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SUSPENDING IMPOSITION AND EXECUTION OF CRIMINAL SENTENCES: A STUDY OF JUDICIAL AND LEGISLATIVE CONFUSION

John M.A. DiPippa *

I. INTRODUCTION

The Arkansas Criminal Code of 1976¹ was part of the modern trend towards codification of the criminal law on the example of the Model Penal Code.² Code drafters, starting with the Model Penal Code and continuing into states like Arkansas, tried to rationalize the criminal law, consolidate its disparate provisions, and reform its anachronisms.³ The Arkansas code was also part of a related trend toward sentencing reform.⁴ This development led courts to articulate their reasons for punishment and provided them with more dispositional possibilities.

The code became effective on January 1, 1976.⁵ It immediately improved the criminal law by collecting it in one place. However, it also created problems by not containing a direct repealer of all the statutes it displaced. Instead, any statutes in conflict with the code were impliedly repealed.⁶ The problems created by this rather sloppy method of repeal have caused confusion in regard to sentencing. This article will deal with this confusion in one area of sentencing.

Prior to the enactment of the code, courts in Arkansas had the authority to either suspend execution of a sentence⁷ or to suspend its

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1. ARK. STAT. ANN. §§ 41-101 to -3110 (1977 & Cum. Supp. 1985).

2. MODEL PENAL CODE (Official Draft and Explanatory Notes 1985). See *infra* notes 15-37.

3. Tucker, *Introduction*, 30 ARK. L. REV. 105, 108 (1976).

4. See generally H. HART, PUNISHMENT AND RESPONSIBILITY (1968).

5. Act of March 3, 1975, No. 280, § 101, 1975 Ark. Acts 500, 500-01 (codified as ARK. STAT. ANN. § 41-101 (1977)). The Arkansas General Assembly adopted the code in March of 1975. The January 1976 effective date was chosen "to allow the law enforcement and legal communities to become thoroughly conversant with the code before it went into effect." ARK. STAT. ANN. § 41-101 commentary (1977). In light of the persistent refusal of some trial courts to abide by some of the sentencing provisions, more study time may have been necessary.

6. *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980).

7. ARK. STAT. ANN. § 43-2326 (1977) (repealed 1985) provided that "all courts of rec-

imposition.⁸ Courts used both methods in spite of the Arkansas Supreme Court's pronouncement that there was no substantive difference between the two.⁹ The code did not authorize suspending execution of a sentence, however.¹⁰ Although the drafters concluded that suspending imposition of the sentence was the more common practice,¹¹ a significant minority of courts suspended execution.

The pre-code law on the suspension of sentences illustrates some of the causes of the codification movement—piecemeal amendment, judicial recalcitrance, and the inability to think of the area as a coherent body of law. The code's sentencing provisions constituted an effort to rectify these problems. In spite of the code's clear rule that its provisions were to govern all sentencing procedures, courts continued to suspend the execution of sentences. On appeal, the Arkansas Supreme Court would declare these sentences illegal, but would not reverse them because of the failure of the defendant to object at the time of pronouncement. This article examines that line of cases as developed by the Arkansas Supreme Court¹² and demonstrates that instead of supporting the provisions of the 1976 Code, the supreme court decisions and subsequent statutory provisions undermine them.¹³ Trial courts continued to pronounce invalid sentences and, eventually, the Arkansas General Assembly passed a statute allowing trial courts to suspend the execution of sentences.¹⁴ The new statute was not made part of the code and, in fact, contradicted its sentencing structure. Ironically, earlier in this century, Arkansas had tried to reform the sentencing practices of trial courts by giving them the power to suspend the imposition but not the execution of sentences. During this time the law developed in almost the same direction as it has recently, resulting in the need to reform sentencing practices. In short, the same factors which created the confusion and irrationality that led to the codification movement have already begun to infect the Arkansas Criminal Code.

ord . . . shall have the authority to suspend the execution of jail sentences or the imposition of fines, or both, in all criminal cases”

8. ARK. STAT. ANN. § 41-2324 (1977) gave a court the authority to “postpone the pronouncement of final sentence and judgment upon such conditions as he shall deem proper and reasonable as to probation of the person convicted Such postponement shall be in the form of a suspended sentence for a definite number of years” This section has been repealed by implication. *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980).

9. *Canard v. State*, 225 Ark. 559, 283 S.W.2d 685 (1955).

10. *See* ARK. STAT. ANN. § 41-801 (1977).

11. *Id.* § 41-803 commentary.

12. *See infra* notes 68-83.

13. *See infra* notes 68-83 and notes 113-46 and accompanying text.

14. ARK. STAT. ANN. § 43-2326.1 (Cum. Supp. 1985).

This article examines the development of the law concerning the suspension of sentences. After an introductory section on the development of the codification movement in the United States and in Arkansas, the article focuses on the treatment of suspended sentences. The article then shows that the pre- and post-code judicial and legislative response to the "problem" of suspended sentences was identical. In both instances, the trial court could not or would not follow the statutory procedures, the supreme court was ineffective in clarifying the law, and the legislature responded with an unnecessary statute. The article then examines a possible constitutional difference in the two types of suspensions. It concludes with an appeal for a return to the goals of the codification movement.

II. THE TREND TOWARD CODIFICATION

The development of the criminal law in the United States did not follow a regular course. Upon independence from England or admission to the Union, most states simply adopted the common law as it existed on a particular date. Thereafter, most changes were made in response to specific needs. By the twentieth century, the state statutes were without any organization.¹⁵ There was little definition of the various crimes and almost no explication of the various concepts of *mens rea*, justification, insanity, punishment or release.¹⁶ As the commentators pointed out, this disorganization would have been serious if it had been the result of deliberate choice. That it arose because of "an old decision deemed to be authoritative, the mood that dominated a tribunal or legislature at strategic moments in the past, a flurry of public excitement on some single matter, the imitative aspects of so much of our penal legislation, [and] the absence of effective legislative reconsideration of the problems posed" made the problem even more serious.¹⁷

In addition, the criminal law became outdated. The law in most jurisdictions at mid-century was at least one hundred years old.¹⁸ Although laws were passed throughout the period in response to new

15. Hall, *Revision of Criminal Law—Objectives and Methods*, 33 NEB. L. REV. 383, 384 (1954) ("The glaring defect in the criminal law of most states is the disorganization of the statutes.").

16. See Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1100-01 (1952).

17. *Id.* at 1101.

18. Remington, *Criminal Law Revision, Codification vs. Piecemeal Amendment*, 33 NEB. L. REV. 396, 398 (1953).

conditions, old laws remained on the books.¹⁹ Besides adding to the disorganization of the criminal law, these outmoded statutes made it difficult to use the law, led to selective enforcement, and took away from the dignity of the law.²⁰ Wechsler claimed that this and other factors led to the abandonment of law in favor of administration.²¹ Finally, critics claimed that science had left the law behind. Wechsler stated the problem with typical precision: "The challenge [from the scientific community] is . . . that the penal law is ineffective, inhumane and thoroughly unscientific."²²

The criminal law was also criticized for its verbosity, its hair-splitting distinctions, and its unnecessary overlapping.²³ These criticisms came together in the treatment of theft offenses. Statutes went to great lengths to specify every method by which property might be stolen and to maintain the increasingly artificial distinctions between larceny, embezzlement, and false pretenses.²⁴

More important for the purposes of this article was the criticism of sentencing. The obsolescence of the law left open the possibility of a criminal sentence for the violation of some obscure provision passed and forgotten long ago. The imprecision of the various crimes did not inspire confidence in the even-handed administration of justice. Most significantly, however, the total disorganization of the criminal law worked against and not for rational sentencing. The penalty provisions were spread throughout the criminal law and often were attached to the specific crime.²⁵ These sanctions were passed as "intermittent responses to pressures on the legislatures, reactions to public opinion which sometimes border[ed] on hysteria or, at best, intelligent guesswork."²⁶ In addition, there seemed to be a "legislative mania for setting up an infinite number of classifications for penalty purposes."²⁷ These far flung penalty provisions and the mind-numbing distinctions between degrees of offenses led to unacceptable

19. Professor Remington cited to a Wisconsin statute that made it a crime for any person to propel or to haul any steam engine on the public highways at night. *Id.* (citing WIS. STAT. § 340.76 (1951)).

