TITLE D3 THE SENTENCING SYSTEM

Chapter 31 General Sentencing Provisions

Section 1. Purposes

The general purposes of the provisions of this Title are:

1. To safeguard offenders and the public from correctional experiences which serve to promote further criminality;

2. To give fair warning of the nature of the sentences that may be imposed on the conviction of an offense;

3. To encourage differentiation among offenders with a view to a just individualization of sentences; and

4. To promote the development of correctional programs which serve to reintegrate the offender into his community.

COMMENT

Source: A somewhat similar provision is in the Model Penal Code, §1.02(2), although only subsections 2. and 3. faithfully use the MPC terminology. The Federal Criminal Code has no statement of purposes specifically for sentencing, although there is a provision for General Purposes, §102, which includes some of these principles. The Massachusetts and New Hampshire codes follow the FCC in not having a purposes statement within the sentencing provisions.

Current Maine Law: There is no explicit statement of purposes such as this in the Maine statutes.

The Draft: The design of this section is both ideological and practical. As an ideological statement, these provisions announce that crime prevention is the central goal, but one which is to be pursued in a variety of ways. The traditional aim of deterrence is supported by subsection 2. Subsections 3. and 4. speak to the issue of crime prevention with individual offenders that may take place at the judicial and post-judicial stages of the criminal process. Thus, subsection 3. seeks to recognize that the sentencing responsibilities of the court can best be carried out by focusing on the particular circumstances, both personal and environmental, that brought the offender to the commission of a criminal offense. In

this respect, the FCC, §102, provides for "the vindication of public norms by the imposition of merited punishment." This differs little in substance from subsection 31, since what is "merited" must be guaged in the context of the individual offender and his circumstances, while "the vindication of public norms" is brought to pass by the whole process of trial and conviction, as well as the imposition of some sentence. That is, the whole of an offender's experience, from arrest to conviction, is coercive and punitive -- few prosecuted persons believe that the drama is primarily for their welfare. In view of this, a directive to officials in the system, judges as well as correctional administrators, to dispense "merited punishment" comes too close to obscuring the fact that an overriding public interest is in strengthening the offender's ability to stay out of trouble in the future. "Merited punishment" is far too backward-looking a concept to serve as a general guide for pursuing this public interest in the future of particular individual offenders.

Subsections 1. and 4. are complementary statements directed to the strengths and weaknesses of all correctional programs. Both identify policies to be pursued which maximize the prevention of crime and the development of individual offenders toward a way of life that is less of a conflict with society.

It remains for subsequent provisions of this Title to implement these policies.

TITLE D3 THE SENTENCING SYSTEM

Chapter 31 General Sentencing Provisions

Section 2. Authorized Sentences

1. Every person and organization convicted of an offense against the state shall be sentenced in accordance with the provisions of this Title.

2. Every person convicted of a felony or a misdemeanor shall be sentenced to one of the following:

A. Probation, conditional discharge or unconditional discharge as authorized by Chapter 32;

B. A special sentence as authorized by Chapter 33;

C. A term of imprisonment as authorized by Chapter 34; or

D. A fine as authorized by Chapter 35. Such a fine may be imposed in addition to probation or a sentence authorized by Chapter 33 or Chapter 34.

3. Every person convicted of an infraction shall be sentenced to one of the following:

A. Probation, conditional discharge, or unconditional discharge as authorized by Chapter 32; or

B. A fine as authorized by Chapter 35. Such a fine may be imposed in addition to probation.

4. Every organization convicted of an offense against the state shall be sentenced to one of the following:

A. Probation, conditional discharge or unconditional discharge as authorized by Chapter 32; or

B. The sanction authorized by section xxx. Such sanction may be imposed in addition to probation.

C. A fine authorized by Chapter 35. Such fine may be imposed in addition to probation.

5. The provisions of this Chapter shall not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office or impose any other civil penalty. An appropriate order exercising such authority may be included as part of the judgment of conviction.

6. If the court, having regard to the nature and circumstances of the felony offense of which the defendant was found guilty, and to the history and character of the defendant, concludes that it would be unduly harsh to enter a judgment of conviction for the felony, the court may enter a judgment of conviction for a misdemeanor and impose sentence accordingly.

COMMENT

Source: The format of this section follows closely that of the Federal Criminal Code, §3001. A similar provision is in the Massachusetts Criminal Code, chapter 264 §1.

Current Maine Law: There is no analogous provision in the present statutes.

The Draft: This section serves several purposes. It is primarily an introduction, or a table of contents, to the main body of sentencing statutes which will follow it. Second, it establishes, in subsection 1., the principle that all of the law governing the sentencing of human and organizational offenders is to be found in this Title. Third, it makes clear that none of the law relating to criminal sentences is in derogation of other law imposing other penalties (subsection 5.), and that these other penalties may be incorporated in the judgment of the criminal case. Finally, subsection 6. creates an authority in the court to mitigate the severity of the judgment in appropriate cases. This authority is recommended by the ABA Project on Standards for Criminal Justice, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft 1968) §3.7 and commentary pp. 197-198. The Federal Criminal Code includes a similar provision as a bracketed subsection (supported by less than a majority of the Commission responsible for the draft). The FCC rejected this provision on the "ground that judicial discretion to lower the classification of an offense would tend to undermine the careful grading of offenses built into the Code by the Congress." Comment to §3001, p. 272, Final Report of the National Commission on Reform of Federal Criminal Laws (1971). This position is, in turn, rejected on account of the undue value placed on legislative grading. It

is, to be sure, a worthwhile and necessary function of the statutes to distinguish the more serious offenses from the less serious ones. But this grading is only a crude means of distinguishing the more serious offenders from the less serious ones, and it is offenders as much as offenses that is the issue presented at the sentencing stage. It makes good sense to permit the refinements acquired by the judge of the individual before him to be expressed in the judgment.

TITLE D3 THE SENTENCING SYSTEM

Chapter 31 General Sentencing Provisions

Section 3. Sanctions for Organizations

A. If an organization is convicted of an offense, the court may, in addition to or in lieu of imposing other authorized penalties, sentence it to give appropriate publicity to the conviction by notice to the class or classes of persons or sector of the public interested in or affected by the conviction, by advertising in designated areas or by designated media, or otherwise as the court may direct. Failure to do so may be punishable as contempt of court.

B. If a director, trustee or managerial agent of an organization is convicted of a felony committed in its behalf, the court may include in the sentence an order disqualifying him from holding office in the same or other organizations for a period not exceeding five years, if it finds the scope or nature of his illegal actions makes it dangerous or inadvisable for such office to be entrusted to him.

