STATE OF MAINE

Commission to Prepare a Revision of the Criminal Laws

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August 2, 1972

MEMORANDUM

TO: Sub-committee C; the Commission
FROM: Sanford J. Fox

1. Enclosed please find drafts of the first five sections of Chapter 11 of Title D1 for discussion at our meeting in Augusta on August 10, 1972.

2. The provisions of section 3 involve modifications to sections of chapter 31 which has already been before sub-committee A. Specifically, where chapter 31 refers to felony or misdemeanor, class A,B,C, or D crime will have to be substituted, if section 3 of chapter 11 is approved.

3. A propos of the discussion concerning merger which took place at the meeting of sub-committee B on July 20, 1972, the attention of members of that subcommittee is called to Title D3, chapter 31, section 5,D,2 which is on page 3-10, dated June 16, 1972.

4. Also enclosed is a letter from Mrs. Clara Flaherty Wass to Jon Lund which he has asked to have circulated to the Commission.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 1. Title; Effective Date; Severability

1. Title 17 of the Revised Statutes Annotated shall be known, and may be cited as the Maine Criminal Code.

2. This Code shall become effective one year after the date of its enactment, and it shall apply only to offenses committed subsequent to its effective date. Prosecution for offenses committed prior to the effective date shall be governed by the prior law which is continued in effect for that purpose as if this Code were not in force; provided, however, that in any such prosecution the court may, with the consent of the defendant, impose sentence under the provisions of this Code. For purposes of this section, an offense was committed subsequent to the effective date if all of the elements of the offense occurred on or after that date.

3. If any provision or clause of this Code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

COMMENT

Source: This section is constructed from provisions in the Massachusetts Criminal Code chapter 263 section 1, and the New Hampshire Criminal Code chapter 625 section 2.

Current Maine Law: There are no counter-part provisions of this section in the present Maine law.

The Draft: This section provides a title for the new criminal laws. The gap between enactment and effective date specified in subsection 2 is designed to provide for a period of familiarization on the part of those who will have administrative and enforcement responsibilities under the Code. The period of one year may or may not be optimum, depending on a further assessment of the number of people and organizations to be directly affected and of their abilities and capacities to absorb the sorts of changes contained in the code. The first sentence of subsection two, is therefore tentative. The remainder of that subsection avoids an ex post facto application of the Code, offering, however, the new sentencing provisions whenever the court and the convicted person agree to accept them, regardless of whether the offense was committed prior to the effective date of the Code.

In view of the complexity and size of the Code as a whole, subsection three provides against a single successful challange to it bringing down the whole Code.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 2. All Offenses Defined by Statute; Civil Actions

1. No conduct constitutes an offense unless it is prohibited by this Code, by any statute outside this Code, or by any rule or regulation authorized by and lawfully adopted under a statute.

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

COMMENT

Source: The terminology of this section is taken primarily from the Massachusetts Criminal Code chapter 263 section 6(a), and the New Hampshire Criminal Code chapter 625 section 5.

Current Maine Law: At the present time, the courts of Maine have the power to punish conduct that is not expressly defined as criminal by an enactment of the legislature. Title 15 section 1741 now provides that when a person has been convicted of an offense for which there is no punishment provided by the legislatute, the court may impose a one year term in prison or a fine of $500. Thus, although there was no specific statute on the subject, it has been held to be a crime to burn a body in the cellar furnace. State v. Bradbury, 136 Me. 347, 9 A.2d 657 (1939).

There is no provision in current Maine law of the sort contained in subsection 2.

The Draft: This section would vest in the legislature the exclusive power to define what is a criminal offense. It would conform Maine law to all of the recent recodifications which

have abolished common law crimes (all save New Mexico which expressly retained them). The case for going to a strictly statutory source of criminal law is almost entirely a matter of providing greater certainty to the law, for the provisions of a criminal code - even when they resort to relatively vague or even common law phrases - constitute a more clear pronouncement of what must not be done than a system which relies on judges deciding what ought not to have been done in the past. It should also be noted that to the extent that resort to judge-made common law crimes developed largely at a time when the legislature sat so infrequently, that there was little alternative to this system of law-making, the raison d'etre has disappeared. But perhaps the most important consideration in support of subsection 1 is that it lends credence to the ideal that we have a rule of laws and not of men.

The reference to rules and regulations in subsection 1 is in order to validate statutes such as section 203 of Title 6 which provides a criminal penalty for violation of regulations adopted pursuant to statutes governing aeronautics.

Subsection 2 is included to insure that there is no implied repeal or modification of civil law relating to rights and duties arising out of conduct which also happens to be within the scope of the Code.

August 1, 1972

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 3. Classification of Crimes; Civil Offenses

1. A crime is conduct which is prohibited by this Code, or by any statute outside this Code, including any rule or regulation authorized by and lawfully adopted under a statute, provided that the penalty for violation of such a statute, rule or regulation includes a term of imprisonment. A civil offense is conduct which is prohibited by any statute outside this Code, including any rule or regulation authorized by and lawfully adopted under such a statute, which provides as a penalty for engaging in such conduct a fine, forfeiture, penalty or other sanction that does not include a term of imprisonment. Civil offenses are enforceable by the Attorney General in a civil action to recover the amount of the penalty or to secure the forfeiture.

2. Crimes are classified as class A, B, C, or D crimes by this Code, or in a statute other than this Code enacted subsequent thereto, or pursuant to the provisions of subsection 3 in regard to statutes outside this Code enacted prior thereto.

3. A crime defined by a statute outside this Code is a class A crime if the statute authorizes a sentence of imprisonment for a term in excess of twenty years or for life; it is a class B crime if the statute authorizes a sentence for a term in excess of five years but not in excess of twenty years; it is a class C crime if the statute authorizes a sentence of imprisonment for a term in excess of one year, but not in excess of five years; it is a class D crime if the statute authorizes a term of imprisonment not in excess of one year.

COMMENT

Source: The classification of offenses into distinct categories is common to criminal law codifications. The content of the classifications made in this section is, however, novel.

Current Maine Law: Criminal offenses in Maine are now sorted into felonies and misdemeanors. There may be legal consequences to whether an offense is a felony or a misdemeanor, e.g., a conspiracy offense is merged in the commission of the crime which was the object of the conspiracy if the latter is a misdemeanor, but not if it is a felony. State v. Parento, 135 Me. 353, 197 A. 156 (1938); State v. Mayberry, 48 Me. 218 (1859).

