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**THE ILLINOIS
CRIMINAL CODE:
AN ANALYSIS
and a
COMPARISON WITH
HAWAII LAW**

LEGISLATIVE REFERENCE BUREAU

STATE OF HAWAII

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JUL 26 1965

STATE OF HAWAII

LEGISLATIVE REFERENCE BUREAU

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FOREWORD

Criminal law in Hawaii and other jurisdictions has been a subject of growing concern in recent years. This interest evolves in part out of new insights into human behavior and as a result of changes in living patterns and social attitudes. The new interest was evidenced by House Resolution 242, adopted by the House of Representatives in 1963, which requested the Legislative Reference Bureau to compare Hawaii and Illinois criminal laws. Illinois was selected for comparative purposes since it is one of the few states that has recently reviewed, revised and codified its criminal law. It adopted a new Code in 1961. The Code's drafters had the benefit of the studies that were conducted in connection with the American Institute's Model Penal Code, the 1942 Criminal Code of Louisiana and the 1955 Wisconsin Criminal Code.

Any attempt to revise or update the criminal laws of any jurisdiction is a formidable task when viewed either technically or as a reexamination of basic policies. The updating and revision of Hawaii's criminal laws is no exception. This study, published in three volumes, is offered as a preliminary step in the process. It compares Hawaii's criminal law, statutory and decisional, with the Illinois Criminal Code of 1961. Part I sets forth the Illinois Criminal Code of 1961 and contains a subject matter index. Part II contains an explanatory note on each section of the Illinois Criminal Code (relying on the comments of the Illinois State and Chicago Bar Associations' Joint Committee to Revise the Illinois Criminal Code), a comment which compares each section with existing Hawaii law, and a referral to the page in Part III at which the Hawaii law can be found. Part III contains Hawaii's statutory and decisional criminal law arranged in the same sequence of organization as the Illinois Criminal Code.

Drafts of this study were reviewed by the State Attorney General's Office, the Prosecuting Attorney's Office for the City and County of Honolulu, the County Attorneys for the counties of Hawaii, Maui and Kauai, and representatives of the Hawaii Bar Association. Their suggestions and corrections were studied and revisions made. The Bureau is most grateful for the assistance rendered by the reviewers.

Tom Dinell
Director

April 1965

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INTRODUCTION

The preparation of the Illinois Criminal Code of 1961 was initiated in 1954 at the requests of the Governor of Illinois and of the Illinois Supreme Court which asked the Illinois State and Chicago Bar Associations to conduct a study for the purpose of proposing a complete revision of the Illinois criminal laws. The respective presidents of the associations appointed the Joint Committee to Revise the Illinois Criminal Code, consisting of sixteen lawyers, judges, prosecuting attorneys and law professors, with former Illinois Supreme Court Justice Floyd E. Thompson serving as chairman. The first two years of the six-year work were devoted to studying the scope of the problems of revision, including detailed studies of the proposed American Law Institute Model Penal Code, the Criminal Code of Louisiana (adopted in 1942), the then pending Wisconsin Criminal Code (adopted in 1955) and the Illinois Draft Criminal Code of 1935, the last previous attempt in Illinois to revise the criminal laws.

The Joint Committee was reorganized in 1956 with twenty-one members and Judge Richard B. Austin, Chief Justice of the Criminal Court of Cook County, as chairman.¹ The Drafting Sub-committee, under the chairmanship of Professor Francis A. Allen of the University of Chicago, enjoyed the services of the expert legal researcher and draftsman, Professor Fred Merrifield of the University of Chicago until his untimely death in February 1959. Subsequent research and drafting were accomplished by Warren L. Swanson, Marvin E. Aspen, Professor Willard D. Lorensen of West Virginia University and Professor Charles H. Bowman and James E. Herget of the University of Illinois.

¹Members of the Joint Committee to Revise the Illinois Criminal Code: Judge Richard B. Austin, Chairman; * Morris J. Wexler, Secretary of the Joint Committee and of the Drafting Sub-committee; * Professor Francis A. Allen, University of Chicago, Chairman of the Drafting Sub-committee; * Charles A. Bellows; * Professor Charles H. Bowman, University of Illinois; * John H. Bresee; George D. Carbary; Judge Wilbert F. Crowley; Peter A. Dammann; James P. Dillie; Fred E. Inbau; * Frank H. Masters, Jr.; Dick H. Mudge, Jr.; Robert B. Oxtoby; Francis X. Riley; James A. Sprowl; James R. Thompson; and Guy R. Williams. Former members--deceased: Judge Floyd E. Thompson, Chairman; Grenville Beardsley; Judge Hubert H. Edwards; Judge Benedict W. Eovaldi; Judge Harry M. Fisher; and Judge Wendell E. Green. Former members--resigned: Nathan T. Elliff; Wilber G. Katz; George N. Leighton; * Leo F. Poch; and Charles H. Thompson. Asterisk (*) indicates members of the Drafting Sub-committee.

The Joint Committee's corps of legal talent faced a monumental chaos not unlike the archaic, anomaly-filled body of criminal law that exists today in Hawaii. The foreword to the Joint Committee's Tentative Final Draft describes the pre-1961 status of Illinois criminal statutes:

The study revealed the magnitude of the project. Illinois has no "Criminal Code" in the sense of a codified, systematic body of law having utility as an instrument of social control in a modern community. Many of the provisions are unchanged since Judge Lockwood, in submitting to the Illinois General Assembly of 1827 a revised draft of the Laws of Illinois, described the small chapter on criminal jurisprudence as having been adopted primarily from a volume of the Laws of New York of 1802 which he brought with him to Illinois, and a volume of the Laws of Georgia which he located in the office of the Secretary of State. There was no serious attempt to revise the criminal laws until 1869 when a commission was appointed by the General Assembly to revise the Laws of Illinois. Chapter 38 of the draft submitted and adopted in 1874 contained the bulk of the penal provisions and was designated the "Criminal Code." It has been amended many times in the past eighty-five years but no over-all revision has been made by the General Assembly since 1874.

Hawaii's courts and legislature are presently confronted with anomalies, inconsistencies and anachronisms of the 1869 Penal Code of the Hawaiian Kingdom, and with the numerous additions to that foundation, made at times without adequate regard to their relationship to or consistency with prior provisions. The crime of instigating another to commit a criminal offense carries a maximum penalty of 20 years imprisonment at hard labor whereas a conspirator to the same criminal offense can be imprisoned for a maximum of only 10 years. The maximum sentence for bribery is a \$10,000 fine or 5 years imprisonment, or both, if the bribery is in connection with an athletic contest, but only \$500 or 1 year imprisonment for bribing a juror. The provisions of Hawaii's sex offense statutes neglect the protection of young boys almost entirely yet impose absolute liability for statutory rape (involving a female under the age of sixteen). Persons who practice hoopiopio, hoounauna, hoomanamana or anaana are subject to criminal prosecution under two statutes, one with a maximum penalty of a \$200 fine or 6 months imprisonment, the other with a maximum penalty

of a \$500 fine or 1 year imprisonment, or both. More than 50 different phrases, none of which are defined, are used to define specific criminal offenses.

An examination of Part II of this study which compares the Hawaii law with each specific provision of the Illinois Criminal Code in a Comment, will reveal that the Code does not effect radical changes in the traditional treatment of criminal jurisprudence. It does redefine practically all criminal offenses. It effects a unified arrangement by title, part, article and section--this in contrast to the alphabetical arrangement of specific crimes in the Revised Laws of Hawaii wherein Chapter 306 Robbery is juxtaposed to Chapter 307 Sabbath Violations which is followed by Chapter 308 Sabotage. The Code employs direct, concise use of modern language in contrast to the eighteenth century common law language of Blackstone used in Hawaii's criminal statutes. The arrangement of the Illinois Criminal Code includes four titles: Title I, General Provisions, deals with the title and construction of the Code, general definitions and rights of defendants. Title II sets forth basic principles of criminal liability. Title III defines specific offenses and prescribes penalties for each offense. Criminal offenses are classified as inchoate offenses, offenses directed against the person, offenses directed against property, offenses affecting public health, safety and decency and offenses affecting governmental functions. Title IV, which provides for a severability clause, savings provisions, specific repealers and an effective date, is not included in this study.

The Illinois Criminal Code is restricted to the substantive law of crimes except for some provisions, such as the place of trial, which might be classified as procedural but which are so closely allied to substance as to require inclusion. (Illinois adopted a Code of Criminal Procedure in 1963.) Accordingly, the compilation of Hawaii's criminal law in Part III, is limited to substantive law.

Aside from the self-evident observations of anomalies, inconsistencies and anachronisms in Hawaii law cited in this Introduction, the comparative presentation of the Illinois Criminal Code and Hawaii criminal law does not attempt a critique as to the relative merits of the differences found in the two bodies of law. The purpose of this study is to offer some useful tools for those who are interested in Hawaii criminal law revision.

TITLE I. GENERAL PROVISIONS

ARTICLE 1. TITLE AND CONSTRUCTION OF ACT; STATE JURISDICTION

Sec. 1-1. Short Title.

Explanatory Note.

The designation assigned to the Ill. CC is consistent with the usage in Illinois of the term "criminal code".

Comment.

States have designated various terms as convenient references to their criminal statutes. Some use "criminal code" (Illinois, Louisiana, Wisconsin); some use "penal code" (Arizona, California, Michigan, Pennsylvania); some use "penal law" (New York). In some states these terms are used to refer to both substantive and procedural criminal statutes (Arizona and California); while in others they refer only to the substantive law, criminal procedure being provided for in a separate code (Michigan, New York, Pennsylvania, Wisconsin).

Hawaii Law, page 1.

Sec. 1-2. General Purposes.

Explanatory Note.

This section sets forth certain recognized purposes of substantive criminal law, states the legislative purpose of the Ill. CC, and provides a general framework for the interpretation of specific Code provisions.

Comment.

A statement of general purposes applicable in the interpretation of criminal statutes would constitute new law in Hawaii.

Hawaii Law, page 1.

Sec. 1-3. Applicability of Common Law.

Explanatory Note.

The supersession of all common-law definitions of particular offenses is not intended to extend to the large body of interpretative rules developed under the common law. These rules are an intrinsic and valuable part of criminal law, and it is doubtful if they could be effectively replaced by statutory law.

Sec. 1-3. (Continued)

Comment.

The rule of not recognizing or punishing common law offenses has been statutory law in Hawaii since the nineteenth century; therefore the first sentence of this section is consistent with existing law in Hawaii.

As to the exception in the second sentence with respect to powers of a court to punish for contempt and to enforce its orders, this authority has commonly been considered to be within the inherent powers of the court. The Ill. CC does not otherwise deal with contempt or enforcement of court orders since these subjects are governed by other statutory provisions or by common law principles.

In the event of a codification of criminal law in Hawaii, it would be necessary to decide whether contempts generally or criminal contempts only or direct criminal contempts only should be included as specific criminal offenses or whether these matters or some of them should be removed to another area of RLH, such as to Title 26, Courts, Attorneys, Jurors.

Hawaii Law, page 1.

Sec. 1-4. Civil Remedies Preserved.

Explanatory Note.

This statement of the independence of criminal and civil aspects of conduct punishable under the Code follows the statutory rule enacted in several states, including California (Penal Code, section 9), Louisiana (Rev. Stats. 1950, 14:6) and New York (Penal Law, section 24). The contrary rule, developed in England, provides that a civil action cannot be maintained until after prosecution if the offense involved is a felony.

As to the admissibility in evidence in a civil action of a record of conviction, it is suggested that statutory solution of this problem belongs in a statute concerning civil evidence, such as the Model Code of Evidence Rule 251.

Comment.

Existing Hawaii law is not as broad as the Ill. CC. For example, it does not specifically extend to suspension of or otherwise affecting a right or liability to damages, penalty, forfeiture or other remedy. Further, the Hawaii statute provides that a civil right of action may be destroyed if it is expressly so provided.

Hawaii Law, page 4.

Sec. 1-5. State Criminal Jurisdiction.

Explanatory Note.

The purpose of this section is to establish a broad jurisdictional basis for the prosecution in Illinois of offenses involving persons, property and public interests in the State. In the case of a conflict of jurisdiction with another state, Illinois jurisdiction will be asserted or not as a matter of official determination. This section is similar to the corresponding section of the Model Penal Code (section 1.03) except that the latter contains additional qualifications and considerations applicable to jurisdiction over conduct in the State causing a result in another state, conduct in another state causing a result in the State, and conduct occurring wholly outside the State when no element of the offense occurs within the State.

Under the Ill. CC a person's location within or outside the State when the offense is committed and his legal relation to the offense as principal or accessory are immaterial for purposes of jurisdiction if the offense has the features described in any of the five subsections.

The provisions of this section relative to offenses committed partly within the State are intended to include all offenses commenced outside and consummated within the State and those commenced within and consummated outside the State as well as the following specific offenses when some elements occur outside the State: homicide, dueling, treason, certain cases of larceny and embezzlement, obtaining property in the State by means of false pretenses or representations made in another state, or vice versa (the general rule being that only the state in which the property is obtained has jurisdiction), assault and battery, and uttering a forged instrument by transmitting it through the mails.

Homicide, in view of its importance, is specifically treated in subsection (b). Instead of the common law rule that jurisdiction of a homicide is where the cause of death is administered or inflicted, jurisdiction is broadened to cover (1) conduct which puts in motion the instrument or agency of death, (2) the occurrence of the physical contact which causes the death, or (3) the occurrence of the death.

Offenses committed wholly within the State, while a self-explanatory classification, should probably be understood to include certain cases of larceny, as when property is brought into a state after having been stolen in another state, the recognized common law exception to the general rule of local jurisdiction of criminal offenses since larceny is regarded as a continuing offense and every asportation is a new taking.

Sec. 1-5. (Continued)

Subsections (2) and (3) extend state jurisdiction to cover inchoate offenses committed outside the State but related to intended offenses within the State.

Comment.

The Ill. CC criminal jurisdiction provisions differ from existing Hawaii statutory law in three respects: (1) the Illinois law is more explicit; (2) the Illinois law gathers all jurisdictional rules into one section in contrast to the Hawaii rules which are scattered among various chapters of the RLH; (3) Illinois jurisdiction is more extensive than that of Hawaii because it covers attempts outside the State to commit offenses within the State, attempts, solicitations or conspiracies to commit certain offenses in other jurisdictions, and offenses based on omissions to act.

Hawaii Law, page 4.

Sec. 1-6. Place of Trial.

Explanatory Note.

This section, dealing with place of trial or venue, should be distinguished from State criminal jurisdiction (section 1-5, Ill. CC). Jurisdiction concerns the power generally of the State to punish offenders and rests on the inherent sovereign power of the State and constitutional and statutory provisions which implement that power. This section should be distinguished also from the jurisdiction of particular courts within the State to try specific types of offenses, a power dependent on state constitutions in the case of constitutional courts and on jurisdictional powers conferred upon courts by statute.

The general rule for ascertaining venue recognizes the right of a defendant to be tried in the county where the offense was committed. Venue in certain situations involving commission and consummation of an offense in more than one county is governed by thirteen specific rules.

The provision in subsection (a) that objections of improper place of trial are waived by a defendant unless made before trial is designed to prevent a defendant who knows the place of trial to be improper or questionable from gambling on the verdict and raising the issue for the first time after he has been found guilty.

Sec. 1-6. (Continued)

Comment.

Illinois and Hawaii both subscribe to the same general rule for designating place of trial of criminal actions, namely, the county or circuit where the offense was committed.

The rule that all objections of improper place of trial are waived by a defendant unless made before trial is absolute in Ill. CC (consistent provisions are found in section 50-1, Illinois Code of Criminal Procedure 1963) whereas the Hawaii Rules of Criminal Procedure permit the court to grant relief from the waiver.

Existing Hawaii law does not include specific rules for the following situations that are specified in Ill. CC:

1. Assailant and victim in different counties;
2. Death and cause of death in different counties;
3. Offense commenced outside the State (but see section 1-5, State Criminal Jurisdiction);
4. Offense committed in bordering navigable waters (but see section 1-5, State Criminal Jurisdiction);
5. Offense committed while in transit;
6. Theft;
7. Bigamy, except the Hawaii rule authorizes venue in any jurisdiction in which the defendant is apprehended or in custody;
8. Kidnapping;
9. Pandering;
10. Treason;
11. Criminal defamation; and
12. Accountability for conduct of another, except in the case of an accessory to a felony as provided in section 252-2, RLH (see Article V for relationship between "accessory" and "accountability for conduct of another").

Hawaii's specific venue rule for the offense of forgery is not included in the Ill. CC. The offense of receiving stolen goods is subject to similar venue

Sec. 1-6. (Continued)

provisions in Hawaii, where it is specifically dealt with, and in Illinois, where it is included under the classification of theft (Article 16, Ill. CC and similar classification in the Model Penal Code, Article 223).

Hawaii's case law dealing with venue for the offense of conspiracy is consistent with the Ill. CC rule that any inchoate offense (see Article 8, Ill. CC) may be tried in any county in which any act which is an element of the offense, including the agreement in conspiracy, is committed.

The Ill. CC does not include any provisions comparable to Hawaii laws which permit district court cases to be tried in the district of arrest or in the district of the defendant's residence as well as in the district where the offense was committed.

Hawaii Law, page 5.

Sec. 1-7. Judgment, Sentence and Related Provisions.

Explanatory Note.

The general provisions of this section are usually considered procedural but are included in the substantive Code in order to implement consistently the policies inherent in the specific offenses and penalties provided for throughout the Ill. CC. The official comments on the Ill. CC make it clear that this section is not intended to affect substantively the provisions of the Illinois Probation Act, Parole Act, or statutes relating to sentencing to the Youth Commission or State reformatory for women.

Section 1-7 provides that sentences for all offenses shall be as provided in the Ill. CC and that all sentences shall be by the court, except the death verdict by the jury in capital cases, a sentence which the court is not obligated to follow. Authorized penalties are listed for all offenders unless otherwise provided by law, e.g., commitment to the Youth Commission. All sentences to the penitentiary are indeterminate, and there is no life sentence authorized. The Illinois Supreme Court has sustained indeterminate sentences with a minimum considerably more than the life expectancy of the defendant (People v. King, 1 Ill. 2d 496, 116 N.E. 2d 623 (1953)) such as "199 years to life". This type of indeterminate sentence is in reality, a "life" sentence, whereas a sentence to "life" is not a true

Sec. 1-7. (Continued)

life sentence because the parole laws of Illinois authorize eligibility for parole within twenty years. However, the Illinois General Assembly in H. B. 343, 1961 amended the Sentence and Parole Act to provide that every person sentenced to the penitentiary shall be eligible for parole at the end of twenty years regardless of the length of his sentence.

Sentences other than to the penitentiary must be for definite terms and may not exceed one year. A presentence hearing in aggravation or mitigation is required in all cases.

Other provisions of this section include authority to impose a fine on a corporation; establishment of a maximum fine schedule for felonies and misdemeanors and the penalty for a regulatory offense when such is not specified in the statute defining the offense (applicable to offenses which may be added to the Code or which appear elsewhere in the Illinois statutes); procedures for collecting fines or satisfying them by imprisonment; and rules for consecutive and concurrent sentences.

Comment.

The principal difference between the Ill. CC and Hawaii law is that the former arranges the provisions in a more systematic manner. Specific and obvious differences include the following:

1. Hawaii does not provide for capital offenses.
2. Ill. CC does not provide for a sentence of imprisonment for life not subject to parole.
3. Hawaii does not specifically provide for presentence hearings in cases of misdemeanors.
4. The maximum fines for offenses wherein no fine is prescribed, as in Hawaii felony cases where the prescribed fine is less than \$1,000 are authorized as follows:

	<u>Hawaii</u>	<u>Ill. CC</u>
Felony	\$1,000 plus imprisonment	\$10,000
Misdemeanor	\$500 plus imprisonment	\$ 1,000

Sec. 1-7. (Continued)

5. Ill. CC does not provide a rule that where a fine or imprisonment is prescribed in the alternative, the court may impose both fine and imprisonment.
6. Hawaii does not provide a blanket penalty for offenses for which no penalty is otherwise provided. Ill. CC sets such penalties as imprisonment not to exceed one year, or fine not to exceed \$1,000, or both.
7. Imprisonment to discharge a fine is at the rate of \$2 a day in Hawaii and \$5 a day under Ill. CC with a maximum imprisonment of six months. Ill. CC does not provide for discharge on a pauper's oath in such cases.
8. Ill. CC and the Illinois Code of Criminal Procedure do not make clear whether or not statutory costs are included in fines. By Hawaii decisional law they are so included.

Hawaii Law, page 7.

ARTICLE 2. GENERAL DEFINITIONS

Explanatory Note.

A systematic body of law such as the Ill. CC necessitates uniform and consistent application of terms. The twenty-two general terms defined in Article 2 are intended generally to apply a particular uniform sense to each term as it is used throughout the Code, thus eliminating interpretation problems in specific provisions. Additional definitions appear elsewhere in the Code, particularly in sections related to specific offenses.

The definitions in this Article have recently been incorporated by reference into the Illinois Code of Criminal Procedure of 1963.

Comment.

The integrated structure and organization of a code differs markedly from the loose organization of existing Hawaii criminal statutes which lack a comprehensive glossary of terms.

Hawaii Law, page 10.

Sec. 2-1. "Acquittal"

Explanatory Note.

Acquittal occurs when the trier of fact--the jury, or the court when a jury is waived--renders a verdict or finding of not guilty. Whether or not a judgment of acquittal is subsequently entered is immaterial. It should be noted that this definition of "acquittal" does not include dismissal of a case, sometimes called "acquittal not on the merits" as in the case of variance or a defective indictment or information. See section 3-4, Effect of Former Prosecution.

Comment.

The Ill. CC and existing Hawaii law differ on the matter of defining "acquittal" in a number of points:

1. The Ill. CC specifically defines the term "acquittal" whereas Hawaii law defines the term by implication as it relates to rights of accused and double jeopardy.
2. The Hawaii statutory provision does not, in contrast to the Ill. CC, provide that a verdict of not guilty by the court, as trier of fact, operates as an acquittal.
3. The equivalence of the Hawaii provision making failure to prosecute at the term an information or indictment is presented operate as an acquittal is found in the newly enacted Illinois Code of Criminal Procedure under the article on rights of accused. Section 103-5 dealing with speedy trial requires generally, and subject to certain exceptions, trial within one hundred and twenty days from the date a defendant is taken into custody or from the date he demands trial.
4. The Hawaii statutory provision making failure to sustain an information or indictment operate as an acquittal has no precise counterpart in the Ill. CC or Code of Criminal Procedure. The provision has not been discussed in Hawaii decisional law; so it is mere speculation to assign significance to it. "Sustain" is usually defined as meaning to carry on or to maintain but may also mean to prove or to establish by evidence.

Sec. 2-1. (Continued)

5. Hawaii law treats of acquittal primarily as a matter of criminal procedure whereas the Ill. CC ascribes a specific definition to the term to be applied wherever it is used in criminal law, substantively or procedurally.

Hawaii Law, page 10.

Sec. 2-2. "Act"

Explanatory Note.

See sections 4-1, Voluntary Act and 4-2, Possession as Voluntary Act.

Comment.

The Hawaii and Ill. CC definitions are substantially the same.

The Hawaii statutory definition of "act" appears specifically as a part of criminal procedure whereas the Ill. CC definition is specifically made to apply to procedural as well as substantive criminal law by the incorporation by reference of Ill. CC definitions into the Code of Criminal Procedure.

Hawaii Law, page 11.

Sec. 2-3. "Another"

Explanatory Note.

Self-explanatory.

Comment.

Hawaii law does not define the term "another" for criminal law purposes. The definition of the term in Ill. CC provides a conveniently brief and consistent means of expression.

Hawaii Law, page 11.

Sec. 2-4. "Conduct"

Explanatory Note.

See Article 4, Criminal Act and Mental State.

Comment.

The importance of a definition of this term is discussed in connection with Article 4.

Hawaii Law, page 12.

Sec. 2-5. "Conviction"

Explanatory Note.

Conviction occurs when the court renders judgment upon a plea of guilty or upon a verdict or finding of guilt. The conviction is not deemed final until judgment is rendered. See sections 3-4, Effect of Former Prosecution and 8-5, Multiple Convictions.

Comment.

A specific definition of the term provides a conveniently brief and consistent means of expression.

Hawaii Law, page 12.

Sec. 2-6. "Dwelling"

Explanatory Note.

See section 7-2, Use of Force in Defense of Dwelling.

Comment.

A specific definition of the term provides a conveniently brief and consistent means of expression.

Hawaii Law, page 12.

Sec. 2-7. "Felony"

Explanatory Note.

Self-explanatory.

See section 1-7, Judgment, Sentence and Related Provisions.

Comment.

The definition of the term "felony" in the Ill. CC provides for an offense punishable by death; such offense is generally comparable to an offense under RLH punishable with life imprisonment not subject to parole, for Hawaii has abolished capital punishment.

The other difference between the Ill. CC and existing Hawaii law is that the former sets a criterion of place of imprisonment (the penitentiary) while the latter sets a criterion of duration of imprisonment (longer than one year).

Hawaii Law, page 12.

Sec. 2-8. "Forcible felony"

Explanatory Note.

See Article 7, Justifiable Use of Force; Exoneration and Title III, Specific Offenses.

Comment.

This term is significant in connection with a new specific classification of felony added by the Ill. CC.

Hawaii Law, page 12.

Sec. 2-9. "Included offense"

Explanatory Note.

See sections 3-3, Multiple Prosecutions for Same Act, 3-4, Effect of Former Prosecution, 8-4, Attempt and 8-5, Multiple Convictions.

Sec. 2-9. (Continued)

Comment.

Existing Hawaii law does not contain a specific definition of the term "included offense". Decisional law and statutory provisions relating to particular crimes determine the elements of an included offense. See the comments on specific crimes, such as arson, assault, battery, burglary, conspiracy, embezzlement, extortion, homicide, larceny, and robbery.

Hawaii Law, page 13.

Sec. 2-10. "Includes"

Explanatory Note.

Self-explanatory.

Comment.

A specific definition of the term provides a conveniently brief and consistent means of expression.

Hawaii Law, page 14.

Sec. 2-11. "Misdemeanor"

Explanatory Note.

See sections 1-7, Judgment, Sentence and Related Provisions and 2-7, Felony.

Comment.

The Ill. CC and RLH definitions are substantially equivalent, except for the distinctions noted in connection with section 2-7.

Hawaii Law, page 14.

Sec. 2-12. "Offense"

Explanatory Note.

Although the term "penal statute" is not defined in the Ill. CC, the implication of subsection 1-7(j) is that the scope of the Code, as it relates at least to penalties, extends to every offense prescribed by State law including regulatory offenses.

Comment.

The RLH definitions of the term "offense" seem to be substantially the same as the Ill. CC definition read in conjunction with the Ill. CC definition of the term "act" which includes a failure or omission to act. Neither one defines the respective terms "penal statute" or "penal law". The amplification of the RLH definition for criminal procedure purposes does not appear relevant to the terms "offense" and "transaction" as they are used in the Hawaii Rules of Criminal Procedure. In the newly enacted Illinois Code of Criminal Procedure (H. B. No. 851, Session Laws of Illinois 1963) the term "offense" is defined to mean "a violation of any penal statute of the State or of any penal ordinance of its political subdivisions".

