

STATE OF MAINE

Commission to Prepare a Revision of the Criminal Laws

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November 6, 1972

From: Sanford J. Fox
To: Subcommittee on Substantive Offenses, the
Commission, and Consultants

Enclosed please find drafts of all that this subcommittee has considered, plus new draft sections on Assault, Aggravated Assault, and Criminal Threatening. At our meeting on November 17, it would be useful to review all of this in preparation for the Commission meeting on December 1st.

The sections on murder and "felony-murder" have been revised according to the decisions reached at the last meeting of the subcommittee. The subcommittee on Sentencing will be recommending a provision governing the former which will require the court to commit a person convicted of murder to the Department of Mental Health and Corrections, and permit the court to set a maximum period for the commitment at either life, or some term of years which is not to exceed forty years. In addition, the court may fix a minimum period for the commitment which may not exceed either 15 years, or one half of the maximum term of years (if one has been set), whichever is shorter. Finally, the court will also have the option of ordering that the minimum period be served in a penal institution. The normal sentencing structure, to which these murder provisions are an exception, leaves up to the Department the decision of where a convicted person will serve his sentence - in an institutional or non-institutional program.

On November 17th, this subcommittee should consider whether these sentencing provisions are consistent with its conception of murder, and if not, whether changes in the definition or in the sentencing provisions are called for to resolve inconsistencies.

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November 17, 1972
Sent to Commission Nov. 6, 1972.
November 17, 1972 meeting

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, 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 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 8 of chapter 11.

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

November 17, 1972

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.

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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 the 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.

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November 17, 1972 meeting

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 class A or class B crime, whether as principal or accomplice, with the intent to cause the imminent commission of the crime, and under circumstances strongly corroborative of that intent, and the person solicited takes a substantial step toward commission of the crime.

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 of culpability, or other incapacity or defense.

4. Solicitation is an offense classified as one grade less serious than the classification of the crime solicited, except that solicitation to commit a class D crime is a class D crime.

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November 17, 1972 meeting

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 class A or class B crime, and that person, in fact, commits the crime contemplated, or a like or related class A or class B crime, employing the assistance so provided. The ready lawful availability from others of the goods 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 crime 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 crime is a class B crime. All other facilitation is a class D crime.

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November 17, 1972 meeting

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

November 17, 1972

Chapter 21 Section 5 cont.

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.

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 1. Murder

1. A person is guilty of murder if he causes the death of another intending to cause such death, or knowing that death will almost certainly result from his conduct.

2. The court or jury before which any person indicted for murder is tried may find him guilty of a violation of sections 2, 3, or 4.

3. Upon an indictment for murder, the defendant may plead guilty to murder or to any crime listed in subsection 2, and the plea may specify the sentence to the same extent as it may be fixed by the court upon conviction after a plea of not guilty. Any such plea must be accepted by the attorney for the state and approved by the court in open court before it shall become effective. If so accepted and approved, the defendant cannot be sentenced to a punishment more severe than that specified in the plea. If such plea is not accepted by the state and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. If such plea is deemed withdrawn, it may not be received in evidence in any criminal or civil action, or proceeding of any nature.

4. The sentence for murder shall be as authorized in chapter 34.

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 2. Facilitating Criminal Homicide

1. A person is guilty of facilitating criminal homicide, a class A crime, if, acting alone or with one or more other persons in the commission of, or an attempt to commit, or immediate flight after committing, or attempting to commit [any class A crime, or escape] he or another participant causes the death of a person.

2. It is an affirmative defense to prosecution under this section that the defendant:

A. did not commit the homicidal act or in any way solicit, command, induce, procure, counsel or aid the commission thereof; and

B. 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

C. reasonably believed that no other participant was armed with such a weapon; and

D. reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury.

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 3. 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 disturbance.
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.

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 4. Negligent Homicide

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

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 5. 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.

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 6. Assault

A person is guilty of assault, a class D crime, if he

1. intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another; or
2. causes, through criminal negligence, bodily injury to another with a dangerous weapon.

COMMENT

Source: This section follows the New Hampshire Criminal Code §631:1.

Current Maine Law: There are four sections of Title 17 which deal with this subject of assault, §§201, 201-A, 202 and 203:

201: Definitions

Whoever unlawfully attempts to strike, hit, touch or do any violence to another however small, in a wanton, willful, angry or insulting manner, having an intention and existing ability to do some violence to such person, is guilty of an assault. If such attempt is carried into effect, he is guilty of an assault and battery. Any person convicted of either offense, when it is not of a high and aggravated nature, shall be punished by a fine of not more than \$100 or by imprisonment for not more than 6 months, or by both. When the offense is of a high and aggravated nature, the person convicted of either offense shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 5 years, when no other punishment is prescribed.