There are hundreds of Maine statutes which create criminal offenses punished only by a fine, e.g., Title 7 section 74 (administering certain substances to animals during a competition); Title 13 section 1222 (failure to maintain a burial lot); Title 13 section 2350 (soliciting membership in an unlicensed society).

The Draft: The purpose of any classification provision is to provide a means for legislative grading of criminal offenses that will express some proportionality between the seriousness of the offense and the seriousness of the penalty. In the absence of such legislative judgments, the criminal law would become almost entirely a utilitarian instrument for accomplishing deterrence, reformation or retribution. That is, a court would be free to sentence a traffic offender to life imprisonment in order to deter the commission of traffic offenses (probably the most frequently committed crime); a first-time petty thief could draw twenty years if a court thought it might take that long to reform the thievery out of him; and one convicted of negligent automobile homicide could be punished equally with the wilful murderer in order to atone for the loss of human life.

The present criminal law, of course, evinces no such scheme of injustice. The trouble is that the legislative judgments that have been made simply defy rational explanation. There can be found in the Maine statutes, for example, maximum imprisonment penalties of 30 days, 60 days, 2 months, three months, 90 days, 4 months, 6 months and 11 months. Such refined distinctions cannot represent decisions about the relative seriousness of offenses; rather, they are ad hoc judgments made in the absence of some over-all plan. The function of this section is to provide such a plan.

Initially, this section needs to address itself to the question of how many classes there ought to be. Obviously, murder needs to be distinguished from simple theft. But the legislative judgment must operate in the absence of knowledge of the particular circumstances in which offenses are committed, and in this context, is robbery more or less serious than rape? is bribery more or less serious than perjury? Where distinctions cannot be defended on the basis of a commonly-held scale of values, the law ought not to make distinctions. This section proposes that no more than four distinctions can rationally be made. The proposal is tentative, however, for an the substantive definitions of offenses are worked out, the Commissiom may find the need for more or fewer classes. My own judgment is that many of the recent codifications have slipped far back in their effort to support a large number of legislatively determined classes. New York, for example, has no fewer than 9; the Michigan draft has 8; Massachusetts has 7; the Federal code has 6. New Hampshire, however, hasmurder plus four classes of offenses.

A similar problem of classification is confronted by the draft's abolition of the distinction between felonies and misdemeanors. In this regard, the relevant commentary to the proposed Federal Criminal

Code is called to the attention of the Commission. In the Working Papers, volume II, p. 1302, it is noted:

> The proposed definitions suggest the continued use of the terms felony and misdemeanor. There would seem little positive advantage in abandoning a terminology which is so familiar and which is still being preserved in all other modern Code revisions in this country. England, interestingly, has just abolished the distinction, for reasons which are not altogether clear.

There is, however, positive advantage and reason that can be made clear. The first advantage lies in the policy of recognizing that the distinctions made by the legislature among offenses is often a matter of degree and often partly arbitrary. This is especially true in regard to the distinction between the least serious felony and the most serious misdemeanor. If more neutral terms were to be used, the general perception that these are differences of degree and not of kind, could be supported and not undermined. There is a further advantage in the flexibility that can be gained by abandoning the traditional words. That is, in the oft-occurring circumstance where the course of wisdom dictates that a felon be accorded something less than the maximum authorized penalty, the decision-maker, be he a judge or a corrections administrator, would not be handicapped by the perjorative characterization that had been laid on the person before him. Since there is such a large amount of discretion to be exercised in the administration of the criminal law, the divestiture of emotion-laden words presents the opportunity for a substantial gain in objectivity. Finally, to any person who sees the need for widespread reform of the criminal justice system, every opportunity for a new start somewhere needs to be grasped.

The other major innovation contained in this section is the exclusion from the criminal law of prohibited conduct that is so minimally serious that it is to be punished only by a fine. Regulation that can be accomplished by the exaction of a monetary pnnalty is beyond the proper scope of the criminal law, for there are collateral consequences to invoking the criminal law system that are both unnecessary and undesirable in such cases. The stigma of criminality is usually quite inappropriate for the malum prohibitum offenses that are at issue. To the extent that there is no longer anything to be avoided in becoming a person convicted of crime, there is a loss of deterrence which ought to be retrieved. Criminal cases are also more expensive, in terms of time as well as money, for all parties concerned. Delays in the processing of cases involving serious anti-social conduct may also be a negative result of retaining what are essentially civil typeeregulations in the criminal justice system. What are proposed here as "civil offenses" which are enforced in civil suits, are usually called "violations" or "infractions" in other criminal law recodifications. In the Massachusetts document, for example, there is a "violation" which is declared to be an "offense" and not a "crime." These "violations" are punishable only by fines, and it is further provided that "A violation does not constitute a crime and conviction thereof shall not give rise to any legal disability or disadvantage based on conviction of a crime." See Massachusetts Criminal Code, chapter 263 section 4. In such a scheme there are far more loses than gains in retaining the "fine only" offenses within the criminal system.

August 1, 1972

August 10, 1972 meeting, unfinished. See October 12, 1972 meeting.

TITLE 01 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 4. Proof; Affirmative Defenses

1. No person may be convicted of a crime unless each element of the crime is proved beyond a reasonable doubt. Although the existence of jurisdiction or venue is not an element of the crime, it shall be proved by the prosecution beyond a reasonable doubt.

2. Subsection 1 does not require negating a defense

A. by allegation in the indictment or information, or

B. by proof at trial, unless the issue is in the case as a result of evidence admitted at the trial which is sufficient to raise a reasonable doubt on the issue.

3. Subsection 1 does not apply to any defense which a statute explicitly designates as an "affirmative defense." Defenses so designated must be proved by the defendant by a preponderance of evidence.

COMMENT

Source: This section is patterned on the Massachusetts Criminal Code chapter 263 section 7.

Current Maine Law: The rule of proof beyond a reasonable doubt is a constitutional requirement. In re Winship, 397 U.S. 358 (1970). Subsection 2 states a commonly accepted rule of evidence, while subsection 3 introduces a new category of defenses.

The Draft: This section accords recognition to the fundamental principle that guilt must be proved beyond a reasonable doubt. Subsections 2 and 3 set up the framework on which later provisions of the Code will operate.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 5. Application to Crimes Outside the Code

The provisions of this Title are applicable to crimes defined outside this Code, unless the context of the statute clearly requires otherwise.

COMMENT

Source: This section follows the New Hampshire Criminal Code section 625:7.

Current Maine Law: There is no statute of this sort in the Maine law at the present time. It is likely, however, that the present law of criminal insanity, rules relating to intoxication, mistake, and otherissues which will be covered in this Title, currently govern criminal cases no matter where the particular crime is defined.

