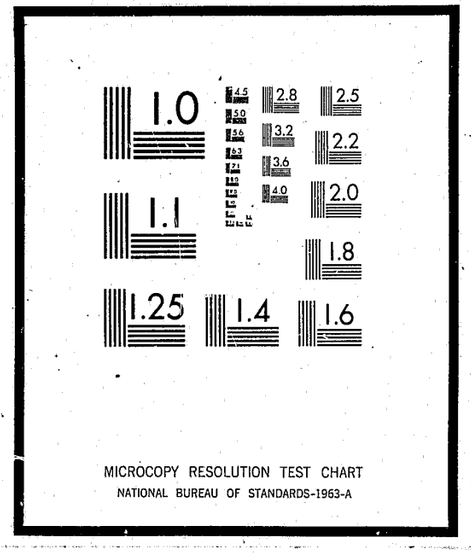

THE PROPOSED CRIMINAL CODE

FOR THE

STATE OF MISSOURI

prepared by

The Committee to Draft a Modern Criminal Code

Norwin D. Houser, Chairman
J. Donald Murphy, Vice-Chairman
Edward H. Hunvald, Jr., Executive Director
Gary L. Anderson, Executive Secretary

October 1973

Printed and Distributed as a Public Service
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PREFACE

After four years of research and revision of the criminal laws of Missouri the Committee to Draft a Modern Criminal Code herewith presents the final official draft of a proposed criminal code.

At its inception in October, 1969, the committee consisted of fourteen lawyers, legislators and judges. It was not appointed by any one person, agency or organization but was drawn from many sources. Each of the following persons appointed two members: the Chief Justice of the Missouri Supreme Court, the Attorney General, the Lieutenant Governor, the Speaker of the House of Representatives, the Superintendent of the State Highway Patrol, the President of the Prosecuting Attorney's Association and the Director of the Department of Corrections. Approximately two years later the committee was augmented by the appointment of fourteen additional members, who served at the request of the Attorney General. During the course of the four years, some members had to resign because of other obligations.

The work of the committee was funded by the Missouri Law Enforcement Assistance Council under the Omnibus Crime Control and Safe Streets Act of 1968. In-kind contributions were made by the office of the Attorney General and by the committee members, all of whom contributed their time and talents gratis. The committee was assisted by four law professors who, acting as reporters, conducted and supervised the research and provided the committee with original and revised drafts of proposed statutes to which were appended extensive comments relating to the source and rationale of the proposals. Only the reporters, their student research assistants and secretarial help received compensation for their services.

In addition to a complete inventory of all existing Missouri criminal laws, which was compiled by the reporters and their research assistants, the committee had the benefit of the work previously done by the distinguished committee of the American Law Institute which prepared the Model Penal Code, and that of the National Commission on Reform of Federal Criminal Laws which drafted a proposed Federal Criminal Code, and, in addition, the benefit of recently enacted or proposed criminal codes from approximately twenty-five states.

Subcommittees refined the work of the reporters on assigned subjects. Subcommittee drafts were then submitted to the whole

committee, which met in monthly meetings, revising, reworking and seeking to improve the produce of the subcommittees. Some sections finally adopted went through as many as five such revisions.

In the effort the committee has produced a body of basic criminal laws which it considers retains the best of the existing criminal laws of Missouri, combining them with the best of the recent enactments and proposals elsewhere.

The code now proposed, if adopted by the General Assembly, will constitute the first comprehensive revision of the criminal laws of Missouri since 1835. The proposed code repeals antiquated, obsolete and outmoded criminal laws; eliminates archaic terminology of dubious meaning and substitutes simple, clear and understandable language plainly defining crimes and proscribing conduct, thereby reducing the occasion for judicial construction, clearly notifying the citizen what conduct is subject to criminal penalties and providing prosecutors, defense counsel, courts and juries with definite guidelines and standards; eliminates needless distinctions, refinements, redundancies and inconsistencies, and for the first time introduces order and system into the criminal law framework. Many inequities and excesses in the penalties provided by existing criminal laws have been corrected. A system of classification of crimes into separate sentencing categories, with an uncomplicated range of penalties assigned to each category has been introduced. Each offense is graded according to its seriousness and placed in one of the categories, thus reducing the unbelievably great number of different penalties now on the books (some of which are unrealistically severe and others of which are patently too lenient), eliminating incongruities, and providing a more logical, just and humane system of criminal justice in which the punishment fits the crime.

Conforming to the rule which obtains in the overwhelming majority of the states of the Union we propose that the responsibility of fixing the punishment be vested in the judge and no longer left to the jury, but that this provision be tempered by a requirement that the jury be informed as to the range of penalties which may be inflicted by the judge in case of conviction. This latter provision is unique in the annals of criminal law. These provisions are calculated to result in greater uniformity in sentencing, and to enable the sentencing authority to have complete background information (not now possessed by the jury) so as to better tailor the punishment to the crime and to the individual, and to best serve the interests of the community if rehabilitation is in prospect.

Dozens of similar offenses are consolidated, thereby reducing the complexity of the law. The number of sections is reduced from 491 currently in Title XXXVIII "Crimes and Punishment" to 231 in the code. Many retained sections are rewritten to clarify meaning. Definitions have been added to sharpen and add certainty to the law. In some cases the scope of crimes has been broadened. Entirely new criminal offenses have been created to meet the needs of society under modern conditions. The proposals conform to the latest constitutional standards and requirements of the Supreme Court of the United States and are the most up-to-date in the country.

The committee attempted to return to fundamentals; to rediscover the philosophical basis underlying the criminal law; to ascertain the societal need calling for proscription and in nontechnical and understandable English to write criminal laws which will protect society from the risks involved and at the same time afford the individual the constitutional protection to which he is entitled.

The committee has drafted separate proposals dealing with the questions of capital punishment, abortion and eavesdropping (wiretapping). These provisions are, however, not included in the basic Code but are set out in the appendix. We ask that these highly controversial matters be considered separately from the Code itself. Our major purpose was to codify and improve the basic criminal law of Missouri and we do not want that purpose to be lost sight of because of differences of opinion on the highly emotional questions of the death penalty, abortion and eavesdropping. We ask that the Code be considered separately and then that these other matters be taken up. The proposals are so drafted that they can be added to the Code, should the legislature decide to adopt them. We believe that our proposals will meet the constitutional requirements in these areas but we make no recommendation as to whether or not there should be legislation adopted in these areas.

No work of the size and complexity of the Code could possibly gain the unanimous approval of every member of a large group of lawyers, judges, legislators and professors such as the committee which assembled for the performance of this task. What appears in this proposed Code is the text adopted and recommended by a majority of the members of the committee voting on each separate section.

The committee is unanimous in the belief that a restructuring and rewriting of the existing criminal laws is badly needed; that while individual members of the committee reserve the right to exercise an independent judgment on particular sections, the

proposed code represents an important advance toward the desirable goal of giving to the citizens, the courts, prosecuting officials, defense counsel, law enforcement agencies and the people in general a practical, enlightened, understandable and enforceable body of criminal law, and that the committee's work product affords the General Assembly the basis upon which to develop the best system of criminal justice of all of the States.

Through the courtesy of West Publishing Company of St. Paul, Minnesota, our proposal has been published free of charge, for distribution to the public, the bar, the news media, the General Assembly, and other interested persons and agencies. Appropriate explanatory comments follow the individual sections. The committee requests that the Code be examined and studied. We invite constructive criticism and suggestions for improvement so that the bill finally passed by the General Assembly may indeed prove to be a model criminal code. All suggestions should be forwarded to the office of Professor Edward H. Hunvald, Jr., School of Law, University of Missouri—Columbia, Columbia, Missouri 65201.

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PROPOSED CRIMINAL CODE
FOR THE
STATE OF MISSOURI

PROPOSED CRIMINAL CODE

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PART I

INTRODUCTORY PROVISIONS

Chapter 1

PRELIMINARY PROVISIONS

1.010 Short title

This Code shall be known and may be cited as "The Criminal Code."

1.020 Effective date

This Code shall become effective on January 1, 1975.

Comment

Since the Code involves a thorough revision of the criminal law it is appropriate that the effective date be the beginning of a calendar year.

1.030 Classes of crimes

(1) An offense defined by this Code or by any other statute of this State, for which a sentence of imprisonment is authorized, constitutes a crime. Crimes are classified as felonies and misdemeanors.

(2) A crime is a felony if it is so designated or if persons convicted thereof may be sentenced to imprisonment for a term which is in excess of one year.

(3) A crime is a misdemeanor if it is so designated or if persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is one year or less.

Comment

This section continues the present classification of felony and misdemeanor. See §§ 556.020 and 556.040 RSMo. The definitions are, however, in terms of length of maximum sentence rather than by place of confinement. The places of confinement remain the same. See Code § 3.010(3).

1.040 Infractions

(1) An offense defined by this Code or by any other statute of this State constitutes 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.

(2) 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.

Comment

This section creates a new classification of offense, the infraction. It is not, however, a crime and does not carry the same disabilities or disadvantages of a criminal conviction. There are laws which utilize fines as a means of regulation. Such are usually termed "public welfare offenses" and often impose absolute or strict liability. While they serve a legitimate function, they are not "true crimes" in the sense of involving moral condemnation implicit in the concept of crime. This section recognizes such offenses and allows for explicitly distinguishing between infractions and crimes.

1.050 Offenses defined by statute

No conduct constitutes an offense unless made so by this Code or by other applicable statute.

Comment

This section requires all offenses to be declared by statute and has the effect of abolishing common law crimes which have not been specifically adopted by statute. At present it is possible to punish under the common law. See § 556.110. Such punishment is very limited (two months imprisonment and fine of $100) and is rarely if ever used. In view of the extensive declaration of offenses by statute there is no need for the unwritten common law offense. Moreover, the idea of the unwritten offense is repugnant to the concept of fair warning.

1.060 Application to offenses committed before and after enactment

(1) The provisions of this Code shall govern the construction and punishment for any offense defined in this Code and committed after the effective date hereof, as well as the construction and application of any defense to a prosecution for such an offense.

(2) 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.

(3) The provisions of this Code do not apply to or govern the construction of and punishment for any offense committed prior to the effective date of this Code, or the construction and application of any defense to a prosecution for such an offense. Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this Code had not been enacted, the provisions of Section 1.160 RSMo notwithstanding.

Comment

This section makes it clear that there is no *ex post facto* application of the Code, but that after the effective date, the provisions of the Code will govern as to offenses within and without the Code, but allows for specific exceptions. For classification of offenses defined outside the Code and committed after the effective date, see Code § 2.030.

1.070 Time limitations

(1) A prosecution for murder or any Class A Felony may be commenced at any time.

(2) Except as otherwise provided in this section, prosecutions for other offenses must be commenced within the following periods of limitation:

(a) for any felony, 3 years.

(b) for any misdemeanor, 1 year.

(c) for any infraction, 6 months.

(3) If the period prescribed in Subsection (2) has expired, a prosecution may nevertheless be commenced for:

(a) any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has a legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation by more than three years; and

(b) any offense based upon misconduct in office by a public officer or employee at any time when the defendant is in public office or employment or within two years thereafter,

but in no case shall this provision extend the period of limitation by more than three years.

(4) An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced either when an indictment is found or an information filed.

(6) The period of limitation does not run:

(a) during any time when the accused is absent from the State, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; or

(b) during any time when the accused is concealing himself from justice either within or without this State; or

(c) during any time when a prosecution against the accused for the offense is pending in this State.

Comment

With some minor changes this section maintains the same periods of limitation now covered by §§ 541.190 through 541.230 RSMo. § 541.190 provides for no limitation in the prosecution of an "offense punishable with death or by imprisonment in the penitentiary during life." Subsection (1) of the Code provision achieves the same result but in terms of "murder or Class A Felony". § 541.200 provides for a three year period for all other felonies with a possible two year extension for "bribery or for corruption in office." Subsections (2)(a) and (3)(b) are similar and in addition subsection (3)(a) provides for a possible extension in cases of fraud where the fraud is not discovered until sometime after the commission of the offense. The one year period for misdemeanors is the same as that provided for by § 541.210. Subsection (6) provides for the tolling of the period when the accused is not within the state, when he is concealing himself from justice or when a prosecution is pending. This is similar to the present provisions of §§ 541.220 and 541.230, except that absence from the state cannot toll the statute for longer than three years and the phrase "concealing from justice" is used rather than "flee from justice."

1.080 Limitation on conviction for multiple offenses

When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such

offense. He may not, however, be convicted of more than one offense if

(1) one offense is included in the other, as defined in Section 1.090; or

(2) inconsistent findings of fact are required to establish the commission of the offenses; or

(3) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohbit a specific instance of such conduct; or

(4) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

Comment

This section follows the general proposition that the state may prosecute and convict for separate offenses even though they arise out of the same conduct. See State v. Richardson, 460 S.W.2d 537 (Mo.1970). The proposition does not apply to included offenses (Subsection (1)), nor to offenses based on inconsistent findings of fact (Subsection (2)). It also ought not apply where one offense is under a statute prohibiting conduct generally and the other is under a statute prohibiting a specific instance of the general conduct. A person ought not be convicted of *both* reckless driving and running a stop sign for the same act of running the stop sign (Subsection (3)). Subsection (4) deals with the continuing offense. Barring specific legislative action (such as declaring that each day's conduct is a separate offense) the continuing offense is only one crime.

For the limitation on multiple conviction and sentencing in conspiracy cases, see Code § 9.020.

While § 1.080 deals with the area of multiple prosecutions and the concept of the separate offense, it is not intended to be a statement of the rules regarding double jeopardy. Double jeopardy may prevent prosecution and conviction in situations other than those listed here. See Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), State v. Richardson, *supra*.

1.090 Conviction of included offenses

(1) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) it is specifically denominated by statute as a lesser degree of the offense charged; or

(c) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.

(2) The court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

Comment

This section follows the present approach that an accused may be convicted of an offense necessarily included in the offense charged, a lesser degree of the offense charged, or an attempt to commit those offenses. See §§ 556.220 and 556.230 RSMo. It is also consistent with the general rule that instructions on the included offenses are not required unless there is a basis for finding the accused innocent of the higher offense *and* guilty of the lesser. *Cf.* State v. Craig, 433 S.W. 2d 811 (Mo.1968).