C. [This subsection will authorize ancillary jurisdiction, upon the conviction of an organization, in the nature of a class action, to recover damages by persons harmed by the organization's illegal conduct.]

COMMENT

Source: The first two subsections are drawn mainly from the Massachusetts Criminal Code, chapter 264 §2. The Federal Criminal Code §3007 is similar to subsection A. Subsection C., which remains to be drafted, was contemplated by the Federal revision commission, but not pursued in view of the fact that the Congress was then considering separate legislation to authorize class actions by consumers.

Current Maine Law: No parts of this section are presently in the Maine statutes.

The Draft: The purpose of this section is to tailor the penalty system so as to take account of the widespread nature of the harm that may be brought about by the criminal activity of organizations. Subsection A. is founded largely on deterrent considerations, although it may also serve to prevent future harm by alerting potential victims, e.g., those who may purchase articles that were offered to the public through fraudulent representations.

Subsection B. has a similar design. It authorizes the court to protect the public from irresponsible managerial behavior for a period which may extend to five years, and it provides an additional deterrent factor directed towards the "white collar" criminal.

Subsection C. is still the subject of research concerning the class action rules in Maine, and the scope of consumer protection statutes which it may supplement. It is possible, of course, that the results of the research will indicate that this subsection should be dropped. But there are distinct advantages to permitting the criminal conviction to serve as the basis for liability which may immediately be asserted by, and on behalf of, those who were the victims of the illegality. In a realistic sense, the proposal is little more than the creation of a procedural device for accomplishing the sort of restitution which is a familiar result of criminal convictions. The National Consumer Law Center at Boston College has offered its assistance in drafting this provision.

TITLE D3 THE SENTENCING SYSTEM

Chapter 31 General Sentencing Provisions

Section 4. Sentence of Imprisonment in Excess of One Year Deemed Tentative

A. When a person has been sentenced to imprisonment for a term in excess of one year, the sentence shall be deemed tentative, to the extent provided in this section, for a period of one year following imposition of the sentence.

B. If, as a result of examination and classification by the Department of Mental Health and Corrections of a person under sentence of imprisonment for a term in excess of one year, the Department is satisfied that the sentence of the court may have been based upon a misapprehension as to the history, character, or physical or mental condition of the offender, the Department, during the period specified in subsection A., may file in the sentencing court a petition to resentence the offender. The petition shall set forth the information as to the offender that is deemed to warrant his resentence and may include a recommendation as to the sentence that should be imposed.

C. The court may dismiss a petition filed under subsection B. without a hearing if it deems the information set forth insufficient to warrant reconsideration of the sentence. If the court finds the petition warrants such reconsideration, it shall cause a copy of the petition to be served on the offender and on the county attorney, both of whom shall have the right to be heard on the issue. The offender shall have the right to be represented by counsel, and if he cannot afford counsel, the court shall appoint counsel.

D. If the court grants a petition filed under subsection B., it shall resentence the offender and may impose any sentence not exceeding the original sentence that was imposed. The period of his imprisonment prior to resentence shall be applied in satisfaction of the revised sentence.

E. For all purposes other than this section, a sentence of imprisonment has the same finality when it is imposed that it would have if this section were not in force. Nothing in this section shall alter the remedies provided by law for appealing a sentence, or for vacating or correcting an illegal sentence.

COMMENT

Source: This section is drawn from the Massachusetts Criminal Code chapter 264 §5.

Current Maine Law: Rule 35 of the Rules of Criminal Procedure, for the Superior and District Courts, provides authority in the sentencing court to revise a sentence at any time prior to commencement of its execution. There is no authority for revision by the sentencing court thereafter.

The Draft: The design of this section is to supplement the provisions of Rule 35. The present rule is an important recognition that "second thoughts" and supplementary information may arise which call for a change in the sentence originally imposed. But it not infrequently occurs that upon his arrival at a correctional facility, or shortly thereafter, there comes to light information about the offender or the offense which, if it had been known by the sentencing judge, would have caused him to reconsider the sentence under his Rule 35 powers. This section provides a means for conveying that information to him in appropriate cases.

The court is given authority to dismiss the petition without any notice or hearing. This is provided in view of the court already having given full consideration to the case and the need to avoid burdening the court with hearings that may be merely a repetition of the original sentencing proceedings. If the court does propose to reconsider the sentence, however, the county attorney must be notified and given the opportunity to be heard.

In appropriate cases, parole staff will be relieved of supervision responsibilities that ought not to be theirs. That is, in the absence of a power in the sentencing court such as is provided in this section, the only relief that can be granted in cases where the term of imprisonment clearly appears to have been too lengthy initially, or to have been ill-advised entirely, is to affect an early parole. Under these circumstances, however, the parole officer would have the unfortunate task of dealing with an unjust sentence in the experience of his parolee, a factor which often causes deep bitterness and inability or unwillingness to cooperate during the period of parole supervision. There is no reason why the sentencing court should not have the opportunity to have the benefit of correctional expertise in reviewing the propriety of an imprisonment sentence.

The terms of this section restrict its operation to prisoners in state, but not county correctional facilities. When this draft is reviewed, it would be important to discuss whether this restriction should be relaxed.

TITLE D3 THE SENTENCING SYSTEM

Chapter 31 General Sentencing Provisions

Section 5. Multiple Sentences

A. When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, the sentences shall run concurrently, or, subject to the provisions of this section, consecutively, as determined by the court. When multiple fines are imposed, the court may, subject to the provisions of this section, sentence the person to pay the cumulated amount or the highest single fine. Sentences shall run concurrently and fines shall not be cumulated unless otherwise specified by the court.

B. The court shall not impose consecutive imprisonment terms or cumulative fines unless, having regard to the nature and circumstances of the offense, and the history and character of the defendant, it is of the opinion that such a sentence is required because of the exceptional features of the case, for reasons which the court shall set forth in detail.

C. The aggregate maximum of consecutive imprisonment sentences to which a defendant may be subject shall not exceed the maximum term authorized for the most serious offense involved, and the cumulated amount of fines shall not exceed that authorized for the most serious offense involved, except that a defendant being sentenced for two or more Class C felonies may be subject to an aggregate maximum of imprisonment and fines not exceeding that authorized for a Class B felony if each Class C felony was committed as part of a different course of conduct or each involved a substantially different criminal objective. The minimum term, if any, shall constitute the aggregate of all minimum terms, but shall not exceed one-third of the aggregate maximum term or ten years, whichever is less.