20. *Id.*

21. Wechsler, *supra* note 16, at 1101-02.

22. *Id.* at 1103. Jerome Hall was a forceful proponent of this criticism. See J. HALL, THEFT, LAW, AND SOCIETY (1935); Hall, *Science and Reform in Criminal Law*, 100 U. PA. L. REV. 787 (1952).

23. Remington, *supra* note 18, at 399-400.

24. *Id.*

25. *Id.*

26. Hall, *supra* note 15, at 384-85.

27. Remington, *supra* note 18, at 401.

variations in sentencing.²⁸

Scientific criticism of sentencing practices also gained favor. Remington claimed that the failure of the law to keep up with the changes in the methods of post-conviction release rendered minimum sentences meaningless.²⁹ Developments in probation and treatment were not always reflected in the contemporary criminal codes. To be sure, an independent sentencing reform had changed the way courts disposed of offenders,³⁰ but the reform was unconnected to any coherent reform of the substantive criminal law. This piecemeal approach ignored the larger question of whether treatment should be a more prominent rationale of the substantive criminal law.³¹

III. DRAFTING THE MODEL PENAL CODE

Although the American Law Institute called for the drafting of a model criminal code in 1931, it did not begin the project, which eventually led to the Model Penal Code, until 1951.³² Several states had already begun to study their criminal codes by 1951 and one, Louisiana, had completed a significant revision of its criminal statutes in 1942.³³ Nevertheless, the Model Penal Code became the most influential source in the gathering movement toward codification. The reasons were obvious. Men and women of uncommon ability worked on the project for a period of eleven years.³⁴ Fourteen tentative drafts were circulated in the widest possible manner before the final draft was proposed in 1962.³⁵ Since that time the Model Penal Code has

28. Hall, *supra* note 15, at 385. See also, Wechsler, *supra* note 16, at 1113 ("The multiplicity of definitions of offenses or degrees thereof embodied in the penal law transcends by far what is required or appropriate in marking out the bounds of criminality.").

29. Remington, *supra* note 18, at 398.

30. Wechsler, *supra* note 16, at 1104.

31. *Id.*

32. *Id.* at 1097.

33. Remington, *supra* note 18, at 396. The states with revisions in progress were Maryland, Missouri, New Hampshire, New Mexico, and Wisconsin. *Id.* at 396-97.

34. The Reporters were Herbert Wechsler, Chief Reporter, and Louis Schwartz. The Associate Reporters were Morris Ploscowe and Paul Tappan. Special Consultants included Francis Allen, Sanford Bates, Rex Collings, Jr., Frank Grad, Manfred Guttmacher, William Jones, Robert Knowlton, Harold Korn, Monrad Paulsen, Frank Remington, Thorsten Sellin, Louis H. Swartz, and Glanville Williams. Research Associates were Paul Berger, Russell Brooks, Yale Kamisar, Lee Kozol, Paula Markowitz, Arthur Pearce, Curtis Reitz, Arthur Rosett, Ruth Schwartzman, Donna Shellabarger, and Max Singer. MODEL PENAL CODE (Official Draft and Explanatory Notes 1985) (*citing* MODEL PENAL CODE (Proposed Official Draft 1962)).

35. The thirteen tentative drafts contained various portions of the Code and its commentary. The Proposed Official Draft of 1962 was the culmination of the entire process. See MODEL PENAL CODE (Foreword 1985).

been adopted in substantial part in thirty-four states.³⁶ Even when its provisions have been rejected, they have provided a focus and a starting point for discussion.³⁷

IV. THE ADOPTION OF THE 1976 CRIMINAL CODE

The Arkansas Criminal Code became effective on January 1, 1976.³⁸ It was the result of several years of study and discussion. The code was drafted by the Arkansas Criminal Code Revision Commission which had been formed under the joint leadership of former Chief Justice Carleton Harris and former Attorney General Ray Thornton.³⁹ According to the supreme court the movement toward revision grew out of three workshops to study the American Bar Association's *Minimum Standards for the Administration of Criminal Justice*.⁴⁰

The Commission echoed many of the goals of the Model Penal Code drafters. The Commission wanted to eliminate "archaic statutes and antiquated statutory language generally" and replace "the profusion of overlapping statutes which had accumulated over the last century and a half with fewer provisions of broader applicaion" and develop "an evenhanded method for grading offenses."⁴¹ A good example of the Commission's work on the first point was the code's treatment of theft. One author noted that prior to the enactment of the code Arkansas punished twenty different forms of theft in fifty different sections whereas the code consolidated all similar property crimes into one theft offense detailed in eight sections.⁴²

The Commission saw the same obsolescence and piecemeal legislative approach in the criminal law that the Model Penal Code draft-

36. *Id.* As Wechsler noted in the foreword to the official draft, "the extent to which particular formulations or approaches of the Model were adopted or adapted varied extensively from state to state." *Id.*

37. *Id.*

38. ARK. STAT. ANN. § 41-101 (1977).

39. Tucker, *The Arkansas Criminal Code*, 10 ARK. LAW. 25 (1976). The Commission was also charged to revise the Arkansas Rules of Criminal Procedure. It produced a draft of revised rules which the Arkansas Supreme Court promulgated on December 22, 1975. *In re: The Arkansas Criminal Code Revision Commission*, 259 Ark. 44, 530 S.W.2d 672 (1975).

40. 259 Ark. at 44, 530 S.W.2d at 672. A study commission eventually produced a document comparing the Arkansas practice to the ABA standards. See R. GUZMAN, *A COMPARATIVE ANALYSIS OF AMERICAN BAR ASSOCIATION STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE WITH ARKANSAS LAW* (1976).

41. Tucker, *supra* note 3, at 108.

42. *Id.* at 109. See also ARKANSAS CRIMINAL CODE preface (Proposed Official Draft 1974), where theft is said to take up eighty-eight sections. For a general discussion of this problem, see J. HALL, *THEFT, LAW, AND SOCIETY* (1935).

ers saw twenty years earlier. In the *Preface* to the Proposed Official Draft, they stated that the "rapid advance of society over the past one hundred years has necessitated a piecemeal approach to legislation" without any careful consideration of the desirability of making particular conduct criminal or the effectiveness of the prescribed punishment.⁴³ Most criminal statutes resulted from a hurried response to a perceived immediate need.⁴⁴ The length of legislative sessions precluded any thorough study of the long-range implications of these statutes or the relationship of the bill under consideration to the rest of the criminal law. Repealer statutes were rarely passed and the result was "a hodgepodge of overlapping acts and distinct statutory provisions aimed at essentially the same type of conduct."⁴⁵

The reform of sentencing is noted as a prominent objective in any contemporary articulation of the goals of the criminal code revision in Arkansas.⁴⁶ Like the substantive criminal law, the sentencing provisions were obsolete and confusing. The goal was to make the system more rational, geared more to the rehabilitation of the defendant and the deterrence of future misconduct by the defendant and others, than to punishment for the offense.⁴⁷ One commentator indicated the sentencing provisions of the 1976 Code placed Arkansas "more in line with the modern concept that rehabilitation is the key to the better protection of society."⁴⁸ Although it was claimed that the code did

43. ARKANSAS CRIMINAL CODE preface (Proposed Official Draft 1974). See also Tucker, *supra* note 3, at 108, where the author noted that among the most important goals were the elimination of archaic statutes and language and the replacement of the profusion of statutes that had developed over the previous one hundred years.

44. Tucker, *supra* note 3, at 109.

45. *Id.* The lack of a specific repealer and the subsequent muddled amendment of statutes to respond to a perceived need is part of the problem that gave rise to this article.

46. ARKANSAS CRIMINAL CODE preface (Proposed Official Draft 1974). Cf. Wechsler, *Codification of the Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968) where the author noted that the substantive problems of the criminal law and the problem of sanctions and penology are analytically separate on some issues but closely intertwined on others.

