A PROPOSAL FOR REVISION OF THE REVISED STATUTES OF MAINE ALONG THE LINES OF THE MODEL PENAL CODE

Submitted to Professor Sheldon Glueck in the Seminar on the Administration of Criminal Justice in Satisfaction of the Requirements of that Seminar and of Third Year Written Work.

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CONTENTS

I. INTRODUCTION

This study deals with a proposal for revision of the criminal penalties within Chapters 130-143 of the Revised Statutes of the State of Maine, 1954, supplemented by the Cumulative Supplement, 1959, (cited hereafter as RMS) in the light of current thinking in this area. The present penalties are, with a few exceptions, those originally enacted. As a result, the disproportion among sentences applicable to similar cases appears to be substantial; the variety of penalties disclaims a reasonable and just categorization of seriousness; and the present division of labor between legislature, judge and parole board presents the trial judge with a sentencing role which is undercut by the limitations of the information at hand at the date of trial. In addition, the substantive crimes are stated with a complexity and proliferation which yield gaps in coverage and a bar to the layman's understanding. These shortcomings are important to the person who is sentenced, to his family, to the sentencing judge and to the community generally. They call for reconsideration and revision based on the best that current scholarship and practice can provide.

Because many states have this situation today, the American Law Institute has developed and published since 1953 the Model Penal Code (cited hereafter as MPC) in the form of twelve tentative drafts (cited hereafter as Draft ___ § ___). (Enclosure 1.) These drafts provide a redefinition of the substantive crimes, a categorization of the penalties, a

redistribution of the sentencing function, and provisions for the administration of criminal justice, including all phases of the corrective establishment. Each provision is accompanied by an explanatory comment and a brief treatment of the legal authorities upon which it is based. The participants in the preparation and revision of these drafts (see Enclosure 1, Draft 1, first three unnumbered pages) represent the best that American scholarship can produce in this day, drawing from judges, law professors, practicing lawyers, penologists, criminologists, psychiatrists and sociologists. Surely they have not achieved perfection, but it is unlikely that a state with limited resources can improve upon their product in the general sense.

Professor Herbert Wechsler of Columbia University, School of Law, the Chief Reporter for the MPC, has informed the writer that he expects no major changes to the present twelve tentative drafts and that the final edition will be published in the summer of 1962. He stated that various features of the drafts are being considered in legislative proposals for penal law revision in California, Illinois, Maryland, New Mexico, New York, Oregon, and Pennsylvania. The formulation on responsibility has been substantially enacted in Vermont, is under consideration in California, Maryland, New York and, with some modification, Massachusetts.

This study, therefore, is aimed at the application of the MPC to the situation in Maine and is organized as follows: Section I, the Introduction; Section II, an explanation of The

MPC Scheme for the Categorization of Criminal Penalties; Section III, Recommendations; and Section IV, A Tabular Comparison of the RMS, and MPC, and the Criminal Codes of New Hampshire, Vermont and Wisconsin.

As this study was initially defined, the present substantive crimes of the RMS were accepted as a given element and the problem was to provide a rational and consistent categorization of the penalties which the RMS might impose. In Section IV, the right-hand column, such a specific recommendation is made for each crime now listed in the RMS. This categorization would be a substantial improvement.

However, as identified by the entries in parentheses in Section IV, the right-hand column, comparing the MPC categorization to the RMS substantive provisions produces substantial inconsistency. This results because the MPC provisions are typically broad and graded on the basis of those elements considered most relevant to the question of seriousness, whereas the RMS provides a larger number of narrow provisions, some without comparable gradations and others with different gradations.

The writer has recommended in Section III, therefore, that the appropriate Maine agencies undertake a revision of the substantive provisions based on the MPC. This appears to be a task for the combined efforts of the Judiciary Council, the Attorney General's department, and a research project of this nature. Such a substantive revision, coupled with the MPC scheme of penalties, should produce a penal code second

to none in the United States. The MPC as published in 1962 will cover most of the areas in question and can be supplemented by the Wisconsin Criminal Code, 1955, or independent drafting on a similar approach.

This study would remain valid to explain the MPC scheme, to compare it to the present Maine statutory provisions and to those of New Hampshire, Vermont and Wisconsin, and to categorize those offenses that are not covered by the MPC. In addition, the writer has added in Section IV comments concerning redrafting, which mention drafting considerations which have become obvious in the course of this study. The Section IV table shows which MPC section, if any, correlates with each section of the RMS.

II. THE MPC SCHEME FOR THE CATEGORIZATION OF CRIMINAL PENALTIES

1. Reasonable Legislative Distinctions

Although other penal codes have achieved a certain degree of categorization, e.g., the draft code prepared in Illinois in 1935, the 1958 revision of the U.S. Code Title 18, and the Wisconsin Criminal Code of 1955, the MPC categorization is selected, as noted in the Introduction of this paper, because of its high quality preparation and because it is most current, To quote from Draft 2, § 6.01, Comment 1, p. 10, the classification

> is premised on the view that the length and nature of the sentences of imprisonment...must rest in part upon the seriousness of the crime and not...solely on the character of the offender... The classification of felonies...into three categories of relative seriousness should exhaust the possibilities of reasonable legislative discrimination.
>
> The number and variety of the distinctions of this order found in most existing systems is one of the main causes of the anarchy in sentencing that is so widely deplored. Any effort to rationalize the system must result in the reduction of distinctions to a relatively few important categories.

The MPC provides for three degrees of felonies (F1, F2, F3), Draft 4 § 6.01, for misdemeanors (M), for petty misdemeanors (PM), and for a civil category, violations (V), Draft 4 § 1.04. The sentence ranges of Draft 4 § 6.06, 6.07, 6.08, 6.09, and 6.03 are as follows:

	Min. Term	Max. Term	Min. Extended Term	Max. Extended Term	Max. Fines
F1	1-10 yrs.	life	1-20 yrs.	life	$10,000
F2	1-3 yrs.	10 yrs.	1-5 yrs.	10-20 yrs.	$10,000
F3	1-2 yrs.	5 yrs.	1-3 yrs.	5-10 yrs.	$ 5,000
M	none	1 yr.	6 mos.-1 yr.	3 yrs.	$ 1,000
PM	none	3 mos.	3-6 mos.	2 yrs.	$ 500
V	none	none	none	none	$ 500

This framework presents a balance between categorization based upon the seriousness of the crime and individualization within the sentence ranges based on the character of the offender.

