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## Introduction to a Symposium on the Proposed New and Modern Criminal Code for Missouri

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could not buy. That devotion was obviously shared by the members of the committee, who gave freely of their time and services. The things to be said in praise of each of the drafters of the Missouri code are so many that one does not know where to begin or end. Therefore, I will but personally thank each of them for meeting the challenge with an unswerving vigor and for a job well done.

Nevertheless, the Missouri code will be worthless unless it is adopted by the legislature. It is true that members of the legislature served on the drafting committee and, for that reason as well as because of the code's obvious merits, one would hope that the chances of the code being enacted are great. But with the support of all organizations involved in the criminal justice system as well as other legal groups, the odds that the code will meet the approval of the legislature become much more favorable. So that is my challenge to you—to speak out in favor of the code and elicit support for its enactment.

## INTRODUCTION TO A SYMPOSIUM ON THE PROPOSED NEW AND MODERN CRIMINAL CODE FOR MISSOURI

JUDGE NORWIN D. HOUSER\*

### I. THE OLD

#### A. *In General*

The basic criminal code of Missouri was enacted in 1835.<sup>1</sup> The existing statutes imposing criminal penalties consist of what may be designated loosely as "the code" (title XXXVIII, chapters 556-64, both inclusive, in 491 separate sections) plus literally hundreds of penalty sections in special statutes scattered through the four volumes of the official 1969 Missouri Revised Statutes and supplemental laws. The code contains many redundancies, inconsistencies, and needless distinctions and refinements. The language of many sections is insufficient to notify the citizen what conduct is subject to criminal penalties, or to provide the courts with adequate guidelines and standards. Missouri criminal law may fairly be characterized as an accumulation of ad hoc responses to the conceived needs of the moment, enacted at different times by different legislatures without regard to the development of a systematic, orderly, and consistent body of criminal law.

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1. RSMo 1835, at 165.

### B. Penalties

Penalties in the current Missouri criminal law reflect the scars of ad hoc development. Some penalties are disproportionate to the seriousness of the offense; some are too severe, while others are too lenient. When, at various sessions, the legislature created new crimes or brought new fields of human activity under expanding governmental control, the legislators gave little consideration to the severity of the penalties prescribed for the new offenses in comparison with the penalties imposed for other offenses of like gravity. Consequently, penalties for similar offenses sometimes vary greatly. For instance, willfully setting fire to any woods or to crops of another whereby any damage is done is a graded felony with a maximum penalty of 5 years' imprisonment in the penitentiary,<sup>2</sup> whereas willfully setting fire on any woodlot, forest, or growing vegetation on the lands of another is a misdemeanor with a maximum penalty of 1 year in jail.<sup>3</sup>

The penalties for some nonviolent, nondangerous crimes involving property damage or loss are greater than those for serious crimes against persons. Thus, stealing a domestic fowl in the nighttime from the message of another or stealing a dog, goat, or hog (regardless of value) carries a maximum penalty of 10 years in the penitentiary,<sup>4</sup> whereas assault with intent to kill or to do great bodily harm without malice aforethought or with intent to commit robbery, rape, or some other offense, is punishable by imprisonment not exceeding 5 years.<sup>5</sup>

### C. Mens Rea

The present criminal law, much of which is written in archaic 19th-century legalese, is a patchwork of definitions, proscriptions, and sanctions. Numerous terms are used to describe the required culpable mental states or "mens rea." The meaning of these terms may vary from crime to crime. The existing code proscribes acts done corruptly; deliberately; falsely; feloniously; fraudulently; intentionally; knowingly; knowingly and willfully; maliciously; negligently; on purpose and of malice aforethought; premeditatedly; unlawfully; willfully, willfuly and corruptly; willfully and maliciously; willfully and maliciously or cruelly; willfully, maliciously or contemptuously; willfully or negligently; wrongfully; and wrongfully and negligently. Rarely do the statutes define these vague adverbs; instead, literally dozens of judicial decisions have been required to construe and define them. Many statutes fail to mention any culpable state of mind necessary for conviction, without making clear that the mere performance or nonperformance of the act in question is criminal regardless of the actor's state of mind.<sup>6</sup>

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2. § 560.590, RSMo 1969. Unless otherwise indicated, all section citations hereinafter refer to Missouri Revised Statutes, 1969.

3. § 560.580.

4. § 560.161.

5. § 559.190.

6. See, e.g., § 563.170 (bigamy); § 563.220 (incest).

### D. *Obsolete Provisions*

Criminal prohibitions relating to a bygone age remain on the books. Section 565.420 makes it a misdemeanor for the driver of a stage, coach, wagon, omnibus, or hack to be intoxicated to such a degree as to endanger the safety of any person therein. (Evidently it was not considered offensive for a hack driver to be intoxicated short of that degree). Section 564.330 requires that from November through March every electric streetcar shall be provided, at the front end, with a screen that shall protect the driver, motorman, and gripman from wind and storm. Section 563.320 prohibits the keeping of a male horse or jack for teasing or serving mares within 300 yards of any school house, college, or church. Section 563.410 provides penalties for playing cards for money, thereby criminalizing innocent social cardplaying for small stakes.