47. Cf. Wechsler, *supra* note 46, at 1432 ("Penal law should not be used merely to express the pious sentiment of the community.")

48. Note, *Disposition of Offenders: Under Arkansas' New Criminal Code*, 30 ARK. L. REV. 222 (1976). Ironically, while the Note writer waxed eloquently about rehabilitation, a gathering body of literature was seeking to re-establish retribution as the core component of punishment and to disparage rehabilitation. See, e.g., Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147 (1978); van den Haag, *A Note on the Sentencing of Criminals*, 1 POLICY REV. 107 (1977); N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974). This article does not address the more general issue of the appropriate theory of punishment; it rather confines itself to an explication of the provisions Arkansas has enacted. For a discussion of the topic of sentencing reform in general, see F. ZIMRING, *A CONSUMER'S GUIDE TO SENTENCING REFORM* (1977).

not seek to establish any new penal or correctional policies, it is apparent from the work of the Commission that they realized sentencing reform necessarily involved the establishment of new policies.⁴⁹ Their most obvious accomplishment was the elimination of the penalty provisions from individual statutes and the consolidation of the sentencing provisions into one article of the 1976 Code.⁵⁰ The Commission was rightly proud of this work, calling it one of their "major accomplishments."⁵¹

V. OVERVIEW OF THE STATUTORY PROCEDURE

Currently, chapter eight of the code governs sentencing.⁵² All defendants convicted of an offense under the code shall be sentenced in accordance with the procedures found in chapter eight.⁵³ This section repealed by implication all inconsistent sentencing statutes.⁵⁴

The sentencing court may suspend imposition of a sentence or place the defendant on probation.⁵⁵ These alternatives are not available if the defendant has been convicted of capital murder, treason, a Class Y felony or murder in the second degree.⁵⁶ Suspension is defined as a "procedure whereby a defendant . . . is released by the court

49. Compare Tucker, *supra* note 3, at 107 (Code did not intend to establish any new penal or correctional policy nor to deal with rising crime rate) with ARKANSAS CRIMINAL CODE § 802 (Proposed Official Draft 1974), which would have dramatically changed Arkansas law by vesting all sentencing authority in the court. The commentary to this section cited to the ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 1.1, comment at 46 (1967) which said, in part, that "[t]he day is long past when sentencing turned solely on the degree of moral approbation which the offense commanded." See, e.g., ARKANSAS CRIMINAL CODE preface (Proposed Official Draft 1974) where the consideration of all of the interests that "should bear on the sentencing decision" was seen as a safeguard against harshness and arbitrariness; Tucker, *supra* note 39, at 26 where the author hoped that the "Commission . . . [had] created a more thorough, simple, and consistent body of criminal law" through the new sentencing provisions.

50. ARK. STAT. ANN. §§ 41-801 to -1351 (1977 & Cum. Supp. 1985).

51. Tucker, *supra* note 39, at 26.

52. ARK. STAT. ANN. §§ 41-801 to -804 (1977 & Cum. Supp. 1985).

53. *Id.* § 41-803(1) (1977).

54. Hunter v. State, 278 Ark. 428, 645 S.W.2d 954 (1983). Cf. ARK. STAT. ANN. § 41-803 commentary (1977) ("Subsection (1) makes it clear that the disposition of a defendant . . . is governed by the provisions of this article.").

55. ARK. STAT. ANN. § 41-803(4), (5) (Cum. Supp. 1985). The procedures for imposing probation are found in chapter twelve of the code. ARK. STAT. ANN. §§ 41-1201 to -1212 (1977 & Cum. Supp. 1985).

56. ARK. STAT. ANN. § 41-803(5) (Cum. Supp. 1985). This section goes on in some detail to list the options available to the sentencing court. This section does not apply if the defendant has been convicted of two or more felonies. *Id.* Multiple felons may be sentenced to an extended term of imprisonment according to chapter ten of the code. *Id.* §§ 41-1001 to -1005 (1977 & Cum. Supp. 1985).

without pronouncement of sentence and without supervision."⁵⁷ Probation, on the other hand, is defined as a "procedure whereby a defendant . . . is released . . . without pronouncement of sentence but subject to the supervision of a probation officer."⁵⁸ The code equates probation and suspension of imposition; the only difference being the supervision of the defendant required by probation.⁵⁹

The code did not authorize suspension of execution. Although prior law authorized both the suspension of execution and the suspension of imposition of a sentence,⁶⁰ there was no practical difference between them.⁶¹ The code specifically did away with the authority to suspend execution because the drafters wanted to discourage the entry of a judgment of conviction.⁶² The code allows a sentence plus the suspension of imposition of an additional part of the sentence or a fine plus either suspension of imposition or probation.⁶³ The code does not allow imprisonment plus probation.⁶⁴

The significant feature of the code's sentencing provisions is the effect of a judgment of conviction. Entry of a judgment of conviction forecloses some of the sentencing court's options. If a judgment of conviction is entered then the court may impose a fine or imprisonment or both.⁶⁵ If a court does not enter a judgment of conviction then it may suspend imposition of a sentence or place the defendant on probation but not both.⁶⁶ The rationale behind this scheme is to give the court a flexibility to deal with offenders in the most appropriate manner. An offender who can be fully rehabilitated by the threat

57. ARK. STAT. ANN. § 41-801(1) (1977).

58. *Id.* § 41-801(2) (1977). The code defines "probation officer" very broadly to encourage the use of probation even in jurisdictions without the funds for a formal probation program. See *id.* § 41-801(3) (1977) (where a "reputable person" may be designated a probation officer). "[L]aw enforcement officers, social workers, ministers, relatives of the defendant" are all listed as persons who might qualify under this section. *Id.* § 41-801(3) commentary.

59. ARK. STAT. ANN. § 41-801 commentary (1977).

60. *Id.* § 43-2326 (1977) (repealed 1985). See *Culpepper v. State*, 268 Ark. 263, 595 S.W.2d 220 (1980) where the court held that the passage of the sentencing provisions of the 1976 Code repealed this section by implication.

61. *Canard v. State*, 225 Ark. 559, 283 S.W.2d 685 (1955).

62. ARK. STAT. ANN. § 41-803 commentary (1977 & Cum. Supp. 1985). This is also consistent with the goal of developing "techniques of dealing with offenders [to] meet modern society's needs, while eliminating . . . ineffectual ways of treating . . . convicted persons." ARKANSAS CRIMINAL CODE preface (Proposed Official Draft 1974).

63. ARK. STAT. ANN. § 41-803(4) (Cum. Supp. 1985).

64. *Id.* See commentary to this section where the drafters explain that "[a] person released from prison should be subject to the supervision of parole officials." ARK. STAT. ANN. § 41-1204 (1977) is available for the judge who wishes to impose some imprisonment and probation.

65. ARK. STAT. ANN. § 41-803 (1977 & Cum. Supp. 1985).

66. *Id.* § 41-803 commentary (1977).

of punishment may receive a suspended sentence and, upon successful completion of the period of suspension, not have a conviction on his record. Courts should reserve this procedure for those offenders most likely to be deterred from future misconduct and who do not need supervision. Those offenders who present more of a risk should be placed on probation. If an offender should fail his probation, or not successfully complete the period of his suspension, the court may impose a sentence up to the maximum allowed.⁶⁷

A problem arises when a court must revoke a suspension. The code's scheme allowed a court to revoke a suspension and impose any sentence which could have been imposed initially, because by suspending imposition and not entering a judgment of conviction, no sentence had ever been pronounced. When a court suspends execution of a sentence, however, it pronounces a sentence at the time of suspension. When the court revokes this suspension, the question is whether or not it can impose a period of incarceration longer than the original period of suspension.