D. A defendant may not be sentenced to consecutive terms or cumulative fines for more than one offense when:

1. One offense is an included offense of the other;

2. One offense consists only of a conspiracy, attempt, solicitation or other form of preparation to commit, or facilitation of, the other; or

3. The offenses differ only in that one is defined to prohibit a designated kind of conduct generally, and the other to prohibit a specific instance of such conduct; or

4. Inconsistent findings of fact are required to establish the commission of the offenses.

E. The limitations provided in this section shall apply not only when a defendant is sentenced at one time for multiple offenses, but also when a defendant is sentenced at different times for multiple offenses all of which were committed prior to the imposition of any sentence for any of them. Sentences imposed by any court, including federal courts and courts of other states, shall be counted in applying these limitations.

COMMENT

Source: This section reflects the provisions of the Federal Criminal Code §3204, and the Massachusetts Criminal Code chapter 264 §13.

Current Maine Law: 15 M.R.S.A. §1702, as amended by Maine Laws 1965, c. 356, Sec. 55 provides: "The court shall rule, and in appropriate cases shall state in the judgment that the terms of imprisonment shall be served concurrently or consecutively; . . . In the event the court fails so to rule or state, said sentences shall be served concurrently."

The Draft: This section provides rules and guides for determining whether penalties for several offenses may be amassed for sentencing purposes. On the whole, they are cast as limitations on when fines may be cumulated and imprisonment terms served consecutively.

In subsection C., the assumption is made that there will be three classes of felonies provided for in the Code (A, B, and C). The major change wrought by this section is to limit the amount of a sentence imposed to run consecutively to the maximum limit authorized for the most serious offense involved, rather than to the sum total of all the maxima involved, as is the present law. The reason for this change is that it is only under the most unusual circumstances that the normal maximum should be exceeded, and these circumstances will be set forth in detail in a separate section dealing with persistent and dangerous offenders.

June 22, 1972

MEMORANDUM

TO: Sub-committee A, Commission to Prepare a Revision of the Criminal Laws.

FROM: Sanford J. Fox

1. Enclosed please find drafts of the first five sections of Title D3, Chapter 31, for discussion at our meeting in Augusta on June 29, 1972. The numbering system of titles and chapters is, at this point, quite arbitrary and does not represent any decision about where any part of the code should be placed within the MRSA.

2. I am also enclosing copies of the Summary of Recommendations regarding sentencing structure and allocation of authority which we used as a basis for discussion in developing the Massachusetts sentencing proposals. It was prepared by Professor Charles Fried of the Harvard Law School.

3. In addition to the issues raised in the draft sections and in Professor Fried's memorandum, I would like to discuss a proposal which would be designed to eliminate what many (including Ward Murphy) would agree to be the most counterproductive of all criminal sentences, namely, those that entail a period of less than a year during which no useful educational, rehabilitative, or vocational program is undertaken. The proposal would involve continuing the state prison or the correctional centers as the places where sentences are served which are for more than one year. But other sentences which include imprisonment would be either: (1) limited to thirty days; or (2) limited to ten days, if imposed as the initial part of a period of probation; or (3) served on weekends, or at night, for a period up to three months. I have recently received some statistics from Miss Hary which I hope to be able to review before the meeting in order to get some estimate for us of what the impact of such a proposal might be.

I. Summary of Recommendations

A. Authority to determine the sentence should be vested in the trial judge, within statutory limits, and not in the jury, nor does it seem necessary to create a special sentencing board to perform the sentencing determination function.

B. Once the decision is made to sentence an offender to a correctional institution, the parole board should in less serious cases have authority to release the prisoner at any time before the expiration of the maximum term set by the court. [redacted] The prisoner should be released by the parole board when he has met certain standards of rehabilitation set for him by the correctional authorities. [redacted] No minimum sentence should be imposed either by the legislature or by the judge, unless special need dictates imposition of a minimum term. [redacted]

C. In the more serious cases, that is Class A and B felonies, the trial judge should, within statutory limits, have the authority to set a minimum sentence limiting a right to parole, when such a sentence is deemed necessary for the safety and reassurance of the public.

D. Maximum terms of commitment for all classes of crimes should be designated by the legislature, as with Model Penal Code. [redacted] Contrary to the Model Penal Code, however, it seems desirable that the judge should have the authority to set the maximum at a lesser term. The maximum term set by the Code should be considered the term for the worst type of offender within a given class of crime. Therefore, for offenders not of this worst type, the maximum term set by the court accordingly is less than the statutory maximum.

E. All good time provisions are omitted, and should be repealed. [redacted] Insofar as such provisions created earlier parole eligibility, they are inapplicable in a scheme where all offenders are eligible for parole at any time. And the use of such good time to shorten the maximum term would be inappropriate.

II. Who Should Sentence?

A. Jury Sentencing

Although eleven states provide for jury sentencing in non-capital cases, it does not seem necessary to consider this alternative at length, for the arguments against jury sentencing are quite persuasive.

Those who favor jury sentencing argue first that just as juries represent the community's idea of justice, so also ought they to represent the community's ideas of what punishment should be noted. 1 / Other worthy arguments for jury sentencing have been summarized in Belts, Jury Sentencing 2 N.P.P.A.J. 369, 370 (1956):

1. The anonymity of jurors makes them less subject to the pressures of public feelings and opinion than the elected judge, who must seek popular favor at the next election.

2. The brief tenure of the jury makes corruption or improper influence especially difficult.

3. Jury fixed punishment diminishes popular distrust of official justice.

Many rebuttals could be made to these propositions; however it seems more appropriate to simply summarize the arguments against jury sentencing. "The principal objection to sentencing by juries is that the transitory nature of jury service virtually precludes rational sentencing." 2 / Individualized sentencing is a job for experts, and juries do not have the opportunity to develop expertise in this extremely complex area. This is clearly the most damning argument against jury sentencing. Further, a jury might be inclined to resolve doubt as to guilt by compromising on a light sentence, and unless the law provides for separate hearings on guilt and sentence, defense counsel may be put in the awkward position of arguing that his client is not guilty, but if he is, he should receive a light sentence. Also, a sentencing decision should be based on complete information about the defendant himself, as well as his offense. Much of this information is properly inadmissible on the question of guilt, and its admission on the question of sentence, when the jury considers both issues simultaneously, may be highly prejudicial to the defendant. 3 /

B. Board Sentencing; The Problem of Disparity of Sentences.

It is possible to have a board of experts on sentencing and corrections appointed by the executive to determine the disposition of all convicted offenders. The reason for suggesting that the sentencing authority ought to be shifted from the judge to a special board is that judicial sentencing has resulted in great

sentencing disparity. This is not to say that all sentences for the same crime should be identical, for this would be contrary to the basic modern principle of "individualization" of sentencing. The problem of disparity arises from the imposition of unequal sentences for the same offense, or offenses of comparable seriousness without any reasonable basis. The President's Commission of Law Enforcement and Administration of Justice Task Force Report on the Courts presents numerous examples of unjustified disparity in sentences.