The proposed Model Penal Code of the American Law Institute (section 1.04) classifies offenses into crimes and violations, the latter being generally an offense punishable only by fine, forfeiture or other civil penalty. The Model Code further classifies crimes into felonies, misdemeanors and petty misdemeanors. The Model Penal Code thus differs sharply from both the Ill. CC and Hawaii law in the treatment of regulatory offenses.

Hawaii Law, page 14.

Sec. 2-13. "Peace officer"

Explanatory Note.

Self-explanatory. See sections 7-5 to 7-9, 31-1, 31-2, 31-7 and 31-8.

Sec. 2-13. (Continued)

Comment.

The generalized definition in the Ill. CC clarifies the sense of the convenient term "peace officer" as it relates particularly to such substantive matters as justifiable use of force and interference with public officers and such procedural matters as the law of arrest and search and seizure.

Hawaii Law, page 15.

Sec. 2-14. "Penal institution"

Explanatory Note.

Self-explanatory.

Comment.

Although there is no Hawaii statutory definition of the term "penal institution", the general usage of the term "state correctional facility" achieves the same result of a convenient referent.

Hawaii Law, page 16.

Sec. 2-15. "Person"

Explanatory Note.

Self-explanatory.

Comment.

The Ill. CC and RLH definitions of the term "person" differ primarily in the specific listings that are included. The Hawaii definition does not include "government" within the meaning of "person".

Hawaii Law, page 16.

Sec. 2-16. "Prosecution"

Explanatory Note.

Self-explanatory.

Comment.

A referral to the provisions of Hawaii Rules of Criminal Procedure with respect to criminal proceedings, from indictment or information to final disposition on appeal, is substantially the same as a definition of the term "prosecution".

Hawaii Law, page 16.

Sec. 2-17. "Public employee"

Explanatory Note.

Self-explanatory. See Articles 31 to 33.

Comment.

These definitions are primarily of importance in connection with specific offenses under the categories of interference with public officers, interference with judicial procedure and official misconduct.

A difference could present itself as between the Ill. CC definition and Hawaii decisional law if the Hawaii courts would classify as a public employee a person authorized to perform an official function without pay, analogous to the holding in the case which classified a special police officer without pay as a public officer. The Ill. CC definition is two-part: (1) a person authorized to perform an official function; and (2) paid by the State.

Hawaii Law, page 16.

Sec. 2-18. "Public officer"

Explanatory Note.

Self-explanatory. See Articles 31 to 33.

Sec. 2-18. (Continued)

Comment.

See comment to section 2-17.

Hawaii Law, page 17.

Sec. 2-19. "Reasonable belief"

Explanatory Note.

This term, significant with respect to the affirmative defenses of ignorance or mistake and justifiable use of force, is defined in words used in Illinois cases.

See section 4-8 and Article 7.

Comment.

This term will be discussed as it applies specifically in other sections of the Code.

Hawaii Law, page 17.

Sec. 2-20. "Solicit"

Explanatory Note.

This definition is for the general purposes of the Code. The specific offense of solicitation is provided in sections 8-1, 8-3, 8-5, and 8-6.

Comment.

Existing Hawaii law does not provide a general definition of the Ill. CC term "solicit" or "solicitation" nor of its Hawaii near-equivalent "instigation". It should be noted that solicitation as a specific offense in RLH (sections 309-26 and 309-27) refers inter alia to offers, or offers to secure, another for the purpose of prostitution or for any other lewd or indecent act.

Hawaii Law, page 17.

Sec. 2-21. "State"

Explanatory Note.

Self-explanatory.

Comment.

Hawaii statutory law does not define the terms "State" or "this State" and "other state" generally for all purposes of criminal law.

The Ill. CC specifically includes air space in its definition. Sovereignty in and ownership of space is not a settled area of law and is currently the subject of intensive study as it relates to state, interstate, national and international jurisdictional problems. Probably, an acceptable general rule to apply as to state criminal jurisdiction in space is that a crime committed over a state is governed by the laws of the state, unless it is committed at an elevation where jurisdiction is transferred out of the state.

Hawaii Law, page 17.

Sec. 2-22. "Statute"

Explanatory Note.

Self-explanatory.

Comment.

Though Hawaii does not explicitly define the term "statute", it is commonly understood to mean the Constitution or an act of the legislature of the State.

Hawaii Law, page 18.

ARTICLE 3. RIGHTS OF DEFENDANT

This Article states certain fundamental rights established for the protection of the person accused of an offense, including rules as to presumption of innocence, multiple prosecutions, former prosecution and double jeopardy, and time limitations on prosecutions.

Sec. 3-1. Presumption of Innocence and Proof of Guilt.

Explanatory Note.

The principle of the "presumption" of innocence is recognized in all United States jurisdictions although it is expressed in various ways, some brief, others elaborate, some by statute, others by decisional law. The primary concern is to provide the basis for a readily understood jury instruction.

The Ill. CC states the principle of innocence separately from that of reasonable doubt in recognition of the holding in People v. Long, 407 Ill. 210, 95 N.E. 2d 461 (1950), that the defendant is entitled to an instruction on the presumption of innocence, as distinguished from an instruction which relates only to the proof of guilt beyond a reasonable doubt. This distinction is not drawn in some states where, on the other hand, the degree of proof necessary to convict is deemed complementary to the presumption of innocence.

The statement of reasonable doubt is not defined, following the Illinois trend toward discouraging jury instructions which attempt such definition.

The Model Penal Code (section 1.12) briefly and separately states the principles of presumption of innocence and reasonable doubt and adds qualifications going to affirmative defense, burden of proof, and presumption.

The official comments to the Ill. CC stress that section 3-1 is intended to state the existing rules and not to effect a change in substantive law or form of instructions.

Sec. 3-1. (Continued)

Comment.

The Ill. CC and the Hawaii statute on presumption of innocence and reasonable doubt are substantially the same. The chief difference arises from the problem of trial judges in giving jury instructions as a guide in applying the rule of proof beyond a reasonable doubt. The Illinois Supreme Court in recent decisions has expressly discouraged the use of such instruction; no similar trend is evident in Hawaii cases.

Hawaii Law, page 18.

Sec. 3-2. Affirmative Defense.

Explanatory Note.

In sustaining its burden of proof, the prosecution need not negate all possible defenses which might be raised.

Subsection (a) states the method of raising the issue of an affirmative defense and prescribes the minimum requirement-- unless the prosecution's evidence raises an issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon. The amount of evidence is not specified, but it is obvious that in order to be of substantial benefit to the defendant, there must be enough evidence to warrant submitting the issue to the jury and to raise a reasonable doubt as to the guilt of the defendant.

Subsection (b) states the effect of raising the issue of an affirmative defense and clarifies that the prosecution's burden of proving the defendant guilty beyond all reasonable doubt is not affected. It still has that burden as to every issue in the case, but matters of affirmative defenses are not issues unless some evidence thereon is presented either by the prosecution or by the defendant.

Comment.

Specific matters of affirmative defense will be discussed as they are involved in other sections of the Ill. CC.

Hawaii Law, page 19.

Sec. 3-3. Multiple Prosecutions for Same Act.

Explanatory Note.

The rules for compulsory joinder of offenses which have certain close interrelationships are included in the Ill. CC and not in the Illinois Code of Criminal Procedure, as permissive joinder is, because of the effect on double or former jeopardy (section 3-4) and because a substantive protection of the defendant is involved. The rationale of the single-prosecution provision is that a defendant should not be subjected to more than one prosecution when that one will permit presentation of all pertinent issues of the related offenses.

Section 3-3 requires that several offenses must be prosecuted in a single prosecution if they are based on the same conduct, and the defense of double jeopardy is unavailable, subject to the following qualifications:

(1) the several charges must be known to the prosecutor when prosecution commences; thus the rule would not apply to an offense concealed by the defendant or to an offense not yet consummated but following directly from the defendant's conduct, such as the death of the victim resulting from an assault, after the defendant has been prosecuted for the assault; (2) the several charges must be within the jurisdiction of the same court, a necessary recognition of the statutory venue provisions; (3) the court may permit the separate trial of one or more of the offenses in the interests of justice.

The phrase "must be prosecuted" does not deprive the prosecutor of his power to decide that only certain of the offenses committed will be prosecuted. The result of trying only some of the offenses, however, would be that he could not prosecute the other offenses at all.

The phrase "same conduct" is designed to describe the situation in which several persons are affected by one act of the defendant or in which two different statutory provisions are violated by one act of the defendant.

Section 3-3 is not intended to cover the situation in which several offenses arise from a series of acts which are closely related to the defendant's single purpose or plan.

Sec. 3-3. (Continued)

Related problems of number of convictions which may be obtained are involved in cases such as when one offense charged is included in another, or consists of conspiracy or solicitation to commit another, or requires findings of fact which are inconsistent with those of another, or is a specific instance of the more general type of misconduct of another, or constitutes one act of a continuing course of conduct and another offense charged also constitute an act in the same course. These problems are considered in the Illinois Code of Criminal Procedure although the Model Penal Code, section 1.07 includes them in the single-prosecution provision.

Comment.

Hawaii law does not require compulsory joinder of offenses although certain situations dealing with the multiple prosecution power have been ruled on under the rubric of double jeopardy. (See section 3-4, Effect of Former Prosecution.)

This section of the Ill. CC constituted a significant change from the prior Illinois law and is contended to prevent abuses of successive criminal prosecutions for reasons unrelated to the proper trial of the issues involved.

Hawaii Law, page 19.

Sec. 3-4 Effect of Former Prosecution.

Explanatory Note.

The rules of double or former jeopardy are stated in this section together with a rule complementing the single-prosecution requirement of section 3-3 and one recognizing the principle of res judicata when it applies.

Subsection (a) bars a subsequent prosecution of the defendant for the same offense, based on the same facts and conducted in the same jurisdiction as the former prosecution which: (1) resulted in an acquittal on the merits or in a conviction; (2) was terminated by certain pre-trial determinations, involving such issues as time limitation on prosecutions, double jeopardy, pardon, immunity from prosecution and substantial insufficiency of the indictment; or

Sec. 3-4. (Continued)

(3) was improperly terminated after the trial commenced, on the assumption that proper termination includes those to which the defendant consents, those required by necessity such as death or illness, prejudicial conduct affecting the fairness of trial, serious procedural defects and a "hung jury".

The rule that a subsequent prosecution is barred when the former prosecution for the same offense resulted in a conviction only of an included offense is consistent with Green v. United States, 355 U. S. 187 (1957). In this case, decided under the double jeopardy clause of the Fifth Amendment, the United States Supreme Court held that a defendant charged with first degree and convicted of second degree murder, who obtains a reversal on appeal, may not again be tried for murder in the first degree.

Subsection (b) bars a subsequent prosecution of the defendant for a different offense, or for the same offense based on different facts under the following circumstances: (1) the defendant could have been convicted of the new offense on the former prosecution, e.g., former conviction or acquittal of murder will bar a subsequent prosecution for manslaughter, similarly with respect to rape and assault with intent to rape or simple assault; (2) an offense in a subsequent prosecution was not charged in the former prosecution as required under the compulsory-joinder rule of section 3-3; (3) a former conviction or acquittal of an offense which is an included offense or an offense of a lower degree with respect to the offense charged in the subsequent prosecution (with qualification), e.g., former prosecution for manslaughter and subsequent prosecution of murder of the same victim; (4) the former prosecution determined facts inconsistent with a fact necessary to conviction in the subsequent prosecution, giving effect to the doctrine of res judicata; or (5) an improper termination of the former prosecution in which the defendant could have been convicted but for the improper termination, e.g., a serious offense improperly terminated and a subsequent prosecution for an included offense.

Subsection (c) bars a subsequent prosecution of the defendant for an offense which was formerly prosecuted in a District Court of the United States or in a sister state if the former prosecution either (1) resulted in a conviction or acquittal based on the same facts, or (2) was terminated by a determination of facts inconsistent with a fact necessary to conviction in the prosecution in Illinois, another extension of the doctrine of res judicata.

Sec. 3-4. (Continued)

The following qualifications and limitations to the bar of former prosecution are stated throughout the section and in subsection (d): (1) the point at which jeopardy attaches in a jury trial is when the jury is sworn and in a trial before the court when the first witness is sworn. Section 1.08(4) of the Model Penal Code provides a uniform rule placing the point of jeopardy at the swearing of the first witness; (2) a former prosecution is not a bar unless it was in a court with jurisdiction; (3) a former prosecution is not a bar if it was procured by the defendant without the knowledge of the prosecutor and for the purpose of avoiding the sentence which might be imposed in a prosecution for a greater offense; (4) a subsequent prosecution is not barred if it has not been consummated at the time of the former prosecution, e.g., a former prosecution of assault with a deadly weapon and thereafter the victim dies; and (5) a subsequent prosecution is not barred if the former conviction has ceased to exist because of action by a reviewing court unless the effect of the reviewing court's action was to acquit.

Comment.

The basic concept of double jeopardy is equally recognized in the Ill. CC and under Hawaii law although the Ill. CC states the rules in a more systematic arrangement. Some significant differences between the two systems are as follows:

1. Improper termination of a former prosecution as a bar to a subsequent prosecution in Hawaii probably would not include entry of a nolle prosequi whereas Illinois recognizes such termination as improper. (See The King v. Manner and Territory v. Fullerton, infra.)
2. The duo rule in the Ill. CC on the point of jeopardy is contrasted to the Hawaii rule which attaches jeopardy when the jury is sworn but does not provide for the case of a trial before the court when jury has been waived.
3. Hawaii does not recognize a ground of double jeopardy based on a compulsory-joinder requirement. (See section 3-3.)

Sec. 3-4. (Continued)

4. No reported Hawaii cases have been found on the subject of res judicata to bar a subsequent prosecution if the former prosecution was terminated by a final order or judgment which required a determination inconsistent with a fact (or legal proposition) necessary to conviction in the subsequent prosecution.

Hawaii Law, page 20.

Sec. 3-5. General Limitations.

Explanatory Note.

A considerable diversity exists among the states with respect to offenses which have no limitations and to limitations for other offenses. The Ill. CC retained the prior Illinois provisions on limitations.

The Model Penal Code (section 1.06) exempts only murder and applies four limitations for all other offenses: six years for a felony of the first degree, three years for any other felony, two years for a misdemeanor, and six months for a petty misdemeanor or violation.

Comment.

Hawaii's numerous list of offenses not subject to a time limitation includes murder, manslaughter, arson and forgery as listed in the Ill. CC but excludes treason.

The rationale in favor of limitations recognizes the desirability of prosecution upon reasonably fresh evidence, the increasing likelihood of voluntary reformation of an offender as time passes without further offenses, the diminishing retributive impulse of the community as time passes after an offense, and the lesser danger of blackmail when prosecution is reasonably prompt.

Hawaii's uniform limitation of two-years for all other offenses makes no distinction between felony and misdemeanor, unlike the Ill. CC where the limit is three years for a felony and a year and a half for a misdemeanor.

Sec. 3-5. (Continued)

The Ill. CC general definition of "commencement of prosecution" in section 2-16 is "the return of the indictment or the issuance of the information". This is substantially the same as the Hawaii law.

Hawaii Law, page 23.

Sec. 3-6. Extended Limitations.

Explanatory Note.

This section is designed to permit extensions of the general time limitations for the prosecution of certain offenses capable of being readily concealed from victims and law enforcing agencies in view of the general rule that the time period commences when an offense is committed, not when it is discovered.

Subsection (a) extends the limitations on prosecution for concealed theft offenses involving fraud or breach of fiduciary duty to a maximum period of one year after the termination of disability if the victim is a minor or an incompetent and, in other cases, to a period of one year after discovery of the offense but not more than three years beyond the limitation otherwise applicable. The theft offenses intended to be covered include obtaining property under false pretenses, embezzlement, larceny by bailee, fraudulent conveyance, bribery and perjury.

Subsection (b) extends the limitations on prosecution for concealed offenses involving misconduct in public office to a period of one year after discovery but not more than three years beyond the limitation otherwise applicable. (See section 3-7(b).)

Comment.

Hawaii has not recognized any law specifically applicable to extended time limitations on prosecution for concealed theft or misconduct in public office offenses. However, it should be noted that the offenses of forgery; larceny in the first degree; giving, promising or receiving a bribe, extortion in the first or second degree; and embezzlement are exempted entirely from all time limitations.

Sec. 3-6. (Continued)

It has been suggested that the blanket exemptions from limitations is undesirable since they apply to the common situation in which the offense is discovered well within the general period, and there is no apparent reason to justify the exemption in such a situation.

Hawaii Law, page 23.

Sec. 3-7. Periods Excluded from Limitation.

Explanatory Note.

Three exclusions from the period of the time limitations are specified. Subsection (a) excludes any period when the defendant is voluntarily or involuntarily absent from the State and any period when he is absent from his usual place of abode and makes some effort to conceal himself. The statute of limitations is not tolled by reason of the offender's concealment of the offense.

Subsection (b) tolls the statute of limitations for the offense of theft of public funds by a public officer while he is in office. The statute is tolled as long as the offender holds any public office. This exclusion applies only to public officers, not public employees. The terms "public employee" and "public employer" are defined in sections 2-17 and 2-18. When this provision is combined with that of subsection 3-6(b), the result is a maximum limitation of six years after a public officer leaves office in which a prosecution may be commenced for the theft of public funds while in office.

Subsection (c), tolling the statute of limitations while a prosecution is pending for the same conduct, does not apply in the case of an improper termination of the pending prosecution which would create a bar to a subsequent prosecution under section 3-4. The phrase "for the same conduct" is used instead of "for the same offense" because "the same conduct" rule has been applied in Illinois when the initial prosecution is dismissed because of a substantial variation between allegation and proof.

Sec. 3-7. (Continued)

Comment.

The statute of limitations is tolled under the Ill. CC and Hawaii law similarly for absence from the State and for concealment within the State, but Hawaii has no provision to toll the statute in cases of public officers charged with theft of public funds. Tolling of the statute while proceedings are pending is subject in Hawaii to the procedural rule which is specifically confined to pleadings and motions before trial.

Hawaii Law, page 23.

Sec. 3-8. Limitation on Offenses Based on Series of Acts.

Explanatory Note.

This section follows the general rule that the period of limitation does not start in the case of a continuing offense until the last act of the offense is performed. The rule is applied to a series of related acts constituting a single course of conduct, extended over a period of time, as in some situations of embezzlement, conspiracy, bigamous cohabitation, and nuisance.

Comment.

Supplementary to the general rule but not stated in the section is the rule that when the limitation period has not run on the offense charged but has run on an included offense, the defendant cannot be convicted only of the included offense.

Hawaii Law, page 24.

TITLE II. PRINCIPLES OF CRIMINAL LIABILITY

ARTICLE 4. CRIMINAL ACT AND MENTAL STATE

This Article refers to the voluntary act as an element of every offense, defining the term to include omission and possession; defines the various mental states, one of which is a necessary element of every offense except an offense involving absolute liability; describes the effect of ignorance or mistake upon criminal liability; and fixes rather strict limits for interpreting a provision defining a specific offense as imposing absolute liability.

Sec. 4-1. Voluntary Act.

Explanatory Note.

The minimum elements of an offense, other than one imposing absolute liability for an act alone, are a certain voluntary act and a certain state of mind. The Ill. CC uses the word "act" in a narrow sense limited to voluntary relevant physical movement, but it expressly includes voluntary omission as a matter of convenient expression although omission denotes lack of physical movement. A series of related acts with the accompanying mental states is defined in section 2-4 as "conduct".

Comment.

The Ill. CC reference to the word "act" is more complete than the Hawaii definition, but both specifically include "omission".

Hawaii Law, page 25.

Sec. 4-2. Possession as Voluntary Act.

Explanatory Note.

Although possession does not necessarily involve physical movement, it is brought within the definition of "act" when it refers to voluntarily and knowingly procuring or keeping a physical object.

Sec. 4-2. (Continued)

Comment.

Hawaii law does not follow the Ill. CC usage of defining "possession" generally for purposes of satisfying the act element of an offense. The necessary characteristics of this kind of act, rather, are particularly included and are varied as to each category of objects, possession of which constitutes an offense.

Hawaii Law, page 25.

Sec. 4-3. Mental State.

Explanatory Note.

This section states the requirement of the mental state element of an offense, except an offense imposing absolute liability. Sections 4-3 to 4-7 present a few terms which are intended to describe adequately the mental element of each offense included in the Ill. CC. The use of the terms "with intent" or "intentionally" (section 4-4) and "knowingly or with knowledge" (section 4-5) and the non-intent terms "recklessly" (section 4-6) and "negligently" (section 4-7) provides uniform meaning in prescribing the mental element of most of the offenses. For certain offenses, appropriate qualifying language to these terms is used as well as the term "reasonably believes" which is defined in section 2-19. Section 2.02 of the Model Penal Code defines kinds of culpability as purposely, knowingly, recklessly and negligently.

Subsection (b) provides two rules of interpretation for (1) statutory references to mental state in defining specific offenses or elements thereof, and (2) lack of statutory reference to mental state in defining specific offenses or elements thereof.

Subsection (c) restates the accepted rule that in the absence of a statutory requirement, ignorance of the law does not exempt a person from criminal responsibility for his acts.

Comment.

Hawaii law lacks statutory definitions of the mental states which are elements of various specific offenses except

Sec. 4-3. (Continued)

for the definition of "malice" which practically runs the gamut of the various mental states, including negligence.

Hawaii Law, page 25.

Sec. 4-4. Intent.

Explanatory Note.

The word "intent" is used in the Ill. CC in the limited sense of conscious objective or purpose to accomplish a described result. This usage is distinguished from the "general intent" that presumes culpability following from injury or awareness that certain voluntary acts will probably have wrongful or unlawful results. "General intent" is not used on the theory that it is unnecessary if the definition of a particular offense describes accurately the mental state involved--either a specific intent or the knowledge of specified facts or of the natural consequences of described acts. The definitions of particular offenses in the Ill. CC are to be understood in relationship to these usages.

Comment.

The most common method of Hawaii law in defining mental state, "with intent" to accomplish a described result, is consistent with the Ill. CC usage. Other terms used either alone or to modify intent for some offenses include "corruptly", "feloniously", "fraudulently", "malice or maliciously", "needlessly", "unlawfully" and "willfully".

Hawaii law does not provide a specific definition of intent nor limit it only to the conscious objective to accomplish a described result.

Hawaii Law, page 27.

Sec. 4-5. Knowledge.

Explanatory Note.

"Knowingly" or "with knowledge" as used to describe mental state is applied to the situation in which a person, while not having an actual intent to accomplish a specific wrongful purpose, is consciously aware of the nature of his

Sec. 4-5. (Continued)

conduct or of the result which will, or is practically certain to, be caused, or of the circumstances under which he acts, as described by the statute defining the offense.

Subsection (b) describes the necessary awareness of the result of conduct involved in knowledge. This awareness must be distinguished from "substantial and unjustifiable risk" involved in recklessness (section 4-6). The phrase "practically certain" as applied to awareness of the result of conduct imports a higher degree of awareness than the phrase "substantial probability" used in subsection (a) applied to awareness of existence of fact. Since an existing fact is usually more readily ascertainable than the future result of conduct, a broader rule of liability is used.

Illinois statutes have frequently used "willfully" in the sense of knowledge; so the Ill. CC specifies the rule that the terms are generally regarded as synonymous.

Knowledge that conduct constitutes an offense or is denounced by statute is the subject of subsection 4-3(c), above.

Comment.

Hawaii law does not define the mental state of knowledge nor does it differentiate the rule as the term is applied to knowledge of facts and to knowledge of the result of conduct. Although cases were found on the subject of knowledge for only a few offenses, it is apparent that the court will imply a requirement of knowledge as an essential ingredient to certain offenses although the statutes do not expressly require mental state.

Hawaii Law, page 30.

Sec. 4-6. Recklessness.

Explanatory Note.

"Recklessness" as a mental state of criminal liability is a degree below that of intent or knowledge. It means acting with a conscious disregard of a high probability of harm, amounting to a gross deviation from proper standards of conduct. Offenses involving recklessness are much less common than those involving intent or knowledge.

Sec. 4-6. (Continued)

The last sentence assimilates to "recklessness" the principal other word, "wantonly", which commonly is used with a similar meaning in Illinois. The Ill. CC does not use "wantonly", but the word appears in other Illinois statutes.

Comment.

Hawaii has used the term "reckless" sparingly in its statutes. The "gross negligence" of the amended negligent homicide statute, however, probably can be equated with "recklessness".

There is some question as to whether the Hawaii usage of "wanton" is equivalent to "recklessness" as in Illinois, or whether in Hawaii "wanton" is equivalent to "willful" and closely approximate to an intentional state of mind.

Hawaii Law, page 31.

Sec. 4-7. Negligence.

Explanatory Note.

Negligence is the least culpable of the mental states which, accompanied by certain acts, give rise to criminal liability. Its usage in the Ill. CC lacks the moral implications of intent, knowledge and recklessness but rather recognizes as criminal the failure to be aware of probable harmful results of persons' acts. The negligence characteristics of lack of awareness and substantial deviation from normal standards are contrasted with the conscious disregard of risk and gross deviation from normal standards which characterize recklessness.

Comment.

Hawaii does not provide a statutory definition of negligence for criminal law purposes. Until the 1964 amendment to the negligent homicide statute, there has been no clear distinction between degrees of negligence or between negligence and recklessness.

Hawaii Law, page 33.

Sec. 4-8. Ignorance or Mistake.

Explanatory Note.

As a corollary of the principle stated in Sec. 4-3 requiring a specific mental state as an element of an offense, except an offense involving absolute liability, this section states the generally accepted rule that a mistake of fact or law is a defense if it disproves the existence of the mental state which is an element of an offense charged.

The ignorance or mistake of law recognized here is not as to the existence or character of the offense, as stated in subsection 4-3(c), but as to some legal concept such as ownership of property, status, effective consent, or agency.

Comment.

Although Hawaii does not provide a statutory definition of ignorance or mistake as a defense, the case law appears consistent with the general principles of the Ill. CC rules.

Hawaii Law, page 33.

Sec. 4-9. Absolute Liability.

Explanatory Note.

This section restricts absolute liability to misdemeanors not punishable by incarceration or by a fine exceeding \$500 and only if there is a clearly indicated legislative intent to create absolute liability. In all other instances, a mental state requirement is implied under the general rule of Sec. 4-3 that an offense consists of an act accompanied by a culpable mental state.

Comment.

Hawaii has no restrictive rule of interpretation to apply to offenses that are by statute described as absolute. It should be noted that this section of the Ill. CC is only a partial solution of the problem. The other part is in the rephrasing of the Code provisions which define the specific offenses, to indicate clearly the intended mental-

Sec. 4-9. (Continued)

state elements and the offenses in which mental state, for some cogent reason, is not an element.

Hawaii Law, page 34.

ARTICLE 5. PARTIES TO CRIME

This Article develops the modern approach, in contrast to the elaborate common law distinctions, to principles of accessoryship although that term is not used in the Code.

Sec. 5-1. Accountability for Conduct of Another.

Explanatory Note.

This section states the general principle that criminal liability is based on conduct and that the conduct may be that of another person.

Comment.

Hawaii law does not state a general proposition covering accountability for the conduct of another; however, Hawaii law is consistent with the Ill. CC treatment of accessoryship which fundamentally modifies such common law distinctions as between principals in the first degree, in the second degree, and accessories before the fact; and which eliminates certain procedural consequences of the common law distinctions. Hawaii law is in terms of "principal and accessory" while the Ill. CC, instead, uses the language of accountability.

Hawaii Law, page 36.

Sec. 5-2. When Accountability Exists.

Explanatory Note.

