

Fall 1973

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Recommended Citation

Gary L. Anderson, *Sentencing under the Proposed Missouri Criminal Code--The Need for Reform*, 38 Mo. L. REV. (1973)

Available at: <https://scholarship.law.missouri.edu/mlr/vol38/iss4/1>

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MISSOURI LAW REVIEW



Volume 38

Fall 1973

Number 4

SYMPOSIUM—PROPOSED MISSOURI CRIMINAL CODE*

SENTENCING UNDER THE PROPOSED MISSOURI CRIMINAL CODE—THE NEED FOR REFORM

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I. INTRODUCTION

The core of a modern criminal code is its sentencing system; therefore, a core project in a criminal code revision is sentencing reform. Among the controversial questions presented are: What type of statutory sentencing structure should be adopted? Who should sentence, and how much discretion should be given to the sentencing authority? What minimum and maximum limits should the legislature place on the sentences for particular crimes? The Committee to Draft a Modern Criminal Code dealt with these and other sentencing questions. Some committee members and the author believe that the Committee's major accomplishment is the development of a rational and effective sentencing system.

The basic sentencing deficiency in Missouri today is the lack of any rationally conceived sentencing system. Existing Missouri sentencing law has developed through piecemeal legislative revision over more than a century. The resulting diversities, anomalies and inconsistencies in sentencing provisions scattered throughout the Revised Statutes cannot be rationally justified; they often contribute to disparity of sentences among offenders of comparable culpability. A modern criminal code should minimize sentencing disparity and provide the sentencing authority sufficient flexibility to impose a sentence that fits the specific circumstances.

*Editor's note: The symposium on the Proposed Code closes with this issue. The Review regrets that a discussion of offenses against the person under the Code does not appear.

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II. CLASSIFICATION OF OFFENSES

Presently, Missouri does not have a rational system for the classification of crimes; each Missouri criminal statute usually contains its own provision authorizing a specific range of penalties. The result is many different types of penalty provisions.

A. *The Data*

Extensive research has produced surprising data on Missouri's "non-system" of criminal penalties. Although there is a basic division of crimes into felonies and misdemeanors based on the place of confinement,¹ there are almost no identifiable subcategories of felonies or misdemeanors based on similarity of authorized penalties.² Nor are there many identifiable subcategories among the 625 scattered penalty provisions that authorize various kinds of fines or forfeiture penalties.³

A "penalty type" is an authorized penalty distinct from all other penalties; it may be authorized only once or for many offenses. For example, the penalty for manslaughter⁴ is a penalty type unique to that crime. The penalty for a crime which the statute creating it designates simply as a

1. Felonies are defined as crimes for which the offender "is liable by law to be punished with death or imprisonment in a correctional institution of the state department of corrections, and no other." § 556.020, RSMo 1969. Misdemeanors include "every offense punishable only by fine or imprisonment in a county jail, or both." § 556.040, RSMo 1969. Compare PROP. NEW MO. CRIM. CODE § 1.030 (1973).

2. There are 353 "statutory misdemeanors" under general § 556.270, RSMo 1969, punishable by imprisonment in the county jail not exceeding one year, or by a fine not exceeding \$1,000, or by both such fine and imprisonment. Section 556.270 applies to misdemeanors for which the statute creating the offense does not specify a penalty. The next largest subcategory consists of 57 felony statutes, each with the penalty provision, "not less than two nor more than five years." If one takes into account only the statutes with the most frequently authorized maximum penalties, the Missouri penalties tend to fall into seven general categories. See Tables I and II *infra*, in pt. II, § A of this article. Category 3 in Table I was ignored because only two crimes are punishable by imprisonment of over 10 years but less than 20 years (15 year maximum).

ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURE 2.1 (a) (Approved Draft 1968) [hereinafter ABA STANDARDS] recommends:

All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this result.

3. Common penalties found in these penalty statutes include forfeiture of office (at least 52 statutes), a percentage penalty on overdue money due the state (at least 40 statutes, the percentage varying widely), a fine of up to \$100 (at least 75 statutes, minimum fines varying), a fine of up to \$500 (at least 72 statutes, minimum fines varying), and a fine of up to \$1,000 (at least 39 statutes, minimum fines varying).

4. § 559.140, RSMo 1969, provides:

Persons convicted of manslaughter shall be punished by imprisonment in the penitentiary for not less than two nor more than 10 years, or by imprisonment in the county jail not less than six months, or by a fine not less than five hundred dollars, or by both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months.

“misdemeanor,” without specifying a penalty, is a penalty type authorized for 353 crimes.⁵

A “penalty provision” is simply a statutory provision that authorizes a specific punishment for a specified crime or crimes. All identical “penalty provisions” make up a penalty type.

There are 280 different penalty types for the 964 criminal penalty provisions authorizing imprisonment as a maximum sentence for felonies and misdemeanors. In addition, there are over 108 different penalty types for the 625 penalty provisions authorizing a fine or forfeiture as a maximum sentence.⁶

Table I divides Missouri penalty types for felonies into five groups. After each defined group, Table I shows the number of penalty provisions within that group, followed by the number of penalty types such provisions authorize and the number of different maximum penalties authorized within the group.⁷

TABLE I
FELONY PENALTIES, PENALTY TYPES AND MAXIMA
IN FIVE PENALTY-TYPE GROUPS

Group Description	Number of Penalty Provisions within Group	Number of Penalty Types* within Group	Number of Different Maxima† within Group
1. Imprisonment up to life, or death	28	13	2
2. Imprisonment 20 years or more, less than life	13	9	5
3. Imprisonment over 10 years, less than 20 years	2	2	1
4. Imprisonment over 5 years to 10 years	47	13	7
5. Imprisonment for 5 years or less ..	182	72	13
Total	272	109	28 (21)‡

*E.g., 7 years to life; not more than 7 years; etc.

†E.g., life; death; 30 years; \$5,000 fine; etc. The same penalty provision may contain alternative maxima.

‡Eliminating duplication of maxima among different groups, which sometimes results from alternative maxima for specific crimes, there are 21 different kinds of felony maxima.

Table II divides Missouri penalty types for misdemeanors punishable by a maximum penalty of imprisonment into three groups, following the same approach as Table I.

5. § 556.270, RSMo 1969.

6. After identifying 108 different penalty types in 450 of the 625 provisions, the task of identifying other penalty types, often based on only slight differences in different combinations of minimum and maximum penalties, became so tedious the author gave up in disgust. Anyone interested in completing such a study should use a computer.

7. For an interesting comparison with the Missouri figures see the statistics in Beckett, *Criminal Penalties in Oregon*, 40 ORE. L. REV. 1, 8 (1960). The Oregon study revealed 466 penalty types for 1,413 penalty provisions.

TABLE II
MISDEMEANOR PENALTIES, PENALTY TYPES AND MAXIMA
IN THREE PENALTY-TYPE GROUPS

Group Description	Number of Penalty Provisions within Group	Number of Penalty Types within Group	Number of Different Maxima* within Group
1. Imprisonment up to 1 year in jail	535	80	10
2. Imprisonment over 30 days, less than 1 year	135	73	12
3. Imprisonment 30 days or less	22	18	10
Total within all groups	692	171	32 (24)

*E.g., up to 1 year, or 6 months, or \$1,000, \$500, \$100, etc.