The Draft: This section makes the necessary connection between the general rules of criminal law which are to be codified in this Title, and thw whole of the criminal law of the state.

Addison, Maine,
July 19, 1972.

Representative Jon R. Lund,
Augusta, Maine.
Dear Mr. Lund;

I am inclosing the clipping to which I refer in this letter. I agree with Governor Curtis that the State's Criminal Law's do need revising, but I doubt very much that he and I would agree as to how they should be changed.
I wonder what the New Attitude of Society is toward Crime and Punishment? The members of society, that I have talked to in this and surrounding towns are horrified when they learn that all the Law gives for punishment in the State of Maine for intentionally murdering another human being is only 11 years.
The case I am referring to happened in Columbia Falls, Maine in September of 1969. This person hitch-hiking across country to Canada -- running from the Law at the time- broke into a home on the outskirts of town, stole some things, was there when the man who owned the place came home from work, as my brother entered his own home he was killed with one of his own guns. The intruder than set the house on fire and left. This person was caught in Canada later and brought to trial-and wouldn't have been found guilty, but he made a confession when he was caught, and the Judge allowed it to be used as evidence. With all these counts against him-Breaking and entering, Larceny, Arson and Murder-they said all he could be tried on was murder-that that meant the rest of his life-time etc. He was found guilty of Murder, the Judge sentenced him to Thomaston for the rest of his life-time-until he drew his last breath and during the next ten minutes I find out from the prosecuting attorney, that the rest of his life-time amounts to eleven years. Why?? Put yourself into the place of the families of these murdered people, if you can. Can you imagine how they feel? I realize it is supposed to be eleven years with good behavior, but that doesn't help in the slightest-he could still be out free in eleven years.
Until June of 1969 the Law gave anyone convicted of murder 22 years, and I thought even that was not enough, but at that it is much more sensible than eleven. I can't imagine anyone being in favor of cutting that law in half than or at any other time.
Another thing I am very much against-why do they say it is for the rest of a person's life-time and until he draws his last breath etc. when they don't really mean that. Why isn't the Law set at a certain number of years-I would suggest 99, or the rest of a person's life-time, without Parole. I believe if the laws were harsher in the State of Maine there wouldn't be so much of that type of thing going on. Can you and your committee do anything to help? Anything you could do would be greatly appreciated by the family of this murdered man, and I know there are many others in the State who feel as strongly as I do about this whose lives have been affected by the murder of relatives, loved ones and friends.

Very truly yours,

Clara Flaherty Haas
(Mrs Leander Haas)

STATE OF MAINE

Commission to Prepare a Revision of the Criminal Laws

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August 21, 1972

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MEMORANDUM

TO: Subcommittee A; the Commission; Consultants

FROM: Sanford J. Fox

Enclosed please find sections one through six of chapter 34. This chapter incorporates the policy decisions reached at our last meeting on July 21, 1972. In addition, it is predicated on a classification of offenses without regard to calling them felonies or misdemeanors. This classification issue is presently before the subcommittee dealing with General Provisions. You will no doubt note that parts of Chapter 31, General Sentencing Provisions, which is already before you, assumes the felony/misdemeanor classification. These will be redrafted if the new classification is adopted. The number of offenses, now set at four in section one, is also tentative since as the subcommittee on Substantive Offenses proceeds with the task of defining offenses and distinguishing them from each other in terms of whether different sentencing limits are called for, they can recommend to the Commission the exact number that seems to be needed.

There are, in other words, a number of important assumptions made in the enclosed material, but no decision concerning them will be on the agenda of the September 7th meeting. The central concerns of that meeting will be with the allocation of authority between courts and the Department of Mental Health and Corrections; the time limits set for each offense; the "parole component" concept; and the role of county institutions in the scheme of the chapter (see section 6).

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 1. Maximum Terms

1. A person who has been convicted of a crime may be committed for an indefinite period to the custody of the Department of Mental Health and Corrections as follows:

A. In the case of a class A crime, the court shall set a maximum period of committment not to exceed thirty years.

B. In the case of a class B crime, the court shall set a maximum period not to exceed ten years.

C. In the case of a class C crime, the court shall set a maximum period not to exceed five years.

D. In the case of a class D crime, the court shall set a maximum period not to exceed one year.

2. The further disposition of such a person shall be pursuant to the provisions of section 5.

COMMENT

Source: Elements of this section may be found in the Federal Criminal Code §3202(1).

Current Maine Law: In regard to the maximum periods for which imprisonment is now authorized, the Maine statutes cover a broad range, from ten days, to any term of years, to life. In all, there are at least two dozen different maximum terms in the laws.

In addition, several of the statutes provide for minimum terms of imprisonment, e.g., Title 17 §1951 (indecent liberties; not less than one year); Title 17 §2657 (attempt to murder; not less than one year); Title 1 §452 (destruction of state documents; not less than one year); Title 7 §1406 (illegal transportation of poultry; not less than thirty days).

Title 17 §2651 provides a mandatory punishment of life imprisonment for murder, although parole eligibility occurs in approximately eleven years.

In some instances, Maine law permits the sentencing court to designate the specific institution in which the period of incarcer-

ation is to be served, e.g., Title 34 §853 (Women's Correctional Center); Title 34 §802 (Men's Correctional Center). Sentences to these reformatories is for an indeterminate period not to exceed three years. The court also has a choice of the state prison or a county jail.

The Draft: This section is significant for its exclusions as well as for its positive content. No mention is made of minimum terms, and it is intended that there be none in the sentencing system. The court is given authority only to set a maximum at any point up to that specified in this section.

Similarly, this section contains no authority for the court to order that the Department of Mental Health and Corrections use a particular institution for an offender. The sentence can only be that the offender be placed in the legal custody of the Department for an indefinite period not to exceed the time set by the court at the time of sentencing. As later sections of this chapter provide, the Department is given discretion to determine which institution is to be used, or whether the offender will be placed in some non-institutional program. Two sorts of limitations are placed on the Department's discretion, in addition to the time limit imposed by the sentence. Parts of this chapter will require the Department to follow designated procedural regularities in transferring offenders from one program to another, especially as those moves impose greater restrictions and more severe conditions. There would be grave doubts about the constitutionality of administrative discretion which could be exercised without regard to considerations of procedural due process. The second limitation on the Department's authority will be the provision for a "parole component" or a period during which the offender is under Department supervision outside of an institution; that is, no person will be kept in an institution for the entire period of the court designated maximum term, he must be introduced back into the community before he is released from the Department's custody. Subject to these limitations, the nature of the offender's correctional experience, where it occurs, and with whom, are entirely a matter for the Department to decide.