Subsection (a) states the accepted principle of liability based on acts of an "innocent agent", e.g., a defendant who induces a child below the age of criminal capacity or an insane person to commit an act, is guilty in the same way he would be had he himself committed the act.

Subsection (b) makes it clear that a person is accountable in circumstances not otherwise included under this section where the particular statute under which he is prosecuted so provides, e.g., a statute imposing vicarious criminal liability on a tavern owner for the act of an employee resulting in sale of liquor to a minor.

Subsection (c) is a comprehensive statement of liability based on soliciting, aiding, abetting, agreeing or attempting to aid the commission of an offense. It includes the common law liability of principals in the second degree and accessories after the fact. It should be noted that liability under this subsection requires proof of an intent to promote or facilitate commission of the substantive crime; moreover, conspiracy between the actor and the defendant is not of itself the basis of accountability for the actor's conduct although acts of conspiracy may in many cases satisfy the requirements of this subsection.

There are three principles under which a person may be relieved from the accountability otherwise imposed under subsection (c):

- (1) A victim, even a willing victim, of a criminal act does not share the guilt of the actor unless the particular statute so states, e.g., a victim of blackmail who paid over money, or a girl under age of consent in statutory rape who solicited the criminal act, are not deemed guilty of the substantive offense;
- (2) Certain persons who do not fit the category of "victim", are relieved of liability on the theory that extension of liability would make law enforcement more difficult, e.g., a man accepting a prostitute's solicitation is not guilty of prostitution, a woman upon whom a miscarriage is produced is not guilty of abortion, unless, of course,

Sec. 5-2. (Continued)

there is a specific statutory provision to the contrary; and

- (3) A person who has promoted or facilitated commission of an offense may relieve himself of liability by terminating his efforts towards commission of the offense and either making his efforts ineffective to the offense, or giving timely warning to the proper authorities or otherwise making proper effort to prevent commission of the offense. The "escape route" is intended to induce prior disclosure of crimes and generally to prevent crime and is to be distinguished from the problem in the law of conspiracy as to what actions permit a person to dissociate himself from a conspiratorial agreement.

Comment.

Hawaii law is consistent with the Ill. CC in the general treatment of principles notwithstanding the former is in the terminology of accessoryship and the latter in terms of accountability. The Ill CC, however, presents a fuller and more explicit statement of applicable law in this area and includes such specific important modifications as proof of intent on the part of one who is to be made accountable and rules to determine when a person is relieved of accountability.

Hawaii Law, page 37.

Sec. 5-3. Separate Conviction of Person Accountable.

Explanatory Note.

This section makes it clear that it is possible to convict a person who is a principal or who under common law would be an accessory, even though another principal or the sole principal is tried and acquitted.

The problems of the accessory after the fact are essentially different since he does not share in the substantive liability of the person he aids. His act is basically a distinct offense against public authority, and this is provided for in Sec. 31-5, Concealing or Aiding a Fugitive.

Sec. 5-3. (Continued)

Comment.

Hawaii case law is consistent with the Ill. CC in following the common law rule that if two persons, both principals in the first degree, are tried separately and one is acquitted, the second is not immune from prosecution. To the extent that Hawaii, by statute, does not distinguish between principals in the first or second degree, the rule is clear as to all persons accountable except perhaps as to an accessory before the fact although he is subject to prosecution in the same manner as a principal. The problem of inconsistent verdicts of juries remains unsolved.

Hawaii Law, page 37.

Sec. 5-4. Responsibility of Corporation.

Explanatory Note.

See section 1-7(h) which provides for corporate fines.

Subsection (a)(1) deals with corporate liability for misdemeanors, for the offense of unlawful use of weapons, and for offenses which clearly indicate a legislative purpose to impose corporate liability where the offense is defined by a statute not included in the Ill. CC. For these offenses, largely of a regulatory nature, a broad scope of liability is provided. The justification for making the corporation criminally responsible for conduct of its employees is to provide inducement for corporate management to supervise the behavior of its employees so as to avoid criminal conduct.

Subsection (a)(2) deals with corporate liability for felonies in which cases the corporation is not liable unless the criminal conduct was performed or participated in by the board of directors or a high-managerial agent. The justification for a more restricted scope of liability in cases of felony is that before the stigma of serious criminality attaches to a corporate body, the conduct should involve someone close to the center of corporate power. Moreover, in these situations, there already exists an inducement for proper supervision, viz., corporate tort liability.

Sec. 5-4. (Continued)

Subsection (b) provides that generally proof of due diligence is a defense to a criminal charge against the corporation in the less serious categories under subsection (a)(1). The persuasive burden of proof is placed upon the corporate defendant because facts relating to due diligence are peculiarly in the possession of the defendant and because the prosecution would be unduly burdened if it were required affirmatively to prove that management failed to exercise due diligence.

The definition of the term "high-managerial agent" is drafted in view of the many variations in organizational schemes of corporate bodies.

Comment.

Hawaii statutory law on the subject of corporate criminal liability is limited to matters of procedure. Although in many cases criminal prosecution of the guilty individual is more effective law enforcement than prosecution of the corporation, there are situations where the only feasible action is against the corporation, i.e., if it is clear that someone in the corporate employ has committed a criminal act, but it is impossible to identify the particular guilty employee; if the criminal act is committed by a corporate employee of a foreign corporation residing outside the jurisdiction.

Hawaii Law, page 38.

Sec. 5-5. Accountability for Conduct of Corporation.

Explanatory Note.

This section is designed to cover some particular Illinois problems related to liability of individual corporate officers.

Subsection (a) makes clear that an individual acting for a corporation is fully responsible for his own criminal acts and is punishable accordingly. The purpose of this principle is to eliminate a failure of justice illustrated by the case of People v. Strong, 363 Ill. 602, 2 N.E. 2d 942 (1936). Officers of a corporation were indicted for

Sec. 5-5. (Continued)

embezzlement, punishable by imprisonment, for failure to turn over certain taxes collected by the corporation. The officers could not be punished as principals since possession of the funds was that of the corporation, not the officers. Nor could they be punished as accessories since the principal, the corporation, lacked capacity to commit the offense by virtue of the inapplicable penalties.

Subsection (b) is intended to alter the difficulty in Illinois illustrated by the case of People v. Duncan, 363 Ill. 495, 2 N.E. 2d 705 (1936). The court set aside the sentence of a corporate officer who had been convicted as an accomplice of the corporation, fined on certain counts and sentenced to imprisonment on others. Since the principal, the corporation, could not be imprisoned, the court held that such a penalty could not be imposed on the accessory. Moreover, if the accessory were fined, the statutory provisions calling for imprisonment to compel payment of the fine would be inapplicable since such a sanction could not be imposed on the corporate principal.

Comment.

While there is no specific Hawaii law with respect to these problems, Hawaii is probably in accord with the general principle that an individual acting for a corporation is responsible, and punishable, for his own criminal acts.

Hawaii Law, page 38.

ARTICLE 6. RESPONSIBILITY

This Article deals with matters of criminal responsibility and capacity as affected by infancy, mental disorder and intoxication.

Sec. 6-1. Infancy.

Explanatory Note.

This section provides that criminal capacity does not exist below the age of thirteen. Individuals in this category who commit acts which would otherwise be criminal are within the exclusive cognizance of the Family Court (Family Court Act, Ill. Rev. Stat. 1957, ch. 23, secs. 2001 ff.). Individuals thirteen years of age or over are treated as possessing criminal capacity, but individuals between the ages of thirteen and eighteen are selected for treatment in the Family Court, rather than remaining in criminal court jurisdiction, under criteria established by the Family Court Act.

Comment.

The Ill. CC age of capacity is thirteen in contrast to the Hawaii age limit of seven. The older minimum in Illinois has been achieved in conjunction with elimination of the common law rule of presumption of incapacity for infants between the ages of seven and fourteen. In Hawaii, although there is no presumption as to capacity in the seven to fourteen age bracket, the determination of the fact of capacity is a matter for jury determination.

Hawaii Law, page 38.

Sec. 6-2. Insanity.

Explanatory Note.

This section, concerned with criminal responsibility, deals only with the problem of mental disorder at the time of commission of the criminal act. Matters of capacity of the defendant to stand trial, effect of insanity at the time of execution of the death penalty, and commitment of

Sec. 6-2. (Continued)

persons to a mental institution who have been acquitted on grounds of insanity are dealt with in the Code of Criminal Procedure. This section is derived from section 4.01 of the Model Penal Code and is a modification of the M'Naghten Rules supplemented by elements of the so-called "irresistible impulse test".

Subsection (a), a statement of the general test for insanity, contains the following important modifications of prior law: (1) the test is founded upon a determination of substantial incapacity in contrast to total incapacity under the strict M'Naghten or irresistible impulse tests; (2) the term "appreciate" is used instead of "know" as being more consistent to modern psychiatric notions of understanding; and (3) the test includes impairment of volitional capacity (conform his conduct to the requirements of law) as well as impairment of cognition (appreciate the criminality of his conduct). Note that the right-wrong issue is not directly put.

Subsection (b) is designed to exclude from the concept of mental disease or defect the case of so-called "psychopathic personality".

Comment.

Neither the Ill. CC nor Hawaii law uses the orthodox M'Naghten Rules in establishing the test of insanity or mental derangement. Hawaii law has not incorporated the irresistible impulse test nor does it specifically extend to incapacity to conform conduct to the requirements of law. No Hawaii law was found on the problem of the "psychopathic personality" with respect to the defense of insanity.

Hawaii Law, page 39.

Sec. 6-3. Intoxicated or Drugged Condition.

Explanatory Note.

This section restates the general rule that intoxication, as such, is not a defense except (1) when it has proceeded so far as to render the defendant incapable of forming the particular criminal intent required for the

Sec. 6-3. (Continued)

offense, or (2) when it has been caused involuntarily to the extent of meeting the tests for insanity under Sec. 6-2. The same provisions apply to similar conditions caused by drugs.

Comment.

Although there is scant Hawaii law on intoxication as a defense, it appears to be in accord with the Ill. CC governing principle. The Ill. CC rules are a more complete statement of the law, are consistent with the Code tests for insanity as a defense, and extend specifically to conditions caused by drugs.

Hawaii Law, page 40.

Sec. 6-4. Affirmative Defense.

Explanatory Note.

See Sec. 3-2, Ill. CC.

Comment.

The Hawaii rule of law that insanity is not an affirmative defense does not, as such, present the converse of the Ill. CC rule because Sec. 3-2, Ill. CC does permit the prosecution to raise an issue involving an affirmative defense.

No Hawaii law was found to indicate if infancy is treated as an affirmative defense.

Hawaii Law, page 40.

ARTICLE 7. JUSTIFIABLE USE OF FORCE;
EXONERATION

This Article describes the general situations in which a person may use force upon another without being criminally liable for his conduct: the defense of person, dwelling,

or property against unlawful injury, invasion, damage or appropriation; and the proper enforcement of the law, as in making an arrest, preventing a prisoner's escape and executing the death penalty.

The Article also describes two situations in which, while the usual elements of an offense exist, the apparent offender is exonerated from criminal liability: when he acted under severe compulsion, and when he was entrapped into committing the offense by public officers or employees.

Sec. 7-1. Use of Force in Defense of Person.

Explanatory Note.

This section presents the general rule on defense of person in the common situation wherein a person who has done nothing to provoke the use of force against himself is confronted immediately with unlawful force under such circumstances that he reasonably believes that he must use force to defend himself.

The first sentence, dealing with non-deadly force, contains several propositions: (1) the person must not be the aggressor (the situation considered in Sec. 7-4); (2) the danger of harm must be a present one, not merely threatened at a future time, or without the present ability of carrying out the threat; (3) the force threatened must be unlawful, either criminal or tortious; (4) the person must actually believe that the danger exists, that his use of force is necessary to avert the danger, and that the kind and amount of force which he uses is necessary; (5) his belief in each of the aspects described is reasonable, even if it is mistaken; (6) the privilege extends to the protection not only of the person using the force, but also of another individual unlawfully threatened with harm; and (7) in determining whether the use of force is necessary, the person need not consider whether the danger might be avoided if he were to give up some legal right or privilege.

The second sentence restricts the use of deadly force in self-defense to situations in which the force imminently threatened apparently will cause death or great bodily harm or in which a violent offense is being committed which in its nature involves serious risk of great bodily harm.

Sec. 7-1. (Continued)

Note that there is no requirement that the person threatened must retreat before resorting to deadly force.

The terms "forcible felony" and "reasonably believes" are used as defined in Secs. 2-8 and 2-19.

Comment.

Hawaii does not have any statutory law on the subject of self-defense. The case law is consistent with Ill. CC provisions generally although the Bridges case held that retreat is necessary before resort to deadly force, and no case was found on the matter of defense of another.

Hawaii Law, page 41.

Sec. 7-2. Use of Force in Defense of Dwelling.

Explanatory Note.

This section states a well-settled aspect of justification; a person may prevent or repel with force another's unlawful entry into a dwelling, whether the dwelling is occupied by the person using such force or by someone else, and whether the trespasser uses force or enters without force. The use of deadly force, however, is limited to situations of violent or forcible felony, or violent entry with apparent threat of personal violence to someone in the dwelling. The no-retreat principle applies.

The "reasonable belief" requirement is the same as in the case of defense of the person, except that to justify the use of deadly force, the apparent threat or purpose of the intruder need not be to cause death or great bodily harm, but only to assault or offer personal violence to any person in the dwelling.

The term "dwelling" is used as defined in Sec. 2-6.

Comment.

The Hawaii case law on defense of dwelling is consistent with the Ill. CC provision except that the Hawaii rule on use of deadly force specifically limits justification to defense of self and family, or to prevention of a great crime or accomplishment of a necessary public duty.

Hawaii Law, page 41.

Sec. 7-3. Use of Force in Defense of Other Property.

Explanatory Note.

The general principles of justification concerning the defense of person and dwelling are applicable, to a limited extent, to the defense of real property other than a dwelling, and personal property in the person's possession or in the possession of certain other persons. A person may use force which he reasonably believes to be necessary to protect the property, but he may not use deadly force except to prevent the commission of a forcible felony. The phrase "reasonable belief" applies to the existence of the trespass or other interference with the property, the necessity of using force, the proper amount of force to be used, the lawfulness of possession which is being protected, and the duty to protect the property of a third person.

Comment.

The Ill. CC does not specifically cover the situation presented by the Savidge case in which the court held that force is not justified by one attempting to recover possession of property.

Hawaii Law, page 41.

Sec. 7-4. Use of Force by Aggressor.

Explanatory Note.

The three preceding sections of this Article assume that the person using force in defense has not committed an unlawful act to inspire the use of threat of force against him or otherwise provoked such force.

This section concerns the more limited right which a person has to defend himself when he has committed such an unlawful act or otherwise provoked such force.

Subsections (a) and (b) deny the right of self-defense to the person attempting, committing, or escaping after a forcible felony; and to the person who provokes force against himself for the purpose of excusing his retaliation.

Sec. 7-4. (Continued)

Subsection (c) concerns all other instances of provocation and outlines the two situations in which the aggressor's right of self-defense is reinstated. The first situation is that the aggressor, not using deadly force, is suddenly confronted with deadly force and has retreated to the practicable limit but nevertheless uses deadly force to prevent death or great bodily harm to himself. In this case, the aggressor's "reasonably belief" (as used in the three preceding sections and as defined in Sec. 2-19) applies to the apprehension of death or great bodily harm and to the exhaustion of every practicable means of escape except for the use of deadly force. The second situation is that in which the aggressor in good faith withdraws from the conflict and effectively communicates to the victim his intention to withdraw, but the victim continues or resumes the conflict; the initial aggressor then becomes the victim. Note that the second situation applies only to the use of non-deadly force in self-defense.

Comment.

No Hawaii law was found on the specific matter of justification of an aggressor's use of force, deadly or non-deadly.

Hawaii Law, page 42.

Sec. 7-5. Peace Officer's Use of Force in Making Arrest.

Explanatory Note.

This section and the one following state the principles of justification in the use of force to make arrests after offenses have been committed. The privilege necessarily includes the arrestor's right of self-defense if the offender resists by assaulting the arrestor. These two sections are not concerned with the right to make arrests or the procedures in so doing, matters that are included in the Illinois Code of Criminal Procedure.

Sec. 7-5. (Continued)

Subsection (a) restates the generally accepted rule that in making a lawful arrest a peace officer or his deputy is entitled to use such non-deadly force as is necessary to accomplish that duty and that he is not obligated to retreat when resisted. The self-defense rule, applicable to non-deadly and deadly force, is included in language similar to that of Sec. 7-1. In addition, the use of deadly force is authorized when necessary to prevent the arrest from being defeated by resistance or escape and when either of two dangerous situations exist. The first situation is that in which the offender has committed a forcible felony. The second is that in which, whether the offense is a felony or misdemeanor, the offender indicates that if not immediately arrested, he will endanger the safety of other persons.

Subsection (b) protects the peace officer in using force to effect an arrest which actually is unlawful in the situation when, without his knowledge, the warrant under which the arrest is made has been issued illegally.

The terms "peace officer" and "forcible felony" are used as defined in Secs. 2-13 and 2-8.

Comment.

The most recent court interpretation of the Hawaii law on use of force by an arresting officer is a very broad rule of justification. Deadly or non-deadly force is authorized, whether the offense involved is a misdemeanor or a felony, if necessary to effect the arrest. In contrast to the Hawaii law, the Ill. CC restricts the justified use of deadly force to certain dangerous situations unless the arrestor is entitled to use deadly force under the defense of person provisions.

Hawaii Law, page 42.

Sec. 7-6. Private Person's Use of Force in Making Arrest.

Explanatory Note.

This subject has been separated from that of the use of force by a peace officer in order to make clear the private person's more limited right to use deadly force and his greater protection in the case of an unlawful arrest.

Sec. 7-6. (Continued)

Subsection (a) provides that in any situation in which a private person is authorized to make an arrest, he may justifiably use necessary non-deadly force and he retains his right of personal defense, including the use of deadly force to prevent death or great bodily harm to himself or another.

Subsection (b) protects from criminal liability a private person who is summoned by a peace officer to make an unlawful arrest. This protection is broader than in the case of a peace officer who has protection only for an arrest that is unlawful because it is pursuant to an invalid warrant.

Comment.

Hawaii statutory law, unlike the Ill. CC, on the use of force in making an arrest treats arrests by peace officers and those by private persons in the same manner. No Hawaii cases were found involving the law of "citizens' arrests".

Hawaii Law, page 43.

Sec. 7-7. Private Person's Use of Force in Resisting Arrest.

Explanatory Note.

This section states a corollary to the justification accorded to a peace officer in using force to make an arrest, even if the arrest is unlawful. This provision applies only to the situation in which the arrestee knows that the arrestor is a peace officer or private person summoned and directed to make the arrest. It does not apply to the situation in which the arrestor uses excessive force; whether the arrest is lawful or unlawful, the arrestor's use of excessive force invokes the right of self-defense as stated in Sec. 7-1.

Comment.

Hawaii statutory law does not expressly state the rule on use of force in resisting arrest. The decisional law, however, is in accord with the Ill. CC in recognizing the inadvisability of sanctioning resistance to unlawful arrest.

Sec. 7-7. (Continued)

The Hawaii rule appears broader in that it is not restricted to situations in which the arrestee has notice of the official character of the arrestor. On the other hand, the Hawaii rule might be deemed narrower if such circumstances of resistance merely reduces the seriousness of the offense, instead of eliminating justification entirely.

Hawaii Law, page 43.

Sec. 7-8. Force Likely to Cause Death or Great Bodily Harm.

Explanatory Note.

This section is intended to make clear the prohibited status of the police practice of firing in the direction of a person fleeing from arrest even though the circumstances are not such that the arrestor is authorized to use deadly force. Firing into the air without endangering the offender undoubtedly is permissible, but firing so close to him that his safety is endangered is the use of deadly force which can be justified only in the circumstances in which the arrestor is authorized to use deadly force, as provided in Secs. 7-5 and 7-6.

Comment.

No comparable Hawaii law was found.

Hawaii Law, page 43.

Sec. 7-9. Use of Force to Prevent Escape.

Explanatory Note.

This section concerns the use of force to prevent the escape of a person in custody or in a place of confinement after arrest.

Subsection (a) applies to force in preventing escape the same rule which applies to an original arrest, i.e., necessary force to accomplish the purpose, including deadly force either in necessary self-defense or in one of the dangerous situations stated in subsection 7-5 (a)(2)

Sec. 7-9. (Continued)

(the person has committed or attempted a forcible felony or is armed with a deadly weapon, or otherwise indicates he will endanger human life or inflict great bodily harm unless captured without delay).

The recapture situation must be evaluated independently as if it were an original arrest situation. Authority to use deadly force to prevent an escape does not depend upon the authority to use such force at the original arrest. If the offense for which the person was arrested was not a forcible felony, but the offender then was armed with a deadly weapon, deadly force might have been used to prevent defeat of his arrest. However, if he was arrested and disarmed and subsequently attempts to escape unarmed and without threatening death or great bodily harm to anyone, deadly force to prevent his escape is not authorized. Conversely, if he was not armed or otherwise dangerous when arrested, but in attempting escape commits a forcible felony or arms himself or threatens death or great bodily harm to anyone, deadly force may be used to prevent the escape.

Subsection (b) concerns escape from a place of confinement as distinguished from personal custody after arrest. In this circumstance a less restrictive rule authorizes the use of deadly force only when necessary to prevent escape and when the guard reasonably believes the prisoner is lawfully detained. The term "penal institution" and "reasonably believes" are used as defined in Secs. 2-14 and 2-19.

Comment.

No Hawaii law was found concerning escape from custody or place of confinement after arrest.

Hawaii Law, page 43.

Sec. 7-10. Execution of Death Sentence.

Explanatory Note.

This section, stating an obvious aspect of justification for homicide, is included for the sake of completeness.

Sec. 7-10. (Continued)

Comment.

There is no comparable provision in Hawaii since capital punishment was abolished in 1957.

Hawaii Law, page 43.

Sec. 7-11. Compulsion.

Explanatory Note.

Compulsion, coercion, or duress is another long-recognized basis for finding a person not guilty of an offense although his conduct is within the definition of the offense. Justification is denied for offenses punishable by death and is limited to threats of death or great bodily harm to the person himself. The person's reasonable fear of imminent death of great bodily harm, even if mistaken, is within the principle. "Reasonably believes" is used as defined in Sec. 2-19.

Subsection (b) abrogates any special defense of the married woman and the common law presumption of the matrimonial subjection of the wife to her husband.

Comment.

The Hawaii statute differs from the Ill. CC compulsion provisions in the following respects: (1) it does not expressly include the capital offense exclusion; (2) it includes compulsion by irresistible or inescapable force as well as by threat; (3) it does not extend the justification to "reasonable belief"; (4) it limits the justification to cases of a lesser injury than the injury threatened; (5) it has never provided for special rules for married women; and (6) it does not limit justification to threats expressly of death or great bodily injury.

Hawaii Law, page 43.

Sec. 7-12. Entrapment.

Explanatory Note.

The defense of entrapment, most usually found in cases concerning the sale of liquor or narcotics, is stated in general terms consistent with the opinion in the leading case, Sorrels v. United States, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 ALR 249 (1932). The official comments to the Ill. CC indicate that the defense is not yet clearly delineated and that later this section may be stated in a more detailed and comprehensive form. At present three principle elements are recognized under the entrapment doctrine: (1) the idea of committing an offense originates, not with the suspect, but with the enforcement authorities, who (2) actively encourage the suspect to commit the offense, and (3) for the purpose of obtaining evidence for his prosecution.

Comment.

The Hawaii case law on the defense of entrapment appears to accord with the Ill. CC provisions on the subject.

Hawaii Law, page 44.

Sec. 7-13. Necessity.

Explanatory Note.

The defense of necessity is stated in general terms in order not to unduly restrict its utility in situations where it is justified. Generally, economic necessity has never been accepted as a defense.

Comment.

No Hawaii law was found on necessity as a justification for crime

Hawaii Law, page 44.

Sec. 7-14. Affirmative Defense.

Explanatory Note.

A defense based upon any of the provisions of this Article is an affirmative defense, and if not put in issue by the prosecution's evidence, the defendant, to raise it as an issue, must present some evidence thereon. See Sec. 3-2, Affirmative Defense.

Comment.

No Hawaii law was found on the defenses stated in this Article as affirmative defenses.

Hawaii Law, page 44.

TITLE III. SPECIFIC OFFENSES

PART A. INCHOATE OFFENSES

ARTICLE 8. SOLICITATION, CONSPIRACY AND ATTEMPT

The offenses of solicitation, conspiracy, and attempt are classified as inchoate offenses because each is preliminary to another, more serious principal offense. Certain necessarily involved questions are common to the three inchoate offenses: (1) When does mere preparation, not a criminal offense, cease and commission of the inchoate offense begin? (2) When is commission of the inchoate offense complete? (3) When does commission of the principal offense begin? (4) What intent element is required for commission of the inchoate offense, as distinguished from the intent element of the principal offense?

Since answers to the first three questions will vary with the facts in each case, the provisions of Article 8 do not attempt to cover every possible fact variation. Guidelines are specified, however, to identify clearly each offense in all possible circumstances by emphasis upon a specific enunciation of the intent element in each of the three offenses. See Secs. 1-5 and 1-6 (m) as to State Criminal Jurisdiction and Place of Trial.

Sec. 8-1. Solicitation.

Explanatory Note.

Solicitation requires the specific intent that the principal offense be committed. The offense of solicitation is complete when the principal offense is commanded, encouraged or requested with that intent. Note the different definition of "solicit" for the general purposes of the Code in Sec. 2-20.

Comment.

The Hawaii offense of instigation, though similar to the Ill. CC offense of solicitation, does not expressly require the specific intent that the principal offense be

Sec. 8-1. (Continued)

committed. Hawaii's maximum penalty of imprisonment at hard labor for twenty years is in contrast to the Ill. CC maximum of imprisonment for one year.

Hawaii Law, page 45.

Sec. 8-2. Conspiracy.

Explanatory Note.

Conspiracy is an agreement to commit "an offense", which, by definition in Sec. 2-12, means a violation of any penal statute of the State. Note, however, the definition of "offense" in Sec. 8-6. An act in furtherance of the agreement, performed either by the accused or a co-conspirator, is a necessary element of the offense.

The intent element of conspiracy is separate and distinct from the intent required for the principal offense. The two-fold intent is (1) an intent to agree, and the agreement must be accomplished with (2) an intent that the offense which is the object of the agreement be committed.

Subsection (b) states instances of the general rule which denies to an accused the legal disabilities of an accomplice. The last two items are significant changes from the usual rule. Number (4) provides that acquittal even of all other conspirators does not absolve the remaining one. Although there must be at least two guilty parties to a conspiracy, what happened to another defendant at another time and place in another trial before a different judge and jury should not be a bar to trial of a co-conspirator. Number (5) denies to an accused who has no legal incapacity or immunity in relation to the principal offense, any rights, benefits, advantages, or defenses which the law may have conferred upon a co-conspirator. Numbers (4) and (5) together deny a defense to an accused in the situation where there are only two conspirators and one co-conspirator has been acquitted because of lack of capacity, due to some legal disability, to commit conspiracy or any other offense.

Subsection (c) ties the penalty for conspiracy to that of the principal offense with maximum penalties provided for capital offenses and for other offenses.

Sec. 8-2. (Continued)

Comment.

A comparison of Hawaii law and the Ill. CC provisions on conspiracy reveals significant differences.