VI. CASE LAW

The Arkansas Supreme Court first addressed the problem of the post-1976 Code validity of suspending execution of a sentence in *Culpepper v. State*.⁶⁸ Culpepper pleaded guilty in January 1979 to burglary. He was sentenced to "five (5) years suspended with three (3) years probation . . ."⁶⁹ Four months later the state moved to revoke his probation because he had committed aggravated robbery. The trial court granted the state's motion, revoked the sentence, and then sentenced Culpepper to fifteen years in prison.⁷⁰ Culpepper challenged the increased sentence on appeal claiming that he was denied due process because the trial court failed to advise him of the maximum possible sentence if he violated the terms of his probation. The court agreed that his sentence should not have been increased but did not rely on constitutional grounds. Instead, the court relied on statutory grounds.⁷¹

The court acknowledged that the failure of the code to expressly repeal conflicting statutes had caused "considerable confusion."⁷² The court reasoned that because the code controlled all sentencing

67. *Id.* § 41-1208(6) (1977).

68. 268 Ark. 263, 595 S.W.2d 220 (1980).

69. *Id.* at 265, 595 S.W.2d at 221.

70. *Id.*

71. *Id.* at 267, 595 S.W.2d at 222.

72. *Id.* at 265, 595 S.W.2d at 221.

decisions after its enactment, suspension of execution was no longer an alternative available to courts.⁷³ The court held that the defendant was entitled under Arkansas law "to know the effect of his sentence."⁷⁴ The court stated that "[t]here is a substantial difference between advising a defendant that he is sentenced to 5 years suspended . . . and in advising a defendant that the imposition of sentence will be suspended or postponed for 5 years"⁷⁵ By suspending *execution* of sentence, the trial court could not later impose a greater sentence. Had the trial court followed the statutory procedure of suspending imposition of sentence, then it could have imposed the fifteen year sentence upon revocation.⁷⁶ The supreme court noted that concurrent suspension *and* probation was not authorized by the Criminal Code.⁷⁷ The court reduced the fifteen year sentence to the original five year sentence.⁷⁸

The *Culpepper* opinion did not clarify the area because the rationale for the court's decision was not clear. The court never disposed of the defendant's constitutional argument. In fact, the court never discussed the constitution; after stating the facts, the court began its discussion of the statutory law, never to return to the defendant's contention. One can infer that the court chose to dispose of the case on statutory grounds as opposed to constitutional grounds, but that is not clear from the case. In any event, it is clear the court agreed with the defendant's conclusion that he was entitled to know the effect of his sentence. The court reversed the fifteen year sentence because neither it nor the original sentence were carried out according

73. *Id.* at 267, 595 S.W.2d at 222. In the course of this discussion the court stated that ARK. STAT. ANN. § 43-2326 (1977) was repealed by implication; ARK. STAT. ANN. § 43-2324 (1977) had been superseded by the recodification and its analogous sections dispersed throughout the new code; and the parts of ARK. STAT. ANN. § 43-2331 (1977) that were in conflict with the new code were impliedly repealed. 268 Ark. at 267, 595 S.W.2d at 222.

74. 268 Ark. at 267, 595 S.W.2d at 222. The court cited to ARK. STAT. ANN. § 41-1203(4) (1977) which required that the defendant be given a written statement explicitly setting forth the terms of his sentence and ARK. STAT. ANN. § 43-2305 (1977) which requires that a sentence be read and explained to a defendant. 268 Ark. at 267-68, 595 S.W.2d at 222.

75. 268 Ark. at 268, 595 S.W.2d at 223.

76. The court reasoned that:

If the appellant had been sentenced in compliance with § 41-803 by the suspension of the *imposition* of sentence, rather than by the suspension of the *execution* of sentence, the trial court could have sentenced him to 15 years imprisonment upon revocation of the suspension, as is authorized by ARK. STAT. ANN. § 41-1208(6)

268 Ark. at 268, 595 S.W.2d at 223. The court went on to note that the latter section was partially repealed by implication when the Arkansas General Assembly amended ARK. STAT. ANN. § 43-2332 (1977). 268 Ark. at 268, 595 S.W.2d at 223.

77. 268 Ark. at 268-69, 595 S.W.2d at 223.

78. *Id.* at 269, 595 S.W.2d at 223.

to the applicable statutes. There is no connection between the invalidity of these sentences and the disclosure rule, however. If the sentence imposed upon revocation was without authority because the original sentence was invalid, then no explanation would be sufficient to adequately inform the defendant. It would be a non-sequitur to hold that in the future the trial court could validly impose the same kind of initial sentence as long as the defendant was told that the sentence he was receiving was illegal.

What may have been present at the bottom of the *Culpepper* case was the simple proposition that sentences that do not follow the criminal code are not valid. The practical effect of the court's decision was the reverse. The result of the court's judgment was to reinstate the original sentence even though the court acknowledged the apparent illegality of suspending execution and imposing probation. The message to lower courts was to continue using this method but not to increase the sentence beyond the term of suspension at revocation.

The Arkansas General Assembly must share some of the blame for this confusion. The 1976 Code did not contain an express repealer of specific provisions of the old law. Instead, any provisions in conflict with the code were repealed by implication.⁷⁹ The legislature subsequently amended several of these statutes. The confusion that has resulted was in large measure caused by these amendments. In 1979 the legislature added, to a statute that otherwise dealt with the salaries of probation officers, a provision that gave courts the power to revoke a probation and require the defendant to serve "the sentence imposed, or any lesser sentence which might have been originally imposed."⁸⁰ This amounted to a non-sequitur because by definition no sentence had been imposed if a court had been following the provisions of the code. Nevertheless, *Culpepper* held that this non-sensical amendment to an apparently superseded statute impliedly repealed the analogous provision of the new code.⁸¹

Later the court would hold that the 1979 amendment was not intended to effect a basic change in sentencing procedures; instead, the amended provision only applied to cases in which a sentence had been imposed and the defendant had been placed on probation.⁸²

79. *Id.* at 267, 595 S.W.2d at 222.

80. ARK. STAT. ANN. § 43-2332 (Cum. Supp. 1985). See also *Culpepper*, 268 Ark. 263, 595 S.W.2d 220 (1980).

81. *Culpepper*, 268 Ark. at 268, 595 S.W.2d at 223, where the court declared that ARK. STAT. ANN. § 41-1208(6) (1977) was repealed in part by the 1979 amendment to ARK. STAT. ANN. § 43-2332 (1977). But see *infra* note 82.

82. *McGee v. State*, 271 Ark. 611, 609 S.W.2d 73 (1980). The court reasoned that:

This holding rendered the amended statute superfluous. *Culpepper* had already limited courts to the sentences originally imposed in these situations. The statute serves no purpose because it too limits the trial court to the sentence originally imposed. The sentences to which the statute would apply were invalid under the 1976 Criminal Code. The result created one statute which covered valid sentences and another statute which covered invalid sentences.⁸³

VII. OVERVIEW OF THE LAW PRIOR TO 1976

Earlier this century, the Arkansas Supreme Court faced a problem similar to *Culpepper*. Prior to 1923, Arkansas trial courts had limited sentencing options. Early cases held that all sentences had to comply with the statutory procedures because a trial court had no inherent sentencing authority.⁸⁴ In spite of this rule, Arkansas trial courts had long employed suspension as a sentencing alternative. In *Davis v. State*⁸⁵ the defendant had been originally sentenced to one year in prison with the "judgment and sentence . . . stayed, so far as pertaining to imprisonment of defendant, provided said defendant does not in any manner or form whatever violate any of the liquor laws of the State of Arkansas"⁸⁶ The judge who succeeded the sentencing judge believed the original sentence was void and he subsequently entered an order suspending the execution of the sentence in-

Unquestionably, the legislature did not intend . . . to effect a basic change in probation procedures or prohibit a court from releasing a defendant on probation for a prescribed period of time without pronouncing sentence. The words "sentence imposed," therefore, presume that a sentence has been pronounced. In the appellant's case, none was pronounced until his four year probation was revoked.

Id. at 614, 609 S.W.2d at 75.