The felony-misdemeanor distinction is retained with a separate category for the petty misdemeanors. The last category, violations, to quote Draft 2 § 1.05, Comment 3

> are offenses not deemed criminal at all, except for the procedure of enforcement. A violation is an offense for which no other sentence than a fine, or fine and forfeiture or other civil penalty, is authorized upon conviction.
>
> There is...need for a public sanction calculated to secure enforcement in situations where it would be impolitic or unjust to condemn the conduct involved as criminal. ...This plan...will serve the legitimate needs of enforcement, without diluting the concept of crime or authorizing the abusive use of sanctions of imprisonment. It should, moreover, prove of great assistance in dealing with the problem of strict liability, a phenomenon of such pervasive scope in modern regulatory legislation. Abrogation of such liability may be impolitic, but authorization of a sentence of imprisonment when the defendant, by hypothesis, has acted without fault seems wholly indefensible. Reducing strict liability offenses to the grade of violations may, therefore, be the right solution. For proposals of this kind see Gausewitz, Reclassification of Certain Offenses as Civil Instead of Criminal, 12 Wisc. L. Rev. 365 (1937); Perkins, The Civil Offense, 100 U. of Pa. L. Rev. 832 (1952).

Concerning the "violation" category proposed by the MPC, one consideration seems worthy of discussion. In Perkins, The Civil Offense, 100 U. of Pa. L. Rev. 832, 848-851 (1952), it is suggested that in those regulatory laws passed for the protection of person or property, an offense should be a crime or a civil offense depending upon the presence or absence of intent, recklessness or criminal negligence. This seems to be a valid and consistent basis for distinction between the categories PM and V in the regulatory area to the extent that significant threats to person or property are involved. The present RMS penalties are consistent with this distinction with the exception of one absolute liability section, Chapter 137 § 3, Sale of Impure or Adulterated Milk or Cream which approximates that distinction by a provision for repeated offenses. This section has been modified in the recommendation in Section IV to conform to the distinction by stating the penalty in the alternative, PM or V, turning upon whether there is alleged and proved a criminal intent, recklessness or negligence. To the extent that regulatory provisions outside of the criminal chapters or future regulatory schemes impose absolute liability for significant threats to person or property, such an alternative penalty will avoid the need for drafting two separate provisions. The availability of the criminal sanction gives this area of regulation more effect upon those for whom fines may be an acceptable expense of doing business in disregard of the law. This seems particularly pertinent to the extent that the facilities for regulatory supervision are not extensive, and that as a result the chances of detection are slight.

The present RMS criminal provisions provide a great number and variety of distinctions, thus presenting the kind of complexity and inconsistency to which the MPC is addressed. The present inconsistency is indicated in the tabular comparison in Section IV by a comparison of the RMS and the MPC provisions. Unless the substantive provisions are also redrafted along the lines of the MPC, those inconsistencies revealed by parentheses in the recommendation column will remain. Even without this substantive redrafting, there will be a substantial improvement. The several parts of the sentencing process are examined in detail in the following sections using the symbols F1, F2, F3, M, PM and V as described above.

2. A Basis for Evaluating the Division of Labor Between Legislature, Trial Court and Parole Board.

To sum up the comments upon Draft 2 § 6.07, p. 24, the draftsmen of the MPC have rejected the proposals to shift all sentencing authority to an administrative body. The writer assumes that decision for the purposes of this discussion, although it has been the subject of much controversy. Cf. a discussion of the advantages and disadvantages, Hayner, Sentencing by an Administrative Board, 23 Law & Contemp. Prob., 474, 493-494 (1958), and a proposal for shifting sentencing to an administrative body, Massachusetts, Report of the Unpaid Special Commission Relative to Prisoners, 31 - 50 (1953). Instead, the draftsmen have sought a sound distribution of authority between courts and administrative organs. The goal is to

give the agencies involved the type of power and responsibility which each is best equipped to exercise, given the time when it must act, the nature of the decisions called for at that stage, the nature of the information available then, and the relative dangers of unfairness and misuse.

However, this explantion slides over what appears to the writer to be the critical question. What are the pruposes of criminal penalties, and how are they served by this distribution?

The purposes are set forth as principles of construction in Draft 4 § 1.02:

> (1) The general purposes of the provisions governing the definition of offenses are:
>
> (a) To forbid and prevent conduct that unjustifiably inflicts or threatens substantial harm to individual and public interests;
>
> (b) To subject to public control persons whose conduct indicates that they are disposed to commit crimes;
>
> (c) To safeguard conduct that is without fault from condemnation as criminal;
>
> (d) To give fair warning of the nature of the conduct declared to constitute an offense;
>
> (e) To differentiate on reasonable grounds between serious and minor offenses.
>
> (2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
>
> (a) To prevent the commission of offenses;
>
> (b) To promote the correction and rehabilitation of offenders;
>
> (c) To safeguard offenders against excessive, disproportionate or arbitrary punishment;
>
> (d) To give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
>
> (e) To differentiate among offenders with a view to a just individualization in their treatment;
>
> (f) To define, co-ordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders;
>
> (g) To advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders;
>
> (h) To integrate responsibility for the administration of the correctional system in a State Department of Correction (or other single department or agency).

> (3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, in so far as they are not decisive, to further the general purposes stated in this section.

See also Draft 2 § 1.02, Comments 1-4. Earlier discussions are found in S. Glueck, Principles of a Rational Penal Code, 41 Harv. L. Rev. 453, 455-462 (1928); Gausewitz, Considerations Basic to a New Penal Code, 11 Wis. L. Rev. 346, 351-365 (1936); and L. Hall, Reduction of Criminal Sentences on Appeal, Part I, 37 Col. L. Rev. 521, 528-556 (1937).

More recent discussions directed to the MPC scheme and to the distribution of labor between the several agencies in light of these purposes are Hart, The aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958); Ohlin and Remington, Sentencing Structure and Its Effect upon Systems for the Administration of Criminal Justice, 23 Law & Contemp. Prob. 495 (1958); Tappan, Sentencing under the Model Penal Code, 23 Law & Contemp. Prob. 528 (1958); and Turnbladh, A Critique of the Model Penal Code Sentencing Proposals, 23 Law & Contemp. Prob. 544 (1958). These authorities are drawn upon in a general manner in the following analysis of which purposes the several agencies are in a position to emphasize and in the following sub-sections where the MPC division of labor is evaluated in the light of this purpose analysis.

For our analysis it will be adequate to distinguish between those purposes aimed at community reaction and deterrence,

the rehabilitation of the offender, and the protection of the offender.

More specifically, when the question is how to evaluate the range of decision-making power assigned to each agency, would it not be helpful to consider which emphasis of purpose we expect a particular agency to fulfill? Assuming that each of the value judgments as to purpose has some validity, can we establish an emphasis of purpose for each agency? The answer seems to turn upon two propositions: (1) that a part of the sentencing process is of primary importance to achieve a particular purpose, and (2) that a particular agency, by its nature, the time at which it operates and the information available to it at that time, is best qualified to perform that part of the sentencing process in light of the purpose which that part tends to achieve.