1. The Ill. CC limits conspiracies to agreements to commit an offense.

Hawaii statutory law extends conspiracies to acts of malicious prosecution and abuse of process, which are not criminal offenses, and the case law stretches the extension to include criminal or unlawful purpose. Furthermore, conspiracy is in terms of "combine and act together" rather than "agreement".

2. The Ill. CC offense of conspiracy must contain a specific intent element.

Hawaii law on conspiracy does not expressly require an intent element.

3. The Ill. CC requires an act in furtherance of the conspiracy.

Hawaii law expressly excludes the requirement of an act in furtherance of the conspiracy; however, no case was found in which some activity pursuant to the conspiracy has not been present.

4. The Ill. CC denies to a conspirator defenses based on certain rights, benefits, advantages, or defenses of a co-conspirator.

Hawaii statutes on the general offense of conspiracy do not expressly provide for or deny these defenses, and no cases were found on the subject. The specific conspiracy offense where the principal offense is sabotage denies some of the defenses listed in the Ill. CC and in addition lists pardon or other discharge, before or after conviction, of a co-conspirator. It does not list defenses based on conviction of a different offense or lack of capacity of a co-conspirator unless these are included within the category of "otherwise has been discharged before or after conviction".

Sec. 8-2. (Continued)

5. The Ill. CC does not accord special treatment to husband and wife alone as conspirators.

Hawaii law follows the common law rule that a husband and wife alone cannot be guilty of conspiracy.

6. The Ill. CC does not provide for different degrees of conspiracy but makes the penalty correspond to the seriousness of the principal offense. The maximum penalties are twenty years imprisonment for conspiracies to commit capital offenses (treason, murder, aggravated kidnaping), and five years for other offenses.

Hawaii law establishes two degrees of conspiracy, and the penalties are tied to those of the principal offenses but with different maximums--fine of \$10,000 or imprisonment at hard labor for ten years, or both, for a first degree conspiracy and fine of \$1,000 or imprisonment for one year, or both, for second degree conspiracy. The tie-in with the penalty for the principal offense, of course, cannot be applied to conspiracies involving malicious prosecution, abuse of process, or "unlawful purpose".

7. The Ill. CC confines the substantive conspiracy provisions to a single article of the Code.

The Hawaii statutes include particular substantive conspiracy statutes in the general conspiracy chapter, in the malicious injury chapter (interference with electrical meters), and in the sabotage chapter.

Hawaii Law, page 45.

Sec. 8-3. Defense.

Explanatory Note.

This section is intended to prevent the prosecution of an individual for solicitation or conspiracy to commit a principal offense when he lacks capacity to commit the principal offense or when the State has given him a defense for the principal offense. This defense provision is in

Sec. 8-3. (Continued)

contrast to the situation in subsection 8-2(b)(5) which provides that it is not a defense for the accused if his co-conspirator would not be guilty of any offense if the conduct which is the object of the conspiracy were to be performed.

Comment.

No Hawaii law was found on this matter. Note that the denial of a defense stated in subsection 8-2(b) applies expressly only to conspiracy and that there is no comparable rule stated for the offense of solicitation.

Hawaii Law, page 48.

Sec. 8-4. Attempt.

Explanatory Note.

This section is designed to govern attempts to all offenses.

The definition of attempt includes the two elements of intent to commit a specific offense and an act which constitutes a substantial step toward commission of that offense.

Subsection (b) codifies the general rule that a factual or legal impossibility, as distinguished from an inherent impossibility, is no defense to attempt. The phrase "misapprehension of the circumstances" is intended to include both factual and legal circumstances. Traditional misapprehension, as to factual circumstances, include the attempt to pick an empty pocket or shoot an unloaded firearm. An illustration of misapprehension of legal circumstances is the attempt to receive stolen goods when in fact the goods have not been stolen. Inherent impossibility, not intended to be excluded as a defense, might be illustrated by an attempt to kill by witchcraft, such as repeatedly stabbing a cloth dummy made to represent the intended victim.

See Sec. 12-1, Assault.

As in the other inchoate offenses, the penalty for attempt is tied to the principal offense with appropriate specified maximums.

Sec. 8-4. (Continued)

Comment.

Although the Ill. CC and the Hawaii statute defining attempt are different approaches, they contain essentially the same elements, intent and act. The Ill. CC act is in terms of "a substantial step toward the commission of the offense" whereas act in the Hawaii statute is in terms of "done towards committing and in part execution of the intent" plus the furnishing of an illustrative example. The Ill. CC does not attempt further definition to aid in solving the problem of when preparation ceases and commission begins. Hawaii defines preparation, again using the device of an illustrative example. Under either the Hawaii or Illinois approach, the court still must make the determination based on the facts of each case.

No Hawaii law was found expressly excluding defenses to attempt based on impossibility.

The penalty provisions for attempt are similar, except that the Ill. CC establishes three categories, based on the seriousness of the principal offense, with appropriate maximums (capital offenses, other forcible felonies, all other offenses); while Hawaii has only two categories (offenses punishable by twenty years or more or life imprisonment, and all other offenses).

The Ill. CC does not contain any special attempt provisions as Hawaii does for sabotage, train wrecking, certain assault offenses (see Article 12) and certain sex offenses (see Article 11).

Neither the Ill. CC nor Hawaii law require failure of the attempt, and both agree that if the attempt is successful, it becomes an included offense of the principal offense, thereby becoming clothed with all the rules and characteristics of an included offense. See Sec. 2-9.

Hawaii Law, page 48.

Sec. 8-5. Multiple Convictions.

Explanatory Note.

This section is intended to limit conviction and punishment to either the inchoate or principal offense (where the principal offense is accomplished). By virtue

Sec. 8-5. (Continued)

of the definition of "conviction" in Sec. 2-5, prosecution may be had for both offenses in the same trial by separate counts, or separately. However, after proceeding finally to verdict of guilty on one or both, the judgment of conviction and sentence can be entered only on one offense. In effect, this applies only to solicitation and conspiracy since they are not included offenses of the principal offense which is their object. This section brings the practice on solicitation and conspiracy into accord with that on attempt, where on a trial for the completed principal offense, the defendant may be found guilty, convicted and punished for either the principal offense or the lesser included offense of attempt, but not for both.

This provision is not intended to apply to the situation where the accomplishment of the principal offense does not occur until after a conviction for the inchoate offense - the attempted murder, or conspiracy to murder, situation where the victim dies after trial and conviction of the inchoate offense.

Comment.

The Ill. CC provision and the Hawaii statute on solicitation (instigation) appear to be in accord that the inchoate offense merges into the completed principal offense. No Hawaii case was found on the problem.

The Ill. CC and Hawaii law both provide that the offense of solicitation does not merge into the completed principal offense, but the Hawaii case law apparently permits treatment of a conspiracy to commit an offense as an included offense of the completed principal offense. The Hawaii statute, section 268-7, RLH does not cover the situation of a person convicted of conspiracy to commit an offense and his subsequent prosecution for the completed principal offense. The Ill. CC would prohibit such multiple prosecution.

In the case of attempt, although the Hawaii law provides for merger, it also provides that an attempt is an included offense of the principal offense. See Secs. 3-3, Multiple Prosecutions for Same Act and 3-4, Effect of Former Prosecution

Hawaii Law, page 50.

Sec. 8-6. Offense.

Explanatory Note.

This section makes it clear that for the purposes of Article 8 "offense" includes, in addition to the meaning specified in Sec. 2-12, an agreement in this State to commit an offense in another State if the conduct which is the object of the agreement and which would constitute an offense in the other State if performed there would likewise be an offense if performed in Illinois. Sec. 1-5 supplements this provision by conferring criminal jurisdiction to prosecute such a conspiracy in Illinois. If such conduct prohibited by the other State would not be an offense in Illinois if performed in Illinois, the agreement in Illinois does not constitute a conspiracy.

Comment.

See Sec. 1-5.

Hawaii Law, page 51.

PART B. OFFENSES DIRECTED AGAINST
THE PERSON

ARTICLE 9. HOMICIDE

This Article defines and prescribes the penalties for offenses in which homicide is an essential element: murder, voluntary manslaughter, involuntary manslaughter and reckless homicide, and concealing death of bastard.

Sec. 9-1. Murder.

Explanatory Note.

This section presents an analytical definition of murder which is intended to describe each aspect of the offense in modern terms instead of using the traditional

Sec. 9-1. (Continued)

brief but confusing "malice" terminology based on the common-law descriptions. The words relating to the mental states of intent and knowledge are used in the sense in which they are defined in Article 4. The definition does not divide the offense into degrees because Illinois has always used a single definition, and the analytical form of the definition, establishing three classes of murder, lends itself readily to differentiation of penalties without the designation of degrees. "Individual" is used to designate the victim, to distinguish him from the "person" who is the offender.

Subsection (a)(1) defines the two most culpable types of conduct which are within the older definition of "express malice" - acting either with actual intent to kill or do great bodily harm, or with knowledge that death or great bodily harm will result. "Intends", as defined in Sec. 4-4, means a "conscious objective or purpose...to accomplish that result". This is the actual intent which many statutes describe as deliberation or premeditation.

"Knows", as defined in subsection 4-5(b), means "consciously aware that...such result is practically certain to be caused by...conduct".

"Or another" recognizes the established principle described as "transferred intent". If the offender has the mental state which characterizes murder, he is guilty of murder even if the person he kills is not the one he intended to kill.

Subsection (a)(2) defines the conduct which, lacking actual intent to kill or do great bodily harm or knowledge that such a result will occur (or is practically certain to), involves knowledge of the probability that the offender's acts will cause death or great bodily harm. The "strong probability" description is intended to apply to a situation which lies between the "practical certainty" of subsection 9(a)(1) and the "likely cause" and "recklessly" of the involuntary manslaughter provision in Sec. 9-3.

Subsection (a)(3) describes the felony-murder situation, restricting it to forcible felonies as defined in Sec. 2-8. It is likely that a homicide,

Sec. 9-1. (Continued)

even if accidental, occurring in the course of a forcible felony would fall, also, within the "strong probability" classification of murder.

In cases of homicide during a non-forcible felony, murder may be proved only by showing the prescribed intent or knowledge.

Subsection (b) retains the death penalty for murder. No recommendations on the abolition or curtailment of capital punishment were included in the Ill. CC when it was proposed because of the controversial and emotional aspects of the question. The Committee Comments to the Code stated that total or partial abolition of the death penalty should be considered on its own merits and not in the context of a new Criminal Code. See Sec. 1-7, Judgment, Sentence and Related Provisions.

Comment.

The Hawaii statutory definitions of murder and the decisions which have applied and construed them are in the traditional common law mold. Although the Ill. CC approach and language appears startlingly new on analysis, the fundamental substantive law of murder (and other homicide offenses) has not been materially altered. Specific comparison between the Ill. CC and the Hawaii law are as follows:

1. The Ill. CC does not divide murder into degrees; Hawaii recognizes two degrees.
2. The Ill. CC use of the mental states of intent and knowledge in subsection (1) would apparently encompass situations described in Hawaii law as first degree murder for homicide committed with deliberate, premeditated malice aforethought or committed with extreme atrocity or cruelty.
3. The Ill. CC felony-murder rule extends to several offenses, including treason, murder, voluntary manslaughter, rape, robbery, burglary, arson, kidnaping and aggravated battery. The Hawaii rule, on the other hand, applicable only to first degree murder, limits the felonies to first degree arson, first degree murder, rape, and train wrecking.

Sec. 9-1. (Continued)

4. The Ill. CC "strong probability" category of murder in subsection (2) is roughly equivalent to the "malice aforethought" of second degree murder under Hawaii law.
5. The "transferred intent" doctrines of the Ill. CC and Hawaii law are substantially the same.
6. The differences between the Ill. CC and Hawaii penalties are obvious. See Sec. 1-7, Judgment, Sentence and Related Provisions.

Hawaii Law, page 51.

Sec. 9-2. Voluntary Manslaughter.

Explanatory Note.

This section states the common law offense of voluntary manslaughter which is essentially a legal compromise between murder and exoneration. The offense recognizes, but does not excuse, a human weakness consisting of an intense passion caused by serious provocation and resulting in homicide.

The references in subsection (a)(1) and (2) to provocation "by the individual killed, or another whom the offender endeavors to kill" is intended to include as voluntary manslaughter the situation in which the offender's blows are aimed at the provoker, but an innocent person is killed negligently or accidentally. Excluded is the situation in which the offender, in revenge for the provocation, directs his blows, not at the provoker, but at an innocent person; this situation remains under the classification of murder.

The usage of "endeavors" to kill precludes confusion that might arise if "attempt" were used since the definition of "attempt" in Sec. 8-4 refers to intent, and intent or knowledge might be an element of murder as well as of voluntary manslaughter.

Comment.

The Ill. CC makes a distinction between voluntary manslaughter and involuntary manslaughter whereas Hawaii makes no such distinction except for homicide caused by

Sec. 9-2. (Continued)

negligent operation of a vehicle. In Hawaii unjustified homicide which lacks the element of malice aforethought constitutes manslaughter whether it be a heat of passion killing or a killing in the course of an unlawful act not amounting to a felony.

The Hawaii decisional law measures "adequate provocation" by the defendant's actual heat of passion instead of the Ill. CC test of "intense passion in a reasonable man".

No Hawaii law was found on the specific situations wherein the person killed is not the provoker.

The Ill. CC provides no special rules for homicide in a duel; Hawaii makes such killing manslaughter.

The maximum penalty for manslaughter is twenty years imprisonment under the Ill. CC and ten years imprisonment at hard labor in Hawaii.

Hawaii Law, page 54.

Sec. 9-3. Involuntary Manslaughter and Reckless Homicide.

Explanatory Note.

Involuntary manslaughter is defined as an unjustified killing resulting from either lawful or unlawful acts likely to cause death or great bodily harm and performed recklessly. The mental state requirement within the definition of "recklessness" in Sec. 4-6 applies to an offender who "consciously disregards a substantial and unjustifiable risk" of "death or great bodily harm", "and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation". The word "negligence" is not used in order to make clear the difference between conduct involving conscious awareness and conduct involving mere failure to be aware.

Subsection (b) provides that reckless homicide has the same elements as involuntary manslaughter though relating only to one type of act which may constitute manslaughter. It also provides that under an indictment

Sec. 9-3. (Continued)

for involuntary manslaughter while driving a motor vehicle, reckless homicide may be found as an included offense. See the double-jeopardy rule in Sec. 3-4, Effect of Former Prosecution.

Subsection (c) provides a lesser penalty for the included offense of reckless homicide.

Comment.

The Ill. CC involuntary manslaughter definition narrows the scope of the common law misdemeanor-manslaughter doctrine. Although this doctrine is stated in its traditional form in the Hawaii cases, the decisions all involved unlawful acts of a dangerous nature.

Hawaii treats negligent homicide involving operation of a vehicle separately from its otherwise single treatment of manslaughter. The Ill. CC, on the other hand, provides that such reckless homicide may be an included offense of involuntary homicide. Both systems provide for penalties consistent with the seriousness of the offense. For a discussion of the 1963 amendment to Hawaii's negligent homicide offense, see Secs. 4-6, Recklessness and 4-7, Negligence.

Hawaii Law, page 56.

Sec. 9-4. Concealing Death of Bastard.

Explanatory Note.

The offense of a mother concealing the death of a child which, if born alive would be illegitimate, carries with it absolute liability. No distinction is made between a child born alive or born dead. The offense applies only to the mother and prosecution for this offense is not a bar to a murder or manslaughter prosecution against the mother.

Comment.

The Ill. CC does not require intent, but the Hawaii statute in the chapter under Sex Offenses specifies that the proscribed concealment must be with the intent that it

Sec. 9-4. (Continued)

not be known whether the issue was born alive or not or whether it was murdered. The Hawaii maximum penalty is a \$100 fine and two years imprisonment at hard labor in contrast to the Ill. CC maximum of one year in a penal institution other than the penitentiary.

Hawaii Law, page 56.

ARTICLE 10. KIDNAPING AND RELATED OFFENSES

This Article codifies the law of the related offenses of kidnaping, aggravated kidnaping, and unlawful restraint or false imprisonment.

Sec. 10-1. Kidnaping.

Explanatory Note.

The elements of the offense of kidnaping are unlawful seizure and secret confinement. The word "knowingly" in the first sentence of subsection (a) qualifies each of the three methods usually employed in kidnaping. Methods (2) and (3), both involving the carrying from one place to another, or inducing to go from one place to another, cover the aspects of conveying a victim out of the country or out of the State.

Subsection (b) eliminates the defense of consent of the victim if the victim is under thirteen years of age.

Subsection (c) provides a range of penalties for simple kidnaping ranging from one year misdemeanor imprisonment to one to five years felony imprisonment.

Comment.

Hawaii statutes do not provide for separate offenses of simple kidnaping and aggravated kidnaping. However, Hawaii does have separate offenses of child-stealing and receiving or harboring a stolen child.

Sec. 10-1. (Continued)

Hawaii law permits differentiation as to the seriousness of kidnaping offenses only under the wide range of penalties - imprisonment for any number of years up to life.

Instead of the Ill. CC elimination of the defense of consent for victims under the age of thirteen years, Hawaii provides a rebuttable presumption against the validity of consent of any victim and apparently eliminates the consent of any victim under eighteen years of age if the offense is child-stealing or receiving or harboring a stolen child.

The Ill. CC does not provide a specific exemption applicable to child-stealing or receiving or harboring a stolen child if it is detained from motives of humanity or under certain claims of right.

No Hawaii cases were found concerning these offenses.

Hawaii Law, page 57.

Sec. 10-2. Aggravated Kidnaping.

Explanatory Note.

This section provides an orderly arrangement of aggravated forms of kidnaping: kidnaping for ransom, abduction of a child under the age of thirteen years, infliction of great bodily harm or commission of another felony upon the victim, and hooded, robed or masked kidnaping.

Subsection (b) provides two ranges of penalties for aggravated kidnaping. Capital punishment is retained for aggravated kidnaping for ransom under the procedures stated in Sec. 1-7(c)(1). For other forms of aggravated kidnaping the range is from one year upward, permitting punishment to fit the gravity of the particular offense.

Comment.

Hawaii does not provide for a particular offense of aggravated kidnaping. See Sec. 10-1, Kidnaping.

Hawaii Law, page 57.

Sec. 10-3. Unlawful Restraint.

Explanatory Note.

The term "unlawful restraint" is a new designation for the offense of false imprisonment. The unlawful restraint must be done knowingly, and it must be without legal authority. By its penalty the offense is made a misdemeanor punishable by a fine of not more than \$500, or imprisonment not more than one year, or both.

Subsection (c) is a statement of the substance of Illinois' prior shoplifting statute.

Comment.

The Ill. CC offense of unlawful restraint and the Hawaii offense of unlawful imprisonment are essentially the same but differ in details. The Ill. CC uses the mental state of "knowingly" while Hawaii uses the term "maliciously". The Ill. CC has no provision on the defense of consent nor does it extend the wrongful act specifically to cover the situation of "causing anyone to be imprisoned". The Ill. CC maximum fine is \$500; Hawaii's is \$200. Hawaii has no shoplifting law. No Hawaii cases were found involving unlawful imprisonment or restraint by force or threats.

Hawaii Law, page 58.

ARTICLE 11. SEX OFFENSES

The broad scope of personal, family, community, social and religious interests which can be affected by sexual activities faced the Ill. CC drafting committee as they prepared legislation to proscribe specific acts of sexual conduct. The Committee approached the problem from these basic premises: (1) protection of the individual against forcible acts; (2) protection of the young and immature from the sexual advances of older and more mature individuals; (3) protection of the public from

open and notorious conduct which disturbs the peace, tends to promote breaches of the peace, or openly flouts accepted standards of morality in the community; and (4) protection of the institution of marriage and normal family relationships from sexual conduct which tends to destroy them.

This Article is not intended to proscribe any sexual conduct between consenting adults unless such conduct adversely affects one of the interests sought to be protected.

Sec. 11-1. Rape.

Explanatory Note.

This section covers only forcible rape. Statutory rape, a substantially different offense intended to protect different interests, is treated separated in Secs. 11-4, Indecent Liberties With a Child and 11-5, Contributing to the Sexual Delinquency of a Child. The offense of rape is restricted to males fourteen years old and over as rape is traditionally an offense of male aggression and against the will of the female. Young males are protected from sexual abuse under Secs. 11-4 and 11-5. Females may be guilty of rape in accountability situations under Sec. 5-2.

Other elements of the offense include (1) the offense cannot be committed against the male's wife; (2) the modern term "sexual intercourse" is used instead of "carnal knowledge"; (3) "sexual intercourse" requires penetration (bodily connection other than natural sexual intercourse is covered by Sec. 11-3, Deviate Sexual Assault); (4) "force", "against her will", "consent" are to be determined by Illinois decisional law as well as the necessary amount of resistance by the victim. Subsections (a)(1) and (2) cover the situations where the victim is unconscious or mentally deranged or deficient.

Comment.

The Ill. CC provisions and Hawaii law on rape are substantially the same. A few differences, however, are apparent: (1) the Ill. CC uses the modern terminology

Sec. 11-1. (Continued)

of "sexual intercourse" in defining the offense; the Hawaii statute is in terms of "ravish" or "carnal intercourse"; (2) the Hawaii statute does not expressly exclude the rape of a wife by her husband although no case was found on this situation; (3) Hawaii does not provide a special minimum age at which a male may commit rape, see Sec. 6-1, Responsibility; (4) the Ill. CC minimum penalty is one year imprisonment in the penitentiary, and the penalty under Hawaii law may be imprisonment at hard labor for any number of years, or for life parolable or non-parolable.

No search was made of Illinois case law to determine the rules on consent, resistance, force or other elements of the offense not stated in the Ill. CC.

Hawaii Law, page 58.

Sec. 11-2. Deviate Sexual Conduct.

Explanatory Note.

This section defines a term rather than specifying an offense. It is necessary for the identification of conduct proscribed in other sections of the Article. "Deviate sexual conduct" is intended to include all unnatural acts of sexual gratification between humans and to exclude such acts with animals. The terminology used is derived from the recent Wisconsin Criminal Code, Sec. 944.17.

Comment.

The Ill. CC uses the term "deviate sexual conduct" instead of the older terms used in Hawaii law, "sodomy" or "crime against nature". The Hawaii statutory definition expressly includes unnatural sex acts between humans and animals although no cases were found on this form of the offense.

The Ill. CC does not include the element of emission which in Hawaii law is not an element of sodomy.

Hawaii Law, page 60.

Sec. 11-3. Deviate Sexual Assault.

Explanatory Note.

This section and Secs. 11-4, 11-5 and 11-9 constitute three new approaches to deviate sexual conduct instead of the usual inclusive "crime against nature" provision. First, compelling another to engage in a deviate sexual act is, as in rape, a unique kind of battery deserving of criminal punishment (Sec. 11-3). Second, similar conduct involving a child is proscribed on the same grounds as are other acts which sexually victimize the immature (Secs. 11-4 and 11-5). Third, deviate sexual acts, and certain acts preliminary thereto, performed in a place where they have an immediate and disturbing impact upon the public, are proscribed (Sec. 11-9). The Ill. CC provisions in this area are thus intended to protect everyone from aggression, protect children from abuse of their immaturity, and protect the public from open affronts to generally accepted standards of behavior.

Sec. 11-3 usage of the term "by force or threat of force, compels..." to describe the criminal act is intended to state generally the equivalent of the force requirement in rape. The offense is restricted to force and intimidation situations and to acts against humans.

The participation of the victim encompasses not only the situation where the victim has a deviate act forced upon him, but, also, where the victim is compelled to perform such an act upon the offender or upon some third person.

The fourteen-year old age limitation is consistent with the rape provision. The offender is described as a "person" to indicate that either a male or female may commit the offense.

Comment.

The Hawaii offense of sodomy, which includes consensual acts between adults, is fundamentally different from the Ill. CC offense of deviate sexual assault. The Ill. CC offense is limited to forceful (or threat of force) acts, consistent with the general treatment of sex offenses intended not to proscribe sexual conduct between consenting adults unless such conduct adversely affects an interest sought to be protected.

Sec. 11-3. (Continued)

The 111. CC penalty is one to fourteen years imprisonment in the penitentiary in contrast to the Hawaii maximum of \$1,000 fine and twenty years imprisonment at hard labor.

Hawaii Law, page 60.

Secs. 11-4, 11-5 and 11-6. General Comments.

These three sections provide an organized, coordinated approach to issues raised by sexual conduct involving children. Generally, all three sections deal with non-violent acts with children and the usual situations where actual consent of the child to the specific course of conduct is obtained. Marriage of the accused and the victim is not a bar to prosecution under these sections because it was felt that marriage should not be coerced by the criminal law, nor substituted for punishment.

Sec. 11-4. Indecent Liberties with a Child.

Explanatory Note.

Subsection (a)(1) is equivalent to the statutory rape offense, applies to offenders of either sex and protects children of either sex. Consent of the victim is immaterial.

Subsection (a)(2) incorporates into indecent liberties the "crime against nature" as modified by Sec. 11-2 and includes deviate sexual assault with a more stringent penalty (one to twenty years) than that offense carries when the victim is over the age of sixteen (one to fourteen years) because of the element in this section of abuse of immaturity. The phrase "any act of deviate sexual conduct" includes such acts performed with the consent of the child, and is thus broader than the force situations under Sec. 11-3, Deviate Sexual Assault.

Subsection (a)(3) covers various types of lewd physical contacts which do not, and may not be intended to culminate in sexual intercourse or a deviate sexual act. Note that Sec. 11-5, a misdemeanor section, provides for lewd acts performed in the presence of a

Sec. 11-4. (Continued)

child with no need of proof of any physical contact.

Subsection (b) lists three affirmative defenses (the effect of affirmative defense is stated in Sec. 3-2). It should be noted that no such defenses are provided in Sec. 11-5, a misdemeanor section, consistent with the Code policy of abandonment of absolute liability for felony offenses (See Sec. 1-2(c)).

The first defense is available to one who engages in a sexual act with another, believing honestly and reasonably that the other was at least sixteen years old. Such an offender may not be conforming to acceptable conduct but has not exhibited a dangerous propensity to victimize the immature.

The other defenses are statutory recognitions of the fact that children under sixteen who are married or are prostitutes do not require the protection that is intended for those who are immature in sexual matters.

Subsection (c) provides a penalty of one to twenty years. Prosecution, and the penalty, under Sec. 11-5 or 11-6 are available for less serious offenses. If force is used for sexual intercourse, it constitutes rape under Sec. 11-1.

Comment.

There are significant differences between the Ill. CC and Hawaii law on statutory rape: (1) under the Hawaii offense, the offender must be a male and the victim a female; the Ill. CC applies to offenders and victims of both sexes; (2) the general rules of capacity of an offender apply to the Hawaii offense; the Ill. CC imposes a special age limitation of seventeen for an offender; (3) the Hawaii statute imposes absolute liability; the Ill. CC recognizes three defenses; (4) Hawaii has two statutory classifications with a greater penalty imposed if the victim is under twelve; the Ill. CC has only one classification of statutory rape; (5) Hawaii statutory and case law apparently recognizes that marriage of the offender and the victim constitutes a bar to prosecution for statutory rape; the Ill. CC does not provide for this bar

Sec. 11-4. (Continued)

Hawaii law does not provide any special treatment for sodomy involving children.

The Hawaii offense of indecent assault is equivalent to the third classification of the Ill. CC offense of indecent liberties. Both statutes permit prosecution of offenders of either sex, but the Hawaii offense is limited to females under the age of twelve while the Ill. CC covers victims of either sex under sixteen. Apparently the only provision of Hawaii law which protects young males is section 330-6, RLH concerning contributing to delinquency. There are similar provisions in the Illinois Family Court Act, Ill. Rev. Stat., ch. 23; see Sec. 11-5.

