity verdict authorized by § 40-2104. Subsection (c) is the present T. C. A. section and merely directs judgment to be entered after the verdict and sentence against the defendant.

There is a distinction to be made between the judgment and the sentence. Although present law is not clear it appears that the judgment is the court's pronouncement of the verdict and the sentence of the court. The sentence, of course, is the penalty imposed by the judgment. With the bifurcated trial provision of § 40-1902, it becomes easier to distinguish between verdict (the "guilty" or "not guilty" decision), sentence (the disposition decided upon at the conclusion of the sentencing hearing), and judgment (the court order embodying both verdict and sentence).

40-2304. Judgment for damages.—(a) If a defendant is convicted of theft, the jury shall ascertain the value of the property or service stolen, if not previously restored to the owner, and the court shall thereupon order the restitution of the property and, if this cannot be done, that the party aggrieved recover the value assessed against the defendant, for which execution may issue as in other cases.

(b) If property has been lost or destroyed as a result of the defendant's criminal action, the jury shall ascertain the damages sustained, upon which judgment shall be rendered in favor of the party aggrieved against the defendant, and execution shall issue as in other cases.

(c) The provisions of this section are cumulative and do not deprive the party injured of any other right he may have for the recovery of his property or its value.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2716—40-2718.

Cross-References:
Arson and other property damage or destruction, see T. C. A. tit. 39, ch. 16, as amended.
Fine based on gain, see T. C. A. § 39-841.
"Theft" defined, see T. C. A. § 39-1901, as amended.
Theft of service, see T. C. A. § 39-1904, as amended.

Comment:
This is merely a restatement of the present Tennessee statutes. Several other states have such provisions and, although it is rarely used, the procedure may allow a victim to avoid hiring an attorney and pursuing his civil remedy at extra costs. See Burton v. State, 214 Tenn. 10, 377 S. W. (2d) 900 (1963).

40-2305. Notification of right to appeal.—After sentencing in any case other than one in which the court has accepted a plea agreement as to both guilt and punishment, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 32(a)(2).

Cross-References:
Plea agreement, see § 40-1306.
Right of appeal, see § 40-2401.
Sentencing, see § 40-2301.

Comment:
This section requires the court to advise the defendant that he has the right to appeal if he has gone to trial on a not-guilty plea. If the verdict is based on a guilty plea, no such notification is required. Orfield's Criminal Procedure Under the Federal Rules states some of the reasons behind this section:

> Counsel may not adequately advise the defendant. Trial counsel may not regard his duty as extending beyond imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances making advice from counsel difficult. Since indigent defendants are most likely to be without effective legal assistance at this stage, the defendant is to be notified of the right to appeal in forma pauperis.

Subchapter B. Commitment of Defendants Found Not Guilty by Reason of Insanity

40-2321. Criminal commitment.—(a) If a defendant charged with an offense enumerated in subsection (b) is found not guilty by reason of insanity, the court shall order him to be committed to the custody of the commissioner of mental health to be placed in an appropriate institution for custody, care and treatment.

(b) Proceedings under this subchapter shall be applicable only to defendants found not guilty by reason of insanity of committing:

(1) an offense under title 39, chapters 11-18, as amended; or

(2) under title 39, chapter 9, as amended, conspiracy, solicitation, or an attempt to commit any offense in title 39, chapters 11-18, as amended.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): Model P. C. § 4.08.
Subsec. (b): New.

Cross-References:
Attempt, see T. C. A. § 39-901, as amended.
Conspiracy, see T. C. A. § 39-902, as amended.
"Insanity" defined, see T. C. A. § 39-601, as amended.
Instruction on insanity defense, see § 40-2104.
Notice of insanity defense, see § 40-1410.
Solicitation, see T. C. A. § 39-903, as amended.

Comment:
This subchapter treats an area of great concern and one heretofore uncontrolled by statute. Tennessee is now the only state not having statutory procedures for the treatment of criminal defendants acquitted on the defense of insanity. The resulting uncertainty as to the disposition of the incompetent offender has resulted in an unreasonable resistance to the proper use of the insanity defense in this state. The five sections of this subchapter provide for mandatory commitment of a defendant to an appropriate institution upon acquittal by reason of insanity of a crime posing danger of bodily harm to others (§ 40-2321); dangerousness to himself or others as the criterion for continued custody (§ 40-2322); power only in the committing court (except through habeas corpus) to discharge or release (§ 40-2322); conditional release as an alternative to absolute discharge (§ 40-2324); and application for release or discharge to be made either by the commissioner of mental health or by the defendant with limitations as to the frequency of application by the latter.

Subsection (a) provides for automatic commitment and is in accordance with the practice in England and a minority of

American jurisdictions. It not only provides the public with the maximum immediate protection, but will also work to the advantage of mentally diseased or defective defendants by making the defense of insanity more acceptable to the public and to the jury. Ten states have provisions for such mandatory commitment: Colo. Stats. Ann. ch. 48, § 510(2) (1935, supp. 1953); Ga. Code Ann. § 27-1503 (1935); Hawaii Rev. L. § 10828 (1945); Kan. Gen. Stats. Ann. § 62-1532 (1949); Mass. Laws Ann. ch. 123, § 101 (1949) (only where indictment was for murder or manslaughter); Minn. Stats. Ann. § 631.19 (1946); Neb. R. S. § 29-2203 (1943); Nev. Comp. L. § 11015 (Hillyer 1929); Ohio Rev. Code Ann. § 2945.39 (1953); Wis. Stats. § 357.11(3) (1951).

Subsection (b) limits the application of the automatic commitment provision to defendants found to have committed in fact a crime involving substantial risk to the safety of others. The reference to tit. 39, chs. 11-18 of the new Criminal Code includes: homicide (ch. 11), kidnapping and false imprisonment (ch. 12), sexual offenses (ch. 13), assaultive offenses (ch. 14), offenses against the family (ch. 15), arson (ch. 16), robbery (ch. 17), and burglary (ch. 18). Offenses to property not involving substantial danger to others are thus omitted. The shoplifting kleptomaniac, therefore, is not subject to criminal commitment. While his problem may result in financial loss and inconvenience he poses no real threat to the safety of others and should not be committed for an indefinite period. The court can ensure that the kleptomaniac (or other mentally incompetent but nondangerous offender) receive psychiatric help by requiring voluntary out-patient treatment as a condition of probation.

40-2322. Commissioner's application for release of defendant.—(a) If the commissioner of mental health is of opinion that a person committed to his custody pursuant to § 40-2321 may be discharged or released on condition without danger to himself or to others, he shall make application for the discharge or release of such person in a report to the court by which such person was committed and shall transmit a copy of such application and report to the district attorney of the district from which the defendant was committed.

(b) The court shall thereupon appoint at least two (2) qualified psychiatrists to examine such person and to report within sixty (60) days, or such longer period as the court determines to be necessary for the purpose, their opinion as to his mental condition.

(c) To facilitate such examination and the proceedings thereon, the court may cause such person to be confined in any institution located near the place where the court sits, which may hereafter be designated by the commissioner as suitable for the temporary detention of irresponsible persons.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Model P. C. § 4.08.

Comment:

This section establishes dangerousness as the criterion for continued custody. This was deemed a preferable test rather than to provide that the committed person may be discharged or released when restored to sanity. Although his mental disease may have greatly improved, such a person may still be dangerous because of factors in his personality and background other than mental disease. Also, such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal. More importantly, however, the criterion of dangerousness makes possible the conditional release of individuals who, while still not mentally competent, pose no danger to themselves or others.

By requiring that the hearing be conducted in the committing court with notice to the district attorney, this section ensures that the interest of the community in being free from the presence of dangerous irresponsible individuals will be protected. Seven states retain exclusive power to release in the committing court and two more require that court's consent prior to release by the hospital superintendent.

Although a few jurisdictions have prescribed a minimum time the committed person must be in custody and have restricted the frequency with which applications for his release may be made, e.g., Cal. Penal Code § 102a (1949) (minimum confinement one year, and one year must elapse between applications), this section allows the commissioner to make or renew such application at any time.

40-2323. Committed person's application for release.—(a) A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed in § 40-2322 for an application by the commissioner.

(b) No such application by a committed person need be considered until he has been confined for a period of not less than six (6) months from the date of the order of commitment, and if the determination of the court be adverse to the application, such person shall not be permitted to file a further application until one (1) year has elapsed from the date of any preceding hearing on an application for his release or discharge.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Model P. C. § 4.08.

Comment:

This section ensures that a defendant, having been found to have committed acts constituting an offense but by reason of insanity to be not criminally culpable, may himself institute proceedings for his release. Due to the extraordinary cost and court time involved, and due to the liberal provisions for application for release by the commissioner, limitations have been placed on the frequency of such procedures. Applications by the patient are limited by what is thought to be a period reasonably necessary to observe him initially and by the interval probably necessary for a significant change in his condition to occur after any application has been denied (one year). Habeas corpus remains a constant avenue of remedy, however, for the exceptional situation.

40-2324. Release by court.—(a) If the district attorney makes no objection and the court is satisfied by the report filed pursuant to § 40-2322, and the testimony of the psychiatrists making such report if the court deems it advisable to hear their testimony, that the committed person may be discharged, or may be released on condition without danger to himself or others, the court shall order his discharge, or shall order his release upon such conditions as the court determines to be necessary and appropriate.

(b) If the court is not so satisfied or if objection is made by the district attorney, the court shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released.

(c) According to the determination of the court upon the hearing, the committed person shall thereupon be discharged, or shall be released on such conditions as the court determines to be necessary, or shall be recommitted to the custody of the commissioner of mental

health subject to discharge or release only in accordance with the procedure prescribed in this subchapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Model P. C. § 4.08.

Comment:
This procedure for release of the committed person by the committing court is designed to fully protect the interests of both the public and the defendant by providing for an independent psychiatric examination. This may become especially important to the committed person if the application is of his own initiative and contrary to the opinion of the commissioner.

The provision for conditional release is used by seven other states and furnishes additional protection to the public in the case of those individuals who need some supervision upon their return to the community.

40-2325. Violation of condition.—If, within five (5) years after the conditional release of a committed person or such additional period as the court may order at the time of conditional release, the court shall determine, upon evidence admitted at a hearing conducted with notice to the released defendant, that the conditions of release have been violated and that for the safety of such person or for the safety of others his conditional release should be revoked, the court shall forthwith order him recommitted to the commissioner of mental health, subject to discharge or release only in accordance with the procedure prescribed in this subchapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Model P. C. § 4.08.

Comment:
This section authorizes the recommitment of an individual released on condition upon a judicial finding that the conditions of his release have been violated. As a general rule it sets a five-year limit for this procedure but allows the court, at the time of release, to specify that the conditions are to apply for a longer period of time.

After the expiration of the conditional period, recommitment must be made through the original criminal procedure or through present civil procedure.

CHAPTER 24

APPEAL AND ERROR

40-2401. Right of appeal.—In all cases tried in criminal courts of record all parties may pray an appeal by writ of error, or in the nature of a writ of error, as in civil cases, except that the state has no right

of appeal or other remedy for the correction of errors upon a judgment of acquittal.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-3401—40-3403.

Cross-References:
Appeal by state of granting of motion to suppress, see § 40-1408.
Appeal by writ of error, see T. C. A. § 27-601, et seq.
Appeal in nature of writ of error, see T. C. A. § 27-306.
"Criminal court" defined, see § 40-105.
Motion in the nature of a writ of error coram nobis, see § 40-2403.
State's appeal of error coram nobis judgment, see § 40-2403.

Comment:
This section merely consolidates and restates present law.

40-2402. Assignment of error not required.—No assignment of error or joinder in error is necessary in criminal cases. The court on appeal shall render such judgment on the record as the law demands.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3409.

Cross-References:
Exceptions unnecessary, see § 40-2006.

Comment:
This is present law.

40-2403. Motion in the nature of a writ of error coram nobis.—(a) Except as otherwise provided in this section, a proceeding in the nature of a writ of error coram nobis in criminal cases shall be governed by the same rules and procedure as is the motion in the nature of a writ of error coram nobis provided for in Tennessee Rule of Civil Procedure 60.02.

(b) The relief obtainable by such motion shall be confined to errors which do not appear of record and to matters that in the exercise of due diligence could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding.

(c) A copy of the motion filed shall be served on the district attorney.

(d) No judge shall grant supersedeas upon the filing of the motion.

(e) The court shall have authority to order the person having custody of the defendant to produce him in court for the hearing of the proceeding.

(f) The issue shall be tried by the court without the intervention of a jury, and if the motion is granted, the judgment complained of shall be set aside and the petitioner shall be granted a new trial or a judgment of acquittal as justice requires.

(g) Upon the granting of a new trial, the court may in its discretion release the petitioner on bail or recognizance or order the defendant to be confined in the county jail to await trial.

(h) The petitioner or the state may pray an appeal in the nature of a writ of error to the Supreme Court from a final judgment in such proceeding.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3411.

Cross-References:
Appeal in nature of writ of error, see T. C. A. § 27-306.
Motion for new trial, see § 40-2407.
Release on recognizance or bail pending appeal, see § 40-2406.

Comment:
This procedure was made available in criminal cases in 1955. Its purpose is to bring to the attention of the court some fact then unknown to the court which would have resulted in a different judgment. See State ex rel. Carlson v. State, 219 Tenn. 80, 407 S. W. (2d) 165 (1966).

40-2404. Appeal from judgment of general sessions court.—(a) Any person aggrieved by the judgment of a court of general sessions or a justice of the peace court in a criminal case rendered pursuant to § 40-202 may appeal such judgment to the next term of the court having criminal jurisdiction in the county for a trial de novo upon executing bond for the amount of the fine and costs not to exceed two hundred fifty dollars ($250) or upon taking the oath prescribed by law for paupers.

(b) An appeal under subsection (a) shall be tried in the court designated in subsection (a) without indictment or presentment, upon the original complaint issued against such person, with the right to a trial by jury as stated in § 40-1901.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-426.

Cross-References:
"Complaint" defined, see § 40-105.
General sessions courts jurisdiction, see § 40-202.

Comment:
This is taken directly from the present statute, with three changes. The terminology is changed to substitute "complaint" for "warrant." Second, the right to trial by jury will be as stated in § 40-1901. The defendant will be entitled to a jury trial unless it is waived rather than being entitled to one only upon demand, as in the present T. C. A. § 40-426. This shift in emphasis is designed to ensure meeting the constitutional requirements of an intelligent waiver of known rights. Third, the provision in the present statute stating that an appeal is taken by posting an appearance bond is eliminated. If read literally this would require the defendant to make bail as a prerequisite to an appeal. While it is a prerequisite to a stay of execution pending appeal it is not a required step for taking an appeal.

40-2405. Stay of execution of sentence.—(a) For purposes of this section "appeal" means only the appeal from the general sessions courts to the criminal court or an appeal in the nature of a writ of error.

(b) A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released on bail or recognizance. If the defendant is not admitted to bail, the court may recommend to the district attorney that the defendant be retained at or transferred to a place of confinement near the place of trial or the place where his appeal is to be heard for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal.

(c) A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the court upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs into court, or to give bond for the payment thereof, or to submit to an examination of assets. The court may make any appropriate order to restrain the defendant from dissipating his assets.

(d) An order placing the defendant on probation, or a sentence to probation, shall be stayed during the pendency of an appeal and the defendant shall be released on recognizance.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Fed. R. Cr. P. § 38(a).

Cross-References:
Appeal from judgment of general sessions court, see § 40-2404.
Appeal in nature of writ of error, see § 40-2401.
Automatic appeal and stay of sentence of death, see § 40-2408.
Release on recognizance or bail pending appeal, see § 40-2406.
Stay for clemency application, see § 40-2906.
Stay for post-conviction relief, see § 40-3006.

Comment:
With the exception of the first subsection, this section is a restatement of the federal rule. Under current procedure only the appeal in the nature of a writ of error works an automatic supersedeas. This section does not affect the appellate court's power to order supersedeas on an appeal by writ of error.
Subsection (b) does not require that the defendant be admitted to bail on appeal. That subject is covered in § 40-2406.
Subsection (c) gives the court broad power and discretion in staying the execution of a sentence to pay a fine.
Subsection (d) provides that in cases where the defendant has been placed on probation, his appeal and the stay of execution of that order does not require his commitment to custody. The same factors are relevant to the recognizance decision as apply to the probation decision. It is therefore proper that the defendant be released on recognizance pending his appeal.

40-2406. Release on recognizance or bail pending appeal.—(a) On motion of defendant after conviction in any noncapital felony case, where an appeal has been prayed and granted to the appropriate appellate court but before it is perfected, the trial judge may allow bail or recognizance release pending appeal.

(b) On motion of the defendant after conviction in any misdemeanor case where an appeal has been prayed and granted to the appropriate appellate court but before it is perfected, the trial judge shall allow release on bail or recognizance pending appeal.

(c) A trial judge, in denying bail or recognizance release under the provisions of subsection (a), shall, as a part of his order denying bail or recognizance release, set forth the matters and facts on the basis of which he declined to allow bail or recognizance release pending appeal.

(d) The trial judge's actions shall be reviewable by the proper appellate court on writ of certiorari upon the record of conviction, the motion of defendant, proof adduced on hearing and the order granting or denying the motion.

(e) If the appellate court shall find that the trial judge abused his discretion in denying bail or recognizance release, the appellate court

or any judge or justice thereof may release the convicted person on bail or recognizance pending the disposition of his appeal by the appellate court or may alter the amount of bail or the conditions of recognizance.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsecs. (a), (c), (d): T. C. A. § 40-3406.
Subsec. (b): T. C. A. § 40-3408.
Subsec. (e): T. C. A. § 40-3407.

Cross-References:

Authority to release defendants, see § 40-1202.
Conditions on release, see § 40-1204.
Continuation of bail or conditions of release, see § 40-1208.

Comment:

This is a combination of the three current statutes noted above. T. C. A. §§ 40-3406, 40-3407 currently apply only in felony cases. T. C. A. § 40-3408 provides that, in the appeal of a misdemeanor case, the judge must admit the defendant to bail.

40-2407. Motion for new trial.—(a) A motion for new trial may be made orally in open court, but in all cases it must be reduced to writing and filed within thirty (30) days after sentencing.

(b) If trial was by the court without a jury and the defendant waives his right to a jury on retrial, the court on motion of a defendant for a new trial may vacate the judgment, if entered, take additional testimony and direct the entry of a new judgment.

(c) A motion for new trial which is denied is not a waiver of the right to make a motion in arrest of judgment.

(d) If a motion for a new trial is based upon affidavits, they shall be filed and served with the motion unless otherwise authorized by the court. The opposing party shall have ten (10) days after such service within which to file and serve opposing affidavits, which period may be extended for an additional period not exceeding twenty (20) days by the court for good cause shown or by stipulation of the parties in writing. The court may permit reply affidavits.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. § 27-201.
Fed. R. Cr. P. § 33.

Cross-References:

Motion in arrest of judgment, see § 40-2409.
Right to jury trial, see § 40-1901.
Sentencing, see § 40-2301.

Comment:

Under current procedure the motion for a new trial is usually made orally immediately after the return of the verdict and later reduced to writing and filed within 30 days of either verdict or sentencing. There has been some confusion concerning from what point the 30 days is measured. T. C. A. § 27-201 states that it is within 30 days of verdict or judgment. The case of Shettles v. State, 209 Tenn. 157, 352 S. W. (2d) 1 (1961), says that such a motion may be made after verdict and before judgment, while the case of Neely v. State, 210 Tenn. 52, 356 S. W. (2d) 401 (1962), gives the movant the option of making it within 30 days of either verdict or judgment.

This section makes it clear that the time is measured from sentencing. Since under § 40-2301 the judge may delay sentencing to inspect a presentence report, it would be possible for 30 days to elapse from verdict without a sentence being imposed. The sentence imposed can be an important factor in deciding whether to move for new trial.

Subsection (b) is taken from the federal rule and provides, in effect, for a streamlined new trial where the first trial was by the judge alone. The provision requiring another waiver of jury trial to allow retrial by the judge alone is not a part of the federal rule but is probably required in Tennessee by Tenn. Const., Art. I, § 9 and the case of Worthington v. Nashville, C. & St. L. Ry., 114 Tenn. 177, 86 S. W. 307 (1905) (right to jury trial applies to retrial).

Subsection (c) is designed to forestall any extension of the implied waiver discussed fully in the comments to § 40-2409.

Subsection (d) governs the time for filing affidavits in support of a motion for new trial and is taken from the civil rules.

40-2408. Automatic appeal and stay of capital murder conviction.—In all cases in which a sentence of death is imposed, an appeal is automatically taken on behalf of the defendant without any action by the defendant or his counsel. During the pendency of the appeal, the execution of the sentence shall be stayed.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Cal. Penal Code § 1239(b).
Ill. S. Ct. Rule 606 (1970).

Cross-References:

Stay for clemency application, see § 40-2906.
Stay for post-conviction relief, see § 40-3006.

Comment:

This section provides for the automatic appeal of death sentences without any action by the defendant. This section will permit a rapid disposition of the appeal and limit some future collateral attacks. Section 40-2405 automatically stays execution of the sentence and § 40-2506 requires the reviewing court, if the conviction is affirmed, to set the date of execution.

40-2409. Motion in arrest of judgment.—(a) The court, on motion of a defendant, shall arrest judgment if the charge does not state an offense or if the court was without jurisdiction of the offense charged.

(b) The motion in arrest of judgment may be made orally in open court, but in all cases it must be reduced to writing and filed within thirty (30) days after sentencing.

(c) A motion in arrest of judgment which is denied is not a waiver of the right to make a motion for new trial.

COMMENTS OF LAW REVISION COMMISSION

Cross-References:

Jurisdiction of courts, see ch. 2.
Motion for new trial, see § 40-2407.
Territorial jurisdiction, see T. C. A. § 39-104, as amended.

Comment:

This section governs a seldom used motion which is available under the present Tennessee procedure. Under current procedure the motion may be used to raise any material defect on the face of the record.

Section 40-2409 limits the use of this motion to two broad grounds. These grounds, failure to charge an offense and lack of jurisdiction, are unwaivable defenses and could also be the subject of a pretrial motion to dismiss. Any other material defects would presumably be raised by a motion for new trial. A motion for new trial should not be granted on the two grounds mentioned here since there could be no retrial on an indictment which did not charge an offense or where there was no jurisdiction.

Subsection (a) is taken from the federal rule. It does not alter the common-law requirement that the defects complained of must appear on the face of the record. See United States v. Zisblatt, 172 Fed. (2d) 740 (2d Cir. 1949).

The proper time to make such a motion is not very clear in Tennessee. It is generally thought that in order to "arrest" a judgment the motion should be made before sentence. See 24 C. J. S., Criminal Law § 1547 (1955). However, under § 40-1902 (bifurcated trial for felonies), sentencing is rendered quickly after the verdict and there would be very little time to raise this motion. Thus this

section sets the same time limits as provided for a motion for new trial.

Subsection (c), as well as subsection (c) in § 40-2407, is designed to change the present law. According to present law, a motion in arrest of judgment waives a motion for new trial. See Freeman v. Illinois C. Ry. Co., 107 Tenn. 340, 64 S. W. 1 (1901); Snapp v. Moore, 2 Tenn. 236 (1814). Thus the attorney who thinks the indictment is insufficient and makes his motion in arrest of judgment before his motion for new trial waives the right to make the latter motion. The theory is that the two motions are inconsistent. A motion for new trial alleges errors in the trial and requests a retrial on the charge. A motion in arrest of judgment alleges that the prosecution itself was defective and admits the correctness of the verdict. In line with the trend toward permitting alternative pleading, it is proper to allow a motion for new trial after a motion in arrest of judgment is denied.

40-2410. Disposition of appeals.—(a) In reviewing a judgment of guilt and sentence, the appellate court may:

(1) reverse and enter a judgment of acquittal, affirm, or modify the judgment or order from which the appeal is taken; or

(2) set aside, affirm or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken; or

(3) reduce the offense of which appellant was convicted to a lesser included offense; or

(4) reduce the punishment imposed by the trial court; or

(5) reverse and remand the sentence for a new sentencing hearing; or

(6) reverse and remand for a new trial.

(b) In reviewing the legality and appropriateness of a sentence, the appellate court shall consider the procedure by which the sentence was imposed, the sufficiency and accuracy of the evidence on which it was based, and the general principles of sentencing set out in § 39-806, as amended.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Subsec. (a): ABA Sentence Review Standards § 3.3.
Ill. S.Ct. Rule 6.5 (1970).
Subsec. (b): Tex. C. C. P. Prop. Rev. Art. 44.25(a).

Cross-References:

General principles in sentencing, see T. C. A. § 39-806, as amended.
Judgment, see § 40-2409.
Lessor included offense, see § 40-2203.
Sentencing alternatives, see T. C. A. § 39-805, as amended.
Sentencing hearing, see § 40-2301.

Comment:

Subdivisions (1)-(3) and (6) are the present Tennessee law relating to the powers of the Court of Appeals. Subdivision (4) grants to the Court of Appeals the broad power to reduce the sentence imposed at trial. It is anticipated that appellate review of sentences will reduce the number of regular appeals, retrials and delays which plague the existing criminal system by granting the Court of Appeals the power to do complete justice when the case is before it.