1.100 Burden of injecting the issue

When the phrase **"The defendant shall have the burden of injecting the issue"** is used in the Code

(1) the issue referred to is not submitted to the jury unless evidence supporting the issue is admitted; and

(2) if the issue is submitted to the jury the court shall instruct that any reasonable doubt on the issue requires a finding for the defendant on the issue.

1.110 Affirmative defense

When the phrase **"Affirmative defense"** is used in the Code

(1) the defense referred to is not submitted to the jury unless evidence supporting the defense is admitted; and

(2) if the defense is submitted to the jury the court shall instruct that the defendant has the burden of persuasion that the defense is more probably true than not.

Comment

For almost all of the issues in a criminal trial, the state has the burden of introducing evidence and the burden of

convincing the jury beyond a reasonable doubt. In a few instances, however, one or both of these "burdens" are placed on the defendant. Sections 1.100 and 1.110 define the effect of placing these burdens (more accurately they are risks of not producing the evidence or of not convincing the jury) on the defendant and differentiate between them. They avoid the use of the ambiguous phrase "burden of proof". Section 1.100 deals with those situations where the burden of producing evidence is placed on the defendant but the burden of persuasion remains with the state (as with the issue of self-defense). Section 1.110 deals with those where the burden of producing evidence and the burden of persuasion is placed on the defendant (as with the defense of lack of responsibility by reason of mental disease or defect. See § 552.030(7)). It should be remembered that placing either of these burdens on the defendant is the exceptional situation and that there are constitutional limitations upon placing these burdens on the defendant. See In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), State v. Commenos, 461 S.W.2d 9 (Mo.1970).

1.120 Code definitions

In this Code, unless the context requires a different definition, the following shall apply:

(1) **"Affirmative defense"** has the meaning specified in Section 1.110.

(2) **"Burden of injecting the issue"** has the meaning specified in Section 1.100.

(3) **"Confinement."** A person is in confinement when he is held in a place of confinement pursuant to arrest or order of a court, and remains in confinement until

(a) a court orders his release; or

(b) he is released on bail, bond, or recognizance, personal or otherwise; or

(c) a public servant having the legal power and duty to confine him authorizes his release without guard and without condition that he return to confinement.

A person is not in confinement if

(a) he is on probation or parole, temporary or otherwise; or

(b) he is

(i) under sentence to serve a term of confinement which is not continuous, or serving a sentence under a work-release program; and

(ii) he is not in fact being held in a place of confinement or under guard by a person having the legal power and duty to transport him to or from a place of confinement.

(4) **"Consent."** Consent or lack of consent may be express or implied. Assent does not constitute consent if

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense and such incompetence is manifest or known to the actor; or

(b) it is given by a person who by reason of youth, mental disease or defect, or intoxication, is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) it is induced by force, duress or deception.

(5) **"Criminal negligence"** has the meaning specified in Section 7.020(2)(d).

(6) **"Custody."** A person is in custody when he has been arrested but has not been delivered to a place of confinement.

(7) **"Dangerous instrument"** means any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.

(8) **"Dangerous felony"** means the felonies of murder, forcible rape, assault, burglary, robbery, kidnapping or the attempt to commit any of these felonies.

(9) **"Deadly weapon"** means any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury may be discharged, or a switchblade knife, dagger, billy, black jack or metal knuckles.

(10) **"Felony"** has the meaning specified in Section 1.030(2).

(11) **"Forcible compulsion"** means either

(a) physical force that overcomes reasonable resistance, or

(b) a threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another person.

(12) **"Incapacitated"** means that physical or mental condition, temporary or permanent, in which a person is unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act. A person is not "incapacitated"

with respect to an act committed upon him if he became unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act, after consenting to the act.

(13) **"Inhabitable structure"** has the meaning specified in Section 14.010(2) and (4).

(14) **"Infraction"** has the meaning specified in Section 1.040.

(15) **"Knowingly"** has the meaning specified in Section 7.020(2)(b).

(16) **"Law enforcement officer"** means any public servant having both the power and duty to make arrests for violations of the laws of this State.

(17) **"Misdemeanor"** has the meaning specified in Section 1.030(3).

(18) **"Physical injury"** means physical pain, illness, or any impairment of physical condition.

(19) **"Place of confinement"** means any building or facility and the grounds thereof wherein a court is legally authorized to order that a person charged with or convicted of a crime be held.

(20) **"Public servant"** means any person employed in any way by a government of this State who is compensated by the government by reason of his employment. It includes, but is not limited to, legislators, jurors, members of the judiciary and law enforcement officers. It does not include witnesses.

(21) **"Purposely"** has the meaning specified in Section 7.020(2)(a).

(22) **"Recklessly"** has the meaning specified in Section 7.020(2)(c).

(23) **"Serious physical injury"** means physical injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

(24) **"Voluntary act"** has the meaning specified in Section 7.010.

Comment

This section contains definitions of phrases that are used throughout the Code. Definitions primarily applicable to a specific chapter are located at the beginning of the chapter.

(1) "Affirmative defense." See comments to Code § 1.110.

(2) "Burden of injecting the issue." See comments to Code § 1.100.

(3) "Confinement," (6) "Custody" and (19) "Place of confinement" are particularly applicable to Chapter 20 and the escape offenses (see Code §§ 20.200, 20.210 and 20.220) and to Chapter 8, Justification (see Code §§ 8.080 and 8.100). "Custody" in Code § 10.150 is used in a different context and clearly has a different meaning.

(4) "Consent." This definition attempts to state the usual meaning of the term consent as to certain matters that do not constitute consent. The Code also contains specific sections on consent applicable to specific crimes. See *e. g.*, Code § 10.080 dealing with consent to physical injury and Code § 10.100 dealing with consent to restraint.

(5) "Criminal negligence" (22) "Recklessly" (15) "Knowingly" and (21) "Purposely" are the culpable mental states defined in Code § 7.020, and discussed in the comments to that section. These are the four basic terms used throughout the Code to describe the particular mental state required.

(7) "Dangerous instrument" and (9) "Deadly weapon". These definitions are based on New York Penal Law § 10.00 (12) and (13). They are used in the Code in reference to several crimes, including the homicide and assault offenses, burglary and robbery. The distinction between the two is not significant in the crimes against the person but is in robbery and burglary.

(8) "Dangerous felony" is significant primarily in the weapons offenses. It is defined in terms that encompass crimes as defined in the Code and crimes as defined in the statutes presently in force and similar crimes in other states.

(10) "Felony" (17) "Misdemeanor" and (14) "Infraction" are the three categories of offenses. However, only felonies and misdemeanors are "crimes". See Code §§ 1.030 and 1.040 and comments.

(11) "Forcible compulsion" and (12) "Incapacitated" are related to the concept of consent and are particularly involved in the sexual offenses. See comments to Code § 11.010.

(13) "Inhabitable structure." See comments to Code § 14.010(2) and (4).

(16) "Law enforcement officer" is a general term designed to cover the wide variety of terms in present use. *Cf.* Ill. Rev.Stat. Ch. 38 § 2–13 and Michigan Revised Criminal Code § 4501(d) (Final Draft 1967).

(18) "Physical injury" and (23) "Serious physical injury" need to be read together. The definitions are similar to those used in the Model Penal Code and the Proposed Texas Code. It should be noted that serious physical injury is aggravated physical injury so that a crime requiring "physical injury" as an element is satisfied by either physical injury or serious

physical injury. It should also be noted that the definition of serious physical injury makes it unnecessary to have a separate crime of mayhem in the offenses against the person. Some Codes add impairment of mental condition to the definition of physical injury, *e. g.*, Colorado § 40–1–1001(3)(c); and some require *substantial* physical pain. It is felt that the simpler definitions used in the Code are adequate.

(20) "Public servant" is a general term covering a wide variety of government employees. A similar term is used in many other codes. The term is particularly useful in defining offenses against the administration of justice and affecting government.

(24) "Voluntary act." See comments to Code § 7.010. Note that voluntary act is there defined to include omissions and possession.

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PART II

DISPOSITION OF OFFENDERS

Chapter 2

GENERAL SENTENCING PROVISIONS

2.010 Authorized dispositions

(1) **General.** Every person found guilty of an offense shall be sentenced by the court in accordance with the provisions of this Chapter.

(2) **Felonies and misdemeanors.** 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.

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

(3) **Infractions.** 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.

(4) **Organizations.** Whenever any organization has been found guilty of an offense, the court shall make one or more of the following dispositions of the organization in any appropriate combination. The court may:

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

(b) suspend the imposition of sentence, with or without placing the organization on probation.

(c) pronounce sentence and suspend its execution, placing the organization on probation.

(d) impose any special sentence or sanction authorized by law.

(5) **Civil penalties.** This chapter shall not be construed to deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. An appropriate order exercising such authority may be included as part of any sentence.

Comment

This section provides a single comprehensive list of the dispositions available to the sentencing court. However, not all dispositions are sentences. Subsections 2(c), 3(b) and 4(b) retain the present "suspend the imposition of sentence" category of § 549.071 RSMo. Subsection 2(e) allows a court to impose a period of detention in jail or prison as a condition of probation imposed after suspending imposition of sentence. While the court retains the authority provided by § 549.071 RSMo to suspend imposition of sentence without placing the person on probation, when sentence is pronounced and execution is suspended, the court must place the person on probation.

2.020 Classification of offenses

(1) Felonies are classified for the purpose of sentencing into the following four categories:

(a) Class A Felonies;

(b) Class B Felonies;

(c) Class C Felonies; and

(d) Class D Felonies.

(2) Misdemeanors are classified for the purpose of sentencing into the following three categories:

(a) Class A Misdemeanors;

(b) Class B Misdemeanors; and

(c) Class C Misdemeanors.

(3) Infractions are not further classified.

Comment

These classifications are based on the Model Penal Code. However, a Class D Felony has been added to take account of the present breakdown of Missouri felonies which fall into four general categories. The Model Penal Code recommends only two misdemeanor categories, but the present Missouri misdemeanor statutes indicate a need for a third category. There are numerous offenses punishable by only a fine or forfeiture of some kind which should be classified as infractions. Similar classification systems have been adopted in other criminal code revisions.

2.030 Classification of offenses outside this Code

(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; and

Section 195.270 RSMo.

(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.

(3) **Limitations.** Notwithstanding the other provisions and classifications provided in this section, the term of imprisonment or the fine imposed shall not exceed the maximum imprisonment or fine authorized by the statute or statutes outside the Code which define the offense and the penalty therefor.

Comment

Not all the existing criminal and quasi-criminal statutes have been included in the Code. Many offenses have relevance only to the chapters in which they are presently located. Moreover, no revision has been attempted in some areas, *e. g.* election offenses. This section aids in carrying out the effort

to integrate and systematize all offenses, including those which remain outside the Code.

In general, a felony higher than Class D should be in the Code. The major exception is the narcotics offenses found in Chapter 195, and specific exception is made for them.

The first sentence of subsection (2) replaces § 556.270 RSMo and achieves the same effect.

In any case in which the authorized imprisonment under a statute outside the Code is 30 days or less, subsection (2) requires that it be treated as a Class C Misdemeanor for which the maximum imprisonment is 15 days. It was felt better to reduce the maximum penalty for these misdemeanors (there are only 19 misdemeanors with a 30 day maximum penalty) than to add another class of misdemeanors. See comment after § 3.010 for further discussion of this.

Under subsection (3) the maximum authorized penalty must not exceed the maximum authorized by the statute outside the Code. This limitation may be constitutionally required in order to give fair notice. However, all offenses outside the Code are assigned classifications, with the exceptions listed in subsection (1), so that, in general, the sentences authorized will be consistent with the Code sentencing categories.

2.040 Presentence investigation and report

(1) **Obligation to report.** When a probation officer is available to any court, such probation officer shall, unless otherwise directed by the court, make a presentence investigation and report to the court before any authorized disposition under Section 2.010. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or been found guilty.

(2) **Procedures under rule of court.** The presentence investigation report shall be prepared, presented and utilized as provided by rule of court.

Comment

Subsection (1) is adapted from Supreme Court Rule 27.07 (b). The major change is the deletion of the provision in Rule 27.07(b) limiting the obligation to report to courts "having original jurisdiction to try felony cases and to the St. Louis Court of Criminal Corrections." It is anomalous to restrict this obligation to felony cases at a time when increasing good use is being made of presentence investigation reports in misdemeanor cases, where persons are more likely to be reformed through proper treatment than in felony cases.

Subsection (2) was substituted for the last part of Rule 27.07(b) to indicate that details such as whether the report shall be disclosed to the defense are left to rule of court.

2.050 Presentence commitment for study

(1) In felony cases where the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the appropriate sentence to be imposed than has been provided by the presentence report, the court may commit a convicted defendant to the custody of the Department of Corrections for a period not exceeding 90 days. The Department shall conduct a complete study of the defendant during that time, inquiring into such matters as the defendant's previous delinquency or criminal experience, his social background, his capabilities, his mental, emotional and physical health, and the rehabilitative resources or programs which may be available to suit his needs. By the expiration of the period of commitment, or by the expiration of such additional time as the court shall grant, not exceeding a further period of 90 days, the defendant shall be returned to the court for sentencing and the court shall be provided with a written report of the results of the study, including whatever recommendations the Department believes will be helpful to a proper resolution of the case. After receiving the report and the recommendations, the court shall proceed to sentence the defendant in accordance with the authorized dispositions available under Section 2.010, unless the court orders a further diagnostic commitment under Subsection (2).

(2) **Commitment for mental examination.** In felony cases where the court desires more detailed information about the defendant's mental condition before making an authorized disposition under Section 2.010, it may order the commitment of the defendant to the custody of a facility of the division of mental diseases for the performance of a psychiatric evaluation. Any commitment shall be for a period not to exceed 90 days. Within that period the facility shall conduct a complete phychiatric evaluation of the defendant and shall return the defendant to court and transmit a diagnostic report to the court which includes whatever recommendations the facility may wish to make. After receiving the report and the recommendations, if the court does not order a further diagnostic commitment under Subsection (1), it shall make an authorized disposition under Section 2.010.

(3) In an appropriate case the court may order diagnostic commitments under both Subsections (1) and (2).

(4) **Credit for commitment time.** If, after receiving a diagnostic report under Subsection (1) or (2), the court sentences the defendant to imprisonment, the period of commitment under either or both shall be credited against the term of imprisonment.

Comment

Based on Michigan Revised Criminal Code § 1220 (Final Draft 1971). Subsection (1) is based on 18 U.S.C.A. § 4208 (b) and Model Penal Code § 7.08(1).