The totals of Table I and Table II reveal an average of slightly more than three penalty provisions per penalty type. The legislature has frequently used unique penalty provisions and only infrequently used the same penalty type more than a few times.⁸ Almost 90 percent of the 280 penalty types are used no more than three times; sixty percent are used only once. Conversely, one penalty type for "statutory misdemeanors" is used 353 times and has been applied to many crimes for which a lesser penalty would be sufficient.⁹

8. A few penalty types are found numerous times. The table below shows the frequency or repetition in penalty type use.

TABLE III
NUMBER OF USES PER PENALTY TYPE

Number of Times the Penalty Type Is Used	Number of Penalty Types So Used	Total Penalty Provisions Created
1	169	169
2	53	106
3	26	78
4	16	64
5	1	5
6	2	12
7	3	21
8	1	8
9	1	9
10 or more	8	492*
Total	280	964

*This includes 353 "statutory misdemeanors" (see note 2 *supra*) and 57 felonies punishable by imprisonment of from 2 to 5 years. The other 6 penalty types are used an average of 14 times apiece, but 3 of them are only slight variations of the "statutory misdemeanor" penalty type.

9. By comparison, only 79 statutes include a maximum sentence of six months in jail, the next most frequent type of misdemeanor maximum. Because of widely varying minimum penalty and fine provisions, these 79 statutes contain 36

Apparently the legislature has never comprehensively studied or revised criminal penalties in Missouri. The excessive number of penalty types cannot be rationally defended. Having too many penalty types arguably reduces the deterrent effect of all penalties; many penalty types are not publicized sufficiently to give notice of their existence. Further, frequent use of different minimum and maximum penalties may result in penalties that are disproportionate to the crimes penalized and produce wide disparities in sentencing for similar crimes. The legislature needs to adopt a classification system to aid in solving these problems.

B. *The Code Classification System*

The Proposed Code offers a remedy to this chaos of sentencing types without sacrificing flexibility.¹⁰ Felonies are classified for purposes of sentencing into four categories, Classes A, B, C, and D.¹¹ Misdemeanors are classified into three categories, Classes A, B, and C.¹² Infractions, a new class of offense not involving possible imprisonment and not considered criminal, are not further classified.¹³ Each offense in the Code is graded according to its seriousness and assigned to one of these penalty classes. Similarly, all non-Code offenses are simply assigned to a proper penalty class without being regraded.¹⁴

1. Felonies

A person convicted of a Class A felony may be sentenced to a term of years not less than 10 years and not to exceed 30 years, or to life imprisonment.¹⁵ The court may fix any maximum term of years within the range of 10 to 30 years if a life sentence is not considered appropriate. The committee decided that no purpose is served by imposing a maximum term of over 30 years, assuming that changes are not made in the parole system, because the Board of Probation and Parole equates longer term sentences with life sentences in determining parole eligibility.

A person convicted of a Class B felony may be sentenced to any term of years not less than 5 years and not more than 15 years.¹⁶ This is the normal range of imprisonment for very serious offenses for which a life sentence would not be appropriate.

A person convicted of a Class C felony may be sentenced to any term of years not less than three years and not more than seven years, and a person convicted of a Class D felony may be sentenced to a term of three,

10. Authorities have concluded that the best method of assuring consistency in penalties is to classify into relatively few penalty types, thereby forcing the legislature to examine carefully both crime and punishment in order to equalize penalties for crimes of similar gravity. ABA STANDARDS § 2.1 (d), comment at 52-53.

11. PROP. NEW MO. CRIM. CODE § 2.020 (1973).

12. *Id.*

13. *Id.*

14. *Id.* § 2.030.

15. *Id.* § 3.010 (1) (a). No sentencing category is included for mandatory death sentences. See *Id.* § 10.025 (App. 1973), *Capital Murder*.

16. *Id.* § 3.010 (1) (b).

four, or five years.¹⁷ The Class C maximum corresponds to the fourth group, and the class D maximum corresponds to the fifth group of penalty types in Table I.¹⁸

Presently, many "hybrid" Missouri felony statutes authorize both felony and misdemeanor type penalties.¹⁹ Similarly, under the Proposed Code, whenever a person is convicted of a Class C or D felony, the court may decide that a term of years is not appropriate and imprison him for a "special term" not to exceed one year in the county jail or other authorized penal institution.²⁰ If instead the court decides that imprisonment for a term of years is appropriate, it must commit the person to the custody of the Department of Corrections for a term of years not less than three years.²¹

The court may sentence any person convicted of a class C or D felony to pay a fine not exceeding \$5,000, or to pay an amount not exceeding double the amount of the offender's gain from the commission of the crime.²² However, the Code generally discourages felony sentences of only a fine.²³

a. Prison Term and Conditional Release Term

Under the Proposed Code the "prison term" (time actually spent in prison) is calculated by subtracting a prescribed "conditional release term" from the term of years imposed by the court.²⁴ The Board of Probation and Parole retains its authority to grant a parole during the prison term.

The committee believes that all persons released from sentences of terms of three years or more should be placed on parole or on "conditional

17. *Id.* § 3.010 (1) (c), (d).

18. The proposed 7-year maximum for Class C felonies roughly corresponds to the 10-year maximum for many group 4 felonies because the Code presupposes that the "three-fourths time rule" of § 216.355, RSMo 1969, will be repealed when the Code is adopted. Under this rule the vast majority of prisoners today can serve a 10 year sentence in 7.5 years, less further reductions for "merit time." See REPORT OF BOARD OF PROBATION AND PAROLE TO COMMITTEE TO DRAFT A MODERN CRIMINAL CODE at 12-13 (March 22, 1971). Under the Proposed Code a prisoner sentenced to seven years might serve almost all of the sentence in prison; text accompanying note 31 *infra*.

19. See, e.g., the manslaughter penalty statute, § 559.140, RSMo 1969, quoted note 4 *supra*.

20. PROP. NEW MO. CRIM. CODE § 3.010 (2) (1973).

21. *Id.* It has been suggested that the shortest prison sentence during which any meaningful program of rehabilitation or reform could be expected to take effect is three to four years. II WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 1260 (1970). If the court imposes a 3-year sentence under the Proposed Code, the person sentenced ordinarily would spend 18 months in prison and then serve a "conditional release" term of 18 months. PROP. NEW MO. CRIM. CODE § 3.010 (4) (1973). See text accompanying notes 24-32 *infra*.

22. PROP. NEW MO. CRIM. CODE § 5.010 (1973).

23. The "nature and circumstances" of a felony usually require a finding that a fine alone will not "suffice for the protection of the public," *Id.* § 5.040 (2), and a further finding that a fine is not "uniquely adapted to deterrence of the type of offense involved or to the correction of the defendant," *Id.* § 5.040 (3).

24. *Id.* § 3.010 (4), quoted note 28 *infra*.

release."²⁵ At present, prisoners who are the worst parole risks are held the longest; usually they are released without any parole supervision after serving "flat time" in prison.²⁶ Under the Proposed Code, the worst parole risks would continue to be held the longest; however, they would also be given a "conditional release" at the end of their "prison term."

The Proposed Code includes this "conditional release term" in all sentences of three years or more to ensure that control is maintained over every prisoner after his release.²⁷ The term varies in length, depending upon the seriousness of the crime and the length of the sentence actually imposed.²⁸ Consequently, the worst offenders, who receive longer sentences, will have the longest period of parole supervision instead of the shortest period or no supervision at all. The longest conditional release term is 5 years; the shortest is 18 months.²⁹

If a person serving his conditional release term commits another crime or otherwise violates a condition of his release, he may be treated as a parole violator and the conditional release term may be revoked by the Board of Probation and Parole.³⁰ Upon revocation of a conditional release term, the remainder of that term becomes an additional prison term.³¹ Of course, the Board of Probation and Parole might be convinced that the

25. PROP. NEW MO. CRIM. CODE § 3.010 (4) (b) (1973) provides:

"Conditional Release" means the conditional discharge of a prisoner by the Department of Corrections subject to conditions of release that the State Board of Probation and Parole deems reasonable to assist the offender to lead a law-abiding life, and subject to the supervision under the State Board of Probation and Parole. It shall be a condition in each case that the offender not commit another crime, federal or state, during the term of conditional release.