To apply the first proposition:

(a) Is not the imposition of a minimum sentence most important to emphasize the reinforcing of society's awareness of the moral responsibility of the individual, the maintenance of respect for law and confidence in our law enforcement institutions, and other purposes which aim at community reaction and at deterrence? The potential maximum, the parole period and the whole corrective system supplement the effect of the minimum, but it is submitted that the minimum sentence is the predominant influence toward these purposes.

(b) Is not the timing of release and the fact that release turns upon the offender's own responsibility for progress

toward rehabilitation most important in achieving that end? The prime rehabilitation role of the department of correction is excluded from this discussion because that department is not part of the sentencing process. A reasonable maximum sentence and fair treatment in the courts do little more than to facilitate the rehabilitation which is critical to and which is affected critically by the timing of release.

(c) Is not the fixed maximum sentence the most important protection of the individual offender? Although the trial court and the parole board are concerned with the rights of the individual, it is when these agencies err or subordinate this value to other values that the maximum sentence assumes primacy as the safeguard of the individual.

To apply the second proposition in the same manner:

(a) Is not the trial court best qualified to set the initial sentence because it is closest to the local situation at the critical time?

(b) Is not the parole board best qualified to determine the timing of release after the minimum set by the trial court because it has the administrative facilities of professional services, because it acts at the time of potential release, and because it has available the situation of the offender at that time?

(c) Is not the legislature, as the policy maker of society acting before a particular case arises, best qualified to balance the freedom of the individual and the protection of the community?

To the extent that these questions can be answered in the affirmative, we establish the following emphasis of purposes among the several agencies: (a) The trial court emphasizes the reinforcing of society's awareness of the moral responsibility of the individual, the maintenance of respect for law and confidence in our law enforcement institutions, and other purposes which aim at community reaction and at deterrence; (b) the parole board, the rehabilitation of the offender as far as is consistent with the protection of society; and (c) the legislature, the protection of the offender in its narrow function of setting the maximum sentence as distinguished from legislating the entire scheme.

This is not to deny that other facets of the sentencing and corrective process contribute to the several purposes, or to ignore that these purposes sometimes conflict. But the writer contends that this is the most valid generalization of the emphasis of purposes available, and that it is a useful tool in evaluating the MPC scheme for distributing sentencing authority, since it serves to point up the weighing of purposes upon which evaluation and legislative choice should rest.

The reader has probably noted that the protection of society, or the prevention of crime has not been accounted for in this analysis. Cf. Draft 2 § 1.02, Comment 2. This is the ultimate goal to which the several purposes contribute. Cf. S. Glueck, Principles of a Rational Penal Code, 41 Harv. L. Rev. 453, 455-456 (1928), and Gausewitz, Considerations Basic to a New Penal Code, 11 Wis. L. Rev. 346, 354 (1936).

This is not to deny the independent value of rehabilitation. Cf. Draft 2 § 1.02 Comment 2, but it is to recognize a priority as far as the administration of criminal justice is concerned. Therefore, we proceed upon the assumption that we limit the application of the rehabilitation purpose to those situations consistent with the protection of society and that we recognize that the statutory maximum sentence is a limitation upon protection of society based upon a competing value, the protection of the individual. Thus the recognition of this ultimate purpose does not interfere with our analysis; rather it states our quest in another way. What balance of emphasis among the contributing purposes and of discretion in the agencies which primarily achieve these purposes will give the greatest protection to society by preventing crime?

The following sub-sections explain the MPC scheme and consider the balance of purposes, means and agencies which its division of labor imply.

3. The Division of Labor Between Trial Court and Parole Board

By the MPC scheme a person who has been convicted of a misdemeanor or a petty misdemeanor may be sentenced to a definite term fixed by the court. Draft 4 § 6.08 and Draft 2 § 6.08, Comment. This proposes no change and we do not have the space to discuss the critical subject of the handling of these offenders who are likely to be the felons of tomorrow.

The setting of the ordinary minimum sentence for felons is left to the trial court within the ranges set forth in

Draft 4 § 6.06 and Draft 2 § 6.06, Comment. Compare the criteria for withholding sentence of imprisonment and the provision for pre-sentence investigation. Draft 4 § 7.01, 7.07, Draft 2 § 7.01, 7.07, Comments. The one year minimum is considered an institutional necessity, Draft 2 § 6.07, Comment 4, p. 26. In comparison, the RMS, Chapter 149 § 11, provides a minimum of six months and allows the trial court to set a maximum within the statutory maximum and a minimum which does not exceed one-half of the maximum chosen. Compare also RMS Chapter 149 § 12. As a result, the MPC would reduce somewhat the range within which the trial court could set the minimum, and in turn would increase somewhat the range within which the parole board could vary the offender's release date based upon his rehabilitation. Extended terms are discussed separately in the next sub-section.

We have concluded in the previous sub-section that the minimum sentence is the prime means of achieving the purposes of reinforcing society's awareness of the moral responsibility of the individual, the maintenance of respect for law and confidence in our law enforcement institutions, and other purposes which aim at community reaction and at deterrence. We have concluded also that the trial court is best qualified to set the minimum sentence because of the respect which it is likely to hold in the community, because it can act at the culmination of the trial when the eyes of the community are upon the outcome, and because of its sense of those local factors upon which these purposes are based.

By the MPC scheme, the decision of when to release between the minimum and the maximum terms is placed in the parole board, Draft 5 § 305.10. The main provision is that the prisoner shall be released after serving his minimum sentence unless

> (a) there is a substantial risk that he will not conform to the conditions of parole; or
> (b) his release at that time would depreciate the seriousness of his crime or promote disrespect for law; or
> (c) his release would have a substantially adverse effect on prison discipline; or
> (d) his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Draft 5 § 305.13(1). These criteria recognize purposes beyond the question of rehabilitation as a practical necessity, but the main emphasis is on whether the individual is rehabilitated, i.e., whether he will present a danger to society. The parole board's prime resources for decision are stated as follows: "The prisoner's apparent readiness to conform to the requirements of law and to assume responsibility, his response to treatment, his criminal and social history, and his future plans and potentialities." Draft 5 § 305.14, Comment, p. 99. A more explicit list is provided in Draft 5 § 305.13(2). The parole board, relying upon facilities centralized in the Department of Correction, can bring professional assistance to this analysis. Since in a particular case this decision is made at a date far removed from trial, it is possible that new scientific tools for rehabilitation and prediction of conduct may bring a new dimension to this analysis. An example of such progress is the Glueck Prediction Tables explained in S. & E. Glueck, Predicting Delinquency and Crime (1959),

particularly Chapter II, 18-31.