One of the most difficult problems in the administration of the criminal law is sentencing. This section is designed to provide the court with information to enable it to make as rational disposition of the offender as is possible.

The Department of Corrections normally determines many of the matters listed in subsection (1) after commitment, unless there was a thorough presentence report which provides all the needed data. Normally a court considering commitment will have a presentence report made, but under this provision a special study by the Department of Corrections could be requested in addition to the usual presentence report.

Under present Missouri law there is no express provision for psychiatric evaluations in connection with sentencing, although under § 552.020(2) RSMo the accused may be committed to determine his capacity to stand trial, under § 552.030 (4) RSMo the accused may be committed to determine his responsibility for criminal conduct, and under § 552.060, a person condemned to death can be examined (presumably with commitment) to determine his capacity to understand the nature and purpose of capital punishment. However, judges do commit for psychiatric evaluations before sentencing. Subsection (2) defines the court's authority and the responsibility of the division of mental diseases to perform the examination within 90 days (the Proposed Michigan Code set the period at 60 days). Provision could be made for local psychiatric evaluation, but local resources ordinarily would not be adequate for a thorough evaluation, and a jail is not the ideal setting for such evaluation, and other local places may not provide adequate security. Furthermore, recommendations concerning disposition from a state agency are more likely to be based on experiences and data acquired by the agency in similar cases.

After the court receives the diagnostic report and recommendations, it may dispose of the defendant by any disposition authorized under § 2.010. Probation could be conditioned on in-patient or out-patient treatment. The goal of this provision is to provide more flexibility as well as to provide the court with more information relevant to the sentencing decision.

Subsection (3) makes it clear that the court may utilize both subsections (1) and (2) in an appropriate case. This should occur primarily when the report from one diagnostic facility suggests the desirability of additional tests which the facility is unable to perform.

2.060 Role of court and jury in sentencing; jury informed of penalties

(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.

Comment

This section provides for judicial sentencing in all cases where there is any sentencing discretion. If the death penalty provision is adopted, the court will have no alternative but to impose the death penalty if the jury convicts of a capital offense. The limits within which the court must sentence, however, will be controlled by the degree of the offense which is found by the jury.

Subsection (2) requires that the jury be informed of the range of authorized terms of imprisonment which the court might impose after a jury finding of guilt. If there is a mandatory death penalty the jury must be informed that the death penalty is mandatory upon conviction. This provision provides a compromise between complete judicial sentencing and jury sentencing and takes into account the fact that juries do consider the possible punishment in determining the question of guilt, even if they are instructed not to consider anything but the issue of guilt. Such instructions will eliminate jury speculation about the seriousness of the offense and how lesser included offenses relate to the offense charged.

2.070 Appellate review of sentences

(1) In every felony case in which a person has been convicted and sentenced to confinement after a trial, such person may ap-

peal from the sentence upon the ground that the sentence is excessive. A person who has pleaded guilty in a felony case and been sentenced to confinement, and a person who is sentenced to confinement in any misdemeanor case, may, with leave granted by the appropriate appellate court, appeal from the sentence upon the ground that the sentence is excessive.

(2) An 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.

(3) The Supreme Court may make appropriate rules of procedure to implement the provisions of this section.

Comment

The Missouri Supreme Court has consistently held that a sentence not exceeding the maximum authorized for a particular crime is not reviewable for excessiveness. A general section authorizing appellate review of sentencing is included because appellate courts generally require statutory authority before exercising their inherent power to review sentences. The provision is consistent with the American Bar Association Standards Relating to Appellate Review of Sentences (Approved Draft 1968), which recommends appellate review to help eliminate the danger of sentencing disparity within any sentencing system. No judicial system of sentencing should depend upon executive clemency to deal with sentencing excesses.

Subsection (1) is based on the recognition that it is desirable, at least for an initial period, to place a reasonable limit on appellate review of sentences to avoid a possible deluge of cases in the appellate courts. This limiting provision is consistent with ABA Standard 1.1(b). Under this provision, only felony sentences to confinement after a trial, which would include confinement in a prison, jail or other institution, are appealable as of right. A person who pleads guilty to a felony, or who is convicted of a misdemeanor, may petition the appellate court for leave to appeal an allegedly excessive sentence.

Subsection (2) limits appellate review to reduction of sentence or to setting aside the sentence for further sentencing proceedings in the lower court. The appellate court may not increase the sentence. See ABA Standard 3.4. While no standard of review is expressly provided, it is intended that the appellate courts will review "the excessiveness of the sentence, having regard to the nature of the offense, the

character of the offender, and the protection of the public interest" as well as "the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based." ABA Standard Relating to Appellate Review of Sentences 3.2 (Approved Draft 1968).

Subsection (3) authorizes the Missouri Supreme Court to adopt rules and procedures for the review of sentences. The ABA Standards Relating to Appellate Review give general guidelines for procedures in reviewing sentences.

Chapter 3

IMPRISONMENT

3.010 Sentence of imprisonment: incidents

(1) **Authorized terms.** The authorized maximum terms of imprisonment, including both prison and conditional release terms are:

(a) for a Class A Felony, a term of years not less than 10 years and not to exceed 30 years, or life imprisonment.

(b) for a Class B Felony, a term of years not less than 5 years and not to exceed 15 years.

(c) for a Class C Felony, a term of years not to exceed 7 years.

(d) for a Class D Felony, a term of years not to exceed 5 years.

(e) for a Class A Misdemeanor, a term not to exceed one year.

(f) for a Class B Misdemeanor, a term not to exceed six months.

(g) for a Class C Misdemeanor, a term not to exceed 15 days.

(2) **Special terms for class C and D felonies.** In cases of Class C and D Felonies, the court shall have discretion to imprison for a special term not to exceed one year in the county jail or other authorized penal institution, and the place of confinement shall be fixed by the court. If the court imposes a sentence of imprisonment for a term longer than one year upon a person convicted of a Class C or D Felony, it shall commit the person to the custody of the Department of Corrections for a term of years not less than three years and not exceeding the maximum authorized terms provided in Subsections (1) (c) and (d).

(3) **Place of imprisonment.**

(a) When a regular sentence of imprisonment for a felony is imposed, the court shall commit the defendant to the custody of the Department of Corrections for a maximum term of years designated by the court under Subsection (1) or until released under procedures established elsewhere by law.

(b) A sentence of imprisonment for a misdemeanor shall be for a definite term and the court shall commit the defendant to the county jail or other authorized penal institution for the term of his sentence or until released under procedures established elsewhere by law.

(4) **Prison and conditional release elements of maximum terms for felonies.**

(a) 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.

(b) "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.

Comment

This section brings all authorized sentences of imprisonment together, except the dangerous offender provisions of § 3.020.

Subsection (1)(a) permits the judge to fix a maximum term within the range of 10 to 30 years for a Class A Felony if he chooses not to impose a life sentence. *Cf.* Model Penal Code, Alternate § 6.06(1). No sentencing category is established for mandatory death sentences if such are included in the Code.

Subsection (1)(b) covers Class B felonies and sets the maximum sentence for these serious felonies.

Subsection (1)(c) covers Class C Felonies, and corresponds to a present group of felonies for which imprisonment up to 10 years is authorized. Since the three-quarter time rule that is applied to almost all prison inmates will be repealed, a 10 year sentence under present law results in a maximum term of imprisonment that is close to the seven year maximum for Class C Felonies.

Subsection (1)(d) covers Class D Felonies, and was added to take account of the numerous felonies punishable at present by a term of five years or less. The upper limit is supported by the theory that a 3 to 4 year period is the shortest term during which any meaningful program of rehabilitation or reform in prison and on conditional release could be expected to take hold.

Subsections (1)(e), (f) and (g) basically correspond with present maximum sentences for misdemeanors. Maximum terms of one year and of six months are common. Most of the 19 misdemeanors with a 30 day maximum sentence should be made Class C Misdemeanors. Four classes of misdemeanors are not needed and the 15 day maximum term will permit the reasonable classification of some minor offenses as misdemeanors rather than infractions.

Subsection (2) gives the judge a broader range of imprisonment alternatives for Class C and D Felonies, including jail terms up to one year. Many present felony statutes permit such misdemeanor type sentences.

Subsection (3) is based on Michigan Revised Criminal Code § 1401(3) and § 1425 (Final Draft 1967). In addition to covering the authorized place of imprisonment, the provision makes it clearer that the court must designate a maximum term of years within the ranges of authorized maximum terms fixed by Subsection (1). The Department of Corrections determines the actual place of imprisonment when a regular felony term of imprisonment is imposed.

The provision in (3)(a) and in (3)(b), "or until released under procedures established elsewhere by law," takes account of felony and misdemeanor defendants released on parole and those discharged before their maximum term is served.

Subsection (4)(a) fixes the prison and conditional release elements of felony sentences to the custody of the Department of Corrections. The maximum term of years of imprisonment authorized by subsection (1) is fixed by the court, but the conditional release term is fixed by subsection (4). The "prison term" is the maximum time a person can be held in prison before conditional release. The "conditional release term" is the maximum length of time a person must satisfactorily serve on parole before he is finally discharged, regardless of the point in time when he is released from his confinement in prison. Under subsection (4)(b) conditional release (parole) is viewed as a transitional process necessary for every offender released from prison. At present most felony offenders are released from prison without any parole supervision or control, and many soon return to prison. Before he is returned to prison, however, he must be prosecuted and convicted of a subsequent crime. In the meantime he

may be committing other crimes. This provision provides for supervision upon release which may be effective in keeping the person from returning to crime. It also provides a more effective deterrent against further crime or misconduct as the person on conditional release will realize that if he does not meet the conditions of his release he faces an immediate and substantial additional prison term under § 3.040(5). Although the conditional release program will require additional probation and parole supervision facilities, it should result in better chances for successful rehabilitation for the majority of inmates who are now unconditionally released from prison, and consequently result in improved "crime control".

3.020 Extended terms for dangerous offenders

(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.

Comment

Based on the Model Sentencing Act § 6 (Revised Ed. 1970), this provision permits extended terms for dangerous, mentally

abnormal offenders who commit Class B, C or D Felonies under certain circumstances. No extended term provision is made for Class A Felonies since the court already has the power to impose a life sentence under § 3.010(1)(a).

Subsection (1) permits but does not require the court to sentence a dangerous offender to an extended term. The drafters of the Model Penal Code concluded that "experience has shown that sanctions of this kind are more effective when they are both flexible and moderate; highly afflictive, mandatory punishment provisions become nullified in practice . . ." Comment to § 7.03 Model Penal Code, Tent. Draft No. 2 at 41 (1954).

The criteria in subsections (1)(a), (b) and (c) are taken from the Model Sentencing Act § 6 (Revised Ed. 1970). The words "severe mental or emotional disorder" were substituted in the 1970 MSA draft for "severe personality disorder" in the 1963 draft on the advice of a number of psychiatrists to whom the phrase "personality disorder" was a specific diagnosis rather than a general category. The criteria differ from those of the Model Penal Code § 7.03(3) which requires a finding that the mental condition is "gravely abnormal" and that the defendant's conduct "has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences."

Subsection (2) authorizes moderate increases in total authorized terms for dangerous offenders. See § 3.010(1) for ordinary terms.

3.030 Extended term procedures

(1) **Commitment.** Whenever, upon conviction or upon receiving the presentence investigation report, in the opinion of the court there is reason to believe the defendant falls within the category of Section 3.020(a) or (b), the defendant shall be referred to a facility of the division of mental diseases for the performance of a psychiatric evaluation under Section 2.050(2). The study and report of the division of mental diseases shall be designed to assist the court in determining whether the defendant is suffering from a severe mental or emotional disorder indicating a propensity toward continuing criminal activity of a dangerous nature.

(2) **Prerequisites to dangerousness finding.** The court shall not make a finding of dangerousness and impose an extended term under Section 3.020 unless

(a) the indictment or information, delivered to the defendant more than 30 days prior to trial or guilty plea, contains notice that the prosecution intends to ask for an extended sentence under Section 3.020, and specifies whether the prosecution relies on Section 3.020(1)(a) or (b), or both; and

(b) a sentencing hearing is held; and

(c) all presentence and diagnostic reports are opened to inspection and copying by the prosecuting attorney and the defendant's attorney prior to the sentencing hearing; and

(d) all evidence presented to sustain the finding is presented in open court at the sentencing hearing with full rights of confrontation and cross-examination; and

(e) the defendant is afforded the opportunity at the sentencing hearing to present evidence; and

(f) each of the findings required under Section 3.020 as a basis for an extended term is found to exist, and the court makes specific findings of fact and conclusions of law.

Comment

The procedural provisions of subsection (2) appear essential to insure the constitutionality of the basic extended term provision. A hearing on notice with the right of the defendant to hear and controvert the evidence against him and to offer evidence on his own behalf would seem to be essential. *Cf.* § 7.07(6) Model Penal Code.

Subsection (1) requires a psychiatric evaluation in all cases of possible dangerous offenders, even if the prosecutor did not give notice in the indictment or information of his intent to ask for an extended term. Whether or not an extended term can be imposed, the court should know whether the defendant is a dangerous offender before passing sentence.

Subsection (2)(a) is designed to give the defendant adequate notice and sufficient time to prepare a defense against imposition of an extended term sentence.

Subsections (2)(b) through (f) contain various basic procedural safeguards which should satisfy the requirements of Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), which struck down the Colorado Sex Offenders Act for permitting an indeterminate life sentence without the "full panoply of . . . protections which due process guarantees in state criminal proceedings." The court noted that the Sex Offenders Act did not make the commission of a specified crime the basis for sentencing, but sentence was tied to the establishment of a "new finding of fact" that the

defendant "constitutes a threat of bodily harm to the public or is an habitual offender and mentally ill." In his situation due process required such basic rights as "reasonable notice" and "opportunity to be heard, be confronted with witness . . . have the right to cross examine, and to offer evidence of his own."

Subsection (2)(f), requiring specific findings of fact and conclusions of law, provides a basis for appellate review of extended term sentencing decisions, an area where appellate review would be important to prevent possible procedural and sentencing abuses.

3.040 Concurrent and consecutive terms of imprisonment

(1) **In general.** Multiple sentences of imprisonment shall run concurrently unless the court specifies that they shall run consecutively.