26. In 1970, 765 persons were paroled by the Board of Probation and Parole, but 1009 prisoners were released by the Department of Corrections after having served "flat time." Thus only 43% of all felons released in 1970 were released under parole supervision. REPORT OF BOARD OF PROBATION AND PAROLE TO COMMITTEE TO DRAFT A MODERN CRIMINAL CODE at 4 (March 22, 1971).

27. Note that as defined in note 25 *supra*, "conditional release" is very similar to parole and would involve a major commitment of parole supervision resources to prevent recidivism by offenders who pose the greatest risks of injury to the public.

28. PROP. NEW MO. CRIM. CODE § 3.010 (4) (a) (1973) provides:

A sentence of imprisonment for a term of years shall consist of a prison term and a conditional release term. The conditional release term of any maximum term of years designated by the court shall be:

- (i) one-third or eighteen months, whichever is greater, for maximum terms of nine years or less;
- (ii) three years for maximum terms between nine and fifteen years;
- (iii) five years for maximum terms more than fifteen years, including life imprisonment;

and the prison term shall be the remainder of such maximum term.

29. *Id.*

30. *Id.* § 3.050 (5) (1973). If the prisoner is paroled before the end of his prison term (before the start of the conditional release term) and his parole is later revoked, he must serve, as an additional prison term, the remainder of the prison term and, in addition, all of the conditional release term. *Id.*

31. *Id.*

violator deserves another chance and grant a regular parole at some time during the remainder of the additional prison term.

Obviously, the proposed system of "conditional release" for every felon committed to the Department of Corrections will require greater public expenditures for parole supervision. Yet, the committee believes that a modest investment in conditional releases³² will lower the recidivism rate.

b. Extended Terms for Dangerous Offenders

The Proposed Code makes special provision for extended felony sentences for dangerous offenders. The basic provision³³ permits the court to sentence the dangerous, mentally abnormal offender who commits a Class B, C or D felony under certain aggravating circumstances to up to double the maximum term for normal offenders. The criteria adopted for identifying dangerous offenders are derived from the Model Sentencing Act.³⁴ The court is not required to sentence a dangerous offender to an extended term and cannot do so unless the formal charge notifies the defendant that the prosecution intends to ask for an extended sentence.³⁵ Detailed extended term procedures providing constitutional safeguards are

32. The Board of Probation and Parole estimated that in order to provide conditional release supervision equivalent to parole supervision for the 1009 prisoners released in 1970 after serving "flat time" (see note 26 *supra*), an additional 22 parole officers would be required, assuming each carried a caseload of 50 offenders. Also required would be a secretarial staff of 11 and a supervisory staff of 3, plus housing, supplies, travel expenses, etc. REPORT OF BOARD OF PROBATION AND PAROLE TO COMMITTEE TO DRAFT A MODERN CRIMINAL CODE at 5 (March 22, 1971). By rough estimate, the proposed conditional release system should not cost over \$500,000 per year.

33. PROP. NEW MO. CRIM. CODE § 3.020 (1973) provides:

(1) Authorization. The court may sentence a person who has been convicted of a Class B, C or D felony to an extended term of imprisonment if it finds

(a) the defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious physical injury; or

(b) the defendant is being sentenced for a felony which seriously endangered the life or safety of another and the defendant has been previously convicted of one or more felonies not related to the instant crime as a single criminal episode; and

(c) in addition to finding the matters defined in (a) or (b) the court finds that the defendant is suffering from a severe mental or emotional disorder indicating a propensity toward continuing criminal activity of a dangerous nature. A finding of mental disease or defect excluding responsibility is not required.

(2) Authorized Terms. The total authorized maximum terms of imprisonment for dangerous, mentally abnormal offenders are:

(a) for a Class B Felony, a term of years not to exceed 30 years.

(b) for a Class C Felony, a term of years not to exceed 15 years.

(c) for a Class D Felony, a term of years not to exceed 10 years.

34. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT §.6 (rev. ed. 1970).

35. PROP. NEW MO. CRIM. CODE § 3.030 (2)(a) (1973) provides that notice that the prosecution intends to ask for an extended sentence under § 3.020 must be contained in the indictment or information and delivered to the defendant more than 30 days prior to trial or guilty plea.

included in a special sentencing section of the Proposed Code,³⁶ because normal sentencing procedures would not meet constitutional due process requirements for imposing an extended term.³⁷

The committee found it difficult to draft criteria sufficiently detailed to avoid possible abuse of the extended term authorization.³⁸ In order to minimize potential for abuse the Proposed Code requires the state to prove that "the defendant is suffering from a severe mental or emotional disorder indicating a propensity toward continuing criminal activity of a dangerous nature."³⁹

Although the principle that legislation should distinguish between ordinary and dangerous offenders has been approved by several authorities,⁴⁰ the legislature should ask whether extended terms are needed. The Proposed Code retains high upper limits for felony sentences in the regular provisions,⁴¹ and dangerous felonies are ordinarily classified as Class A or Class B felonies. The case for an extended term provision and special sentencing procedures would be much stronger if there were a substantial and

36. The Proposed Code provides for notice, a sentencing hearing, discovery of all presentence and diagnostic reports, full rights of confrontation and cross-examination, a right to present evidence, and specific findings of fact and conclusions of law. *Id.* § 3.030 (2).

37. *Cf. Specht v. Patterson*, 386 U.S. 605 (1967).

38. The committee rejected the major formulation in MODEL PENAL CODE § 7.03 (3) (Prop. Off. Draft 1962):

The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

39. PROP. NEW MO. CRIM. CODE § 3.020 (1) (c) (1973), quoted note 33 *supra*.

40. MODEL PENAL CODE §§ 7.03, .04 (Prop. Off. Draft 1962); NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT § 6 (rev. ed. 1970); ABA STANDARDS 2.5 (1968).

41. Although the maximum penalties for many felonies were reduced somewhat, a substantial majority of the committee members resisted extensive reductions in criminal penalties. Some penalties were even increased substantially; e.g., attempting a Class A or B felony, PROP. NEW MO. CRIM. CODE § 9.010 (3) (a), (b) (1973). Conspiracy is a felony when the conspiracy is to commit a Class A, B or C felony, *Id.* § 9.020 (8) (1973).