A study that highlights the problem is the result of the workshop sessions at the Federal Institute on Disparity of Sentence:

"The judges were given sets of facts for several offenses and offenders and were asked what sentences they would have imposed. One case involved a 51-year-old man with no criminal record who pleaded guilty to evading $4,945 in taxes. At the time of his conviction he had a net worth in excess of $200,000, and had paid the full principal and interest on the taxes owed to the Government. Of the 54 judges who responded, 3 judges voted for a fine only; 23 judges voted for probation (some with a fine); 28 judges voted for prison terms ranging from less than 1 year to 5 years (some with a fine). In a bank robbery case the sentences ranged from probation to prison terms of from 5 to 20 years." 4 /

The Task Force Report notes further that disparity of sentences can undercut the rehabilitation of the prisoner, who feels that he is the victim of a judge's prejudices. 5 / The problem of disparity in sentences remains and grows because different judges have different attitudes about the purposes and goals in sentencing. As long as there are different judges for different offenders, there is going to be a problem of disparity of sentences. Thus, a sentencing board authorized to dispose of all convicted offenders within a given judicial district seems a reasonable alternative to judicial sentencing.

Surprisingly enough, not much is written about such board sentencing. Most attention focuses on the California and Washington board sentencing approaches, where the board only determines the maximum and minimum terms once the offender has been sentenced to prison. Such a system only partially meets the disparity problem. Greater uniformity in length of sentences may result, but this is only part of the problem. In a particular

case probation, a suspended sentence or a fine may be a more suitable disposition than imprisonment; therefore only a board which has complete authority to impose whatever sentence it feels is suitable, within legislative limits, is likely to bring about uniformity of sentencing within a given district. A collective judgment of social scientists, jurists, and psychiatrists based on a detailed presentence report of the prisoner, his problems, and the circumstances of the crime for which he was convicted certainly has its appeal for those concerned with bringing about a more evenhanded administration of the criminal law.

The most likely criticism of such a system of sentencing would be the greater expense involved. In order to get a well qualified board, substantial salaries would have to be offered. Further expense would arise in providing sufficient documentation for each case--(presentence reports and transcripts of the trial).

A more legally-rooted argument against board sentencing, based on fear that due process notions would be relaxed under such a system, obtains in a note in 81 Harvard Law Review 821:

"It seems basic to a scheme of 'ordered liberty,' that whenever organized society undertakes to impose punitive physical restraint on an individual, it should do so only by regular procedures established in advance. And these procedures should be carried out under the aegis of a judge; that is, of an official equipped by training and professional tradition to weigh conflicting interests and evidence with even-handed detachment and to reach judgments in particular cases."

This due process theme paints a highly idealized portrait of the typical trial judge. The ability of many trial judges to apply a sense of "evenhanded detachment" is at best questionable, considering Howard James' survey of various trial courts across the United States. 6 /

Furthermore, it does not seem too difficult to write certain notions of due process into a sentencing board statute. Defendants would obviously have rights to counsel, and a formal hearing could be employed.

Were it possible that a statute establishing a sentencing board would be acceptable, then that would be our recommendation, but one may expect that, because of the great expense involved and because of the radical departure from present practices, such

proposal would stand little chance of being enacted into law.

It therefore remains for us to endorse the alternative of judicial sentencing, but with certain recommendations for improvements. The Task Force Report on the Courts urges use of sentencing councils and appellate review of sentences to bring about greater uniformity of sentences. It may be worthwhile to write either provision into the code. Criticisms of appellate review of sentences have developed over many years, but opposition to sentencing councils may not be so great. The sentencing council also seems a practical method for attacking the problem of unwarranted disparity of sentences without greatly increasing costs. As the Task Force Report notes, Sentencing Councils used in the Federal District Courts have at least "tended to repress the imposition of excessively severe or lenient sentences." 7 / We recommend combining these alternatives through proposals for revision in the sentencing courts and for appellate review by a specially established Appellate Division of the Superior Court.

III. Sentence Structure and Judicial Discretion

A. Maximum Terms

Should the maximum term of a sentence of confinement be fixed by the legislature for all offenses within a given class of crimes or, on the other hand, should the sentencing judge be authorized to fix the maximum term within a legislatively prescribed range? The former alternative is proposed by the Model Penal Code; the latter by the Model Sentencing Act. The arguments advanced are:

1. For Maximum Fixed by the Legislature.

The arguments favoring legislatively fixed maxima with no judicial discretion can be summarized thus: 8 /

(a) This system would aid in achieving uniformity in sentencing. All convicted offenders within a given class of crimes would have the same maximum sentence. In part at least, the problem of disparity of sentences is really in an offender's subjective evaluation of his sentence. If he deems his sentence more severe than that of another convicted for the same type of crime, his resentment may hinder rehabilitation. Therefore it may be better that all convicted for the same type of crime have

the same maximum term, particularly as few will serve out their maximum terms but will be released once certain rehabilitation standards are met.

(b) The legislatively fixed maximum term properly makes the parole board responsible for determining release time. The trial judge is inequipped to so decide, for such necessary information as the nature of the offender's institutional adjustment may then be unavailable. Assessment of the risk a particular offender presents can best be made from hindsight based in examination and diagnosis over time.

(c) Rubin and other opponents of a system of legislatively fixed maximum terms argue that longer detention periods will result because parole boards look to an offender's maximum term in determining release time. They feel maximum terms would generally be much higher under this system than under a system where the judge could grant a lower maximum term deemed warranted by the circumstances of the crime or the character of the offender. Proponents of the legislatively fixed maximum term counter that since a fixed maximum term expresses a statutory judgment of how a given class's worst offender should be treated, parole authorities feel less restraint than when a judge purportedly tailored the maximum to the particular offender. "The parole authorities would thus be encouraged to grade offenders on the basis of present condition, rather than intimidated by what can only be a judicial guess of future condition." 9 / Further, Paul W. Tappan has attempted to show from statistics on sentences and actual terms served that "neither the statutory determination of maximum terms nor higher maximum terms themselves. . . necessarily result in a longer duration of imprisonment." 10 / However Rubin asserts that "statistics show that the parole board keeps a man in the institution and under supervision longer if the maximum term imposed is longer." 11 / The argument based on statistics remains unresolved.