(2) **Effect of probation or parole.** If a person who is on probation, parole or conditional release is sentenced to a term of imprisonment for an offense committed after the granting of probation or parole or after the start of his conditional release term, the court shall direct the manner in which the sentence or sentences imposed by the court shall run with respect to any resulting probation, parole or conditional release revocation term or terms. If the subsequent sentence to imprisonment is in another jurisdiction, the court shall specify how any resulting probation, parole or conditional release revocation term or terms shall run with respect to the foreign sentence of imprisonment.

Comment

Subsection (1) changes and clarifies the present law. In effect, it creates a presumption in favor of concurrency of sentences, putting the burden on the court to specify when sentences are to run consecutively. This approach is followed by most, if not all, of the recent criminal code revisions in other states. Present Missouri law can be very harsh in that consecutive sentences are sometimes required. § 546.480 RSMo can be a trap for the unwary prosecutor or defense attorney who must make sure that sentence is pronounced for each offense before the defendant is convicted of another offense in order to avoid the operation of the statute. § 222.-020 RSMo also requires consecutive sentences for crimes committed by persons while under sentence. Subsection (1) does not prohibit consecutive sentences but just requires that the court specify when they are to apply. No standards are specified for the imposition of consecutive sentences but the court should not impose a consecutive sentence unless, having re-

gard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required because of the exceptional features of the case. The court should obtain a presentence report before imposing a consecutive term.

Subsection (2) requires the judge to specify how a sentence for a crime committed while the person is on probation, parole or serving his conditional release term shall run with respect to any resulting probation, parole or conditional release revocation term. A judge may not learn about probation, parole or conditional release before sentencing, but whenever he finds out, this provision requires him to state how the sentence is to run with respect to any revocation term. Where the subsequent sentence to imprisonment is out of state, the Missouri court mut specify how any resulting revocation term shall run with respect to the foreign sentence. Under § 3.050 (5) the Board of Probation and Parole decides whether the conditional release term of an offender should be revoked, just as it would normally decide whether parole should be revoked.

3.050 Calculation of terms of imprisonment

(1) A sentence of imprisonment commences to run when sentence is imposed, if the defendant is in custody or surrenders himself into custody at that time. Otherwise, it commences to run when he comes into custody.

(2) All time actually spent in custody until the prisoner is sentenced to imprisonment shall be credited toward the maximum term of imprisonment imposed under the provisions of this chapter.

(3) If a sentence of imprisonment is vacated and a new sentence is imposed on the defendant for the same offense, the new sentence is calculated as if it had commenced at the time the vacated sentence was imposed, and all time served under the vacated sentence shall be credited against the new sentence.

(4) If a person serving a sentence of imprisonment escapes from custody, the escape interrupts the sentence. The interruption continues until the person is returned to the institution in which the sentence was being served, or in the case of one committed to the custody of the Department of Corrections, to any institution administered by the department.

(5) If a person released from imprisonment on parole or serving a conditional release term violates any of the conditions of his parole or release, he may be treated as a parole violator under the provisions of Section 549.265 RSMo. If the Board of Probation

and Parole revokes the parole or conditional release, the paroled person shall serve the remainder of his prison term and all the conditional release term, as an additional prison term, and the conditionally released person shall serve the remainder of the conditional release term as an additional prison term, unless he is sooner released on parole under Section 549.261 RSMo.

(6) The sentencing court shall include the time of commencement of sentence under Subsection (1) and the computation of time credited against sentence under Subsection (2) or (3) in the original or amended commitment order, under procedures established by rule of court.

Comment

Based partly on Michigan Revised Criminal Code § 1430 (Final Draft 1967) which was based on portions of New York Revised Penal Law § 70.30.

Under subsection (1) a defendant who is free on bond pending appeal does not start serving his sentence until he is actually in custody.

Subsection (2) requires that credit be given for all time spent in custody until the defendant is sentenced to imprisonment. Until the adoption of what is now § 546.615 RSMo (1971 Supp), § 546.615(2) RSMo (1969) gave the court discretion on crediting prior prison or jail time. § 546.615 now requires credit in *felony* cases "for all time spent in prison or jail both awaiting trial and pending transfer to the Department of Corrections."

Subsection (3) makes it clear that all time served under a vacated sentence is credited on any new sentence.

Subsection (4) provides that escape interrupts the running of time under a sentence; the interruption continues until the defendant is restored to custody.

Subsection (5) provides that violation of any of the conditions of conditional release may result in revocation of the conditional release, and the remainder of the conditional release term then must be served as an additional prison term unless parole is granted prior to the end of the term. Thus, a person on conditional release is to be treated as a parolee, and the procedures of § 549.265 are applicable to him. If a prisoner is released on parole before his conditional release term is scheduled to begin, the conditional release term still becomes an additional prison term if the parole is revoked. In addition, the parolee must serve the remainder of his original prison term. This provides an added incentive for prisoners released early on parole to live up to the parole conditions. As in the case of revocation of conditional release, a second parole can be granted.

Subsection (6) makes clear where the duty lies to compute the allowances for time spent in custody. The sentencing court should have more convenient access to most information for applying the statute than does the Department of Corrections. Details of procedure are left to rule of court. § 546.615(3) RSMo (1971 Supp) requires the officer whose duty it is to deliver the convicted person to the Department of Corrections to endorse the length of time spent in jail or prison on the commitment papers.

Chapter 4

PROBATION

4.010 Criteria for applying chapter

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.

Comment

Based on New York Penal Law § 65.00, this provision states the basic criteria for granting probation. No preference is stated either for or against probation; the provision merely contains guidelines for the use of probation.

4.020 Terms of probation

(1) Unless terminated as provided in Section 4.060, the terms during which probation shall remain conditional and be subject to revocation are:

(a) A term of years not less than one year and not to exceed five years for a felony.

(b) A term not less than six months and not to exceed two years for a misdemeanor.

(c) A term not less than six months and not to exceed one year for an infraction.

(2) The court shall designate a specific term of probation at the time of sentencing or at the time of suspension of imposition of sentence.

Comment

Based on Federal Criminal Code § 3102 (Study Draft 1970) and present Missouri law, § 549.071 RSMo. The provision continues the present maximum probation term of five years for felonies and two years for misdemeanors and the present minimum probation term of one year for felonies. The proposal changes present law in denying the court the power to

fix a term of less than six months probation for a misdemeanor. Until the offender has been on probation for some time, the length of the period of probation needed may be difficult to determine. The apparent harshness of the proposed minimum terms is mitigated by the power under Code § 4.060 to terminate probation early.

4.030 Conditions of probation

(1) The 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. When a defendant is placed on probation, he shall be given a certificate explicitly stating the conditions on which he is being released.

(2) The court may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the probation term.

Comment

Based on § 549.071 RSMo. Some proposed revisions have contained a list of standard probation conditions; *e. g.*, Federal Criminal Code § 3103 (Study Draft 1970) lists 12 standard conditions. There is a danger in listing standard conditions that other possibilities may not be considered, and the court may be tempted to routinely impose most or all of the conditions without carefully considering the needs of the particular offender. To avoid misunderstanding and to provide a basis for probation revocation hearings, each probationer must be given a certificate setting forth the probation conditions.

Changing circumstances during the term of probation may require the court to modify or enlarge the conditions of probation, as authorized under subsection (2).

4.040 Detention condition of probation

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 under this section shall not exceed the shorter of 60 days or the maximum term of imprisonment authorized for the misdemeanor by Chapter 3.

(2) In felony cases, the period of detention under this section 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.

Comment

This "split sentence" provision is derived from 18 U.S.C.A. § 3651. The basic purpose of the provision is to permit the shock of relatively short-term imprisonment in a disposition which is primarily probation for a much longer period of time. Availability of such short term detention is particularly important in cases involving young persons who should not be kept in prison or jail over long periods of time, but who would be quite likely to benefit from such "shock treatment". Also, the provision for intermittent detention permits great flexibility. For example, a judge could permit a man to keep his job and still serve nights or weekends in jail. A married man could thus be punished with imprisonment without the risk that this would put his family on the welfare rolls.

This provision does not apply to "detention" imposed for purposes of physical or mental treatment. If a judge believes the offender should receive psychiatric treatment in an institution as a condition of probation, there should be no short time limit on such detention fixed by the judge or by statute. In such cases, the judge retains discretion under Code § 4.060 (3) to mitigate any later prison or jail term by all or part of the time the offender was on probation.

4.050 Transfer to another court

Jurisdiction over a probationer may be transferred from the court which imposed probation to a court having equal jurisdiction over offenders in any other part of the State, with the concurrence of both courts. Retransfers of jurisdiction may also occur in the same manner. The court to which jurisdiction has been transferred under this Subsection shall be authorized to exercise all powers permissible under this Chapter over the defendant, except that the term of probation shall not be terminated without the consent of the sentencing court.

Comment

Based on Federal Criminal Code § 3103(5) (Study Draft 1970), dealing with transfers between federal districts. Mobility of probationers within Missouri should not be inhibited by lack of such authority, nor should a court in one part of

the state be forced to retain jurisdiction over a probationer who is living and working some distance away.

4.060 Duration of probation; revocation

(1) **Commencement; Multiple Periods.** A term of probation commences on the day it is imposed. Multiple terms of Missouri probation, whether imposed at the same time or at different times, shall run concurrently. Terms of probation shall also run concurrently with any federal or other state jail, prison, probation or parole term for another offense to which the defendant is or becomes subject during the period, unless otherwise specified by the Missouri court.

(2) **Early Termination.** The court may terminate a period of probation and discharge the defendant at any time before completion of the specific term fixed under Section 4.020 if warranted by the conduct of the defendant and the ends of justice. Procedures for termination and discharge may be established by rule of court.

(3) **Revocation.** If the defendant violates a condition of probation at any time prior to the expiration or termination of the probation term, the court may continue him on the existing conditions, with or without modifying or enlarging the conditions, or, if such continuation, modification, or enlargement is not appropriate, may revoke probation and order that any sentence previously imposed be executed. If imposition of sentence was suspended, the court may revoke probation and impose any sentence available under Section 2.010. The court may mitigate any sentence of imprisonment by reducing the prison or jail term by all or part of the time the defendant was on probation.

(4) **Revocation Procedure.**

(a) Probation shall not be revoked without giving the probationer notice and an opportunity to be heard on the issues of whether he violated a condition of probation and, if he did, whether revocation is warranted under all the circumstances.

(b) At any time during the term of probation the court may issue a notice to the probationer to appear to answer a charge of a violation, and the court may issue a warrant of arrest for the violation. Such notice shall be personally served upon the probationer. The warrant shall authorize the return of the probationer to the custody of the court or to any suitable detention facility designated by the court.

(c) Any probation officer, if he has probable cause to believe that the probationer has violated a condition of probation, may arrest the probationer without a warrant, or may deputize any other officer with the power of arrest to do so by giving him a written statement of the circumstances of the alleged violation, including a statement that the probationer has, in the judgment of the probation officer, violated the conditions of his probation. The written statement, delivered with the probationer to the official in charge of any jail or other detention facility, shall be sufficient authority for detaining the probationer pending a preliminary hearing on the alleged violation.

(d) If the probationer is arrested under the authority granted in Subsections (4)(b) or (4)(c), he shall have the right to a preliminary hearing on the violation charged. He shall be notified immediately in writing of the alleged probation violation. If he is arrested in the jurisdiction of the sentencing court, and the court which placed him on probation is immediately available, the preliminary hearing shall be heard by the sentencing court. Otherwise, he shall be taken before a judge or magistrate in the county of the alleged violation or arrest having original jurisdiction to try criminal offenses, and the preliminary hearing shall be held as soon as possible after the arrest. Such preliminary hearings shall be conducted as provided by rule of court. If it appears that there is probable cause to believe that the probationer has violated a condition of his probation, or if the probationer waives the preliminary hearing, the judge or magistrate shall order the probationer held for further proceedings in the sentencing court. If probable cause is not found, this shall not bar the sentencing court from holding a hearing on the question of the probationer's alleged violation of a condition of probation nor from ordering the probationer to be present at such a hearing. Provisions regarding release on bail of persons charged with offenses shall be applicable to probationers arrested and ordered held under this provision.

(e) Upon such arrest and detention, the probation officer shall immediately notify the sentencing court and shall submit to the court a written report showing in what manner the probationer has violated the conditions of probation. Thereupon, or upon arrest by warrant, the court shall cause the probationer to be brought before it without unnecessary delay for a hearing on the violation charged. Revocation hearings shall be conducted as provided by rule of court.

(5) **Delayed Adjudication.** The power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and for any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

Comment

Subsection (1) is based on Federal Criminal Code § 3104 (Study Draft 1970). The provision for the concurrent running of multiple periods of probation is based on the same premise as the limitation of the maximum period of probation for felonies to five years—either probation will work within a relatively short period or it will not work at all.

The apparent harshness of the proposed minimum probation terms under Code § 4.020 is mitigated by the power under subsection (2) to terminate probation early. A probationer who has lived up to the conditions of probation for a time may have good reason to apply for an early termination and may be entitled to it.

Subsection (3) authorizing revocation of probation also authorizes continuation of probation, with or without modifying or enlarging existing probation conditions. The same authority is now available under § 549.101 RSMo. There should be no revocation unless the court is going to order a sentence previously imposed to be executed, or, if imposition of sentence was suspended, is going to impose a sentence available under Code § 2.010. § 549.101(2) RSMo now attempts to limit the court by providing that after probation has been revoked, the court may grant a second probation, "but no more than two probations . . . shall be granted the same person under the same judgment of conviction." The last sentence of the subsection corresponds with the last sentence of § 549.010(1) RSMo. Unless the court mitigates any sentence of imprisonment by giving partial or full credit for time served on probation, there is no mitigation.

Subsection (4) on revocation procedures has been added to guarantee that the probationer's federal due process rights are observed. Under the federal due process guidelines in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484 (1972), a parole revocation case made applicable to probation revocation proceedings in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), it is clear that both a preliminary hearing and a revocation hearing are part

of the process that would be due in a probation revocation case. Consider the following language from the *Morrissey* opinion by Chief Justice Burger, speaking for a unanimous court:

> "The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available . . . Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of parole conditions. . . . In our view due process requires that after the arrest, the determination that reasonable grounds exist for revocation of parole should be made by someone not directly involved in the case. . . . This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. . . . With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation." [Following this is a summary of the required hearing procedures for both the preliminary hearing and the later revocation hearing]. 92 S.Ct. at 2602–2603.