83. Compare ARK. STAT. ANN. § 41-1208(6) (1977) with ARK. STAT. ANN. § 43-2332 (1977). In *Diffee v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986) the court addressed the 1979 amendment more fully. The court termed it an "interesting question" whether or not the legislature intended to re-write the paragraph in question when it amended another part of the statute. *Id.* at 197, 718 S.W.2d at 96. Apparently, the only change in this paragraph was the omission of the words "sentence, and if sentence was not imposed, the court may impose any. . . ." *Id.* at 119, 718 S.W.2d at 96 (citing ARK. STAT. ANN. § 43-2332 (1977)). The omission could have simply been a typographical error because the word "sentence" is the next to the last word in the third and fourth lines of the statute. *Id.* If this is true, then the legislature could not have intended any change. On the other hand, the paragraph reads coherently in its revised form, thus suggesting that the legislature intended the change. *Id.* The court did not decide the question in *Diffee* because under either construction no sentence had ever been imposed and the court was free to impose a sentence within the statutory range. *Id.* See *McGee v. State*, 271 Ark. 611, 609 S.W.2d 73 (1980).

84. *Holden v. State*, 156 Ark. 521, 247 S.W. 768 (1923).

85. 169 Ark. 932, 277 S.W. 5 (1925).

86. *Id.* at 933, 277 S.W. at 5.

definitely.⁸⁷ Eventually, the trial court revoked the defendant's sentence and ordered him to prison for one year.⁸⁸

On appeal, the Arkansas Supreme Court upheld the one year sentence. The court declared that neither the constitution nor any statutes conferred on circuit courts the power to suspend the execution of sentences. Only the common law could provide this authority.⁸⁹ Although a court has the inherent authority to enforce its orders, the court found that a sentencing court did not have the inherent authority to indefinitely suspend its judgments in criminal cases.⁹⁰ To do so would intrude into the province of the executive.⁹¹ Thus, the court held that the circuit court had no power to suspend the execution of the defendant's sentence in either instance.⁹² Because the suspensions were void the circuit court had the power to order the defendant to serve his original one year prison term.⁹³

Apparently, an act of the Arkansas General Assembly caused the resentencing in the *Davis* case. In 1923 the legislature gave circuit courts the power to postpone the pronouncement of a sentence.⁹⁴ The *Davis* court found that the act did not apply because the original sentence had been pronounced before the act was passed.⁹⁵ In *Calloway v. State*⁹⁶ the court upheld a revocation of a sentence imposed under these statutes. The court found that the sentence and revocation had been carried out under the statutes.⁹⁷ The *Calloway* court may have been too hasty in its conclusion that the sentence had been rendered pursuant to statute, however. The trial court ordered that the defendant "should serve a sentence of ten years in the Arkansas Penitentiary; that pronouncement of such sentence should be suspended

87. *Id.* at 933, 277 S.W. at 6.

88. *Id.* at 933, 277 S.W. at 5.

89. *Id.* at 935, 277 S.W. at 6.

90. *Id.*

91. *Id.* at 936, 277 S.W. at 6.

92. *Id.*

93. According to the court, "[t]he postponement of his imprisonment was with his consent, and he can not now object to being called upon to serve it A sentence of imprisonment is satisfied, not by lapse of time after it is pronounced, but by actual suffering of the imprisonment imposed by it." *Id.* at 937, 277 S.W. at 7. There are echoes of this position in the current courts' repeated finding that the defendant waived his right to object to the original sentence by not taking an appeal from it. See *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986); *Miller v. State*, 13 Ark. App. 314, 683 S.W.2d 937 (1985).

94. 169 Ark. at 936-37, 277 S.W. at 6 (citing Act of Feb. 9, 1923, No. 76, § 1, 1923 Ark. Acts 40, 41 (current version at ARK. STAT. ANN. § 43-2324 (1977))).

95. *Id.* at 937, 277 S.W. at 6-7.

96. 201 Ark. 542, 145 S.W.2d 353 (1940).

97. *Id.* at 544, 145 S.W.2d at 354.

during the good behavior of defendant”⁹⁸ In *Ketchum v. Vansickle*⁹⁹ the court held that a similar suspension was void because it was not authorized by statute. The court succinctly stated that “[s]entence was pronounced and a final judgment rendered, after which the pronounced sentence and judgment was suspended.”¹⁰⁰ The precise characterization of the sentence may not have mattered, however, because the defendant would be made to serve the original sentence no matter what it was called.

These cases point out the persistent difficulty Arkansas courts have had in distinguishing between the suspension of imposition of sentence and the suspension of execution (and the courts’ long tradition of independence). The earliest statutes gave the courts the power only to suspend the imposition of sentences. The cases expressly distinguish between imposition and execution, yet the trial courts continued to suspend execution. The Arkansas Supreme Court inadvertently encouraged the lower courts by refusing to review these sentences by relying on the fiction that the defendant had consented to the sentence. Further confusion and lax practice was bound to follow the mischaracterization of the sentence in the *Calloway* case.

This inability to see the distinction between suspension of imposition and suspension of execution formed the basis for *Canard v. State*.¹⁰¹ In this case, the defendant pleaded guilty to grand larceny. The trial court ordered that he be “sentenced to serve one year in the state penitentiary at hard labor, which sentence is hereby suspended . . . for said period of time”¹⁰² Almost two years later the same court revoked the sentence and ordered him incarcerated.¹⁰³

On appeal, the supreme court reversed the revocation order. The court held that the trial court lacked the statutory authority to revoke a sentence beyond the period for which it had been suspended.¹⁰⁴ Although the original statutes had only authorized the suspension of imposition of a sentence, a later statute expressly granted the power to suspend execution to all courts.¹⁰⁵ Any suspensions had to be for a specific number of years, during which time the court had jurisdiction

98. *Id.* at 543, 145 S.W.2d at 353.

99. 171 Ark. 784, 286 S.W. 948 (1926).

100. *Id.* at 785, 286 S.W. at 949.

101. 225 Ark. 559, 283 S.W.2d 685 (1955).

102. *Id.* at 559-60, 283 S.W.2d at 686.

103. *Id.* at 560, 283 S.W.2d at 686.

104. *Id.* at 563, 283 S.W.2d at 687.

105. ARK. STAT. ANN. § 43-2326 (1977) (repealed 1985) authorized all courts “to suspend the execution of jail sentences or the imposition of fines” 225 Ark. at 560, 283 S.W.2d at 686.

to revoke the sentence.¹⁰⁶ The jurisdiction of the court lasted until the period of suspension ended or, in the case of a postponement of sentence, until the statute of limitations for the particular offense ran.¹⁰⁷

The court noted that *Davis* and *Ketchum* distinguished between postponing pronouncement and postponing execution of sentence, but candidly admitted "that a clear distinction has not at all times been made" between the two.¹⁰⁸ In spite of this distinction, the court found that there was no difference between the two practices in light of the intervening statutes.¹⁰⁹ These statutes were designed to alleviate the hardship on the defendant who received an indefinite suspension.¹¹⁰

This history can be summarized briefly. Sentencing was governed by statutes but trial courts pronounced idiosyncratic sentences. The General Assembly gave trial courts the power to suspend the imposition of sentences but not their execution; trial courts nonetheless continued to suspend execution. The supreme court tried to clarify this process but did not succeed. Finally, in response to the perceived deficiency in the courts' sentencing powers, the General Assembly added a statute which allowed the suspension of execution. The result was a system that allowed two different suspensions which had no practical differences in effect. Thus, in 1973, the Arkansas General Assembly, following the *Canard* case, made no distinction between suspending execution and imposition when it adopted Arkansas Statutes Annotated section 43-2331.¹¹¹ Other statutes dealt with the related problem of revocation.¹¹²

VIII. POST-CULPEPPER CASE LAW

The case law subsequent to *Culpepper* follows this pattern. The court again faced the problem of revocation of a suspended sentence in *McGee v. State*.¹¹³ The defendant pleaded nolo contendere to a charge of theft in 1976. The court postponed pronouncement of his sentence and placed the defendant under supervision for four years.¹¹⁴

106. 225 Ark. at 561, 283 S.W.2d at 686 (citing ARK. STAT. ANN. § 43-2324 (1947)).

107. *Id.* (citing ARK. STAT. ANN. § 43-2324 (1947) and Act of March 23, 1949, No. 358, 1949 Ark. Acts 1016).

108. *Id.* at 562, 283 S.W.2d at 687.