2. For Judicial Discretion in Fixing Maximum Terms

(a) The proponents of court fixed maximum terms argue, first, that sentences are now too long, that prolonged incarceration is inconsistent with rehabilitation, and that it is, therefore, desirable to give the trial judge power to fix the maximum term, within the statutory limit, since this will generally result in lower sentences.

(b) To counter the argument presented under 1(a) above the proponents of judicial discretion in setting maximum terms argue that while a legislatively fixed maximum term may assure uniformity of sentence in relation to the offense, it does not necessarily insure consistency between the sentence and the actual conduct of the offender. 12 /

(c) In countering the argument presented under 1(b) above the proponents of judicial discretion argue that parole boards may not in fact be in a better position than judges to assess the offender's readiness to return to society. Despite a possible timing advantage, unless the state's correction and parole facilities are highly developed, the parole board will be unable to make an adequately informed decision.

There is the further question of the inclination of the parole board to release a prisoner who may in fact be rehabilitated (disregarding for a moment the relativeness of that term) at an early time, i.e., long before the statutory maximum term is reached. Professor Kadish has observed that there is an "inevitable pressure upon agencies responsible for release to avoid making favorable discretionary judgments where they have to face the consequences of public chastisement in the event of further criminal acts by the person released." 13 / In addition, the fact that judicial sentencing occurs in open court following an opportunity to present a case with the assistance of an attorney "affords a visibility to the process which is normally absent before parole authorities as well as greater procedural protection." 14 /

(d) Professors Ohlin and Remington express a further rationale for judicial discretion. They argue that where the judge lacks discretion in sentencing, a guilty plea must command a different concession. More plea bargaining with the prosecutor to reduce charges will result. Thus, the system of legislatively fixed maximum terms rests discretion as to length of incarceration not in the parole board, but in the prosecutor.

Only with the certain knowledge that this state's correctional and parole facilities would rise to the highest level of development and independence and that highly qualified social scientists and other experts in fields of parole and corrections would constitute the parole board, would this memorandum favor the Model Penal Code system for maximum terms. However, fearing that an actually rehabilitated offender may spend too much time in prison, we deem it more conducive to guaranteeing due process

that the trial judge have authority to set a maximum term lower than the statutory maximum term.

B. Minimum Terms

There are three questions regarding minimum terms: (1) Shoul there be any minimum term at all; (2) Should the legislature set a minimum term for all crimes; or (3) Should the trial judge set the minimum term? Arguments of those favoring an affirmative response to the first and either of the two latter questions merge somewhat, so we shall consider them first:

1. For Statutorily and Judicially Set Minimum Terms

Arguments favoring minimum terms can be summarized thus:

(a) The argument most commonly advanced favoring a minimum term stresses community reassurance. Since the basic purpose of the criminal law is protection of the public, the public must be reassured that this purpose is being carried out, and that offenders against society's laws will be incarcerated for at least a minimum period.

(b) Minimum terms are necessary, it is argued, to provide guidelines for the parole board. "Effective sentencing and parole policy--requires a nicely balanced distribution of authority between the legislature, the courts, and the paroling agency. . . ." 15 / While such a balancing most likely places primary sentencing discretion in the parole board, it should also offer visible guidance for exercising such discretion.

(c) Such are the major arguments favoring minimum terms generally. Backers of the Model Penal Code argue that a legislatively fixed one year minimum is an institutional necessity for all sentences of imprisonment, in order for any valid correctional program to have a meaningful chance to operate.

(d) Statutory minimum sentences of longer than one year have been imposed because it has been thought that such sentences would have a deterrent effect on potential offenders.

(e) The claim of a deterrent effect also arises in advocacy of judicially imposed minimum sentences. The comments to the Model Penal Code §6.07 assert that the "Court should have some control of the minimum, mainly for deterrent purposes and especially in dealing with the gravest crimes, where the deterren factor normally looms largest at the time of sentencing."

2. For No minimum Terms

(a) Challenging 1(d) and (e), opponents of a minimum term assert that deterrence is primarily the product of effective law enforcement rather than of the sentencing or punishment system. 16

(b) Against claims that the correctional system needs a statutory minimum to assure a chance of operation, opponents counter that such a system fixes the judge with a wide gap in his sentencing options. Denying him the choice of imposing a sentence between probation and a year's imprisonment either will force a sentence upon an offender stiffer than is appropriate or will generate a sentence upon an offender milder than is deserved and may in fact be required.

(c) The primary argument of advocates of no minimum terms is that an offender should be released once fit to rejoin society. Sol Rubin, an aggressive foe of minimum terms, asserts that "one of the truly destructive elements in sentencing is the existence of minimum terms. . . . Parole boards need power to release when they see fit according to the adjustment of the individual." 17 / "If the purpose of sentencing is rehabilitation and public protection, or rehabilitation as protection, the minimum term is an anachronism." 18 /

Rubin cites Warden Harry G. Tinsley of the Colorado State Penitentiary, noting that a prisoner who gets a minimum term which through good behavior alone will comprise practically the extent of his imprisonment may never recognize the existence of his problems. He can, in due time, earn his release, with his attitudes and self-awareness unchanged. 19 /

Might we not prefer to advise him: Your problem seems to be in this particular area. Here is what we recommend that you do about it. . . . We will provide the facilities, the encouragement, and the help. . . . You will have to accomplish certain things; you will have to improve yourself academically, or you will have to attain certain vocational skills, or you will have to learn to get along with other people and to respect other people's rights , privileges, and property. When you have demonstrated that you can do this, you will be in a position to be considered for release on parole.

"It seems self-evident that the prisoner who is not marki time during the mandatory minimum term, but who is aware that may be released as he improves must think about his behavior n merely the calendar." 20 /

The arguments rejecting minimum terms seem persuasive for great number of less serious cases. In the context of Tinsley' and Rubin's analyses of how a correctional system could and sho work, a mandatory minimum sentence obviously distracts the pris and hinders those people working towards his rehabilitation. O the other hand, in the most serious crimes, public outrage and de for assurance of public safety may be such that a sentence whic in effect allows parole at any time might be simply unacceptabl For this reason in Section 4 we allow the judge to set a mini sentence, within statutory limits. By Section , however, the court is empowered to revise this limit on petition of the Board of Parole.

IV. Resolution in Other Jurisdictions

All nine recent revisions studied for comparison provided generally for judicial, rather than board or jury sentencing. Only two -- Hawaii and Michigan* -- denied judges discretion in setting the maximum term for indeterminate sentences. Hawaii, Michigan, Vermont and Minnesota set no minimum sentence, and all parole at any time. The draft Federal code allows minimum sente only for Class A and B felonies, and then only where the judge affirmatively acts to impose a minimum. This is the proposal we put forward in this draft. All nine jurisdictions except California and Michigan require uniform definite terms for misdemeanants (i.e., prohibit the setting of minima and maxima as with indeterminate terms).