The present Missouri approach and the Proposed Code approach is typical in American sentencing. ABA STANDARDS 2.5 (b) provides:

[M]any sentences authorized by statute in this country are, by comparison to other countries and in terms of the needs of the public, excessively long for the vast majority of cases. Their length is undoubtedly the product of concern for protection against the most exceptional cases, most notably the *particularly dangerous offender* and the professional criminal. It would be more desirable for the penal code to differentiate explicitly between most offenders and such exceptional cases, by providing lower, more realistic sentences for the former and authorizing a special term for the latter

(emphasis added).

general reduction of maximum sentences authorized for most felonies in the Proposed Code.⁴²

2. Misdemeanors

A person convicted of a Class A misdemeanor under the Proposed Code may be sentenced to a definite term not to exceed one year in the county jail or other authorized penal institution.⁴³ The maximum fine for a Class A misdemeanor is \$1,000.⁴⁴ Thus, the Class A misdemeanor penalty type is basically the same as the "statutory misdemeanor" penalty type under present law.⁴⁵ Important changes are recommended, however. In lieu of the maximum fine authorized for *any* class of misdemeanor, the Proposed Code authorizes the court to sentence the person to pay an amount not exceeding double the amount of the offender's gain from the commission of *any* misdemeanor.⁴⁶ A corporation convicted of a Class A misdemeanor may be fined up to \$5,000, with the alternative "double the gain" fine also available for *any* misdemeanor conviction.⁴⁷ This should prevent corporations from regarding misdemeanor fines as occasional costs of doing business.

A person convicted of a Class B misdemeanor may be sentenced to a definite term not to exceed six months; a person convicted of a Class C misdemeanor may be sentenced to a definite term not to exceed 15 days.⁴⁸ In addition to, or in place of, a jail sentence,⁴⁹ he may be fined not more

42. *Id.* The ABA Advisory Committee would not endorse any special terms for dangerous offenders unless provision for such special terms were accompanied by a substantial and general reduction of the terms available for most offenders. The Advisory Committee believes this combined general reduction and extended term approach would go a long way toward eliminating severe disparities in the disposition of similarly situated offenders. *Id.* comment at 84.

43. PROP. NEW MO. CRIM. CODE § 3.010 (1) (e), (3) (b) (1973).

44. *Id.* § 5.020 (1) (a) (1973).

45. See note 2 *supra*.

46. PROP. NEW MO. CRIM. CODE § 5.020 (2) (1973) provides:

In lieu of a fine imposed under Subsection (1) [covering all misdemeanor degrees], a person who has been convicted of a misdemeanor or infraction through which he derived "gain" as defined in Section 5.010 (3), may be sentenced to a fine which does not exceed double the amount of gain from the commission of the offense. An individual offender may be fined not more than twenty thousand dollars under this provision.

47. *Id.* § 5.030 (1) (1973).

48. *Id.* § 3.010 (1) (f), (g) (1973).

49. The misdemeanor sections in the Proposed Code do not provide for imprisonment only, or a fine only, or for both a fine and imprisonment, as many present misdemeanor penalty provisions do. Instead, the Proposed Code provides:

Whenever any person has been found guilty of a felony or a misdemeanor the court shall make one or more of the following dispositions of the offender in *any appropriate combination*. The court may:

(a) sentence the person to a term of imprisonment as authorized by Chapter 3.

(b) sentence the person to pay a fine as authorized by Chapter 5.

(c) suspend the imposition of sentence, with or without placing the person on probation.

(d) pronounce sentence and suspend its execution, placing the person on probation.

than \$500 for a Class B misdemeanor and not more than \$300 for a Class C misdemeanor.⁵⁰ A corporation may be fined up to \$2,000 for a Class B misdemeanor and up to \$1,000 for a Class C misdemeanor.⁵¹

The Code contains general criteria for the imposition of fines,⁵² authorizes installment or delayed payments,⁵³ and limits the response to non-payment of fines.⁵⁴ The court is given authority to revoke a fine previously imposed under limited circumstances.⁵⁵ Although the Code recognizes the need for fines in certain cases, it explicitly discourages the indiscriminate imposition of fines in lieu of jail sentences.⁵⁶

3. Infractions

The creation of the new "infraction" classification is a significant innovation. An infraction is a noncriminal offense.⁵⁷ An offense defined

(e) impose a period of detention as a condition of probation, as authorized by Section 4.040.

Id. § 2.010 (2) (emphasis added).

50. *Id.* § 5.020 (1) (b), (c).

51. *Id.* § 5.030 (1) (c), (d).

52. The Proposed Code provides:

General Criteria. In determining the amount and the method of payment of a fine, the court shall, insofar as practicable, proportion the fine to the burden that payment will impose in view of the financial resources of an individual. The court shall not sentence an offender to pay a fine in any amount which will prevent him from making restitution or reparation to the victim of the offense.

Id. § 5.040 (1).

53. *Id.* § 5.040 (4).

54. The Proposed Code prohibits imprisonment for nonpayment, unless the offender's default was attributable to an intentional refusal to obey the sentence, or to a failure to make a good faith effort to obtain the funds for payment. The maximum term of imprisonment for such contempt of court in the case of non-payment of a misdemeanor fine is 30 days. *Id.* § 5.050.

55. The Proposed Code provides:

A defendant who has been sentenced to pay a fine may at any time petition the sentencing court for a revocation of the fine or any unpaid portion thereof. If it appears to the satisfaction of the court that the circumstances which warranted the imposition of the fine no longer exist or that it would otherwise be unjust to require payment of the fine, the court may revoke the fine or the unpaid portion in whole or in part or may modify the method of payment.

Id. § 5.060.

56. The Proposed Code provides:

When any other disposition is authorized by statute, the court shall not sentence an individual to pay a fine only unless, having regard to the nature and circumstances of the offense and the history and character of the offender, it is of the opinion that the fine alone will suffice for the protection of the public.

Id. § 5.040 (2). A fine often has an uncertain impact; for example, it may hurt the offender's dependents more than the offender. Unless a fine is uniquely adapted to deterrence of the type of offense involved or to the correction of the offender, it ordinarily will not suffice for the protection of the public. *See Id.* § 5.040 (3) (1973).

57. PROP. NEW MO. CRIM. CODE § 1.040 (2) (1973) provides:

An infraction does not constitute a crime and conviction of an infraction shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

by the Code or in any other Missouri statute is an infraction "if it is so designated, or if no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction."⁵⁸ The purpose of the infraction classification is to give the courts and legislature some flexibility in dealing with a large group of offenses⁵⁹ not properly called crimes. These so-called "public welfare offenses" are ordinarily created in order to use fines as a means of regulating conduct.⁶⁰ Strict liability for violation of most public welfare statutes means that no moral condemnation is involved; therefore, conviction of an infraction does not constitute a crime and does "not give rise to any disability or legal disadvantage based on conviction of a criminal offense."⁶¹

A person convicted of an infraction will be subject to a maximum penalty of a fine which may not exceed \$200.⁶² In lieu of the maximum

58. *Id.* § 1.040 (1).

59. See note 6 and accompanying text *supra*. There are numerous different minimum and maximum fines authorized among the 108 penalty types discovered. A list of the various maxima shows how difficult it would be to establish subclasses of infractions: \$1, \$2, \$3, \$4, \$5, \$8, \$10, \$20, \$25, \$50, \$90, \$100, \$150, \$200, \$250, \$300, \$400, \$500, \$1,000, \$1,500, \$2,000, \$3,000, \$5,000, \$10,000. Among 92 penalty types identified authorizing a fine only, or a fine and forfeiture, 47 penalty types authorize a maximum fine of \$300 or less. These 47 penalty types contain almost half of the penalty provisions in the group of 92 penalty types. Another 13 penalty types were found in the over \$300 to \$500 maximum fine range. Adding these penalty provisions shows that 60 of the 92 penalty types contain about 60% of the total number of penalty provisions authorizing only a fine, or a fine and forfeiture. Section 5.020 (i) authorizes a maximum fine of \$200 for infractions. Obviously, the fine is a compromise that would give the sentencing court sufficient flexibility to deal with the vast majority of offenses that should be classified as infractions. In many cases where a larger fine is now authorized by law, the court will be able to impose a fine larger than \$200 by determining how much the offender gained by commission of the infraction. If an offender is not likely to "gain" from the commission of an offense now punishable only by a very large fine, the legislature should consider making the offense a Class C misdemeanor, punishable by a fine of up to \$300 and/or imprisonment up to 15 days.