If the sentencing court wished to hold an immediate hearing on the probation violation, the arrested probationer probably would waive his right to a preliminary hearing. However, he may have good reason to ask for a preliminary hearing at the place of arrest or in the county of the alleged violation, which may be far from the sentencing court, or he may wish to have the sentencing court determine at a preliminary hearing whether there is a need for a revocation hearing. If the judge or magistrate conducting the preliminary hearing decides to "bind over" the probationer, subsection (4)(d) requires the court to admit the probationer to bail as with any

person charged with a crime. The probationer should be entitled to be released on bail because he has the due process right to present evidence at the hearing. See 92 S.Ct. at 2603. Note that a finding of "no probable cause" at the preliminary hearing would not prevent the sentencing court, in its discretion, from ordering a more extensive revocation hearing to be held or from ordering the probationer to attend the hearing. However, the probationer could not be arrested and held before the time of the revocation hearing.

The provisions of subsection (4) are based on § 549.101 RSMo, § 95–2811 of the Proposed Montana Code of 1970, and the due process requirements outlined in Morrissey v. Brewer, *supra*. Detailed procedures for the conduct of the preliminary hearing and the revocation hearing are not included but these are left to the rule of court. Although the opinion in *Morrissey* states that the official conducting the preliminary hearing in a *parole* revocation case need not be a judicial officer, it is more appropriate to use judicial officers in probation revocation cases, so that all procedures can be established and coordinated by rule of court.

Chapter 5

FINES

5.010 Fines for felonies

(1) A person who has been convicted of a Class C or D Felony may be sentenced

(a) to pay a fine which does not exceed five thousand dollars; or

(b) if the offender has gained money or property through the commission of the crime, to pay an amount, fixed by the court, not exceeding double the amount of the offender's gain from the commission of the crime. An individual offender may be fined not more than twenty thousand dollars under this provision.

(2) **Determination of amount.** As used in this Section the term "gain" means the amount of money or the value of property derived from the commission of the crime. The amount of money or value of property returned to the victim of the crime or seized by or surrendered to lawful authority prior to the time sentence is imposed shall be deducted from the fine. When the court imposes a fine based on gain the court shall make a finding as to the amount of the offender's gain from the crime. If the record does not contain sufficient evidence to support such a finding, the court may conduct a hearing upon the issue.

(3) **Exception.** The provisions of this section shall not apply to corporations.

Comment

Based on New York Penal Law § 80.00 (1967). Under present Missouri law a fine cannot be imposed for a felony unless authorized by the particular statute defining the offense. Ordinarily the amount of the authorized fine for a felony is limited to the misdemeanor level—$1,000 maximum—and the fine is an alternative considered equivalent to a jail term and can only be imposed in place of or in addition to a jail term for the felony. § 546.470 RSMo provides that no fine can be imposed in addition to a sentence of imprisonment in the penitentiary.

This section allows fines for Class C and D Felonies. The fine allowed under subsection (1)(a) goes up to $5,000. Under (1)(b) the amount is determined by the amount of gain the offender has obtained from the crime. While, in general, a felony is so serious an offense that a fine may be

inappropriate, there are times when, particularly where the offender has profited financially, that a fine based on the amount of gain should be imposed. This section permits this in the case of C and D Felonies. The method of computing the fine based on gain also should encourage the offender to disgorge any ill-gotten gains. Very serious crimes, those carrying a Class A or B penalty, are too serious for the mere imposition of a fine. This limitation is consistent with present Missouri law which authorizes misdemeanor type sentences and fines only for felonies punishable by relatively short prison terms.

Any imposition of fines is also governed by the provisions of Code § 5.040.

Subsection (1)(b) places an upper limit on the amount of the "gain" fine for an individual. See 28 U.S.C.A. § 201(e) which contains a similar limit in bribery cases.

5.020 Fines for misdemeanors and infractions

(1) **Dollar limits.** Except as otherwise provided for an offense outside this Code, a person who has been convicted of a misdemeanor or infraction may be sentenced to pay a fine which does not exceed:

(a) For a Class A Misdemeanor, one thousand dollars.

(b) For a Class B Misdemeanor, five hundred dollars.

(c) For a Class C Misdemeanor, three hundred dollars.

(d) For an infraction, two hundred dollars.

(2) **Alternative fine.** In lieu of a fine imposed under Subsection (1), 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.

Comment

The dollar limits for Class A and B Misdemeanors are consistent with the usual limits fixed in misdemeanor statutes that remain outside the Code. When the authorized imprisonment is one year, the maximum authorized fine is usually $1,000; when the maximum imprisonment is six months, the maximum fine is often $500.

Subsection (2) may be useful for the misdemeanors and infractions for which fines are most apt to be used—the economic offenses. However, in order to have subsection (2)

apply, it will be necessary to redefine the offenses outside the Code in terms of Class A Misdemeanor, Class B, etc. because of the limitation of Code § 2.030(3).

5.030 Fines for corporations

(1) **In general.** A sentence to pay a fine, when imposed on a corporation for an offense defined in this Code or for any offense defined outside this Code for which no special corporate fine is specified, shall be a sentence to pay an amount, fixed by the court, not exceeding:

(a) Ten thousand dollars, when the conviction is of a felony.

(b) Five thousand dollars, when the conviction is of a Class A Misdemeanor.

(c) Two thousand dollars, when the conviction is of a Class B Misdemeanor.

(d) One thousand dollars, when the conviction is of a Class C Misdemeanor.

(e) Five hundred dollars, when the conviction is of an infraction.

(f) Any higher amount not exceeding double the amount of the corporation's gain from the commission of the offense, as determined under Section 5.010(3).

(2) **Exception.** In the case of an offense defined outside the Code, if a special fine for a corporation is expressly specified in the statute that defines the offense, the fine fixed by the court shall be:

(a) An amount within the limits specified in the statute that defines the offense; or

(b) Any higher amount not exceeding double the amount of the corporation's gain from the commission of the offense, as determined under Section 5.010(3).

Comment

Adapted from New York Penal Law § 80.10 (1967). The most important of the few penal sanctions that can be used against a corporation is the fine. Therefore, this section provides fines for felonies as well as for lesser offenses. Under present law fines for corporations are seldom higher than fines for individuals, and a corporation could conclude that the fine is just a cost of doing business. Note that the fines listed in Subsection (1) apply to all offenses defined in the Code and to all offenses defined outside the Code for which

no special corporate fine is stated. Subsection (2) applies to offenses defined outside the code for which a fine for a corporation is expressly stated.

The specific dollar limitation by type of offense can be disregarded when the corporation derives a pecuniary gain from the offense. Corporations doing business on a large scale might not be affected to any great degree by the ordinary fine but could hardly ignore the "double the gain" fines.

5.040 Imposition of fines

(1) **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.

(2) **Fine alone.** 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.

(3) **Fine with other sanctions.** The court shall not sentence an individual to pay a fine in addition to any other sentence authorized by Section 2.010 unless

(a) he has derived a pecuniary gain from the offense; or

(b) the court is of the opinion that a fine is uniquely adapted to deterrence of the type of offense involved or to the correction of the defendant.

(4) **Installment or delayed payments.** When an offender is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, the fine shall be payable forthwith.

(5) **Nonpayment.** When an offender is sentenced to pay a fine, the court shall not impose at the same time an alternative sentence to be served in the event that the fine is not paid. The response of the court to nonpayment shall be determined only after the fine has not been paid, as provided in Section 5.050.

Comment

Based on Federal Criminal Code § 3302 (Study Draft 1970). See also Model Penal Code § 7.02. Existing Missouri law does not contain general rules for the imposition of fines.

Subsection (1) states the general principle that the fine imposed should be related to the resources of the defendant. A fine should not be imposed on an indigent defendant. See Model Penal Code § 7.02(3)(a). To prevent competition with the victim of the crime, the court is prohibited from setting a fine which will so deplete a defendant's resources that he cannot compensate the victim.

Because fines may not have affirmative rehabilitative value and because the impact of the fine is uncertain, *e. g.*, it may hurt the offender's dependents more than the offender, fines are discouraged in subsections (2) and (3), unless some affirmative reason indicates that a fine is particularly appropriate. For too long fines have been assessed almost automatically. Even though jail sentences and probation with conditions are possible alternatives under present law, very often an offense is regarded by prosecutors, defense attorneys, judges and defendants as "worth so much" and little or no thought may be given to better sentencing alternatives.

Subsection (4) formalizes the present practice by giving the court express authority to fix a future date of payment or installment payments.

Subsection (5) is consistent with Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971). While the Missouri Constitution, Art. 1, § 11, authorizes imprisonment for nonpayment of fines and penalties imposed by law, it also states the principle that "no person shall be imprisoned for debt." Naturally, judges who no longer can imprison for failure to pay fines (see § 543.270 RSMo) may now turn to imprisonment as the alternative. However, a judge who feels that he would ordinarily impose a fine should impose a jail sentence only after determining that probation is not a sufficient sentence. He should not adopt a practice of imposing jail sentences on all indigent persons who cannot pay fines, since this would violate the spirit of the decision in Tate v. Short that indigent persons should not be penalized for being poor by being sent to jail.

5.050 Response to nonpayment

(1) **Response to default.** When an offender sentenced to pay a fine defaults in the payment of the fine or in any installment, the court upon motion of the prosecuting attorney or upon its own motion may require him to show cause why he should not be imprisoned for nonpayment. The court may issue a warrant of arrest or a summons for his appearance.

(2) **Imprisonment.** Following an order to show cause under Subsection (1), unless the offender shows that his default was

not attributable to an intentional refusal to obey the sentence of the court, or not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment, the court may order the defendant imprisoned for a term not to exceed 180 days if the fine was imposed for conviction of a felony or 30 days if the fine was imposed for conviction of a misdemeanor or infraction. The court may provide in its order that payment or satisfaction of the fine at any time will entitle the offender to his release from such imprisonment or, after entering the order, may at any time reduce the sentence for good cause shown, including payment or satisfaction of the fine.

(3) **Modification of sentence.** If it appears that the default in the payment of a fine is excusable under the standards set forth in Subsection (2), the court may enter an order allowing the offender additional time for payment, reducing the amount of the fine or of each installment, or revoking the fine or the unpaid portion in whole or in part.

(4) **Corporations.** When a fine is imposed on a corporation it is the duty of the person or persons authorized to make disbursement of the assets of the corporation and their superiors to pay the fine from the assets of the corporation. The failure of such persons to do so shall render them subject to imprisonment under Subsections (1) and (2).

(5) **Civil process.** Upon default in the payment of a fine or any installment thereof, the fine may be collected by any means authorized for the enforcement of money judgments.

Comment

Based on Federal Criminal Code § 3304 (Study Draft 1970). A separate proceeding is required under subsections (1) and (2) to determine whether there was culpability for the nonpayment of a fine. If there is, the defendant may be sentenced to what is to be regarded as imprisonment for contempt of court, not for a debt.

Subsection (2) sets limits on confinement for contempt and permits flexibility in treatment of the culpable nonpayer by permitting the court to provide the incentive of release from jail if the fine is paid.

Additional flexibility to modify the fine or method of payment is provided in subsection (3) for the nonculpable defendant, who may not be imprisoned for debt after Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971).

Subsection (4) poses the threat of imprisonment to corporate officers who refuse to pay a corporate fine.

Subsection (5) permits civil process to be used to collect a fine or any installment due.

5.060 Revocation of a fine

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.

Comment

Based on Federal Criminal Code § 3303 (Study Draft 1970). This permits revocation or adjustment of a fine to fit altered conditions or to correct a mistake.

Chapter 6

COLLATERAL CONSEQUENCES OF CONVICTION

6.010 Basis of disqualification or disability

(1) No person shall suffer any legal disqualification or disability because of a finding of guilt or conviction of a crime or the sentence on his conviction, unless the disqualification or disability involves the deprivation of a right or privilege which is

(a) necessarily incident to execution of the sentence of the court; or

(b) provided by the Constitution or the Code; or

(c) provided by a statute other than the Code, when the conviction is of a crime defined by such statute; or

(d) provided by the judgment, order or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.

(2) Proof of a conviction as relevant evidence upon the trial or determination of any issue, or for the purpose of impeaching the convicted person as a witness, is not a disqualification or disability within the meaning of this Chapter.

Comment

Based on Model Penal Code § 306.1 and Proposed New Jersey Penal Code § 2C:51–1 (1971), this general section is the foundation of the recommended proposal to rationalize the collateral consequences of a criminal conviction. As indicated by the proliferation of statutory provisions now on the books there is a need for general provisions on the matter of disqualification or disability following conviction.

No person shall suffer any legal disqualification or disability because of a finding of guilty or a criminal conviction unless he falls within one or more of the four subsections, (1)(a) to (d).

Subsection (1)(a) preserves disabilities necessarily incident to execution of the sentence. A person who is in prison would not be permitted to engage in acts inconsistent with incarceration; *e. g.*, he obviously could not continue any outside employment. Chapter 460 RSMo on estates of convicts would continue to apply and require appointment of a trustee in most situations in which a convict is sued or wishes to

sue while in prison. See § 460.100 RSMo. If the convict is a litigant, he would still have to obtain a writ of habeas corpus in order to leave prison to testify.

Subsection (1)(b) recognizes that either the Constitution or the Code may require a specific legal disability. *E. g.*, Mo. Const. art. VIII § 2 provides that "No . . . person . . . while confined in any public prison shall be entitled to vote . . . ."

Subsection (1)(c) permits retention of any provisions outside of the Code, wherever they might be, which make disqualification or disability a penalty for an offense defined by such statute. There should be very few of these statutes containing special penalties if the Code is enacted and the present disqualification and disability statutes are repealed and replaced by the Code provisions.

Subsection (1)(d) allows a deprivation when it is provided in a judgment, order or regulation of a court, agency or official exercising jurisdiction conferred by law, whenever the commission of the crime of the conviction or the sentence "is reasonably related" to the competency of the offender to exercise the right or privilege of which he is deprived. This is the most important provision in this section. The present law sometimes contains blanket restrictions against employment in certain regulated areas of persons convicted of crimes. Sometimes conviction is relevant to the public safety interests underlying the regulation, but often it is not. By eliminating irrational barriers to employment, we assist offenders in reintegrating themselves into the community. Thus, instead of providing that no liquor license shall be issued to any person "convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the sale of intoxicating liquor, or who employs in his business as such dealer, any person . . . who has been convicted of violating such law since the date aforesaid," § 311.060 RSMo, the Code provides a reasonable rule which would authorize a licensing agency to refuse to grant a license to an applicant whose criminal record and other circumstances indicate that he would endanger the particular group or industry protected by the agency's licensing power. Many Missouri statutes now leave the matter of licensing to the discretion of the licensing agency, without arbitrary restrictions. *E. g.*, § 334.100 RSMo, giving the state board of registration for the healing arts the power to license individuals guilty of "unprofessional or dishonorable conduct," including "conviction of a felony." A prospective physician might have committed a felony followed by a successful period of rehabilitation. The legislature has wisely given the board the power to decide whether he should be licensed.