It becomes obvious as we consider the jobs which the two agencies are assigned by the MPC, the aspects of their nature which make them effective, the time at which they act, and the related factor of the data that is available at that time, that one cannot do the job nor, therefore, pursue the emphasis of purpose which the other is assigned.

This is not to deny that the trial court under the proposed scheme must still make predictions to serve these purposes in the question whether to put on probation or to confine, and in regard to the maximum sentence for misdemeanors and petty misdemeanors. (The Glueck Prediction Tables provide a substantial aid in the former of these two situations.) In these cases there is today no practical alternative because the parole board operates only at the level of sentences in excess of one year and there is no analogous source for administrative discretion in the handling of misdemeanants. However, we will concentrate on what is the best arrangement in regard to felons.

This brings us to the weighing of emphasis of purpose which is involved when we compare the trial court's emphasis of purpose and that of the parole board. Are the MPC minimum sentence ranges adequate for the trial court's job in view of the fact that to increase their range is to decrease the parole board's range of decision in regard to the time of release? This legislative choice turns upon a complex judgment as to the diminishing effect of added ranges upon each task and to

the selection of a balance which maximizes the protection of society. The writer would contend that to the extent the offender is rational, he has received as much punishment as he is capable of reacting to after a public trial and a substantial period of confinement within these minimum terms. The writer would further contend that such a minimum sanction reinforced by the potential maximum term is enough to exert a maximum achievement of the several purposes emphasized by the trial court which aim at the community reactions and at deterrence. The latter contention in regard to deterrence is supported by the conclusions of the analysis in Sellin, The Death Penalty, a report to the Model Penal Code Project, Draft 9, which considers the deterrent power of the death penalty and concludes, on balance, that even this unique type of severity has no demonstrable deterrent effect, as opposed to the certainty of punishment, upon those in the mental states typical of those who commit serious crimes. Compare also Guttmacher, Psychiatric Approach to Crime and Correction, 23 Law & Contemp. Prob. 633, 642 (1958)

Another implication of the MPC scheme is that it is likely to reduce the apparent inconsistency in the sentences set by several courts in similar cases. Although it is difficult to compare cases, this inconsistency has long been recognized as a problem; cf. the comment upon inconsistency and upon studies of the sentences set by trial judges, S. Glueck, Predictive Devices and the Individualization of Justice, 23 Law & Contemp. Prob. 461, 462-466 (1958). Compare also the controversy in

S. Glueck, The Sentencing Problem, 20 Fed. Prob. No.4; 15 (1956); Rubin, Sentencing Goals: Real and Ideal, 21 Fed. Prob. No.2; 51 (1957); S. Glueck, Further Comments on the Sentencing Problem, 21 Fed. Prob. No.4; 47 (1957). The likelihood of inconsistency seems to be related to the range of sentences available and seems greatest when the several trial judges may impose relatively long sentences based on a guess as to the potential for rehabilitation. Although some inconsistency is inevitable in applying the trial court's emphasis of purpose within the MPC minimum sentence range, it is much less. In contrast, the question of long sentences, when left to the parole board to be decided upon their criteria for rehabilitation, is based upon the attitude and predicted behavior of the offender at that time. This basis of distinction, although far from perfect, appears relatively fair and consistent.

It is interesting to note that the draftsmen of the MPC, struggling with this balance, set the minimum range for F1 as 1-10 years, Draft 4 § 6.06, whereas earlier it had been proposed as 1-20 years, Draft 2 § 6.06. A similar reduction was made in the extended minimum range, Draft 4 § 6.07 and the earlier Draft 2 § 6.07. Cf. Turnbladh, A Critique of the Model Penal Code Sentencing Proposals, 23 Law & Contemp. Prob. 544, 548 (1958). As it obviously must, this approach considers the caliber of the parole board and its procedures to be a critical factor. Provisions for these are stated at Draft 5 Article 402 and the comment thereto, and Article 305 and the comment thereto. To generalize a much debated conclusion, it appears to be the consensus that extended confinement is of little

social value when the offender is no longer dangerous.

It is helpful to compare this overall outlook with the historical trend to date. We have moved from a fixed sentence specified by statute to a fixed sentence set by the trial court to maximum and minimum limits set by the trial court to the present proposal. S. Glueck, Principles of a Rational Penal Code, 41 Harv. L. Rev. 453, 462-475 (1928) and S. Glueck, The Sentencing Problem, 20 Fed. Prob. No. 4; 15, 16 (1956). With this outlook and as parole board performance is improved by virtue of additional techniques, it remains within the control of the trial court to continue this trend by setting minimums below the top of the available range in appropriate cases. The result of this trend is to increase flexibility by deferring the decision for release until it can be most thoroughly individualized on the basis of the offender as he then is. As a result, we move toward the point at which the offender's own assertion of responsibility, his receptiveness for rehabilitation and his actual progress will determine the extent of confinement beyond moderate minimum terms.

The MPC does not discuss the question of appellate review of minimum sentences. Compare the provision for re-sentencing within one year of conviction on petition of the commissioner of correction. Draft 4 § 7.08. The American Law Institute, Code of Criminal Procedure, June 1930, does provide for appeal upon the ground that a sentence is excessive, Sections 458-460. Compare RMS Chapter 148 §§ 29, 30 and 32, which make no such explicit provision. The limited potentiality of the review of

criminal sentences has been pointed out, S. Glueck, Predictive Devices and Individualization of Justice, 23 Law & Contemp. Prob. 461, 466 (1958); Hall, Reduction of Criminal Sentences on Appeal, 37 Col. L. Rev. 521, 762 (1937), but these writers have not denied the contentions that the key exercise of discretion involved in sentencing would be improved by a written opinion of its rationale and that a capable appellate court could accomplish a constructive treatment of the principles involved, especially as limited by the MPC to the question of an appropriate minimum sentence. Sobeloff, The Sentences of the Court -- Should There be Appellate Review?, 41 A.B.A.J. 13 (1955); George An Unsolved Problem: Comparative Sentencing Techniques, 45 A.B. A. J. 250 (1959).

The writer would contend that a provision for appellate review is desirable, and that it should be limited to foreclose reconsideration of the cases of those now confined so as to avoid the practical problem involved therein. In addition, the appeal of future cases could be made subject to the appellate court's discretion so as to avoid the appeal of every sentence. The contrast between our striving for a rule of law in the determination of guilt and an unfettered discretion as to its consequence supports at least such a proposal. Compare Sobeloff, supra at 13-14. Whether it is worth the trouble is a question for legislative choice.