60. If the effective regulation of conduct requires the availability of an imprisonment alternative, *e.g.*, when many persons committing the offense are likely to be indigent, the legislature should not hesitate to classify the offense as a Class C misdemeanor.

61. PROP. NEW MO. CRIM. CODE § 1.040 (2) (1973). Chapter 6 of the Proposed Code defines the collateral consequences of conviction of a crime, including forfeiture of public office, disqualification from holding public office, and disqualification from voting and jury service. All disqualifications and disabilities not necessarily incident to the execution of the criminal sentence must be listed under the Proposed Code approach. This avoids the confusion that has developed under the present approach and provides a better basis for rehabilitation of offenders.

62. *Id.* § 5.020 (1) (d) (1973). In addition, the Proposed Code provides:

Whenever any person has been found guilty of an infraction, the court shall make one or more of the following dispositions of the offender in any appropriate combination. The court may:

- (a) sentence the person to pay a fine as authorized by Chapter 5.
- (b) suspend the imposition of sentence, with or without placing the person on probation.
- (c) pronounce sentence and suspend its execution, placing the person on probation.

Id. § 2.010 (3).

fine, the court may sentence the person to pay an amount not exceeding double the amount of his gain from the commission of the infraction.⁶³ A corporation convicted of an infraction may be fined up to \$500, with the alternative "double the gain" fine also available.⁶⁴

4. Offenses Outside the Code

Although the Proposed Code contains a general codification of Missouri criminal law, many criminal and quasi-criminal statutes have not been included. It would be inconvenient and undesirable to move offenses into the Code which have relevance only to the chapters in which they are presently located.⁶⁵ Moreover, the committee did not attempt to revise the law in some areas.⁶⁶

To cover these omissions, the Proposed Code provides:

Offenses defined outside of this Code and not repealed shall remain in effect, but unless otherwise expressly provided or unless the context otherwise requires, the provisions of this Code shall govern the construction *and punishment* for any such offenses committed after the effective date of this Code as well as the construction and application of any defense to a prosecution for such offenses.⁶⁷

This section and the general sentencing section on classification of offenses outside the Proposed Code⁶⁸ help carry out the reform effort of integrating and systematizing all offenses.

63. *Id.* § 5.020 (2).

64. *Id.* § 5.030 (1) (e), (f).

65. Potential violators of the many regulatory statutes scattered throughout the Missouri Revised Statutes should not have to search in two places—in the regulatory chapter and also in a miscellaneous chapter of the Criminal Code—in order to find applicable regulatory offenses. Usually such offenses are not felonies, most of which are found in the Proposed Code.

66. *E.g.*, election offenses and traffic offenses are not included in the Proposed Code.

67. PROP. NEW MO. CRIM. CODE § 1.060 (2) (1973) (emphasis added).

68. The Proposed Code states:

(1) Felonies. All offenses defined outside this Code for which imprisonment in a state correctional institution is authorized are classified and shall be treated as Class D Felonies, with the following exceptions:

Section 195.200-1 (1), (2), (3), (4) and (5) RSMo 1969; and Section 195.270 RSMo 1969.

(2) Misdemeanors and Infractions. Any offense defined outside this Code which is declared by law to be a misdemeanor without specification of the penalty therefor is a Class A Misdemeanor. If the authorized imprisonment specified for an offense defined outside this Code exceeds six months in jail, the offense shall be treated as a Class A Misdemeanor; if such authorized imprisonment exceeds 30 days but is not more than six months, the offense shall be treated as a Class B Misdemeanor; if such authorized imprisonment is 30 days or less, the offense shall be treated as a Class C Misdemeanor; if there is no authorized imprisonment, either in the statute defining the offense or in an applicable sentencing statute outside this Code, the offense shall be treated as an infraction.

•••••

Id. § 2.030.

A constitutional notice problem may appear to exist in the case of any non-Code offense with an authorized penalty which is less than the maximum authorized penalty of the Code sentencing class to which it is assigned. The Code provides a temporary solution to this problem by providing that the term of imprisonment or fine actually imposed shall not exceed the maximum imprisonment or fine authorized by the statute outside the Code, even though that statute is assigned to a Code penalty class with a higher maximum penalty.⁶⁹ Ultimately the legislature should solve the problem by specifically assigning each non-Code offense to a particular Code sentencing class.⁷⁰

III. APPELLATE REVIEW OF SENTENCES

Following the *ABA Standards Relating to Appellate Review of Sentences*,⁷¹ the Proposed Code authorizes appellate review of sentences. At present there is no provision in Missouri law authorizing sentencing review and Missouri appellate courts have shown no desire to construe their general authority to review criminal judgments to include such authority. If a sentence does not exceed the maximum penalty authorized for the particular crime committed, a defendant subjected to harsh punishment has almost no chance of successfully appealing on the ground that the sentence is excessive.⁷² Missouri appellate courts will not even examine the merits of an allegedly excessive sentence unless there is clear evidence that "passion or prejudice" of the sentencing court or jury affected the sentence,⁷³

69. *Id.* § 2.030 (3). There is a related conceptual problem created in cases of non-Code offenses punishable by a larger fine or longer term of imprisonment than is authorized by the corresponding Code sentencing class. For example, if an offense outside the Code is punishable solely by a fine, it is punishable under the Code by a fine that may not exceed \$200 or double the "gain" from commission of the offense, even though the non-Code penalty provision authorizes a much greater fine. For a discussion of the problem and a suggested solution, see note 59 *supra*.

70. Another alternative would be to provide that a fine or sentence of imprisonment for an unclassified offense outside the Proposed Code shall be fixed by the court in accordance with the sentence authorized in the statute that defines the crime. However, this would leave many of these offenses with substantially greater or lesser penalties than those provided in the Proposed Code for equivalent grades of offense. See note 59 *supra*.

71. ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 1.1 (Approved Draft, 1968) recommends:

(1) In principle, judicial review should be available for all sentences imposed in cases where provision is made for review of the conviction. . . .

(2) Although review of every such sentence ought to be available, it is recognized that it may be desirable, at least for an initial experimental period, to place a reasonable limit on the length and kind of sentence that should be subject to review.

72. See, e.g., *State v. Rapp*, 412 S.W.2d 120, 125 (Mo. 1967); *State v. Wolfe*, 343 S.W.2d 10, 16 (Mo. En Banc 1961) (death penalty for statutory rape affirmed because within range prescribed by statute).

73. If there is evidence of passion or prejudice on the part of the judge or jury imposing a sentence, the failure of the trial judge to reduce the sentence will be treated as an issue on appeal. *State v. Rizer*, 353 Mo. 368, 182 S.W.2d 525 (1944); *State v. McGee*, 386 Mo. 1082, 83 S.W.2d 98 (1935). The appellate

or that the sentence is so extreme that it is arguably "cruel and unusual" in the constitutional sense.⁷⁴

Appellate courts in this country generally deny that they have the power to review sentences in the absence of statutory authority. Many old Missouri cases go farther by saying that fixing punishment for crime is a legislative and not a judicial function; thus, when punishment is assessed within the legislative limits, it cannot be adjudged excessive.⁷⁵ Occasionally, when the sentence has appeared excessive the appellate court has suggested that executive clemency is available as a possible remedy.⁷⁶ Alternatively, where the sentence is grossly excessive⁷⁷ the appellate court may reverse on other grounds that would otherwise be dismissed as harmless error.