The penalties for these sexual offenses involving children can be compared as follows:

Hawaii offenses:

statutory rape - ten years at hard labor, maximum
carnal abuse under twelve - life or any number
of years
sodomy - \$1,000 fine and twenty years at hard
labor, maximum
indecent assault - \$1,000 fine, five years at
hard labor, or both, maximum

Ill. CC offenses: penalty is imprisonment in
the penitentiary for one to twenty years.

Hawaii Law, page 61.

Sec. 11-5. Contributing to the Sexual Delinquency of
a Child.

Explanatory Note.

This is a misdemeanor provision which is intended to discourage premature ventures into sexual experiences. It is patterned closely after Sec. 11-4, the felony provision and is intended as a lesser included offense of Indecent Liberties with a Child.

Sec. 11-5. (Continued)

The offense includes the two elements of (1) a sexual act and (2) participation with a child. The range of sexual acts is broader than that of the felony section because lewd acts done in the presence of a child are included.

Any person over thirteen may commit the offense and anyone under eighteen may be the "victim"; thus a child might be both the victim and the perpetrator of a violation of this section in a single transaction. This section abandons the traditional assumption that the boy is always the "offender" when boy-girl relations are involved; instead, both participants are viewed as contributing to each other's delinquency when they are of similar age and maturity.

Subsection (b) negates the defense of mistake of age, because otherwise Sec. 4-3(b) would require a mental state as to the material element of age. The other defenses stated in the felony section, i.e., previous marriage and prostitution, do not automatically arise; so they need not be negated. This misdemeanor is intended to discourage generally sexual activities of children under eighteen regardless of their prior sexual experience or inexperience.

Subsection (c) provides a penalty of a fine not to exceed \$1,000, imprisonment in a penal institution other than the penitentiary not to exceed one year, or both. This is consistent with the penalty for contributing generally in the Family Court Act, Ill. Rev. Stat., ch. 23, sec. 2011.

Comment.

Hawaii has no statute comparable to Contributing to the Sexual Delinquency of a Child, except insofar as the general "contributing" provision applies. The contributing statute is consistent with the Ill. CC in that no distinction is made as to the sex of the perpetrator or the victim and defendant's ignorance of age is not a defense. The penalties are similar except that the maximum fine under the Ill. CC is \$1,000 and under the Hawaii provision \$200.

Sec. 11-5. (Continued)

It would appear that Hawaii's "contributing" and sodomy statutes are the only provisions that extend to sexual conduct involving male children.

Hawaii Law, page 63.

Sec. 11-6. Indecent Solicitation of a Child.

Explanatory Note.

This section proscribes the invitation or solicitation of a child to engage in some sexual act condemned in either of the two preceding sections. It is intended to cover cases which fall short of coverage by the attempt provisions.

The relatively low age "under thirteen" is selected because this section is aimed at pathological solicitation manifested by attraction toward children of pre-pubertal age.

Note that the "lewd act" provision of subsection 11-5(a)(4) is limited by a specific intent whereas this section covers a mere inquiry or invitation of a child to sexual activity. If solicitation is coupled with an exposure or surrounded by a grossly obscene discourse, the act as a whole would fall under the proscriptions of Sec. 11-5.

The mistake of age defense is expressly negated (see subsection 11-5(b)) for two policy reasons: first, the age range is so limited that the possibility of mistaking one of those protected for a person of relative maturity is remote; and second, the offense is of a regulatory, misdemeanor nature.

The penalty of a fine up to \$500 or six months imprisonment, or both, brings the offense within the jurisdiction of the justice of the peace and police magistrate, Ill. Rev. Stat., ch. 79, sec. 165 and ch. 24, sec. 9-73.

Comment.

There is no comparable provision under Hawaii law except to the extent that an act of indecent solicitation might be covered by the provisions relating to contributing to the delinquency of a child.

Hawaii Law, page 64.

Sec. 11-7. Adultery and Sec. 11-8. Fornication.

Adultery and fornication are treated similarly except for penalty distinctions, the former being viewed as the more serious offense. Only open and notorious participation in adultery and fornication is criminal, consistent with the Article 11 policy to avoid projecting criminal penalties into matters of principally private moral concern.

The sexual misconduct is described in the alternative of sexual intercourse or cohabitation.

Adultery involves an affront to a specific marriage relationship, rather than an affront to the institution of marriage generally, and it creates the danger of an aggrieved spouse seeking private revenge; so it is made a more serious offense.

The distinction between adultery and fornication is based on the criterion of knowing interference with an existing marital bond. A single person who is unaware of his paramour's contrary marital obligation is not subject to the more severe punishment under the adultery section. Note that Sec. 4-8, Ignorance or Mistake, may limit the offense to fornication where a person makes an honest mistake as to his own marital status.

There is no marriage defense because the offense occurs when the marriage institution is abused, and subsequent marriage by the offending parties does not undo that abuse, nor does compelling marriage under threat of criminal penalties enhance public esteem for the institution.

Comment.

A comparison of the Ill. CC and Hawaii law on adultery and fornication reveals the following differences:

1. The Hawaii law does not include a requirement that the proscribed act or conduct be open and notorious, i.e., the community be aware of the sexual intercourse (or cohabitation) and aware of the fact that the parties are not married to each other.

Secs. 11-7 and 11-8. (Continued)

2. The Ill. CC defines the act in the alternative of "cohabit" or "sexual intercourse" while the Hawaii statutes refer only to sexual intercourse.
3. Hawaii law does not provide for the lesser offense of fornication when an unmarried person believes mistakenly that the other is unmarried.
4. Hawaii provides for a special case of adultery applicable to cohabitation after divorce. Under the Ill. CC these offenders would be liable only for fornication.
5. Hawaii provides the marriage defense to the offense of fornication.
6. Hawaii has special provisions relating to definition of marital status, pregnant women, contributing to delinquency and women who have been the subject of seduction.
7. The Illinois penalties are somewhat more severe as to both fine and imprisonment and do not differentiate on the basis of sex.

Hawaii Law, page 64.

Sec. 11-9. Public Indecency.

Explanatory Note.

This section and the two preceding sections are essentially public nuisance offenses embracing sexual acts deemed worthy of criminal sanction because of the manner and locale of their performance. The two preceding sections concentrate on public affronts to the marriage institution. This section concentrates on the performance of specific sexual acts in public. Other disorderly conduct not involving sexual conduct is dealt with under Article 26.

The two elements of the offenses described in this section are (1) the sexual act and (2) performance in a "public place".

Sec. 11-9. (Continued)

Subsection (a)(1) proscribes performance of an act of sexual intercourse in a public place, meaning normal heterosexual intercourse. The marital status of the parties is of no consequence. The concern for public display of heterosexual activities is limited to acts of intercourse and does not extend to preliminary acts in contrast to (a)(4).

Subsection (a)(2) proscribes acts of deviate sexual conduct in public places.

Subsection (a)(3) proscribes acts of "exhibitionism" although the exposure necessary is of the "body" and not of a particular part, the sexual intent qualification prevents stretching the provision to cover regulation of swim fashions or prohibitions against wearing "short shorts" on public streets. This provision does not refer to lewd acts performed with the intent to stimulate the viewer. Obscene acts performed not to the disturbance of, but rather to the delight of witnesses, such as commercial erotic displays are dealt with in Sec. 11-20, Obscenity.

Subsection (a)(4) is aimed specifically at lewd and public physical contacts such as fondling between homosexuals. It does not cover sexual conduct by consenting adults in private nor public solicitation to deviate sexual conduct.

Subsection (b) defines public place by a standard of "reasonable expectation of public view" as being more realistic for the purposes of this section than the usual tests of ownership or use.

Comment.

Hawaii's common nuisance offense of open lewdness or lascivious behavior, or indecent exposure, while not particularizing the proscribed behavior probably encompasses the specific sexual acts listed in the Ill. CC.

The Ill. CC and the Hawaii decisional law on the meaning of "public place" for this purpose is in substantial accord.

Sec. 11-9. (Continued)

The penalties under the Ill. CC and the Hawaii law are similar, a maximum fine of \$500 or maximum imprisonment of six months (or both in the Ill. CC).

Hawaii Law, page 65.

Sec. 11-10. Aggravated Incest.

Explanatory Note.

The rationale of this and the following section is that criminal concern for incest should be limited to situations involving either (1) abuse of family authority or (2) the possibility of biological risk of genetically defective offspring.

Illinois distinguishes between father-daughter and other types of incest, recognizing the former as the more serious and more common offense.

The definition of "daughter" limits criminal penalties in the case of adoptive and step-daughters to those situations where parental authority may be abused in taking advantage of a young and dependent child. However, where blood daughters are involved, the biological risk remains irrespective of the age of the daughter.

The proscription of deviate sexual conduct is included out of concern for the protection of a young daughter irrespective of blood relationships, and it was felt unnecessary to make a special exclusion for deviate acts with mature blood daughters.

Knowledge of the relationship is an element of the offense since it is the existence of the relationship which makes the sexual act criminal.

Comment.

Hawaii has no aggravated incest provision relating to father-daughter incest.

Hawaii Law, page 66.

Sec. 11-11. Incest.

Explanatory Note.

This section deals with incest affecting sexual intercourse between relatives other than fathers and daughters. The prohibition is not identical in scope to the similar marriage prohibition. The general scope of incest laws in the United States is extremely variable. These variations, imposed on a mobile population, have created many problems in the recognition of foreign marriages as well as problems of criminal law. Since modification of marital restrictions based on incest is clearly outside the scope of a criminal code, the problem of incest restrictions is confined to criminal law.

In this section incest is limited to relationships which pose a biological risk and which will not create serious problems with respect to marriages contracted outside the State: parent-child and brother-sister.

Consistent with the biological risk basis of this section, the only prohibition is against sexual intercourse. Other provisions of Article 11, of course, might apply to situations where a young child in the family is molested by an older member.

Knowledge of the relationship is an element of the offense because it was felt that the severe sanctions (one to ten years imprisonment) would be unjust in the unusual situation of orphaned children meeting as adults without any knowledge of their kinship.

Comment.

The Hawaii incest statute prohibits both sexual intercourse and intermarriage while the Ill. CC is in terms only of sexual intercourse. It was thought to be unnecessary to include expressly "marriage" or "cohabitation" in the Code because they are simply situations which give rise to an inference of sexual intimacies. If sexual intercourse can be inferred, then the section is violated.

The scope of prohibited relationship is broader under the Hawaii statutes, in which the criminal restrictions are identical to the marriage restrictions,

Sec. 11-11. (Continued)

than under the Ill. CC. Sexual intercourse between grandparent and grandchild, aunt and nephew, or uncle and niece is criminally incestuous in Hawaii but not in Illinois.

The Hawaii offense is one of absolute liability in contrast to the Ill. CC provision in which knowledge is an express element of incest.

The Code does not specify the consequences of adoptive relationships although the Committee Comments stress the "biological risk" basis of the offense. The Hawaii Att. Gen. Op. leaves open the situation of marriage or sexual intercourse between an adopted child and a natural parent.

The penalties, ten years imprisonment, are the same, except that the Hawaii statute includes the alternative of a maximum fine of \$500.

Hawaii Law, page 66.

Sec. 11-12. Bigamy.

Explanatory Note.

The criminal act of bigamy may be either the subsequent marriage within the State or cohabitation in the State following a subsequent marriage outside the State. In order for the cohabitation to be deemed bigamous, the subsequent marriage must be bigamous under the laws of this State.

The defenses listed in subsection (b) refer to facts existing at the time of the subsequent, or allegedly bigamous, marriage. The defenses apply in cases of bigamous cohabitations even if they would not have been available to the accused had he been indicted in the State where the subsequent marriage actually occurred.

The first defense listed, dissolution of the prior marriage by divorce or annulment, is properly an exception, but it is expressed as a defense for procedural convenience.

Sec 11-12. (Continued)

The second defense, reasonable belief that the prior spouse was dead at the time of the subsequent marriage, is included because the spouse who reasonably believes his mate to be dead is not exhibiting evil intentions, an affront to the institution of marriage, or abuse of his spouse.

The third defense involves two elements:
(1) absence of spouse for the five-year period and
(2) lack of affirmative knowledge that the absent spouse is alive.

The fourth defense, a reasonable mistake as to eligibility to remarry, is included for generally the same reasons as is the defense of reasonable mistake as to death of a prior spouse.

The defenses are made affirmative (see Sec. 3-2, Affirmative Defense) principally because evidence to establish the issues involved is peculiarly available to the defense and practically impossible for the prosecution to obtain.

Comment.

The Ill. CC definition of bigamy and the Hawaii statutory definition of polygamy are essentially the same. In Hawaii, the offense imposes absolute liability with no specification of defenses. It cannot be determined if the presumptions of validity, innocence and legitimacy in favor of the subsequent marriage carries over from civil to criminal cases.

The statutory defenses of four years continuous absence of a spouse or a legal divorce in section 309-7, RLH are applicable only to the offenses of adultery and fornication in Hawaii.

The penalties are different: in the Ill. CC the offense may be a misdemeanor with a maximum imprisonment of one year or a felony with a maximum of five years; the maximum penalty in Hawaii is a fine of \$500 and imprisonment at hard labor for two years.

Hawaii Law, page 67.

Sec. 11-13. Marrying a Bigamist.

Explanatory Note.

This companion provision to Sec. 11-12 is necessary because a single person who knowingly contracts a bigamous marriage cannot be held accountable on principles of accessoryship since his conduct is "inevitably incident to its commission", subsection 5-2(c)(2).

This section is intended to provide like defenses for the single person who marries a bigamist as are provided for the alleged bigamist himself.

The offense is a misdemeanor with a maximum penalty of one year imprisonment.

Comment.

Although Hawaii law has no comparable provision, a person who knowingly marries a bigamist could, in certain cases, be prosecuted under the rules of Principals and Accessories or for adultery. See Article 5, Parties to Crime.

Hawaii Law, page 68.

Sec. 11-14. Prostitution.

Explanatory Note.

This section describes in direct terms the offense of prostitution, i.e., the performance, offer or agreement of a sexual act for money. The offender is described as a "person" to afford coverage over male homosexual prostitutes. The verb "offers" generally incorporates prohibitions on "soliciting" but is intended to connote less urging and invitation on the part of the prostitute. The word "agrees" covers the situation where the prostitute simply makes it a practice of accepting properly endowed propositions; the prostitute's reputation does the soliciting.

The remuneration moving to the paid participant in the sexual act is in terms of "money" because it was felt that this element should be tailored to the prime concern, i.e., the business of selling sexual activity, and not be so broad as to describe purely private, non-commercial acts.

Sec. 11-14. (Continued)

Comment.

Hawaii law on prostitution is very similar to the Ill. CC provision although there are differences in terminology.

Some of the differences in detail are as follows: (1) the Hawaii statute uses "for hire" instead of "for money"; (2) the Hawaii statute includes indiscriminate sexual intercourse without hire; (3) the Hawaii statute does not expressly include an act of deviate sexual conduct although such would probably be an instance of "lewdness"; (4) Hawaii provides a special statute applicable to accessories; these persons would be reached under the Ill. CC general principles of accountability expressed in Article 5, Parties to Crime; (5) the maximum fine in Hawaii is \$1,000 as contrasted to \$200 under the Ill. CC (the maximum imprisonment in either case, misdemeanors, is one year).

Hawaii Law, page 68.

Sec. 11-15. Soliciting for a Prostitute.

Explanatory Note.

This section is broadly drafted to insure coverage of all acts by the "middle-man" in arranging business for a prostitute.

Subsection (a)(1) proscribes soliciting in the sense of an invitation. It is intended to reach one who actively seeks customers for the prostitute and initiates the suggestion to the prospective patron. The response of the prospect and the locale of the solicitation are immaterial.

The other two subsections expand solicitation to include essential activities of a "middle-man" who might not initiate the suggestion but whose participation in arrangements is vital to the engagement.

Subsection (a)(2) covers the person who arranges or offers to arrange a meeting of persons for purposes of prostitution, e.g., elevator

Sec. 11-15. (Continued)

operator or bell hop in a hotel who establishes contact between a patron and a prostitute who might be living in the hotel or who will visit the patron's room if summoned.

Subsection (a)(3) deals with directing the prospective patron to a prostitute or a place of prostitution. If a man entered a taxicab and asked the driver to take him to a place of prostitution, and the driver took him to a prostitute, the section would be violated by the cab driver. The term "transport" is not used, out of concern for the employee who has a duty to respond to certain directions from persons he serves, e.g., if a man entered a taxicab and told the driver to take him to a specific address, and the driver knew that it was the address of a brothel, the driver would not be criminally liable simply because he followed the directions of his customer.

Each of the subsections is qualified by the phrase "for purposes of prostitution" to relate the soliciting activities to the vice sought to be deterred. It is not necessary to show that actual acts of prostitution followed the soliciting activity, but merely to show that acts of prostitution were intended. Financial benefit to the solicitor is not an element of the offense.

Subsection (b) provides for the same penalty applicable to prostitution on the theory that in modern practice the solicitor is equally blameworthy in the activity sought to be suppressed.

Comment.

The Hawaii statutory provisions on soliciting are far-ranging in contrast to the Ill. CC general approach to prostitution which is limited to the business of selling an act of sexual intercourse or of deviate sexual conduct.

The Hawaii decisional law does not indicate the Ill. CC distinction that requires the solicitor to supply or initiate some measure of essential information or direction to a prospective customer.

Sec. 11-15. (Continued)

Hawaii authorizes a maximum \$500 fine (half of the maximum for prostitution) in contrast to the Ill. CC \$200 fine. In both jurisdictions the offense is a misdemeanor carrying maximum imprisonment of one year. Hawaii has unique license forfeiture provisions applicable to operators of vehicles, airplanes and boats who use the conveyance in violation of the soliciting statute.

Hawaii Law, page 69.

Sec. 11-16. Pandering.

Explanatory Note.

Arbitrary distinctions in terminology have been made to provide convenient references for "pander" and "pimp" used to describe various types of activities connected with prostitution. "Pander" denominates activities of one who recruits prostitutes; "pimp" is the label for one who lives off the earnings of the prostitute; "procure" is not used.

This section involves recruiting of females into the practice of prostitution and keeping practicing prostitutes in that line of endeavor. The functional classification makes distinctions among the "recruiter-business manager" referred to in this section, and the runner or contact man under Sec. 11-15, Soliciting for a Prostitute, and the individual who is the prostitute's consort; see Sec. 11-19, Pimping.

Subsection (a)(1) deals with the use of coercion to place the woman in the trade or keep her there. The coercion frequently now arises from drug addiction although in the past it more usually arose from financial destitution.

Subsection (a)(2) requires only that the accused arrange or offer to arrange for another to become a prostitute. Whether she does or not is immaterial because the evil aimed at in this section is the recruitment and management activity.

Sec. 11-16. (Continued)

No limitation is included to require that the recruitment be done for money since it was felt that any recruitment would be financially motivated, and requiring proof of this intent would unnecessarily hamper application of the section.

Subsection (b) divides the penalty provisions to permit punishment consistent with the seriousness of the offense. If compulsion is used, the offense carries one to ten years in the penitentiary. If compulsion is not used, the technique of the offender may vary in seriousness; therefore a wider range of punishment is provided for: up to one year in a penal institution other than the penitentiary, or one to five in the penitentiary.

Comment.

The Ill. CC functional categorization of offenses that involve activities connected with prostitution is not employed in Hawaii where activities of the "recruiter-business manager" and of the prostitutes "consort" are treated as alternative means of committing a single offense. Most of the acts prohibited by the Hawaii statute require the specific intent of the offender to participate in the profits of the prostitution trade. The financial requirement is not an element of the Ill. CC provision for pandering, but, see Sec. 11-19, Pimping. The Hawaii statute does not differentiate the seriousness of the offense on the basis of presence or absence of compulsion.

Hawaii specifically provides for liability of certain business organizations and of accessories, subjects which the Ill. CC covers in Article 5, Parties to Crime.

The Ill. CC does not have a specific offense for transportation of females for purposes of prostitution because this activity falls within the general definitions of pandering.

Hawaii Law, page 71.

Sec. 11-17. Keeping a Place of Prostitution.

Explanatory Note.

This section defines a place used for prostitution in generalized terminology as "any place which could offer seclusion or shelter"... to avoid the possibility that more specific, example definitions could result in unintended limits on the scope of the provision.

The offender's relation to the place is described as "has or exercises control", regardless of his authority to exercise control. The offender may be the owner, the lessor, a trespasser or an employee on the premises.

Subsection (a)(1) refers to direct, on the spot, control of the place.

Subsection (a)(2) refers to a situation where the person in control of the place ignores facts which would reasonably justify the conclusion that the place is being used for purposes of prostitution, e.g., an apartment manager who lives on the premises and becomes aware of the practice of a female occupant of receiving numerous male guests individually during night hours but nevertheless continues to renew a month to month lease without question.

Subsection (a)(3) refers to the situation where the person in control of the place becomes aware of such circumstances after the use of the premises has been granted to another for an extended period of time, e.g., a year, and the lessor soon becomes aware of facts indicating that the premises are being used for purposes of prostitution and fails to take steps to terminate such use of the property.

Comment.

Some differences between the Hawaii law and the Ill. CC provisions on keeping a place of prostitution are as follows:

- (1) The Ill. CC defines a place used for prostitution generally, whereas the Hawaii statute employs definition by

Sec. 11-17. (Continued)

example with a general classification. If a fenced space around a swimming pool were used for the purpose of prostitution, the place would probably fall within the Ill. CC definition, but it is possible that such place would exceed the scope of the Hawaii definition.

- (2) The Ill. CC treats the knowledge element of the offense in detail, varying with the relationship of the offender to the place used for prostitution. The Hawaii statute is violated when the prohibited act is committed for the proscribed purpose or, in certain situations, when it is done knowingly.
- (3) The Ill. CC limits the offense to places of prostitution; the Hawaii statute extends the offense to places of prostitution, assignation or lewdness.
- (4) The Ill. CC provides for accountability generally under Article 5, Parties to Crime; Hawaii has specific provisions for corporate, and other organization, liability.
- (5) The Ill. CC includes within this section and within the sections on prostitution, public indecency and obscenity (Secs. 11-9, 11-4 and 11-20) acts which in Hawaii constitute varieties of disorderly conduct or keeping a disorderly house. See Article 26, Disorderly Conduct.
- (6) Procedures for abatement, prevention and termination of common nuisances appear elsewhere in the Illinois statutes (ch. 100-1/2, Ill. Rev. Stat.) instead of being a part of the criminal statutes as in Hawaii.
- (7) The Ill. CC maximum penalty is a \$500 fine or imprisonment in a penal institution other than the penitentiary for one

Sec. 11-17. (Continued)

year, or both. The Hawaii maximum penalty for the common nuisance offense is a \$1,000 fine and imprisonment for one year; for the disorderly house offense, \$100 fine or imprisonment for six months.

Hawaii Law, page 73.

Sec. 11-18. Patronizing a Prostitute.

Explanatory Note.

The evil aimed at in this section is prostitution; therefore, age of the parties, privacy of the place, consent, open and notorious conduct, and similar elements are immaterial.

Subsection (a)(1) prohibits an act of sexual intercourse or deviate sexual conduct with a prostitute who is not the offender's spouse regardless of the place where the act or conduct occurs.

Subsection (a)(2) prohibits patronizing of a place of prostitution in specific terms of intent.

Comment.

Hawaii law does not include a specific offense comparable to patronizing a prostitute. Under the Ill. CC rules of accountability (see Sec. 5-2, When Accountability Exists) a patron of a prostitute would not be criminally liable for the principal offense; therefore it was necessary to provide for this situation.

To the extent that patrons are liable under the Hawaii statutes on lascivious conduct, prostitution, and accessories thereto, the penalties are the same as for the principal offense. The Ill. CC maximum penalty is a fine of \$200, imprisonment in a penal institution other than the penitentiary for six months, or both.

Hawaii Law, page 75.

Sec. 11-19. Pimping.

Explanatory Note.

Sharing in the profits of prostitution is treated separately in recognition of knowledge learned from studies of the practice of prostitution. These studies indicate that the pimp is frequently disconnected from the business side of prostitution and may play primarily a strange psychological role in the life of the prostitute. If he does participate in soliciting customers or managing the business, he would be subject to prosecution under other sections of this Article.

The offender in this section is described as "any person" to include either a male or a female. The rewards moving to such person is described as "money or other property" to insure adequate coverage. The property may thus be gifts of automobiles, clothing, living accommodations, or the like.

The "not for a lawful consideration" exception avoids placing criminal liability upon those who deal in normal business transactions with persons whom they know, or have reason to suspect, are prostitutes.

Comment.

The Hawaii law treats sharing in the profits of prostitution within the pandering statutes; otherwise the law is substantially the same as the Ill. CC section. One significant difference is in the penalty provisions: the Ill. CC maximum penalty is a fine of \$500 or imprisonment in a penal institution other than the penitentiary for one year, or both; the Hawaii penalty is a fine of not less than \$100 nor more than \$500 or imprisonment at hard labor not more than five years, or both.

Hawaii Law, page 75.

Sec. 11-20. Obscenity.

Explanatory Note.

The provisions on obscenity have been placed in this Article on sex offenses on the theory that the dissemination of obscenity, while it may also be other things, is primarily an offense against sexual morals. Other provisions of the Code are related to obscenity, e.g., Sec. 11-9, Public Indecency; Article 26, Disorderly Conduct, Article 27, Criminal Defamation.

This section is based on Sec. 251.4 of the Model Penal Code and is aimed primarily at the commercial dissemination of obscenity.

The definition of obscenity in subsection (b) provides that the material must appeal to sexual interest, or interest in nudity or excretion, and it must go beyond the customary limits of candor in the description of such things.

Subsection (c) lists different types of evidence which are admissible as bearing on the question of whether the material is obscene. This inclusion was deemed necessary because of the elusive nature of the standards which determine obscenity. It is not necessary to conviction to introduce any or all of the types of evidence listed; nor is the list exclusive of the types of evidence which may be admissible as bearing on the question of obscenity. The list is intended to serve as a guide and to deter a trial court from holding any one of the types to be inadmissible in a proper case.

The affirmative defenses provided in subsection (f) are intended to reserve criminal punishment for those situations in which the obscenity is disseminated to strangers for gain. Private noncommercial dissemination between adults is not an offense nor is dissemination of such material to those who have a legitimate need for it, such as scientists, educational institutions, the police and other authorities.

The section is thought to be free from constitutional deficiencies and to be within the holdings of Roth v. United States, 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957) and the series of obscenity cases since.

Sec. 11-20. (Continued)

Comment.

Hawaii's statute on obscene publications is categorized as a common nuisance and is a broad proscription. The reported case law has not added much in the way of judicial interpretation other than to imply the element of scienter to the offense.

The Ill. CC maximum penalty for obscenity approximately twice as severe as in Hawaii, is a fine of \$1,000 or imprisonment in a penal institution other than the penitentiary for one year, or both.

Hawaii Law, page 75.

ARTICLE 12. BODILY HARM

Article 12 reorganizes the law in regard to bodily harm and threatened bodily harm offenses. The traditional offenses are redefined so that, in conjunction with Sec. 8-4, Attempt, the offenses of attempt, assault, aggravated assault, battery, aggravated battery and intimidation cover the various types of criminal conduct which are usually proscribed in an identifiable form and with realistic consistency in relation to penalties. The special situations of bodily harm through reckless (as defined in Sec. 4-6) conduct, compelling a confession or other information by force or threat, and dueling are included in separate sections of this Article.