One benefit of authorizing sentence review lies in the power to reverse the sentence only: the verdict of guilt remains valid and the Court of Criminal Appeals under subsections (4) and (5) may either remand for a new sentencing hearing and resentencing by the trial court or substitute a more appropriate sentence. This appellate review of sentences will allow a reduction in the disparity of sentences presently existing in Tennessee, and will set standards to guide the trial courts in imposing sentences.

In at least one respect, appellate review of sentences is available now. Many present appeals—some have estimated as many as half—are taken because the defendant is dissatisfied with his sentence. It is not difficult for skillful counsel to find scores of technical errors in the most carefully conducted trial. The temptation to the appellate court to seize on such errors for the reason that justice was denied by too severe a sentence has in fact—by the admission of many experienced appellate judges—induced numerous reversals. Overt appellate review should thus serve to focus such contests on what is really at stake, to the benefit both of future sentences and of the law of harmless error. It can also avoid an unnecessary retrial where only the sentence is defective.

The most apparent benefit of sentence review is that it will provide our system of criminal justice with a means by which the grossly excessive sentence can be corrected. Sentence review will also force the sentencing decision much more into the open, and thereby expose for correction many of the mistakes that need not be made again. It will result in both sentencing and reviewing courts' thinking in terms of justifying individual sentences. Articulation of the reasons for a sentence should both improve each sentence and contribute to the development of a rational policy to serve as a basis for future sentences.

In addition, defendants who have an opportunity to air their grievances are much more likely to approach rehabilitation with a positive attitude than defendants who are convinced that one man did them wrong and are told they can do nothing about it.

CHAPTER 25

EXECUTION OF JUDGMENT

40-2501. Computation of term.—(a) The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary or jail for service of such sentence. If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

(b) Credit toward service of the maximum term and minimum term of a sentence to imprisonment shall be given by the department of correction for all time spent in custody as a result of the offense for which the sentence was imposed, including time spent in custody pending appeal. All officers having custody of the defendant, shall, prior to their surrender of the defendant, furnish a certificate, to be annexed to the defendant's official record, stating all time spent in custody prior to their release of him.

(c) No sentence shall prescribe any other method of computing the term.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

T. C. A. §§ 40-3101—40-3102.
Fed. 18 U. S. C. 3568.
Fed. Prop. Pen. Code § 3207.

Cross-References:

Stay of execution of sentence, see § 40-2405.
Suspension of execution for clemency application, see § 40-2906.

Suspension of sentence, see ch. 27.
Transportation of prisoners to penitentiary, see § 40-2504.

Comment:

This section is substantially a combination of the present Tennessee statutes. The wording is taken from the federal rules, with minor changes.

Subsection (a) is a compilation of present T. C. A. § 40-3101 and the first paragraph of § 40-3102. In the event execution of judgment is stayed pending appeal, or otherwise, the effective date of sentence is to be computed according to this section. Present Tennessee case law interprets these credits as being mandatory, and this is to be continued. Stubbs v. State, 216 Tenn. 567, 393 S. W. (2d) 150 (1965). Credit for detention time is to be given for service in any place of detention, including state, federal, and local jails while awaiting transportation.

Deduction of such credits from both maximum and minimum sentences is required by subsection (b). Present Tennessee law requires a credit only from the maximum term. Stubbs v. State, 216 Tenn. 567, 393 S. W. (2d) 150 (1965).

Detention time credit is applicable to all detention for the offenses for which sentence was imposed, whether in a state, local, or federal facility. When a judgment of conviction is vacated and a new sentence is thereafter imposed upon the defendant for the same offense; the period of detention and imprisonment previously served shall be deducted from the maximum and minimum term of the new sentence.

These credits shall be given in both felony and misdemeanor cases, as is provided by the present statute. If the defendant is in jail pending appeal, it will only be so because it is necessary to prepare his appeal and otherwise he will be in the designated place of confinement, unless released on bail or recognizance. This mandatory credit is to include time spent in jail pending arraignment and trial, revising present Tennessee law which grants such credit for detention time pending appeal at the discretion of the Supreme Court. This modification of the law to make such credits mandatory, is simpler and more equitable and will avoid time-consuming petitions to the Supreme Court.

The provisions for a certificate stating time of confinement is to ensure that adequate records of all detentions are maintained. In the interest of uniformity, all detention credits, including those arising prior to sentencing, are to be deducted from the defendant's sentence by the department of correction.

40-2502. Sentencing court's report. — (a) The sentencing court shall make, and transmit, to the department of correction, a short report on each defendant sentenced to the penitentiary during the term in which he is sentenced.

(b) This report shall contain information concerning: the circumstances of the offense committed; any known aggravating or extenuating factors; the character of the inmate during the proceedings; any knowledge of prior felony convictions; and additional information thought necessary by the court or requested by the board of pardons and paroles.

(c) The board of pardons and paroles shall file and preserve such reports.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3116.

Cross-References:
Parole board, see ch. 29.
Presentence report, see § 40-2964.
Sentencing hearing, see § 40-2301.

Comment:

This is a restatement of the present law, with the exception that the recipient of these reports is to be the board of pardons and paroles. The board of pardons and paroles may request such additional information as it deems necessary, either from the individual court, or as a matter of course from all courts. The sentencing hearing conducted pursuant to § 40-2501 will provide most of the information.

40-2503. Notice to institutions.—Within five (5) days of the final disposition of a case, or the adjournment of any court, the clerk of the court shall notify the officials of any institution to which prisoners have been sentenced of the number of inmates sentenced to each institution.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3107.

Comment:

Present law is retained. The section is expanded to include a notice to the sheriff and all institutional officials who will have custody.

40-2504. Transportation of prisoners to penitentiary. — (a) The department of correction shall transport all prisoners to the penitentiary, or one of the branch prisons, within five (5) days of the receipt of the sentencing notice. The court may order immediate removal of prisoners, at cost to the state, where the county jail is insufficient or safekeeping of the prisoner requires such removal.

(b) The sheriff shall remove inmates not timely removed by the department of correction as soon as practicable. The sheriff shall execute judgment of imprisonment, as soon as practicable, where the defendant is or comes into custody of the sheriff after the rendition of judgment.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-3103—40-3104, 40-3107—40-3110.

Cross-References:
Costs to defendants, see § 40-3409.
Judgment, see § 40-2303.
Sentencing notice, see § 40-2503.
Stay of execution of sentence, see § 40-2405.

Comment:

This is the present law.

40-2505. Transportation guards.—(a) If the number of persons convicted requires additional guards, the criminal courts shall make an order specifying a sufficient number of guards for removal of the prisoners to the penitentiary in the event the department of correction fails to remove them in the manner provided by law.

(b) The sheriff transporting a prisoner may summon additional guards in the event such guards are necessary to ensure the safe conduct of the prisoner. The additional guards shall be compensated as other guards on the oath of the sheriff and satisfaction of the officer making the payment that such guards were necessary.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-3111—40-3115.

Cross-References:
Fees and costs, see ch. 34.
Transportation of prisoners to penitentiary, see § 40-2504.

Comment:

This section is a compilation of present statutes. The qualifications of guards and the disqualification of jurors as guards (T. C. A. §§ 40-3114, 40-3115) have been deleted. It is reasonable to expect that the sheriff will select guards of sufficient quality as to make the de-

leted sections unnecessary. The section allowing a warrant to summon help is unnecessary and has been deleted. In the event additional guards are needed, the sheriff of that county can be expected to aid the transporting sheriff.

40-2506. Execution of death sentence.—(a) A sentence of death shall be executed at the state penitentiary at Nashville by the electrocution of the defendant or by such other humane means as may be authorized by the commissioner of correction. The warden of the penitentiary shall maintain all necessary equipment for execution by electrocution.

(b) The warden of the penitentiary shall supervise the execution, which shall be conducted in privacy. The only witnesses who may attend are: the prison physician; the sheriff of the county of arrest; members of the family, if requested by the defendant; a minister or priest, if requested by the defendant; and such attendants as are necessary for the execution.

(c) In pronouncing the sentence of death, the trial court shall not set the date of execution. The final order of the reviewing appellate court shall set the date and time of execution, which shall not be less than sixty (60) nor more than ninety (90) days from the date of the final order, and shall be transmitted to the warden of the state penitentiary at Nashville. A sentence of death shall not be executed until a certified copy of the final order specifying the date of execution has been received by the warden of the state penitentiary at Nashville.

(d) If for any reason the sentence of death is not executed as ordered, the sentence stands in full force and shall be executed on a subsequent date and time to be fixed by the appellate court.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-3121—40-3123, 40-3117—40-3120.

Cross-References:
Commutation of death sentence, see § 40-2903.

Comment:
This is present law. The provisions regarding removal by the sheriff are deleted since they are covered by § 40-2504. A specific date of execution is not to be set by the trial court and the sentence to death is stayed by an appeal as provided for in § 40-2405. Subsection (c) provides for the date of execution to be set by a final order of the reviewing court and a certified copy thereof to be transmitted to the warden of the state penitentiary at Nashville.

CHAPTER 26

COLLECTION OF FINES AND COSTS

40-2601. Confession of judgment.—If a defendant is sentenced to pay a fine, the court shall allow the defendant to confess judgment for the fine and costs, with good sureties.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3202.

Cross-References:
Criteria and methods for imposing fines, see T. C. A. § 39-821, as amended.
Ordinary fine for felony, see T. C. A. § 39-822, as amended.
Ordinary fine for misdemeanor, see T. C. A. § 39-823, as amended.

Comment:
This is present law.

40-2602. Inquiry into defendant's ability to pay fine.—If a defendant fails to pay a fine as directed, the court may, and upon application of defendant shall, inquire and make investigation into the defendant's financial, employment, and family situation, and the reasons for nonpayment of the fine, including whether nonpayment of the fine was contumacious or due to indigency.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3208.

Cross-References:
Methods of payment, see T. C. A. § 39-821, as amended.

Comment:
This is taken from the recent (1972) act, now T. C. A. § 40-3208, as are the next two sections.

40-2603. Remedies for nonpayment of fine.—If the defendant fails to pay a fine the court may, after any inquiry pursuant to § 40-2602:

(1) enter any order it could have rendered under § 39-821, as amended; or

(2) reduce the fine to an amount the defendant is able to pay; or

(3) release the defendant from the obligation to pay the fine; or

(4) direct that the defendant be imprisoned until the fine, or any portion of it remaining unpaid or remaining undischarged after a pro rata credit for any time already served in lieu of payments, is paid.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3208.

Cross-References:
Criteria and methods for imposing fines, see T. C. A. § 39-821, as amended.
Imprisonment for nonpayment, see 40-2604.

Comment:
This section provides for the same options as the recent (1972) act from which it is derived. The Criminal Code section referred to provides for various methods of payment.

40-2604. Imprisonment for nonpayment of fine.—(a) The court shall determine, in light of the defendant's situation, means, and conduct with regard to the nonpayment of the fine, the period of any imprisonment in default of payment of the fine, subject to the following limitations:

(1) in no event shall such period of imprisonment exceed one (1) day for each five dollars ($5.00) of the fine.

(2) if the fine is imposed for a felony, the period may not exceed one (1) year.

(3) if the fine is imposed for a misdemeanor, the period may not exceed one-third (⅓) the maximum of imprisonment authorized for the offense.

(4) if the fine is imposed for a municipal ordinance violation, the period may not exceed ten (10) days.

(5) if a sentence of imprisonment as well as a fine is imposed, the aggregate of the period and the term of the sentence may not exceed the maximum term of imprisonment authorized for the offense.

(b) In no case shall an indigent defendant be imprisoned for inability to pay a fine.

(c) If a court orders a defendant to pay a fine, imposed as a result of a traffic violation, in instalment payments, the court shall revoke the defendant's privilege to operate a motor vehicle in this state upon the failure of the defendant to comply with the order of the court. If the defendant's privilege to operate a motor vehicle has been revoked for the failure to comply with such court order, the privilege shall remain so revoked until the total amount of the fine imposed is paid.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsecs. (a), (c): T. C. A. § 40-3208.
Subsec. (b): T. C. A. § 40-3209.

Cross-References:
Imprisonment for felony, see T. C. A. § 39-831, as amended.
Imprisonment for misdemeanor, see T. C. A. § 39-832, as amended.
Inquiry into ability to pay, see § 40-2602.

Comment:
This is present law.

40-2605. Collection of costs.—Costs shall not be deemed part of the penalty and no defendant shall be imprisoned for nonpayment of costs.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3209.

Comment:
The prohibition of imprisonment for nonpayment of costs is derived from Anderson v. Ellington, 300 Fed. Supp. 789 (E.D. Tenn. 1969) in which contrary provisions of present T. C. A. § 40-3208 were held violative of the 13th amendment. This provision is present law, T. C. A. § 40-3209.

40-2606. Execution of fine and costs.—If the fine is not discharged by payment or service of imprisonment in default of fine, the clerk may issue execution for the fine and costs adjudged, or any portion remaining unpaid, as in civil cases. The district attorney or the county or municipal attorney, as applicable, may, and shall upon order of the court, institute proceedings to collect the fine as a civil judgment in the court of appropriate jurisdiction.

COMMENTS OF LAW REVISION COMMISSION

Comment:
This is present law.

40-2607. Fines accruing to state.—(a) Except as otherwise provided by law, fines, amercements, forfeitures, and recoveries in criminal cases constitute a part of the revenue to the state and shall be paid into the state treasury in the following cases:

(1) all fines and forfeitures which may be recovered in any case in which the defendant is indicted for a felony, whether he is convicted of a felony or of an offense less than felony; and

(2) all fines and forfeitures imposed for a violation of any law regulating the business of banking.

(b) Except as otherwise provided by law, fines and forfeitures in all other state cases go to the county in which the charge was made.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3206.

Comment:
This is present law.

Cross-References:
Payment of fees and costs, see ch. 34.

CHAPTER 27

SUSPENSION OF SENTENCE

40-2701. Authority to suspend sentence.—(a) Except as provided in this section, all trial judges having criminal jurisdiction are authorized and empowered to suspend the execution of sentence for any defendant who has been found guilty of a crime upon a verdict or a plea of guilty and place the defendant on probation, subject to such conditions as the trial judge may deem fit and proper, at the trial term or any term thereafter.

(b) No sentence to death or life imprisonment shall be suspended.

(c) No order of suspension shall take effect for any felony sentence until the defendant shall have served five (5) consecutive days in the county jail either before or after trial.

(d) If a probation and paroles counselor is available to the court, and if the probation and paroles counselor to whom the matter has been referred shall file his report within ten (10) days after such

reference, no defendant shall be placed on probation until a written report of investigation by a probation and parotes counselor shall have been presented to and considered by the court.

(e) The trial judge shall not require that the defendant first either secure or pay the costs accrued in the case as a condition of either suspending the sentence or placing the defendant on probation.

(f) The trial judge may set the duration of the suspension and probation at any period of time equal to the minimum sentence, but not more than the maximum sentence provided for the offense, and may terminate the balance of such suspension at any time not less than the minimum provided for the offense.

(g) For purposes of this section, "trial judge" includes the judge before whom the defendant was tried and any successor of the trial judge holding court in that jurisdiction.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsecs. (a), (f), (g): T. C. A. § 40-2804.
Subsecs. (b), (c): New.
Subsec. (d): T. C. A. § 40-2804.
Subsec. (e): T. C. A. § 40-2805.

Cross-References:
"Defendant" defined, see § 40-2701.
Jurisdiction of courts, see ch. 2.
Probation and parotes counselor, see §§ 40-2705, 40-2804.
Stay of execution of judgment, see § 40-2805.
Suspension of execution for clemency application, see § 40-2806.
Verdict, see ch. 22.

Comment:
This section restates present law's authority in the trial judge to suspend sentence with two significant changes. The first is that the judge is empowered to suspend sentences in all cases except where a death or life imprisonment sentence is imposed. Present T. C. A. § 40-2801 limits the power of suspension to sentences less than ten years. The second change is the addition of a mandatory five-day imprisonment in all felony cases where sentence is suspended. It is felt that some token imprisonment is called for in felony cases even where it is proper that sentence be suspended.
Subsections (d)-(g) retain present law.

40-2702. Entry of judgment, suspension, and probation.—(a) Any trial judge intending to suspend a sentence and place the defendant on probation pursuant to § 40-2703, shall:

(1) first pronounce judgment against the defendant; and

(2) then suspend the execution thereof by placing the defendant upon probation, subject to such conditions as the trial judge shall deem fit and proper; and

(3) except in those counties which have their own probation officers, direct that such defendant be under the supervision of the board of pardons and paroles.

(b) The trial judge shall cause the judgment, the suspension of sentence, the duration of the probation period, the conditions of the probation, and date of termination of probation to be entered on the minutes of his court in the same minute entry, and cause copies of the minute entry to be delivered to the probation and parotes counselor and to the probationer.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2802.

Cross-References:
Board of pardons and paroles, see ch. 28.
Judgment, see § 40-2301.
Probation and parotes counselor, see §§ 40-2705, 40-2804.

Comment:
This is present law.

40-2703. Suspension after service of part of sentence.—(a) Except as provided in subsection (b), no trial judge shall have the authority under the provisions of § 40-2702 to suspend the execution of sentence after the defendant shall have begun to serve his sentence.

(b) If the sentence is to confinement for a period of time less than one (1) year, with or without a fine, the trial judge may at any time after the defendant has actually served not less than thirty (30) days of his sentence, suspend the remainder thereof despite the expiration of the term of court at which such judgment was pronounced or an earlier refusal to suspend the entire sentence.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2803.

Cross-References:
Felonies and misdemeanors distinguished, see T. C. A. § 39-3302, as amended.
Sentencing alternatives, see T. C. A. § 39-3305, as amended.
Stay of execution of judgment, see § 40-2805.

Comment:
Present T. C. A. § 40-2803 includes an additional paragraph prohibiting the suspension of fines after the expiration of the trial term. In light of the liberal provisions in § 40-2308 for remedies for nonpayment of fines, this present statutory provision is both inconsistent and superfluous. In all other respects this is the current statute.

40-2704. Duties of probation and parotes counselor.—(a) The probation and parotes counselor to whom the matter has been referred shall file his report within ten (10) days after such reference.

(b) The report shall inquire into the circumstances of the offense, criminal record, social history, and present condition of the defendant. Whenever the trial judge deems it desirable, such investigation shall include a physical and mental examination of the defendant, the expense of which shall be adjudged as part of the costs.

(c) All persons released on probation shall be subject to the direct supervision of the board of pardons and paroles, and each such probationer must report as directed to his probation and parotes counselor until released from supervision.

(d) No probationer shall be allowed to leave the jurisdiction of his probation and parotes counselor without the permission of the trial judge.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2804.

Cross-References:
Board of pardons and paroles, see § 40-2801.

Out-of-state supervision, see ch. 30, subch. E.
Probation and paroles counselor, see § 40-2864.

40-2705. Appearance bond.—(a) Upon the suspension of any judgment, as provided in this chapter, the trial judge may require the defendant to:

(1) execute an appearance bond in such sum as deemed right and proper by the trial judge; or

(2) execute his personal recognizance bond without sureties in such sum as the trial judge may fix.

(b) Both appearance bonds and recognizance bonds may contain conditions requiring the defendant to appear before the trial judge at such times as the court may direct.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2905.

Comment:
This is present law.

Cross-References:
Pretrial release, see ch. 12.

40-2706. Effect of suspension on right to appeal.—(a) The filing of a petition for suspension of sentence and probation of the defendant or the entry of any order thereon, shall not prevent or be a bar to the defendant, concurrently or thereafter, within the time allowed by law:

(1) filing, arguing, or demanding judgment on any motion for new trial;

(2) taking, filing, and perfecting an appeal from any judgment of conviction, whether or not the petition for suspension is granted.

(b) A defendant may file application for a suspension of sentence or probation upon the return of the final judgment of the Court of Criminal Appeals or the Supreme Court of Tennessee, as the case may be, whichever may be final on or before the expiration of the term to which the procendendo of the final appellate court is returned, and the trial court shall have full power to act thereon.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2901.

Comment:
This is present law.

Cross-References:
Appeal, see ch. 24.
Motion for new trial, see § 40-2407.

40-2707. Authority to revoke suspension.—(a) Within the time set by the court for suspension of sentence, the trial judge pursuant to § 40-2708, may revoke and annul the suspension of sentence.

(b) If suspension is revoked, the original judgment rendered by the trial judge shall be in full force and effect from the date of the revocation and shall be executed accordingly.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2906.

Cross-References:
Procedure to revoke suspension, see § 40-2708.
Time for suspension, see § 40-2701.

40-2708. Procedure to revoke suspension or probation.—(a) If it shall come to the attention of the trial judge that any defendant who has been released upon suspension of sentence has been guilty of any breach of the laws of this state or has violated the conditions of his probation, the trial judge may cause to be issued a warrant for the arrest of the defendant as in other criminal cases.

(b) A warrant issued pursuant to subsection (a) may be executed by a probation and paroles counselor or any peace officer of the county in which the probationer is found.

(c) Any probation and paroles counselor for good cause may arrest a probationer without a warrant.

(d) If any defendant is arrested pursuant to subsection (b) or (c), the trial judge granting the probation and suspension of sentence shall, at the earliest practicable time, inquire into the charges and determine whether or not a violation has occurred. The defendant must be present at such inquiry and shall be entitled to be represented by counsel and shall have the right to introduce testimony in his behalf.

(e) If the trial judge finds that the defendant has violated the conditions of his probation and suspension, the trial judge may, by order duly entered upon the minutes of his court, revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered. Time served on probation shall diminish the maximum term of imprisonment set but shall not diminish the minimum term.

(f) In case of revocation of probation and suspension, the defendant may appeal from an order revoking suspension and probation as in other criminal cases.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2907.

Cross-References:
Arrest warrant, see ch. 7.
Appeal, see ch. 24.
Conditions of probation, see § 40-2702.
Counsel, see §§ 40-3202—40-3204.
Execution of judgment, see ch. 25.
"Peace officer" defined, see § 40-105.
Probation and paroles counselor, see § 40-2864.
Revocation of parole, see §§ 40-2844—40-2847.
"Trial judge" defined, see § 40-2701.

Comment:
This section restates present law with one alteration. Subsection (e) allows credit to be given the defendant for time successfully served on probation. It is important to note, however, that this credit may be applied only to the maximum term imposed, not the minimum term. For a probated sentence of 2-6 years, for example, successful completion of one year's probation does not diminish the parole eligibility date (minimum term), while it does diminish the maximum term so that reinstatement of the sentence results in a 2-5 sentence. It was felt that, while some credit should be given for successful probation time, it should not reduce the minimum term, in which the department of correction has its best opportunity to effect rehabilitation.

40-2709. Costs on revocation proceeding.—(a) If suspension is not revoked, the costs of the proceeding shall be taxed against the county if the defendant be originally convicted of a misdemeanor, or against the state if originally convicted of a felony.

(b) If the trial judge finds that the proceeding for revocation was not brought in good faith, he may tax the costs of the case against the party making the charges against the defendant.

(c) If the suspension is revoked, the costs of the proceeding shall be collected or enforced against the defendant pursuant to chapter 26.

(d) No state and county tax nor attorney-general's fee shall accrue upon any hearings for the purpose of revoking suspension.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2908.

Comment:
This is present law.

Cross-References:
Collection of fines and costs, see ch. 26.
Fees and costs, see ch. 34.

CHAPTER 28

PAROLE

Subchapter A. General Provisions

Subchapter B. Eligibility and Grounds for Parole

Subchapter C. Parole, Conditions, Violations, and Discharge

Subchapter D. The Board of Pardons and Paroles

Subchapter E. Out-of-State Supervision

Subchapter A. General Provisions

40-2801. Legislative policy.—(a) It is the policy of this state that the treatment of persons convicted of crime reflect their individual characteristics, circumstances, needs and potentials. It is preferable that convicted persons remain in the community under such rehabilitative programs as supervised probation. Where public safety and the needs of the individual require a period of institutional treatment, constructive parole supervision programs should be provided upon release of the individual to the community.

(b) Nothing in this chapter shall be construed in any way as intended to modify or abridge the clemency powers of the governor as set forth in chapter 29.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3601.

Comment:
This statement of policy is drawn from present law and, combined with the philosophy of sentencing set out in tit. 39, ch. 8, sets the tone for the correctional aspect of the criminal justice system.

Cross-References:
Executive clemency, see ch. 29.
General principles in sentencing, see T. C. A. § 39-806, as amended.
Sentencing alternatives, see T. C. A. § 39-805, as amended.

40-2802. Application of chapter.—The provisions of this chapter shall apply to every person hereafter sentenced to imprisonment for a felony and to those who may now be serving sentence for a felony.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3610.

Comment:
No changes are made in the sentence, manner of service, or parole eligibility of prisoners sentenced prior to the enactment of this code. Provisions of this chapter, such as §§ 40-2823—40-2825, are retained to apply the present system to current prisoners.

The adoption of a new sentencing structure and rationale, however, as embodied in such innovations as the bifurcated trial (§ 40-1903), instructions on effect of sentences (§ 40-2002), and sentencing principles (T. C. A. § 39-806, as amended), require some alterations in parole eligibility statutes. See comment following § 40-2822.