Even though it is sometimes said that sentencing is a legislative function, limited discretionary judicial review of jury sentences and misdemeanor sentences by the trial judge is now authorized in Missouri by statute.⁷⁸ When the court sentences in felony cases no review is available. But in misdemeanor cases the provision for trial *de novo* in circuit court after conviction and sentence in magistrate court can be used to seek revision of an allegedly excessive sentence.⁷⁹ Thus, trivial sentences can be reviewed as of right in another court, but review of felony sentences is limited

standard for reducing the sentence on this ground is that "passion and prejudice so clearly appear from the record that we may confidently say that the trial court abused its discretion when it declined to reduce the punishment" *State v. Laster*, 365 Mo. 1076, 1083, 293 S.W.2d 300, 305 (En Banc 1956). Mere assertion of excessiveness presents nothing for appellate review. *State v. Ransburg*, 466 S.W.2d 691 (Mo. 1971).

74. Excessiveness of sentence could be made an issue in a death penalty or other very severe penalty case under Mo. CONST. art. I, § 21 or U.S. CONST. amend. VIII, *State v. French*, 318 Mo. 619, 300 S.W. 793 (1928).

75. *E.g.*, *State v. McGee*, 336 Mo. 1082, 83 S.W.2d 98 (1935); *State v. Copeland*, 335 Mo. 140, 71 S.W.2d 746 (1934); *but see State v. Rizor*, 353 Mo. 368, 374, 182 S.W.2d 525, 529 (1944) (legislative function to fix limits, primarily jury function to assess punishment).

76. *E.g.*, *State v. Laster*, 365 Mo. 1076, 1083, 293 S.W.2d 300, 305 (En Banc 1956) (suggests that any relief because of inequality must come through clemency).

77. *See ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES* 1.2, comment at 30 (Approved Draft 1968) and authorities therein cited.

78. § 546.430, RSMo 1969, provides:

The court shall have power, in all cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if in its opinion the conviction is proper, but the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted.

Unfortunately, trial court review of jury sentences does not promote the development and application of criteria for determining when punishment is excessive, one of the benefits of appellate review. *ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES* 1.2 (iv) (Approved Draft 1968). Also, since Missouri appellate courts hold that a sentence is not excessive, and subject to review unless there is clear evidence of passion and prejudice (*see note 73 supra*) and that it is primarily the jury's function to assess punishment (*State v. Rizor*, 353 Mo. 368, 374, 182 S.W.2d 525, 529 (1944)), it is doubtful that a trial judge feels obliged to reduce a jury sentence, although it is much more severe than he would have imposed.

79. § 543.290, RSMo 1969; Mo. SUP. CT. R. 22.10, 22.16.

to review by the trial judge and then only in cases wherein the jury originally assessed the punishment.⁸⁰

The Proposed Code provides that all felons who are sentenced to confinement after a trial can appeal as of right on the issue of excessiveness.⁸¹ A person sentenced to confinement after pleading guilty to a felony or misdemeanor, or after a trial in a misdemeanor case, may petition the appropriate appellate court for leave to appeal on the ground that the sentence is excessive.⁸² Sentences to pay a fine or to serve a term of probation are not appealable.

Under the Proposed Code "[a]n appellate court reviewing a sentence may reduce it on the ground that the sentence imposed was greater than, under the circumstances of the case, ought to be imposed; or the court may set the sentence aside for further proceedings in the sentencing court."⁸³ The committee decided that appellate courts should not be permitted to increase any sentence,⁸⁴ although some committee members argued that granting such authority would tend to deter the filing of frivolous sentencing appeals. The committee believes that the proposed limitations on the right to appeal and the broad discretionary power of the appellate courts to deny leave to appeal will effectively prevent a flood of frivolous appeals.

The Proposed Code authorizes the supreme court to adopt rules and procedures for the review of sentences.⁸⁵ The *ABA Standards Relating to Appellate Review of Sentences* provides excellent guidelines for the court to follow in drafting such rules.⁸⁶

Appellate review of sentencing in Missouri would encourage the development of uniform sentencing policies, provide a means of correcting

80. The probability that the power to decrease a jury sentence is exercised very infrequently (*see* note 78 *supra*) means that at present there is almost no way "to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest." ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 1.2 (i) (Approved Draft 1968).

81. PROP. NEW MO. CRIM. CODE § 2.070 (1) (1973).

82. *Id.*

83. *Id.* § 2.070 (2).

84. ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 3.4 (Approved Draft 1968) recommends:

(a) No reviewing court should be empowered to impose, or direct the imposition of, a sentence which results in an increase over the sentence imposed at the trial level.

(b) On remand for the purpose of re-sentencing the offender, no sentencing court should be empowered to impose a sentence which results in an increase over the sentence originally imposed.

Noting that the question of whether the reviewing court should be authorized to increase the penalty is perhaps the most controversial question involved in the decision to provide for sentence review, the Advisory Committee discusses the various arguments in detail. *Id.* comment at 55-63.

85. PROP. NEW MO. CRIM. CODE § 2.070 (3) (1973).

86. ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (Approved Draft 1968).

excessive or disparate sentences, and cause trial and appellate courts to explicitly consider the justification for particular sentences. The Proposed Code provisions provide a sound basis for achieving these goals.

IV. PROBATION

No legislative definition or classification of offenses can take account of all contingencies. However right it may be to take the gravest view of an offense in general, there will be cases comprehended in the definition where the circumstances were so unusual, or the mitigations so extreme, that . . . probation would be proper. We see no reason to distrust the courts upon this matter or to fear that such authority will be abused.⁸⁷

The drafters of the Model Penal Code thus described the basis for a broad general provision authorizing probation as one of the alternatives available to a sentencing court.⁸⁸ The Proposed Code follows their lead:

The court may place a person on probation for a specific period upon conviction of any offense or upon suspending imposition of sentence if, having regard to the nature and circumstances of the offense and to the history and character of the defendant, the court is of the opinion that

- (1) institutional confinement of the defendant is not necessary for the protection of the public; and
- (2) the defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision.⁸⁹

Although the Proposed Code states no preference for probation, some members of the committee believe that probation should presumptively be the disposition of an offender absent good reasons indicating that imprisonment is necessary.⁹⁰

The Proposed Code follows the existing law⁹¹ and the *ABA Standards Relating to Sentencing Alternatives and Procedures*⁹² in authorizing maximum probation terms of five years for felonies and two years for misdemeanors and a minimum probation term for felonies.⁹³ The Proposed

87. MODEL PENAL CODE § 6.02, Comment at 13-14 (Tent. Draft No. 2, 1954).

88. Compare MODEL PENAL CODE § 6.02 (Prop. Off. Draft 1962) with the broad sentencing alternatives provision in PROP. NEW MO. CRIM. CODE § 2.010 (2) (1973), quoted note 49 *supra*.

89. PROP. NEW MO. CRIM. CODE § 4.010 (1973). Present § 549.071, RSMo 1969, permits probation of "any person of previous good character" sentenced to confinement when the court is satisfied that the defendant, "if permitted to go at large, would not again violate the law."

90. Preference for probation is recommended in MODEL PENAL CODE § 7.01 (Prop. Off. Draft 1962) and ABA STANDARDS 2.2.

91. § 549.071, RSMo 1969.

92. ABA STANDARDS 2.3 (b).

93. § 549.071, RSMo 1969.