November 17, 1972

Chapter 22 Section 6 (cont.)

201-A. Firearm

Whoever, if armed with a firearm, unlawfully attempts to strike, hit, touch or do any violence to another, however small, in a wanton, willful or angry or insulting manner having an intention and existing ability to do some violence to such person, is guilty of an armed assault. If such attempt is carried into effect, he is guilty of an armed assault and battery. Any person convicted of either offense shall be punished by imprisonment for not less than 2 nor more than 25 years. The imposition of execution of a sentence for a violation of this section shall not be suspended and probation shall not be granted.

202. Intent to Commit Felony

Whoever commits an assault with intent to commit a felony, which has not been otherwise described or for which no penalty has been provided, shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 5 years.

203. Intent to Commit Felony; Firearm

Whoever, if armed with a firearm, commits an assault with intent to commit a felony which has not been otherwise described or for which no penalty has been provided shall be punished by imprisonment for not less than 2 nor more than 25 years. The imposition or execution of such sentence shall not be suspended and probation shall not be granted.

These statutes encompass two common law crimes. As has been noted in *Williams v. State*, 276 A.2d 601, 603 (Me. 1971): "Under our statutes, as under the common law, assault and assault and battery are separate and distinct legal concepts and offenses but an assault is a necessarily included element of an assault and battery. It is sometimes said that an assault is an inchoate battery and that a battery is a consummation of an assault."

November 17, 1972

Chapter 22 Section 6 (cont 3)

Although it was traditional in Maine for the judge, and not the jury to determine whether the offense was simple or aggravated, see 19 Maine L. Rev. 372 - 379 (1967), this has been changed in response to decisions of the Supreme Court of the United States granting jury trial rights under the Fourteenth Amendment. See *State v. Ferris*, 249 A.2d 523 (Me. 1969.)

An assault may be committed even if the actor has no intention to complete a physical contact with the victim, provided there is an intention to create an apprehension of such a contact on the part of the victim, as where the actor takes the victim's property at gunpoint. See *State v. Cuccinello*, 152 Me. 431 (1957.) But there must at least be some existing ability to do harm. See *Stearns v. Sampson*, 59 Maine 568 (1871.)

It is not clear whether Maine would permit an assault and battery to be established on the basis of grossly negligent, but not intentional, conduct.

The Draft: This section does not include two elements of the present law on assault and battery, namely, an attempted battery or an intentional creation of apprehension on an impending battery. Both of these common law offenses are covered elsewhere in the Code (Attempts and Criminal Threats [to be drafted])

Taken with the next section in this chapter, the draft continues the present structure of having less serious and more serious offenses of the same sort. This section would be a lesser included offense of the next section, dealing with

November 17, 1972

Chapter 22 Section 6 (cont 4)

Aggravated Assaults. The present section identifies the least serious sorts of assaults as those committed with less than serious bodily injury as the object of the conduct, or when there is injury caused by the culpably negligent use of a dangerous weapon. The assault would fall into the next section, and be punished as a class B crime, if there is serious bodily injury contemplated, or the actor is aware (not simply negligent) that injury may result from his handling of a dangerous weapon.

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TITLE D2 SUBSTANTIVE OFFENSES

Chapter 22 Offenses Against the Person

Section 7. Aggravated Assault

A person is guilty of aggravated assault, a class B crime, if he intentionally, knowingly, or recklessly causes:

1. serious bodily injury to another; or
2. bodily injury to another by means of a deadly weapon; or
3. bodily injury to another under circumstances manifesting extreme indifference to the value of human life.

COMMENT

Source: This section is taken from the New Hampshire Criminal Code §631:2.

Current Maine Law: See the comment to section 6.

The Draft:

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TITLE D2 SUBSTANTIVE OFFENSESChapter 22 Offenses Against the PersonSection 8. Criminal Threatening

A person is guilty of criminal threatening a class D crime, if he intentionally or knowingly places another person in fear of imminent bodily injury.

COMMENT

Source: This section follows the Massachusetts Criminal Code chapter 265 §11 and the Federal Criminal Code §1616.

Current Maine Law: The assault statutes are set out in the Comment to section 5.

The Draft: This section essentially provides a penalty for committing a common law assault, except that it is more narrow than the common law. The requirement that there be fear of bodily injury leaves uncovered the situations where there is created by the defendant a fear of something less than that, namely simply physical contact which would cause no injury at all. Where the defendant's conduct goes to far as to ripen into an attempt, he would be guilty of an offense even if only offensive, but not injurious, contact were attempted. Short of an attempt, it is the policy of this section to leave threats of contact within the realm of abrasive social relations which, while regrettable, ought not to invoke the machinery of the criminal law.