6.020 Forfeiture of public office; disqualification

(1) A person holding any public office, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of a crime shall forfeit such office if

(a) he is convicted under the laws of this State of a felony or under the laws of another jurisdiction of a crime which, if committed within this State, would be a felony; or

(b) he is convicted of a crime involving misconduct in office, or dishonesty; or

(c) the Constitution or a statute other than the Code so provides.

(2) Except as provided in Subsection (3), a person convicted under the laws of this State of a felony or under the laws of another jurisdiction of a crime which, if committed within this State, would be a felony, shall be ineligible to hold any public office, elective or appointive, under the government of this State or any agency or political subdivision thereof, until the completion of his sentence or period of probation.

(3) A person convicted under the laws of this State or under the laws of another jurisdiction of a felony connected with the exercise of the right of suffrage shall be forever disqualified from holding any public office, elective or appointive, under the government of this State or any agency or political subdivision thereof.

Comment

Based primarily on Model Penal Code § 306.2 this section mandates forfeiture of any public office, elective or appointive, state or municipal, upon a conviction of any felony, any crime involving malfeasance in office, or of any crime involving dishonesty. In addition, where the Constitution or a statute outside the Code so provides, the office is forfeited.

At present, there are various types of provisions in Chapters 556 to 564 RSMo which generally prohibit a person convicted of a felony from "holding any office of honor, profit or trust within this state" and these apparently require forfeiture of office. Under § 558.130 RSMo, conviction of certain felonies and misdemeanors relating to official duties results in such disqualification to hold office and the additional punishment of forfeiture of office. Forfeiture of public office for commission of a felony of any type or degree (for

conduct while in office) is the almost automatic result of a felony conviction today.

Public employees, as distinguished from public officers, are not covered by the Model Penal Code or the proposed section.

Under subsection (2) a person is disqualified to hold public office until completion of his sentence for commission of a felony; but if the felony involves the right of suffrage, he is permanently disqualified under subsection (3). *Cf.* Ill. Unified Corrections Code Ch. 38, § 1005–5–5(b) (1973) and Kansas Criminal Code § 21–4615 (1970).

6.030 Disqualification from voting and jury service

Notwithstanding any other provision of law, a person who is convicted:

(1) Of any crime shall be disqualified from registering and voting in any election under the laws of this State while confined under a sentence of imprisonment.

(2) Of a felony connected with the exercise of the right of suffrage shall be forever disqualified from registering and voting.

(3) Of any felony shall be forever disqualified from serving as a juror.

Comment

Based on Model Penal Code § 306.3, Kansas Criminal Code § 21–4615 (1970), Ill. Unified Corrections Code Ch. 38, § 1005–5–5 (1973), Oregon Revised Statutes § 137.240 (1961), and Proposed New Jersey Penal Code § 2C:51–3 (1971). Only the New Jersey proposal creates any disqualification that extends beyond the completion of the sentence. In New Jersey a person convicted of a felony is disqualified from serving as a juror until the completion of his sentence and for a period of five years thereafter. However, as in the other states, he may vote as soon as he is released from prison.

The permanent exclusion from the right to vote, although supported by history, is being discarded by most states. At common law an offender could not vote because of the notion that he had forfeited his citizenship. He could not contract, sue, hold or inherit property, or testify in a court of law. Thus he was forever branded as a criminal, unless pardoned. One of the most difficult tasks of modern society is to successfully reintegrate the offender into the free community upon his release from incarceration. Denying to convicted persons a place in the political processes is more appropriate to the concept of "civil death", a concept repudiated by nearly every

state today, and is inconsistent with the rehabilitative ideal. Exclusion from the right to vote of otherwise qualified citizens because of a past conviction is contrary to society's interest in rehabilitating offenders.

However, because of the direct relation of the offense to the electoral process, the Committee decided to continue the present law under § 111.021 RSMo and withhold the franchise from persons convicted of felonies "connected with the exercise of the right of suffrage."

At present only persons convicted of certain felonies "or of a misdemeanor involving moral turpitude" are disqualified from serving as jurors. See §§ 494.020, 557.490, 559.470, 560.610 and 561.340 RSMo. Some felons lose their right to hold public office or to vote without losing their right to serve as a juror, except while imprisoned. See §§ 558.130 and 564.710 RSMo. Many felons lose no civil rights at all, except while imprisoned, because they were not convicted of one of the designated felonies. Persons convicted of only one felony usually regain their right to serve as a juror almost automatically without any pardon by the governor. See §§ 216.355 and 549.111 RSMo. There is no "waiting period" when a disqualified felon is released from judicial probation or parole. First offenders discharged from prison under the three-fourths rule regain their civil rights automatically after two years, and they regain them immediately if they were paroled and successfully complete parole. § 494.020 RSMo which appears to make "any person convicted of a felony" ineligible to serve as a juror, only applies until "such person has been restored to his civil rights." Many felons sentenced to prison regain their civil rights as soon as the term has expired under § 222.010 RSMo, and many convicted felons never lose their rights. Thus, at present, there is no permanent or indefinite disqualification of most persons convicted of felonies, and restoration of rights is not dependent solely upon the pardon power of the governor.

Many states permit persons with felony records to serve on juries. However, the Committee decided to exclude all convicted felons from jury service (unless pardoned) in order to help maintain the integrity of the jury system.

Summary Comment

The approach of the Code is based on the premise that all persons are "civilly alive" but may be deprived of certain privileges of citizenship because of conviction of crime. The present Missouri approach is based on the historical premise under the common law and § 222.010 RSMo that a sentence to imprisonment for a felony suspends all civil rights, and in the case of a life sentence, creates a "civilly dead" person. This requires knowledge of what all the "civil rights" are.

The researcher must look to the common law cases and then to the various statutory and case law exceptions to the suspension of civil rights that have been created. Under the Code approach, all disqualifications and disabilities which are not necessarily incident to the execution of the sentence must be expressly listed. By defining these disqualifications and disabilities and stating when they apply, much of the present confusion is avoided and a sounder basis for rehabilitation is created.

PART III

GENERAL PROVISIONS

Chapter 7

GENERAL PRINCIPLES OF LIABILITY

7.010 Voluntary act

(1) **Requirement.** A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act.

(2) **Definition.** A voluntary act is

(a) a bodily movement performed while conscious as a result of effort or determination; or

(b) an omission to perform an act of which the actor is physically capable.

(3) **Possession as a voluntary act.** Possession is a voluntary act if the possessor knowingly procures or receives the thing possessed, or having acquired control of it was aware of his control for a sufficient time to have enabled him to dispose of it or terminate his control.

(4) **Liability based on an omission.** A person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law.

Comment

This section covers "actus reus" and is based on the Illinois Code Ch. 38, §§ 4–1, 4–2; the New York Penal Law §§ 15.00, 15.05; and the Model Penal Code § 2.01. It requires that criminal liability be based on conduct which includes a voluntary act or the omission to perform an act, and thus states the accepted principle that an "act" is an essential component of criminal liability. The requirement is not that liability must be based upon an act, but rather upon conduct which includes a voluntary act. Liability can be based on a course of conduct during part of which the actor may not be conscious. For example, if a driver loses consciousness and his car hits and kills a pedestrian, the driver is clearly not acting while he is unconscious. However, if criminal liability is to be imposed, his failure to stop as he felt illness approaching could, in the appropriate circumstances, be regarded as sufficiently negligent for the imposition of criminal liability. The liability would be based on the entire course of conduct of which

his failing to stop would be a part. See Comments, Model Penal Code, Tent. Draft No. 4, 119–120 (1955).

Subsection (1) states this minimal requirement of conduct. It does not require that the conduct be that of the defendant. While some conduct on his part will always be required, a defendant can be held responsible, in appropriate circumstances, for the conduct of other persons.

Subsection (2) defines voluntary act. (2)(a) requires consciousness and follows present law that criminal liability cannot be based on behavior while unconscious. See State v. Buxton, 324 Mo. 78, 22 S.W.2d 635 (1929); State v. Barr, 366 Mo. 300, 78 S.W.2d 104 (1935); and State v. Small, 344 S.W.2d 49 (Mo.1961), all dealing with unconsciousness resulting from intoxication.

Subsection (2)(b) defines "act" to include "omission". At first blush, this seems incongruous. This approach is taken in the Illinois Code and their reasons are persuasive.

> "[A]n omission necessarily is defined by describing the act of commission which is omitted; and if the distinction is made, then the phrase 'act or omission' must be used each time reference is made to a person's physical behavior, unless the reference is only to a positive movement, or only to the lack of required movement. Consequently, the use of 'act' to include 'omission' seems reasonable, and clearly is more convenient."
>
> Tent. Final Draft, Proposed Illinois Revised Code of 1961, 144.

Subsection (3) provides that possession can be sufficient as a voluntary act. This is needed since possession is not necessarily a bodily movement nor an omission. The definition is consistent with Missouri decisions. See State v. Burns, 457 S.W.2d 721 (Mo.1970) ruling that for illegal possession under § 195.020 RSMo "there must be a conscious possession of the particular substance . . . "

Subsection (4) states the accepted principle that omissions are not sufficient for criminal liability unless there is a "duty to act". The duty can, of course, be based on a statute providing that the failure to perform a certain act is a crime. For example, see § 143.330 RSMo covering failure to pay taxes, make returns and keep records. More difficult from an analytical point of view is criminal liability by omission in crimes not defined in terms of failure to act. Such situations are rare and the most common is liability for homicide (usually manslaughter) based on the failure to perform some act, such as supplying medical assistance to a close relative. See *e. g.* State v. Beach, 329 S.W.2d 712 (Mo.1959). A concise summary of the "law" is in Jones v. United States, 308 F.2d 307, 310 (D.C.Cir. 1962):

> "The problem of establishing the duty to take action which would preserve the life of another has not often arisen in the case law of this country. . . .
>
> "There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid." (Footnotes omitted).

7.020 Culpable mental state

(1) **Requirement.** Except as provided in Section 7.040, a person is not guilty of an offense unless he acts with a culpable mental state, that is, unless he acts purposely or knowingly or recklessly or with criminal negligence, as the statute defining the offense may require with respect to the conduct, the result thereof or the attendant circumstances which constitute the material elements of the crime.

(2) **Definitions.**

(a) **Purposely.** A person acts purposely, or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result.

(b) **Knowingly.** A person acts knowingly, or with knowledge,

(i) with respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist, or

(ii) with respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

(c) **Recklessly.** A person acts recklessly or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

(d) **Criminal negligence.** A person acts with criminal negligence or is criminally negligent when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

Comment

This and the next two sections deal with the mental component of crime or "mens rea" and are based on the Illinois Code Ch. 38, §§ 4–3 through 4–9, the New York Penal Law §§ 15.00 and 15.05 and the Model Penal Code § 2.02.

Section 7.020 simplifies the number of terms used to describe the culpable mental states and provides definitions of them. Present Missouri statutes use a variety of terms to describe the necessary mental state. For example: willfully; willfully and corruptly; knowingly and willfully; willful and malicious; voluntarily; deliberately; on purpose and of malice aforethought; unlawfully and purposely; intentionally; willfully and maliciously or cruelly; willfully, maliciously or contemptuously; wrongfully and willfully; willfully or negligently; willfully or reckessly; knowingly and negligently; and there are many others. While some of these terms have been defined by judicial decisions with regard to specific crimes, others are vague at best and the meaning of a given term, such as "willful", may vary from crime to crime. As stated in the Working Papers of the National Commission on Reform of Federal Criminal Laws, 120 (1970):

> "Unsurprisingly, the courts have been unable to find substantive correlates for all these varied descriptions of mental states, and, in fact, the opinions display far fewer mental states than the statutory language. Not only does the statutory language not reflect accurately or consistently what are the mental elements of the various crimes; there is no discernible pattern or consistent rationale which explains why one crime is defined or understood to require one mental state and another crime another mental state or indeed no mental state at all."

Subsection (1) states the proposition that, with exceptions, crime requires a culpable mental state and that the mental state must relate to the elements of conduct, result and attendant circumstances as set out in the statute defining the offense.

Subsection (2) defines the four basic culpable mental states. These four cover nearly all the mental states that are needed. There may be a specific crime that will require its own peculiar mental element but these four cover nearly all, and

perhaps all, of the variety of terms in the present statutes. The terms and their definitions are derived from the Model Penal Code and have been used with slight variations in most of the recent criminal law revisions in other jurisdictions.

7.030 Culpable mental states, application

(1) If the definition of an offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state applies to each such material element.

(2) Except as provided in Section 7.040, if the definition of an offense does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly or recklessly, but criminal negligence is not sufficient.

(3) If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts purposely or knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts purposely.

(4) Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute defining an offense is not an element of an offense unless the statute clearly so provides.

Comment

This section sets out the rules to be followed in interpreting what mental states are required in a particular statute. At present, in addition to having a variety of terms to describe mental states, Missouri has many statutes which do not mention any culpable mental at all. For example, § 560.115 RSMo declares it to be a crime with a penalty of imprisonment of not less than two nor more than ten years to make, mend, design, or set up, or have in one's custody or concealed on one's person a variety of items popularly termed "burglar's tools". It took two decisions by the Missouri Supreme Court, Ex Parte Roberts, 166 Mo. 207, 65 S.W. 726 (1901) and State v. Hefflin, 338 Mo. 236, 89 S.W.2d 938 (1936) before it was made clear that the crime required "a criminal intent upon the part of the possessor of alleged burglar's tools to use them burglariously or for some criminal purpose" even though no such intent was mentioned in the statute. More recently, the Missouri Supreme Court has had to decide whether the

crime of tampering with a motor vehicle required a culpable mental state, there being none mentioned in the statute. With one judge dissenting, the court ruled the crime required criminal intent. State v. McLarty, 414 S.W.2d 315 (Mo.1967). See also State v. Drane, 416 S.W.2d 105 (Mo.1967) and State v. Tate, 436 S.W.2d 716 (Mo.1969). A similar problem existed with regard to the Missouri drug offenses. Neither § 195.020 (narcotic drugs) nor § 195.240 (barbiturate, stimulant, or hallucinogenic drugs) mentioned a culpable mental state as an element of the crime. In State v. Burns, 457 S.W.2d 721 (Mo. 1970) the court concluded that a mental element, at least with regard to possession was required.