Sec. 12-1. Assault.

Explanatory Note.

This section eliminates the usual requirements of "attempt" and "present ability" and

Sec. 12-1. (Continued)

retains the requirement that the victim reasonably apprehend a battery (a traditional element of assault borrowed from the law of torts). The intention is to restore the two offenses of attempt and assault to their respective roles in identifying criminal conduct: An attempt applies to all offenses, requires specific intent, and may be further removed than assault from the principal offense in both time and place (since the doing of any act which constitutes a substantial step toward the commission of the principal offense is sufficient for an attempt).

Assault under this section is not a specific intent offense. The Code treats "assault with intent" (to kill, maim, rape, etc.) offenses as attempts or aggravated assaults, or aggravated batteries. It should be emphasized that an assault does not involve a touching; if a touching occurs, by any means, it is a battery.

It is the intent of Secs. 8-4, Attempt and 12-1, Assault to identify attempted batteries as attempts, governed by the same rules that govern all attempts; and conduct which is without lawful authority and which places another in reasonable apprehension of receiving a battery as an assault, without regard to present ability or specific intent to commit a battery except as they may bear on the reasonableness of the apprehension.

The penalty for simple assault involves no imprisonment.

Comment.

The Hawaii triple statutory definition of assault includes elements of attempt, present ability and intent as well as reasonable apprehension of the victim.

Most of the reported cases involve situations of assault and battery, assaults with intent, and aggravated assault. No clear distinction is made between assault and attempt as separate offenses.

Sec. 12-1. (Continued)

The Hawaii maximum penalty for simple assault may be alternatively a \$500 fine, imprisonment for six months, or both in contrast to the Ill. CC which provides only for a maximum fine of \$500.

The Ill. CC does not have specific included offense provisions for assault, instead the matter is covered generally under Secs. 2-9, Included Offense, 3-3, Multiple Prosecutions for Same Act, 3-4, Effect of Former Prosecution.

Hawaii Law, page 77.

Sec. 12-2. Aggravated Assault.

Explanatory Note:

The elements of a simple assault, specified in Sec. 12-1, must be present, and, in addition, one of the aggravated conditions must exist. This section still covers only assaults and not batteries. If there is a touching, the offense would be subject to the provisions of the sections on attempt, battery or aggravated battery.

Comment.

Hawaii law provides definitions of aggravated assault, but the Hawaii law in this area produces an indiscriminate mixture which tends to blend and confuse distinctions between attempts, assaults, aggravated assaults, batteries, aggravated batteries, and assaults with intent to commit specific crimes. The application of Hawaii's offense of aggravated assault usually involves a battery. See Sec. 12-4, Aggravated Battery.

Hawaii Law, page 77.

Sec. 12-3. Battery.

Explanatory Note.

Battery is restricted to intentional or knowing conduct, as defined respectively in Secs. 4-4 and 4-5, which is without legal justification. Reckless conduct which causes bodily harm or endangers bodily safety is dealt with in Sec. 12-5.

A battery can be committed by any means which (1) causes bodily harm to an individual; or (2) makes physical contact of an insulting or provoking nature. These provisions are intended to limit the traditional "barest touching" which does not cause physical harm to one of "an insulting or provoking nature".

Comment.

Hawaii's statutory definition of simple battery is substantially the same as the Ill. CC provision although the Hawaii offense requires the element of unlawful and intentional, in contrast to the Ill. CC alternative elements of intentional or knowingly, without legal justification.

Both jurisdictions impose the same penalties. The special included offense provisions of the Hawaii law are dealt with generally in the Ill. CC under Secs. 2-9, Included Offense, 3-3, Multiple Prosecution for Same Act, 3-4, Effect of Former Prosecution.

Hawaii Law, page 78.

Sec. 12-4. Aggravated Battery.

Explanatory Note.

Aggravated battery is divided into three categories each with a rather wide range of penalties commensurate to the seriousness of the offense.

Subsection (a) includes the more serious batteries which are not inflicted with a specific intent to murder, rape or rob and, therefore can

Sec. 12-4. (Continued)

not be prosecuted as attempted murder, rape or robbery. It also includes the old offense of mayhem.

The penalty for aggravated battery which results in great bodily harm or permanent disability or disfigurement is one to ten years in the penitentiary or not to exceed one year in a penal institution other than the penitentiary. This wide range in penalty is afforded because of the comparative minor and serious harm which can result because of the use of the term "disfigurement".

Subsection (b) involves a battery committed under the aggravated circumstances specified in Sec. 12-2, Aggravated Assault from which great harm might and usually does result although it did not in the particular case. The maximum penalty for this category of aggravated battery, not involving great bodily harm nor permanent disability or disfigurement, is five years imprisonment.

Subsection (c) covers an unusual type of battery frequently preceding a more serious offense, such as rape, robbery or murder. It also covers the deceptive inducing to drug addiction without the victim's consent. The same wide range in penalty is provided as in subsection (b) because of the possible variations in seriousness which may attend the commission of the offense.

Comment.

It is difficult to compare specifically the provisions of the Hawaii law and the Ill. CC on aggravated battery because of the fundamental Code reorganization which separates strictly attempts, assaults and batteries.

Some of the obvious differences are as follows:

Sec. 12-4. (Continued)

- (1) Hawaii provides for aggravated offenses (including use of acids, chemicals, etc.) and intermediate offenses. The Ill. CC provides three categories of aggravated battery.
- (2) Hawaii case law is usually in terms of "assault" and "assault and battery". The Ill. CC sharply differentiates between "assault" and "battery".
- (3) The Hawaii extension of common law "mayhem" requires specific intent. The Ill. CC provision requires either specific intent or knowledge.
- (4) The Hawaii provisions for specific intent offenses (to commit any felony, to rape, to rob) would be prosecuted under the Ill. CC as attempts.
- (5) The Hawaii provisions relating to leaving the scene of the commission of any felony and interfering with a public officer are dealt with in the Ill. CC under Article 31, Interference with Public Officers.
- (6) Hawaii law does not include the concealment of his identity by the offender or the status of the victim as a school teacher or employee as types of aggravated battery.
- (7) Hawaii law requires specific intent (to injure, disfigure or commit an offense) to constitute the aggravated offense pertaining to use of acids, chemicals and other dangerous substances. The comparable Ill. CC provision imposes absolute liability.
- (8) The Hawaii intermediate offense of a battery by a means intended or likely to humiliate, degrade or sicken would probably be a simple battery under the Ill. CC.

Sec. 12-4. (Continued)

- (9) There are several variations between the penalty provisions, e.g., wounding or inflicting grievous bodily harm carries a fine of not more than \$1,000 or imprisonment not more than one year, or both in Hawaii; in the Ill. CC it might carry one year in a penal institution other than the penitentiary or up to ten years in the penitentiary.

Hawaii Law, page 78.

Sec. 12-5. Reckless Conduct.

Explanatory Note.

This offense is aimed primarily at the reckless homicide type of conduct where no homicide results. Endangering the bodily safety of an individual is sufficient; bodily harm is not required. It is sufficient if the conduct is reckless, as defined in Sec. 4-6 without regard to whether it is otherwise lawful or unlawful. The offense may be committed "by any means", which includes handling of motor vehicles and deadly weapons. The penalty permits flexibility so as to fit the punishment to the seriousness of the offense.

Comment.

Hawaii has no comparable general offense of reckless conduct. For Hawaii law on careless or heedless operation of a vehicle, see Sec. 4-6, Recklessness.

Hawaii Law, page 82.

Sec. 12-6. Intimidation.

Explanatory Note.

This section defines and prohibits a wide range of acts and conduct but excludes the use of force or threat to obtain a confession, statement or information regarding an offense (see Sec. 12-7).

Intimidation requires a specific intent to cause another to perform or to omit the performance of an act, and the threat must be communicated with that intent. It is also necessary that the act threatened, if performed, would be without lawful authority. The offense is committed when the accused is apprehended and prosecuted for intimidation before the harm threatened is performed. The penalty is relatively light. If the threatened harm has been performed, then the accused is probably subject also to prosecution for the more serious offense that is the substance of such performance.

Comment.

Hawaii law does not clearly differentiate as does the Ill. CC between intimidation as such and the related offenses of extortion, unlawful restraint, and official misconduct. See Sec. 10-3, Unlawful Restraint; PART C., OFFENSES DIRECTED AGAINST PROPERTY; and Article 33, Official Misconduct.

Generally this area of the Ill. CC is concerned only with the communicated threat. The Hawaii law, on the other hand, pertains generally to situations where the threatened harm has been executed and does not include provisions dealing only with the relatively low grade offense of intimidation.

Hawaii Law, page 82.

Sec. 12-7. Compelling Confession or Information by Force or Threat.

Explanatory Note.

This offense is handled separately because of the special circumstances which usually surround the obtaining of information regarding

Sec. 12-7. (Continued)

criminal offenses. The conduct proscribed is deemed to be much more serious than the usual intimidation situation; therefore a more severe penalty is provided.

The conduct must be performed with intent to obtain a confession, statement or information regarding an offense; but the offense involved may be one which the victim is suspected of having committed, or one of which another is suspect. The harm inflicted or threatened must be physical, but it may be on the victim from whom the confession, statement or information is desired, or it may be inflicted or threatened upon any other person for the purpose of causing the victim to reveal the desired information.

The range of penalties, up to one year in a penal institution other than the penitentiary or up to three years in the penitentiary, is intended to encourage the initiation of prosecutions of less serious situations.

Comment.

There are no comparable provisions in Hawaii law.

Hawaii Law, page 84.

Sec. 12-8. Dueling.

Explanatory Note.

It was felt that a simple statement prohibiting dueling is sufficient for modern conditions of society.

Comment.

Hawaii's comparatively elaborate statutory provisions on dueling reflect the community's concern with that offense in 1869. In contrast to the wide range of imprisonment penalty under the Ill. CC, the Hawaii offenses (except cases of homicide) carry penalties only of fine and incapacity for public office.

Hawaii Law, page 84.

ARTICLE 13. VIOLATION OF CIVIL RIGHTS

No attempt was made in the Ill. CC to alter the general policy of Illinois civil rights legislation. Article 13 is essentially a reorganization, rewording, and removal of inconsistencies and duplications of the provisions of four separate acts passed in 1885, 1919, 1935 and 1937 with more recent amendments.

Sec. 13-1. Definitions.

Explanatory Note.

Three terms are defined (public place of accommodation or amusement, operator of such public place, and official) to insure precision of expression and economy of words.

Comment.

Hawaii has not enacted comparable civil rights legislation.

Hawaii Law, page 85.

Sec. 13-2. Elements of the Offense.

Explanatory Note.

This section specifies the conduct which, if based upon race, religion, color or national ancestry, constitutes violation of civil rights:

- (1) denial of full and equal enjoyment of the facilities and services of any public place of accommodation or amusement;
- (2) written communications by an operator of a public place of accommodation or amusement to the effect that his facilities will be denied to anyone or that anyone is unwelcome, objectionable, or unacceptable;
- (3) refusal to employ or discrimination in employment by an official for any work relief project;

Sec. 13-2. (Continued)

- (4) denial or refusal by an official of full and equal enjoyment of the accommodations, advantages, facilities or privileges of his office or services or of property under his care.

Comment.

Although Hawaii has no civil rights law in the area of public accommodations, the Constitution prohibits discrimination based on race, religion, sex or ancestry in the exercise of civil rights. There is also some prohibition in Hawaii's civil service statutes of certain discriminatory practices in public employment.

Hawaii Law, page 85.

Secs. 13-3 and 13-4, Sanctions and Enforcement.

Explanatory Note.

These sections provide the detailed procedures for punishment of violations of civil rights and for enforcement of civil rights.

Comment.

There are no comparable Hawaii provisions.

Hawaii Law, page 86.

ARTICLE 14. EAVESDROPPING

Explanatory Note.

This Article is a rearrangement of Illinois' comprehensive eavesdropping statute which was enacted in 1957. Illinois is one of the very few states which unqualifiedly prohibit eavesdropping. The reason for this legislation has been to protect the privacy of the individual, generally considered to be a fundamental civil liberty.

Opposition to eavesdropping legislation is founded on the position that eavesdropping is an effective instrument of law enforcement, and authorities should not be hampered by restrictive legislation in fighting criminal organizations who indiscriminately employ any means to accomplish their ends. The conflicting considerations of the proponents of the right to privacy and of those who prefer more effective law enforcement have led to a wide variety of legislation and practices in the various states.

There is a general disfavor of eavesdropping by private individuals; so the issue is whether or not to permit law enforcement authorities to do it.

The Ill. CC definition of "eavesdropping device" extends to any device which may be used for the prohibited purpose and is not limited to electronic devices.

It should be noted that eavesdropping is intimately associated with the procedural problems of obtaining evidence for law enforcement; so a consideration of the substantive offense should be made only in connection with a detailed study of the pertinent procedural and evidentiary rules.

Comment.

Hawaii does not provide comprehensive eavesdropping or "wiretapping" legislation. The simple, single prohibition is against recording of telephone conversation and is applicable alike to private individuals and law enforcement officers.

Hawaii Law, page 86.

PART C. OFFENSES DIRECTED
AGAINST PROPERTY

The drafters of the Ill. CC consider Articles 16 and 17 as their most comprehensive codification of the law on any subject. The entire range of theft, including larceny, larceny by trick, embezzlement, extortion, false pretenses, confidence game and their variations, are codified in Articles 16 and 17. The labels and highly technical distinctions of these traditional offenses are abolished. Other states that have taken this new approach to theft crimes are New York (1942), California (1949), Wisconsin (1955) and Massachusetts (1956).

The other offenses against property, robbery, burglary, arson, and trespass, are covered respectively in Articles 18, 19, 20 and 21.

ARTICLE 15. DEFINITIONS

Explanatory Note.

This Article defines terms used throughout PART C, OFFENSES DIRECTED AGAINST PROPERTY (Articles 16 to 21). Pertinent definitions are referred to in connection with the specific offenses.

Comment.

Since Hawaii criminal law does not consolidate the numerous offenses which are directed against property, there are no definitions to be used for this classification of offenses. There are numerous chapters throughout the Revised Laws of Hawaii involving offenses directed against property.

Hawaii Law, page 87.

ARTICLE 16. THEFT AND RELATED OFFENSES

This Article includes all forms of theft except the special deceptive practices proscribed by Article 17.

Sec. 16-1. Theft.

Explanatory Note.

Subsections (a), (b), (c) and (d) describe the act, and subsections (1), (2) and (3) describe the mental state or conduct from which mental state is presumed, which must accompany the act.

The first sentence requires that the act must be done knowingly. As is true in all except absolute offenses generally, the act and the mental state must coincide. Therefore, the offense of theft is committed when any one of the acts listed in the first four subsections coincides with any one of the mental states, or actions indicating mental state, listed in the last three subsections. It is felt that one of the first four and one of the last three subsections will match together to cover most conceivable forms of theft.

Subsection (a) is the most comprehensive and probably includes all other forms of theft when combined with one of subsections (1), (2) or (3). "Obtain" and "obtains control" or "exerts control" are defined in Secs. 15-7 and 15-8. Note in subsection (a) that such control must be unauthorized. "Owner" is defined in Sec. 15-2.

Subsections (b), (c) and (d) clarify the inclusion within theft of situations usually covered by a variety of statutory provisions on fraud, extortion and receiving stolen property.

Subsection (1) covers the traditional mental state required in theft. "Permanently deprive" is defined in Sec. 15-3.

Sec. 16-1. (Continued)

Subsections (2) and (3) cover special situations where it is difficult to prove a specific intent to permanently deprive, but the offender's handling or disposition of the property directly results in permanent deprivation to the owner, or would have so resulted but for the fortuitous intervention of circumstances of recovery.

Subsection (c) is not intended to convert all "joyriding" escapades into theft unless the abandonment of the vehicle is under such circumstances that the owner probably, at the time of abandonment, would be deprived permanently of the use or benefit of his vehicle.

The penalty provisions retain the traditional distinction between grand and petty theft, and an increased penalty for a second or subsequent conviction for petty theft after a prior conviction of either grand or petty theft.

Comment.

It would appear from the statutory and decisional law that most of the Hawaii offenses that are defined as varieties of grave robbing, embezzlement, extortion, gross cheat, larceny, malicious conversion of vehicle or boat, and receiving stolen goods would fit within the Ill. CC provisions covering the offense of theft.

Specific comparisons do not truly mesh since the Ill. CC comprehensive treatment is not comparable to the traditional Hawaii treatment of particular theft offenses and their technical differences. Comparisons in detail are apparent, e. g., Hawaii provides especially for embezzlement by public officers and employees whereas such offenders are not handled separately in the Ill. CC (but see Sec. 33-3, Official Misconduct); the maximum penalty for larceny

Sec. 16-1. (Continued)

from the person in Hawaii is a \$2,000 fine or imprisonment at hard labor for two years, or both, whereas under the Ill. CC it is ten years imprisonment; receiving stolen goods in Hawaii requires that it be done "fraudulently", whereas the Ill. CC mental element is "knowing the property to have been stolen by another".

Hawaii Law, page 87.

Sec. 16-2. Theft of Lost or Mislaid Property.

Explanatory Note.

This section codifies the law on the theft of lost or mislaid property. Subsection (a) covers the situation where the owner is known or there is a clue to his identity at the time control over the property is obtained. The clue provision is designed to eliminate any distinction between lost property or property which has merely been mislaid, the distinction turning on the point that in all mislaid property situations there is a clue to ownership.

Subsection (b) requires that reasonable measures be taken to restore the property, and subsection (c) specifies the traditional mental state in theft, intent to deprive permanently. Section 15-3 defines "permanently deprive".

The three subsections are in the conjunctive; so the requirements of all three must coincide before the offense is committed.

Because of the special circumstances which surround the original taking of lost or mislaid property, the penalty is lighter than it would be for other forms of theft of the same property. No imprisonment is provided, but the fine may be double the value of the property, or \$500, whichever is greater.

Comment.

Hawaii law on larceny of lost or mislaid property depends upon the element of the taker's lack of ownership rather than the Ill. CC

Sec. 16-2. (Continued)

provisions which rest on the taker's knowledge of the property's owner, failure to take reasonable measures to restore it and the intent to deprive the owner permanently of the use or benefit of the property.

Hawaii does not provide for lighter penalties for larceny of stolen or mislaid property than for other forms of larceny.

Hawaii Law, page 96.

Sec. 16-3. Theft of Labor or Services or Use of Property.

Explanatory Note.

This section codifies in a single section the temporary use aspects of defrauding hotels, customers' lists, commercial vehicles, motor vehicles and similar offenses.

Comment.

The Hawaii statutes prohibiting theft of labor or services or use of property are specific, e. g., defrauding carriers or hotels, ship stowaways and obtaining telecommunications service, in contrast to the Ill. CC provisions which are applicable generally to all instances of the offense. Furthermore, the Ill. CC maximum penalties are consistent for all instances of the offense instead of being variable, as in Hawaii, according to the service obtained or the type of victim.

Hawaii Law, page 97.

Sec. 16-4. Offender's Interest in the Property.

Explanatory Note.

This provision is intended to remove any doubt regarding the commission of theft by a co-owner, such as a partner, joint tenant or tenant in common, who exercises unauthorized control with intent permanently to deprive such co-owner of his interest in the property.

Sec. 16-4. (Continued)

Subsection (b) recognizes the modern trend of overruling any surviving aspects of the common-law fiction of unity of husband and wife. It was felt, however, that unless the husband and wife have separated and are living apart when the theft occurs, the criminal law should not intrude into what usually is a civil controversy over property distribution. If, on the other hand, the parties have separated and are living apart and theft occurs, there is no good reason why the theft should not be punished in the criminal courts.

Comment.

Hawaii law relating to the offender's interest in the property taken applies specifically only to the offense of embezzlement in contrast to the Ill. CC provision which applies to any theft offense. Furthermore, the Hawaii statute imposes a special penalty for this type of embezzlement, a fine of up to \$1,000 or imprisonment up to five years, or both.

Hawaii law relating to property of the offender's spouse applies specifically only to the offense of larceny in contrast to the Ill. CC provision which applies to any theft offense. The larceny rule in Hawaii does not recognize the Ill. CC exception which permits criminal action in cases where the husband and wife have separated and are living apart.

Hawaii Law, page 98.

ARTICLE 17. DECEPTION

Sec. 17-1. Deceptive Practices.

Explanatory Note.

This section supplements Sec. 16-1(b) which requires one of the mental states specified in 16-1(1), (2) or (3). Most outright swindles

Sec. 17-1. (Continued)

will fall within Sec. 16-1(b). Sec. 17-1 is designed to cover a great variety of deceptive practices where the mental state does not fall within one of the categories specified in Sec. 16-1. Since a less dangerous mental state is required, the offense is a misdemeanor with a maximum fine of only \$500 or imprisonment for one year, or both.

Subsection (a) requires that the execution of the document be caused by deception (defined in Sec. 15-4) or threat (defined in Sec. 15-5).

Subsection (b) does not require deception or threat but does require that the officer, manager or other person participating in the direction of the financial institution (as defined in this section) (1) must receive or permit the deposit "knowingly", and (2) "knowing" that the institution is insolvent.

Subsection (c) prohibits untrue, misleading and deceptive advertising. The prohibition is limited to statements (1) made or directed knowingly, (2) for the purpose of sales promotion, and (3) addressed to the public. This section does not encompass the usual "puffing" between individual salesman and private customer, but if a salesman goes beyond puffing, he may violate subsection (a).

Subsection (d) codifies the law on making bad checks to defraud.

The definition of "financial institution" includes various types of institutions which accept deposits as savings or investment.

Comment.

The Hawaii scheme of categorizing the various theft and fraud offenses is not readily divisible along the Ill. CC pattern separating theft and deceptive practices. For instance, particular offenses under gross cheat, such as false advertising or certain confidence games, might be deemed offenses to be categorized under

Sec. 17-1. (Continued)

deceptive practices rather than theft (see Sec. 16-1); and some of the fraud offenses might fall within the categories of theft, if committed with the requisite mental state element, or interference with public officers (Article 31), interference with judicial procedure (Article 32), or official misconduct (Article 33).

Hawaii's provisions on making bad checks include an exception to the rule that insufficient funds is prima facie evidence of intent to defraud. The prima facie rule does not apply in Hawaii if the maker pays the drawee within five days after making the check.

Hawaii's false advertising provisions have been construed as limited to advertisement which is misleading as to the character and quality of the things or services offered to the public. The Ill. CC parallel provision is broader in its extension to any purpose of promoting the sale of property or services, but it is also more restricted in that it is limited specifically to sales. The Hawaii provisions reach a sale, purchase, other disposition, or a contract with reference to the subject of an advertisement.

Hawaii imposes a variety of maximum penalties for the various fraud offenses, some being misdemeanors, others felonies. The Hawaii fraud offenses which include the mental states specified in Sec. 16-1 would be classified under theft, rather than deceptive practice under the Ill. CC codification.

Hawaii Law, page 99.

Sec. 17-2. Impersonating Member of Fraternal or Veteran's Organization.

Explanatory Note.

This section covers all false personation situations involving organizations that can be classified generally as fraternal or veteran's.

Sec. 17-2. (Continued)

The false representation of membership in the organization is sufficient; obtaining pecuniary or other benefit is not required.

Comment.

The Hawaii provisions on false personation of membership in a fraternal or veteran's organization lists examples of veteran's organizations and provides that the offense is committed either by the unlawful wearing of the badge or insignia or by the unauthorized wearing of the badge or insignia in order to obtain aid or assistance. The Ill. CC provisions, on the other hand, cover the broad general categories of fraternal and veteran's organizations without giving examples; and they prohibit the broad general act of false representation, regardless of wearing a badge or insignia and regardless of obtaining any benefit. The maximum fine penalty under the Ill. CC is much higher than the Hawaii law, \$200 in contrast to \$20, but the Ill. CC does not provide for penalty by imprisonment.

Hawaii Law, page 104.

Sec. 17-3. Forgery.

Explanatory Note.

This section codifies the criminal law of forgery as it pertains to currency, records and other writings, securities, bills and notes and public records.

Subsection (b) defines "intent to defraud" for the purposes of this section, and subsection (c) defines "document apparently capable of defrauding" by an illustration but does not limit it to the illustration since the possible variations are innumerable.

The wide range of penalties, up to \$1,000 fine or one to fourteen years imprisonment, or both, permits a less serious offense to receive a fine and a more serious one imprisonment. In appropriate cases both fine and imprisonment are authorized.

Sec. 17-3. (Continued)

Comment.

The Ill. CC provisions and Hawaii statutes which deal with the offense of forgery do not differ materially in gross substance. Most of the specific forgery offenses, defined in the Hawaii statutes and the Hawaii case law would fit within the relatively more concise Ill. CC section.

Some of the differences between the Ill. CC provisions and the Hawaii law are as follows:

1. The Hawaii statutes define and illustrate several specific forgery offenses in contrast with the Ill. CC codification which defines the offense and certain terms generally to cover the gamut of forgery offenses.
2. The intent element of the Hawaii forgery offenses is variously defined as "intent to deceive another and prejudice him in some right", "intent to defraud", "intent to deceive", "deceptively and fraudulently", "deceptively", "intent to defraud or prejudice", "fraudulently", "false and fraudulent", "fraudulently and deceitfully", "knowingly, corruptly and falsely", "falsely and corruptly", and other variations, none of which is defined. The intent element of the Ill. CC forgery offense is "intent to defraud", a term which is defined.
3. The Hawaii law makes it clear that it is not essential to forgery that anyone should, in fact, be "deceived" or that the intent be to defraud a particular person. The Ill. CC definition of "intent to defraud" does not make these points clear.
4. The Hawaii statutes do not expressly provide for forgery by possession with intent to issue or deliver a forged document knowing it to be forged. The Ill. CC does include this specific species of forgery.
5. The Hawaii statutes include within forgery offenses "canceling, destroying, secreting or obliterating a writing". It is not clear whether all of these acts are comprehended within the Ill. CC term "alters any document".

Sec. 17-3. (Continued)

6. The specific Hawaii forgery offense of fraudulently and deceitfully procuring a signature to, or authentication of, a writing under pretense that it is a different writing, is in part within the deceptive practice offense defined in Sec. 17-1(a). This Ill. CC offense is a misdemeanor.
7. The Ill. CC does not specify as forgeries such offenses as an officer falsely taking testimony, certifying acknowledgment of deeds, or making public records, but see Sec. 33-3, Official Misconduct.
8. The penalty provisions under the Ill. CC and the Hawaii statutes also differ. The Ill. CC does not differentiate between first and subsequent offenses nor does it differentiate penalties on the basis of the value involved; and its maximum is fourteen years in contrast to the Hawaii maximum of ten years for a first offense.

Hawaii Law, page 104.

ARTICLE 18. ROBBERY

Sec. 18-1. Robbery.

Explanatory Note.

This section is a codification of the prior Illinois statutes and of the Illinois case law on robbery.

"Property" is used as defined in Sec. 15-1 and threat as defined in Sec. 15-5. No intent element is required since the taking by force or threat of force is the gist of the offense.

Comment.

The Ill. CC provision on robbery is a concise codification of the offense in contrast to the more detailed Hawaii statutory definitions of the elements of the offense. The most notable specific difference is that the Ill. CC section does not require an element of intent whereas the Hawaii law requires proof of intent to steal.