40-2803. Chapter definitions.—In this chapter, unless the context requires a different definition:

(1) "Board" means the state board of pardons and paroles.

(2) "Parole" means the release of a prisoner to the community by the board of pardons and paroles prior to the expiration of his term subject to conditions imposed by the board and subject to its supervision, or where a court or other authority has issued a warrant against the prisoner and the board in its discretion has released him to answer the warrant of such court or authority.

(3) "Paroles counselor" is a probation and paroles counselor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3601.

Cross-References:
Composition of board, see § 40-2861.
Duties of parole counselor, see § 40-2864.
Eligibility for parole, see subch. B.
Probation, see ch. 27.

Comment:
The change from parole "officer" to parole "counselor" is made to conform the statute to present practice. The new terminology is indicative of the change in parole supervision philosophy from a surveillance approach to a counseling approach.

Subchapter B. Eligibility and Grounds for Parole

40-2821. Indeterminate terms.—(a) Except as provided in subsection (b), every person sentenced to an indeterminate term of imprisonment shall be eligible for parole when he has served a period of time equal to the minimum term imposed by the court less credit for good conduct.

(b) The time of his release shall be discretionary with the board, but no such person shall be released until he shall have served one (1) year.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-3612, 40-3613.

Cross-References:
Credit for good conduct, see T. C. A. §§ 41-333—41-335, 41-358.
Grounds for parole, see § 40-2826.
Ordinary term imprisonment for felony, see T. C. A. § 39-831, as amended.

Comment:
The use of the minimum term less credit for good conduct as the parole eligibility date is the current practice for the indeterminate sentences now authorized by law. The sentencing structure of the new Criminal Code (see T. C. A. tit. 39, ch. 8, as amended) does not provide for the use of determinate terms. Sections 40-2823—40-2825, dealing with parole eligibility for determinate terms, are provided for the prisoners now incarcerated under the old sentencing structure.

Subsection (b) ensures that every felon sentenced to imprisonment will remain in the custody of the department of correction long enough to benefit from its rehabilitative programs.

40-2822. Life sentences.—(a) No person sentenced to imprisonment for life under the provisions of § 39-831, as amended, shall be eligible for parole.

(b) Every person sentenced to imprisonment for life prior to the effective date of this code shall be eligible for parole when he has served for twenty-five (25) years, less credit which would have been allowed for good conduct had his sentence been for twenty-five (25) years.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): New.
Subsec. (b): T. C. A. § 40-3613.

Cross-References:
Executive clemency, see ch. 29.
General principles in sentencing, see T. C. A. § 39-806, as amended.
Instructions on effect of sentence, see § 40-2103.
Ordinary term imprisonment for felony, see T. C. A. § 39-831, as amended.
Sentencing alternatives, see T. C. A. § 39-805, as amended.

Comment:
Under T. C. A. § 39-831, as amended, a conviction of a first degree felony provides the sentencing authority with three types of possible sentences. Two of them, indeterminate terms with either a 3-15 year minimum and life maximum or a 3-10 year minimum and 30 year maximum, have a built-in parole eligibility date. The third alternative is life imprisonment without eligibility for parole. Subsection (a) conforms to that possible sentence.

The possibility of a no-parole life sentence has been provided for those crimes not falling under the extremely limited capital punishment provision, T. C. A. § 39-1105, as amended, which conclusively demonstrates the nonexistence of any potential for rehabilitation. The power of executive clemency is unimpaired, however, as a safeguard against abuse.

Subsection (b) continues present law for those sentenced under it.

40-2823. Determinate terms.—Except as provided in § 40-2824, any person now serving a determinate term of imprisonment for a felony shall be eligible for parole in the same manner provided for those sentenced to an indeterminate term when he has served a period of time equal to one half (½) of the term imposed by the court less credit for good conduct, but in no event less than one (1) year.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3612.

Comment:
See comment following § 40-2825.

Cross-References:
Credit for good conduct, see T. C. A. §§ 41-333—41-335, 41-358.

40-2824. Extended determinate terms.—Any person now serving a determinate sentence of imprisonment for a term of fifty (50) years or more, shall be eligible for parole when he has served a term of not less than thirty (30) full calendar years.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3613.

Comment:
See comment following § 40-2825.

40-2825. Habitual criminal sentences.—Any person convicted and sentenced to imprisonment as an habitual criminal pursuant to § 40-2806, prior to the effective date of the code of criminal procedure, shall be eligible for parole when he has served a term of not less than thirty (30) full calendar years.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3613.

Cross-References:
Extended term for habitual offender, see T. C. A. § 39-842, as amended.

Comment:
Sections 40-2823—40-2825, as well as subsection 40-2822(b) and § 40-2827, are included merely to continue the application of present law to those prisoners sentenced under it. Just as the new sentencing alternatives provided in tit. 39 necessitate the change of parole provisions for the life sentence, the abolition of determinate terms and extended terms makes these sections obsolete after the completion of those terms now being served.

The new habitual offender provision of T. C. A. § 39-842, as amended, provides for an indeterminate term.

40-2826. Grounds for parole.—(a) Except as provided in subsection (c), parole is a privilege, rather than a right, and no prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties while in prison.

(b) Except as provided in subsection (c), the board shall release a prisoner only if the board is of opinion that:

(1) the prisoner is eligible for parole under the provisions of this subchapter; and

(2) there is reasonable probability that the prisoner, if released, will remain at liberty without violating the law; and

(3) that his release is not incompatible with the welfare of society.

(c) Every prisoner shall be released on parole at least six (6) months prior to the expiration of his maximum term of imprisonment less credit for good conduct.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsecs. (a), (b): T. C. A. § 40-3614.
Subsec. (c): New.

Cross-References:
Board proceedings, see subch. D.
Ordinary term of imprisonment for felony, see T. C. A. § 39-831, as amended.
Parole eligibility, see §§ 40-2821—40-2825.

Comment:
The criteria for the grant of parole are those now in use under present T. C. A. § 40-3614.
Subsection (c) is a new provision that assures that no prisoner will be released without the aid and supervision of a paroles counselor. In other words, prisoners will no longer be able to "go out flat" after service of their terms. This mandatory parole provision serves both the interests of the prisoner and of society.

40-2827. Probationary parole.—(a) This section shall apply only to persons sentenced to imprisonment prior to the effective date of the code of criminal procedure.

(b) If the prisoner has been accorded a bona fide offer of employment, the board may release that prisoner on probationary parole:

(1) at any time not more than six (6) months before the date of his eligibility for parole as provided in this subchapter if, after all credit for good conduct, that eligibility shall occur more than eighteen (18) months and less than five (5) years from the date of sentence; or

(2) at any time not more than one (1) year before the date of his eligibility for parole as provided in this subchapter if, after all credit for good conduct, that eligibility shall occur more than five (5) years from the date of sentence.

(c) The prisoner shall at all times during probationary parole be under the supervision of the board which may revoke the probationary parole for any reason satisfactory to it.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3612.

Cross-References:
Credit for good conduct, see T. C. A. §§ 41-333—41-335, 41-358.

Parole eligibility, see §§ 40-2821—40-2825.
Revocation proceedings, see §§ 40-2844—40-2847.

Comment:
The probationary parole provision, originally designed for determinate terms, will be phased out of operation as the sentencing alternatives and procedures of this code become effective. The simplification of sentencing and parole procedures obviates the need for probationary paroles and renders parole eligibility more intelligible to the jury. See § 40-2103 (instructions for sentencing hearing).

Subchapter C. Parole, Conditions, Violations, and Discharge

40-2841. Grant of parole.—(a) If the board determines to release a prisoner on parole pursuant to § 40-2826, the prisoner shall be allowed to go outside the prison walls upon such terms and conditions as the board may prescribe.

(b) If a prisoner is released pursuant to subsection (a), he shall remain in the legal custody of the warden of the prison from which he is paroled until the expiration of the maximum term specified in his sentence or until he is granted a final discharge under § 40-2842.

(c) The action of the board in releasing prisoners shall be reviewable only if not done according to law.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsecs. (a), (b): T. C. A. § 40-3614.
Subsec. (c): T. C. A. § 40-3612.

Cross-References:
Discharge from parole and sentence, see § 40-2842.

Ordinary term imprisonment for felony, see T. C. A. § 39-831, as amended.
Violations of parole, see §§ 40-2844—40-2846.

Comment:
This section consolidates present law.

40-2842. Discharge from parole and sentence.—(a) The board may recommend to the governor that he grant a parolee a final discharge from the sentence under which he was paroled if the board is satisfied that:

(1) the parolee has kept the conditions of his parole in a satisfactory manner; and

(2) he will probably remain at liberty without violating the law; and

(3) that his release is not incompatible with the welfare of society.

(b) If the governor grants a final discharge, the board shall issue to the parolee a certificate of final discharge.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3622.

Cross-References:
Remission of sentence, see § 40-2904.

Rights restored on discharge, see § 40-3305.

Comment:
This is present law.

40-2843. Relief from reports.—The board may relieve a parolee from making further reports and may permit the parolee to leave the state or county, if satisfied that this action is for the best interests of society.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3621.

Comment:
This is present law.

Cross-References:
Out-of-state supervision, see subch. E.

40-2844. Report and arrest of parole violator.—(a) If the paroles counselor having charge of a parolee shall have reasonable cause to believe that such parolee has violated the conditions of his parole in a material respect, the paroles counselor shall report such facts to the director of probation and paroles, who thereupon shall issue a warrant for the retaking of such parolee and his return to the designated state prison. The governor shall have the power to issue requisition for any such parolee if he has departed from the state.

(b) Any paroles counselor, any officer authorized to serve criminal process, or any peace officer to whom such warrant shall be delivered shall execute the warrant by taking the parolee and returning him to the prison designated by the commissioner of correction there to be held to await the action of the board.

(c) The officer, except an officer of the prison or paroles counselor, shall be entitled to receive the same fees therefor as upon the execution of a warrant of arrest at the place where said parolee shall be retaken, and as for transporting a convict from the place of arrest to the prison, in case such officer also transports the parolee to the prison.

(d) The fees of the officer, other than a prison officer or paroles counselor, shall be paid by the agent and warden of the prison out of the moneys standing to the credit of the parolee, if any or sufficient therefor, and otherwise out of the funds of the prison, in which case the expenses shall be charged against and deducted from any moneys which may stand to the credit of the parolee in the future.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3617.
Subsecs. (b), (c): T. C. A. § 40-3618.

Cross-References:
Conditions of parole, see § 40-2841.
Extradition, see ch. 31.
Fees of officers, see ch. 34.
"Peace officer" defined, see § 40-105.

Comment:
This section makes one change from the present statutes from which it is drawn. Paroles counselors are no longer authorized to retake parolees on reason to believe that the parolee "is about to lapse into criminal ways or company."

40-2845. Probable cause hearing.—(a) Upon the arrest of a parolee pursuant to § 40-2844, unless waived in writing, a preliminary hearing shall be conducted to determine whether probable cause exists to believe that the parolee has violated the conditions of his parole in a material respect.

(b) Written notice of the violations alleged and the time, place, and purpose of the hearing shall be given the parolee a reasonable time before the hearing.

(c) The hearing shall be conducted by a hearing officer, to be appointed by the commissioner of correction, who may be any responsible adult other than the paroles counselor responsible for the parolee.

(d) The parolee shall be allowed to:

(1) appear at the hearing and speak in his own behalf; and

(2) produce documents, letters, and individuals relevant to the violations alleged; and

(3) unless the hearing officer determines that the informant would be subject to risk of harm if his identity were disclosed, confront and cross-examine persons who have given adverse information on which parole revocation is to be based upon request.

(e) The hearing officer shall:

(1) informally conduct the hearing; and

(2) make a written summary of the hearing including the documents or evidence in support of parole revocation and responses of the parolee; and

(3) determine on the basis of information before him whether probable cause exists to believe the parolee violated the conditions of his parole in a material respect; and

(4) if probable cause is found, cause the parolee to be returned to the designated state prison, pursuant to the warrant issued under § 40-2844, for final decision on revocation by the board.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
New.

Cross-References:
Felony while on parole, see § 40-2847.
Parole court, see § 40-2846.

Comment:
The provision of a probable cause hearing at the time and place of the allegation of parole violation is required under the due process clause of the fourteenth amendment. Morrissey v. Brewer, 408 U. S. 471 (1972). This section has been drawn from and closely follows the opinion in the *Morrissey* case and an opinion of the attorney general on the issue. Op. Tenn. Att'y Gen. (Oct. 31, 1972).

40-2846. Parole court.—(a) If there is reasonable cause to believe that a parolee has violated his parole, the board at its next meeting may declare the parolee to be delinquent and time owed shall date from such delinquency.

(b) The warden of each prison shall promptly notify the board of the return of a parolee charged with violation of his parole.

(c) The board shall, as soon as practicable, hold a parole court at the prison and consider the charge of the parole violation. The parolee shall be given an opportunity to appear personally before the board and explain the charges made against him.

(d) The board shall, within a reasonable time, act upon the charges and may:

(1) require the parolee to serve out in prison the balance of the maximum term for which he was originally sentenced or any part thereof calculated from the date of delinquency; or

(2) impose such punishment as it deems proper, subject to the provisions of § 40-2847.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3619.

Ordinary term for felony, see T. C. A. § 39-831, as amended.

Cross-References:
Finding of probable cause, see § 40-2845.

Comment:
This procedure is present law.

40-2847. Conviction of felony while on parole.—(a) If any prisoner be convicted in this state of a felony, committed while on parole, he shall serve the remainder of the sentence under which he was paroled, or such part of that sentence as the board may determine, before he commences serving the sentence imposed for the felony committed while on parole.

(b) If any prisoner while on parole shall commit a crime under the laws of another state or country which if committed within this state would be a felony, and if he shall be convicted of the crime, the board shall return such prisoner through the terms of the interstate parole compact and require that he serve the portion remaining of his maximum term of sentence or such part of that sentence as the board may determine.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3620.

Interstate parole compact, see subch. E.

Cross-References:
"Felony" defined, see T. C. A. § 39-107, as amended.

Comment:
This is present law.

Subchapter D. The Board of Pardons and Paroles

40-2861. Creation and composition of board.—(a) There is created a full-time board of pardons and paroles, to be known as the "Tennessee board of pardons and paroles."

(b) The board shall consist of three (3) members who shall be appointed by the governor. Each appointee shall hold office for a term of six (6) years or until his successor shall have been appointed and qualified. In considering persons for appointment, the governor shall take into account the prospective member's training, education, background, and experience in the criminal justice system. The members of the board shall not hold any other public office or employment and shall devote full time to the duties of the board.

(c) Vacancies occurring in an office of a member of the board before the expiration of his term by reason of death, resignation, removal or any other reason shall be filled in the manner aforesaid for the remainder of the term.

(d) The governor may remove a member of the board for good cause, and before removal, he shall furnish to such member a statement in writing of the reasons thereof.

(e) The members of the board, director of probation and paroles, probation and paroles counselors, and employees of the board shall have their compensation fixed and shall be paid as other state officials and state employees are paid. Salaries for said board members shall not exceed the salary of the commissioner of correction nor be less than the salary of the assistant commissioner of correction.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3601.

Comment:
This subchapter is present law.

40-2862. Chairman of the board.—(a) The governor shall appoint a chairman for a term of two (2) years. No person shall be chairman for more than three (3) consecutive terms of two (2) years each. The governor, by designating one of the members of the board to be its chairman, causes this chairman to direct the operation of the board and fulfill the functions established by this chapter.

(b) The chairman shall preside at all meetings of the board, ensure compliance with the procedures and rules of order of the board and perform all other duties and functions of the chairman. The chairman, in performing his duties, shall act in accordance with the policies and procedures established by the board.

(c) The board may designate one of its members to act as chairman during the absence or incapacity of the chairman, and when so acting, the member so designated shall have and perform all the powers and duties of the chairman of the board, but shall not receive any additional compensation for so acting.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3601.

40-2863. Director of probation and paroles.—(a) The commissioner of correction shall, with the approval of the governor, appoint a director of probation and paroles who shall devote his full time and capacities to the duties of this office.

(b) No person shall be eligible for the position of director unless he:

(1) has attained his twenty-fifth (25th) birthday and has not passed his sixtieth (60th) birthday; and

(2) has received a bachelor's degree from an accredited college or university, or substitute one (1) year of successful full-time paid employment in the field of rehabilitation or social work for one (1) year

of the required college education, with a maximum substitution of two (2) years; and

(3) has had four (4) years' experience in the field of rehabilitation or social work; and

(4) is fitted physically, mentally, and morally.

(c) The director shall:

(1) formulate methods of investigation and supervision in the work of the division of probation and paroles and develop various processes in the technique in the casework of the official staff of the division, including interviewing, consultation of records, analysis of information, diagnosis, plan of treatment, correlation of efforts by individuals and agencies, and methods of influencing human behavior; and

(2) prepare and issue rules and regulations for the guidance of the staff and the conduct of its work in the manner prescribed by § 4-501, et seq. and supervise the work of the staff.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3605.

40-2864. Probation and paroles counselors.—(a) The commissioner of correction, subject to the approval of the governor, shall appoint probation and paroles counselors to be placed in counties embraced within districts or such other places as may be from time to time designated by the board. The counselors shall devote their full time and capacities to the duties of their office.

(b) No person shall be eligible for the position of probation and paroles counselor unless he:

(1) has attained his twenty-fifth (25th) birthday and has not passed his sixty-fifth (65th) birthday or has attained his twenty-first (21st) birthday and has a bachelor's degree from an accredited college or university; and

(2) has had two (2) years of college or four (4) years' experience in the field of paroles and probation work.

(c) The duties of the probation and paroles counselors shall be:

(1) to supervise and investigate the conduct, behavior, and progress of parolees in their several districts and of such parolees as may be assigned them for supervision; and

(2) to make to the director a report of such investigation; and

(3) to perform such other duties and functions as the regulations of the board may direct; and

(4) to supervise and investigate the conduct and behavior of persons placed on probation pursuant to § 40-2702 or title 39, chapter 8, as amended; and

(5) to prepare reports pursuant to §§ 40-2301 and 40-2701 as the courts of their districts shall direct.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3606.
Subsec. (b): T. C. A. § 40-3607.
Subsec. (c): T. C. A. § 40-3611.

40-2865. Executive secretary.—(a) The board shall appoint an executive secretary for the board and such clerical staff as are necessary.

(b) The duties of the executive secretary shall be:

(1) to schedule parole hearings for each correctional institution; and

(2) to compile parole eligibility lists for the board; and

(3) to plan and arrange with cooperation of the director of probation and paroles for the preparation, collection and compilation of all information which members of the board require for all hearings conducted by the board, including hearings involving paroles, parole revocations, commutations, respites and pardons; and

(4) to assist the board and director in the formulation, development and implementation of procedures and policies; and

(5) to prepare the necessary forms and keep records important to the decisions of the board; and

(6) to conduct conferences and handle correspondence with attorneys, relatives and other interested persons who wish to be heard concerning the parole or parole revocation of any inmate; and

(7) to recruit and supervise all employees of the board; and

(8) to develop and maintain communication and cooperation with the department of correction and the board.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3601.

40-2866. Duties, powers and functions of the board.—(a) The board shall adopt an official seal by which its acts and proceedings shall be authenticated and of which the court and other officials concerned with action of the board shall take judicial notice. The certificate of the chairman of the board, under the seal of the board and attested by the executive secretary, shall be accepted in evidence in any judicial proceedings in any court of this state as adequate and sufficient proof of the acts and proceedings of the board therein certified to.

(b) Subject to the provisions of this chapter, the board shall promulgate rules and regulations to be used in its operation. The rules and regulations shall be filed with the secretary of state, in accordance with § 4-502.

(c) A majority of the board shall constitute a quorum for transacting business and, except as otherwise provided in this chapter, a majority vote of those present at any meeting shall be sufficient for any official action taken by the board. No person shall be paroled or discharged from parole, nor shall the parole of any person be revoked, except by a majority vote of the entire membership of the board.

(d) For the purpose of any investigation made by it or any member thereof in the performance of its duties, the board shall have the power to issue subpoenas and compel the attendance of witnesses, the production of books, papers and other documents pertaining to the subject of its inquiry. The board or any member thereof may administer oaths and take the testimony of persons under oath.

(e) Subject to other provisions of law, the board shall:

(1) determine whether, when, and under what conditions prisoners serving felony sentences in the state may be released on parole; and

(2) determine whether violation of parole conditions exists in specific cases and decide the action to be taken in such cases; and

(3) personally study the prisoners confined in the prisons of the state under sentences, so as to determine their ultimate fitness to be paroled.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsecs. (a)-(c): T. C. A. § 40-3601.
Subsec. (d): T. C. A. § 40-3603.
Subsec. (e): T. C. A. § 40-3615.

40-2867. Records of parolees.—(a) The board shall cause to be kept at its office complete social, physical, mental, psychiatric, and criminal records of every prisoner released under its supervision. The records shall contain the aliases and photographs of each such prisoner, and the other information referred to herein, as well as all reports of paroles counselors with relation to the prisoner.

(b) The records shall be filed in the central office of the division of parole and shall be organized in accordance with the most modern methods of filing and indexing so there will always be immediately available complete information about each prisoner released on parole.

(c) The board may make rules, as it deems proper, as to the privacy of such records and their use by others than the board and its staff.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3616.

40-2868. Recommendations and reports to the governor.—(a) The board shall, when requested by the governor, collect the records, make investigations and report to the governor the facts, circumstances, criminal records, the social, physical, mental, and psychiatric conditions and histories of prisoners under consideration by the governor for pardon or commutation of sentence.

(b) The board shall notify the district attorney and trial judge, in whose court the case was tried, of the hearing of applications for executive clemency. Any report received from the trial judge or attorney-general will be made part of the file of the applicant.

(c) The board shall make such reports concerning the records, organization and work of the board as may be from time to time requested by the governor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3603.
Subsec. (b): T. C. A. § 40-3623.
Subsec. (c): T. C. A. § 40-3604.

Cross-References:
Recommendation for pardon, see § 40-2904.

40-2869. Meetings of the board.—(a) The principal office of the board shall be at Nashville.

(b) The board shall meet at each of the institutions under its jurisdiction at such times as may be necessary for a full study of the cases of all prisoners eligible for release on parole, and for determining when and under what conditions and to whom such parole may be granted.

(c) The board may prescribe such times and places of meeting as the business of the board may require.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3602.

40-2870. Cooperation with the board.—The warden and all officers and employees of each prison and of the department of correction and all other public officials shall at all times cooperate with the board and shall furnish to the board and its employees such information as may be necessary to enable it to perform its functions, and such wardens and other employees shall at all times give the members of the board and its employees free access to all prisoners confined in the prisons of the state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3624.

Subchapter E. Out-of-State Supervision

40-2881. Authorization and text of agreement.—The governor of this state is authorized and directed to execute a compact on behalf of the state of Tennessee with any of the United States legally joining therein in the form substantially as follows: A compact entered into by and among the contracting states, signatories hereto, with the consent of the congress of the United States of America, granted by an act entitled "An act granting the consent of the congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state"), to permit any person convicted of an offense

within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state"), while on probation or parole, if (a) such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there; (b) though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one (1) year prior to his coming to the sending state and has not resided within the sending state more than six (6) continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That the duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For the purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state. If at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state, until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

(7) That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3626.

Comment:
This is the Interstate Compact for the Supervision of Parolees and Probationers.

40-2882. Procedure on violation report for interstate paroles.—(a) Where supervision of a parolee or probationer is being administered pursuant to the interstate compact for the supervision of parolees and probationers, the appropriate judicial or administrative authorities in this state shall notify the compact administrator of the sending state whenever, in their view, consideration should be given to retaking or reincarceration for a parole or probation violation.

(b) Prior to the giving of any such notification, a hearing shall be held in accordance with § 40-2845, unless such hearing is waived by the parolee or probationer. Any hearing pursuant to this section may be before the administrator of the interstate compact for the supervision of parolees and probationers, a deputy of such administrator, or any other person authorized pursuant to the laws of this state to hear cases of alleged parole or probation violation.

(c) The appropriate officer or officers of this state shall as soon as practicable, following termination of any such hearing, report to the sending state, furnish a copy of the hearing record, and make recommendations regarding the disposition to be made of the parolee or probationer by the sending state.

(d) Pending any proceeding pursuant to this section, the appropriate officers of this state may take custody of and detain the parolee or probationer involved for a period not to exceed fifteen (15) days prior to the hearing and, if it appears to the hearing officer or officers that retaking or reincarceration is likely to follow, for such reasonable period after the hearing or waiver as may be necessary to arrange for the retaking or reincarceration.

(e) In any case of alleged parole or probation violation by a person being supervised in another state pursuant to § 40-2881, any appropriate judicial or administrative officer or agency in another state is authorized to hold a hearing on the alleged violation. Upon receipt of the record of a parole or probation violation hearing held in another state pursuant to a statute substantially similar to this section, such record shall have the same standing and effect as though the proceeding of which it is a record was had before the appropriate officer in this

state, and any recommendations contained in or accompanying the record shall be fully considered by the appropriate officer of this state in making disposition of the matter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Interstate Parole and Probation Hearings Act (1972).