## II. THE NEW

### A. *In General*

For some time the criminal law of Missouri has needed comprehensive revision.<sup>7</sup> After four years of work the Committee for a Modern Criminal Code has completed a tentative final draft of a proposed new and modern criminal code for Missouri.

Early in its work the committee decided not merely to patch up the existing code piecemeal, but rather to draft an entirely new and modern criminal code, retaining the good of existing laws, modifying or rewriting provisions susceptible of improvement, deleting undesirable or antiquated provisions, and adding new provisions considered necessary and proper for the protection of the public and the intelligent application of the criminal law to the individual. In the process, the committee has considered the existing criminal laws of this state, the Model Penal Code, the modern criminal codes lately enacted by or proposed in a number of the states, and the Proposed Federal Criminal Code.

The work product of the committee will be proposed as a new Title XXXVIII, in 23 chapters, consisting of only 238 sections. The hundreds of special statutes imposing criminal penalties presently scattered throughout the revised statutes will not be lifted from their present locations and collected as a special chapter under Title XXXVIII. They will remain where now found. In the interest of uniformity and essential justice, however, these offenses outside the code are assigned classifications; persons convicted of such offenses will be subject to the dispositions authorized by the code.

In many instances, the Proposed Code consolidates similar offenses. The 35 sections of the present code relating to gambling have been reduced to 12.<sup>8</sup> The proposed section on aiding escape from confinement combines six

7. See Hunvald, *Criminal Law in Missouri—The Need for Revision*, 28 Mo. L. REV. 521 (1963).

8. PROP. NEW MO. CRIM. CODE §§ 17.010-120 (1973).

present sections and replaces six others,<sup>9</sup> and broadens the coverage on this crime. The proposed sections on official misconduct<sup>10</sup> replace 18 present sections, now scattered throughout the code. Many existing sections have been rewritten to clarify meaning. Definitions have been included that sharpen and add certitude. In some cases the scope of crimes has been broadened, or entirely new criminal offenses created, to meet the needs of society under modern conditions.

The Proposed Code is written in broader, more comprehensive language than is the old. It undertakes to define specific offenses in understandable, everyday English. Obsolete language such as "carnally knows," "ravishes," and "premeditatedly" is dropped. Technical language is avoided. Where special terms are necessary, they are given a definite legal meaning couched in layman's language. Unnecessary verbosity is eliminated. Concise language has been the committee's goal.

### B. Penalties

The Proposed Code corrects many of the inequities and excesses of the existing criminal law by adopting a system of classification that separates crimes into sentencing categories, with an uncomplicated range of penalties assigned to each category. Each offense is graded according to its seriousness and placed in one of the categories, thus reducing the number of different penalties, lessening the possibility of inconsistent penalties, and providing a more logical and humane system of criminal justice.

The Proposed Code relieves juries of the responsibility of fixing the punishment; it vests that power exclusively in the trial judge. The proposal to let the judge fix the punishment is calculated to result in more uniformity in sentencing, to enable the sentencing authority to obtain complete background information on the convict so that the punishment may be better tailored to fit the crime, and to serve the best interests of the community and the individual if rehabilitation is in prospect.

The committee is not recommending one way or the other on the controversial issue of the death penalty. The committee, however, has prepared a draft providing for the death penalty in certain cases; one which the committee believes meets the constitutional requirements of *Furman v. Georgia*.<sup>11</sup> It imposes the death penalty mandatorily where the defendant is guilty of capital murder (which can result only from an intentional killing), is over seventeen years of age, and one or more of the following factors is charged and proved: the defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value; the defendant by his own act committed the murder as consideration for the receipt of anything of pecuniary value; the defendant by his own act committed the murder during the commission or attempted commission of arson, rape, sodomy, robbery, burglary in the

9. PROP. NEW MO. CRIM. CODE § 20.210 (1973).

10. PROP. NEW MO. CRIM. CODE §§ 20.320, 21.040 (1973).

11. 408 U.S. 238 (1972).

first degree, kidnapping, or escape from custody or confinement; for the purpose of preventing identification or apprehension of the defendant or another as a participant in the felony being committed or attempted; the defendant by his own act committed the murder for the purpose of preventing the victim from giving testimony; the defendant by his own act committed the murder while serving a term of imprisonment of more than ten years or for life.

### C. *Mens Rea*

The new code requires that criminal liability be based on conduct that includes a voluntary act or the omission to perform an act, thus stating the accepted proposition that an "act" is an essential component of criminal liability. For an accused to be guilty of an offense he must have acted with (1) purpose, (2) knowledge, (3) recklessness, or (4) criminal negligence,<sup>12</sup> unless the offense is an infraction (a minor offense, newly created) or the legislative intent to dispense with a mens rea requirement is clear.<sup>13</sup> Each of the four culpable mental states is carefully defined and its application specifically delimited.<sup>14</sup> These four basic mental states cover most of those needed as well as most of those now described by the wide variety of terms employed in the existing statutes. Under the Proposed Code it will be easy to ascertain what culpable mental state, if any, is an element of a given offense. The necessity for extensive judicial interpretation of statutory language prescribing the mens rea will be minimized if not entirely eliminated.