Sec. 18-1. (Continued)

The penalty provisions of the Ill. CC and the Hawaii statute are substantially the same, a maximum of twenty years, although in Hawaii the imprisonment is at hard labor.

Hawaii Law, page 108.

Sec. 18-2. Armed Robbery.

Explanatory Note.

This section provides that a robbery, as defined in Sec. 18-1, committed by a person armed with a dangerous weapon is armed robbery. Subsection (b) does not refer to a maximum penalty, such as life imprisonment, consistent with the philosophy of the Code as stated in Sec. 1-7(e).

Comment.

The chief difference between the Ill. CC offense of armed robbery and the Hawaii provisions on robbery in the first degree is that under Hawaii law it is specifically required that the robber must have the intent, if resisted, to kill, maim, wound or inflict other severe corporal injury upon the person robbed to make the offense robbery in the first degree. The Ill. CC does not require an element of intent to constitute the offense of armed robbery.

Neither the Ill. CC nor the Hawaii statute defines "dangerous weapon."

The penalty provisions of the Ill. CC and the Hawaii law are substantially the same although the Ill. CC does not state a maximum penalty.

Hawaii Law, page 109.

ARTICLE 19. BURGLARY

Sec. 19-1. Burglary.

Explanatory Note.

The common modifications of the common law offense of burglary are codified to include the elements of (1) unauthorized entry or unauthorized remaining (2) in various types of spaces or parts of spaces (3) with the intent to commit therein a felony or theft.

Sec. 19-1. (Continued)

Comment.

The Ill. CC and Hawaii law on burglary differ in a number of respects.

1. The list of spaces that might be entered under the Ill. CC includes building, housetrailer, watercraft, aircraft, railroad car. Under the Hawaii statute the list includes dwelling house, room, building, store, mill, warehouse, outhouse, vessel. The Ill. CC specifies entry into any part of the space involved; Hawaii law is silent on this matter.
2. The Ill. CC makes it burglary to remain in the space without authority, as well as to enter without authority, with the requisite intent; Hawaii law is silent on this matter.
3. The Hawaii statutes do not specify, as does the Ill. CC, that the entry must be without authority and knowingly, but the Ill. CC does not, as do the Hawaii statutes, clarify what constitutes entry as a physical fact.
4. The Hawaii statutes provide for two degrees of burglary, with a different maximum penalty for each degree. The Ill. CC does not divide the offense into degrees.
5. The Ill. CC penalty for burglary is imprisonment for a minimum of one year with no maximum. The Hawaii provision is a maximum of twenty years imprisonment at hard labor for first degree burglary and ten years imprisonment at hard labor for second degree burglary.

Hawaii Law, page 110.

Sec. 19-2. Possession of Burglary Tools.

Explanatory Note.

This section defines the offense of possession of burglary tools in language consistent with the Code provisions on burglary. The offense requires two intent elements: intent to enter and intent to commit a felony or theft in the place entered.

Sec. 19-2. (Continued)

Comment.

Hawaii law does not provide for an offense comparable to possession of burglary tools, except for the vagrancy provision with respect to possession of a false or skeleton key or implement of housebreaking. Vagrancy is a misdemeanor, carrying a penalty of a fine between \$10 and \$500 and up to one year imprisonment, in contrast to the Ill. CC offense which is a felony with a penalty of imprisonment from one to two years. The Hawaii vagrancy provision requires no element of intent.

Hawaii Law, page 111.

ARTICLE 20. ARSON

The Code redefines various types of burning offenses so as to bring within statutory arson the more serious offenses provided with a common penalty. The less serious burning offenses are included in the description of criminal damage to property under Sec. 21-1.

Sec. 20-1. Arson.

Explanatory Note.

This section includes the more serious elements of knowingly damaging by fire or explosive (1) any building of another without his consent, (2) any vehicle, aircraft or watercraft of another designed for use as a dwelling, or (3) any building, vehicle, aircraft or watercraft designed for use as a dwelling, with intent to defraud an insurer.

In addition to these more common acts where there is likelihood of human occupancy, or an actual intent to defraud an insurer, subsection (b) includes the highly dangerous damage by use of explosives to any property, real or personal, of another.

The wide range of the penalty, an indeterminate term with a minimum of one year, permits sentences to fit the most dangerous acts such as setting fire to a crowded tenement or dynamiting a crowded public carrier.

Sec. 20-1. (Continued)

Comment.

The Hawaii statutory offenses of arson, in the first and second degree; malicious burning in the first and second degree; burning with intent to injure an insurer; unlawful use of explosives; and train wrecking by explosives would generally fit within the Ill. CC arson section. The Hawaii statutes, in contrast to the Ill. CC codification, differentiate the various offenses and degrees thereof by specification of different elements such as the time of the burning, the nature of the building burnt, whether or not the building burnt is occupied, and the value of the thing burnt. The Hawaii offenses also specify various mental elements (wilfully, maliciously, intent to injure, without legal or justifiable motive or object, recklessly, fraudulently) whereas the mental element under the Ill. CC is knowingly and without consent. The Hawaii offense of burning with intent to injure an insurer covers all property real and personal whereas such burning is arson under the Ill. CC only if it involves a building, vehicle, aircraft or watercraft designed for use as a dwelling.

The special provision in Hawaii for attempted train wrecking by explosives would be dealt with in the Ill. CC under the general attempt provisions. In Hawaii the offenses involving explosives are not included within arson, and except for train wrecking by explosives, are subject to a lesser maximum penalty (twenty years) than is prescribed for arson in the first degree (life, not subject to parole), arson in the second degree (life) or malicious burning in the first degree (life).

Hawaii Law, page 111.

Sec. 20-2. Possession of Explosives.

Explanatory Note.

Possession, manufacture or transportation of explosives is prohibited when done with the intent to commit any offense or with knowledge that another intends to use the explosive to commit an offense.

Comment.

The Hawaii statute which prohibits possession of explosives does not extend specifically, as does the Ill. CC provision, to manufacture or transportation of explosives. Other differences between the two systems include the following:

Sec. 20-2. (Continued)

1. The intent element in the Hawaii statute involves specific acts, but in the Ill. CC it is intent to commit any offense or knowledge of another's intent to commit any offense;
2. The Hawaii statute exempts possession of ammunition for firearms. There are no exemptions in the Ill. CC section;
3. The Hawaii presumption that proof of possession is prima facie evidence of unlawful intent has no counterpart in the Ill. CC;
4. The penalty under Hawaii law is a fine or imprisonment at hard labor not more than five years, except for the common nuisance of making or storing gunpowder with the penalty being a fine or six months imprisonment. The Ill. CC offense is imprisonment in the penitentiary for one to twenty years.

Illinois provides for regulatory laws on explosives, administered by the Department of Mines and Minerals, comparable to Chapter 96, Part II, RLH. See Chapter 93, Section 143 ff., Ill. Rev. Stats. 1961.

Hawaii Law, page 113.

ARTICLE 21. DAMAGE AND TRESPASS TO PROPERTY

The three offenses in this Article, Criminal Damage to Property, Criminal Trespass to Vehicles and Criminal Trespass to Land, comprise a catch-all of relatively minor offenses against property. The penalties for all are within the jurisdiction in Illinois of the peace and police magistrates. Each offense covers a troublesome area of activity which is easily identifiable and well known to the police.

Sec. 21-1. Criminal Damage to Property.

Explanatory Note.

This section includes malicious mischief type of activities in addition to the damage to property by burning offenses that do not constitute the more serious offense of arson.

Sec. 21-1. (Continued)

Comment.

The various Hawaii malicious burning and malicious injury offenses would either fit squarely within the Ill. CC misdemeanor offense of criminal damage to property, or under the definition of property in Sec. 15-1, would constitute theft as prescribed in Article 16.

The Hawaii maximum penalties for these offenses vary widely from the Ill. CC maximum of \$500, imprisonment in an institution other than a penitentiary for one year, or both. For instance, third degree malicious burning--\$500 or five years at hard labor; burning with intent to defraud an insurer--ten years, cruelty to animals--\$100 or three months, or both; damage to survey monuments--\$500 or four months, or both; malicious injury--\$1,000 or one year, or both.

The provision in Section 296-2, RLH, which states that an act done in the fair exercise, assertion or vindication in good faith of a supposed legal right shall not be punishable as malicious injury would be comprehended under the Ill. CC Article 7 general provisions on Justifiable Use of Force; Exoneration.

It should be noted that in the general malicious injury provisions of the Hawaii statutes, the offense is not limited to injury to property but extends as well to personal rights and privileges. For these specific offenses, see Article 26, Disorderly Conduct.

Hawaii Law, page 116.

Sec. 21-2. Criminal Trespass to Vehicles.

Explanatory Note.

This section covers only trespass to vehicles, aircraft or watercraft. If the trespass also involves damage to the vehicle, aircraft or watercraft, the separate offense of criminal damage to property (Sec. 21-1) would be committed as well.

Comment.

No comparable provision was found in Hawaii law.

Hawaii Law, page 116.

Sec. 21-3. Criminal Trespass to Land.

Explanatory Note.

This section covers criminal trespass to land without regard to the nature, use or location of the land. It is a criminal trespass only if, immediately prior to entry, the offender receives oral or written notice that such entry is forbidden, or he remains upon the land after being notified to leave.

Subsection (b) specifies what constitutes notice. Trespass to unposted land is left to the civil, rather than criminal, law.

Comment.

The Hawaii provisions relating to criminal trespass to land are more specific than is the Ill. CC with regard to the nature of the land, with particular distinctions made for trespass on railroad rights of way. Also, Hawaii provides a special exception in the case of roads, paths and trails leading to public beaches. The Hawaii maximum penalties are more severe, \$250 or three months, or both, as compared to \$100 or ten days.

Hawaii Law, page 116.

PART D. OFFENSES AFFECTING PUBLIC HEALTH,
SAFETY AND DECENCY

ARTICLE 22. UNIFORM NARCOTIC DRUG ACT

Explanatory Note.

In view of the extensive and comprehensive nature of the Uniform Drug Act, effective in Illinois on January 1, 1958, the drafter of the Ill. CC deemed it unwise to attempt any modifications or amendments to the Act in conjunction with the Code as a whole. The Uniform Act, as adopted, was incorporated into the format of the Code as Secs. 22-1 to 22-49. Also included in Article 22, Secs. 22-50 to 22-54, was the Hypodermic Syringes and Needles Act which was approved in Illinois on July 11, 1955.

Comment.

The General Statutory Notes to the Uniform Narcotic Drug Act (9B Uniform Laws Annotated, p. 277 and Supp. p. 108) state that in Hawaii so many changes were made in

Article 22. (Continued)

the Uniform Act that it was not feasible to set out differences and that the Act in Illinois is substantially similar to the Uniform Act, but that the many variations and additional phraseology could not practicably be indicated by statutory notes.

Hawaii Law, page 117.

ARTICLE 23. ABORTION AND RELATED OFFENSES

Sec. 23-1. Abortion.

Explanatory Note.

This section defines and identifies the substantive offense of abortion leaving attempted abortion to be handled under the general attempt provisions of Sec. 8-4. Intent to procure a miscarriage is required although it is not necessary that a miscarriage in fact be accomplished. It is thought that where an instrument, medicine, drug or other substance is used with intent to procure a miscarriage, the danger to the woman and fetus is sufficiently great to warrant the offense without regard to success. Likewise, in such an event it should be immaterial whether the woman is in fact pregnant.

Subsection (b) states a form of the affirmative defense most usually allowed, "necessary for the preservation of the woman's life". This is an affirmative defense, however, only if the abortion is performed by a physician licensed to practice medicine and surgery in all its branches, and in a licensed hospital or other licensed medical facility. A miscarriage performed by one other than a physician so licensed, or in a place other than a licensed hospital or medical facility, even under what would otherwise be an affirmative defense situation, would be an abortion in violation of the section, and punishable by one to ten years.

Comment.

Hawaii law and the Ill. CC provisions on abortion differ in a number of respects:

1. The Hawaii statute requires the element of malice in addition to the specific intent to produce a miscarriage although the definition

Sec. 23-1. (Continued)

of "malice" probably renders the act malicious simply if there is no lawful justification for it. The Ill. CC requires only intent to procure a miscarriage.

2. The Hawaii statute prohibits the act as well as causing or procuring the act. The Ill. CC section prohibits only the act since the general accountability provisions of Article 5 would cover the causing or procuring situations.
3. The Hawaii statute assigns different maximum penalties, both fine and imprisonment, depending on whether or not the woman is in fact pregnant. The Ill. CC makes no such distinction nor does it provide for penalty by fine.
4. The maximum imprisonment under Hawaii law is five years in contrast to the Ill. CC maximum of ten years.
5. The Hawaii law on affirmative defense is broader, "purpose of saving the life of the woman", than the Ill. CC justification of "necessary for the preservation of the woman's life".
6. The Hawaii law on affirmative defense is also broader because it is not limited, as in the Ill. CC, to licensed physicians and to performance in a licensed hospital or medical facility.

Hawaii Law, page 118.

Sec. 23-2. Distributing Abortifacients.

Explanatory Note.

Consistent with the requirements of Sec. 23-1 that no abortion may be performed except by a licensed physician in a licensed hospital or other licensed medical facility, this section restricts the sale and distribution of abortifacients to or for licensed physicians only.

Comment.

No comparable provision was found in Hawaii law.
Hawaii Law, page 119.

Sec. 23-3. Advertising Abortion.

Explanatory Note.

This section provides for the offense of advertising abortion or abortifacients specifically in terms of a violation of the two preceding sections. The maximum penalty of a \$500 fine or six months imprisonment is consistent with the penalty for the sale or distribution of abortifacients.

Comment.

Hawaii law prohibits only outdoor advertising of certain medicines instead of the comprehensive prohibition in the Ill. CC. The Hawaii penalty is a fine only in contrast to the Ill. CC alternative penalty provision under which the maximum fine of \$500 is twice as high as the Hawaii maximum.

Hawaii Law, page 119.

ARTICLE 24. DEADLY WEAPONS

This article is primarily a consolidation of prior Illinois legislation into the Code, to deal in an orderly manner with the law of deadly weapons. This type of legislation is sometimes criticized for prohibiting the law-abiding citizen from protecting himself while at the same time failing to reach the criminal who habitually uses dangerous weapons for illegal ends. The law relating to deadly weapons is based upon the rationale that possession and use of weapons inherently dangerous to human life constitute a sufficient hazard to society to warrant prohibition unless there is appropriate justification brought about by special circumstances.

Sec. 24-1. Unlawful Use of Weapons.

Explanatory Note.

Subsection (a) lists the prohibited uses of weapons. Some of the prohibitions are absolute and some are conditioned by an intent element or by the manner or place of the use.

Subsection (b) provides for penalties consistent with the seriousness of the offense: violation of the machine gun prohibition is a felony with maximum

Sec. 24-1. (Continued)

imprisonment of five years; violation of any of the prohibitions by a convicted felon within five years of release from the penitentiary, or within five years of conviction if penitentiary sentence was not imposed, is a felony with maximum imprisonment of ten years; all other violations are misdemeanors with maximum penalties of a \$500 fine or one year imprisonment, or both.

Comment.

The Hawaii firearms and ammunition law constitutes one of the most comprehensive and particular bodies of such regulation in the nation. It is basically a registration and permit system administered by the chiefs of police of the counties. A precise comparison between the provisions of Chapter 157, RLH, and the provisions of Article 24 of the Code is not feasible because the Ill. CC approach is basically prohibitory legislation rather than regulatory.

A notable difference between Sec. 24-1 and the Hawaii law is that the Hawaii firearms and ammunition law does not include other kinds of dangerous weapons. Prohibitions involving switchblade knives are included within the chapter on Assaults, Battery and Affray and those involving other devices (dirk, dagger, blackjack, etc.) within the chapter on Common Nuisances. The Ill. CC codifies within a single article all provisions relating to deadly weapons.

Hawaii Law, page 119.

Sec. 24-2. Exemptions.

Explanatory Note.

The exemptions absolutely prohibit the use or possession of certain weapons, and permit the use or possession of others when justified by the office or position of the user or by the activity for which they are used.

Comment.

The exemption provisions under the Hawaii law are essentially the same as those set forth in the Code. The specific Hawaii exemptions extend to more federal employees, even mail carriers, than the Ill. CC provision, but the Hawaii exemptions do not, as does the Ill. CC, exempt watchmen. However, presumably a watchman would qualify for a permit to carry a pistol or revolver under Section 157-9, RLH.

Hawaii Law, page 120.

Sec. 24-3. Unlawful Sale of Firearms.

Explanatory Note.

This section prohibits the knowing sale or gift of firearms to a person under eighteen, a narcotic addict, or to a person who has been convicted of a felony within five years from release from the penitentiary or within five years of conviction if penitentiary sentence was not imposed.

Comment.

The Ill. CC does not require licensing of firearms sellers and manufacturers as does the Hawaii law. The same general prohibitions are found under both systems but the penalty is more severe under Hawaii law with a maximum fine of \$1,000, in contrast to the Ill. CC maximum of \$500, and the further economic sanction of loss of license.

Hawaii Law, page 120.

Sec. 24-4. Register of Sales by Dealer.

Explanatory Note.

This section requires sellers of firearms of a size which may be concealed upon the person to keep a register of all firearms sold or given away.

Comment.

The Hawaii firearms and ammunition law requires a permit from the chief of police in order to acquire a firearm rather than dealers' registration.

Hawaii Law, page 121.

Sec. 24-5. Defacing Identification Marks of Firearms.

Explanatory Note.

This section prohibits the defacement of identification marks on firearms and makes possession of a firearm so defaced prima facie evidence that the possessor defaced it.

Sec. 24-5. (Continued)

Comment.

The Hawaii law and the Ill. CC are essentially the same on the matter of defacing identification marks of firearms, except that the Hawaii statute specifically extends the rule to identification marks of ammunition.

Hawaii Law, page 121.

Sec. 24-6. Confiscation and Disposition of Weapons.

Explanatory Note.

This section provides for the disposition of confiscated weapons. A mere arrest or imprisonment is insufficient to justify confiscation; a conviction must be obtained. Once the defendant has been convicted, however, this section provides for appropriate disposition of the weapon involved.

Comment.

The Hawaii law and the Ill. CC on confiscation and disposition of weapons are substantially the same. The Hawaii law specifically extends to ammunition. Although the section in the Hawaii firearms and ammunition law does not clarify that the forfeiture occurs only after conviction, this requirement is expressed in the provision dealing with carrying deadly weapons. Under the Ill. CC the disposition is a function of the trial court, and in Hawaii it is a function of the chief of police.

Hawaii Law, page 121.

ARTICLE 25. MOB ACTION AND RELATED OFFENSES

Explanatory Note.

This article comprises a comprehensive codification of the law of affray, mob action, riot, rout and unlawful assembly as well as supplementary provisions relating to injuries to person and property, refusal to disperse, replacement of officials and recovery against municipality. The single offense of mob action is made the all-inclusive statutory offense in this area.

Article 25. (Continued)

Subsection (a) (1) incorporates affray, riot and rout. Subsection (a) (2) incorporates unlawful assembly. Subsection (a) (3) incorporates mob action wherein the gist of the offense is the exercise by violence of purported correctional powers.

Comment.

The Hawaii statutory offenses of unlawful assembly for the purpose of advocating or teaching the doctrines of criminal syndicalism, affray, and riot are generally comparable to Subsections 25-1 (a) (1) and (2) although constitutional questions might be raised as to the validity of such matters in the Hawaii statutes as the criminality of "teaching the doctrines of criminal syndicalism". No provision in Hawaii law was found comparable to Subsection 25-1 (a) (3).

The Hawaii statutory offense of riot requires the participation of six or more persons in contrast to the Ill. CC requirement of two or more persons for any mob action offense.

Generally the Hawaii offenses carry a more severe penalty than the Ill. CC:

	<u>Hawaii</u>	<u>Ill. CC</u>
Affray	\$500, six months	\$500, thirty days
Riot	\$1,000, two years	\$500, thirty days
Failure to disperse	\$500, one year	\$500, one year
Unlawful assembly	\$5,000, ten years	\$500, thirty days
Offense involving)		\$1,000, one year
injury to per-)	—	(misdemeanor)
son or property)		Five years (felony)

Hawaii does not provide by statute for dealing with peace officers in cases of lynching or recovery from municipalities of damages resulting from mob action.

Hawaii Law, page 122.

ARTICLE 26. DISORDERLY CONDUCT

Sec. 26-1. Elements of the Offense.

Explanatory Note.

The gist of the offense of disorderly conduct is that the offender knowingly engaged in an activity in an

Sec. 26-1. (Continued)

unreasonable manner which he knew or should have known would tend to disturb, alarm or provoke others.

Subsection (a) (1) is intended to encompass all of the usual types of disorderly conduct and disturbances of the peace. The prohibited activity is so varied and so contingent upon surrounding circumstances that a precise definition is not feasible.

Subsection (a) (2) is borrowed from the Wisconsin Code (Wis. W.S.A. Sec. 947.01 (1955)) and removes any doubt about the proscription of intentional harassment by telephone.

Subsections (a) (3) and (a) (4) dealing with false alarms also are specifically included to insure the prohibition of such conduct. (For other offenses commonly included in disorderly conduct, see Secs. 11-9, Public Indecency, 11-14, Prostitution, 11-20, Obscenity.)

Comment.

The Ill. CC concise, generalized treatment of disorderly conduct is markedly different than the detailed prohibitions scattered and over-lapping throughout the Hawaii criminal statutes. The scope of the Ill. CC disorderly conduct is considerably narrower than the comparable Hawaii provisions, primarily because the Code excludes from disorderly conduct provisions dealing with prostitution, public indecency and obscenity. The Code does not limit the scope of disorderly conduct to public acts; the Hawaii case law on common nuisance, disorderly house, disorderly conduct and obscenity has labored to find the public act element of the offenses.

Probably all of the classes, types and examples of "disorderly conduct" found in the Hawaii statutes would be covered under the Code provision. Of the specific acts in the Ill. CC provision, Hawaii law contains approximate parallel provisions with respect to annoying telephone calls and false explosive alarms. False fire alarms are dealt with by county ordinance in Hawaii (see Secs. 13-8.1 and 13-8.2, R.O. Honolulu 1961). Drunkenness, begging, sorcery, fortune telling and other specific Hawaii offenses do not in themselves constitute an offense under the Ill. CC; however, the attendant conduct would often satisfy the requirements of the Code definition of disorderly conduct or other Code offenses. The maximum penalties for the various Hawaii offenses range from a \$1,000 fine and one year imprisonment to a \$15 fine or thirty days imprisonment. The Ill. CC

Sec. 26-1. (Continued)

provides for penalty only by fine, maximum of \$500, except for violation of the false alarm prohibitions where six months imprisonment is also provided for.

Hawaii Law, page 123.

ARTICLE 27. CRIMINAL DEFAMATION

Sec. 27-1. Elements of the Offense.

Explanatory Note.

This section rejects the notion of punishing communications which tend merely to injure reputation and makes the gist of the offense the tendency to provoke breaches of the peace. It was thought that criminal law should generally not be used to remedy private wrongs but that a tort action for libel or slander is the more appropriate and effective remedy.

Several related crimes are combined into the single offense of criminal defamation. Since the prevention of violence is the principle behind criminal defamation, the traditional distinctions between libel and slander, written and spoken words, words libelous per se and words not, are irrelevant.

The section requires an intent to defame. Malice is not an element of the offense. The word "another" in the intent element makes possible the defamation of groups as well as individuals by operation of the definitions of "another" and "person" in Secs. 2-3 and 2-15. The phrase "communicates by any means" covers both libel and slander situations and makes liable anyone furthering the communication with the requisite intent. The communication may be made to anyone, including the person defamed, in keeping with the object of the section which is to prevent breaches of the peace. The defamatory matter need not actually provoke violence; it is sufficient if it tends to provoke a breach of the peace.

Comment.

Hawaii statutory provisions relating to criminal defamation maintain most of the traditional distinctions and elements of the offense that are rejected by the Ill. CC section, e.g., malice, privilege, libel vis-a-vis slander.

Sec. 27-1. (Continued)

However, Hawaii case law is entirely consistent with the Ill. CC theoretical justification for criminal defamation which is grounded entirely on the prevention of breaches of the peace.

Hawaii Law, page 130.

Sec. 27-2. Justification.

Explanatory Note.

This section provides for the affirmative defense in criminal defamation of truth consistent with Article II, Section 4 of the Illinois Constitution which states "Every person may fully speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

Comment.

Both the Ill. CC and the Hawaii law on justification involve the three elements of truth, good motives and justifiable ends. Hawaii law places the burden of proof as to all three elements of justification on the accused. Sec. 3-2, Affirmative Defense, of the Ill. CC provides that unless the prosecution raises the issue involving an affirmative defense, the defendant, to raise the issue, must present some evidence thereon, but then the prosecution still has the burden of proof as to every issue in the case.

Hawaii Law, page 132.

ARTICLE 28. GAMBLING AND RELATED OFFENSES

Article 28 attempts to present a unified statute expressing the public policy that recognizes gambling as an activity detrimental to the best interests of society.

Sec. 28-1. Gambling.

Explanatory Note.

Subsection (a) lists ten categories of activities that constitute gambling, including (1) gaming or wagering

Sec. 28-1. (Continued)

generally, (2) slot machines, (3) manufacture or other transactions involving gambling devices, (4) gambling in futures, (5) pools, (6) lotteries, (7) policy games, (8) advertising, and (9) transmission of betting information by means of rapid communication.

Subsection (b) clarifies that the gambling prohibitions do not apply to arguments to compensate for loss caused by chance, such as indemnity or insurance contracts; prizes in bona fide contests; or authorized pari-mutuel betting.

Subsection (c) provides a uniform maximum penalty for first offenders regardless of the particular type of gambling for which they are convicted. Persons who repeatedly violate subsections (a) (3) to (a) (10) (excluding thereby playing a game of chance or skill for money or other thing of value; and wagering upon the result of a game, contest or political nomination, appointment or election) are subject to maximum penitentiary sentences of three years. The policy behind this provision is to place severe sanctions on the conduct of gambling as a business enterprise. It is thought that the possibility of a penitentiary sentence will discourage the practice by professional gamblers of paying fines as a part of "overhead".

Comment.

The Ill. CC does not include as an offense a witness's failure to testify in a gambling prosecution.

Specific prohibitions in the Ill. CC that are not included in the Hawaii law are as follows:

1. Wagering upon the result of a political nomination, appointment or election;
2. Keeping, owning, purchasing or manufacturing a gambling device;
3. Gambling in futures;
4. Using or keeping any book or apparatus for recording bets;
5. Holding funds which have been bet;
6. Selling pools;
7. Setting up or promoting a policy game;
8. Advertising a lottery or policy game; and
9. Transmitting betting information by means of rapid communication.

Sec. 28-1. (Continued)

Hawaii law does not provide for a statutory exemption in the case of insurance contracts. There is no authorized pari-mutuel betting in Hawaii.

Hawaii does not differentiate the penalty on the basis of repeated violations but prescribes a uniform maximum penalty of \$1,000 fine or one year imprisonment.

Hawaii Law, page 133.

Sec. 28-2. Definitions.

Explanatory Note.

This section defines "gambling device", "lottery" and "policy game". "Gambling device" excludes a slot machine played for amusement which rewards the player with the right to replay if the result depends in part on the player's skill and if the player does not receive in return coins, tokens or merchandise. It also excludes a vending machine by which full and adequate return is made for the money invested and in which there is no element of chance or hazard.