109. *Id.*

110. *Id.* at 562-63, 283 S.W.2d at 687.

111. This statute simply restated in one place the authority of the court to choose not to imprison the defendant contingent upon his good behavior for a period of time. ARK. STAT. ANN. § 43-2331 (Supp. 1975).

112. ARK. STAT. ANN. § 43-2332 (Supp. 1975).

113. 271 Ark. 611, 609 S.W.2d 73 (1980).

114. *Id.* at 611-12, 609 S.W.2d at 74.

In 1979 the defendant pleaded guilty to a gun charge. Again he was placed on probation, this time for three years.¹¹⁵ Later in 1979 the trial court revoked the probation it had set earlier in the year and imposed a sentence of five years, suspending all but 119 days.¹¹⁶ In January 1980 the prosecuting attorney filed another revocation petition because of still another criminal episode.¹¹⁷ The court revoked the defendant's probation and suspended sentence and imposed a prison term of nine years: five years for violating the terms of his 1976 probation and four years for violating the terms of his 1979 suspended sentence.¹¹⁸

On appeal, the defendant claimed that the court erred by sentencing him to more than seven years.¹¹⁹ This argument was premised on the notion that the court could not increase the sentence. The two original sentences, according to the defendant, were the probation in 1976 and the probation and suspended sentence in 1979. The defendant thus argued that he could not be sentenced to more than seven years because the two periods of probation added up to seven years.

The question before the court was whether or not a specified period of probation constituted a sentence so that a court may not impose a prison term longer than the probation upon revocation.¹²⁰ The defendant's argument grew out of *Culpepper*; he reasoned that because the supreme court in *Culpepper* limited the trial court to the sentence originally imposed, the trial court in *McGee* was also limited to the seven years originally imposed.¹²¹

The defendant found support for his position in the 1979 amendment to Arkansas Statute Annotated section 43-2332. The amend-

115. *Id.* at 612, 609 S.W.2d at 74.

116. *Id.* The revocation came about because of a burglary and theft committed in June of 1979. In a footnote the court added that "[t]he trial court actually improperly sentenced [the defendant] since it suspended execution of a pronounced sentence, a method of sentencing which the 1976 Criminal Code no longer sanctions." *Id.* at 612 n.1, 609 S.W.2d at 74 n.1 (citing ARK. STAT. ANN. § 41-801(1) (1977)).

117. Actually there were two episodes in December of 1979. The defendant was accused of theft and, in a separate incident, he was accused of being a felon in possession of a firearm, rape, and burglary. 271 Ark. at 611, 609 S.W.2d at 74. So much for either deterrence or rehabilitation.

118. *Id.* at 612, 609 S.W.2d at 74.

119. *Id.*

120. The court did not decide the question of the validity of the 1979 revocation and suspended sentence because the defendant failed to object to the sentence in the trial court. By failing to object at the proper time the defendant had no "legal standing" to now object to it. *Id.* at 612, 609 S.W.2d at 74. The issue of the validity of the January 1980 revocation of his 1976 probation was before the court, however. *Id.*

121. *Id.* at 612-13, 609 S.W.2d at 74.

ment provided that "[once the defendant is before the proper court] the court may revoke the probation and require him to serve the *sentence imposed*, or any lesser sentence which might have been originally imposed."¹²²

If a period of probation was the equivalent of a sentence, then this section expressly limited the amount of time to which the defendant could be sentenced. Citing *Jefferson v. State*¹²³ the court held that a period of probation was not a sentence and, therefore, it did not limit the trial court on revocation.¹²⁴ Under the code a court does not impose a sentence until it pronounces a fixed term of imprisonment.¹²⁵ The amended statute must be construed *in pari materia* with the 1976 Criminal Code. When this is done it becomes clear that the legislature did not intend to materially change the criminal code.¹²⁶ No sentence was pronounced until the defendant's four year probation was revoked. Therefore, section 2332 was not applied to the case.¹²⁷

Chief Justice Fogleman wrote a curious concurrence.¹²⁸ He asserted that "no legislation has in any way impaired or abolished court probation."¹²⁹ Because the General Assembly could have expressly abolished court probation but had not, Chief Justice Fogleman reasoned, circuit courts still had the authority to impose court proba-

122. *Id.* at 213, 609 S.W.2d at 75 (emphasis added by the court).

123. 270 Ark. 909, 606 S.W.2d 592 (1980). In *Jefferson*, the defendant originally was given a seven year sentence with five years suspended. The court suspended execution on the sentence and placed the defendant on probation for five years. Later that sentence was revoked and he was sentenced to seven years. The supreme court rejected the defendant's contention that his sentence on revocation should have been limited to five years. Without the improper sentence the defendant could have been sentenced to twenty years. Because the judge improperly suspended execution of the seven year sentence the defendant could not be prejudiced by any failure to comply with the sentencing statute.

124. 271 Ark. at 613, 609 S.W.2d at 75. *Jefferson* is not persuasive precedent on this point. In *Jefferson* the trial court clearly sentenced the defendant to seven years. The error came in combining a suspended sentence with a period of probation. In *McGee* the trial court had not combined a period of probation with a longer suspended sentence. If the question is whether or not a period of probation is a sentence, then *Jefferson* does not really answer it. The better answer and the one the court turns to is based on the statutory requirements for probation. *Id.* at 613-14, 609 S.W.2d at 75.

125. 271 Ark. at 613, 609 S.W.2d at 75.

126. *Id.* at 614, 609 S.W.2d at 75. The court noted that the 1979 amendment "was obviously intended to merely effect a change in the salary administration of probation officers" and not to change the criminal code. *Id.* at 613-14, 609 S.W.2d at 75.

127. *Id.* at 614, 609 S.W.2d at 75.

128. *Id.* at 614-15, 609 S.W.2d at 75-76 (Fogleman, C.J., concurring).

129. *Id.* at 614, 609 S.W.2d at 75. He defined court probation as the situation when the court postpones acceptance of a guilty plea but retains jurisdiction, thus giving the defendant an opportunity to rehabilitate himself. *Id.*

tion.¹³⁰ The curious aspect of this concurrence is that the system Chief Justice Fogleman describes as court probation is identical to the statutory procedure of suspending imposition of a sentence.¹³¹ The drafters made it clear that this option was designed to allow the trial courts flexibility to deal with potentially recoverable offenders.¹³² Indeed, suspending imposition is simply probation without the supervision.¹³³ If this is what Chief Justice Fogleman was referring to, then "court probation" is another name for the process of suspending imposition of a sentence. The problem in the *McGee* case was that the trial court did not follow the statutory procedure when it imposed a sentence and then suspended it for the 1979 offense. If this is the "court probation" that the Chief Justice was referring to, then such a procedure was expressly superseded by the 1976 Criminal Code.¹³⁴ Finally, McGee's 1976 sentence, which was specifically before the court, suspended imposition of the sentence and placed the defendant on probation. This cannot be "court probation" since it put the defendant under supervision and court probation apparently does not.¹³⁵ The supreme court repudiated the notion that "court probation" was still a sentencing alternative in *English v. State*¹³⁶ when it found the trial court erred by allowing court probation as proof of a prior conviction under the habitual offender statute. According to the court, placing the defendant on probation without imposing a sentence constituted court probation.¹³⁷ Under the 1976 Code, this is the essence of probation. Thus, court probation as a separate sentencing alternative is no longer available.¹³⁸

130. *Id.* at 615, 609 S.W.2d at 75.

131. ARK. STAT. ANN. § 41-802 (1977).

132. *Id.* § 41-803 commentary (1977).

133. *Id.* § 41-801(1) commentary (1977).

134. *Id.* §§ 41-801, -803 commentary (1977).

135. The supreme court decided two cases involving court probation after *McGee*. In *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983) the court held that the statutory form of probation put an end to any local forms. In *English v. State*, 274 Ark. 304, 626 S.W.2d 191 (1981) the supreme court held that a court probation did not constitute a conviction and could not be used to enhance a later sentence.

136. 274 Ark. 304, 626 S.W.2d 191 (1981).