These problems would not have arisen had the original statutes indicated whether or not a culpable mental state was required and, if so, what mental state was required. This section provides rules for determining what culpable mental state is required and when one is required. It does not prevent variation from the rules in a specific statute, but does require that the variation be expressly stated. See also Code § 7.040.

If the statute specifies a mental state but does not indicate the elements to which it refers, then the mental state applies to all the elements, Subsection (1). If the statute does not mention a mental state, then, subject to the exception of Code § 7.040, recklessness or a higher mental state is needed. It should be noted that for criminal negligence to be sufficient as a mental state, it must be expressly included in the statute. This is consistent with the idea that imposing criminal liability for negligence is the exception and most crimes, certainly the serious ones, require a higher mental state, Subsection (2).

Subsection (3) makes it clear that the culpable mental states are "graded", that is, each mental state is included in the higher mental states. This is useful in grading offenses (making it possible to convict for lesser included offenses) and also avoids the argument that something was not done recklessly because it was done knowingly or purposely.

Subsection (4) makes it clear that knowledge of the existence of a statute or its meaning is not an element of the offense (unless expressly provided) and therefor acting purposely, knowingly, recklessly or with criminal negligence as to the existence or the meaning of the law is not required for guilt. This proposition is often and inaccurately stated as "Ignorance of the law is no excuse." It is more accurate to say that knowledge of the law is not an element of the crime.

7.040 Culpable mental state, when not required

A culpable mental state is not required

(1) if the offense is an infraction and no culpable mental state is prescribed by the statute defining the offense, or

(2) if the statute defining the offense clearly indicates a purpose to dispense with the requirement of any culpable mental state as to a specific element of the offense.

Comment

This section provides for exceptions to the requirement of a culpable mental state. Subsection (1) allows for absolute liability for infractions, the regulatory offenses in which quite often the mental element is omitted as the purpose is regulation rather than punishment and the penalty very small. Of course, an infraction can specifically require a mental element. This section merely states the rule that if no mental state is specified in an infraction the legislative intent was that none was required.

Subsection (2) permits doing away with the requirement of a mental state as to an element of a "true crime". Such an exception must be clearly indicated. It is expected that there will be very few instances of such criminal liability without fault.

7.050 Ignorance and mistake

(1) A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact or law unless such mistake negatives the existence of the mental state required by the offense.

(2) A person is not relieved of criminal liability for conduct because he believes his conduct does not constitute an offense unless his belief is reasonable and

(a) the offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in

(i) a statute;

(ii) an opinion or order of an appellate court;

(iii) an official interpretation of the statute, regulation or order defining the offense made by a public official or agency legally authorized to interpret such statute, regulation or order.

(3) The burden of injecting the issue of reasonable belief that conduct does not constitute an offense under Subsections (2)(a) or 2(b) is on the defendant.

Comment

Based on the Illinois Code Ch. 38, § 4–8, the New York Penal Law § 15.20 and the Model Penal Code § 2.02.

Subsection (1) states the obvious conclusion that if a mistake negatives the culpable mental state which is required for an offense, the actor cannot be guilty of that offense. If the actor thinks he is shooting a deer but actually shoots and kills a man, he cannot be guilty of an offense requiring that he purposely or knowingly kill a human being. He may, however, be guilty of a lesser degree of criminal homicide for which he does have the necessary culpable mental state. That is, he could be guilty of a reckless or criminally negligent homicide. The mistake to be significant must negative culpability. If the actor thought the object was a woman when it was a man, that mistake would be irrelevant since the sex of the victim is not an element of criminal homicide.

There are not many offenses in which a mistake of "law" will remove culpability. One is theft where a mistaken belief as to ownership can negative the intent to steal. Code § 7.030 (4) makes it clear that knowledge of the existence or meaning of the offense charged is not an element of the offense (unless the statute so provides) so that the actor's belief that he is acting lawfully will normally be irrelevant.

There are a few narrow situations where a good faith belief of legality should be a defense. Subsection (2) codifies those that are commonly recognized. The burden of injecting this defense is placed on the defendant. This is not the case with subsection (1) which is, strictly speaking, not a defense but the converse of the proposition that the state must prove the required culpable mental state beyond a reasonable doubt. Under subsection (2) the state still has the burden of persuasion once the issue is in the case. See Code § 1.100.

7.060 Accountability for conduct

A person with the required culpable mental state is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible, or both.

Comment

This states the general proposition that liability can be based on the conduct of the defendant or on the conduct of another person.

7.070 Responsibility for the conduct of another

A person is criminally responsible for the conduct of another when

(1) the statute defining the offense makes him so responsible; or

(2) either before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense.

However, a person is not so responsible if:

(a) He is the victim of the offense committed or attempted.

(b) The offense is so defined that his conduct was necessarily incident to the commission or attempt to commit the offense. If his conduct constitutes a related but separate offense, he is criminally responsible for that offense but not for the conduct or offense committed or attempted by the other person.

(c) Before the commission of the offense he abandons his purpose and gives timely warning to law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense. The defense provided by Subsection (2)(c) is an affirmative defense.

Comment

This section deals with accessorial liability and attempts to state the rules by which the defendant can be held criminally liable for the conduct of another person. It is based on several other codes but differs in wording and organization from all of them.

Subsection (1) is the same as Illinois Code Ch. 38, § 5–2(b) and permits a statute to create greater liability for the conduct of another than would be true under the rest of this section. For example, Code § 10.020(1)(d) deals with liability for felony murder committed by another person during the commission of a felony.

Subsection (2) is similar to Illinois Code Ch. 38, § 5–2(c) but unlike that section is designed to cover two different bases

for liability for conduct of another. These two bases, causing an innocent or irresponsible person to commit the conduct and accessorial liability by aiding and abetting, are in separate sections in the other codes. For example, the proposed Texas Code provides:

> "A person is criminally responsible for an offense committed by the conduct of another if:
>
> "(1) acting with the kind of culpability required for the offense, he causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense; or
>
> "(2) acting with [purpose] to promote or assist the commission of the offense, he solicits, directs, aids, or attempts to aid the other person to commit the offense; . . .

Both these theories are here combined in a single section, which must be read in connection with Code § 7.080(1) which precludes certain matters, including the other person's lack of criminal capacity, unawareness of defendant's criminal purpose or immunity from prosecution, from being a defense to liability based on the conduct of another.

The section requires a "purpose to promote the commission of an offense". Some codes provide for liability for "knowingly providing substantial assistance" to one who commits an offense. This is usually a lesser degree of crime than the offense assisted. This Code does not contain such a provision. While such would be useful in some situations it was felt that it carried criminal liability too far.

Subsection (2)(a) excludes the victim as being an accessory even though the victim in certain crimes does provide assistance, as for example, the victim who pays the extortionist, or the girl who is under the age of consent and solicits the act of "statutory rape". Subsection (2)(b) extends the same protection to persons who do not fall neatly into the category of victims. For example, if a statute simply makes the giving of a bribe a crime should the recipient be guilty of a violation of that statute on the basis of aiding and abetting. If he should be, this should be covered in the statute on bribery. This subsection does not prevent his being criminally liable, it merely requires the statute defining the offense to so specify. The subsection does make it clear that it does not bar conviction for a related offense based on his own conduct, as, for example, if there were another statute making it a crime to receive a bribe.

Subsection (2)(c) provides an escape route for those who have provided assistance, etc. but the crime has not yet occurred. It is desirable to provide an inducement to disclose

crimes before they occur and to take steps to prevent the comission of crimes. Questions under subsections (2)(a) and (b) involve interpretations of statutes and would be decided by the court. The issues involved in subsection (2)(c) could, in an appropriate case, be submitted to the jury. A claim under (2)(c) is an affirmative defense which places the burden of persuasion on the defendant. A similar, but not identical, defense is found in the conspiracy sections where renunciation of criminal purpose can be a defense to conspiracy. See Code § 9.020(5) and comments. That defense is not an affirmative defense (though the defendant has the burden of injecting the issue). The reason for the difference is that a successful claim of renunciation und § 9.020(5) can be made only when the offense which is the object of the conspiracy has not occurred—it must be thwarted—while under § 7.070(2)(c) the offense will have been committed by someone else and the defendant will be trying to absolve himself of liability by establishing that he made proper efforts to prevent it.

7.080 Defense precluded

It is no defense to any prosecution for an offense in which the criminal responsibility of the defendant is based upon the conduct of another that

(1) such other person has been acquitted or has not been convicted or has been convicted of some other offense or degree of offense or lacked criminal capacity or was unaware of the defendant's criminal purpose or is immune from prosecution or is not amenable to justice; or

(2) the defendant does not belong to that class of persons who are legally capable of committing the offense in an individual capacity.

Comment

Similar statutes are found in most codes. This section is broader than the present Missouri statute, § 556.190 RSMo, which merely provides:

> "An accessory, before or after the fact, may be indicted, tried and punished notwithstanding the principal felon may not have been arrested, tried and convicted."

Subsection (2) is designed to cover the situation where the individual could not be guilty of the crime on the basis solely of his own conduct but can be an accessory. For example, a husband cannot by his own conduct be guilty of raping his wife. However, if he assists another in doing the act he can

be guilty as an accessory, State v. Drope, 462 S.W.2d 677 (Mo.1971). Subsection (2) must be read, however, in light of Code § 7.070(2)(a) and (b).

7.090 Conviction of different degrees of offenses

Except as otherwise provided, when two or more persons are criminally responsible for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating or mitigating fact or circumstance.

Comment

Based on New York Penal Law § 20.15. At common law there was a question whether an "aider and abettor" could be guilty of a higher (or lower) degree of the offense assisted. This section clearly permits the degree of punishment to be apportioned according to the culpability of each person.

7.100 Liability of corporations and unincorporated associations

(1) A corporation is guilty of an offense if

(a) the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(b) the conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of his employment and in behalf of the corporation, and the offense is a misdemeanor or an infraction, or the offense is one defined by a statute that clearly indicates a legislative intent to impose such criminal liability on a corporation; or

(c) the conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.

(2) An unincorporated association is guilty of an offense if

(a) the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the association by law; or

(b) the conduct constituting the offense is engaged in by an agent of the association while acting within the scope of his employment and in behalf of the association and the

offense is one defined by a statute that clearly indicates a legislative intent to impose such criminal liability on the association.

(3) As used in this section:

(a) **"Agent"** means any director, officer or employee of a corporation or unincorporated association or any other person who is authorized to act in behalf of the corporation or unincorporated association.

(b) **"High managerial agent"** means an officer of a corporation or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.

Comment

Based on New York Penal Law § 20.20; Michigan Revised Criminal Code § 430 (Final Draft 1967); Model Penal Code § 2.07; Illinois Revised Criminal Code Ch. 38, § 5–4; Proposed California Criminal Code § 430.

The subject of holding corporations criminally liable has not been considered very often by Missouri Appellate courts. In State ex rel. McKittrick v. American Insurance Co., 346 Mo. 269, 140 S.W.2d 36 (1940) there is language indicating that there can be criminal liability on the part of corporations; and in St. Louis v. Consolidated Products Co., 185 S.W. 2d 344 (St.L.App.1945), a corporation was held liable for violation of a city ordinance. See also State v. White, 96 Mo. App. 34, 69 S.W. 684 (1902) where the court stated that a corporation could be guilty of willfully and knowingly obstructing a public road.

This section attempts to set the standards for determining when a corporation may be held criminally liable. Subsection (1)(a) covers the obvious situation of corporate liability for the failure to perform a duty specifically imposed by statute on corporations. Subsection (1)(b) provides for corporate criminal liability for misdemeanors and infractions where such are committed by an agent acting within the scope of his employment and in behalf of the corporation; and for liability where a statute specifically provides for corporate liability. Subsection (1)(c) covers the situation where the crime is in effect directed by the management of the corporation. Again, the persons involved must be within the scope of their employment and acting in behalf of the corporation. Thus, a corporation cannot be guilty of a felony unless the statute so provides or unless the board of directors or a high managerial agent in effect directed the commission of the felony. See Code § 5.030 which provides for fines for corporations.

Subsection (2) deals with criminal liability for unincorporated associations. Their liability traditionally is far more limited simply because of the difficulty of defining the entity involved and the great variety of such organizations. This subsection basically does not provide for any criminal liability for unincorporated associations but merely allows for statutes to impose specific duties on such organizations and provide a penalty for failure to comply, subsection (2)(a); and in subsection (2)(b) allows for the possibility that the legislature may wish to specifically provide for criminal liability for unincorporated associations in the definition of a particular offense.

7.110 Liability of individual for conduct of corporation or unincorporated association

A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of a corporation or unincorporated association to the same extent as if such conduct were performed in his own name or behalf.

Comment

Based on New York Penal Law § 20.25; Michigan Revised Criminal Code § 435 (Final Draft 1967); Model Penal Code § 2.07(6); Illinois Revised Criminal Code Ch. 38, § 5–5. This section states what should be obvious; that an individual who engages in conduct constituting an offense cannot avoid liability because he does so while acting for a corporation or other organization. It is specifically included to avoid the type of problem that arose in People v. Strong, 363 Ill. 602, 2 N.E.2d 942 (1936).

7.120 Entrapment

(1) The commission of acts which would otherwise constitute an offense is not criminal if the actor engaged in the proscribed conduct because he was entrapped by a law enforcement officer or a person acting in cooperation with such an officer.

(2) An entrapment is perpetrated if a law enforcement officer or a person acting in cooperation with such an officer, for the purpose of obtaining evidence of the commission of an offense, solicits, encourages or otherwise induces another person to engage in conduct when he was not ready and willing to engage in such conduct.

(3) The relief afforded by Subsection (1) is not available as to any crime which involves causing physical injury to or placing

in danger of physical injury a person other than the person perpetrating the entrapment.

(4) The defendant shall have the burden of injecting the issue of entrapment.

Comment

Based on Model Penal Code § 2.10 Tent. Draft No. 9 (1959); New York Revised Penal Law § 40.05 [formerly numbered § 35.40]; Kentucky Penal Code 433C.3–010.