Code departs from existing law in so far as it provides for a six-month minimum probation term for misdemeanors, and authorizes six months to one year of probation for infractions.⁹⁴ The minimum limits allow sufficient time for rehabilitative programs to take effect or to determine if the offender can rehabilitate himself without supervision.

Although some new codes contain a list of standard conditions of probation, the Proposed Code is flexible: "[t]he conditions of probation shall be such as the court in its discretion deems reasonably necessary to insure that the defendant will not again violate the law."⁹⁵ Each probationer must be given a certificate containing the conditions on which he is being released in order to avoid misunderstanding and to provide a basis for probation revocation hearings.⁹⁶ The court may at its discretion modify or enlarge the conditions at any time prior to the expiration or termination of the probation term.⁹⁷

A major innovation in the Proposed Code is the provision allowing imposition of a detention term as a condition of probation.⁹⁸ Also known as the "split sentence" provision, it permits the court to impose the shock of a relatively short-term imprisonment as a prelude to a much longer probation period. In misdemeanor cases the maximum period of "split sentence" detention is 60 days; in felony cases the maximum period is 180 days.⁹⁹ Availability of such detention is a very important rehabilitative tool, particularly in felony cases or in cases involving young offenders where the

94. PROP. NEW MO. CRIM. CODE § 4.020 (1) (b), (c) (1973).

95. *Id.* § 4.030 (1). Present § 549.071, RSMo 1969, provides less guidance, providing that the court may "place the defendant on probation upon such conditions as the court sees fit to impose."

96. *Id.* Comment.

97. *Id.* § 4.030 (2).

98. *Id.*

When probation is granted the court, in addition to conditions imposed under Section 4.030, may require as a condition of probation that the defendant submit to a period of detention in an appropriate institution at whatever time or intervals within the period of probation, consecutive or nonconsecutive, the court shall designate.

(1) In misdemeanor cases, the period of detention . . . shall not exceed the shorter of 60 days or the maximum term of imprisonment authorized for the misdemeanor

(2) In felony cases, the period of detention . . . shall not exceed 180 days.

(3) Time spent in custody under a detention condition of probation shall be deducted from the maximum prison or jail term if probation is revoked and the defendant serves a term of imprisonment.

Id. § 4.040.

99. *Id.* The Board of Probation and Parole recommended a 90-day maximum "shock treatment" detention period on the ground that if a person "has not received sufficient shock in 90 days (maximum) this person will not usually be shocked in a longer period of time." REPORT OF BOARD OF PROBATION AND PAROLE TO COMMITTEE TO DRAFT A MODERN CRIMINAL CODE at 17 (March 22, 1971). The PROP. FED. CRIM. CODE § 3103 (Study Draft 1970) recommended a maximum of 60 days, but the PROP. FED. CRIM. CODE § 3106 (Final Draft 1971) recommends a 6-month maximum detention period.

court believes that some imprisonment is necessary, but that long-term imprisonment would be undesirable.¹⁰⁰

The "split sentence" provision also allows intermittent detention as a condition of probation.¹⁰¹ This would give all Missouri sentencing courts "work release" authority.¹⁰² For example, the court could require an offender to serve nights or weekends in jail, while continuing to work to support himself and his family.¹⁰³

Probation granted under the Proposed Code may or may not be a "sentence" because the Code, as well as present law, authorizes the court to suspend imposition of any sentence and still place the offender on probation.¹⁰⁴ Because an offender may be required to submit to a period, or intermittent periods, of detention as a condition of probation, a court suspending imposition of sentence and putting an offender on probation could indirectly impose short-term imprisonment without sentencing. Thus, if the offender successfully completes his probation term, he will have no record of having been convicted or sentenced to imprisonment. Nor will he suffer any collateral consequences of conviction.¹⁰⁵ If this flexibility in the proposed probation law is properly used, it should reduce the need for legislation authorizing removal of collateral consequences or expungement of records of conviction.¹⁰⁶

V. COURT VERSUS JURY SENTENCING

This review of sentencing under the Proposed Code would not be complete without discussion of the changed roles of the court and jury in sentencing. The Proposed Code provides:

100. The Board of Probation and Parole learned that in jurisdictions that have used short term detention as "shock treatment" the rate of success measured by reduction in recidivism has been phenomenal. REPORT OF BOARD OF PROBATION AND PAROLE TO COMMITTEE TO DRAFT A MODERN CRIMINAL CODE 7 (March 22, 1971).

101. PROP. NEW MO. CRIM. CODE § 4.040 (1973), quoted note 98 *supra*.

102. At present only persons sentenced to jail in first class counties under charter government and counties containing first class cities may be allowed to leave jail to continue employment or business, to attend an educational institution, to obtain medical treatment, or, in the case of a woman, to keep house and attend to the needs of her family. § 221.170, RSMo 1969. This type of legislation usually has general application throughout states that have adopted it. See ABA STANDARDS 2.4, comment at 76-77.

103. Recommended by ABA STANDARDS 2.4 (a) (ii). Other possibilities include confinement for selected periods to a facility designed to provide educational or other rehabilitative services. *Id.* 2.4 (a) (i). While the Proposed Code includes no presumption in favor of probation or these forms of probation disposition (see note 90 and accompanying text *supra*), a sentence involving partial confinement ordinarily would be preferable to a sentence of total confinement. ABA STANDARDS 2.4 (c).

104. § 549.071, RSMo 1969; PROP. NEW MO. CRIM. CODE § 2.010 (2) (c) (1973), quoted note 49 *supra*. Under present law, no person convicted under the Narcotic Drug Act, ch. 195, RSMo 1969, may receive a suspended sentence and be placed on probation unless it is his first felony narcotic offense and it does not involve selling, giving or delivering the drug. § 195.200 (4), RSMo 1969. The Proposed Code does not revise drug offenses and does not attempt to reclassify or redefine the penalties for certain Narcotic Drug Act felonies. PROP. NEW MO. CRIM. CODE § 2.030 (1) (1973).

105. See PROP. NEW MO. CRIM. CODE ch. 6 (1973).

106. See MODEL PENAL CODE § 305.6 (Prop. Off. Draft, 1962)

(1) Upon a finding of guilt upon verdict or plea the court and not the jury shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant, and render judgment accordingly.

(2) In all jury trials the jury shall be informed of the range of authorized terms which the court might impose after a jury finding of guilt.¹⁰⁷

This provision, although basically conforming to the *ABA Standards Relating to Sentencing Alternatives and Procedures*,¹⁰⁸ changes Missouri law substantially. Presently in most cases¹⁰⁹ of conviction by jury trial "where by law there is any alternative or discretion in regard to the kind or extent of punishment to be inflicted, the jury may assess and declare the punishment in their verdict. . . ."¹¹⁰ Consequently, most authorities say that Missouri has a "jury sentencing system."¹¹¹ The legislature, however, has created so many exceptions to jury sentencing that in the vast majority of cases the court actually assesses and declares the punishment. Thus, Missouri has a "judicial sentencing system" whenever: (1) The jury fails to agree upon or to declare the punishment;¹¹² (2) the jury assesses a punishment not authorized by law;¹¹³ (3) the defendant pleads guilty or waives a jury trial;¹¹⁴ (4) the defendant has previously been convicted of a felony;¹¹⁵ or (5) the court determines that the punishment assessed by the jury is greater than ought to be imposed under the circumstances and reduces it.¹¹⁶

A fundamental issue during committee debates was whether the Proposed Code should abandon this "sometimes jury, usually judge sentencing system" in favor of judicial sentencing. Ultimately the committee opted for judicial sentencing,¹¹⁷ but required that whenever the trial is to a jury,

107. PROP. NEW MO. CRIM. CODE § 2.060 (1973).

108. ABA STANDARDS 1.1 recommends: "Authority to determine the sentence should be vested in the trial judge and not in the jury." Most jurisdictions in this country give the trial judge exclusive authority in sentencing. *Id.* comment at 43-44.