The law provides for maximum periods because an essential element of criminal justice is some sense of proportionality between the seriousness of offenses and the deprivations that are ordered against those who commit them. Completely indeterminate sentences create too large a

potential for abuse. The maxima are set in the statute rather than by those who administer the law since there are involved here questions of the relative seriousness of offenses as viewed in the context of the whole of the law, and judicial as well as clinical expertise lies more in judgments about particular cases than it does in making decisions from a more removed perspective.

But legislative judgments concerning the gravity of offenses can only be made in a general way, without efforts at great refinement that have produced the hodge-podge of different sentencing periods that now characterizes the statutes. The number of classes of crimes into which all offenses will be put, is therefore organized on a rule of parsimony. Only four classes are now provided, although the subcommittee on General Provisions has not finally decided whether to recommend this or a larger number, or whether it will retain the characterization of crimes as felonies and misdemeanors. It is prepared, in any event, to defer to the experience of the subcommittee on Substantive Offenses in determining whether there is a need for more than four classes. It is likely that if a fifth is to be added, it will be at the lower end of the scale, carrying a maximum of six months.

At the more serious end, this section is designed to reflect the Maine experience that extremely long periods of incarceration are seldom called for. The longest maximum for the most serious crimes is thirty years, the same period that is provided for the class A felony under §3201 of the Federal Criminal Code. For treason or intentional murder, however, §3601 authorizes a life term; it should be noted that a federal prisoner sentenced for life may become eligible for parole in ten years under this same section. Moreover, the significance of §3601 is that it is being proposed to the Congress as an alternative to the present federal capital punishment. The Massachusetts proposed code includes a maximum for its class A felony of life, or any term of years not to exceed thirty years. Ch. 264 §9.

For two reasons, the draft section does not use the phrase "life imprisonment" or some equivilent. Central is the fact that it never means what it says; the possibility of parole always reduces the sentence to a term of years. As a general rule, it is a regretable thing for the law to recite untruths, misleading some and promoting cynicism on the part of others. Second, to the extent that such words

do convey an intention to confine the offender for the rest of his life, his post-conviction experiences are stamped with a sense of hopelessness and a label of incorrigibility which might severely impede the efforts officially undertaken to restore his will and capacity for good behavior.

As matter of public safety, it will rarely be necessary to invoke the maximum period provided by this section in order to get the offender to a "burned out" status in which he is no longer a social threat. When the upper reaches of these periods is called for, the following section provides the basis for invoking them.

TITLE D? THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 2. Upper-Range Commitments

1. The maximum term for a crime shall not be set at more than twenty years for a class A crime, seven years for a class B crime, three years for a class C crime, or six months for a class D crime unless, having regard for the nature and circumstances of the offense and the history and character of the defendant, the court is of the opinion that a term in excess of these limits is required for the protection of the public from further criminal conduct of the convicted person.

2. The court shall not impose sentence under this section unless there has been a pre-sentence investigation pursuant to the provisions of Rule 32(c) of the Maine Rules of Criminal Procedure.

3. If a person is committed under the authority of this section, the court shall set forth in detail its reasons for doing so.

COMMENT

Source: This section is based upon the Federal Criminal Code §3202(1) and the Massachusetts Criminal Code ch. 264 §9(b).

Current Maine Law: The generally applicable law for enhancing penalties in certain cases is the recidivist statute in Title 15 §1742. This provides a penalty of "any term of years" for any person convicted of a crime punishable by sentence to the state prison who had previously been sentenced to the state prison. The prior conviction must, however, be indicted and proved separately from "the current principal offense." See State v. McClay, 146 Me. 104, 78 A.2d 347 (1951). There must be proof beyond a reasonable doubt both of the prior convictions and that the person then before the court is the same person who had been earlier convicted. State v. Mottram, 155 Me. 394, 156 A.2d 383 (1960); State v. Beaudoin, 131 Me. 31, 158 A. 863 (1932). The constitutionality of this statute has been often upheld. See e.g., Mottram v. Murch, 330 F.Supp. 51 (D.Me. 1971); Stubbs v. State, 243 A.2d 57 (Me. 1968).

In addition to Title 15 §1742, there are numerous other statutes which provide for a greater penalty upon second and subsequent conviction

for the same offense. See e.g., Title 29 §900 (unconsented to use of motor vehicle); Title 20 §1014 (failure of parents to disinfect children for school); Title 23 §3253 (wilful violation of law relating to drainage).

The Draft: This section represents a legislative judgment that although the penalties provided in section one are deemed appropriate for the offenses which are placed in each class, some guidelines are called for when the upper reaches of those penalties are contemplated. On this basis, the provisions of this section do not make for an increased or enhanced penalty; they merely provide the framework for the exercise of discretion contained in section one. The distinction between enhanced penalties and the exercise of sentencing discretion according to a statutory standard is important in regard to the procedures that must be followed. If increased penalties were provided, it is probable that the facts upon which the increase becomes possible would have to be the subject of an indictment and the formalities of proof beyond a reasonable doubt, at least in regard to any prior convictions that would serve to support the increase. See State v. McClay, 146 Me. 104, 78 A.2d 347 (1951). When, however, the legislature identifies the evidence on which sentencing discretion is to be exercised greater procedural flexibility is possible. This is, at least, the opportunity for distinction which has been extended by the Supreme Judicial Court and which this section proposes to accept.

Since the upper reaches of the section one limits are only rarely used, the burden placed on investigative resources by the requirement of subsection two is not substantial. The gain, on the other hand, in terms of informed judgment when a lengthy sentence is in the offing, can be quite significant. The requirments of disclosure and opportunity for comment by the offender or his counsel contained in Rule 32(c) import considerations of fairness and integrity.

TITLE 03 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 3. Parole Components

1. The maximum period set by the court under section one or two shall automatically include a parole component. A parole component is a period of time when a convicted person is in the custody of and under the supervision of the Department, but is not confined in an institution. The parole component may be served at any time when the person is in the custody of the Department, and shall be administered in accordance with the provisions of chapter 36.

2. When the maximum period set by the court is nine years or less, the parole component shall be one-third of such maximum; when the maximum is between nine and fifteen years, it shall be three years; when the maximum is more than fifteen years, it shall be five years.

COMMENT

Source: This section is based largely on the Federal Criminal Code §3201(2).