4. The Ordinary Maximum Sentence

Under the MPC scheme the legislature sets the maximum sentence. Draft 4 § 6.06 and 6.08.

> The ordinary maxima of 5 years, 10 years and life, with reductions contemplated for good behavior, are based in part on a priori considerations but in major part on the reflection of good practice in the operation of release procedures even where longer maxima have been employed. Draft 2 § 6.07, Comment 4, p. 26.

Comparison with existing maxima is complicated by the fact that the MPC proposes a process for extended terms discussed in the next sub-section, and a longer and more flexible parole period which is proportional within limits to the period of confinement. "The maximum parole term shall be 10 years or twice the period of time that he [the offender] has actually served in a state correctional institution prior to such first conditional release, whichever is shorter." Draft 5 § 6.09 A (2) (b). In contrast, RMS Chapter 149 § 15 provides a maximum of 4 years. See also Draft 5, Article 305, Release on Parole, and Draft 5, Article 404, the Division of Parole.

As we concluded in Subsection 2 of this section, although the trial court and the parole board are concerned with the individual's rights, if they err or subordinate this value to other values, the only absolute protection is a statutory maximum. Since this is a matter of weighing two conflicting purposes, the protection of the individual and the protection of society, it is an appropriate matter for legislative choice. Therefore, it is most conveniently set beforehand. Since its considerations are broader than the confines of a particular case, and are aimed at avoiding the distractions of the particular case, this is essential to the purpose which it serves. We should also remember that for the insane offender

even beyond the extended term, there remains the procedure for civil commitment to pick up where the criminal sentence terminates. Cf. RMS Chapter 27 §§ 103-130, especially § 129. In this manner commitment for life for other than the F1 felonies is based openly on that standard of dangerousness, which is applied to all members of the community. This avoids discriminating against those who committed a crime at some earlier date.

There are three alternatives to a statutory maximum, all of which seem less desirable. One is the completely indeterminate sentence where confinement continues until the administrative agency finds the offender rehabilitated. When is the political dissenter, the religious zealot, or the harmless nonconformist "rehabilitated," even in the judgment of men of pure motives? Nor can the hunches of human decision makers be perfected for this task by present predictive devices, e.g., the Glueck Prediction Tables, set forth in S. & E. Glueck, Predicting Delinquency and Crime (1959) at p. 29 Exhibit C reveal that if an offender's score on the several factors involved were between 300-349, there would be an 85% chance of recidivism, and if between 250-299, a 63.5% chance. On the extreme ranges the table is more accurate, but in the central range where the larger number of offenders is grouped, there is this limitation. The writer would contend that life commitment for other than a F1 felony on such a basis is incompatible with safe-guarding the individual and that the criteria for judicial review of such decisions based on the shifting sands of psychiatry and prediction would be a doubtful safeguard. This is not to deny

the usefulness of these tables in other circumstances.

A second alternative is to have the trial court set the maximum within a statutory maximum. The present RMS provision Chapter 149 § 11 is of this type. The entire analysis in Subsection 3 points to the fallacy that results. If we assume the MPC alternative of a parole board releasing upon a finding of rehabilitation within a high statutory maximum, the only difference in outcome would be the release of offenders who were dangerous to the public or in need of further training or treatment. This is the result of trying to determine the point of future rehabilitation at an earlier date. In addition, several courts struggling with this impossible role are likely to emphasize different factors and produce inconsistent results. Cf. the comment upon inconsistency and upon studies of sentences set by trial judges. S. Glueck, Predictive Devices and the Individualization of Justice, 23 Law & Contemp. Prob. 461, 462-466 (1958).

A third alternative is like the second except that the trial court could set the maximum without any statutory limit. This presents the fallacy discussed above with even greater likelihood of inconsistency, and it provides no absolute protection of the individual offender. Therefore, the MPC scheme seems to provide the best solution.

5. Extended Sentences

The MPC scheme provides that the trial court may set extended minimum and maximum sentences within certain ranges for

the aggravated offender. These ranges are stated in Subsection 1 of this section and in Draft 4 § 6.07 and § 6.09. They are explained in Draft 2 § 6.07 Comment and § 6.09 Comment.

The criteria for employing the extended terms are set forth for felonies in Draft 4 § 7.03 and for misdemeanors in Draft 4 § 7.04. They are explained in Draft 2 § 7.03 Comment and Draft 2 § 7.04 Comment. To summarize, the extended term may be applied when the trial court finds that the protection of the public necessitates it because the defendant is (1) a persistent offender, (2) a professional criminal, (3) a dangerous, mentally abnormal person, or (4) a multiple offender of extensive criminality. For each of these categorizations specific criteria are provided as minimal requirements, but the existence of these requirements does not make imposition of an extended term compulsory. This framework guides the making of these key decisions, tends toward consistency among judges of various judicial temperaments, and safeguards against the possibility of abuse. The criteria for misdemeanors expand category (3) to include the chronic alcoholic, narcotics addict, prostitute, or person of abnormal mental condition who requires rehabilitative treatment for a substantial period of time.

The present RMS provision, Chapter 149 § 3, provides that if a person is convicted of a felony and if it is alleged and proved or admitted upon trial that he has previously been sentenced to any state prison in the United States, he may be imprisoned for any term of years. This provision is in turn subject to Chapter 149 § 11, that the trial court must set a

minimum which does not exceed one-half of the maximum, which in this situation could be any term of years. This arrangement presents three weaknesses. First, referring to the discussion in Sub-sections 3 and 4, it leaves the trial court, in the case of felonies, free to set high minimum sentences which unduly subordinate the rehabilitation emphasis of the parole board and which are likely to appear inconsistent. This is most striking when compared to the MPC extended terms for F2 and F3. In addition, the lack of a statutory maximum leaves the offender without any absolute protection. Second, the RMS arrangement provides no comparable provision for misdemeanants. Third, the requirement that prior convictions be alleged and proved presents the alternative of accepting the prejudice to the defendant which results from disclosing the prior conviction to the jury or of using two juries. This latter question is discussed in the next subsection

The extended term provisions should be judged by whether they draw a desirable balance between the emphases of purpose of the several agencies and the range for each to apply its means. The handling of the aggravated offender is perhaps the most crucial phase of the protection of society. The MPC scheme in comparison to its ordinary terms raises the minimum, thereby giving the trial court's emphasis more range and reducing the flexibility for rehabilitation. It also allows the trial court to increase the maximum, thus increasing the period for rehabilitation and reducing correspondingly the protection of the offender. Do the circumstances of aggravation warrant this shift? It seems that they do, and it is

interesting to note that Draft 4 modified the earlier Draft 2 proposal by reducing the extended minimum for F1 from 1-30 years to 1-20 years. Cf. Draft 4 § 6.07 and Draft 2 § 6.07. This is consistent with the trend we noted in Sub-section 2 of extending the parole board's discretion as to when rehabilitation justifies release. In addition, the MPC provides broad criteria to guide the trial court's classification of "aggravated offender," and it avoids the proof of prior convictions and the procedural inconvenience or prejudice to the defendant which such proof entails.