### D. *The Personnel*

The Committee for a Modern Criminal Code as constituted in October, 1969, consisted of the following persons: Chairman, Judge Norwin D. Houser; Vice-Chairman, Hon. Donald J. Murphy, Judge of the Circuit Court of Jackson County; Senator Donald L. Manford; Senator Ronald L. Somerville (now Judge of the Missouri Court of Appeals and a continuing member); Representatives George E. Murray and James E. Spain; Prosecuting Attorneys Frank Conley and Byron L. Kinder (now Judges of the Circuit Court and continuing members); Prosecuting Attorneys Gene McNary, James Millan and John Crow; Professor Joseph Simeone (now Judge of the Missouri Court of Appeals and a continuing member); Hon. Orville Richardson (now Judge of the Circuit Court and a continuing member); Hon. Norman S. London (a practicing attorney in St. Louis), and Hon. Manford Maier (Attorney for the Kansas City Board of Police Commissioners). During the first three years of the committee's existence the following members were obliged to resign for various reasons: Senator Manford, Representative Spain and Mr. Crow. In the Fall of 1971, Attorney General John C. Danforth appointed the following new members to

12. PROP. NEW MO. CRIM. CODE §§ 7.020-040. Comment (1973).

13. PROP. NEW MO. CRIM. CODE §§ 7.060-070 (1973) defines these terms and explains their application.

14. See text accompanying note 12 *supra*.

the committee: Hon. Theodore McMillan (now Missouri Court of Appeals Judge); Hon. Frank Cottey, Circuit Judge for the First Judicial Circuit (since resigned); Senator Ike Skelton; Senator Paul L. Bradshaw; Representative Harold Holliday; Representative Robert O. Snyder; Representative Harold L. Volkmer; Jackson County Judge Harry Wiggins (now General Counsel of the Public Service Commission); Assistant Attorney General Gene Voights; Prosecuting Attorney Harold Barrick (since resigned); Prosecuting Attorney David Dalton; Hon. Curt Vogel and Hon. Raymond R. Roberts, practicing attorneys in Perryville and Farmington, respectively. Messrs. Frank Kaveney and D. Brook Bartlett have made contributions to the effort.

The committee has been assisted by four reporters: Professors Edward Hunvald, Jr., and Gary Anderson, of the School of Law at Missouri University-Columbia, and Professors Gene Schultz and Alan G. Kimbrell, of the law faculty of St. Louis University. Research has been conducted by law students under the direction of the reporters.

#### E. *The Modus Operandi*

The work of the committee has been accomplished in the following fashion. Subcommittees were assigned specific topics. A reporter was assigned to each subcommittee. After reviewing existing Missouri statutes, reading all available literature on the subject, consulting and reviewing the Model Penal Code, modern criminal codes lately enacted or proposed in sister states, and the Proposed Federal Criminal Code, the reporter prepared a proposed draft on the assigned subject. The subcommittee studied the proposal, met with the reporter and accepted, rejected, or revised the text, and made its recommendations to the full committee, which in turn accepted, rejected, or revised the product of the subcommittee. The whole Committee, meeting in approximately monthly sessions, sometimes considered as many as four or five drafts before finally adopting a tentative final draft. The committee secretary, Gary Anderson, prepared extensive minutes of each meeting of the full committee to assist reporters in re-drafting and to provide the General Assembly and courts with the underlying committee action on various sections of the Proposed Code. The reporters prepared extensive comments following sections of the text, reciting the history and explaining the source and reasons underlying the text as written. After the Proposed Code was prepared in tentative final draft form it was thoroughly reviewed in several sessions of the whole committee, which made appropriate changes and approved the final draft.

#### F. *Presentation to the General Assembly*

The final draft was ordered published for distribution to the judiciary, the bar, and interested organizations and groups for review and criticism. After the committee makes all changes deemed advantageous, the final draft will be incorporated in a bill for presentation to the 87th Session of the Missouri General Assembly.

The committee has wrought a valuable restructuring and rewriting of the criminal code of Missouri. Enactment by the General Assembly will give to the courts, prosecuting attorneys, defense counsel, and law enforcement agencies a more practical, enlightened, understandable, and enforceable body of criminal law with which to work. It is said that the largest room in the world is the room for improvement; as the Proposed Code is submitted to the judiciary, the bar, and the public for examination the committee welcomes constructive criticism and suggestions for improvement to the end that the bill finally adopted by the General Assembly will reflect the best system of criminal laws of all the States.<sup>15</sup>

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15. The following states have recently enacted modern criminal codes: Colorado (1972), Connecticut (1971), Georgia (1969), Idaho (1972), Illinois (1962), Kansas (1970), Kentucky (effective 1974), Louisiana (1942), Minnesota (1963), New Mexico (1963), New York (1967), Oregon (1971), and Wisconsin (1956).