Current Maine Law: There is no present requirement that persons incarcerated in a penal institution be released on parole. When a person may be released depends on what institution he is in, what offense he has been convicted of, and whether he has kept "good behavior" during the time he has been imprisoned. For prisoners at the State Prison and at the Women's Correctional Center eligibility usually occurs at the expiration of the minimum term, less deductions for good behavior. Title 34 §1672(1). Title 34 §705 contains the rules concerning these deductions:

> Each convict whose record of conduct shows that he has faithfully observed all the rules and requirements of the State prison, shall be entitled to a deduction of 7 days a month from the minimum term of his sentence, commencing on the first day of his arrival at the State Prison. An additional 2 days a month may be deducted from the sentence of those convicts who are assigned duties outside the prison walls or security system, or

> those convicts within the prison walls who are assigned to work deemed by the Warden of the State Prison to be of sufficient importance and responsibility to warrant such deduction. Any portion of the time deducted from the sentence of any convict for good behavior may be withdrawn by the Warden of the State Prison for the infraction of any rule of the State Prison, for any misconduct or for the violation of any law of the State. Such withdrawal of good time may be made at the discretion of the Warden, who may restore any portion thereof if the convict's later conduct and outstanding effort warrant such restoration.

In some instances, a prisoner may not be released on parole until he has served half of his sentence, less good behavior deductions. This requirement applies to persons who have been convicted of indecent liberties, rape, statutory rape, and any who were previously convicted of these offenses. Title 34 §1672. For persons serving a mandatory life sentence (murder) parole may not be granted prior to fifteen years, less good behavior deductions. This same rule applies to any prisoner who has been sentenced to a minimum term of fifteen years or more. Title 34 §1672(3)(4).

For prisoners at the Men's Correctional Center, on the other hand, Title 34 §1673 withholds parole until "it appears to the superintendent that the inmate has reformed" and "some suitable employment or situation has been secured for him in advance."

It appears that prisoners from the county jails cannot be released on parole and have, therefore, no supervision when they are returned to society. They may, however, receive deductions from their sentences on terms similar to those quoted above. See Title 34 §952.

The Draft: This section works several major changes in existing law. It promulgates the novel requirement that no person who has been committed to the Department may be released from its custody without being supervised in his course of conduct outside of an institution. This serves to reverse the present situation which permits the most incorrigible prisoners to be released back into society without any supervision at all, while those who have responded most favorably to a prison program are given the longest period of supervision following their release. The policy of this section is based on the view that parole is not a reward for good behavior in the artificial atmosphere of a penal institution, but is rather a means for insuring that all prisoners who must be returned to society are accorded the maximum assistance in establishing themselves in law-abiding ways of life. Mandatory parole, on such a policy, is found in both the Federal and

Massachusetts proposals.

This section differs from these drafts, however, in conceiving of the parole component in a less restricted way than as a period of community supervision following the period of imprisonment. Under this section, the mandatory period of community supervision may occur at any time during the period when the offender is in the custody of the Department. That is, the Department may, in appropriate cases, determine that the initial correctinns experience should be in a community setting, rather than in an institution. The central innovation of the sentencing system of this Code is to provide the Department with the authority to determine whether persons sentenced to their custody shall serve any of the sentence in a penal institution. A separate chapter of the Sentencing System title will be devoted to how the Department administers this discretion, including general standards for reaching decisions and procedural requirements for the decision-making process.

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 4. Transmittal of Statements to the Department of Mental Health and Corrections

After sentence has been imposed under section one or section two, the judge, the person representing the state, the attorney representing the defendant, and any law enforcement agency which investigated the case or participated in the prosecution, may file with the clerk for transmittal to the Department along with the documents otherwise forwarded, a brief statement of their views respecting the person convicted and of the crime. Upon request, each of these statements shall be made available to such persons or agencies.

COMMENT

Source: Similar provisions are found in the Massachusetts Criminal Code ch. 264 §9(c).

Current Maine Law: There is no such statute presently in force.

The Draft: The purpose of this section is to provide the Department of Mental Health and Corrections the maximum amount of useful information concerning the person who is committed to it. The papers that are ordinarily transmitted to the Department rarely include anything of the experience and evaluations of those who have been most closely connected with the case. This section seeks to encourage these persons to participate in the corrections process, at least by communicating with the corrections administration at the outset.

The draft is purposefully vague on the timing and means for transmitting these statements so as not to change local practices in regard to getting the record of a case to the Department. There are also no specifics concerning how and when the defendant's lawyer can get to see the statements filed by the county attorney, etc. It is expected that each court can reach a satisfactory means of achieving the requirement of availability.

It should be noted that this section is permissive, and does not require that anyone file a statement.

TITLE D3 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 5. Calculation of Period of Commitment

1. The sentence of any person committed to the custodyof the Department of Mental Health and Corrections shall commence to run on the date on which such person is received into the custody of the Department.

2. When a person sentenced to the custody of the Department has previously been detained in any state or local institution for the conduct for which such sentence is imposed, such period of detention shall be deducted from the maximum term of such sentence. The officer having custody of the offender shall furnish the court, at the time of sentence, a statement showing the length of any such detention, and the statement shall be attached to the official records of the commitment.

COMMENT

Source: This section is drawn from MRSA Title 34 §702 and the Massachusetts Criminal Code ch. 264 §14(a). A similar provision is in the Federal Criminal Code §3205(1).

Current Maine Law: Title 34 §702 provides: "No convict shall be discharged from the State Prison until he has served the full term for which he was sentenced, including the day on which he was received into it,..." There does not appear to be any other statutory provision governing the commencement of imprisonment periods in other penal institutions. Section 702 means that the sentence starts on the first day of actual incarceration . State v. Couture, 156 Me. 231, 163 A.2d 646 (1960).

The Draft: This section provides a means for calculating when the period of commitment to the Department commences. As far as this section is concerned, the commitment begins when the offender is delivered into the custody of any employee of the Department, although Departmental regulations may want to specify which employee this is to b

TITLE 03 THE SENTENCING SYSTEM

Chapter 34 Commitments to the Department of Mental Health and Corrections

Section 6. Authority of the Department of Mental Health and Corrections

1. Upon receiving a person committed to its custody under section one or section two, the Department shall place the person in a classification program the aim of which is to determine which institution or program available to the Department is most likely to insure the lawful conduct of such person upon his release from the custody of the Department.