Limitations in this approach are that it is doubtful to what extent the legal criteria of "dangerous offender" actually accord with the security needs of the community and that the trial court's judgment is an imperfect means of detecting such a "dangerous offender." Turnbladh, A Critique of the Model Penal Code Sentencing Proposals, 23 Law & Contemp. Prob. 544, 547 (1958). It seems that this limitation will remain until the trial courts make use of predictive devices, e.g., the Glueck Prediction Tables, or until sentencing is transferred to a central administrative agency which makes use of such techniques.

6. Extended Sentences, a Constitutional Question

In the preceding sub-section, reference was made to the present RMS provision Chapter 149 § 3, which provides that if a person is convicted of a felony and if it is alleged and proved or admitted upon trial that he has previously been sentenced to any state prison in the United States, he may be imprisoned for any term of years. We recognized that this

requirement of allegation and proof of prior conviction presents the alternative of accepting the prejudice to the defendant which results from disclosing the prior conviction to the jury or of using two juries.

This issue was before the Maine Supreme Court in State v. McClay, 146 Me. 104, 78 A.2d 347 (1951), which was a driving-under-the-influence case for which the statute setting forth the offense provided a minimum three months imprisonment for the second or subsequent offense. The defendant contended that the allegation of a prior conviction was prejudicial. The court held at p. 108 that the allegation of the prior conviction was required by the Maine Constitution, Article I, Section 6, which provides that the accused in a criminal prosecution shall have a right "to demand the nature and cause of the accusation, and have a copy thereof." The court stated that the purpose of this provision is to provide a reasonable particularized statement to apprise the defendant of the criminal act charged. Such prejudice as resulted was accepted as the lesser evil and was to be limited by an instruction addressed thereto.

Revised Statutes (1944), Chapter 136 § 3, the counterpart of the present RMS Chapter 149 § 3, was not involved because those provisions speak only to felonies. However, in Ingerson v. State, 146 Me. 412,82A. 2d 407 (1951), a felony conviction under RS (1944) Chapter 136 § 3 was upheld on the basis of the McClay case.

In the McClay case at p. 114, the court said

> Where the power and authority of the court to impose an enhanced penalty is wholly dependent on the existence

> of facts set forth in the statute, which facts are entirely separate from, and unconnected with, the commission of the immediate infraction, such additional facts must be alleged in the complaint or indictment and proved beyond a reasonable doubt to authorize the imposition of the enhanced penalty...Typical of this class of cases are those arising under statutes providing for enhanced punishment for those previously convicted of a similar offense.
>
> The foregoing rule is not in conflict with the cases of Rell v. State of Maine, 136 Me. 322 and State of Maine v. McKrackern, 141 Me. 194. The statute applicable to those cases which permits discretionary severity in the punishment of assaults which are of a "high and aggravated nature," now R.S., Chap. 117, Sec. 21, sets forth no specific facts entirely separate from and unconnected with the commission of the immediate infraction as a prerequisite for imposing the enhanced penalty.

The Court also made it clear that it intended no inference to situations not before it:

> Nor would we even intimate that the mere absence of a statuatory provision requiring the existence of specific facts entirely separate from and unconnected with the commission of the immediate infraction as a prerequisite to imposition of the enhanced penalty necessarily excuses additional allegation and proof of the statutory requirements which authorize the imposition of such penalty. The necessity of allegation and proof of facts or conditions authorizing a statutory enhanced penalty will in each case depend upon the provisions of the particular statute under consideration.

The statement of the court at p. 108 that the purpose of the constitutional requirement is to apprise the defendant of the criminal act charged proceeds upon the assumption that the legislature has stated acts of a different quality depending upon whether the actor has previously been convicted. The metaphysics involved are hard to follow, since the acts are the same in both cases; the difference is in the range of sentencing discretion assigned to the trial court.

The distinguishing of the Rell and McKrackern cases is based upon the difference that the statute involved there "sets

forth no specific facts entirely separate from and unconnected with the commission of the immediate infraction as a prerequisite for imposing the enhanced penalty." This distinction is unconvincing since in these cases the question of whether the assaults were of a "high and aggraveted nature" is relevant to apprising the defendant of the quality of the criminal act charged.

The writer would contend that what the court did in McClay was to read a statute that did not say who was to find the prior conviction in the manner that avoided any constitutional question and which was consistent with the legislative purpose expressed in RS (1944) Chapter 136 § 3, the analagous provision dealing with felonies. This was aided by the fact that the finding of a prior conviction mechanically foreclosed the discretion of the trial court to impose less then three months confinement. The court's constitutional basis of appraising the defendant of the acts charged is undercut by the failure to distinguish between the definition of the criminal act and the question of punishment, and by the failure to square the constitutional purpose with its denial in the Rell and McKrackern cases which the court approved.

However, the MPC provision presents quite a different situation. It will rest upon legislative enactment. The finding of prior convictions or other circumstances does not mechanically require that the court impose the extended term, Draft 4 § 7.03, Draft 2 §§ 7.03, Comment 3, pp. 41-42. Instead the bases for imposing extended terms are broad discretionary

findings by the trial court as to the offender's present situation and the necessity for lengthy commitment to protect the public. These considerations are typical of the trial court's general sentencing discretion. The prior convictions are relevant only as a limit on the power of the court to safeguard the individual.

This constitutional question is considered in Draft 2 § 7.03, Comment 3, p. 42.

> In so far as this calls for a court determination rather than a jury verdict on the question of previous convictions, the draft departs from the most usual procedure under the present habitual offender laws. Some states now provide, however, for determination of the issue by the court. 2 And since the issue bears entirely on the nature of the sentence, rather than on guilt or innocence, we see no reason why a jury trial should be accorded in a system where questions of sentence otherwise are for determination of the court. The draft does provide, however, for a hearing on the issue, upon notice to the defendant of the ground on which sentence for an extended term will be proposed. See Section 7.07(6), infra p. 52. Such notice was held essential to due process in U.S. ex rel. Collins v. Claudy, 204 F. 2d 624 (3d Cir. 1953).