Comment:
This is taken from legislation suggested by the Parole and Probation Compact Administrators' Association to bring the Interstate Compact into compliance with the *Morrissey* decision discussed in the comment to § 40-2845.

40-2883. Deputization of agents.—(a) The governor of this state is authorized and empowered to deputize any person regularly employed by another state to act as an officer and agent of this state in effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this state.

(b) Any deputization pursuant to subsection (a) shall be in writing and any person thus authorized to act as an agent of this state shall carry formal evidence of his deputization and shall produce the same upon demand.

(c) In any matter relating to the return of such person, any agent so deputized shall have all the powers of a peace officer of this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3627.
Subsec. (b): T. C. A. § 40-3628.
Subsec. (c): T. C. A. § 40-3627.

40-2884. Contracts for costs.—The governor of this state is authorized to enter into contracts with the governors of any other states for the purpose of sharing an equitable portion of the costs of effecting the return of any person who has violated the terms and conditions of parole or probation as granted by this state. Any such contract shall be subject to available appropriations and shall so state on its face.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3629.

Comment:
This is present law.

CHAPTER 29

EXECUTIVE CLEMENCY

40-2901. Powers of the governor.—(a) The governor has power to grant reprieves, commutations, and pardons, in all criminal cases after conviction, except impeachment, subject to the provisions of this chapter.

(b) This chapter shall be liberally construed, and nothing in the chapter shall be construed as seeking to impair the pardoning power of the governor or the duties of the commissioner of correction in regard to the paroling of prisoners not inconsistent with the spirit of the chapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3501.
Subsec. (b): T. C. A. § 40-3018.

Cross-References:
Parole, see ch. 28.

Comment:
This section combines two present statutes to state the policy of the chapter and delineate the powers of the executive.

40-2902. Pardon.—(a) The governor may grant pardons upon such conditions and with such restrictions and limitations as he may deem proper and may issue his warrant to all proper officers to carry into effect any conditional pardon, which warrant should be returned by the officer after execution with his indorsement of his action to the secretary of state, to be by him filed with the other papers.

(b) The governor in his discretion may grant a pardon to any person who has been illegally convicted or who has served all or any portion of a prison sentence for a crime of which it is determined the convicted person was not guilty.

(c) The granting of a pardon restores all rights of citizenship as a matter of law.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. §§ 40-3502, 40-3503.
Subsec. (b): T. C. A. § 40-3502.
Subsec. (c): T. C. A. § 40-3508.

Cross-References:
Restoration of rights, see ch. 33.

Comment:
This section combines several current statutes.

40-2903. Commutation of death sentence.—The governor may commute a sentence of death to life imprisonment in the penitentiary if he is of opinion that the facts and circumstances adduced are not sufficient to warrant a total pardon.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3505.

Cross-References:
Death penalty, see T. C. A. § 39-1105, as amended.
Execution of death sentence, see § 40-2506.

Comment:
Under the United States Supreme Court decision in Furman v. Georgia, 408 U. S. 238 (1972), executive clemency will be the only discretion allowed after the finding of fact that the defendant has committed a capital felony.

40-2904. Remission of imprisonment.—The governor may in his discretion remit a portion of the imprisonment of a convict in the penitentiary, upon the recommendation of the board of pardons and paroles in writing, as prescribed in § 41-331.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3504.

Cross-References:
Board of pardons and paroles, see § 40-2868.

Comment:
This is present law, providing an option for release where parole is not available.

40-2905. Recordation of clemency decisions. — The governor shall cause to be entered in a book kept for that purpose his reasons for granting pardons or commuting punishment, and preserve on file all documents on which he acted, and submit the same to the general assembly when called on.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3507.

Comment:
This is present law.

40-2906. Suspension of execution of sentence for clemency application.—(a) Upon conviction and sentence of a defendant to imprisonment, the trial judge on motion may postpone the execution of the sentence for such time as is necessary to enable the defendant to make application to the governor for a pardon or commutation of punishment.

(b) Upon entry of a plea of guilty to a felony charge, the execution of sentence may be suspended by the trial judge for such time to enable application to be made to the governor for a pardon if it appears that there are circumstances or conditions connected with the crime or the defendant's life and surroundings tending to mitigate his offense, and:

(1) it is the defendant's first offense, and it does not appear likely that he will again engage in criminal conduct if released; and

(2) in the opinion of the trial judge it is not in the public interest that the defendant be imprisoned.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3001.
Subsec. (b): T. C. A. § 40-3002.

Cross-References:
"Felony" defined, see T. C. A. § 39-107, as amended.

Pardon, see § 40-2902.
Parole by commissioner of correction, see § 40-2910.
Plea of guilty, see ch. 13.
Sentencing hearing, see § 40-2301.
Suspension of sentence, see § 40-2701.

Comment:
This section, a restatement of present law, provides the trial judge with a procedure that goes beyond mere suspension of sentence. Under an ordinary suspension, the defendant is placed on probation and avoids imprisonment but still suffers a felony conviction. If under this procedure a pardon is granted, all rights of the defendant will be restored pursuant to § 40-2902.

40-2907. Duties of judge suspending execution of sentence.—(a) Upon the suspension of sentence pursuant to § 40-2906, the trial judge shall:

(1) immediately transmit to the commissioner of correction a copy of the charge, together with his reasons for suspending the sentence and such other recommendations as he may think proper to make in the premises; and

(2) cause to be entered on the minutes of the trial court an order reciting the reasons for the suspension of sentence and providing that the defendant whose sentence has been so suspended shall, from the date of suspension, be subject to be placed under the control of the commissioner of correction, and, when so placed, shall be subject to all laws, rules and regulations pertaining to parolees; and

(3) cause the defendant to be held in custody unless he is released on bond or recognizance to appear at the next term of court.

(b) If the governor should not pardon the defendant and the commissioner not parole him by the first day of the next term of court, the judge shall put into execution the sentence of the court by delivering or causing to be delivered to the proper authorities the defendant for the execution of said sentence.

(c) If the defendant be pardoned or paroled, it shall then be the duty of the court to show by minute entry the facts and discharge of defendant if pardoned or the terms of parole if paroled, and discharge any bond taken for the appearance of the defendant.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a):
Subdiv. (1): T. C. A. § 40-3003.
Subdiv. (2): T. C. A. § 40-3004.
Subdiv. (3): T. C. A. § 40-3005.
Subsec. (b): T. C. A. § 40-3006.
Subsec. (c): T. C. A. §§ 40-3007, 40-3017.

Cross-References:
"Charge" defined, see § 40-105.
Conditions of parole, see § 40-2841.
Control by commissioner, see § 40-2908.
Execution of judgment, see ch. 25.
Pardon, see § 40-2902.
Release on bond or recognizance, see ch. 12.

Comment:
This section consolidates present law.

40-2908. Duties of commissioner of correction.—Upon receipt of the pleadings in the case together with the recommendations of the trial judge as provided in § 40-2906, the commissioner of correction shall, through the state parole counselor, look after the welfare of and have

charge of and keep in communication with the defendant thus on suspension and also keep in communication with his employer, if any.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3008.

Comment:
This is present law.

Cross-References:
Parole and probations counselor, see § 40-2864.

40-2909. Powers of commissioner of correction.—If from the conduct and demeanor of a defendant whose sentence has been suspended under § 40-2906 the commissioner finds that he is reliable and trustworthy and that he will probably remain at liberty without violating the law and his final release is not incompatible with the welfare of society, the commissioner may in his discretion parole the defendant for such period of time as the commissioner deems best, or he may recommend to the governor that he grant the defendant a pardon and final discharge.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3009.

Cross-References:
Final discharge, see § 40-2842.
Pardon, see § 40-2902.
Parole by commissioner, see § 40-2910.
Recommendation for pardon, see § 40-2911.

Comment:
This is present law.

40-2910. Parole by commissioner of correction. — (a) A parole granted by the commissioner of correction shall not extend in length of time beyond the minimum term imposed upon the defendant and shall not affect the power of the governor to pardon the defendant.

(b) The commissioner shall immediately notify the judge of the court where the case aganst the defendant is pending of his action and the reasons for granting the defendant a parole.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3010.
Subsec. (b): T. C. A. § 40-3011.

Cross-References:
Ordinary term imprisonment for felony, see T. C. A. § 39-831, as amended.
Pardon, see § 40-2902.

Comment:
This is a combination of the provisions of two current statutes.

40-2911. Recommendation of pardon by commissioner of correction.—(a) A recommendation by the commissioner of correction to the governor that a defendant be pardoned and finally discharged, together with the papers received from the trial judge, shall be filed with the governor in sufficient time before the next term of court at which the defendant is required to appear to enable the governor to take action thereon.

(b) If the governor acts on such application, he shall communicate his action to the commissioner and to the judge of the court where the case against the defendant is pending

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3015.
Subsec. (b): T. C. A. § 40-3016.

Cross-References:
Final discharge, see § 40-2842.
Pardon, see § 40-2902.
Recommendation for pardon, see § 40-2911.

Comment:
This is present law.

40-2912. Duties of paroles counselor.—It shall be the duty of the state paroles counselor:

(1) to perform all duties imposed upon him by law and by the rules and regulations of the commissioner of correction; and

(2) to keep in communication as far as possible with all defendants who are paroled under this chapter and with their employers.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3013.

Comment:
This is present law.

Cross-References:
Probation and paroles counselor, see § 40-2864.

40-2913. County board of parole.—On the recommendation of the state paroles counselor, the commissioner of correction shall appoint in each county not more than three (3) persons to act as a county board of parole, who shall serve without salary, and whose duty it shall be to keep in touch with all defendants under this chapter in their county and make report to the commissioner.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3014.

Comment:
This is present law.

CHAPTER 30

POST-CONVICTION RELIEF

40-3001. Right of petition and relief.—(a) A prisoner in custody under sentence of a court of this state may petition for post-conviction relief under this chapter at any time after he has exhausted his appellate remedies or his time for appeal in the nature of a writ of error has passed and before the sentence has expired or has been fully satisfied.

(b) Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the Constitution of this state or the Constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3802.
Subsec. (b): T. C. A. § 40-3805.

Cross-References:
Appellate remedies, see ch. 24.
Appeal in nature of writ of error, see § 40-2401; T. C. A. § 27-306.

Comment:
This chapter is the recently passed (1967) law.

40-3002. Filing and contents of petition.—(a) To begin proceedings under this chapter the petitioner shall file a written petition with the clerk of the court where the conviction occurred naming the state of Tennessee as the defendant. No filing fee shall be charged.

(b) The petition shall briefly and clearly state:

(1) petitioner's full name and address;

(2) the indictment number, if known, and the offenses for which the sentence was pronounced;

(3) the name and location of the court which pronounced the sentence;

(4) the date the sentence was pronounced;

(5) the terms of the sentence;

(6) what restraint of liberty is presently being imposed;

(7) who is imposing the present restraint, and when it commenced;

(8) any appeals and all other applications for relief previously filed including the date decided, the court, the grounds asserted and the result;

(9) the names of the lawyers who have represented the petitioner and at what stage of the proceedings;

(10) facts establishing the grounds on which the claim for relief is based, whether they have been previously presented to any court and, if not, why not. If no prior petition under this chapter has been filed, the petition shall set forth each of the individual grounds, if any, required by the rules of the Supreme Court or by any post-conviction petition form provided under this chapter;

(11) whether the petitioner has a lawyer and, if not, whether he has funds to hire a lawyer; and

(12) any other information required by rule of the Supreme Court.

(c) The petition shall have attached affidavits, records or other evidence supporting its allegations or shall state why they are not attached.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3803.
Subsec. (b): T. C. A. § 40-3804.

Cross-References:
Criminal offenses, see T. C. A. tit. 39, as amended.
Grounds for relief, see § 40-3001.
Nonconforming petitions, see § 40-3003.
Sentencing, see § 40-2301.

40-3003. Nonconforming petitions, amendment and withdrawal.—(a) No petition for relief shall be dismissed for failure to follow the prescribed form or procedure until after the judge has given the petitioner reasonable opportunity, with the aid of counsel, to file an amended petition.

(b) A petition for habeas corpus may be treated as a petition under this chapter when the relief and procedure authorized by this chapter appear adequate and appropriate, notwithstanding anything to the contrary in title 23, chapter 18 or any other statute.

(c) The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief. The district attorney shall be allowed a reasonable time to respond to any amendments.

(d) The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, with aid of counsel, to file amendments.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3807.
Subsec. (b): T. C. A. § 40-3808.
Subsecs. (c), (d): T. C. A. § 40-3815.

Cross-References:
Appointment of counsel, see § 40-3204.
Relief under chapter, see § 40-3001.

40-3004. Designation of judge.—(a) The chief justice of the Supreme Court shall designate and assign any chancellor, judge of the criminal court, or circuit court judge to hear and determine any petition for relief under this chapter.

(b) The original trial judge, where available, shall be designated where an issue is raised as to the competency of counsel representing

the petitioner in the original proceeding, and in no other case shall he be designated.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3803.

40-3005. Duties of clerk.—When the clerk of the trial court receives any petition applying for relief under this chapter, he shall forthwith:

(1) make three (3) copies of the petition; and

(2) docket and file the original petition and its attachments; and

(3) mail one (1) copy of the petition to the attorney-general and reporter; and

(4) mail or forward one (1) copy of the petition to the district attorney; and

(5) mail or forward one (1) copy to petitioner's attorney; and

(6) notify the judge.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3806.

40-3006. Judge's action on petition.—(a) If the petition has been competently drafted and all pleadings, files, and records of the case which are before the court conclusively show that the petitioner is entitled to no relief, the court may order the petition dismissed.

(b) In all other cases the court shall grant a hearing as soon as practicable. The trial court shall issue such interlocutory orders, including a stay of execution, as may be required.

(c) If the petitioner is under the death sentence, the judge of any court of record with criminal jurisdiction in the county where the prisoner is confined or the justice of any appellate court may for good cause stay execution pending the filing of the petition with the trial judge and his interlocutory action thereon.

(d) If the judge finds that the petitioner is indigent as defined in § 40-3201, the judge is empowered to issue an order directed to the clerk of any court in Tennessee to furnish to the petitioner or to his counsel, without cost to the petitioner, certified copies of such documents or parts of the record on file in his office as may be required. Counsel and court reporters for indigent petitioners shall be appointed and reimbursed as provided in chapter 32.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsecs. (a)-(c): T. C. A. § 40-3809.
Subsec. (d): T. C. A. §§ 40-3813, 40-3821.

Cross-References:
Appointment of counsel, see § 40-3204.
Contents of petition, see § 40-3002.
Death penalty, see T. C. A. § 39-1105, as amended.
Execution of death penalty, see § 40-2506.
Indigence, see § 40-3201.
Transcripts, see § 40-3223.

40-3007. Scope of hearing.—(a) The scope of the hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined, as defined in this section.

(b) A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.

(c) A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented. There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3811.
Subsecs. (b), (c): T. C. A. § 40-3812.

Cross-References:
Jurisdiction of courts, see ch. 2.
Waiver of indictment and jury trial, see § 40-903.
Waiver of jury trial or sentencing, see § 40-1901.
Waiver of right to counsel, see § 40-3203.

40-3008. Representation of state.—(a) The district attorney shall represent the state and respond by proper pleading on behalf of the state within thirty (30) days after receiving notice of the docketing or within such time as the court orders. If the petition does not include the records or transcripts, or parts of records or transcripts that are material to the questions raised therein, the district attorney is empowered to obtain them at the expense of the state and shall file them with the responsive pleading or within a reasonable time thereafter. The district attorney shall be reimbursed for any expenses including travel incurred in connection with the preparation and trial of any proceeding under this chapter. This expense shall be paid by the state of Tennessee, and shall not be included in the expense allowance now received by the various district attorneys.

(b) It shall be the duty and function of the state attorney-general and his staff to lend whatever assistance may be necessary to the district attorney in the trial and disposition of such cases. In the event an appeal is taken or a delayed appeal in the nature of a writ of error is granted, the state attorney-general and his staff shall represent the state and prepare and file all necessary briefs in the same manner as now performed in connection with criminal appeals.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3814.

Cross-References:
Appeal in nature of writ of error, see § 40-2401; T. C. A. § 27-306.
Appeals, see ch. 24.
Delayed appeal, see § 40-3010.

40-3009. Evidence and testimony at hearing.—(a) All evidentiary hearings shall be recorded.

(b) Evidence may be taken orally or by deposition, or in the discretion of the judge by affidavit. If affidavits are admitted, any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits.

(c) If the petitioner has had no prior evidentiary hearing under this chapter and in other cases where his petition raises substantial questions of fact as to events in which he participated, he shall appear and testify.

(d) If the petitioner is imprisoned, the warden shall arrange for transportation of the petitioner to and from the court upon proper orders issued by the trial judge. The sheriff of the county where the proceeding is pending shall have the authority to receive and transport the petitioner to and from the penitentiary and the court, if the court so orders or if for any reason the warden is unable to transport him. The sheriff shall be entitled to the same costs allowed for the transportation of prisoners as is provided in criminal cases upon the presentation of the account certified by the judge and district attorney.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3816.
Subsec. (b): T. C. A. § 40-3817.
Subsecs. (c), (d): T. C. A. § 40-3810.

Cross-References:
Fees of officers, see ch. 34.
Transcripts, see § 40-3223.

40-3010. Grant of delayed appeal.—(a) When the trial judge conducting a hearing pursuant to this chapter finds that the petitioner was denied his right to an appeal in the nature of a writ of error from his original conviction in violation of the Constitution of this state or the Constitution of the United States and that there is an adequate record of the original trial proceeding available for such review, the judge may:

(1) if a bill of exceptions was filed, grant a delayed appeal in the nature of a writ of error; or

(2) if, in the original proceedings, a motion for a new trial was filed and overruled but no bill of exceptions was filed, authorize the filing of the bill of exceptions in the convicting court and the order authorizing the filing shall be deemed to be the order or action of the court which occasioned the filing of said bill of exceptions as authorized by § 27-111.

(3) if no motion for a new trial was filed in the original proceeding, authorize such motion to be made before the original trial court within thirty (30) days. Such motion shall be disposed of by the original trial court as if the motion had been filed under authority of § 27-111.

(b) Any bill of exceptions filed pursuant to this section may be approved by the judge of the court wherein the petitioner was convicted irrespective of whether such judge presided over the case at the time of the original trial.

(c) An order granting proceedings for a delayed appeal shall be deemed a final judgment for purposes of the review provided by § 40-3013. If either party does appeal, the time limits provided in this section shall be computed from the date the clerk of the trial court receives the order of the appellate court determining the appeal.

(d) The judge of the court which sentenced a prisoner who has sought and obtained relief from that sentence by any procedure in a federal court is likewise empowered to grant the relief provided in this section.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3820.

Cross-References:
Appeal in nature of writ of error, see § 40-2401; T. C. A. § 27-306.
Appeals generally, see ch. 24.
Disposition of appeals, see § 40-2410.
Motion for new trial, see § 40-2407.

40-3011. Finding of court and disposition.—(a) Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground.

(b) If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, the court shall vacate and set aside the judgment or order a delayed appeal as provided in § 40-3010 and shall enter an appropriate order and any supplementary orders that may be necessary and proper.

(c) Where the petitioner has court-appointed counsel, the court may require petitioner's counsel to file a verified statement of dates and times he has consulted with petitioner and this statement shall become part of the record.

(d) Costs shall be taxed as in criminal cases.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3818.

Cross-References:
Appointment of counsel, see §§ 40-3204, 40-3205.
Delayed appeal, see § 40-3010.
Fees and costs, see ch. 34.

40-3012. Release on bail or recognizance.—When a new trial or delayed appeal in the nature of a writ of error is granted, release on bail or recognizance shall be discretionary with the trial judge pending further proceedings. In all other cases the petitioner shall not be entitled to release.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3824.

Cross-References:
Delayed appeal, see § 40-3010.
Release pending appeal, see § 40-2406.

40-3013. Final judgment and appeal.—(a) The order granting or denying relief under the provisions of this chapter shall be deemed a final judgment, and an appeal may be taken to the Court of Criminal Appeals by simple appeal. A motion for a new trial shall not be required for such appeal.

(b) The clerk of the court shall send a copy of the final judgment to the petitioner, the petitioner's counsel of record, any authority imposing restraint on the petitioner, and the attorney-general and reporter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3822.
Subsec. (b): T. C. A. § 40-3819.

40-3014. Rules of practice.—(a) The Supreme Court may promulgate rules of practice and procedure consistent with this chapter, including rules prescribing the form and contents of the petition, the preparation and filing of the record and assignments of error for simple appeal and for delayed appeal in the nature of a writ of error and may make petition forms available for use by petitioners.

(b) If no petition forms are available under subsection (a), the attorney-general and reporter shall draft a post-conviction procedure petition form, including a list of the most common grounds upon which post-conviction procedure relief is granted, in compliance with this chapter and applicable rules promulgated by the Supreme Court and shall make such forms available for use by petitioners at the state prisons until such time as forms may be made available under subsection (a).

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3823.

Cross-References:
Delayed appeal, see § 40-3010.
Filing and contents of petition, see § 40-3002.

CHAPTER 31

EXTRADITION AND DETAINER

SECTION.

Subchapter A. Extradition

SECTION.

Subchapter B. Detainer

Subchapter A. Extradition

40-3101. Subchapter definitions and construction. — In this subchapter, unless the context requires a different definition:

(1) "Executive authority" means the governor, and any person performing the functions of governor in a state other than this state.

(2) "Governor" includes any person performing the functions of governor by authority of the law of this state.

(3) "State," referring to a state other than this state, means any other state or territory organized or unorganized of the United States of America.

(b) This subchapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-1002.
Subsec. (b): T. C. A. § 40-1034.

Comment:
This subchapter is the Uniform Criminal Extradition Act.

40-3102. Arrest warrant for crime in another state.—Whenever any person within the state shall be charged on the oath of any credible person before any judge or other magistrate of this state with the commission of a crime in any other state, and, except in cases arising under § 40-3112, with having fled from justice; or whenever complaint shall have been made before any judge or other magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the ac-

cused has been charged in such state with the commission of the crime, and, except in cases arising under § 40-3112 has fled therefrom and is believed to have been found in this state, the judge or magistrate shall issue a warrant directed to the sheriff of the county in which the oath or complaint is filed directing him to apprehend the person charged, wherever he may be found in this state, and bring him before the same or any other judge, court, or magistrate who may be convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit; and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1003.

40-3103. Arrest without warrant for felony in another state.—The arrest of a person may be lawfully made also by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one (1) year; but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in § 40-3112; and thereafter his answer shall be heard as if he had been arrested on a warrant.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1004.

40-3104. Commitment awaiting extradition.—If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and that he probably committed the crime, and, except in cases arising under § 40-3112, that he has fled from justice, the judge or magistrate must commit him to jail by a warrant reciting the accusation for such a time specified in the warrant as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused be released on bail or recognizance as provided in § 40-3106, or until he shall be legally discharged.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1005.

40-3105. Release on bail or recognizance.—Unless the offense with which the defendant is charged is shown to be an offense punishable

by death or life imprisonment under the laws of the state in which it was committed, the judge or magistrate must release the person arrested on recognizance or on bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, for his appearance before him at a time specified and for his surrender, to be arrested upon the warrant of the governor of this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1006.

40-3106. Failure to appear.—If the defendant is admitted to bail, and fails to appear and surrender himself according to the condition of this bond, the court, by proper order, shall declare the bond forfeited; and recovery may be had thereon in the name of the state as in the case of other bonds or undertakings given by the accused in criminal proceedings within this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1007.

40-3107. Disposition of defendant on expiration of time specified in warrant of commitment pending proceedings before governor.—(a) If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant, bond, undertaking, or recognizance, the judge or magistrate may discharge him or may recommit him to a further day, or may again take bail or recognizance for his appearance and surrender, as provided in § 40-3105; and at the expiration of the second period of commitment, or if he has been bailed and appeared according to the terms of his bond or undertaking, the judge or magistrate may either discharge him, or may require him to enter into a new bond, undertaking, or recognizance to appear and surrender himself at another day.

(b) If any fugitive from justice awaiting extradition to another state files a protest or requests a hearing before the governor of this state, prior to the returning of the fugitive to the other state, no judge or court in this state shall have the authority to order the release or discharge of such fugitive, pending the final disposition of the extradition proceeding before the governor. Likewise, the surety on any bail or appearance bond shall not be released from liability until final disposition of the matter by the governor of this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1008.

40-3108. Governor's duty to cause arrest and extradition of fugitives.—Subject to the qualifications of this subchapter, and the provisions

of the Constitution of the United States controlling, and acts of congress in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1009.

40-3109. Contents of demands from other states.—(a) No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon.

(b) The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy must be authenticated by the executive authority making the demand, which shall be prima facie evidence of its truth.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1010.

40-3110. Investigation by prosecuting officer.—When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney-general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1011.