2. The Department shall, by regulation, provide for the classification process to include:

A. An opportunity for the person being classified to communicate, orally or in writing, concerning the program he is to be placed in; and

B. A written statement from the Department to such person setting forth the reasons why he is being placed in a particular program.

3. Upon completion of the classification process, the Department may place a person committed to its custody as follows:

A. In a state institution, pursuant to the provisions of Chapter 37; or

B. In a county jail, pursuant to the provisions of Chapter 38; or

C. In a parole program pursuant to the provisions of Chapter 36.

4. Transfers from one program to another shall be made pursuant to the probisions of Chapter 39.

COMMENT

Source: This section has no counterpart in other Codes.

Current Maine Law: At the present time, courts commit convicted persons directly to a particular institution. This may be either a state facility, or a county jail. There is also statutory authority for transfers of prisoners, e.g., Title 34 §705 (from state prison to Men's Correctional Center); Title 34 §808A (from Men's Correctinnal Center to state prison).

There appears to be no statute concerning classification.

The Draft: This section serves several important purposes. It provides a statutory mandate for classification, an element that has long been recognized as essential to any corrections program or system. Without it, corrections is merely a matter of moving bodies in and out of vacancies where they happen to occur. The Department is not constrained by this or any other section to classify offenders at any particular place or places; it is intended that the Department be able to call upon the full range of institutions and resources under its control in reaching classification decisions.

The standard provided in subsection one is in recognition of the fact that virtually every person committed to the Department will be released back into society. In view of this, the Department is required by subsection one to bend its efforts to returning offenders at that time as more peaceful and honest citizens. Sometimes corrections goals are stated more ambitiously - in terms of personality change, productivity, usefulness, etc. Regardless of how well the corrections process may function in these regards, it will surely be enough if the goal set by subsection one is reached.

Subsection two seeks to make the classification process an integral part of the effort to achieve the subsection one goal. To this end, the offender can be made to feel, at the very outset, that he has a stake in determining the nature of his experience with the Department. Much of prison unrest that is now being experienced is attributable by knowledgable persons to the near total absence of any such offender participation in the corrections process.

Subsection three is a table of contents for chapters which follow. At this point, it is important to note that the authority of the Department extends to assigning persons to the county institutions. Since, by virtue of section one, the sentencing court has no authority to identify a particular institution for a particular offender, that classification decision must be made outside of the court. Since the Department is required to set up and run a classification program, it makes sense for that program to include the possibility of using the county institutions. In other words, the intake of county facilities is to be a function lodged in the Department. What the implications are of this for influencing the nature of programs in those places is the subject of Chapter 38, although discussion in the subcommittee before that chapter is drafted would be useful.

September 14, 1972
September 21, 1972 meeting

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 1. Murder

1. A person is guilty of murder if:

A. He intentionally or knowingly causes the death of another human being; or

B. He recklessly causes the death of another human being under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or in immediate flight after committing or attemping to commit arson, burglary, robbery or any class A or class B crime against the person.

2. The sentence for murder shall be pursuant to the provisions of Chapter 34.

COMMENT

Source: This section is a modified version of the Model Penal Code §210.2.

Current Maine Law: Title 17 §2651 now provides: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." This is the common law definition of murder. Case law in Maine has generally followed the common law developments that have

given meaning to the definition. Thus, an intentional killing is the equivalent of express malice, and constitutes murder. State v. Wilbur, 278 A.2d 139 (Me. 1970). But there need not be a specific intent to kill. State v. Turmel, 148 Me. 1 (1952), quoting from State v. Knight, 43 Me. 11, 137 (18): "But in all cases where the unlawful killing is proved, and there is nothing in the circumstances of the case as proved, to explain, qualify or palliate the act, the law presumes it to have been done maliciously; and if the accused would reduce the crime below the degree of murder, the burden is upon him to rebut the inference of malice, which the law raises from the act of killing, by evidence in defense."

What the Maine statute calls "implied malice" arises "by law from any deliberate, cruel act, committed by one person against another, suddenly, without any, or without considerable provocation. State v. Neal, 37 Me. 468 , 470 (1854). Thus, a person who shoots another in the head, without any intention to kill him, is nonetheless guilty of murder. State v. Duguay, 158 Me. 61 (1962). This sort of murder is often described by the judges as arising from "the general malignancy and disregard of human life which proceed [s] from a heart void of social duty and fatally bent on mischief." State v. Merry, 136 Me. 243, 248 (1939). In the Merry case, the deceased had been killed by several blows to the head, one penetrating the skull, by an instrument such as a manner or a socket wrench.

Maine also follows the felony murder rule, which holds responsible all persons who are parties to the commission of a felony, during the course of which a homicide is committed. In such cases, guilt for murder attaches regardless of which of the parties actually committed the killing. "No principle of criminal law is more firmly established than this," wrote the Supreme Judicial Court in 1918, "that when two persons combine and conspire together for the common object of robbery and in pursuance of that object one of them does an act which causes the death of another both are regarded as principals and both may be convicted of murder. The State need neither allege nor prove that the respondent used the weapon with which the killing was done." State v. Priest, 117 Me. 223, 231 (1918).

The Draft: This section makes very little change in the existing law. Subsection 1A restates what would today in Maine be called express malice. The first part of subsection 1B covers the common law "depraved mind" sort of murder. It does so, however, with a focus on what the essential elements are, so that juries and others might more clearly understand that it is the person who disregards human life whom this section contemplates.

In most instances, there is the same taking of a calculated risk that human life will be forfeited when persons get together to commit serious offenses such as robbery, burglary or kidnapping. The person who sits at the wheel of the getaway car while his confederate enters the grocery store with a gun which to the driver's knowledge,

he is prepared to use, constitutes a sufficient threat to human life for the common law to be quite justified in holding him for murder. But the law would be going too far in placing into the same depraved classification the getaway man who had asked for and received assurance from his accomplice that there were no weapons present and that under no circumstances would bodily harm be offered. Under such circumstances, the liability for the underlying robbery would be unaffected by the precautions taken to preserve the safety of potential victims; but it would be to ignore real distinctions in the nature of the depravity and deviance presented to treat such a person as a murderer when the accomplice leaves the agreed to plan and commits a homicide. This section proposes to make the distinction, following the lead of the Model Penal Code. The means for doing this is the presumption which permits the accused person to demonstrate that he did not disregard risks to life by his involvement; and if he succeeds in persuading a jury that this is so, he cannot be held for a murder.