The lengthy citation in footnote 2 is available in Enclosure 1. It includes Section 403 of the American Law Institute Model Code of Criminal Procedure (1931). In several of the cases cited therein, analogous statutes were upheld against constitutional challenge. Levell v. Simpson, 142 Kan. 892, 52 P. 2d 372 (1935); app. dis. 297 U.S. 695 (1936), (State and U.S. Constitutions); State v. Guitry 169 La. 215, 124 So. 832 (1929), (State Constitution); and U.S. ex rel. Collins v. Claudy, 204 F. 2d 624 (3d Cir. 1953). (U.S. Constitution). Therefore, the writer concludes that the MPC provisions for an extended sentence should be upheld under the Constitution of the State of Maine.

7. Fines

The MPC provisions for fines are set forth in Draft 4 § 6.03 and commented upon in Draft 2 § 6.03. The maximum fines for each category of offense are stated in Sub-section 1 of Section II of this paper. They are high enough to give the trial court considerable discretion in their application as compared to the present RMS provisions which typically set smaller maxima. In addition, Draft 4 § 6.03 provides, "Any higher amount equal to double the pecuniary gain derived from the offense by the offender," for the obvious purpose of depriving the offender of any pecuniary gain from his offense. Draft 4 § 6.03 (6) provides, "Any higher amount specifically authorized by statute," to preserve higher limits fixed by other statutes.

A related section, Draft 4 § 7.02, provides criteria to guide the trial court in imposing fines. As Draft 2 § 7.02 comment explains, the purpose of this section is to retard the merely routine imposition of the fine and to emphasize that to forego confinement in favor of a fine is to raise a question as to the protection of the public. Limitations are imposed on the use of fines in addition to imprisonment or probation to assure that the fine will serve deterrent or correctional objectives. The provision also seeks to outlaw fines which the defendant cannot pay or the payment of which will conflict with restitution or reparation to the victim. It further states that a later draft of Article 302 will provide for installment payment. These criteria and the comment thereto provide a

statement of principle to guide the trial court in imposing fines.

8. Inchoate Crimes, i.e., Criminal Attempt, Solicitation, and Conspiracy.

The MPC Draft 10, Article 5, deals with what it terms "inchoate crimes." In §§ 5.01-5.03 it defines these crimes and in § 5.05 provides penalties thereto. The scheme is as follows: Attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted, solicited or is an object of the conspiracy. An attempt, solicitation or conspiracy to commit a capital crime or a felony of the first degree is a felony of the second degree. If the conduct charged is so unlikely to result in the commission of a crime that neither such conduct nor the actor presents a public danger warranting such grading of the offense, then the court shall execute its power under § 6.11 to enter judgment and impose sentence for a crime of lower grade or degree, or in extreme cases may dismiss the prosecution.

The Comments, Draft 10, pp. 24-197, provide a helpful analysis of the entire subject. The Comments to § 5.05, pp. 178-179, explain the provision for penalties on the basis that

> to the extent that sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction, there is likely to be little difference in the gravity of the required measures depending on the consummation or failure of the plan. It is only when and insofar as the severity of a sentence is designed for general deterrence that a distinction on this ground is likely to have reasonable force.

Therefore, in the case of an attempt at a first-degree felony where the penalty aimed at is general deterrence, the attempt sanction is reduced to F2. The mitigation provisions within this legislative declaration maximize the flexibility of the court in dealing with the infinite degrees of danger involved in this area, ranging from incantations of doom to misdirected bullets.

In the tabular comparison of the penalties imposed by the several states, Section IV, these provisions, especially the attempt provision, are sometimes relevant. The RMS provisions dealing with assaults and aggravated assaults, Chapter 130, §§ 6,7,12,17,19,20 are examples of this. The MPC, as did the Wisconsin Criminal Code of 1955, treats these as attempts or as the crime of reckless conduct, Draft 11 § 201.11. This area and the problems arising under simple assaults are discussed in Draft 9 § 201.10, Comment 3, p. 82. The comments in Section IV indicate the relevance of inchoate crimes when they are applicable. Therefore, the substance of the provisions for attempt, solicitation and conspiracy for the several states are set forth in the following paragraphs.

The statutes for attempt compare as follows:

Maine, Chapter 145 § 4. If the principal offense provides a life sentence, then 1-20 years; in all other cases, a maximum of one-half the maximum sentence for the principal offense.

New Hampshire, Chapter 590:5. If the principal offense provides a maximum greater than twenty years, then a maximum of ten years; otherwise, Chapter 590:6, a maximum of one-half the maximum sentence of the principal offense.

Vermont, Title 13:9. If the principal offense provides a life sentence, then a maximum of ten years; otherwise, a maximum of one-half the maximum sentence of the principal offense. For certain violent crimes, Title 13:1402, five years to life or $10,000.

Wisconsin, Chapter 939.32. If the principal offense provides a life sentence, then a maximum of thirty years; otherwise, a maximum of one-half the maximum sentence of the principal offense.

For solicitation, the statutes are as follows:

Maine, Chapter 145:2, procuring a felony (not including misdemeanors), treated as an accessory before the fact and punished as the principal offense.

New Hampshire, Chapter 590:1. For any offense, treated as an accessory before the fact and punished as the principal offense.

Vermont, Title 13:1403. For any offense, treated as an accessory before the fact and punished as the principal offense.

Wisconsin, Chapter 939.30. If the principal offense provides a life sentence, then a maximum of ten years; otherwise, a maximum of $2500 or the maximum for the completed crime not to exceed five years.

For conspiracy, the provisions are the following:

Maine, Chapter 130:25, ten years or $1,000.

New Hampshire, No general provision, but compare Chapter 590:1, accessories before the fact, treated as the principal offense.

Vermont, Title 13:1402. For certain violent crimes, twenty years or $10,000.

Wisconsin, Chapter 939.31. If the principal offense provides a life sentence, then a maximum of thirty years; otherwise, as the principal offense.

In comparison with the present RMS provision, the MPC scheme provides broader coverage in fewer, simpler sections and a more flexible scheme of penalties within the framework of the general sentencing provisions.

III. RECOMMENDATIONS

1. a. That the appropriate Maine agencies undertake a revision of the Maine substantive criminal provisions, using as a guide the MPC or, where it does not cover the topic, the Wisconsin Criminal Code, W.S.A. Chapters 939-947.

   b. That this substantive redefinition and the MPC categorization of penalties set forth in Enclosure 1 be enacted.

2. In the alternative, if a substantive redefinition cannot be undertaken, that the categorization of penalties recommended in the right-hand column of Section IV of this study be enacted.