137. *Id.* at 305-06, 626 S.W.2d at 192.

138. *Id.* Interestingly enough, the court misstated the provisions of the Criminal Code. After defining court probation, the court noted that "[a]ll other statutory sentencing procedures require that a judgment of conviction be entered, and the sentence begins to run from the time of the sentence and it is immaterial whether the trial court suspends [execution or imposition.]" *Id.* The 1976 Code did not require a judgment of conviction for every other statutory procedure. As we have seen, the drafters of the code wanted to discourage the routine entry of a judgment of conviction. Suspending the imposition of sentence was the unsupervised version of probation, neither of which allowed the trial court to enter a judgment of conviction.

McGee is a significant case. It defined the concept of sentence and thus foreclosed attacks on a great number of sentences. Moreover, it clarified *Culpepper's* discussion of the relationship between Arkansas Statutes Annotated sections 2332 and 1208(6). *Culpepper* said that the latter was partially repealed by the 1979 amendment to section 2332. *McGee* reconciles the two sections. In effect the two cases hold that regardless of the form the original sentence takes, the court will be limited on revocation to the term of any sentence actually imposed.¹³⁹ There is nothing in either of the two statutory sections that is inconsistent with this position. This is precisely the result that obtained after the earliest cases.¹⁴⁰

After *McGee* the appellate courts reviewed eight cases which challenged a sentence's validity where its execution had been suspended.¹⁴¹ The court could not rule on most of the sentences because the defendant had failed to appeal his original sentence and only challenged the sentence when it was revoked.¹⁴² Of course, this is understandable. A defendant is not likely to perceive the problem unless his lawyer points it out to him. Moreover, a defendant who is free under a suspended sentence will not want to tempt fate by objecting to the form of this freedom. Thus, the only realistic time to object to an invalid sentence was at the time of revocation and that was too late. Compliance with the law depends largely on the individual efforts of trial judges and prosecutors. The supreme court seemed to hint at its frustration at the inability of some courts to follow the statutory procedures when it suggested Rule 37¹⁴³ petitions to the defendants in the

Neither *Canard* nor *Culpepper* support the court's statement. At the time *Canard* was decided, trial courts enjoyed the statutory authority to suspend either execution or imposition. After the enactment of the 1976 Criminal Code, trial courts could only suspend the imposition of sentences which was the situation facing the court in *Culpepper*. Thus, *Canard* cannot be persuasive because it dealt with a completely different situation while *Culpepper* stands for the proposition that trial courts could not enter a judgment of conviction and still suspend imposition.

139. *Cf. Wolfe v. State*, 266 Ark. 811, 586 S.W.2d 4 (Ark. App. 1979) (trial court may not change previously pronounced sentence from concurrent to consecutive).

140. *See supra* notes 84-112.

141. *Diffie v. State*, 290 Ark. 194, 718 S.W.2d 94 (1986); *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986); *Blakely v. State*, 283 Ark. 138, 671 S.W.2d 183 (1984); *Cooper v. State*, 278 Ark. 394, 645 S.W.2d 950 (1983); *English v. State*, 274 Ark. 304, 626 S.W.2d 191 (1981); *Smith v. State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986); *Miller v. State*, 13 Ark. App. 314, 683 S.W.2d 937 (1985); *Drain v. State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984).

142. *See, e.g., Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986). This is identical to the fiction of consent which prevented review in the earliest cases. *See Davis v. State*, 169 Ark. 932, 277 S.W. 5 (1925).

143. ARK. R. CRIM. P. 37.

later cases.¹⁴⁴

IX. THE 1985 LEGISLATIVE RESPONSE

The Arkansas General Assembly added the latest chapter to this story in 1985. At that time, the General Assembly passed a law which revived a court's authority to suspend the execution of sentences.¹⁴⁵ Although the exact motivation of the legislature is lost without any recorded legislative history, some indication of the sponsor's thinking may be gleaned from the emergency clause. There the General Assembly declared that "there is confusion as to whether present law allows courts to suspend execution of sentences" and that "such power is vital to the administration of justice."¹⁴⁶ The Legislature may have been responding to the continuing series of cases challenging invalid sentences and to the prospect of freeing convicted criminals on a "technicality."¹⁴⁷ Unfortunately, the General Assem-

144. See *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986). *But see* *Blakely v. State*, 283 Ark. 138, 671 S.W.2d 183 (1984) (adverse decision on direct appeal precludes Rule 37 review).

145. ARK. STAT. ANN. § 43-2326.1 (Cum. Supp. 1985) reads

In all instances where courts now have the authority to suspend the imposition of sentences or otherwise grant suspensions, the courts may also suspend execution of sentences under the same circumstances. Suspension of execution of sentence means the procedure whereby a defendant who pleads guilty or is found guilty of a criminal offense is released by the court after pronouncement of sentence.

The General Assembly also gave all courts of record the authority to suspend the execution of sentences or the imposition of fines. *Id.* § 43-2326.2 (Cum. Supp. 1985).

146. Act of April 15, 1985, No. 956, § 5, 1985 Ark. Acts 2156, 2157 (codified as ARK. STAT. ANN. §§ 43-2326.1 to -2326.3 (Cum. Supp. 1985)).

147. Although most of the challenges were not successful, a few succeeded. See *Cooper v. State*, 278 Ark. 394, 645 S.W.2d 950 (1983). The sentence in the *Cooper* case is a travesty of justice. The defendant originally received a "General Sentence of Five Years in the Arkansas Department of Correction, said sentence to be suspended during good behavior . . ." *Id.* at 396, 645 S.W.2d at 952. The court also entered an order placing him on probation for five years. A federal district court revoked the defendant's sentence and sentenced him to one year in federal prison. The prosecuting attorney filed a motion to revoke the defendant's state suspended sentence. *Id.* During the proceeding, the court indicated that "the revocation of this sentence will run concurrent with the revocation of the sentence in the Federal Court . . ." *Id.* at 398, 645 S.W.2d at 953. According to the supreme court, "only one conclusion can be drawn and that is the trial court revoked the suspension. The court could only suspend imposition of sentence so obviously the imposition of sentence was revoked." *Id.* at 399, 645 S.W.2d at 953. The court concluded that the trial court imposed a sentence concurrent with the one year federal sentence. *Id.* More than a year later and after the defendant had served his federal sentence, the prosecuting attorney again moved to revoke the defendant's suspended sentence. After a hearing, the court sentenced the defendant to five years in the Arkansas penitentiary. *Id.* at 399-400, 645 S.W.2d at 953. In essence, the trial court sentenced the defendant three times for the same offense. This is hardly a technicality. The court invalidated the second sentence for three reasons: (1) the trial court could not impose a second sentence at a revocation hearing; (2) the trial court did not have jurisdiction at the time of the

bly was wrong on both counts. Courts did not have the authority to suspend the execution of sentences. As we have seen, the supreme court had repeatedly affirmed this point. Whether or not one sees this authority as "vital to the administration of justice" depends on one's state of hysteria. The original provisions of the criminal code gave trial courts more flexibility to deal with individuals who, in the judgment of the court, did not require imprisonment. On the other hand, it did not restrain the judge who saw imprisonment as a necessary punishment. By following the code, judges would have a self-contained system of sentencing that was a significant improvement over the muddled former system. At best, the inability to suspend the execution of sentences inconvenienced courts which, upon revocation, would have to impose a sentence.

X. THE PRACTICAL DIFFERENCE BETWEEN THE TWO SUSPENSIONS

Ironically, Arkansas has come almost full circle since *Davis*. As before, the General Assembly undermined its own enactments by eventually allowing courts to suspend the execution of sentences. Unlike before, the entry of a judgment of conviction can make a significant difference in at least two circumstances. The first is the *Culpepper* example where the trial court revokes the original sentence and imposes a sentence greater than suspension. Nothing in the 1985 law changes the basic rule that a court cannot resentence a defendant once a sentence has been set in motion.¹⁴⁸ A sentence occurs when the trial court sets a fixed term of imprisonment.¹⁴⁹ When a trial court pronounces sentence and then suspends execution, it must enter a judgment of conviction and, upon revocation, cannot impose a greater term of imprisonment.¹⁵⁰ On the other hand, when a court suspends the imposition of a sentence, it still may impose any sentence within the statutorily prescribed range upon revocation. Thus, the court which suspends imposition has more flexibility upon resentencing than the court which suspends execution.