The approach of the federal criminal code is similar. Section 1601(c) first provides for murder liability committed in the course of designated felonies, but then goes on to provide that it is an affirmative defense that the defendant:

> (i) did not commit the homicidal act or in anyway solicit, command, induce, procure, counsel or aid the commission thereof; and
> (ii) was not armed with a firearm, destructive device, dangerous weapon or other weapon which under the circumstances indicated a readiness to inflict serious bodily injury; and
> (iii) reasonably believed that no other participant

was armed with such a weapon; and
(iv) reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

These federal provisions would produce results similar to those contemplated by this draft section. They are, however, more rigid in that it is not possible under the federal proposal for the defendant to bring to the jury's attention circumstances that are not specified in the law but which may well constitute an absence of the disregard for human life which is central to the defense concept underlying the federal draft. Rather than rely on legislatively designated examples of when this disregard is absent, the Maine draft provides the standard to which all assertions of an absence of murder liability must conform.

Subsection 2 of this draft is a reference to the sentencing provisions which will provide that in the case of murder, an individual may be committed for a maximum period of life. It is necessary for the murder sentence to exceed the limits otherwise available for sentencing, not only because life is the public interest that needs to be protected most strongly, but also because in the felony murder case, some inducement must be maintained for the felon to preserve the life of his victim.

September 15, 1972
September 21, 1972 meeting

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 2 Manslaughter

1. A person is guilty of manslaughter if he:

A. recklessly causes the death of another human being; or

B. causes the death of another human being under circumstances which would be murder, except that he causes the death under the influence of extreme emotional distrubance.

2. Manslaughter is a class B crime, except that if it occurs as the result of the reckless operation of a motor vehicle, it is a class C crime.

COMMENT

Source: This section is patterned on the New Hampshire Criminal Code, RSA 630.2. Similar provisions are in the Massachusetts Criminal Code, chapter 265 §3, and in the federal Criminal Code §1602.

Current Maine Law: The present manslaughter statute is RSA Title 17 §2551. It provides:

> Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, or being under the legal duty to care and provide for any child or other person, willfully fails or neglects to provide for such child or other person necessary food, clothing, treatment for the sick or other necessaries of life, thereby causing or hastening the death of such child or other person, or commits manslaughter as defined by the common law, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than

> 20 years, except that if there is a violation of Title 29, sections 1315 or 1316, no prosecution for manslaughter shall lie.

The two sections referred to in Section 2551 are reckless homicide in the operation of a motor vehicle (§1315), and motor vehicle homicide resulting from "violation of law" (§1316)

The common law definition of manslaughter is in State v. Pond, 125 Me. 453 (1926):

> Manslaughter is the unlawful killing of another without malice aforethought either express or implied, and may be either voluntary, as when the act is committed with a real desire and purpose to kill but in the heat of passion occasioned by sudden provocation; or involuntary, as when the death of another is caused unintentionally by some unlawful act not amounting to a felony nor likely to endanger life, or while doing some lawful act in an unlawful manner. At p. 455.

From this, it can be seen that the statute specifies voluntary manslaughter in the description of an unlawful killing "in the heat of passion, on sudden provocation," and refers to involuntary manslaughter when speaking of "manslaughter as defined by the common law."

Despite the fact that there is no requirement that the defendant act reasonably under the definition ov voluntary manslaughter, it is clear from general common law, and from the Maine case law, that such a qualification exists.

> It is sometimes stated that, in order to reduce an intentional killing to voluntary manslaughter, the provocation involved must by such as to cause a reasonable man to kill. . . . What is really meant by "reasonable provocation" is provocation which

> causes a reasonable man to lose his normal self-control; and although a reasonable man who has thus lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable. Therefore, one who reacts to the provocation by killing his provoker should not be builty of murder. But neither should he be guilty of not crime at all. So his conduct falls into the intermediate category of voluntary manslaughter.
>
> There has been a tendency for the law to jell concerning what conduct does or does not constitute a reasonable provocation for purposes of voluntary manslaughter. Thus it is often held that a reasonable man may be provoked into a passion when he (or a close relative) is hurt by violent physical blows, or is unlawfully arrested or discovers his spouse in the act of adultery; but that he is never provoked by mere words or by trespasses to his property. LaFave and Scott, Criminal Law 573-573 (1972)

See also State v. Park, 159 Me. 328 (1963): "At best for the respondent, he 'bumped into' the deceased and was angered by her calling him 'a queer.' There is not the slightest evidence that the physical contact was an offensive act by the deceased against the respondent. If the words of the deceased angered the respondent, he is faced with the plain rule of law that words alone do not constitute sufficient provocation to reduce homicide from murder to manslaughter." At p. 332.

It should also be observed that there are qualifications on when involuntary manslaughter is committed "unintentionally by some unlawful act not amounting to a felony nor likely to endanger life." The distinction appears in State v. Budge, 126 Me. 223 (1927). The court there noted that in order to show that a homicide amounted to this sort of involuntary manslaugher, the burden was on the state to prove that "if it resulted while in the performance of an unlawful

act and involuntarily, the unlawful act was malum in se, or, if malum prohibitum, that it was at least the proximate cause of the homicide." At pp. 226-226.

The doing of "some unlawful act in an unlawful manner" as will amount to involuntary manslaughter, refers to criminal or gross, or culpable, negligence which causes the death of another person. "Gross or culpable negligence in criminal law involves a reckless disregard for the lives or safety of others. It is negligence of a higher degree than that required to establish liability upon a mere civil issue." State v. Ela, 136 Me. 303, (1939). It has been held that this same higher degree of negligence is required even when the penal statute, in this case the prohibition against homicide while hunting, uses the unqualified words "negligently or carelessly." State v. Jones 152 Me. 188 (1956).

The Draft: This section changes Maine manslaughter law in several respects. There will be a provision among the General Principles portion of the code which will define "reckless" as requiring that the actor consciously advert to the risk he is taking and intentionally disregard it. Although the case law is now not clear on this point, it is generally the case that gross negligence, even though more than civil negligence, does not include such a requirement.

The reduction of murder to manslaughter under this section when there is extreme emotional distrubance goes beyond present law by permitting a finding of manslaughter whenever it is found that

extreme emotional disturbance is the underlying factor in the homicide. By excluding any requirement that there be an element of reasonable under such circumstances, common law restrictions on the mitigation of murder to manslaughter are eased. The effect of this provision is also to create an intermediate sort of responsibility. The cases falling within subsection 1.B would normally be those in which the evidence would not support a finding of insanity, but in which there is substantial evidence some mental abnormality at the time of the act. In State v. Park, 159 Me. 328 (1963) the defendant requested that the court find there to be such an intermediate zone of limited responsibility, but the court found that there was no such rule. The class of unlawful act manslaughter is eliminated.