3. That the MPC provisions concerning sentencing, Draft 4, Part I, Article 1, Sections 1.02, 1.04-1.05; Draft 4, Part I, Articles 6 and 7; penalties against corporations and unincorporated associations, Draft 5, Article 6, Section 6.04; inchoate crimes, Draft 4, Part 1, Article 5; and the parole term, Draft 5, Part I, Article 6, Section 6.09A, be enacted.

4. That further study be directed to the following:

   a. The use of the Glueck Prediction Tables by the trial court, the parole board, and the department of correction.

   b. Consideration of the MPC provisions or the drafting of analogous provisions directed to a small establishment providing for treatment and correction, Draft 5, Part III; the organization of correction, Draft 5, Part IV; and other general provisions of the MPC, e.g., Draft 4, Part I, Articles 1-4; Draft 5, Part I, Article 1; and others as indexed therein.

c. A continuing re-evaluation of the department of correction, or analogous agency, and the administration of criminal justice as a totality.

Comment on Recommendation 1. The advantages of redrafting the substantive provisions along the lines of the MPC are substantial. It would reduce the number of sections and simplify their language. The scope and degrees of seriousness would be based on those elements that the present consensus finds most valid and generally accepted. The switch to broad provisions of this sort would facilitate prosecution and make it less likely that acts considered criminal would not be covered by the criminal provisions.

Three examples illustrate these differences and the inconsistency that results from matching the broader MPC provisions and their penalties to provisions of narrower scope. Compare MPC Draft 11 § 220.3, Criminal Mischief, a broad provision concerning damage to property, with the several narrower provisions on that subject, RMS Chapter 131 § 13-21, 23, 24, 26, 29-33. Further inconsistency arises where the RMS draws distinctions of seriousness that the MPC considers unnecessary. Compare RMS Chapter 135, § 1, Perjury, and MPC Draft 6, § 208.20, Perjury. For the reverse case in which the MPC draws a rational set of distinctions which would guide the trial judge and tend towards consistency among criminal sentences, but the RMS does not, compare MPC Draft 4, § 207.4, Rape, and RMS Chapter 130 § 10, Rape.

New substantive provisions should be annotated by comments providing (1) an adaptation of the MPC comments, and (2) a statement of which provisions of the present statutes have been encompassed, how the new statutes differ, and a constructive treatment of the case law thereto. Such comments would communicate the purpose of the draftsmen and would maintain the relevance of the prior case law without limiting the intended scope of the new provisions.

It also seems advisable to index the criminal provisions and violations which are more appropriately located in regulatory chapters in the penal code. To accommodate the MPC scheme, it will be necessary to change RMS Chapter 149 § 4 dealing with those sentences to be served in the state prison from "one year or more" to "more than one year."

With this statutory revision in mind, the writer has keyed the present RMS provisions to the applicable MPC provisions in Section IV and has noted certain comments concerning redrafting. If substantive revision is undertaken, the MPC categorization of penalties will apply without inconsistency. In areas not covered by the MPC, its framework provides an adequate guide for the selection of categories for comparable offenses as demonstrated by the recommendations of Section IV, e.g., RMS Chapter 137. A new penal code drafted on the basis of the MPC would be an accomplishment of national significance. It would be comparable to Maine's new procedural code as a sign of progress.

Comment on Recommendation 2. This recommendation is based on the present RMS provisions. The MPC categorization has

been applied to those provisions most analogous to provide the recommendations in Section IV. Because the MPC scheme is broadly categorized, the result is substantially consistent. However, as discussed under Recommendation 1, some inconsistency would remain as indicated by those entries in parentheses.

A second inconsistency would arise because the RMS provisions add an additional 10 year sentence if the offender carries a dangerous weapon in various crimes of violence, e.g., Chapter 130 § 6, 17, 19, and Chapter 131 § 4, 10. Compare also Chapter 130 § 12 Assault with intent to commit rape, where a similar problem arises. The MPC approach does not categorize on this basis, although the criteria for extended terms, Draft 4 § 7.03, may have a similar effect. Therefore, if the MPC categorization were to be applied to the statutes as they are now drafted, it would be necessary to add to the provision analogous to Draft 4 § 7.03 this additional criterion for an extended term. The recommended penalties for these offenses in Section IV are stated as F2 Ext. to recognize this difference in the substantive provision.

This addition to the criteria for extended terms would be inconsistent with the more significant criteria therein and serves to illustrate that this alternative is desirable only if Recommendation 1 cannot be achieved.

If, as the writer proposes, a redrafting of the substantive provision is undertaken, the tabular comparison in

Section IV will remain valid except for the recommended penalties which will be replaced by the MPC penalties.

Comment on Recommendation 3. These provisions provide the statutory sections for the sentencing scheme described in Section II of this study. Their comparison to present Maine provisions is also discussed in Section II. The Draft 5, Article 6 § 6.04 Penalties against Corporations and Unincorporated Associations is self-explanatory. Again, there will be a need to annotate new provisions to clarify the draftsman's purpose and to relate the prior case law to the new provisions.

Comment on Recommendation 4. These recommendations point to areas outside the scope of this study where new developments have occurred and where a project of this sort would be useful to apply them to the particular situation in Maine.

a. The Glueck Prediction Tables, S. & E. Glueck, Predicting Delinquency and Crime (1959) provide a prediction of whether continued criminal behavior is more likely or not to assist the trial court, parole board, or department of correction in deciding whether to place the offender on probation, to grant parole, or to assign him to a prison, reformatory, or a house of correction. The validity of these predictions has been checked by follow-up studies with results for juvenile delinquents as high as 92%, Glueck, at 127-136, and for adults as high as 84%, Glueck at 75-76. The social investigation required to reveal the factors upon which these tables operate requires certain training and capacity. It

seems likely that a study directed to this particular situation in Maine could provide a way to make this technique available within the limits of economy and personnel.

b. The provisions of the MPC which are essential to implement the categorization of penalties proposed in this study are set forth in Recommendation 3. The provisions in Recommendation 4b cover additional topics: the administration of long term imprisonment; the criteria, procedure and facilities for the administration of release on parole; the organization and responsibilities of the department of correction and the power, duties and organization for the administration of probation and parole services. In addition, there are general provisions on criminal procedure, principles of liability, justification and responsibility. These provisions cited in Recommendation 4b are indexed more specifically in Enclosure 1. These provisions provide a guide for the evaluation of the present Maine law in these areas, all of which bear upon the administration of criminal justice as a whole.

c. The continued re-evaluation of the department of correction and the administration of criminal justice as a whole is emphasized because these areas are so important and because the knowledge of them is steadily growing and providing constant opportunity for research related to particular local problems.