40-3111. Allegations required in demand for extradition.—(a) A warrant of extradition must not be issued unless the documents presented by the executive authority making the demand show that:

(1) except in cases arising under § 40-3112, the accused was present in the demanding state at the time of the commission of the alleged crime, and thereafter fled from the state; and

(2) the accused is now in this state; and

(3) he is lawfully charged by indictment found or by information filed by a prosecuting officer and supported by affidavit to the facts,

or by affidavit made before a magistrate in that state, with having committed a crime under the laws of that state, or that he has been convicted of a crime in that state and has escaped from confinement or broken his parole.

(b) The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in § 40-3111 with committing an act in this state, or in a third state, intentionally resulting in crime in the state whose executive authority is making the demand; and the provisions of this subchapter not otherwise inconsistent shall apply to such cases, notwithstanding that the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-1012.
Subsec. (b): T. C. A. § 40-1013.

40-3112. Guilt or innocence not at issue.—The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1014.

40-3113. Demand for person held on charge of crime in Tennessee.—If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor at his discretion either may surrender him on the demand of the executive authority of another state, or may hold him until he has been tried and discharged, or convicted and punished in this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1015.

40-3114. Issuance of arrest warrant by governor.—If the governor shall decide that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to a sheriff, marshal, coroner, or other person whom he may think fit to entrust with the execution thereof; and the warrant must substantially recite the facts necessary to the validity of its issue.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1016.

40-3115. Recall or reissuance of warrant.—The governor may recall his warrant of arrest, or may issue another warrant whenever he deems proper.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1017.

40-3116. Authority given by governor's warrant.—(a) Such warrant shall authorize the officer or other person to whom directed to arrest the accused at any place where he may be found within the state and to command the aid of all sheriffs and other peace officers in the execution of the warrant, and to deliver the accused subject to the provisions of this subchapter, to the duly authorized agent of the demanding state.

(b) Whether the prisoner or fugitive so charged be bound to appear before any court, be committed to jail, or discharged, any person authorized by the warrant of the governor of the state may at any time take such person or fugitive into custody, and such apprehension shall forthwith be a discharge of the bond or other proceeding, if there be one pending in any court of this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1018.

40-3117. Officer's authority in execution of warrant.—Every such officer or other person empowered to make the arrest, shall have the same authority in arresting the accused to command assistance therein, as sheriffs and other officers have by law in the execution of any criminal process directed to them, with the like penalties against those who refuse their assistance.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C .A. § 40-1019.

40-3118. Information to person arrested—Habeas corpus.—(a) No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand legal counsel; and if the prisoner, his friends, or counsel shall state that he or they desire to test the legality of the arrest, the prisoner shall be taken forthwith before a judge of a court of

record in this state, who shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus.

(b) If such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the public prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1020.

40-3119. Penalty for unlawful delivery of extradition.—Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant in disobedience to § 40-3118 shall be guilty of a class B misdemeanor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1021.

40-3120. Confinement of prisoner en route.—The officer or person executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may when necessary confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the person having charge of him is ready to proceed on his route, such person being chargeable with the expense of keeping.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1022.

40-3121. Demand for fugitive from Tennessee.—(a) The governor of this state may demand of the executive authority of any other state or territory, any fugitive from justice, or other person charged with treason, felony, or other crime in this state and may appoint an agent to demand and receive such person and return such person to this state.

(b) If it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state or territory, or the District of Columbia, the governor of this state may agree with the executive authority of such other state or territory for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state or territory, or the District of Columbia, upon condition that such person be returned to such other state or territory at the expense of this state as soon as the prosecution in this state is terminated.

(c) The governor of this state may also surrender on demand of the executive authority of any other state or territory, any person in

this state who is charged in the manner provided in this subchapter with having violated the laws of the state or territory whose executive authority is making the demand, even though such person left the demanding state involuntarily.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1023.

40-3122. Warrant to agent to return prisoner.—Whenever the governor of this state shall demand a person charged with crime in this state from the chief executive of any other state, or from the chief justice or an associate justice of the Supreme Court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1024.

40-3123. Application for requisition of person charged with crime.—When the return to this state of a person charged with crime in this state is required, the district attorney-general (for the county in which the offense is committed) shall present to the governor his written application for a requisition for the return of the person charged, certifying that in the opinion of the said district attorney-general the ends of justice require the arrest and return of the accused to this state for trial, and that the proceeding is not instituted to enforce a private claim, in which application shall be stated:

(1) the name of the person so charged;

(2) the crime charged against him, and the approximate time, place and circumstances of its committal; and

(3) the state in which he is believed to be, including the location of the accused therein at the time the application is made.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1025.

40-3124. Application for requisition of person failing to appear.—When the return to this state is required for a person who has been convicted of a felony in this state and has escaped from confinement or broken the terms of his bail, probation or parole, the district attorney-general for the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated:

(1) the name of the person;

(2) the crime of which he was convicted;

(3) the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole; and

(4) the state in which he is believed to be, including the location of the person therein at the time application is made.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1026.

40-3125. Form and contents of application.—(a) The application shall be verified by affidavit, shall be executed in triplicate and shall be accompanied by three (3) certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the magistrate, stating the offense with which the accused is charged. The prosecuting officer may also attach such further affidavits and other documents in triplicate as he shall deem proper to be submitted with such application.

(b) One (1) copy of the application with the action of the governor indicated by indorsement thereof, and one (1) of the certified copies of the indictment or complaint or information and affidavit, shall be filed in the office of the secretary of state to remain of record in that office. The other two (2) copies of all papers shall be forwarded with the governor's requisition.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1027.

40-3126. Expense incurred by demanding agent.—(a) The demanding agent appointed by the governor under § 40-3121 to return any fugitive from justice under this subchapter to this state for trial in the proper county in which the offense is alleged to have been committed or to other proper official or prison, as the case may be, is authorized to employ a guard or escort sufficient to so return such fugitive from justice to this state and contract such other expenses as are absolutely required in performing the duties of the agent.

(b) In no event shall more than one (1) person be named or designated as demanding agent in any extradition proceeding, and only one (1) such person shall be paid expenses in returning any fugitive to this state. However, an alternate agent may be named and designated, who shall be authorized to go and return the fugitive only when the original demanding agent named or designated is unable to make the trip and return the fugitive.

(c) No guard or escort shall be authorized and no expenses for the same shall be paid, unless such a request for a guard or escort shall be

set forth and certified to by the district attorney-general in his written application, for the issuance of requisition papers as now authorized under §§ 40-3123, 40-3124, and 40-3125.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1028.

40-3127. Expenses paid by state.—Except as provided in § 40-3130, all of the costs and expenses incurred in the return of any fugitive from justice to this state under the provisions of this subchapter shall be paid out of the treasury of the state of Tennessee on the certificate of the governor by the warrant of the commissioner of finance and administration. The costs and expenses incurred, subsequent to the issuance of the warrant or requisition by the governor of Tennessee when the demanding agent is unable to return such fugitive from justice to this state under the provisions of this subchapter, after making a bona fide effort to do so, shall be paid in the same manner.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1029.

40-3128. Allowable expenses.—(a) The demanding agent who shall have gone for such person shall receive ten cents (10¢) per mile for each mile necessarily traveled in going and coming, and all other actual and necessary expenses.

(b) The words "all other actual and necessary expenses" mean and include the actual expenses for meals and lodging for both the demanding agent, alternate agent, guard, escort and the fugitive, plus any other actual expense that the demanding agent might be required to pay in the responding state as a prerequisite to the release of custody of the fugitive to the demanding agent. It shall also include such other items and the costs thereof as now allowed or which may be allowed regular employees of the state of Tennessee, under current or subsequent state travel regulations. The mileage travel allowance shall include all miles traveled both inside or outside the state of Tennessee, and no separate travel allowance shall be allowed any guard, escort or fugitive unless said travel is made by public transportation and in that event the actual cost of the public transportation will be reimbursed to said agent, guard or escort. No mileage travel allowance will be paid unless the personal automobile of the agent is actually used in travel.

(c) If any municipality or other governmental agency in the state of Tennessee, may own, lease or contract for the use of an airplane for the purpose of air travel facilities, and the airplane facilities are used in going after and returning any fugitive from another state, the municipality or other governmental agency shall be reimbursed the cost of the plane fare for the demanding agent, alternate agent, guard and fugitive in the amount as may be charged by any regular commercial

airline, plus such other expenses as may be necessary for meals, lodging, and such actual expenses incurred in going to and from the airport.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1030.

40-3129. Statement of expenses.—(a) The demanding agent shall make out an itemized statement of his actual and necessary expenses as to the number of miles traveled, and including the compensation to be paid any guard and swear to the same.

(b) The itemized statement shall be submitted to the governor of this state as a condition precedent to the certificate by the governor directing the payment of the account. Payment to the guard shall be by separate warrant, based on the certificate of the governor.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1031.

40-3130. Expenses paid by county.—(a) When a warrant shall be sworn before any justice of the peace or general sessions judge or any indictment returned by a grand jury, charging any person with a felonious crime and such person shall have absconded beyond the borders of this state, and on authority of the district attorney-general, the county judge, and chairman of the county commissioners of such county in which said crime shall have been committed shall pay to the sheriff or to one officer named by the district attorney-general of such county who shall have gone for such person ten cents (10¢) per mile for each mile necessarily traveled in going and coming, both inside and outside the state of Tennessee and reasonable expenses for meals and lodging.

(b) The person so designated shall be known as the demanding agent, and shall be empowered to contract with another person having been first approved in writing by the authorities who appointed the demanding agent.

(c) Only the demanding agent shall be paid ten cents (10¢) per mile, as herein provided, with only the actual expenses of the guard being paid. When the guard travels with the demanding agent in the personal automobile of the demanding agent, or in any automobile belonging to any political subdivision or agency, no allowance will be granted him for transportation expense; and when commercial transportation is used, then only the actual cost of fare.

(d) The demanding agent shall be reimbursed the actual money expended by him for transportation costs of the fugitive, with no reimbursement being allowed when the fugitive is returned in the personal automobile of the demanding agent, and only actual cost of fare for such fugitive when a commercial carrier is used. The demanding agent shall further be reimbursed reasonable expenses of meals

and lodging for the fugitive, plus any and all costs paid by him, that are imposed by the responding state as a prerequisite to release of custody of the fugitive to the demanding agent.

(e) Upon the sheriff's or named officer's return he shall give to each official herein named an itemized statement supported with receipts for each item of expense, and make a sworn affidavit covering all expenditures, and the receipt of the sheriff or named officer so returning the fugitive charged with a felonious crime shall be a voucher for the amount thereof of such chairman of the board of county commissioners in his settlement with the county. No designation by the chairman of the county court and county judge and chairman of the board of county commissioners shall be necessary to authorize the sheriff or named officer to act and draw pay under this section, and that the chairman of the county court and county judge and chairman of the board of county commissioners shall have no power to designate any person. The officers named by the district attorney-general of such county shall not exceed two (2)—one (1) to be designated as demanding agent and one (1) to be designated as guard—for each fugitive returned under this section.

(f) In this section "reasonable expenses" are determined to be in close cost proximity as allowed state employees in pamphlet, "State of Tennessee—Comprehensive Travel Regulations."

(g) The provisions of this section shall apply only when the case is actually tried by a jury, or the defendant pleads guilty.

(h) All sums paid by any county, or chairman of the county court thereof, to the sheriff or named officer for returning such absconding felon, shall be certified to the clerk of the criminal court of the county and all such sums then to be assessed as part of the costs of the court in the case.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1032.

40-3131. Trial for crimes not specified in requisition.—After a person has been brought back to his state upon extradition proceedings he may be tried in this state for other crimes which he may be charged with having committed here, as well as that specified in the requisition for his extradition.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1033.

40-3132. Nonwaiver by state and waiver by defendant.—(a) Nothing in this subchapter contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings

or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this subchapter which result in, or fail to result in, extradition be deemed a waiver by this state of any rights, privileges or jurisdiction in any way whatsoever.

(b) In the event that the return of a person, imprisoned or held under criminal proceedings pending against him in this state, is requested by another state or territory, by a demand made upon the governor of this state by the executive authority of such other state or territory in the manner provided in this chapter, the governor of this state may, without waiving the rights, power, privileges, or jurisdiction of this state in any way, enter into an agreement with the executive authority of such other state or territory for the extradition of such person to such other state or territory, before the conclusion of such proceedings or his term of sentence in this state, with or without the condition that at a time agreed upon by the governor of this state and the executive authority of such other state or territory, the person returned to such other state or territory shall be returned to this state. This agreement shall provide that the expense of returning such a person to such other state or territory and of returning such a person from such other state or territory to this state, if applicable, shall be paid by such other state or territory.

(c) Any waiver of extradition from this state to another state or territory for the purposes of trial, sentence, or punishment in the other state or territory, made by a person imprisoned or held under criminal proceedings pending against him in this state, shall include a waiver of extradition for the return of such a person to this state from the other state or territory for trial, sentence, or punishment in this state on the charges against him at the time of the execution of this waiver, at any time agreed upon by the governor of this state and executive authority of the other state or territory, at the time of this waiver or any later time.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-1035.

Subchapter B. Detainer

40-3151. Subchapter definition.—In this subchapter, unless the context requires a different definition, "appropriate court" means a court of record with criminal jurisdiction.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3902.

Comment:
This subchapter is the Interstate Compact on Detainers.

40-3152. Enactment and text of agreement.—The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

The contracting states solemnly agree that:

ARTICLE I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

ARTICLE II

As used in this agreement:

(1) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the commonwealth of Puerto Rico.

(2) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he intitiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

(3) "Receiving state" shall mean a state in which trial is to be had on an indictment, information or complaint pursuant to article III or article IV hereof.

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided, that

for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good and honor time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of correction, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of correction, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of

this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided, that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request. There shall be a period of thirty (30) days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good and honor time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. These authorities in the sending state simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceedings made possible by this article, trial shall be commenced within one hundred twenty (120) days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is being given.

(2) a duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of such person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this

agreement; time being served on the sentence shall continue to run but good and honor time shall be earned by the prisoner only if and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner as in the case of other criminal prosecution costs. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of such time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

COMMENTS OF LAW REVISION COMMISSION

Derivation: Tenn. Pub. Acts 1972, ch. 865.
T. C. A. § 40-3901.

40-3153. Enforcement of agreement.—All courts, departments, agencies, officers and employees of this state and its political subdivisions shall enforce the agreement on detainers and cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3903.

40-3154. Escape from temporary custody.—Any prisoner released to temporary custody under the provisions of the agreement on detainers from a place of imprisonment in Tennessee who shall escape or attempt to escape from such temporary custody, whether within or without the borders of this state, shall be dealt with in the same manner as if the escape or attempt to escape were from the original place of imprisonment.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3904.

40-3155. Surrender of prisoner.—The warden or other official in charge of a penal or correctional institution in this state shall give over the person of any inmate thereof whenever so required by the operation of the agreement on detainer.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3905.

40-3156. Habitual offender treatment not required.—Nothing in this subchapter or in the agreement on detainers shall be construed to require the application of § 39-842, as amended, to any person on account of any conviction had in a proceeding brought to final disposition by reason of the use of the agreement on detainer.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3906.

40-3157. Central administrator and information agent.—The governor is empowered to designate the officer who will serve as central administrator of and information agent for the agreement on detainers, pursuant to the provisions of article VII of § 40-3152.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3907.

40-3158. Distribution of copies of enactment.—Copies of this subchapter shall, upon its approval, be transmitted to the governor of each state, the attorney-general and the administrator of general services of the United States, and the council of state governments.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3908.

CHAPTER 32

APPOINTED COUNSEL AND TRANSCRIPTS

Subchapter A. Right to Counsel

Subchapter B. Court Reporters and Transcripts

Subchapter A. Right to Counsel

40-3201. Subchapter definitions.—In this subchapter, unless the context requires a different definition:

(1) "Indigent person" means any person who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney.

(2) "Public defender" means any attorney appointed or elected under the provisions of any act of the legislature or any provision of a metropolitan charter to represent indigent persons accused of crime.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2014.

Comment:
This subchapter restates the definitions, procedures, and arrangements currently in use in Tennessee for providing counsel without substantive changes in the statutes.

40-3202. Right to counsel.—(a) Every person accused of any crime, felony or misdemeanor, is entitled to counsel in all matters necessary for his defense, as well to facts as to law.

(b) If unable to employ counsel, he is entitled to have counsel appointed by the court according to provisions set forth in § 40-902.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-2002.
Subsec. (b): T. C. A. § 40-2003.

Cross-References:
Appointment of counsel, see § 40-3204.
Statement of magistrate at preliminary examination, see § 40-902.
Waiver of right to counsel, see § 40-3203.

Comment:
This section restates present Tennessee law which literally required counsel for both felony and misdemeanor defendants, even before the recent Supreme Court ruling to that effect in Argesinger v. Hamlin, 407 U. S. 25 (1972).
Subsection (b) refers to the statement of this right by the magistrate at the preliminary examination. See § 40-902.

40-3203. Waiver of right to counsel.—(a) Any waiver of a defendant's right to counsel must be in writing.

(b) Before a court shall accept a written waiver of the right to counsel, it shall first advise the accused in open court of his right to the aid of counsel in every stage of the proceedings.

(c) The court shall at the same time determine whether or not there has been a competent and intelligent waiver of such right by inquiring into the background experience and conduct of the defendant and such other matters as the court may deem appropriate.

(d) If a waiver is accepted by the court, such waiver shall be spread upon the minutes of the court and filed with the papers of the cause.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-2015.
Subsecs. (b)-(d): T. C. A. § 40-2016.

Cross-References:
Statement of magistrate at preliminary examination, see § 40-902.

Comment:
This is present law.

40-3204. Appointment of counsel.—(a) If the defendant is not represented by counsel and the court determines that he is an indigent person who has not competently waived his right to counsel, the court shall appoint to represent the accused either the public defender if there be one for the county or, in the absence of a public defender, a competent attorney licensed in this state.

(b) The court may call upon any legal aid agency operating in conjunction with an accredited college of law to recommend attorneys for appointment under the provisions of this subchapter.

(c) The court may upon its own motion or upon application of counsel appointed under this section name additional attorneys to aid and assist in the defense.

(d) Each appointment of counsel shall be denoted by an appropriate entry upon the minutes of said court, which shall state the name of counsel and the date of his appointment, but failure of the court to make such a minute entry shall not in any way invalidate the proceeding if an attorney was in fact appointed.

(e) Upon the appointment of an attorney under this section, no further proceeding shall be had until the attorney so appointed has had sufficient opportunity to prepare the case.

(f) If the court should determine that the accused is not an indigent person, the court shall then advise the accused with respect to his right to counsel and afford him an opportunity to acquire counsel.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2002, 40-2003, 40-2017.

Cross-References:
Competent waiver, see § 40-3203.
"Indigent person" defined, see § 40-3201.
"Public defender" defined, see § 40-3201.
Relief on grounds of inadequate counsel, see ch. 30.

Comment:
This provision is a combination of present T. C. A. § 49-2002, which guarantees appointed counsel for both felonies and misdemeanors, and T. C. A. § 40-2017, which specifies procedure for appointing counsel in felony cases.

40-3205. Appointed counsel.—(a) Any attorney appointed to represent any person under the provisions of this subchapter shall proceed to counsel with and represent such person at all stages of the proceedings before the court which appointed him, and also upon any appeal from the judgment of such court which imposes a prison sentence.

(b) In all proceedings for the writ of habeas corpus or the writ of error coram nobis, the court having jurisdiction of such matters shall

determine the questions of indigency and appoint counsel, if necessary, in the manner set out in § 40-3204.

(c) The court may, upon good cause shown, permit an attorney appointed under this subchapter to withdraw as counsel of record for the accused. If an attorney is permitted to withdraw, the court shall immediately proceed in the manner set out in § 40-3204.

(d) The court may upon its own motion replace any attorney appointed under this subchapter if the court deems such action necessary to preserve the rights of the accused.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2018—40-2021.

Cross-References:
Appeals, see ch. 24.
Coram nobis, see § 40-2403.
Post-conviction relief, see ch. 30.

40-3206. Reimbursement and compensation of appointed counsel.—(a) The Supreme Court shall prescribe by rule the nature of the expenses for which reimbursement may be allowed under this section, and such limitations on and conditions for such reimbursement as it deems appropriate in the public interest, subject to the provisions of this section. Such rules shall also specify the form and content of applications for reimbursement or compensation to be filed hereunder. The court may adopt such other rules with regard to the accomplishment of the purposes of this subchapter as it deems appropriate in the public interest.

(b) Attorneys appointed under this subchapter, other than public defenders, shall be entitled to reasonable compensation for their services rendered, both prior to and at the trial of the cause, and shall be entitled to reimbursement for their reasonable and necessary expenses in accordance with the rules of the Supreme Court. No allowance of compensation to all attorneys in any case shall, however, exceed one hundred dollars ($100) for each day of trial, with a maximum compensation for any one proceeding of five hundred dollars ($500).

(c) Each attorney seeking reimbursement or compensation under this section shall file an application with the trial court, stating in detail the nature and amount of the expense claimed, supporting such claim with receipts showing payment thereof and stating the nature and extent of his services, including those in connection with any preliminary hearing.

(d) Any attorney rendering services or incurring expenses incident to any appeal and seeking compensation or reimbursement therefor shall file an application with the appellate court stating in detail the matters required in applications to trial courts and such other information as the rules of the court require.

(e) All applications for compensation or reimbursement shall also state any payments made or to be made to the applicant by or on behalf of the accused and the court, in fixing compensation shall take any such payments into account.

(f) A certified copy of the court order fixing any compensation or approving any expenses hereunder, along with a true copy of the attorney's application shall be forwarded to the office of the executive secretary to the Supreme Court, who shall audit and review the same, and upon finding payment to be in order process the payment thereof out of money appropriated for that purpose.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2022—40-2027.

40-3207. Compensation of public defenders.—(a) The state shall reimburse counties and metropolitan governments having public defenders for the operation of such offices in accordance with this section.

(b) Each public defender shall submit to the office of the executive secretary to the Supreme Court by the fifteenth (15th) day of each month a report covering the activities of his office in such detail as the executive secretary may require.

(c) On the basis of such report, the executive secretary shall compute an estimate as to the amount which the state would otherwise have had to pay for counsel for indigent persons in such county or metropolitan government, but for the operation of the public defender's office.

(d) The executive secretary shall then cause to be paid out of moneys appropriated for that purpose to the county or metropolitan government the sum thus computed. In no event, however, shall the state in any one year pay such county or metropolitan government more than the amount fixed in the budget of such county or metropolitan government for the operation of the public defender's office for that year.

(e) The determinations of the executive secretary pursuant to this section shall be final.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2028.

Subchapter B. Court Reporters and Transcripts

40-3221. Subchapter definitions.—In this subchapter, unless the context requires a different definition:

(1) "Court" means any court exercising jurisdiction over felony cases.

(2) "Judge" means the judge of any court exercising jurisdiction over felony cases.

(3) "Criminal case" means the trial of any felony offense or any proceeding for the writ of habeas corpus wherein the unlawful confinement is alleged to be in a state, county or municipal institution.

(4) "Executive secretary" means the executive secretary to the Supreme Court of Tennessee.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2029.

Cross-References:
"Felony" defined, see § 40-105.
Jurisdiction of courts, see ch. 2.

Comment:
This subchapter restates and consolidates the present statutes without substantive change.

40-3222. Court reporters, auxiliary reporters, and recording equipment.—(a) The judge of each court shall designate one or more persons to act as court reporters to serve at the pleasure of the judge. The executive secretary shall determine the number of reporters who may be designated by each judge and shall formulate standards for the determination of reporters' qualifications.

(b) Each judge, with the approval of the executive secretary, may designate auxiliary reporters who may serve when there is more reporting work than can be performed promptly by the regularly designated reporters, or when the regularly designated reporters are unable to attend court. Such auxiliary reporters shall be paid on a per diem basis under scales to be fixed by the executive secretary.

(c) If any judge and the executive secretary find that it is in the public interest that the duties of reporter be combined with those of any other employee of the court or of the judge thereof, the executive secretary may authorize such combination of duties and fix additional compensation for the performance of the added duties of acting as court reporter.

(d) The reporters shall be subject to the supervision of the appointing judge in the performance of their duties, including dealings with the parties requesting transcripts. The executive secretary may by rule prescribe reports to be filed by reporters.

(e) If a proceeding for the writ of habeas corpus is commenced in any court which is not authorized a reporter under this subchapter, the judge thereof shall immediately notify the executive secretary who shall immediately arrange for a reporter to record the proceedings. In courts where such proceedings are filed on a recurring basis, the executive secretary may make arrangements for reporters without the necessity of case-by-case notification by the judge.

(f) Each reporter shall be compensated in accordance with schedules fixed by the executive secretary within budgetary limits as provided by law.

(g) The executive secretary is authorized, upon a determination of a need therefor and upon certification of a judge that no qualified court reporter is available to record the proceedings in any court in his circuit, to purchase out of money appropriated for that purpose such recording equipment as may be necessary to carry out the purpose of this subchapter and to formulate all necessary rules and regulations for its use, maintenance, and replacement. Any such certification by a

judge and determination of need by the executive secretary shall be reviewed not less than annually, and if a qualified court reporter should become available to attend the court, it shall be the duty of the judge so to certify to the executive secretary. Any recording equipment purchased under the provisions of this section shall remain the property of the state and be under the direct control and supervision of the executive secretary.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2030—40-2033, 40-2036, 40-2038, 40-2039, 40-2042.