September 15, 1972
September 21, 1972 meeting

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 3. Negligent Homicide

A person is guilty of negligent homicide if he negligently causes the death of another. Negligent homicide is a class D crime.

COMMENT

Source: This section is based on the federal criminal code §1603. The federal provision, and similar ones in other recent codifications, are taken from the Model Penal Code §210.4.

Current Maine Law: At the present time if a person commits a homicide with "gross or culpable" negligence, he will be guilty of manslaughter, if the homicide did not come about from the use of a motor vehicle, Title 17 §2551, or he will be guilty of "reckless homicide under Title 29 §1315 if it was through the operation of a vehicle.

The Draft: In the General Principles part of the code, there will be a definition of "negligently" which will approximate both the present Maine definition of culpable or gross negligence, and the meaning of "reckless" as it appears in Title 29 §1315. As thus defined, this section becomes an offense of lesser degree than the reckless homicide which the code will denominate as manslaughter. It will serve as a lesser offense to motor vehicle manslaughter

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 4. Causing or aiding Suicide

A person is guilty of causing or aiding suicide if he intentionally aids or solicits another to commit suicide, and the other commits or attempts suicide. Causing or aiding suicide is a class D crime.

COMMENT

Source: Similar provisions are in the New Hampshire Criminal Code §630:4.

Current Maine Law: There is no such offense under the present law.

The Draft: The importance of deterring the conduct described in this section justifies having such an offense. The participation of the victim in bringing about his own death does not make the defendant's conduct in inducing him to commit suicide free from fault.

that might be found under section 2 since this negligent homicide section is a less serious (class D) offense than is motor vehicle manslaughter under section 2 (class C).

August 22, 1972
Revision sent to Commission
September 15, 1972

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 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, whetheror 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 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 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. 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 his conduct 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 -- or 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 D crime is a class D crime.

COMMENT

This is a revision of the conspiracy section which was discussed at the meeting of the subcommittee on Substantive Offenses on July 20, 1972. In subsection two, the phrase "or could expect" has been deleted from the first line. In subsection tour, the phrase "other than a class A felon" has been deleted from the second line. What was subsection 6B has been deleted, with former subsection 6C now numbered 6B. In the present 6B, the phrase "his conduct" has been substituted for the phrase "a defense" in the last sentence.

Subsection 9A has been reworded to reflect the change, presently before the subcommittee on General Provisions, which would eliminate the felony/misdemeanor distinction and classify everything as either an A,B,C, or D crime. This rewording is tentative since no decision has yet been made concerning this change. It is important, however, for the subcommittee on Substantive Offenses to be aware that the General Provisions subcommittee is recommending that there be only four classes of crimes (regardless of whether the felony/misdemeanor distinction is retained or rejected), SUBJECT to the recommendation of the Substantive Offenses group on the question of whether four classes permits a sufficient differentiation among the substantive offenses it will be defining during the course of its work. It is, of course, too early at this point for the Substantive Offenses subcommittee to formulate a recommendation on this issue.

TITLE D2 SUBSTANTIVE OFFENSES

Chapter 21 Offenses of General Applicability

Section 2. Attempt

1. A personis guilty of criminal attempt if, acting with the kind of culpability required forthe 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 goes beyond mere preparation and 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 person is 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 D crime is a class D crime.

COMMENT

This is a revision of subsections one and four of the attempt section which was discussed at the meeting of the subcommittee on Substantive Offenses on July 20, 1972. At that time it was decided that the definition of "substantial step" in subsection one would change the present Maine law by permitting conduct to be condemned as an attempt which would now be considered merely preparation. In order to make clear that conduct as remote from the crime as preparation is not included in the present defintion, subsection one has been revised to make clear that mere preparation is still not punishable as an attempt.

The grading provisions of subsection four have also been revised. See the last paragraph on page 2-2R, dated August 22, 1972.

Chapter 11 Preliminary

Section 1. Title: Effective Date: Severability

1. Title 17 of the Revised Statutes Annotated shall be known, and may be cited as the Maine Criminal Code.

2. This Code shall become effective January 1, 1976, and it shall apply only to offenses committed subsequent to its effective date. Prosecution for offenses committed prior to the effective date shall be governed by the prior law which is continued in effect for that purpose as if this Code were not in force; provided, however, that in any such prosecution the court may, with the consent of the defendant, impose sentence under the provisions of the Code. For purposes of this section, an offense was committed subsequent to the effective date if all of the elements of the offense occurred on or after that date; an offense was not committed subsequent to the effective date if any element thereof occurred prior to that date.

3. If any provision or clause of this Code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

COMMENT

Subsection 2 has been revised to provide a specific effective date and to clarify, in the last clause, when an offense is deemed to have been committed prior to that date.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 2. All Offenses Defined by Statute: Civil Actions

1. No conduct constitutes an offense unless it is prohibited by this Code, by any statute outside this Code, including private acts, by any ordinance, or by any rule or regulation authorized by and lawfully adopted under a statute or ordinance.

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

COMMENT

Subsection 1 has been revised to authorize the definition of crimes by municipal ordinances and by regulations made under them. This subsection also now includes private acts.

TITLE D1 GENERAL PROVISIONS

Chapter 11 Preliminary

Section 3. Classification of Crimes: Civil Violations

1. A crime is conduct which is prohibited by this Code, or by any statute or private act outside this Code, including any rule or regulation authorized by an lawfully adopted under a statute, provided that the penalty for violation of such a statute, rule or regulation includes a term of imprisonment. A civil violation is conduct which is prohibited by any statute, private act, or ordinance outside this Code, including any rule or regulation authorized by and lawfully adopted under such a statute, act or ordinance which provides as a penalty for engaging in such conduct a fine, forfeiture, penalty or other sanction that does not include a term of imprisonment. Civil violations are enforceable by the Attorney General, his representative or any other appropriate public official, in a civil action to recover the amount of the penalty or to secure the forfeiture.

2. Crimes are classified as class A, B, C, or D crimes by this Code or by a statute outside of the Code which defines a crime.

COMMENT

Revisions made in this section are: (1) the term civil violation replaces civil offense; (2) mention is made of private acts and ordinances where appropriate in subsection 1; (3) civil violations are made enforceable by "the Attorney General, his representative, or any other appropriate official;" (4) subsection 2 has been simplified, and former subsection 3 deleted, to reflect that all of the statutes defining crimes will be classified by the Commission.