* Both are draft proposals.

Footnotes

(1) Roy Moreland, "Model Penal Code: Sentencing, Probation, and Parole," 57 Kentucky Law Journal 51, 52 (1968).

(2) The President's Commission of Law Enforcement and Administration of Justice, Task Force Report: The Courts (1968), 26.

(3) Ibid., 26, also American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures (1967), 45-46.

(4) Task Force Report, supra ,23.

(5) Ibid., 23 see also on the problem of disparity, Sheldon Glueck, The Sentencing Problem, 1956

(6) Howard James, Crisis in the Courts, (David McKay Co. Inc., New York, 1967).

(7) Task Force Report, supra , 23

(8) Arguments from Lloyd E. Ohlin and Frank J. Remington, "Sentencing Structure: Its Effect upon Systems for the Administration of Criminal Justice," 23 Law and Contemporary Problems, 495 (1958); Herbert Wechsler, "Sentencing, Correction, and the Model Penal Code," 109 Pa. L. Rev. 465, (1961); Paul W. Tappan, "Sentencing Under the Model Penal Code," 23 Law and Contemp. 528 (1958).

(9) ABA Project, Ibid., p. 134.

(10) Tappan, Ibid., p. 560.

(11) Sol Rubin, Sentencing and Correctional Treatment Under the American Law Institute's Model Penal Code, 46 A.B.A.J. 994 (1960).

(12) Ohlin and Remington, Ibid.

(13) Kadish, "Legal Norm and Discretion In the Police and Sentencing Processes," 5 Harvard Law Review 904, 922 (1962)

(14) ABA Project, Ibid., P. 135

(15) Tappan, Ibid., p. 560.

(16) Gerald F. Flood, "The Model Sentencing Act: A Higher Level of Penal Law," Crime and Delinquency, 9(4): 370-380, 1963.

(17) Rubin, ABAJ, Ibid., p. 996.

(18) Sol Rubin, "Allocation of Authority In the Sentencing-Correction Decision," 45 Texas Law Review 455, 464 (1967).

(19) Ibid.

(20) Ibid.

(21) Federal Study Draft, N.Y., Calif., Illinois, Wisconsin, Michigan, Hawaii (draft proposal), Minnesota, Vermont.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 1. Conspiracy

1. A person is guilty of conspiracy, if, with the intent that conduct be performed which, in fact, would constitute a crime or crimes, he agrees with one or more others to engage in or cause the performance of such conduct.

2. If a person knows, or could expect, that one with whom he agrees has agreed or will agree with a third person to effect the same objective, he shall be deemed to have agreed with the third person, whether or not he knows the identity of the third person.

3. A person who conspires to commit more than one crime is guilty of only one conspiracy if the crimes are the object of the same agreement or continuous conspiratorial relationship.

4. No person may be convicted of conspiracy to commit a crime, other than a class A felony, unless it is alleged and proved that he, or one with whom he conspired, took a substantial step toward commission of the crime. A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime.

5. Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined by the provisions of section -- of chapter --.

6. For the purpose of determining the period of limitations under section -- of chapter --:

A. A conspiracy shall be deemed to continue until the

criminal conduct which is its object is performed, or the agreement that it be performed is frustrated or is abandoned by the defendant and by those with whom he conspired. For purposes of this subsection, the object of the conspiracy includes escape from the scene of the crime, distribution of the fruits of the crime, and measures, other than silence, for concealing the commission of the crime or the identity of its perpetrators.

B. Such abandonment is presumed if no substantial step toward commission of the crime, as defined in subsection 4, is taken during the applicable period of limitations.

C. If a person abandons the agreement, the conspiracy terminates as to him only when: (i) he informs a law enforcement officer of the existence of the conspiracy and of his participation therein, or (ii) he advises those with whom he conspired of his abandonment. The defendant shall prove a defense under (ii) by a preponderance of the evidence.

7. It is no defense to prosecution under this section that the person with whom the defendant is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, or is immune from or otherwise not subject to prosecution.

8. It is a defense to prosecution under this section that, had the objective of the conspiracy been achieved, the defendant would have been immune from liability under the law defining the offense, or as an accomplice under section -- of chapter --.

9. Conspiracy is an offense classified as one grade less serious than the classification of the most serious crime which

is its object, except that a conspiracy to commit a class B misdemeanor is a class B misdemeanor.

COMMENT

Source: This section follows the pattern of the Model Penal Code §5.03, the Massachusetts Criminal Code chapter 263 §48, and the Federal Criminal Code §1004.

Current Maine Law: There are two Maine conspiracy statutes, Title 17 §§951, 952. Section 951 provides:

> If 2 or more persons conspire and agree together, with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or property of another; or for one or more of them to sell intoxicating liquor in this State in violation of law to one or more of the others; or to do any illegal act injurious to the public trade, health, morals, police or administration of public justice; or to commit a crime punishable by imprisonment in the State Prison, they are guilty of conspiracy. Every such offender and every person convicted of conspiracy at common law shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 10 years.

Section 952 is more specialized:

> If 2 or more persons conspire and agree together, with intent falsely, fraudulently and maliciously to cause another person to be indicted or in any way prosecuted for an offense of which he is innocent, whether he is prosecuted or not, they are guilty of a conspiracy, and each shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 5 years.

There are several important things about these statutes and the cases that have interpreted them. Like the conspiracy offense

at common law, the object of the conspiratorial agreement is not limited to the commission of crimes. Those who agree to do something deemed "injurious to the public trade, health, morals" etc. are equallly as guilty as those who conspire to rob a bank. State v. Parento, 135 Me. 353, 197 A. 156 (1938). Similarly, there is no requirement that any action be taken pursuant to the agreement; the mere formulation of the agreement constitutes an offense. State v. Pooler, 141 Me. 274, 43 A.2d 353 (1945); State v. Vetrano, 121 Me. 368, 117 A. 460 (1923). Under the section 951 offense, it is possible for a person to receive a more severe punishment as a conspirator than is provided for in regard to the crime which was contemplated by his agreement. State v. Pooler, supra.

The Draft: The draft changes Maine law in some respects, and provides rules in some circumstances which are not now covered by the law.

The major change wrought by subsection 1 is to limit the offense to agreements which contemplate the commission of a crime. This is in keeping with the trend set by the Model Penal Code and followed by most other penal law revisions. Massachusetts is contra, proposing that: "the defendant knows [the conduct] to be substantially and clearly unlawful, and likely to cause such significant harm to an individual or to the general public as to be seriously contrary to the public interest." Such conduct stands, with crimes, as the possible object of a criminal conspiracy. The difficulty with the Massachusetts proposal is, however, that it is difficult, if not impossible, to find conduct that fits this formulation that does not, at the same time, constitute a crime.