40-3223. Verbatim records and transcripts.—(a) The executive secretary shall prescribe or approve methods for the taking of verbatim records of proceedings under this subchapter. Any such method shall be of such a nature that an accurate written transcript can be prepared therefrom.

(b) A designated reporter shall attend every stage of each criminal case before the court and shall record verbatim in accordance with subsection (a), all proceedings in open court and such other proceedings as the judge may direct. The reporter shall attach his official certificate to the records so taken and promptly file them with the clerk of the court, who shall preserve them as a part of the records of the trial.

(c) A party at his own expense may retain a reporter other than the reporter provided under this subchapter to record and transcribe the proceedings, and a transcript so prepared may be used for purpose of appeal, as provided by law.

(d) Upon the direction of the court in the case of an indigent defendant, or at the request of any party who has agreed to pay the fee therefor, a reporter designated by the court shall transcribe from the original records such parts of the proceedings as are requested, attach his official certificate and deliver the transcript as requested. In any case the transcript certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and the proceedings.

(e) Each reporter may charge and collect fees for transcripts at rates prescribed by the executive secretary. The reporter may require any party requesting a transcript to pay the estimated fee in advance except as to transcripts which are to be paid for by the state.

(f) If the defendant prays and is granted an appeal, and is determined by the trial judge to be without sufficient funds to pay for the preparation of the transcript of the proceedings, the trial judge shall direct the court reporter to furnish the defendant a complete transcript of the proceedings, the fee for which shall be paid by the state out of money appropriated for that purpose.

(g) The executive secretary shall adopt rules to implement the provisions of this subchapter, which rules shall, among other things, prescribe the form and content of applications for the payment of all

court reporter fees and other expenses charged to the state under this section. All such applications shall be submitted to, audited and reviewed by the executive secretary, and shall be paid upon his approval thereof.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2034, 40-2035, 40-2039—40-2041.

40-3224. Contract services for reporting.—If the executive secretary and the judge or judges in a particular area determine that verbatim transcripts could be more efficiently provided in that area by entering into contracts for that purpose rather than by utilizing the designation of court reporters as provided in § 40-3221, the executive secretary is authorized to enter into such contracts for and on behalf of the state on such terms and conditions as he deems appropriate for the accomplishment of the purposes of this subchapter.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-2043.

CHAPTER 33

RESTORATION OF RIGHTS

COMMENTS OF LAW REVISION COMMISSION

Comment:

This chapter denies the right to vote and hold public office to persons convicted of a felony only from the time of sentence until release from prison. Upon final discharge from sentence, § 40-3305 works an automatic restoration of rights lost by virtue of conviction and eliminates the complex and costly procedure presently required by T. C. A. §§ 40-3701—40-3704.

Suffrage.

Tennessee presently has an "infamous crime" statute, T. C. A. § 40-2712, which sets forth the specific crimes for which a convict is rendered infamous and, until 1972, disenfranchised. This statute is consistent with Tenn. Const., Art. I, § 5 and Art. IV, § 2 which allow the statutory denial of suffrage for such infamous crimes as the general assembly may designate. The disenfranchising section of the infamous crime statute was repealed, however, by Tenn. Pub. Acts 1972, ch. 740, the election law revision.

Section 40-3304(a)(1) embodies the policy of the 1972 Election Code provision, T. C. A. § 2-602, which merely prohibits imprisoned persons from casting absentee ballots. The section does not, however, prohibit voting by convicted persons who are not being held in confinement. This is the policy advocated in the Uniform Act on the Status of Convicted Persons and the Model Penal Code.

Although the courts have recognized in recent years that the right to vote is a fundamental one in a democratic society, e.g., Reynolds v. Sims, 377 U. S. 533 (1964), state laws disenfranchising felons have been sustained against constitutional attack. See, e.g., Ray v. Pennsylvania, 263 Fed. Supp. 630 (W. D. Pa. 1967).

Public Office.

Section 40-3304(a)(2) is a modification of present T. C. A. § 40-2714 which disqualifies persons convicted of a felony, except manslaughter, from holding any office "under the state." T. C. A. § 8-1801 presently overlaps that statute and disqualifies from office only persons convicted of "infamous crimes." This section provides for disqualification only during the term of imprisonment and adopts the policy of the Uniform Act on the Status of Convicted Persons.

Similar statutory provisions on the right to hold public office have been sustained against constitutional attack on the basis of a state constitutional grant of legislative authority to deny suffrage. See Lucas v. McAfee, 217 Ind. 534, 29 N. E. (2d) 403, petition for rehearing denied, 217 Ind. 541, 29 N. E. (2d) 588 (1940).

Although courts have upheld statutes permanently disqualifying convicted persons from public office, these laws have been soundly criticized by the President's Commission on Law Enforcement and the Administration of Justice. The Commission has suggested that the states should rely on the judgment of the voters and on the appraisal of persons with appointive powers. President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 90 (1967).

Forfeiture of an office held at the time of conviction of a crime involving "moral turpitude" is presently provided for by T. C. A. § 8-2701 and is continued by this chapter in modified form.

40-3301. Legislative policy.—Except as otherwise provided in this chapter, a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil rights or forfeiture of estate or property, but retains all of his rights, political, personal, civil, and otherwise, including the right to hold public office or employment, to vote, to hold, receive, and transfer property, to enter into contracts, to sue and be sued, and to hold offices of private trust in accordance with law.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

N. H. Stat. Ann. § 607-A: 3 (Supp. 1969).

40-3302. Effect of chapter.—This chapter does not affect the power of a court to impose sentence or to suspend imposition or execution of sentence on any conditions, or to impose conditions of probation, or the power of the board of pardons and paroles to impose conditions of parole.

(b) This chapter does not affect the qualifications or disqualifications otherwise required or imposed by law for a designated office, public or private, or to serve as a juror, or to vote, or for any designated profession, trust or position, or for any designated license or privilege conferred by public authority.

(c) This chapter does not affect the rights of others arising out of the conviction or out of the conduct on which the conviction is based and not dependent upon the doctrines of civil death, the loss of civil rights, the forfeiture of estate, or corruption of blood.

(d) This chapter does not deprive or restrict the powers of officials of a penal institution or other penal facility for the administration of the institution or facility or for the control of the conduct and conditions of confinement of a convicted person in their custody.

(e) This chapter does not affect laws denying financial benefit from his crime to the perpetrator of a homicide.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

N. H. Stat. Ann. § 607-A: 4 (Supp. 1969).

Conditions of parole, see § 40-2841.
Sentencing, see § 40-2301.
Suspension of sentence, see § 40-2702.

Cross-References:

Civil remedies preserved, see T. C. A. § 39-103, as amended.

40-3303. Chapter definitions.—In this chapter, unless the context requires a different definition, "felony" includes:

(1) a crime committed against the laws of this state or of the federal government punishable by death or imprisonment for more than one (1) year; or

(2) a crime committed against the laws of another state which, had it been committed in this state would be punishable by death or imprisonment for more than one (1) year.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

N. H. Stat. Ann. § 607-A: 1 (Supp. 1969).

40-3304. Disabilities imposed upon conviction.—(a) Except as provided in subsections (c) and (d), a person sentenced to imprisonment for a felony, from the time of his sentence until his final discharge, may not:

(1) vote in an election; or

(2) become a candidate for or hold public office.

(b) Public office held at the time a person is sentenced for a felony is forfeited as of the date of the sentence if the sentence is in this state or, if the sentence is in another state or in a federal court, as of the date a certification of the sentence from the sentencing court is filed in the office of secretary of state who shall receive and file it as a public document.

(c) If execution of sentence is suspended with or without the defendant being placed on probation, or if he is paroled after commitment to imprisonment, he may vote during the period of the suspension or parole.

(d) An appeal or other proceeding taken to set aside or otherwise nullify the conviction or sentence does not affect the application of this section unless the conviction is reversed and the charge against the defendant is dropped, in which case the defendant shall be restored to any public office forfeited under this chapter from the time of the reversal and shall be entitled to the emoluments thereof from the time of the forfeiture.

COMMENTS OF LAW REVISION COMMISSION

Derivation:

Model Penal Code § 306.3 (Prop. Off. Draft, 1962).

N. H. Stat. Ann. § 607-A: 2 (Supp. 1969).

Cross-References:
Appeals, see ch. 24.
"Felony" defined, see § 40-3303.
Final discharge, see § 40-2842.
Sentencing alternatives, see T. C. A. § 39-805, as amended.

40-3305. Rights restored on discharge.—(a) If the sentence was in this state, the certificate of discharge given upon completion of service of his sentence or after service under probation or parole, shall state that the defendant's rights to vote and to hold any future public office, of which he was deprived by this chapter, are thereby restored and that he suffers no other disability by virtue of his conviction and sentence. A copy of the certificate of discharge shall be filed with the clerk of the court of conviction.

(b) If the sentence was in another state or in a federal court and the convicted person has similarly been discharged by the appropriate authorities, the governor of this state upon application and proof of the discharge in such form as the governor may require shall issue a certificate stating that such rights have been restored to him under the laws of this state.

(c) If another state having a similar statute issues its certificate of discharge to a convicted person stating that the defendant's rights have been restored, the rights of which he was deprived in this state under this chapter are restored to him in this state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
N. H. Stat. Ann. § 607-A: 5 (Supp. 1969).

Cross-References:
Certificate of final discharge, see § 40-2842.

CHAPTER 34

FEES AND COSTS

40-3401. Application of general provisions on fees.—(a) The provisions of title 8, chapters 21-25 apply to this chapter unless otherwise specifically provided.

(b) The provisions of title 24, chapter 4 apply to the compensation of witnesses unless otherwise specifically provided.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3301.
Subsec. (b): T. C. A. § 40-2421.

Comment:
This chapter is a restatement of present statutes without substantive change.

40-3402. Allowable costs.—Except as provided in § 40-3403, costs which may be adjudged in criminal cases include all costs incident to the arrest and safekeeping of the defendant, before and after conviction, due and incident to the prosecution and conviction and incident to the carrying of the judgment or sentence of the court into effect.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3304.

40-3403. Costs of witnesses and boarding juries.—(a) Witnesses shall only be allowed fees for their attendance on days which are set in the subpoena or which are set in orders of the court.

(b) Each witness shall prove attendance by oath before the clerk in open court that:

(1) he has not, directly or indirectly procured himself to be summoned as a witness; and

(2) he was legally summoned on behalf of the state; and

(3) he has attended court as a witness for the number of days claimed.

(c) The district attorney and judge shall not certify any witness fees against the state without examination of the written directions of the district attorney for the attendance of the witnesses.

(d) The director of accounts shall not issue a warrant for the payment of costs of witnesses unless the district attorney and judge have certified to the inspection provided for in subsection (c).

(e) Neither the state of Tennessee nor any county thereof shall pay or be liable in any criminal case or prosecution for the fees, costs, or mileage which may accrue in favor of any witness who shall, at the time of his attendance as such witness before any court, grand jury, or magistrate, reside within five (5) miles of the place where he attends as witness.

(f) When in the judgment of the court trying criminal cases wholesome food and proper lodging cannot be provided for the petit jurors for the sum of eighteen dollars ($18.00) per day, he shall have the power to make arrangements to provide the jurors with proper board and lodging, and to pay therefor a sum not to exceed forty-five dollars ($45.00).

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-2422—40-2426, 40-2512, 40-3306.

Cross-References:
Subpoena, see ch. 18.
Out-of-state witness, see ch. 20, subch. B.

40-3404. Officers entitled to fees.—(a) Officers are entitled to no other fees in criminal cases, except such as are expressly provided by law, and in no case are they entitled to payment from the state or county, unless expressly allowed.

(b) If any of the duties in this chapter or in title 8, chapters 21-25 are performed by officers other than those designated, whose duty it is to perform the duties, the officers are entitled to the same fees in the same manner as the designated officers.

(c) The provisions of subsection (b) do not apply to any of the judges or chancellors of the state.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-3302, 40-3303.

40-3405. Non-allowable fees.—(a) No clerk is entitled to any fees in any state case, when such fees have become chargeable to the state or county, in consequence of any omission of his duty or clerical defect in the record.

(b) No fee is allowed the sheriff or other execution officer, upon the return of any kind of criminal process or subpoena "not found," unless he makes oath before the clerk that:

(1) he has been to the residence of the person named in the process; or

(2) he has been to the place where the person last resided in that county; or

(3) the person has not for twelve (12) months resided in the county.

(c) Except as provided in subsection (d), no sheriff, jailer, or other officer charged with the custody of the prisoner is entitled to any allowance for keeping or removing the prisoner if the prisoner escapes from the custody of such sheriff or jailer, or from the officer during removal.

(d) If it shall be clearly made to appear to the satisfaction of the judge of the criminal court that the prisoners escaped from jail by means of force, stratagem, or other fraudulent device, and reasonable care and diligence were used by the jailer to prevent the escape, to secure the prisoner in jail, and to recover the prisoner or prisoners, the jailer shall be entitled to his fees as jailer. In all cases falling within the provisions of this section, it shall be the duty of the judge to certify said claim for payment as in other bills of cost. The sheriff, or other officers, having custody of escaped prisoners shall have all of the benefits of this section.

(e) No prosecutor in a misdemeanor is entitled to any compensation for his services as prosecutor or for his attendance as a witness on behalf of the state.

(f) It is the duty of the sheriff to carry to the penitentiary, at the same time, all convicts in his custody, at that time sentenced to the

penitentiary, and he shall not be entitled to charge for more than one (1) trip.

(g) The sheriff and guard shall be entitled to no other compensation than such as is allowed by this title.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3308.
Subsec. (b): T. C. A. § 40-3309.
Subsec. (c): T. C. A. § 40-3310.
Subsec. (d): T. C. A. § 40-3311.
Subsec. (e): T. C. A. § 40-3305.
Subsec. (f): T. C. A. § 40-3312.
Subsec. (g): T. C. A. § 40-3313.

40-3406. Costs for offenses removed to federal courts.—(a) In felony cases commencing in any of the courts of this state and afterwards removed to the United States district courts, and there disposed of adversely to the state, the costs of the prosecution shall be paid by the state, as in such cases determined in the state courts.

(b) In case of a misdemeanor transferred and disposed of as in subsection (a), the county where the case originated shall pay the costs.

(c) Sheriffs or other officers delivering prisoners from state to federal courts shall be allowed the same fees, and have the same guards and pay therefor, as is allowed for like services in state courts.

(d) The costs in subsections (a), (b) and (c) shall be paid upon warrant of the director of accounts, or judge or chairman of the county court, as the case may be, which warrant shall be issued upon properly authenticated and itemized bills of costs certified by the United States district attorney and judge holding said federal court, in the same manner as other similar costs are paid by the state or counties.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3347.
Subsec. (b): T. C. A. § 40-3348.
Subsec. (c): T. C. A. § 40-3348.
Subsec. (d): T. C. A. § 40-3349.

Cross-References:
Fees of officers, see § 40-3404.
"Felony" defined, see T. C. A. § 39-107, as amended.
"Misdemeanor" defined, see T. C. A. § 39-107, as amended.

40-3407. Liability of state and county for costs.—(a) Neither the state of Tennessee nor any county thereof shall pay or be liable in any criminal prosecution for any costs or fees accruing, except in the following classes of cases:

(1) all felony cases, where prosecution has proceeded to a verdict in the circuit or criminal court.

(2) cases under the small offense law where the defendant has submitted before a magistrate and been sentenced to imprisonment and no costs shall be allowed unless the defendant pays, secures or works out the costs as provided in §§ 41-1107 and 41-1219, except the costs accruing to the clerks of the court in which the case is tried and the sheriff or arresting officer executing the process in the case.

(3) all cases where the defendant has been convicted in a court of record and the execution issued upon the judgment against the de-

fendant has been returned nulla bona. Neither the state of Tennessee nor any county thereof shall be liable for, or pay any costs in any criminal case, where security has been accepted by the officer taking the security, and an execution, afterwards returned nulla bona, as to the defendant and his securities. Compensation for boarding prisoners (§§ 8-2507, 40-3411(a)-(d), and 41-1135—41-1141), expenses of keeping and boarding juries (§§ 40-3410, 40-3411), compensation of jurors (§§ 22-401—22-407 and 40-3403(f)), costs of transcripts in cases taken to the Supreme Court by appeal or writ of error (§ 8-2115, subsection (37)), mileage and lawful fees for removing or conveying criminals and prisoners from one county to another, or from one jail to another (§ 8-2133, subsections (15) and (24)), and compensation and mileage of witnesses for the state duly subpoenaed and required to attend before any court, grand jury, or magistrate in a county other than that of their residence and more than five (5) miles from such residence (§§ 24-402 and 40-3401(b)), and where any witness for the state shall be confined in jail to await the trial in which he is to testify, shall be paid in all cases as heretofore.

(b) The state, or the county in which the offense was committed or is triable, according to the nature of the offense, pays the costs accrued on behalf of the state, and for which the state or county is liable under subsection (a), in the following cases:

(1) when the defendant is acquitted by a verdict of the jury upon the merits.

(2) when the prosecution is dismissed, or a nolle prosequi entered by the state.

(3) when the action has abated by the death of the defendant.

(4) when the defendant is discharged by the court or magistrate before indictment preferred or found, or after indictment and before verdict.

(5) when the defendant has been convicted, but the execution issued upon the judgment has been returned nulla bona.

(c) The costs which have accrued in any criminal prosecution for felony offenses in cases accruing under subsections (b)(1), (b)(2) and (b)(5) shall be paid by the state.

(d) The state shall also pay the accrued costs in all criminal prosecutions for felony offenses where the accused shall have been convicted by trial or by guilty plea. In those cases where the accused receives concurrent sentences, the state shall not be liable to pay the costs in more than three (3) of the prosecutions where concurrent sentences are given.

(e) Similar costs in criminal prosecutions for offenses punishable in any other way than by death or confinement for more than one (1) year, also similar costs in criminal prosecutions for offenses punishable with death or confinement for more than one (1) year, in cases accruing under subsections (b)(2) and (b)(4), shall be paid by the county.

(f) "Costs" in subsections (c), (d), and (e) are all costs accruing under existing laws on behalf of the state or county, as the case may

be, for the faithful prosecution and safekeeping of the defendant, including the costs of boarding juries and that of the jailer; but the term "cost" shall not be construed as requiring the state to pay any cost for guarding the jail to prevent mob violence, or to prevent rescue or the prisoner's escape, or for transporting to any other county for safekeeping on any account whatever, but these expenses shall be paid by the county in which the crime was committed or claimed to have been committed.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3331.
Subsec. (b): T. C. A. § 40-3332.
Subsecs. (c), (d): T. C. A. § 40-3333.
Subsec. (e): T. C. A. § 40-3334.
Subsec. (f): T. C. A. § 40-3335.

Cross-References:
Concurrent sentences, see T. C. A. § 39-845, as amended.
Execution of judgment, see ch. 25.
"Felony" defined, see T. C. A. § 39-107, as amended.

40-3408. Costs to defendants.—(a) If the defendant is convicted of a criminal offense, he shall pay all the costs which have accrued in the cause.

(b) The district attorney shall include in one (1) charge all persons engaged in the same offense, and the costs shall be taxed as one (1) suit. If the court grants severance of defendants the costs are to be taxed as two (2) or more suits, according to the nature of the case.

(c) The provisions of subsection (a) apply to all cases triable before a justice of the peace and finally acted upon by him.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3325.
Subsec. (b): T. C. A. § 40-3326.
Subsec. (c): T. C. A. § 40-3338.

Cross-References:
"Charge" defined, see § 40-105.
Collection of costs, see § 40-2605.
Cost of bail forfeiture, see § 40-1205.
Joinder of defendants, see § 40-1604.
Severance of defendants, see § 40-1606.

40-3409. Costs to other persons.—(a) Upon the trial of a person who has been arrested on a warrant to keep the peace, and bound over for his appearance at court to answer the charge, the court may, at its discretion, order such person or the person at whose instance the warrant was taken out to pay the costs.

(b) When the defendant is discharged upon the examination, or acquitted in any criminal prosecution for a public offense, and the court is of the opinion that the prosecution was malicious or frivolous, the prosecutor may be taxed with all the costs.

(c) If any person shall commence a criminal prosecution against any individual, either by warrant from a justice of the peace, or otherwise, and shall afterwards willfully abandon the same, the court having jurisdiction of said cause shall have power to tax the prosecutor with the costs.

(d) In all cases of embezzlement and fraudulent breach of trust, where it appears to the court that the defendant has made settlement

before the time of trial, and the prosecutor fails to attend and prosecute, the court shall tax the prosecutor with all costs of the case.

(e) In a hearing under § 40-1407, if it appear that there was no probable cause for suing out the warrant, the whole costs may be taxed against the complainant, and execution awarded.

(f) The provisions of this section extend to trials before justices of the peace.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3327.
Subsec. (b): T. C. A. § 40-3328.
Subsec. (c): T. C. A. § 40-3329.
Subsec. (d): T. C. A. § 40-3330.
Subsec. (e): T. C. A. § 40-517.
Subsec. (f): T. C. A. § 40-3328.

Cross-References:
Embezzlement, see T. C. A. § 39-1902, as amended.
Peace bond, see T. C. A. § 38-301, et seq.
Preliminary examination, see ch. 9.

40-3410. Preliminary certification of jury expenses in misdemeanor cases.—(a) The expenses of keeping a jury in any misdemeanor case in which the county may eventually become liable may, in the discretion of the court, be certified upon the adjournment of the court to the judge or chairman of the county court. The judge or chairman of the county court shall then issue his warrant for the jury-keeping expenses to any person authorized to receive it.

(b) For certification of expenses in subsection (a), all persons having such bills against the county shall first make oath before the clerk of the circuit or criminal court that the bills are true and correct, and the clerk shall affix his certificate to the bill. All such bills shall then be read and presented in open court to the judge and the district attorney, for their inspection and allowance if correct. The clerk of the court shall:

(1) enter the amounts of such bills as may be so approved and allowed, upon the minutes of his court; and

(2) certify the approved amount in writing on the face of each original bill; and

(3) attach the seal of his office to the original bill; and

(4) forward it to the proper authorities for payment; and

(5) receive a fee of fifty cents (50¢) from the party to whom the bill belongs.

(c) The judge or chairman of the county court shall not issue warrants for any accounts for boarding juries until the bill shows on its face that all the requirements of subsections (a) and (b) have been complied with.

(d) If the costs are afterwards collected from the defendant or his sureties, they shall be turned over to the trustee of the county, by the clerk of the court, as the fines are paid.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsecs. (a), (b): T. C. A. § 40-3317.
Subsec. (b): T. C. A. § 40-3318.
Subsec. (d): T. C. A. § 40-3319.

Cross-References:
Costs of boarding jurors, see § 40-3403.
"Misdemeanor" defined, see T. C. A. § 39-107, as amended.
Separation of jurors, see § 40-1929.

40-3411. Preliminary certification of felony expenses.—(a) After a charge is found in all felony cases, in which the state may eventually become liable, the judge shall render judgment against the state for, and certify at the adjournment of each term of the court:

(1) all fees of the sheriff for board of the prisoners; and

(2) the fees for boarding the juries in cases in which no final disposition has been had.

(b) All of the fees in subsection (a) may be made out in one (1) bill, but each case shall show:

(1) the date of indictment; and

(2) the date of commitment; and

(3) the date or dates of boarding the jury; and

(4) the rate charged for boarding the jury; and

(5) up to what date judgment has been given for the costs; and

(6) all previous dispositions of any previous court in the case or cases.

(c) If, on the final disposition of the case, the state shall be held liable for the costs, the clerk shall tax only the difference between the amount previously collected and the amount due to date of final disposition.

(d) In the event the court shall not hold the state liable for the costs in any such cases when finally disposed of, it shall be the duty of the clerk to include all of the costs previously paid by the state on this account in his executions and in his bill of costs, and to collect and refund the same to the state, in the same manner as he is required by law to pay over state revenue.

(e) The sheriff or other officer, conveying a convict to the penitentiary, shall make out his account in writing, stating the number of miles on the usual route from the place of conviction to the penitentiary, the number of guards necessarily employed to ensure the safe conveyance of the convict, and the distance each of said guards may have traveled, and make oath to the truth of the account before the warden of the penitentiary, or any judge or justice of the peace, who shall certify the fact. Upon presentation of the account thus sworn to and certified, the director of accounts shall issue his warrant for the amount, as in other cases, if satisfied of the correctness of the account.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3320.
Subsec. (b): T. C. A. § 40-3321.
Subsec. (c): T. C. A. § 40-3322.
Subsec. (d): T. C. A. § 40-3323.
Subsec. (e): T. C. A. § 40-3314.

Cross-References:
"Charge" defined, see § 40-105.
Costs of boarding jurors, see § 40-3403.
"Felony" defined, see T. C. A. § 39-107, as amended.
Officers' fees, see § 40-3404.
Separation of jurors, see § 40-1929.
Transportation of prisoners to penitentiary, see § 40-2504.

40-3412. Certification of fees and costs by justice of the peace.—(a) In all cases, the fees due to a justice of the peace for any proceedings before him therein shall be certified to the circuit or criminal court.