Comment.

The Hawaii gambling statutes contain only one definition, that of "lottery", and it is substantially similar to the Ill. CC definition.

The Ill. CC exclusion of certain slot machines from "gambling device" is contrary to the Hawaii law on gambling by gaming. See Territory v. Uyehara, supra (under Sec. 28-1, Gambling).

Hawaii Law, page 135.

Sec. 28-3. Keeping a Gambling Place.

Explanatory Note.

The prohibition against keeping a gambling place contains significant enforcement provisions which include authority to abate gambling establishments of all types as public nuisances; revocation of food and liquor licenses issued to any gambling place or any restaurant, bar or

Sec. 28-3. (Continued)

similar establishment where gambling is permitted and the availability of penitentiary sentences for repeated violations, for the same policy reasons stated in connection with Sec. 28-1.

Comment.

The Ill. CC offense of keeping a gambling place requires the intent element of knowledge, as defined in Sec. 4-5, and it is probably a less stringent requirement than the knowledge element of the Hawaii offense as interpreted by the Hawaii Supreme Court.

The enforcement provisions of the Hawaii statutes do not have all of the added teeth of the Ill. CC with respect to abatement, revocation of food and liquor licenses (in Hawaii only billiards and bowling alley licenses are affected) and greater severity of penalty for repeated violations. The variations in the Hawaii penalties depend upon the specific offense: common gambling house, \$500 or six months; disorderly house, \$100 or six months; keeping a place for gambling, \$1,000 or one year.

Hawaii Law, page 136.

Sec. 28-4. Registration of Federal Gambling Stamps.

Explanatory Note.

This section, providing for the registration of federal gambling stamps, is intended to increase the ease and effectiveness of enforcement. It places the gambler effectively under the scrutiny of both state and federal law enforcement authorities.

Comment.

No comparable Hawaii law was found.

Hawaii Law, page 137.

Secs. 28-5. Seizure of Gambling Devices and 28-6. Seizure of Gambling Funds.

Explanatory Note.

These sections authorize the seizure of gambling devices (as defined in Sec. 28-2) and gambling funds.

Secs. 28-5 and 28-6. (Continued)

Comment.

The Ill. CC and Hawaii law are substantially similar on the matter of seizure of gambling devices and gambling funds. The Hawaii statute specifies that such goods may be recovered only by the owner lawfully entitled to possession who is without blame in connection with the illegal use. Under the Ill. CC it is clear that gambling devices are to be destroyed.

Hawaii Law, page 137.

Sec. 28-7. Gambling Contracts Void.

Explanatory Note.

This section restates the general rule that wagering contracts are illegal and unenforceable and provides the procedures for setting aside an obligation or judgment void under these provisions.

Comment.

Both the Ill. CC and Hawaii law generally consider gambling contracts void. The Hawaii statute, however, makes an express exception in the case of persons who hold a claim under such contracts in good faith and without notice of the illegality.

Hawaii Law, page 137.

Sec. 28-8. Gambling Losses Recoverable.

Explanatory Note.

This section provides that a person who loses \$50 or more at gambling may recover the loss with costs in a civil action.

Subsection (b) provides that if the losing gambler does not pursue his remedy, any person may bring a civil action against the winner and recover a judgment of triple the amount of loss.

Comment.

The Ill. CC and Hawaii law on recovery of gambling losses are generally the same, but with some detailed differences:

Sec. 28-8. (Continued)

1. The Ill. CC permits recovery for loss by gambling, which includes all of the gambling proscriptions; the Hawaii law permits recovery only for loss by playing cards or other gambling game or by betting on the sides or hands of those who do play.
2. The Ill. CC sets a minimum of \$50 loss; the Hawaii statute includes no limitation.
3. The Ill. CC authorizes the loser to recover costs but not another person who sues; the Hawaii provisions on costs are the reverse, and allocate the recovery in case of suit by another, one-half to the other and one-half to the State for the public schools.
4. The Ill. CC does not restrict suit by another person; the Hawaii law permits such suit only if the loser fails to act in good faith and without collusion.
5. The Ill. CC does not deny the privilege of self incrimination to witnesses in actions by losers to recover gambling losses; the Hawaii law does not allow the privilege but grants immunity.

Hawaii Law, page 138.

ARTICLE 29. BRIBERY IN CONTESTS

Explanatory Note.

The purpose of bribery in sporting events legislation is two-fold. First, by prohibiting the offer and acceptance of bribes, it attempts to protect the moral character of participants and officials from the influences of corruption. Secondly, through the use of criminal sanctions, the economic and psychological ill effects of "fixed" contests are sought to be avoided.

The general phrase "not to use his best efforts in connection with such contest" is intended to cover any conduct whereby a participant tries to lose the contest, lower the margin of victory, establish a point spread, etc., or, in the case of an official or other person, any conduct whereby he deliberately misjudges, dishonestly referees or supervises, or otherwise unfairly attempts to influence the outcome of the contest.

Article 29. (Continued)

The phrase "any person participating in, officiating or connected with any contest" is intended to include participants and officials and also semi-official persons such as coaches, managers, trainers, supervisors and assistants. (Bribery of public officials is covered in Secs. 33-1 and 33-2)

Comment.

The Ill. CC and Hawaii law on bribery in contests are substantially the same. The Ill. CC provisions are worded more simply, using general phrases, in contrast to the Hawaii statute which lists the persons, events and acts involved with particularity.

Hawaii law does not provide for an offense comparable to the Ill. CC misdemeanor of failure to report an offer of a bribe.

The Ill. CC does not provide as does the Hawaii law for forfeiture of money or property offered, received or accepted as a bribe.

The penalties under the two systems are similar except that the maximum fine under Hawaii law is \$10,000 and under the Ill. CC it is \$5,000.

Hawaii Law, page 138.

PART E. OFFENSES AFFECTING GOVERNMENTAL FUNCTIONS

ARTICLE 30. TREASON AND RELATED OFFENSES

Sec. 30-1. Treason.

Explanatory Note.

This section defines treason in terms of a proscription of treason against the State, to preclude conflict with federal law that preempts the area of treason against the United States.

Comment.

The Hawaii offenses classified under disloyalty, military organization and sabotage, in certain instances would constitute treason under the Ill. CC definition of "adheres to the enemies of this State, giving them aid or

Sec. 30-1. (Continued)

comfort". There is no specific Hawaii offense of treason under the Ill. CC definition of "levies war against this State".

The Hawaii statutes include offenses against the United States unlike the Ill. CC which is limited to treason against the State.

The most severe penalty imposed by the Hawaii statutes in this area, applicable to certain sabotage offenses, is \$10,000 fine or twenty years imprisonment at hard labor, or both. The Ill. CC penalty for treason is death or indeterminate sentence with a minimum of fourteen years.

Hawaii Law, page 139.

Sec. 30-2. Misprision of Treason.

Explanatory Note.

This section defines misprision of treason in terms that are consistent with the definition of treason in Sec. 30-1.

Comment.

No Hawaii law was found on the offense of misprision of treason.

Hawaii Law, page 140.

Sec. 30-3. Advocating Overthrow of Government.

Explanatory Note.

This section combines into a single offense various acts of advocating the overthrow of the government, including advocating, publishing and membership in organizations. The offense is limited to overthrow of the state government consistent with Secs. 30-1 and 30-2. Note that this offense can be committed by any person whereas treason and misprision of treason can be committed only by a person owing allegiance to the State.

Comment.

The prohibitions of Hawaii's anarchistic publications and criminal syndicalism statutes are far broader than, but would include, the Ill. CC prohibition on advocating overthrow of the government. The maximum penalties are the

Sec. 30-3. (Continued)

same except that the Ill. CC does not provide for penalty by fine.

Hawaii Law, page 140.

ARTICLE 31. INTERFERENCE WITH PUBLIC OFFICERS

Sec. 31-1. Resisting or Obstructing a Peace Officer.

Explanatory Note.

This section makes it an offense knowingly to resist or obstruct any authorized act of a peace officer (defined in Sec. 2-13) known to be such. Note that under Sec. 7-7 if the act resisted or obstructed is the making of an arrest, a private person is not privileged to resist the arrest with force even though he knows the arrest is unlawful.

Comment.

The Hawaii law and the Ill. CC provisions on resisting or obstructing a peace officer are similar. However, the intent elements differ, the Hawaii statutes requiring only wilful interference, and the Ill. CC section requiring knowing resistance or obstruction and knowledge of the status of peace officer. The Ill. CC definition of "peace officer" includes fish and game wardens, and the penalty provision applies equally to all categories of peace officers. Hawaii law provides a lesser penalty for the offense involving acts of fish and game wardens.

Hawaii Law, page 141.

Sec. 31-2. Resisting or Obstructing a Peace Officer
While Armed.

Explanatory Note.

The penalty range in Sec. 31-1 permits a nominal fine if the offense is minor. However, if the offense is committed while armed with a dangerous weapon, it becomes a felony carrying a penalty of one to two years in the penitentiary.

Sec. 31-2. (Continued)

Comment.

No comparable provision was found in the Hawaii law to increase the seriousness of the offense when committed while armed.

Hawaii Law, page 141.

Sec. 31-3. Obstructing Service of Process.

Explanatory Note.

This offense is separated from that of resisting a peace officer because of the separate governmental authority sought to be protected. Under Sec. 31-1, it is the authority of the duly appointed peace officer which must not be flouted or obstructed. In this section, it is the authority of the judiciary represented by its judicial process which must not be flouted or obstructed.

Comment.

Hawaii law does not treat obstruction service of process as a separate offense but includes it under the general provisions dealing with interference with a peace officer.

Hawaii Law, page 142.

Sec. 31-4. Obstructing Justice.

Explanatory Note.

This section is a codification of several specific acts under the general rubric of "obstructing justice". The acts constituting the offense must be done knowingly and with the required specific intent. The penalty range is broad to permit the punishment to fit the seriousness of the offense.

Comment.

Hawaii law does not include as offenses the following specific conduct which under the Ill. CC constitutes obstructing justice:

1. Destroying, altering, concealing or disguising physical evidence (except the rescue of things under legal seizure or detention. See Sec. 33-1, Bribery);

Sec. 31-4. (Continued)

2. Planting false evidence;
3. Furnishing false information (except false report of crime);
4. Inducing a witness to leave the State or conceal himself; and
5. Leaving the State or concealing oneself.

As to Hawaii statutory offenses which might be classified as obstructing justice: conspiracies and attempts would be handled under the Code as offenses under Secs. 8-2 and 8-4; and there is no specific Code provision comparable to the offense of threatening or intimidating public officers although such conduct frequently would be covered by Sec. 31-4, Resisting or Obstructing a Peace Officer.

Hawaii Law, page 142.

Sec. 31-5. Concealing or Aiding a Fugitive.

Explanatory Note.

This section states the offense of accessory after the fact.

Comment.

The most important difference between the Ill. CC and Hawaii treatment of accessory after the fact is that the Hawaii statute limits the offense to instances where the principal offense is punishable by imprisonment for five years or more. The Ill. CC does not provide any such limitation but makes the offense applicable even to one who harbors, aids or conceals a misdemeanor.

Other differences between the Ill. CC and the Hawaii law are as follows:

1. The Hawaii definition of the offense is more particular than the Ill. CC definition. The statute specifies that exemption of certain relatives includes relationship by consanguinity or affinity and that the principal offender includes a person guilty as a principal or as an accessory after the fact;

Sec. 31-5. (Continued)

2. The Ill. CC prohibition is either to conceal knowledge that an offense has been committed or to harbor, aid or conceal the offender. The Hawaii statute prohibits only harboring, concealing, maintaining or assisting the offender; and
3. The Hawaii range of penalties is clearly divided on the basis of the seriousness of the principal offense and is comparatively severe with a maximum of a \$2,000 fine or ten years imprisonment at hard labor for the more serious category and \$500 or two years at hard labor for the less serious. The Ill. CC penalty ranges from a \$1,000 fine or one year in a penal institution other than the penitentiary, or both, to a \$1,000 fine or one to two years imprisonment in the penitentiary, or both.

Hawaii Law, page 142.

Sec. 31-6. Escape.

Explanatory Note.

This section lists acts of escape in a logical sequence with appropriate penalties relative to the seriousness of the offense of which the escapee has been convicted and other pertinent factors. For a person already convicted or charged, the escape must be from a penal institution or from the employee of a penal institution; otherwise it is an escape from custody within the proscription of Subsection (c).

Comment.

The Ill. CC and the Hawaii statutes use somewhat different bases for categorizing the seriousness of various escapes and assigning penalties. The Ill. CC distinguishes between felons and misdemeanants, and escape from a penal institution and escape from custody; would treat escape by a witness only as escape from custody; increases the penalty for certain escapes committed while armed with a dangerous weapon; and provides penalties only by imprisonment and a maximum penalty of ten years imprisonment for the most serious escape offenses and one year for the least serious. The Hawaii statutes distinguish between offenses punishable by imprisonment for ten years and offenses punishable by less severe penalties; do not clearly distinguish between

Sec. 31-6. (Continued)

escape from imprisonment and escape from custody; include escapes by witnesses in the most serious escape offenses; do not provide for increased penalties for escapes committed while armed with a dangerous weapon; provide penalties of either fine or imprisonment and a maximum penalty of a \$500 fine or three years at hard labor for the most serious escape offenses, and \$10 and three months for the least serious.

Hawaii Law, page 143.

Sec. 31-7. Aiding Escape.

Explanatory Note.

This section organizes various acts that constitute the offense of aiding escape and provides a consistent range of appropriate penalties.

Subsection (a), which prohibits the conveyance into a penal institution or transfer to a prisoner of anything for use in escaping, does not require that the person aided or sought to be aided in fact escapes. Subsections (b), (c), (d) and (e) involve situations where an escape has been made.

Subsection (f), dealing with permitting a prisoner to escape, requires the mental element of "recklessness", as defined in Sec. 4-6.

Comment.

The Ill. CC and the Hawaii statutes use different bases for categorizing the seriousness of various aiding escape offenses and assigning penalties consistent with the differences noted in the escape provisions of the two systems under Sec. 31-6. The Ill. CC distinguishes between felons and misdemeanants and aiding escape from a penal institution and aiding escape from custody; limits the offense to cases where an escape has been effected, with one exception; limits the offense of an officer permitting an escape to reckless conduct which under the Code definitions is more blameworthy than negligent conduct; provides generally for aiding escapes from public institutions other than a penal institution; increases the penalty for certain acts of aiding escape while armed with a dangerous weapon; and provides a maximum penalty of ten years imprisonment for

Sec. 31-7. (Continued)

the most serious aiding escape offenses and a \$500 fine or six months imprisonment, or both, for the least serious (officer recklessly permits escape).

The Hawaii statutes distinguish between offenses punishable by imprisonment for ten years and offenses punishable by less severe penalties; do not clearly distinguish between aiding escape from imprisonment and aiding escape from custody; define the offense to include aiding escape by certain witnesses and with no distinction as to whether or not an escape is effected; provide for two offenses in the case of an officer permitting escape, one voluntary and one negligently; do not provide for aiding escape from institutions other than penal institutions except in the enticing and harboring provisions relating to the training school and the Waimano training school and hospital; do not provide for increased penalties for aiding escape while armed with a dangerous weapon; and provide generally for maximum penalties of a \$500 fine and three years imprisonment at hard labor for the most serious aiding escape offenses and a \$50 fine and six months for the least serious.

The Hawaii offense of an officer voluntarily permitting an escape would be covered by the Ill. CC in Sec. 33-3, Official Misconduct.

The Hawaii offense of harboring or concealing an escapee would probably be covered by the Ill. CC in Sec. 31-5, Concealing or Aiding a Fugitive, and might be considered to overlap the Hawaii provisions on accessory after the fact. Note that in the offense of harboring or concealing an escape there are no exemptions for specified relatives.

Hawaii Law, page 143.

Sec. 31-8. Refusing to Aid an Officer.

Explanatory Note.

This offense is stated in terms of refusal or failure reasonably to aid.

Comment.

The Ill. CC and Hawaii versions of the offense differ in a number of particulars.

1. The Ill. CC limitation of reasonably is not present in the Hawaii statute;
2. The Ill. CC section applies to any peace officer as that term is defined in Sec. 2-13; the Hawaii statute applies only to a sheriff or policeman;
3. The Ill. CC section requires aid in apprehending a person or in preventing the commission of an offense; the Hawaii statute requires aid in the execution of the office in any criminal case, in preservation of the peace, or in apprehending or securing a person for a breach of the peace;
4. The Ill. CC does not include the Hawaii statutory limitation of cases of emergency; and
5. The Ill. CC maximum penalty is a \$100 fine in contrast to the Hawaii maximum of \$50.

Hawaii Law, page 145.

ARTICLE 32. INTERFERENCE WITH JUDICIAL PROCEDURE

Sec. 32-1. Compounding a Crime.

Explanatory Note.

This section makes both the receiving or offering an offense. This section is not intended to prohibit a theft or other property offense victim from taking steps to recover his property, so long as such action does not involve, as consideration for the property recovery, a promise not to prosecute or aid in prosecuting.

Comment.

The most important difference between the Ill. CC and Hawaii provisions on compounding a crime is that the Hawaii offense includes concealing an offense. Concealing

Sec. 32-1. (Continued)

an offense is covered in the Ill. CC Secs. 31-4, Obstructing Justice, and 31-5, Concealing or Aiding a Fugitive. The Ill. CC section is in terms of "any consideration" in contrast to the examples of consideration listed in the Hawaii statute. The Ill. CC provides for penalty only by fine, with a maximum of \$500. Hawaii differentiates the penalty whereby if the offense compounded or concealed is punishable by life imprisonment, the maximum penalty is \$500 or five years imprisonment at hard labor, otherwise it is a \$100 fine or one year imprisonment.

Hawaii Law, page 145.

Sec. 32-2. Perjury.

Explanatory Note.

The definition of perjury describes the intent element of the offense as "which he does not believe to be true". The penalty range is extensive to accommodate varying circumstances.

Comment.

The intent element of perjury under the Ill. CC is "which he does not believe to be true" in contrast to the Hawaii statutory element of "wilfully, knowingly and falsely". The Hawaii statute specifies that the statement may be orally or in writing but that the offense is not committed unless the oath or affirmation is duly administered; the Ill. CC does not include these particulars.

The Ill. CC rule that an indictment for perjury on the grounds of contradictory statements need not specify which statement is false is apparently contrary to the Hawaii case law holding that an indictment for perjury must set forth with reasonable certainty the subject of the alleged material inquiry with respect of which the alleged perjury is assigned.

No Hawaii law was found comparable to the Ill. CC provision barring prosecution for perjury in the case of an admission by the offender of the falsity of one of his contradictory statements made in a single continuous trial.

Sec. 32-2. (Continued)

The Ill. CC maximum penalties for perjury range from a \$1,000 fine or one year imprisonment in a penal institution other than the penitentiary, or both, to a \$1,000 fine or one to fourteen years in the penitentiary, or both. The Hawaii penalty provision is less flexible, providing only for a maximum of twenty years imprisonment at hard labor.

Hawaii Law, page 145.

Sec. 32-3. Subornation of Perjury.

Explanatory Note.

The intent element of subornation of perjury is "knows to be false". This element involves a stricter requirement of proof than the element of "does not believe to be true" in perjury. The explanation for the distinction is that one who "knows a statement to be false" obviously does not believe it to be true, but one who makes a false statement without a positive belief that it is true may be acting recklessly only. Thus, a person under oath should not make a statement unless he believes it to be true, and if he actually makes a material false statement without such belief, even if acting recklessly, he is committing perjury. On the other hand, one who is not under oath may act recklessly in encouraging another to make a statement without being guilty of subornation; if he "knows" (as defined in Sec. 4-5) the statement he is encouraging the other to make is false, then he is more culpable and is guilty of subornation.

Comment.

The Hawaii law does not differentiate the intent elements of the offenses of perjury and subornation of perjury. The Hawaii penalty provision for subornation of perjury is the same as for perjury, a maximum of twenty years imprisonment at hard labor. The Ill. CC penalty for subornation is one to five years in the penitentiary with an alternative of a \$1,000 fine.

Hawaii Law, page 146.

Sec. 32-4. Communicating with Jurors.

Explanatory Note.

This section prohibits unauthorized communication by anyone with intent to influence any person believed to have been summoned as a juror.

Comment.

The scope of the Ill. CC provisions on communicating with jurors is broader than the Hawaii statute on corruptly influencing jurors. The Code offense includes unauthorized communication with a person believed to have been summoned as a juror while the Hawaii offense is limited to influencing anyone actually serving or summoned as a juror.

The maximum fine under both the Ill. CC and the Hawaii law is \$500, but the maximum imprisonment is one year for Hawaii and only six months under the Code.

Hawaii Law, page 146.

Sec. 32-5. False Personation of Judicial or Governmental Officials.

Explanatory Note.

The gist of this offense is the false representation; it is not necessary that it be done for any purpose of gain or otherwise.

Comment.

The codified definition of the offense of false personation of judicial or governmental officials is broader than the various Hawaii offenses of unauthorized practice of the law, false personation of a government officer or employee, and unauthorized wearing of a police uniform or badge. The Ill. CC provides that the mere representation, if false, constitutes the offense. The Hawaii offenses in addition require respectively actual practice or attempt to practice law, acting as a government officer or employee, and intent to deceive. Although both the Ill. CC and the Hawaii offenses are misdemeanors, the penalty provisions are quite different. The Ill. CC provides only for a maximum of a \$500 fine or six months imprisonment. The Hawaii penalty provisions range from a maximum of a \$1,000 fine, or one year imprisonment, or both, to a \$50 fine.

Hawaii Law, page 147.

Sec. 32-6. Performance of Unauthorized Acts.

Explanatory Note.

The prohibition against performance of unauthorized acts is limited to those acts which are not proscribed by Sec. 31-4, Obstructing Justice.

Comment.

The acts proscribed by the Ill. CC section and by the Hawaii statute on false personation are not identical. The Ill. CC does not cover the act of causing a marriage license to be granted by false representation as a parent or guardian of a minor, or any act before a public officer by falsely personating another; and the Hawaii prohibitions against confession of judgment and against any act whereby the person represented or personated may be liable or his rights or interests may be affected, are probably covered by Sec. 31-4, Obstructing Justice. The Ill. CC provision makes clear that the intent element of the offense is "knowing that his performance is not authorized by law" in contrast to the Hawaii statute, in terms of "false personation" or "false representation", which may or may not imply knowledge of lack of authority.

The Ill. CC provides a penalty range in the alternative of a \$500 fine or one year imprisonment or one to five years, or both fine and imprisonment. The Hawaii maximum penalty is a \$1,000 fine and five years imprisonment at hard labor.

Hawaii Law, page 147.

Sec. 32-7. Simulating Legal Process.

Explanatory Note.

This section prohibits issuance or delivery of any document known falsely to purport to be, or known to simulate legal process.

Comment.

No Hawaii law was found on the specific offense of simulating legal process. Certain instances of the offense might fall within the proscriptions of Section 284-1, RLH, dealing with false personation.

Hawaii Law, page 147.

Sec. 32-8. Tampering with Public Records.

Explanatory Note.

This section does not include theft of public records, covered by Sec. 16-1 and the definition of "property" in Sec. 15-1. The penalty provisions are consistent with the penalties for theft.

Comment.

The Ill. CC provisions on tampering with public records and the Hawaii malicious injury statute relating to public records are substantially the same. The Ill. CC section defines the offense to require the intent elements of "knowingly and without lawful authority" in contrast to the Hawaii statute under which the proscribed acts are characterized respectively as "maliciously", "wilfully and maliciously" and "wrongfully". The Hawaii statute does not provide for an alternative felony penalty. The Ill. CC authorizes a one to five year penitentiary sentence as well as a \$1,000 fine or one year in a penal institution other than the penitentiary.

Hawaii Law, page 148.

Sec. 32-9. Tampering with Public Notice.

Explanatory Note.

This section prohibits the knowing and unauthorized tampering with a posted public notice.

Comment.

The Ill. CC and the Hawaii statute on tampering with public notice are substantially the same. The Ill. CC offense includes the intent elements of knowing and unauthorized, while the Hawaii offense is characterized as malicious. The maximum penalty under the Ill. CC is a \$200 fine; under the Hawaii statute, a \$100 fine.

Hawaii Law, page 148.

Sec. 32-10. Violation of Bail Bond.

Explanatory Note.

This section prohibits an intentional violation of recognizance or a bail bond and ties the maximum penalty to the principal offense.

Sec. 32-10. (Continued)

Comment.

No comparable provision was found in the Hawaii law.
Hawaii Law, page 148.

ARTICLE 33. OFFICIAL MISCONDUCT

Sec. 33-1. Bribery.

Explanatory Note.

The codification of bribery provisions uniformly states the intent element as "to influence the performance of any act related to the employment or function"; uniformly designates the persons covered as "any public officer, public employee or juror"; and uniformly describes the consideration, or bribe, as "which he is not authorized by law to accept".

In appropriate combination the uniform key phrases proscribe:

- (a) Promise or tender directly to the person sought to be influenced;
- (b) Promise or tender directly to a person believed to be a public officer, public employee or juror;
- (c) Promise or tender to a person who is not a public officer, public employee or juror, with the intent that such person try to influence someone who is a public officer, public employee or juror;
- (d) Acceptance by anyone with knowledge that the consideration is promised or tendered with the requisite intent; and
- (e) Solicitation of bribery.

The penalty provisions apply uniformly to the five categories of the offense, but the range is sufficient to accommodate offenses of varying culpability.

The offense of bribery in contests is covered in Article 29.

Sec. 33-1. (Continued)

Comment.

The Hawaii bribery offenses are not arranged in a fashion comparable to the Ill. CC codification. The Hawaii law does not specifically provide for a promise or tender of a bribe to a person believed to be a public officer, public employee or juror; a promise or tender of, or acceptance by, any person with the intent that such person influence someone who is a public officer, public employee or juror, e.g., influence peddler; or solicitation of bribery.

The Hawaii offense of suppressing evidence is limited to bribery situations unlike the Ill. CC treatment in Sec. 31-4, Obstructing Justice, where suppressing evidence alone, without the element of bribery, constitutes the offense. The Hawaii offense of corruptly influencing jurors is not limited to bribery situations whereas the Ill. CC provides for two different offenses, communicating with jurors under Sec. 32-4 and any of the acts of bribery under Sec. 33-1.

Instead of the uniform broad-ranged penalty of the Ill. CC, the Hawaii statutes differentiate the penalty applicable to offering a bribe, accepting a bribe (the most severe penalty) and suppressing evidence (the least severe penalty).

Hawaii Law, page 148.

Sec. 33-2. Failure to Report a Bribe.

Explanatory Note.

This section imposes a positive duty on public officers, public employees and jurors to report an offer of a bribe.

Comment.

No comparable provision was found in the Hawaii law.

Hawaii Law, page 149.

Sec. 33-3. Official Misconduct.

Explanatory Note.

This section codifies a variety of acts of misconduct by public officers and employees. The penalty provisions include forfeiture of office or employment in addition to the broad range of penalty by fine or imprisonment, which recognizes the varying degrees of culpability which may be involved in violations under this section.

Comment.

Hawaii does not provide by criminal statute for the general offense of official misconduct. The laws and rules and regulations governing public employment cover official misconduct generally and provide for dismissal for cause. The specific Hawaii criminal offenses which involve public officials and employees relating to failure to account, escape, embezzlement, refusal to serve process, extortion and forgery would all fall within the Ill. CC classification of official misconduct.

Hawaii Law, page 149.

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