The phrase "in fact" is designed to settle a problem which has arisen about the conspiracy offense, namely, does it make any difference

that the defendant does not know that what he agrees to is a crime? The answer provided here, and in the other codes, is No.

Subsection 2 provides a rule for still another fuzzy aspect of conspiracy at common law, and under such statutes as now are in force in Maine. This relates tothe scope of the conspiracy and the matter of who is a conspirator with whom. The problem arises in many contexts, but the narcotics situation is a ready illustration. The street pusher who buys from his supplier, knowing that the latter is involved in an agreement with a third party source, becomes a conspirator with such a third party, even if he does not know who he is.

Subsection 3, too, is a commonly found provision designed to settle the question of how many offenses are committed when the agreement among the conspirators relates to more than one crime. The rule that only one conspiracy results in such circumstances does not, of course, prevent multiple criminal liability if the criminal objects of the agreement are achieved.

Subsection 4 changes the common law rule that has prevailed in Maine to the effect that no overt act is required for the conspiracy to constitute an offense. State v. Chick, 263 A.2d 71 (Me. 1970). The overt act requirement that has long prevailed in federal law, and has been carried forward in the proposed Federal Criminal Code, is provided for in a modified form by subsection 4. The modification is in the direction of requiring more than has traditionally been needed to satisfy the federal overt act requirement. The draftsmen of the Federal Code recognize this difficulty, for in the comment to the conspiracy statute it is noted that: "the act need

not constitute a 'substantial step' as is required in the case of attempt....An alternative to the text would be to adopt the substantial step requirement on the theory that otherwise the act may be innocent in itself and not particularly corroborative of the existence of a conspiracy." The appraisal of the proposed Federal Code by the American Civil Liberties Union includes:

> An overt act is required to prove the firmness of the intent. Unfortunately, this act can be virtually negligible, indicative of absolutely nothing. It therefore offers no reliable indication of the danger to thecommunity, for the act can be very far indeed from actually trying to achieve the unlawful objective.
>
> It would be more appropriate to insist that the overt act represent a substantial step toward consummation. The Comment recognizes this shortcoming of the proposed provision and raises the possibility of such a requirement.
>
> Testimony of The American Civil Liberties Union Before the Senate Subcommittee on Criminal Law and Procedures on the Final Report of the National Commission on Reform of Federal Criminal Laws, March 21, 1972 at p. 57.

The General Provisions of the proposed criminal code will include rules for determining when one person may be held criminally liable for the criminal conduct of another. Subsection 5 says that a conspirator is to be held responsible for the crimes of his co-conspirator pursuant to such rules.

Subsection 6 combines provisions from the Massachusetts and Federal codes in determining how to compute the running of the statute of limitations in regard to conspiracy offenses.

Subsection 7 proposes to change the present law in Maine, as it appears in State v. Breau, 222 A.2d 774 (Me. 1966). In that case, A, B, and C were jointly tried for conspiracy. The confessions of A and B were introduced in order to establish the conspiracy. But since A and B had not been advised of their constitutional rights prior to giving the confessions, they were granted a directed acquittal. The conviction of C was reversed on appeal by the Supreme Judicial Court on the grounds that it was not possible to convict only one conspirator, the court remarking that "he could not conspire with himself." Subsection 7 would convict him despite this. Since he had done everything prohibited by the penal law, there is every reason to hold him accountable. His responsibility is especially attractive under the circumstances of Breau where the acquittal of his fellows was based on tainted proof that the conspiracy in fact had taken place, rather than on any suggestion that there had been no criminal agreement.

Subsection 8 deals with a somewhat converse situation. Here the defendant who satisfies all the elements of the offense is, nonetheless, not to be held liable. The under-age person in a statutory rape case, for example, may technically become a conspirator by agreeing to the prohibited relations, but as the victim to be protected, she would not be criminally liable, and this subsection insures that this protection extends to the conspiratorial relationship as well.

July 13, 1972

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 2. Attempt

1. A person is guilty of criminal attempt if, acting with the kind of culpability required for commission of a crime, and with the intent to complete the commission of the crime, he engages in conduct which, in fact, constitutes a substantial step toward its commission. A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime.

2. It is no defense to a prosecution under this section that it was impossible to commit the crime which the defendant attempted, provided that it could have been committed had the factual and legal attendant circumstances specified in the definition of the crime been as the defendant believed them to be.

3. A person who engages in conduct intending to aid another to commit a crime is guilty of criminal attempt if the conduct would establish his complicity under section -- of chapter -- were the crime committed by the other person, even if the other personis not guilty of committing or attempting the crime.

4. Criminal attempt is an offense classified as one grade less serious than the classification of the offense attempted, except that an attempt to commit a class B misdemeanor is a class B misdemeanor.

COMMENT

Source: This section follows closely the Federal Criminal Code §1001, and the Massachusetts Criminal Code §45.

Current Maine Law: There are two statutes of general applicability which deal with the subject of attempts. The most broadly drawn is

Title 17 §251:

> Whoever attempts to commit an offense and does anything towards it, but fails or is interrupted or is prevented in its execution, where no punishment is expressly provided for such attempt, shall, if theoffense thus attempted is punishable with imprisonment for life, be imprisoned for not less than one nor more than 10 years; and in all other cases he shall receive the same kind of punishment that might have been inflicted if the offense attempted had been committed, but not exceeding ½ thereof.

The second statute was enacted in 1971 as section 252 of Title 17:

> Whoever, if armed with a firearm, attempts to commit an offense and does anything towards it, but fails or is interrupted or is prevented in its execution, where no punishment is expressly provided for such attempt, shall, if the offense thus attempted is punishable with imprisonment for life, be imprisoned for not less than 5 nor more than 10 years; and in all other cases he shall receive the same kind of punishment that might have neen inflicted if the offense attempted had been committed, but not exceeding ½ thereof.

In addition to these two statutes, there are other penal laws which include an attempt among their definitional elements, for example, Title 17 §§1405, 1405-A, relating to escapes from confinement and attempts to escape.

Although section 251 specifically mentions the doing of some act towards the commission of the crime, other attempt statutes such as §1405, do not. It has been held by the Supreme Judicial Court, however, that where an attempt is included within the law, some action beyond preparation is nonetheless required to be proved to make out an attempt. Logan v. State, 263 A.2d 266 (Me. 1970).