(b) The judge and district attorney shall carefully examine and inspect all bills of costs certified for payment by justices of the peace in which the state or county has been charged with the costs of criminal prosecution; and if it shall appear to the judge and district attorney, in any manner, that the prosecution in which the state or county has been taxed with the cost by the justice of the peace is frivolous, malicious, or commenced to procure fees, it shall be the duty of the judge and district attorney to disapprove and disallow said bill of cost, and no part of said cost shall be paid by the state or county in such case.

(c) The certificate of the justice of the peace trying a cause, that the prosecution is not frivolous, malicious, or set on foot to procure fees, shall not be conclusive on the judge or district attorney, but they shall inquire, and, if it shall appear to them that the prosecution is frivolous, malicious, or commenced to procure fees, to disapprove said bills of cost as provided in subsection (b).

(d) The costs due constables or other executive officers, on proceedings in criminal cases before a justice of the peace, shall be certified and allowed pursuant to subsections (a) and (b).

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsec. (a): T. C. A. § 40-3338.
Subsec. (b): T. C. A. § 40-3339.
Subsec. (c): T. C. A. § 40-3340.
Subsec. (d): T. C. A. § 40-3341.

Cross-References:
Fees of officers, see § 40-3404.
Jurisdiction of justices of the peace, see § 40-203.

40-3413. Discretion of court.—The court has also discretion in controlling the taxation of costs, and in no case shall the state or county be charged therewith, unless the court so order. The court shall specify in the order the officers and witnesses whose costs are to be taxed, together with the amount due each.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3316.

40-3414. Certification of costs.—(a) The courts and the district attorneys shall examine, inspect, and audit all bills of costs accruing against the state or county, and disallow any part or all of said bills of costs that may be illegally or wrongfully taxed against the state or county.

(b) The costs chargeable to the state or county in criminal cases tried in criminal courts, circuit courts, or general sessions courts shall be made out so as to show the specific terms, and be examined, entered of record, and certified to be correct by the court or judge before whom the case was tried or disposed of.

(c) The district attorney shall examine the said costs in cases tried in criminal courts and circuit courts and shall certify them to be correct.

(d) It shall not be necessary for clerks to affix the seal of their respective courts to their certificate to the bill of costs in criminal prosecutions.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsecs. (a)-(c): T. C. A. § 40-3343.
Subsec. (d): T. C. A. § 40-3324.

40-3415. Judgment for costs.—The judgment for costs may be rendered at the time of conviction, or upon motion at any time subsequent thereto, and execution awarded accordingly.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. §§ 40-3336, 40-3337.

Cross-References:
Collection of costs, see § 40-2605.

40-3416. Procedure for reporting of costs.—(a) If the jailer, sheriff, workhouse keeper, or any person or officer, other than the clerks of the circuit or criminal court of any county, collects from a defendant or surety, all or any part of the costs, fees, taxes, and expense fees, shown upon the mittimus issued by any circuit, criminal or other court, he shall on or before the fifteenth (15th) day of the month immediately following the month during which such collections are made, report and remit said collections to the clerk of the criminal court in counties having a criminal court, and to the clerk of the circuit court in all other counties, and it shall be the duty of the clerk to distribute the costs, taxes and expense fees among the state, county, and officers entitled thereto. If only a part of the whole of the fine, costs, taxes, and expense fees is collected, that proportion which is collected shall be distributed to the state, county and officers in proportion to their respective interest in the whole amount originally due.

(b) All state taxes, district attorney fees, expense fees, fines in felony cases, and all costs which have been previously paid by the state to officers entitled thereto shall be reported by the clerk to the commissioner of finance and administration and paid to the state.

(c) All county taxes, expense fees, fines in misdemeanor cases, and costs which have been previously paid by the county, shall be reported to the county chairman and paid to the county trustee.

(d) All costs belonging to officers which have not been paid either by the state or county, shall be paid to such officers entitled thereto.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3342.

40-3417. Payment by state and county.—(a) A copy of the judgment and bill of costs, certified by the clerk of the court and by the district attorney and judge, as provided in § 40-3414, shall be presented to the director of accounts, chairman of the county court, or county judge, as the case may be, who, after the bills have been examined and approved by the judge and district attorney, shall examine, inspect, and audit all bills of costs accruing against the state or county and disallow any part of said bills of cost that may be illegally or wrongfully taxed against the state or county.

(b) The state director of accounts, judge, or chairman of the county court may disallow any and all costs taxed against the state or county on account of malicious, frivolous, or unnecessary prosecution in the event the judge and district attorney should, by mistake or otherwise, approve any of such bills.

(c) After correcting and auditing such bills of cost, the director of accounts, judge, or chairman of the county court, as the case may be, shall issue a warrant for the amount, which shall be paid to such clerk or any other person authorized by him, in writing, to receive the same.

(d) The director of accounts, in auditing bills of costs of state prosecutions, when, in his judgment, it is expedient and proper to do so, may draw his warrant on the treasurer in favor of any of the parties interested in the bills of cost for the sum due him, which warrant the director of accounts shall send to the clerk of the court from which said bills were sent, and at the same time notify the clerk that the amount sent is all that was due said party in said bills. The clerk shall deliver the warrant to the party in whose favor it is drawn, as soon as called for, taking receipt for the same.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
Subsecs. (a)-(c): T. C. A. § 40-3344.
Subsec. (d): T. C. A. § 40-3345.

40-3418. Refund to county by state.—(a) The state of Tennessee shall pay and refund to any county of the state any moneys that have heretofore been irregularly or otherwise paid, or that shall hereafter be irregularly or otherwise paid in connection with criminal prosecutions by any county of the state, which should have been paid by the state, if the same had been adjudged, authenticated and presented for payment as provided by law, or any moneys which have been, or shall hereafter be paid by any county to the state to which the state is not entitled or shall not be entitled in connection with criminal prosecution.

(b) If bills or claims for such moneys have heretofore been filed in the office of the director of accounts of the state, or shall hereafter

be filed therein, sworn to by the county judge or chairman of the county court of such county, and comptroller shall immediately have such claim or claims audited, and when said audit has been completed, the director of accounts will draw his warrant or warrants on the treasurer of the state, in favor of the county, for so much and such parts of said claim or claims as shall be found correct by the auditors auditing the same, which warrants shall be payable out of the miscellaneous funds of the state treasury.

(c) No claim for moneys hereafter paid by the county on behalf of the state may be allowed where the same is filed with the comptroller more than six (6) years after the date of such payment by the county.

COMMENTS OF LAW REVISION COMMISSION

Derivation:
T. C. A. § 40-3346.

APPENDIX I

DISPOSITION TABLES

The following tables indicate the disposition made in the proposed Criminal Code and Code of Criminal Procedure of each of the sections in present T.C.A. Titles 39 and 40. The code sections listed in the right column refer to the new sections which deal with the same subject matter. The difference in approach between existing Titles 39 and 40 and the new codes is such that many specific statutes are replaced with fewer, more general ones. In such cases the new general section is listed as the disposition of the old specific statute.

The word "Omitted" indicates that the subject matter of the old statute is not dealt with in the new codes because it has no further utility or because it duplicates a provision in another body of law. The word "Transfer" means that the statute referred to is recommended for transfer to another title of the T.C.A.

TENNESSEE CODE ANNOTATED TO CRIMINAL CODE

Showing the disposition of each section in T.C.A. Title 39 by the Criminal Code.

T.C.A. Sections	Criminal Code Sections
39-101	Omitted
39-102	39-103
39-103	39-802
39-104	39-803
39-105	39-804
39-106	Omitted
39-107—39-109	39-501, 39-502
39-110	39-504
39-111	39-302
39-112, 39-113	39-2305
39-114	Omitted
39-201, 39-202	39-1504
39-203—39-210	Transfer
39-215	39-1504
39-216	Omitted
39-217	39-1504
39-218	Omitted
39-219	39-1504
39-220	Omitted
39-301	39-1505
39-302	39-901
39-401	39-2511
39-402, 39-403	39-1603
39-404—39-406	39-2511
39-407	Omitted
39-408	39-2511
39-409	Omitted
39-410	39-501, 39-502, 39-2511
39-411—39-419	Omitted
39-420	39-2511
39-421, 39-422	39-2043
39-423, 39-424	39-2511
39-501	39-1602
39-502	39-1603
39-503	39-901
39-505	39-901
39-506	39-1602
39-507	39-1603
39-509—39-517	Omitted
39-518	Transfer
39-601	39-1402
39-602	39-1401
39-603—39-607	39-901
39-608	40-2203
39-609, 39-610	39-1402
39-611	39-731, 39-732
39-612	39-1402
39-613	39-1403
39-614	39-1402
39-701, 39-702	39-1501
39-703	Omitted
39-704	39-1501
39-705	39-1502
39-706	Omitted

T.C.A. Sections	Criminal Code Sections
39-707	39-1304, 39-1307, 39-2641
39-708	Omitted
39-801—39-806	39-2102
39-807	39-107
39-808	39-2401
39-809	39-2102
39-810	39-501, 39-2102, 39-2401
39-811, 39-812	Omitted
39-813	39-2104
39-814—39-820	Omitted
39-821—39-823	39-2042
39-824—39-826	39-2043
39-827—39-834	Omitted
39-835, 39-836	39-2105
39-837	39-1903
39-901—39-904	39-1802
39-905	39-901, 39-1903
39-906	Omitted
39-907	40-2203
39-908	39-1001
39-909	39-2803
39-1001	39-1401
39-1002—39-1011	Omitted
39-1012—39-1014	39-2624
39-1015	39-2624, 39-2625
39-1016	Omitted
39-1017, 39-1018	39-2624
39-1101—39-1106	39-902
39-1107	39-502, 39-903
39-1201, 39-1202	Omitted
39-1203	39-1403
39-1204	39-2505
39-1205, 39-1206	Omitted
39-1207, 39-1208	39-2501
39-1209	39-1803, 39-2501
39-1210, 39-1211	Omitted
39-1212	39-1803
39-1213	39-2501
39-1214	39-1603, 39-1803, 39-2508
39-1215	39-1803, 39-2503
39-1216	39-2503
39-1217	39-502, 39-2502
39-1218	Omitted
39-1301—39-1304	Omitted
39-1401	39-1602
39-1402	39-1603
39-1403	39-901
39-1404	39-2803
39-1405	39-2801
39-1406	39-2803
39-1407, 39-1408	39-902
39-1409	Omitted
39-1410	39-2803
39-1411	39-2506
39-1412	39-1402
39-1501	39-1903
39-1502	39-2045
39-1503	39-2212, 39-2213
39-1601, 39-1602	Omitted
39-1603	39-2509
39-1604	Omitted
39-1605	39-2509
39-1606	Omitted
39-1607	39-2509
39-1701	39-2021
39-1702, 39-1703	39-107
39-1704—39-1711	39-2021
39-1712—39-1715	39-1001
39-1716—39-1718	39-2021
39-1719, 39-1720	39-1001
39-1721	39-1001, 39-2021
39-1722	39-1001
39-1801	39-1903
39-1802—39-1807	Omitted
39-1901	39-1903, 39-2045
39-1902	39-1903
39-1903	39-1901
39-1904, 39-1905	39-901, 39-1903
39-1906	39-2032
39-1907	39-2021
39-1908, 39-1909	39-901, 39-1903
39-1910, 39-1911	39-2041
39-1912	39-1904
39-1913, 39-1914	Omitted
39-1915	39-2041, 39-2045
39-1916	39-1903, 39-1904
39-1917	39-2041
39-1918	40-823
39-1919—39-1925	39-2041
39-1926, 39-1927	Omitted
39-1928, 39-1929	39-2041
39-1930	39-1903
39-1931	39-2041
39-1932	39-2033
39-1933, 39-1934	Omitted
39-1935, 39-1936	39-1903
39-1937, 39-1938	39-2033
39-1939, 39-1940	39-2401
39-1941	39-2211
39-1942	39-2046, 39-2211
39-1943	39-2046
39-1944	39-1903, 39-1909
39-1945	39-2041
39-1946, 39-1947	Omitted
39-1948—39-1951	39-2031
39-1952, 39-1953	39-1903
39-1954—39-1957	39-2033
39-1958	39-1001
39-1959—39-1966	39-2048
39-1967	Omitted
39-1968, 39-1969	39-2031
39-1970	39-2032
39-1971	39-1903, 39-2021, 39-2031
39-1972	39-502, 39-2031
39-1973	39-1903
39-1974	39-2031
39-1975	39-2031
39-1976—39-1978	39-104, 39-2031
39-1979	39-2041
39-2001	39-2702

T.C.A. Sections	Criminal Code Sections
39-2002	39-2703
39-2003	39-2704
39-2004	39-2704, 39-2705
39-2005	Omitted
39-2006	39-2705
39-2007, 39-2008	Omitted
39-2009	40-826
39-2010	39-1102
39-2011	39-2401
39-2012, 39-2013	Omitted
39-2014	39-2703
39-2015	39-2704
39-2016	39-2702
39-2017	39-2706
39-2018	39-2702, 39-2706
39-2019	39-2702
39-2020—39-2024	Omitted
39-2025	39-501
39-2026, 39-2027	Omitted
39-2028	39-2701
39-2029, 39-2030	Omitted
39-2031, 39-2032	39-2703
39-2033	39-2701, 39-2707
39-2034	39-2707
39-2035	39-501, 39-2704
39-2036	39-2707
39-2037	40-2004
39-2101	39-1603, 39-2509
39-2102, 39-2103	39-2510
39-2104	39-901, 39-1903, 39-2510
39-2105	39-2510
39-2106	39-501, 39-2510
39-2107	39-2510
39-2201, 39-2203	Transfer
39-2204—39-2206	39-1603
39-2207	Omitted
39-2208	39-1403
39-2209—39-2211	Omitted
39-2212—39-2214	Transfer
39-2215	39-2506
39-2216—39-2221	Transfer
39-2301	39-1603
39-2302—39-2304	39-2503
39-2305	Omitted
39-2306, 39-2307	39-2503
39-2308	39-1603, 39-1903
39-2401	39-1102
39-2402, 39-2403	39-1102
39-2404	39-2102, 39-2203
39-2405	39-1102
39-2406	Omitted
39-2407	39-502
39-2408	39-1102
39-2409	39-1103, 39-1104
39-2410	39-1103
39-2411	39-1103, 39-1104
39-2501—39-2514	Transfer
39-2515	39-1104
39-2516, 39-2517	Omitted
39-2518—39-2520	39-2508
39-2521—39-2530	Transfer
39-2531—39-2534	Omitted
39-2601	39-1201
39-2602	39-1503
39-2603	39-1201
39-2604	39-1903
39-2701—39-2704	Omitted
39-2801—39-2808	Omitted
39-2809	39-2103
39-2901—39-2908	Omitted
39-3002	39-2507
39-3003	39-2623
39-3004	Omitted
39-3005	39-2625
39-3006, 39-3007	39-2621
39-3008, 39-3009	Omitted
39-3101—39-3103	39-2306
39-3104—39-3106	Omitted
39-3107	39-2303
39-3108	39-2304
39-3109—39-3114	Omitted
39-3201, 39-3202	39-2401
39-3203	39-2402
39-3204	39-1903, 39-2401
39-3205—39-3210	Transfer
39-3211	39-2312
39-3213	39-2401
39-3214, 39-3215	39-2308
39-3216—39-3218	39-2401
39-3219—39-3221	Omitted
39-3222, 39-3223	Transfer
39-3301	39-2202
39-3302	39-2208
39-3303	39-2207
39-3304	39-2204
39-3305	39-901
39-3306	39-2203
39-3307, 39-3308	39-2202
39-3401—39-3404	Omitted
39-3405—39-3407	39-2312
39-3408	39-502
39-3409	Omitted
39-3410	39-2312
39-3411—39-3415	Omitted
39-3501	39-2601
39-3502	39-2602—39-2604
39-3503	39-2603
39-3504	39-2602
39-3505	39-2603, 39-2605
39-3506—39-3510	Omitted
39-3601	Omitted
39-3602	39-1104
39-3603	Omitted
39-3604, 39-3605	39-1603
39-3606	39-1101
39-3607	39-1603
39-3608	Omitted
39-3609, 39-3610	39-1603
39-3611—39-3615	Omitted
39-3616, 39-3617	39-1603

T.C.A. Sections	Criminal Code Sections
39-3701—39-3704	39-1302
39-3705, 39-3706	39-1306
39-3707	39-502
39-3708, 39-3709	39-1201, 39-2605
39-3801	39-502, 39-2307
39-3802	39-2307
39-3804	39-2310
39-3805	39-2201
39-3806	39-2307, 39-2308
39-3807	39-2307
39-3808, 39-3809	39-502, 39-2307, 39-2308
39-3810	39-504
39-3811	Omitted
39-3812	39-502, 39-2307, 39-2308
39-3813—39-3815	39-2311
39-3901, 39-3902	39-1702
39-4001—39-4003	Omitted
39-4101—39-4105	Omitted
39-4201	39-1901
39-4202—39-4204	39-1903
39-4205	Omitted
39-4206, 39-4207	39-1903
39-4208	Omitted
39-4209, 39-4210	39-1903, 39-2010
39-4211, 39-4212	39-1903
39-4213	39-502, 39-1903
39-4214	39-1903
39-4215	39-1904
39-4216—39-4225	39-1903
39-4226—39-4229	39-1903, 39-2044
39-4230	39-1903
39-4231	39-1903, 39-2045
39-4232	39-1903
39-4233	Omitted
39-4234, 39-4235	39-1903
39-4236	39-901, 39-1903
39-4237	39-1903, 39-2033
39-4238—39-4240	39-1903
39-4241—39-4243	Transfer
39-4244—39-4250	39-2022
39-4251	39-901, 39-1001, 39-1903
39-4301	39-1903, 39-2103
39-4401—39-4423	Omitted
39-4424	39-2211
39-4501, 39-4502	39-1603
39-4504, 39-4505	39-1603
39-4506	39-2509
39-4507	39-1603
39-4508—39-4510	39-1803
39-4511, 39-4512	39-1603
39-4513, 39-4514	39-1903
39-4515	39-1603
39-4516	39-502, 39-1603
39-4517—39-4519	39-1603, 39-1903
39-4520	Omitted
39-4521—39-4523	39-1603, 39-1903
39-4524, 39-4525	Omitted
39-4526	39-502, 39-1903
39-4527—39-4529	Omitted
39-4530	39-1603
39-4531	39-103
39-4532—39-4535	39-1603
39-4536—39-4542	Transfer
39-4601, 39-4602	39-2047
39-4701, 39-4702	Omitted
39-4801—39-4809	39-1603
39-4810	Omitted
39-4811	39-1603
39-4812	39-2021
39-4901—39-4903	39-2802
39-4904	39-2803
39-4905	39-2804
39-4906, 39-4907	Omitted
39-4908	39-105
39-4909	Omitted
39-4911, 39-4912	39-2807, 40-821—40-828
39-4913	Omitted
39-4914	Omitted
39-4915, 39-4916	39-2806
39-5001—39-5007	Omitted
39-5101—39-5103	39-502, 39-902, 39-2502
39-5104	39-2305
39-5105	39-1903
39-5106	39-1602
39-5107	39-1603
39-5108	39-1402
39-5109	39-901, 39-1602
39-5110	39-901, 39-1001, 39-1602
39-5111	39-1001
39-5112	39-902
39-5113	Omitted
39-5114	39-902, 39-1603, 39-2502
39-5115, 39-5116	Omitted
39-5201	Transfer

TENNESSEE CODE ANNOTATED TO CODE OF CRIMINAL PROCEDURE

Showing the disposition of each section in T. C. A. Title 40 by the Code of Criminal Procedure.

T.C.A. Sections	Code of Criminal Procedure Sections
40-101	39-104
40-102, 40-103	39-104, 39-304
40-104	40-301
40-105	40-302
40-106	40-303
40-107	40-301
40-108, 40-109	40-301, 40-302
40-110	40-304
40-111	40-301
40-112	40-302
40-113	40-301
40-114	40-105
40-115, 40-116	40-201, 40-202, 40-203
40-117	40-203
40-118, 40-119	40-202
40-201—40-203	40-401
40-204	40-402
40-205	40-404
40-206	40-405
40-207, 40-208	40-404
40-301, 40-302	40-1001, 40-1002
40-303	Omitted
40-304	40-1002
40-305	39-303
40-401—40-422	40-203
40-423	40-902, 40-903
40-424	40-1201—40-1216
40-425	Transfer
40-426	40-2404
40-427—40-429	Omitted
40-430	40-202
40-501	40-803
40-502	40-801
40-503—40-505	40-802
40-506	40-803
40-507, 40-508	40-804
40-509	40-803, 40-805
40-510	39-2401
40-511, 40-512	40-804
40-513	40-824—40-828
40-514, 40-515	40-1407
40-516	40-806
40-517	40-3409
40-518	40-803
40-519	40-1407
40-601—40-603	40-105
40-604	40-901, 40-1301
40-605	40-1801
40-606	40-906
40-701—40-704	40-701
40-705	40-704
40-706—40-709	40-702
40-710	40-701, 40-703
40-711—40-713	40-703
40-714	40-701, 40-703
40-715	Omitted
40-801	40-631, 40-636, 40-703
40-802	40-634
40-803	40-631
40-804	40-703
40-805	40-634
40-806	40-631, 40-703, 40-705
40-807	40-633, 40-701, 40-703
40-808	39-751
40-809—40-815	40-635
40-816—40-820	40-636
40-821	40-636, 40-901
40-822	40-631
40-823	40-633
40-824	40-637
40-825	40-631
40-826	40-637
40-901, 40-902	40-501
40-903, 40-904	40-502
40-905	40-503
40-1001	Omitted
40-1002	40-3101
40-1003	40-3102
40-1004	40-3103
40-1005	40-3104
40-1006	40-3105
40-1007	40-3106
40-1008	40-3107
40-1009	40-3108
40-1010	40-3109
40-1011	40-3110
40-1012, 40-1013	40-3111
40-1014	40-3112
40-1015	40-3113
40-1016	40-3114
40-1017	40-3115
40-1018	40-3116
40-1019	40-3117
40-1020	40-3118

T.C.A. Sections	Code of Criminal Procedure Sections
40-1021	40-3119
40-1022	40-3120
40-1023	40-3121
40-1024	40-3122
40-1025	40-3123
40-1026	40-3124
40-1027	40-3125
40-1028	40-3126
40-1029	40-3127
40-1030	40-3128
40-1031	40-3129
40-1032	40-3130
40-1033	40-3131
40-1034	40-3101
40-1035	40-3132
40-1101	40-901
40-1102	40-902
40-1103—40-1105	40-905
40-1106	40-1205
40-1107	39-2311
40-1108	40-603
40-1109	40-906
40-1110	40-902
40-1111, 40-1112	Omitted
40-1113	40-906
40-1114	40-909
40-1115	Omitted
40-1116	40-907
40-1117	40-906
40-1118	Omitted
40-1119	40-906
40-1120, 40-1121	Omitted
40-1122—40-1127	40-1209
40-1128—40-1130	Omitted
40-1131	40-904
40-1201	40-1201
40-1202—40-1204	40-1202
40-1205	40-1215
40-1206	40-1212
40-1207—40-1210	40-1205, 40-1212
40-1211	Omitted
40-1212	Omitted
40-1213	40-1204
40-1214	40-1205, 40-1206
40-1215, 40-1216	Omitted
40-1217	40-1203
40-1218	40-1211
40-1219—40-1222	Omitted
40-1223	40-1208
40-1224—40-1229	Omitted
40-1230	40-1206
40-1231—40-1233	40-1205, 40-1206
40-1234	40-1205
40-1235, 40-1236	Omitted
40-1237, 39-1238	40-1213
40-1239, 40-1240	Omitted
40-1241, 40-1242	40-1210
40-1243	40-1216
40-1301	40-1205, 40-1206
40-1302, 40-1303	40-1206
40-1304, 40-1305	40-1214
40-1306—40-1314	Omitted
40-1315—40-1318	40-1206
40-1401—40-1415	Omitted
40-1501—40-1503	40-1101
40-1504	Omitted
40-1505	40-1101
40-1506, 40-1507	40-1102
40-1508, 40-1509	40-1103
40-1510—40-1512	40-1107
40-1513	40-1102
40-1514, 40-1515	40-1120
40-1516	40-1119
40-1601	40-1104
40-1602—40-1604	Omitted
40-1605	40-1106
40-1606, 40-1607	40-1105
40-1608	40-1106
40-1609	40-1105
40-1610	40-1112
40-1611, 40-1612	40-1116
40-1613	40-1118
40-1614	40-1117
40-1615—40-1617	Omitted
40-1618, 40-1619	40-1110
40-1620	40-1804
40-1621	40-1107
40-1622	40-1108
40-1623	40-1111
40-1624, 40-1625	Omitted
40-1701, 40-1702	40-105
40-1703	40-1001
40-1704, 40-1705	Omitted
40-1706	40-1113
40-1707	40-1114
40-1708	Omitted
40-1709	40-1113
40-1710, 40-1711	40-1115
40-1712	Omitted
40-1713	40-1005
40-1714, 40-1715	40-1116
40-1801, 40-1802	40-1003
40-1803	40-1003, 40-1004
40-1804—40-1818	40-1003
40-1819	40-1004
40-1820—40-1828	40-1003
40-1901	Omitted
40-1902	40-1007
40-1903	Omitted
40-1904	40-1008
40-1905, 40-1906	40-1202
40-1907, 40-1908	40-1009
40-1909—40-1911	Omitted
40-1912	39-2401
40-1913	Omitted
40-2001	Omitted