109. Where the defendant has previously been convicted of a felony the court has exclusive sentencing authority. *But see* note 115 *infra*.

110. § 546.410, RSMo 1969; Mo. SUP. CT. R. 27.02 (emphasis added).

111. E.g., *State v. Rizer*, 358 Mo. 368, 374, 182 S.W.2d 525, 529 (1944) (legislative function to fix limits, primarily jury function to assess punishment); see Comment, *A Review of Sentencing in Missouri: The Need for Re-evaluation and Change*, 11 St. L.U.L.J. 69 (1966), criticizing jury sentencing.

112. § 546.440, RSMo 1969; Mo. SUP. CT. R. 27.03.

113. *Id.*

114. Mo. SUP. CT. R. 27.03.

115. § 556.280 (1), RSMo 1969. If the court finds insufficient evidence of the alleged prior conviction, the jury determines punishment as in other cases. § 556.280 (2), RSMo 1969.

116. § 546.430, RSMo 1969, quoted note 78 *supra*; Mo. SUP. CT. R. 27.04.

117. At first there was substantial sentiment for retaining some type of jury sentencing system, or a system in which the jury is informed of the range of penal-

they must be informed of the potential range of punishment before they reach their decision. This latter requirement was added to ensure the jury would be aware of the serious consequences that could potentially accompany a finding of guilt.¹¹⁸ The committee decided that judicial sentencing would reduce sentencing disparity produced by unpredictable jury sentences.¹¹⁹ Also, the court is in the best position to receive information concerning the defendant's background, character, and past criminal record.¹²⁰ Furthermore, only the court has the requisite knowledge and experience to interpret the material presented in a presentence report¹²¹ and to tailor the punishment to fit the rehabilitative needs of each defendant.¹²²

Although there are allegedly certain advantages to jury sentencing,¹²³ it is difficult to imagine an ad hoc jury of laymen properly weighing the goals of punishment¹²⁴ before assessing the sentence. Often juries tend to overemphasize a felt need for retribution, ignoring rehabilitative needs

ties and recommends a sentence to the court. However, it was noted that in Missouri a defendant who probably would be placed on probation upon a plea of guilty often will be sentenced to prison if he elects to stand trial because the jury cannot impose probation and the judge usually defers to the jury's sentencing verdict. See notes 78 and 80 *supra*; Comment, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 973-75 (1967). Permitting the jury simply to make a sentencing recommendation is not significantly different than complete judicial sentencing; Missouri judges already have authority to reduce jury sentences, but seldom do.

118. See PROP. NEW MO. CRIM. CODE § 2.060 (1973), quoted in text accompanying note 107 *supra*. The provision for informing the jury about the range of authorized terms is probably unique in American law. It represents a committee compromise between strict judicial sentencing, with the jury supposedly deliberating solely about guilt but perhaps speculating about the punishment that the judge might impose, and jury sentencing as it now exists in Missouri.

119. "Sentencing by a distinct jury at each trial is necessarily a guarantee of significant disparity between sentences." ABA STANDARDS 1.1, comment at 45.

120. Missouri and other states authorizing jury sentencing do not submit a presentence report to the jury because much of its contents would be inadmissible on the primary issue of guilt. Admitting evidence relevant only to the issue of punishment often would be highly prejudicial. The committee opposes any bifurcated trial procedure involving a jury sentencing trial because it would be too time-consuming and expensive. See Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1156 (1960), which collects and discusses jury sentencing statutes.

121. PROP. NEW MO. CRIM. CODE § 2.040 (1973) follows MO. SUP. CT. R. 27.07 (b) in requiring a presentence investigation and report whenever a probation officer is available to the court, unless the court directs otherwise. The introduction of jury sentencing to take the place of common law judicial sentencing made sense in the 1800's when there usually was little difference between the training and intelligence of judges and jurors and when presentence investigations were not conducted.

122. See ABA STANDARDS 7.1-7.5 for recommendations on the development of sentencing criteria and the exposure of judges to rehabilitation developments and techniques.

123. See ABA STANDARDS 1.1, comment at 44 for arguments favoring retention of jury sentencing.

124. The accepted goals or theories of criminal punishment are retribution, deterrence, incapacitation and rehabilitation. In recent years there has been a growing recognition that the best protection for society is provided by rehabilitating the offender, the goal least likely to be emphasized by a sentencing jury. Note, *Sentencing Felons to Imprisonment under the Kansas Criminal Code: The Need for a Consistent Sentencing Policy*, 10 WASHBURN L.J. 269 (1971).

because they know little about the defendant.¹²⁵ Racial and ethnic factors are more likely to affect jury sentencing deliberations. Compromise quotient verdicts may result from combined jury deliberations on guilt and punishment.¹²⁶

Adoption of a purely judicial sentencing system will not eliminate all problems of sentencing. Sometimes judges are subject to political pressures. Also, it is impossible for judges, as it is for jurors, to disengage their prejudices against certain types of offenders. There are, however, many ways for judges to work together to develop criteria for the imposition of sentences and to otherwise attack the pervasive problem of sentencing disparity.¹²⁷ Appellate review of sentencing will further the development of sentencing criteria and insure they are implemented at the trial level.

If the legislature adopts the proposed judicial sentencing system it will authorize the type of sentencing procedure now followed by most jurisdictions and supported by almost all authority on the subject.

VI. CONCLUSION

The Proposed Code sentencing system is designed to deal with the major sentencing problems and deficiencies of present Missouri law. The Proposed Code classifies all crimes for purposes of sentencing into eight major categories, with an uncomplicated and uniform range of penalties applicable to all crimes within each category. Offenses of like gravity are assigned to the same sentencing category. The court will impose all sentences within the ranges of sentencing alternatives. Limited appellate review of sentences is authorized to promote the development of rational sentencing criteria and to curb abuses of sentencing power. Flexible probation provisions will permit a broader range of dispositions consistent with the protection of the public and the rehabilitation of the offender. These major reforms in the sentencing system and other proposed changes not discussed in this article provide a sound basis for adoption of the Proposed Code and for the subsequent cooperation of agencies concerned with sentencing—the legislature, appellate courts, trial courts, and corrections agencies.

125. This is especially true in cases of heinous crimes, when the community is seeking vengeance through criminal punishment. *Id.* at 270. Some authorities argue that juries tend to place too much emphasis on deterrence through severe punishment. *E.g.*, Comment, *supra* note 111, at 70-71, which includes a comparative study of the length of judge and jury sentences in St. Louis. A survey by the Atlanta Crime Commission showed that in Atlanta some first offenders received heavier punishment through jury sentencing than hardened recidivists. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 145 (1967). *See Id.* for a recommendation that jury sentencing be abolished.

126. Comment, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 986-87 (1967), argues that jury sentencing may thus destroy the integrity of the "beyond a reasonable doubt" standard.

127. *See* ABA STANDARDS 7.1 to 7.5, which recommend various means of attacking sentencing disparity, including sentencing councils, sentencing institutes, orientation of new judges, regular visitation of facilities for custody and treatment, and feedback of information and statistics about sentenced offenders.