The Draft: This section makes very little change in current Maine law. The first subsection spells out a bit more clearly the nature of the mental element which must accompany the conduct, and specifies the significance which that conduct must have in the total circumstances.

Subsection 2 deals with a problem that has arisen regarding attempts (but apparantly not in Maine) when, for one reason or another, it would have been impossible for the defendant to consumate the crime, e.g., giving his victim harmless sugar, supposing it to be arsenic. Since, in such cases, it is merely good luck that frustrates theoffense, the criminal liability of the actor is not affected.

Subsection 3 fills a gap in the law which appears when the actor's conduct would bring about complicity liability were the offense to be committed by his accomplice, but because the offense is not consumated, the actor cannot be held as an accomplice to anything. Here, too, the actor satisfies all of the elements of the attempt offense, but for reasons unrelated to him, no attempt or consumation is brought about by the other person.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 3. Solicitation

1. A person is guilty of solicitation if he commands, requests or attempts to induce another person to commit a particular felony, whether as principal or accomplice, with the intent to cause the imminent commission of the felony, and under circumstances strongly corroborative of that intent, and the person solicited takes a substantial step toward commission of the felony.

2. It is a defense to prosecution under this section that, if the criminal object were achieved, the defendant would not be guilty of a crime under the law defining the offense or as an accomplice under section -- of chapter --.

3. It is no defense to a prosecution under this section that the person solicited could not be guilty of the offense because of lack of responsibility or culpability, or other incapacity or defense.

4. Solicitation is an offense classified as one grade less serious than the classification of the crime solicited.

COMMENT

Source: This section is a modified verson of the Massachusetts Criminal Code, chapter 263 §47, and the Federal Criminal Code §1003.

Current Maine Law: There is no Maine statute making this sort of conduct criminally punishable. Solicitation of a felony has been recognized as a common law offense in Maine, however, since 1875. See State v. Beckwith, 135 Me. 423, 198 A. 739 (1938), citing State v. Ames, 64 Me. 386 (1875) a case involving soliciting

a witness not to appear at a trial to which he had been summoned. According to the Beckwith opinion, the offense of solicitation can be committed even if the crime solicited does not take place.

The Draft: Several changes in the common law offense are proposed in this section. Following the federal pattern of requiring some action beyond mere verbal expression, for there to be criminal liability, subsection 1 includes the same "substantial step" element as is provided for in other parts of this chapter on inchoate crime. The federal pattern is abandoned, however, in respect to the nature of the communication involved, in favor of the Massachusetts formulation: the element of "entreating" found in the federal act is dropped out, and it is only by commanding, requesting, or attempting to induce, that the offense can be committed.

Subsection 1 of the draft further departs from both the Massachusetts and federal element that the communication to the other person be with an "intent to promote or facilitate" the commission of the felony. The quoted phrase appears to fall short of the constitutional requirement that there be a close proximity between speech and the proscribed criminal behavior. Brandenburg v. Ohio, 395 U.S. 444 (1969). This point is forcefully made in the Testimony of The American Civil Liberties Union Before the Senate Sub committee on Criminal Law and Procedures on the Final Report of the National Commission on Reform of Federal Criminal Laws, March 21, 1972 at p. 51. The opinion of the Supreme Court in Brandenburg emphasized that the Court has evolved

> the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or

produce such actions, 395 U.S. at 447.
Subsection 1 is limited accordingly.

Similar to the preservation of policies of immunity provided for in sections one and two of this chapter, subsection 2 of this section is to the same effect. Subsection 3 is also similar to the first two sections in its denial of any benefit to the defendant by virtue of the immunity from guilt which may be enjoyed by the person he solicits.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 4. Facilitation

1. A person is guilty of facilitation if he knowingly provides substantial assistance to a person intending to commit a felony, and that person, in fact, commits the crime contemplated, or a like or related felony, employing the assistance so provided. The ready lawful availability from others of thegoods or services provided by the defendant is a factor to be considered in determining whether or not his assistance was substantial. This section does not apply to a person who is either expressly or by implication made not accountable by the statute defining the felony facilitated or related statutes.

2. It is no defense to a prosecution under this section that the person whose conduct the defendant facilitated has not been prosecuted for or convicted of any offense based upon the conduct in question, or has been convicted of a different offense or class or degree of offense, or has an immunity to prosecution or conviction or has been acquitted.

3. Facilitation of a class A felony is a class C felony. Facilitation of any other felony is a class A misdemeanor.

COMMENT

Source: Based on the provisions ofNew York Penal Law §§115.00 - 115.15, statutes of this sort appear in the Massachusetts Criminal Code chapter 263 §46, and the Federal Criminal Code §1002. This draft section follows the Massachusetts formulation closely.

Current Maine Law: There is neither statute nor common law defining such an offense at the present time.

The Draft: This section should appropriately be considered in conjunction with the provisions (yet to be drafted) relating to accomplice liability. The former will deal with similar conduct undertaken with the intent that the other person commit an offense. The crime of facilitation defined in this section relates to conduct accompanied only by knowledge that there will be a crime committed, but without any intent that it take place. The defendant who furnishes a drug pusher with bags for the packaging of the drugs, but does not care one way or another whether the drugs are sold, is an example of the person contemplated by this section. In the absence of a provision such as this, the court would be faced with the requirement of finding that the defendant intended that the drug sales take place, or letting him go completely.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 5. General Provisions Regarding Chapter 21

1. It shall not be an offense to conspire to commit, or to attempt, solicit, or facilitate any offense set forth in this chapter.

2. There is an affirmative defense of renunciation in the following circumstances:

A. In a prosecution for attempt under section 2, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.

B. In a prosecution for facilitation under section 4, it is an affirmative defense that, prior to the commission of the felony which he facilitated, the defendant made a reasonable effort to prevent the commission of such felony.

C. In a prosecution for solicitation under section 3, or for conspiracy under section 1, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited or of the crime or crimes contemplated by the conspiracy, as the case may be.

D. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by (i) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another participant in the criminal operation, or which makes more difficult

the consummation of the crime, or (ii) a decision to postpone the criminal conduct until another time or to substitute another victim or another but similar objective.

COMMENT

Source: This section follows the Massachusetts Criminal Code, chapter 263 §49, which, in turn, is based upon the New York Penal Law §34.45 and the Federal Criminal Code §1005.

Current Maine Law: Subsection 1 states a principle of common law which has not, however, apparantly been expressed in a Maine court opinion or statute. The remainder of this section has no counterpart in existing law.

The Draft: The major purpose of this section is to provide a limited defense to persons whose conduct, while criminal, has not yet brought about substantive harm, provided that they take effective steps to prevent that harm.