T.C.A. Sections	Code of Criminal Procedure Sections
40-2002, 40-2003	40-3202, 40-3204
40-2004	Omitted
40-2005—40-2007	40-1312
40-2008	40-1301
40-2009	40-113
40-2014	40-3201
40-2015, 40-2016	40-3203
40-2017	40-3204
40-2018—40-2021	40-3205
40-2022—40-2027	40-3206
40-2028	40-3207
40-2029	40-3221
40-2030—40-2033	40-3222
40-2034, 40-2035	40-3223
40-2036	40-3222
40-2037	40-3223
40-2038, 40-2039	40-3222
40-2040, 40-2041	40-3223
40-2042	40-3222
40-2043	40-3224
40-2044	40-1504
40-2101, 40-2102	40-112
40-2103	40-3407
40-2104	Omitted
40-2201, 40-2202	40-305
40-2203—40-2205	40-306
40-2206—40-2211	40-307
40-2301	40-1401, 40-1402
40-2302, 40-2303	40-1401
40-2304, 40-2305	39-303
40-2306	39-302
40-2307	39-304
40-2308	40-1403
40-2309	40-1303
40-2310	40-2302
40-2401	40-2001
40-2402, 40-2403	40-2002
40-2404, 40-2405	Omitted
40-2406	39-2311
40-2407	Omitted
40-2408	40-1801
40-2409—40-2414	Omitted
40-2415, 40-2416	40-1804
40-2417, 40-2418	Omitted
40-2419	39-2311
40-2420	40-1209
40-2421	40-3401
40-2422—40-2426	40-3403
40-2427	Omitted
40-2428	40-1701
40-2429—40-2438	40-2021—40-2029
40-2439, 40-2440	40-2005
40-2441	40-1501, 40-1506
40-2501, 40-2502	Omitted
40-2503	40-113
40-2504	40-1901, 40-1921
40-2505	40-1922
40-2506	40-1923
40-2507—40-2510	40-1927
40-2511	40-1926
40-2512	40-1929
40-2513—40-2515	40-1928
40-2516	Omitted
40-2517	40-2101
40-2518	40-2102
40-2519	40-2202
40-2520, 40-2521	40-2203
40-2522	40-2204
40-2523, 40-2524	40-2205
40-2525	40-1901
40-2526—40-2528	40-1929
40-2529	40-2201
40-2601	40-1302
40-2602	Omitted
40-2701	40-2303
40-2702	40-1901
40-2703	39-847
40-2704	40-1901, 40-2301
40-2705	Omitted
40-2706	40-1901, 40-2301
40-2707, 40-2708	39-831
40-2709	Omitted
40-2710, 40-2711	39-845
40-2712—40-2715	40-3301—40-3305
40-2716—40-2718	40-2304
40-2719	39-849
40-2801, 40-2802	39-842
40-2803	40-1411, 40-1503
40-2804	40-2301
40-2805—40-2807	39-842
40-2901	40-2701, 40-2706
40-2902	40-2702
40-2903	40-2703
40-2904	40-2704
40-2905	40-2705
40-2906, 40-2907	40-2708
40-2908	40-2709
40-3001, 40-3002	40-2906
40-3003—40-3007	40-2907
40-3008	40-2908
40-3009	40-2909
40-3010, 40-3011	40-2910
40-3012, 40-3013	40-2912
40-3014	40-2913
40-3015, 40-3016	40-2911
40-3017	40-2907
40-3018	40-2901
40-3101, 40-3102	40-2501
40-3103	40-2504
40-3104	39-2401
40-3105	39-847
40-3106	39-847
40-3107	40-2503
40-3108—40-3110	40-2504
40-3111—40-3113	40-2505
40-3114, 40-3115	Omitted

T.C.A. Sections	Code of Criminal Procedure Sections
40-3116—40-3119	40-2502
40-3120	39-2401
40-3121	40-2506
40-3122, 40-3123	Omitted
40-3201	40-2603
40-3202	40-2601
40-3203, 40-3204	40-2604
40-3205	40-2606
40-3206	40-2607
40-3207	39-821
40-3208	40-2603
40-3209	40-2605, 40-2606
40-3301	40-3401
40-3302, 40-3303	40-3404
40-3304	40-3402
40-3305	40-3405
40-3306	40-3403
40-3307	40-3408
40-3308—40-3313	40-3405
40-3314	40-3411
40-3315	40-3414
40-3316	40-3413
40-3317—40-3319	40-3410
40-3320—40-3323	40-3411
40-3324	40-3414
40-3325, 40-3326	40-3408
40-3327—40-3330	40-3409
40-3331—40-3335	40-3407
40-3336, 40-3337	40-3415
40-3338—40-3341	40-3412
40-3342	40-3416
40-3343	40-3414
40-3344, 40-3345	40-3417
40-3346	40-3418
40-3347—40-3349	40-3406
40-3401—40-3404	40-2401
40-3405	Omitted
40-3406—40-3408	40-2406
40-3409	40-2402
40-3410	Omitted
40-3411	40-2403
40-3501	40-2901
40-3502, 40-3503	40-2902
40-3504	40-2904
40-3505	40-2903
40-3506	Omitted
40-3507	40-2905
40-3508	40-2902
40-3601	40-2801, 40-2803, 40-2861, 40-2862, 40-2865
40-3602	40-2869
40-3603	40-2866
40-3604	40-2868
40-3605	40-2863
40-3606—40-3608	40-2864
40-3609	40-2861
40-3610	40-2802
40-3611	40-2864
40-3612	40-2821, 40-2823, 40-2827
40-3613	40-2822, 40-2824, 40-2825
40-3614	40-2826, 40-2841
40-3615	40-2866
40-3616	40-2867
40-3617, 40-3618	40-2844
40-3619	40-2846
40-3620	40-2847
40-3621	40-2843
40-3622	40-2842
40-3623	40-2868
40-3624	40-2870
40-3625	40-2801
40-3626	40-2881
40-3627, 40-3628	40-2883
40-3629	40-2884
40-3701	40-3305
40-3702—40-3704	Omitted
40-3801	Omitted
40-3802	40-3001
40-3803	40-3002, 40-3004
40-3804	40-3002
40-3805	40-3001
40-3806	40-3005
40-3807, 40-3808	40-3003
40-3809	40-3006
40-3810	40-3009
40-3811, 40-3812	40-3007
40-3813	40-3006
40-3814	40-3008
40-3815	40-3003
40-3816, 40-3817	40-3009
40-3818	40-3011
40-3819	40-3013
40-3820	40-3010
40-3821	40-3006
40-3822	40-3013
40-3823	40-3014
40-3824	40-3012
40-3901	40-3152
40-3902	40-3151
40-3903	40-3153
40-3904	40-3154
40-3905	40-3155
40-3906	40-3156
40-3907	40-3157
40-3908	40-3158

APPENDIX II

CLASSIFICATION OF OFFENSES

First-Degree Felonies

39-1102 Murder
39-1201 Kidnapping
39-1303 Aggravated rape
39-1305 Aggravated sexual abuse
39-1306 Rape of a child under 12
39-1307 Sexual abuse of a child under 12
39-1602 Arson (occupied habitation)
39-1703 Aggravated robbery
39-1802 Burglary (occupied habitation)
39-2905 Trafficking in dangerous drug (2nd offense)
39-2910 Trafficking with a minor (dangerous drug or abusable drug with previous convictions)

Second-Degree Felonies

39-1103 Manslaughter
39-1201 Kidnapping (mitigating circumstances)
39-1203 Rape
39-1304 Sexual abuse
39-1602 Arson
39-1702 Robbery
39-1802 Burglary
39-1903 Theft (over $10,000)
39-1904 Theft of service (over $10,000)
39-2021 Forgery (money, securities, stamps, etc.)
39-2105 Tampering with witness (threat to kill)
39-2307 Escape (with deadly weapon)
39-2605 Compelling prostitution
39-2706 Lotteries, chain letters and pyramid clubs (over $10,000)
39-2803 Possession of prohibited weapon (except switchblade or knuckles)
39-2904 Trafficking in dangerous drug (1st offense)
39-2905 Trafficking in dangerous drug (2nd offense, mitigating circumstances)
39-2906 Trafficking in abusable drug (2nd offense)
39-2910 Trafficking with a minor (abusable drug and no previous convictions)

Third-Degree Felonies

39-1001 Sale or manufacture for sale of criminal instrument
39-1104 Criminally negligent homicide
39-1202 False imprisonment (aggravating circumstances)
39-1306 Rape of a child age 12-16
39-1307 Sexual abuse of a child age 12-16
39-1311 Indecency with a child under 12
39-1402 Aggravated assault
39-1503 Interference with child custody
39-1504 Criminal nonsupport (aggravating circumstances)
39-1505 Criminal abortion
39-1506 Aiding self-abortion
39-1603 Criminal mischief (over $250 or aggravating circumstances)
39-1903 Theft ($250-$10,000, from person or of trade secret)
39-1904 Theft of service ($250-$10,000)
39-2021 Forgery (will, codicil, deed, deed of trust, etc.)
39-2022 Criminal simulation
39-2031 Credit card abuse (aggravating circumstances)
39-2033 Hindering secured creditors (removal of property from state)
39-2043 Rigging publicly exhibited contest (aggravating circumstances)
39-2046 Fraudulent destruction, removal or concealment of writing (will, codicil, deed, mortgage, etc.)
39-2102 Bribery
39-2103 Coercion of public servant or voter
39-2105 Tampering with witness
39-2203 Aggravated perjury
39-2204 Subornation of aggravated perjury
39-2210 Tampering with or fabricating physical evidence (aggravating circumstances)
39-2211 Tampering with governmental record (aggravating circumstances)
39-2303 Resisting stop, frisk, halt, arrest or search (with a deadly weapon)
39-2307 Escape (charged with felony or institutionalized)
39-2308 Permitting or facilitating escape (aggravating circumstances)
39-2310 Implements for escape (with deadly weapon)
39-2311 Bail jumping and failure to appear (for felony charge)
39-2604 Aggravated promotion of prostitution
39-2704 Aggravated gambling promotion
39-2706 Lotteries, chain letters and pyramid clubs ($250-$10,000)
39-2802 Unlawful possession of weapon (handgun and recent felony conviction)
39-2904 Trafficking in dangerous drug (1st offense, mitigating circumstances)
39-2906 Trafficking in abusable drug (1st offense)
39-2906 Trafficking in abusable drug (2nd offense, mitigating circumstances)
39-2910 Trafficking with a minor (restricted drug)
39-2911 Possession of dangerous drug (second offense)
39-2912 Possession of drug paraphernalia (prior drug felony conviction)

Class A Misdemeanors

39-1001 Possession of criminal instrument with intent to commit offense
39-1308 Indecency with a child age 12-16
39-1405 Terroristic threat (aggravating circumstances)
39-1501 Bigamy
39-1502 Incest
39-1504 Criminal nonsupport (aggravating circumstances)
39-1603 Criminal mischief ($50-$250)
39-1804 Criminal trespass (in a habitation)
39-1903 Theft ($50-$250)
39-1904 Theft of service ($50-$250)
39-2021 Forgery
39-2022 Criminal simulation (mitigating circumstances)
39-2031 Credit card abuse
39-2032 False statement to obtain credit
39-2033 Hindering secured creditors
39-2034 Fraud in insolvency
39-2035 Receiving deposit, premium, or investment in failing financial institution
39-2041 Deceptive business practices
39-2042 Commercial bribery
39-2043 Rigging publicly exhibited contest
39-2044 Misapplication of fiduciary property or property of financial institution (over $250)
39-2045 Securing execution of document by deception
39-2046 Fraudulent destruction, removal or concealment of writing
39-2047 Criminal usury
39-2104 Improper influence
39-2106 Retaliation for past official action
39-2107 Compensation for past official behavior
39-2108 Accepting gift by public servant
39-2109 Offering gift to public servant
39-2202 Perjury
39-2204 Subornation of perjury
39-2210 Tampering with or fabricating physical evidence
39-2211 Tampering with governmental record
39-2213 Impersonating peace officer
39-2303 Resisting halt, arrest or search
39-2305 Hindering apprehension or prosecution
39-2306 Compounding
39-2307 Escape
39-2308 Permitting or facilitating escape
39-2310 Implements for escape
39-2311 Bail jumping and failure to appear (for class A misdemeanor charge or if subpoenaed for felony trial).
39-2312 Barratry
39-2401 Official misconduct
39-2402 Official oppression
39-2403 Misuse of official information
39-2502 Riot
39-2506 False alarm or report (aggravating circumstances)
39-2603 Promotion of prostitution
39-2703 Gambling promotion
39-2705 Possession of gambling device or record
39-2706 Lotteries, chain letters or pyramid clubs ($50-$250)
39-2802 Unlawful possession of weapon (handgun in public place)
39-2802 Unlawful possession of weapon (with intent to commit offense)
39-2804 Unlawful sale of firearm
39-2906 Trafficking in abusable drug (1st offense, mitigating circumstances)
39-2908 Trafficking in restricted drug
39-2911 Possession of dangerous drug (2nd offense)
39-2912 Possession of drug paraphernalia

Class B Misdemeanors

39-1202 False imprisonment
39-1401 Assault
39-1403 Reckless conduct
39-1804 Aggravated criminal trespass
39-1906 Unauthorized use of automobile or other vehicle
39-2044 Misapplication of fiduciary property or property of financial institution (under $250)
39-2209 False report to peace officer
39-2212 Impersonating public servant
39-2303 Resisting stop or frisk
39-2311 Bail jumping and failure to appear (for class B misdemeanor charge)
39-2501 Disorderly conduct (with deadly weapon)
39-2503 Obstructing highway or other passageway
39-2505 Disrupting meeting or procession
39-2506 False alarm or report
39-2508 Public intoxication
39-2509 Desecration of venerated object
39-2510 Abuse of corpse
39-2511 Cruelty to animals
39-2602 Prostitution (second conviction)
39-2623 Obscenity
39-2624 Sale, distribution, or display of harmful material to juvenile
39-2641 Public lewdness
39-2802 Unlawful possession of weapon
39-2803 Possession of prohibited weapon (switchblade or knuckles)
39-2908 Trafficking in restricted drug (mitigating circumstances)
39-2911 Possession of abusable drug (2nd offense)

Class C Misdemeanors

39-1401 Assault (mitigating circumstances)
39-1603 Criminal mischief (under $50)
39-1604 Reckless damage to property
39-1803 Criminal trespass
39-1903 Theft (under $50)
39-1904 Theft of service (under $50)
39-2302 Failure to identify as witness
39-2304 Evading arrest
39-2311 Bail jumping and failure to appear (for class C misdemeanor charge or if subpoenaed for misdemeanor trial)
39-2501 Disorderly conduct
39-2507 Harassment
39-2602 Prostitution
39-2622 Obscene display
39-2702 Gambling
39-2706 Lottery, chain letters or pyramid clubs ($50 or less)
39-2911 Possession of abusable drug (first offense)

APPENDIX III

OFFENSES BY CATEGORY

Section	Offense	Felony 1	Felony 2	Felony 3	Misdemeanor A	Misdemeanor B	Misdemeanor C
	Offenses Against the Person						
39-1102	Murder	X					
39-1103	Manslaughter		X				
39-1104	Criminally negligent homicide			X			
39-1201	Kidnapping (mitigating circumstances)		X				
39-1201	Kidnapping	X					
39-1202	False imprisonment					X	
39-1202	False imprisonment (aggravating circumstances)			X			
39-1302	Rape		X				
39-1303	Aggravated rape	X					
39-1304	Sexual abuse		X				
39-1305	Aggravated sexual abuse	X					
39-1306	Rape of a child (12-16)			X			
39-1306	Rape of a child (under 12)	X					
39-1307	Sexual abuse of a child (12-16)			X			
39-1307	Sexual abuse of a child (under 12)	X					
39-1308	Indecency with a child (12-16)				X		
39-1311	Indecency with a child (under 12)			X			
39-1401	Assault (mitigating circumstances)						X
39-1401	Assault					X	
39-1402	Aggravated assault			X			
39-1403	Reckless conduct					X	
39-1405	Terroristic threat (aggravating circumstances)				X		
	Offenses Against the Family						
39-1501	Bigamy				X		
39-1502	Incest				X		
39-1503	Interference with child custody			X			
39-1504	Criminal nonsupport				X		
39-1504	Criminal nonsupport (aggravating circumstances)			X			
39-1505	Criminal abortion			X			
39-1506	Aiding self-abortion			X			
	Offenses Against Property						
39-1602	Arson		X				
39-1602	Arson (aggravating circumstances)	X					
39-1603	Criminal mischief (under $50)						X
39-1603	Criminal mischief ($50-$250)				X		
39-1603	Criminal mischief (over $250 or aggravating circumstances)			X			
39-1604	Reckless damage to property						X
39-1702	Robbery		X				
39-1703	Aggravated robbery	X					
39-1802	Burglary		X				
39-1802	Burglary (occupied habitation)	X					

Section	Offense	Felony 1	2	3	Misdemeanor A	B	C
39-1803	Criminal trespass						X
39-1804	Aggravated criminal trespass					X	
39-1804	Criminal trespass (in a habitation)				X		
39-1903	Theft (under $50)						X
39-1903	Theft ($50-$250)				X		
39-1903	Theft ($250-$10,000, or from person, or if trade secret)			X			
39-1903	Theft (over $10,000)		X				
39-1904	Theft of service (under $50)						X
39-1904	Theft of service ($50-$250)				X		
39-1904	Theft of service ($250-$10,000)			X			
39-1904	Theft of service (over $10,000)		X				
39-1906	Unauthorized use of automobile					X	
39-2021	Forgery				X		
39-2021	Forgery (will, codicil, deed, deed of trust, etc.)			X			
39-2021	Forgery (money, securities, stamps, etc.)		X				
39-2022	Criminal simulation (mitigating circumstances)				X		
39-2022	Criminal simulation			X			
39-2031	Credit card abuse				X		
39-2031	Credit card abuse (aggravating circumstances)			X			
39-2032	False statement to obtain credit				X		
39-2033	Hindering secured creditors				X		
39-2033	Removal of property from state			X			
39-2034	Fraud in insolvency				X		
39-2035	Receiving deposit, premium, or investment in failing financial institution				X		
39-2041	Deceptive business practices				X		
39-2042	Commercial bribery				X		
39-2043	Rigging publicly exhibited contest				X		
39-2043	Rigging publicly exhibited contest (aggravating circumstances)			X			
39-2044	Misapplication of fiduciary property or property of financial institution (under $250)					X	
39-2044	Misappliction of fiduciary property or property of financial institution (over $250)				X		
39-2045	Securing execution of document by deception				X		
39-2046	Fraudulent destruction, removal or concealment of writing				X		
39-2046	Fraudulent destruction, removal or concealment of writing (will, codicil, deed, etc.)			X			
39-2047	Criminal usury				X		
	Offenses Against Government						
39-2102	Bribery			X			
39-2103	Coercion of public servant or voter			X			
39-2104	Improper influence				X		
39-2105	Tampering with witness			X			

Section	Offense	Felony 1	2	3	Misdemeanor A	B	C
39-2105	Tampering with witness (threat to kill)		X				
39-2106	Retaliation for past official action				X		
39-2107	Compensation for past official behavior				X		
39-2108	Accepting gift by public servant				X		
39-2109	Offering gift to public servant				X		
39-2202	Perjury				X		
39-2203	Aggravated perjury			X			
39-2204	Subornation of perjury				X		
39-2204	Subornation of aggravated perjury			X			
39-2209	False report to peace officer					X	
39-2210	Tampering with or fabricating physical evidence				X		
39-2210	Tampering with or fabricating physical evidence (aggravating circumstances)			X			
39-2211	Tampering with governmental record				X		
39-2211	Tampering with governmental record (aggravating circumstances)			X			
39-2212	Impersonating public servant					X	
39-2213	Impersonating peace officer				X		
39-2302	Failure to identify as witness						X
39-2303	Resisting stop or frisk					X	
39-2303	Resisting halt, arrest or search				X		
39-2303	Resisting stop, frisk, halt, arrest or search (with deadly weapon)			X			
39-2304	Evading arrest						X
39-2305	Hindering apprehension or prosecution				X		
39-2306	Compounding				X		
39-2307	Escape				X		
39-2307	Escape (with deadly weapon)		X				
39-2307	Escape (charged with felony or institutionalized)			X			
39-2308	Permitting or facilitating escape				X		
39-2308	Permitting or facilitating escape (aggravating circumstances)			X			
39-2310	Implements for escape				X		
39-2310	Implements for escape (deadly weapon)			X			
39-2311	Bail jumping and failure to appear (for class C misdemeanor)						X
39-2311	Bail jumping and failure to appear (for class B misdemeanor)					X	
39-2311	Bail jumping and failure to appear (for class A misdemeanor)				X		
39-2311	Bail jumping and failure to appear (for felony charge)			X			
39-2311	Bail jumping and failure to appear (if subpoenaed for misdemeanor trial)						X
39-2311	Bail jumping and failure to appear (if subpoenaed for felony trial)				X		
39-2312	Barratry				X		
39-2401	Official misconduct				X		
39-2402	Official oppression				X		
39-2403	Misuse of official information				X		

Section	Offense	Felony 1	Felony 2	Felony 3	Misdemeanor A	Misdemeanor B	Misdemeanor C
	Offenses Against Public Order						
39-1001	Unlawful sale of criminal instrument			X			
39-2501	Disorderly conduct						X
39-2501	Disorderly conduct (with deadly weapon)					X	
39-2502	Riot				X		
39-2503	Obstructing highway or other passageway					X	
39-2505	Disrupting meeting or procession					X	
39-2506	False alarm or report					X	
39-2506	False alarm or report (aggravating circumstances)				X		
39-2507	Harassment						X
39-2508	Public intoxication					X	
39-2509	Desecration of venerated object					X	
39-2510	Abuse of corpse					X	
39-2511	Cruelty to animals					X	
39-2602	Prostitution						X
39-2602	Prostitution (second conviction)					X	
39-2603	Promotion of prostitution				X		
39-2604	Aggravated promotion of prostitution			X			
39-2605	Compelling prostitution		X				
39-2622	Obscene display						X
39-2623	Obscenity					X	
39-2624	Sale, distribution, or display of harmful material to juvenile					X	
39-2641	Public lewdness					X	
39-2702	Gambling						X
39-2703	Gambling promotion				X		
39-2704	Aggravated gambling promotion			X			
39-2706	Lotteries, chain letters or pyramid clubs ($50 or less)						X
39-2706	Lotteries, chain letters or pyramid clubs ($50-$250)				X		
39-2706	Lotteries, chain letters or pyramid clubs ($250-$10,000)			X			
39-2706	Lotteries, chain letters or pyramid clubs (over $10,000)		X				
39-2804	Unlawful sale of firearm				X		
39-2904	Trafficking in dangerous drug (1st offense)		X				
39-2904	Trafficking in dangerous drug (1st offense, mitigating circumstances)			X			
39-2905	Trafficking in dangerous drug (2nd offense)	X					
39-2905	Trafficking in dangerous drug (2nd offense, mitigating circumstances)		X				
39-2906	Trafficking in abusable drug (1st offense)			X			
39-2906	Trafficking in abusable drug (1st offense, mitigating circumstances)				X		
39-2906	Trafficking in abusable drug (2nd offense)		X				

Section	Offense	Felony 1	Felony 2	Felony 3	Misdemeanor A	Misdemeanor B	Misdemeanor C
39-2906	Trafficking in abusable drug (2nd offense, mitigating circumstances)			X			
39-2908	Trafficking in restricted drug				X		
39-2908	Trafficking in restricted drug (mitigating circumstances)					X	
39-2910	Trafficking with a minor (restricted drug)			X			
39-2910	Trafficking with a minor (abusable drug and no previous convictions)		X				
39-2910	Trafficking with a minor (dangerous or abusable drug with previous convictions)	X					
	Possession Offenses						
39-1001	Possession of criminal instrument				X		
39-2705	Possession of gambling device or record				X		
39-2802	Unlawful possession of weapon					X	
39-2802	Unlawful possession of weapon (with intent to commit offense or handgun in public place)				X		
39-2802	Unlawful possession of weapon (handgun and recent felony)			X			
39-2803	Possession of prohibited weapon (switchblade or knuckles)					X	
39-2803	Possession of prohibited weapon (except switchblade or knuckles)		X				
39-2911	Possession of dangerous drug				X		
39-2911	Possession of dangerous drug (2nd offense)			X			
39-2911	Possession of abusable drug (1st offense)						X
39-2911	Possession of abusable drug (2nd offense)					X	
39-2912	Possession of drug paraphernalia				X		
39-2912	Possession of drug paraphernalia (prior drug felony conviction)			X			

END