The form of the original sentence can also determine if a defendant is entitled to counsel at the revocation hearing. Black letter law holds that the right to counsel attaches to criminal proceedings. A

second revocation; and (3) double jeopardy prohibited double sentencing. *Id.* at 400, 645 S.W.2d at 953.

148. *Shipman v. State*, 261 Ark. 559, 550 S.W.2d 424 (1977).

149. *McGee v. State*, 271 Ark. 611, 613, 609 S.W.2d 73, 75 (1980).

150. ARK. STAT. ANN. § 43-2332 (Cum. Supp. 1985).

criminal proceeding begins when formal adversary proceedings are instituted against a defendant.¹⁵¹ These proceedings end at sentencing.¹⁵² A defendant has a right to a counsel at trial and at all critical stages of this process.¹⁵³

In a series of cases, the United States Supreme Court defined the reach of the right to counsel at the post sentencing stage of the trial. In *Mempa v. Rhay*¹⁵⁴ the Supreme Court held that a defendant was entitled to appointed counsel at a probation revocation hearing. The Court found that the sixth amendment applied at the sentencing stage of the criminal process.¹⁵⁵ Because the imposition had been deferred initially by the trial court, the sixth amendment applied when the court ultimately imposed sentence at the revocation hearing.¹⁵⁶ *Mempa* contains language which indicates that the provision of counsel under the sixth amendment depends on whether or not the defendant's rights will be prejudiced at the particular hearing.¹⁵⁷ Later cases have read *Mempa* to draw the sixth amendment line at sentencing. The leading case is *Gagnon v. Scarpelli*.¹⁵⁸ In *Gagnon* the Court held that the failure to provide counsel at a probation revocation hearing

151. *Kirby v. Illinois*, 406 U.S. 682 (1972). "The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice . . . [and] [i]t is this point . . . that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable . . ." *Id.* at 689-90. Compare *Moran v. Burbine*, 475 U.S. 412 (1986) (sixth amendment does not attach before formal charging procedures even though police knew lawyer claimed to represent defendant) with *Michigan v. Jackson*, 475 U.S. 625 (1986) (defendant who requests lawyer at arraignment may not be subsequently questioned by police in absence of lawyer). See also *Maine v. Moulton*, 474 U.S. 159 (1985) (post-indictment statements obtained by informer inadmissible at trial of indicted charges but admissible at any trial on charges not part of current indictment).

152. *Mempa v. Rhay*, 389 U.S. 128 (1967).

153. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (*Gideon* applies to trial of misdemeanors). The Supreme Court has limited the reach of the *Gideon-Argersinger* rule. In *Scott v. Illinois*, 440 U.S. 367 (1979) the Court held that a defendant has no right to counsel under the sixth amendment in a misdemeanor case when he is not imprisoned. The court noted that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . ." 440 U.S. 373. The Court has had a considerably more difficult time defining the meaning of "critical stage." In *United States v. Wade*, 388 U.S. 218 (1967) the Court indicated that whether or not a particular stage of the criminal proceeding was critical depended on the prejudice to the defendant's rights and whether counsel can help avoid that prejudice. Later, in *United States v. Ash*, 413 U.S. 300 (1973), the Court limited the *Wade* analysis to trial-like confrontations at which there was no adequate substitute for the presence of a lawyer.

154. 389 U.S. 128 (1967).

155. *Id.* at 134.

156. *Id.* at 135.

157. "Even more important in a case such as this is the fact that certain legal rights may be lost if not exercised at this stage." *Id.* at 135.

158. 411 U.S. 778 (1973).

violated the defendant's due process rights. The Court acknowledged that the sixth amendment did not apply to a probation revocation hearing where the defendant had been sentenced at the time of trial.¹⁵⁹ On the other hand, the loss of liberty from revocation was so significant that some due process protection was in order. Nevertheless, the Court refused to fashion a requirement of counsel in all cases. Instead, the Court held that the due process clause required counsel whenever fundamental fairness, as shown by the particular facts of a case, required counsel.¹⁶⁰ The Court did not set out any detailed guidelines to determine when counsel should be appointed.¹⁶¹ Rather, the Court said counsel should be provided when the defendant claims that he did not commit the violation with which he is charged, or there are substantial mitigating or justificatory factors which are complex or difficult to present. The deciding factor in close cases may be whether or not the defendant is capable of presenting the case himself.¹⁶²

The 1985 statutory amendment which restored to Arkansas trial courts the power to suspend execution of sentences can create a right to counsel problem because of the different constitutional requirements imposed by *Mempa* and *Gagnon*. Before the court can suspend a sentence, it must impose one; and when it imposes a sentence it must enter a judgment of conviction.¹⁶³ This ends the criminal proceeding for sixth amendment purposes. A later revocation can be treated under the *Gagnon* due process rule. When a court suspends the imposition of a sentence, the criminal proceeding does not end. The proceeding ends when sentence is imposed, and by definition, no sentence is imposed until a judgment of conviction is entered.¹⁶⁴ The question of the right to counsel at a later revocation hearing then comes under the *Mempa* sixth amendment rule. Applying these principles leads to the conclusion that a defendant has an absolute right to counsel at a revocation hearing when the court initially suspended the imposition of the sentence, but has only a qualified due process right

159. *Id.* at 781. The Court relied on *Morrissey v. Brewer*, 408 U.S. 471 (1972), which held that a revocation of parole is not part of a criminal prosecution. The *Morrissey* court held that revocation was a serious deprivation of liberty and that certain due process protections were required.

160. 411 U.S. at 790.

161. *Id.* "It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed . . ." *Id.*

162. *Id.* at 790-91.

163. ARK. STAT. ANN. § 43-2301 (1977) and ARK. R. CRIM. P. 36.4. See also *Hunter v. State*, 278 Ark. 428, 645 S.W.2d 954 (1983).

164. ARK. STAT. ANN. § 43-2301 (1977).

to counsel when the court initially suspended execution of sentence. Because it is reversible error to fail to appoint counsel when a court is required to do so, a trial court must be very clear which rule applies when it revokes sentence.¹⁶⁵

XI. CONCLUSION

The problems outlined in this article will not topple the criminal justice system. However, they illustrate what can happen when the actors in the criminal justice system do not approach their tasks with clarity and rigor. The original provisions of the 1976 Criminal Code were designed to create a rational system of punishment. The structure of the sentencing provisions flowed from a vision of sentencing which assumed that judges needed and would use flexibility in sentencing. It was to be expected that for a period of time after the 1976 Code went into effect some judges would continue to use the old forms out of habit if nothing else. But to continue to use the old forms (and for the legislature to amend the law to reinstate the old forms) shows an approach to the criminal code that may be detrimental in the long run. The problems which prompted the modern drive toward codification—piecemeal amendment, provisions inconsistent with the overall theory, and complicated, contradictory sentencing procedures—are all present here. Slowly, inexorably, the same unthinking approach to the criminal code that has caused this problem will infect the rest of the code. Eventually, the gains made by the codifiers will be lost and the state will have to undergo the expense and confusion of another codification.

Beyond the expense, ignoring the structure of the code betrays the high ideals of the people who led the drive for codification. The criminal law is the most significant exercise of governmental power over citizen's lives. More than any other area of the law, the criminal law should be rational, clear, intelligent, and fair. Convenience should not drive the criminal law. Rather, our deepest notions of fairness and justice should determine how and when we punish our fellow citizens. The current treatment of these minor provisions in the sentencing law shows a devotion to wooden-headedness and convenience and not to the principles behind the criminal code.

165. See *Strickland v. Washington*, 466 U.S. 668 (1984) (prejudice presumed when counsel is actually or constructively denied but not when defendant raises ineffectiveness claim); *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (presumption of prejudice when lawyer has actual conflict of interest which adversely affects the conduct of the case).