The doctrine of entrapment in Missouri goes back to State v. Ebel, 188 S.W. 1132 (Mo.App.1916) where the St. Louis Court of Appeals held that a defense based on police overreaching was available. See Comment, Entrapment: A Critical Discussion, 37 Mo.L.Rev. 633 (1972). By the late 1920's entrapment in Missouri had roughly assumed its present form. In State v. Murphy, 320 Mo. 219, 6 S.W.2d 877 (1928), the Missouri Supreme Court, relying on Ritter v. United States, 293 F.2d 187 (9th Cir. 1923), stated (at 227 and 880)

> "The distinctions seem to be well defined. If a person is induced by anyone to commit a crime for the purpose of securing a conviction, the conviction will not stand. But if the purpose to commit the crime is in the mind of the defendant at the time, or suggested by him, the defense of entrapment will not avail."

Missouri today follows a subjective test for entrapment, similar to that adopted by a majority of the United States Supreme Court in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed.2d 413 (1932) and in Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958), and most recently in United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). See State v. Decker, 321 Mo. 1163, 14 S.W.2d 617 (1928), State v. Hammond, 447 S.W.2d 253 (Mo.1968), and State v. Boxley, 497 S.W.2d 129 (Mo. 1973).

This section reflects the present Missouri law. An inducement establishes the defense of entrapment only if the defendant is not predisposed to commit the crime involved. The aim is to discourage the use of overzealous methods by law enforcement officers to trap the unwary innocent into the commission of an offense. However, the defense is not available as to crimes involving causing or threatening bodily injury to another person. An individual who can be persuaded to cause such injury presents a danger that cannot safely be disregarded.

7.130 Duress

(1) It is an affirmative defense that the defendant engaged in the conduct charged to constitute an offense because he was coerced to do so, by the use of, or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense of duress as defined in Subsection (1) is not available:

(a) As to the crime of murder.

(b) As to any offense when the defendant recklessly places himself in a situation in which it is probable that he will be subjected to the force or threatened force described in Subsection (1).

Comment

Based on Model Penal Code § 2.09; New York Revised Penal Law § 35.35; Michigan Revised Criminal Code § 635 (Final Draft 1967).

The section attempts to codify the common law defense of duress, which has also been called coercion or compulsion. Present Missouri law is based on State v. St. Clair, 262 S.W. 2d 25 (Mo.1953), Anno. 40 A.L.R.2d 903 (1953). There, the defendant claimed coercion as a defense to a charge of robbery. The trial court rejected the defense and the Missouri Supreme Court reversed. The court stated after discussing authorities from other jurisdictions:

> "From these cases and others cited below it is established by the great weight of authority that although coercion does not excuse taking the life of an innocent person, yet it does excuse all lesser crimes." 262 S.W.2d at 27.

The court then enumerated the elements of the defense:

> "But, to constitute a defense to a criminal charge, the coercion must be present, imminent and impending and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done. Threat of future injury is not enough. Nor can one who has a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily injury invoke the doctrine as an excuse."

The only other important Missouri decision on duress is State v. Green, 470 S.W.2d 565 (Mo.1971), noted 37 Mo.L.Rev. 550 (1972), where, over a vigorous dissent, the court ruled that the defense was not available on the facts of the case.

This section allows the defense where the individual is coerced by the use of force or the threatened imminent use of force which "a person of reasonable firmness in his situation would have been unable to resist." This standard allows such tangible factors as the individual's size, age, health, strength, etc. to be taken into consideration but not his temperament. It also takes account of the individual's "situation". The threat of force must be "imminent". This term is not defined, but it clearly indicates that the threat should not be remote in time. However, neither is it necessarily limited to the last possible second. The question is whether the indidual had a reasonable opportunity to avoid the coercive force without harm to himself or the other threatened person.

The use of the defense is limited in subsection (2) in that it does not apply to murder nor to an offense committed after the defendant recklessly places himself in the situation where it is probable he will be subjected to force. Thus, a person who voluntarily goes along with others to commit a robbery cannot defend against a charge of assault based on striking the victim by claiming a threat to kill him by a cohort. In such a situation the jury could properly find that he recklessly (or knowingly) placed himself in a situation where it was probable such force would be threatened.

It should be noted that duress is an affirmative defense and the defendant not only has the burden of raising the issue but also of establishing that it is more probably true than not.

7.140 Intoxicated or drugged condition

(1) A person who is in an intoxicated or drugged condition whether from alcohol, drugs or other substance, is criminally responsible for conduct unless such condition

(a) negatives the existence of the mental states of purpose or knowledge when such mental states are elements of the offense charged or of an included offense; or

(b) is involuntarily produced and deprives him of the capacity to know or appreciate the nature, quality or wrongfulness of his conduct or to conform his conduct to the requirements of law.

(2) The defendant shall have the burden of injecting the issue of intoxicated or drugged condition.

Comment

Based on Model Penal Code § 2.08; New York Revised Penal Law § 15.25; Michigan Revised Criminal Code § 715 (Final Draft 1967); Illinois Revised Criminal Code Ch. 38, § 6–3; Kansas Criminal Code § 21–209.

This section deals with both "voluntary" and "involuntary" intoxication. It first states the unanimously accepted doctrine that intoxication, no matter what the cause—whether it be alcohol, drugs or something else—does not in and of itself affect criminal liability; or, in other words, drunkenness is no excuse for crime.

Paragraphs (a) and (b) to subsection (1) set forth the two situations where intoxication can affect criminal liability: where the intoxication is of such a degree that it negatives an essential mental state required for guilt of the particular offense and where the intoxication is "involuntary" and is of such a degree as to render the individual irresponsible.

Subsection (1)(a) adopts the view of the vast majority of jurisdictions that where the crime requires that to be guilty the defendant must have had a specific mental state, evidence of his being intoxicated is admissible as bearing on whether he did in fact have that mental state. Missouri (along with possibly two other states) does not follow this approach, but instead excludes evidence of the defendant's intoxication on the issue of whether he had the required "specific intent." The Missouri law on this point is criticized by Hunvald, Criminal Law in Missouri—The Need for Revision, 28 Mo.L.Rev. 521, 527–532 who states at 530:

> "The phrase that drunkenness cannot be an excuse for crime makes excellent sense if it means that a person who is intoxicated is still subject to the same standards as a sober man. Most people who are intoxicated still retain the power to reason, and they still know what they are doing, even though their power to think may be somewhat impaired and their inhibitions somewhat overcome. They can reason and they have arrived at their state of intoxication by a choice. It would certainly not seem fair to say that a person whose judgment has been impaired by drink is entitled to special consideration while a person whose judgment is impaired because he is highly emotional (without the assistance of alcohol) and who had no choice in his emotional makeup is denied such consideration.
>
> "But this does not lead to the result that if a crime requires a certain mental state, a person can be convicted of that crime even though he does not have the required mental state. If one of the elements of a crime is that the defendant have as his purpose the achievement of a certain result, or that he have knowledge of certain facts, then he should have a 'defense' if he does not in fact have the necessary purpose or knowledge, no matter what the cause of his lack of purpose or knowledge may be whether from mental disease, ignorance, mistake or intoxication."

The code section brings Missouri law on this point into line with that of nearly every other state and reaches a more logical result. The change will not be of any great benefit to drunks as it will be very difficult to establish that a person was so intoxicated as to not know something when his actions indicate that he did know. Even if the defendant was so intoxicated as to not have the purpose or knowledge required by a particular crime, the result in most instances will not be an acquittal but simply a finding of guilt of a lesser degree of the crime—a degree which does not require the mental elements of purpose or knowledge. The section is limited to negativing the mental states of purpose and knowledge. It does not apply to any crime that can be committed with recklessness or criminal negligence.

Subsection (1)(b) states the commonly accepted view as to "involuntary" intoxication, that it is a complete defense provided the individual is rendered irresponsible as judged by the same standards applicable to lack of responsibility because of mental disease or defect. See Perkins, Criminal Law 894 (2nd ed. 1969) and LaFave & Scott, Criminal Law 341 (1972).

7.150 Infancy

(1) No person shall be convicted of any offense unless he had attained his fourteenth birthday at the time the offense was committed.

(2) The defendant shall have the burden of injecting the issue of infancy.

Comment

This section is included primarily for completeness. The age of fourteen is consistent with the present Missouri law on juveniles. See § 211.071 RSMo.

7.160 Lack of responsibility because of mental disease or defect

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.

(2) The procedures for the defense of lack of responsibility because of mental disease or defect are governed by the provisions of Chapter 552 RSMo.

Comment

The Code makes no change in the Missouri law on lack of responsibility because of mental disease or defect. That law was thoroughly revised and updated in 1963. This section uses the language from § 552.030(1) as the standard for criminal responsibility and then in subsection (2) provides the necessary cross reference to Chapter 552.

Chapter 8

DEFENSE OF JUSTIFICATION

8.010 Chapter definitions

(1) **"Deadly force"** means physical force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious physical injury.

(2) **"Dwelling"** means any building or inhabitable structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging.

(3) **"Premises"** includes any building, inhabitable structure and any real property.

(4) **"Private person"** means any person other than a law enforcement officer.

Comment

The definition of "deadly force" is derived from the Model Penal Code § 3.11(2) and Kentucky Penal Code § 433C.1–010(1). It does not include the threat to cause death or serious physical injury, provided the actor does not intend to carry out the threat.

The definition of "dwelling" is the same as Model Penal Code § 3.11(3) and is broad enough to include a tent, caravan or hotel room. The rationale or the rule giving special protection to the "dwelling-house" is that a man "is under no duty to take to the fields and the highways, a fugitive from his own home." Cardozo, J., in People v. Tomlins, 213 N.Y. 240, 107 N.E. 496 (1914). This suggests that all places should be included which can be said to be in any sense a person's home, even though temporarily.

The definition of "premises" is derived from New York Revised Penal Law § 140.00 and the proposed Michigan Criminal Code § 2601(a), (d).

"Private person" is defined to include all other persons than law enforcement officers.

8.020 Civil remedies unaffected

The fact that conduct is justified under this Chapter does not abolish or impair any remedy for such conduct which is available in any civil actions.

Comment

Based on Model Penal Code § 3.01(2) and Kansas Criminal Code § 21–3103 (1969). This section makes clear that the principles of justification for conduct in the criminal law do not control any applicable civil remedies.

8.030 Execution of public duty

(1) Unless inconsistent with the provisions of this Chapter defining the justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when such conduct is required or authorized by a statutory provision or by a judicial decree. Among the kinds of such provisions and decrees are:

(a) Laws defining duties and functions of public servants.

(b) Laws defining duties of private persons to assist public servants in the performance of their functions.

(c) Laws governing the execution of legal process.

(d) Laws governing the military services and the conduct of war.

(e) Judgments and orders of courts.

(2) The defense of justification afforded by Subsection (1) of this Section applies:

(a) When a person reasonably believes his conduct to be required or authorized by the judgment or directions of a competent court or tribunal or in the legal execution of legal process, notwithstanding lack of jurisdiction of the court or defect in the legal process.

(b) When a person reasonably believes his conduct to be required or authorized to assist a public servant in the performance of his duties, notwithstanding that the public servant exceeded his legal authority.

(3) The defendant shall have the burden of injecting the issue of justification under this Section.

Comment

Based on Model Penal Code § 3.03; Michigan Proposed Criminal Code § 601 (Final Draft 1969); New York Revised Penal Law § 35.05(1); Kentucky Penal Code 433C–1–040.

Subsection (1) restates a common-sense requirement that statutes be interpreted in relation to each other and that judicial decisions which create a duty or privilege to act may be followed without incurring criminal liability.

Subsection (2) extends the defense of justification to cases where the defendant acts in a reasonable belief that his conduct is required by a judgment or in the lawful execution of legal process or to assist a public officer in the performance of his duties. Pursuant to the general principles of criminal culpability, a reasonable error on these scores does not forfeit the defense.

8.040 Justification generally

(1) Unless inconsistent with other provisions of this Chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute any crime other than a Class A Felony is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the crime charged.

(2) The necessity and justifiability of conduct under Subsection (1) may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this Section is offered, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.

(3) The defense of justification under this Section is an affirmative defense.

Comment

Based on Model Penal Code § 3.02; New York Revised Penal Law § 35.05(2); Michigan Proposed Criminal Code § 605.

This section accepts the view that a principle of necessity properly conceived affords a general defense of justification for conduct that otherwise would constitute a crime; and that such a qualification is essential to the rationality and justice of all penal prohibitions.

Subsection (1) restricts the defense of justification under this section to crimes other than Class A Felonies. In addition, competing values which have been foreclosed by deliberate legislative choice are excluded from the general defense of

justification, as when the law has dealt explicitly with the specific situations that present a choice of evils.

The section is designed to cover unusual situations in which some compelling circumstances or "emergency" warrant deviation from the general rule that transgression of the criminal law will not be tolerated. It would "justify", for example, blasting buildings to prevent the spread of a major conflagration; breaking into an unoccupied rural house for the purpose of making a telephone call vital to a person's life; or forcibly restraining a person infected with a virulent contagious disease in order to prevent him from going out and starting an epidemic.

The phraseology of the section, tightened by the use of such terms as "emergency measure," is designed closely to limit its application and to preclude extension beyond the narrow scope intended. However, it must be remembered that what constitutes "emergency measure" and "imminent" does not depend solely on the interval of time before the injury sought to be prevented will occur. Additional circumstances of the particular fact situation must also be evaluated. Thus, if under the circumstances, the mere passage of time is such that a reasonable man would perceive no viable alternatives to his present course of conduct the fact that the injury sought to be prevented will not take place for some time hence, e. g. six hours, will not prevent the use of the defense of justification under this section, provided it is otherwise available.

Subsection (2) is intended to insure that the balancing cannot go to the desirability of the statute itself under which the prosecution is maintained. This renders the provision unavailable to the mercy killer, or the crusader who considers a penal statute unsalutory because it tends to obstruct his cause, or to anyone who bases his violation on the "immorality" of the statute he is charged with violating.

Subsection (3) provides that the defense of justification under this section is an affirmative defense. Thus the state need not prove the absence of this defense and the defendant has the burden of establishing that h[illegible] claim is more probably true than not.

8.050 Use of force in defense of persons

(1) A person may, subject to the provisions of Subsection (2), use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to

be the use or imminent use of unlawful force by such other person, unless:

(a) The actor was the initial aggressor; except that in such case his use of force is nevertheless justifiable provided

(i) he has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force, or

(ii) he is a law enforcement officer and as such is an aggressor pursuant to Section 8.080(1), or

(iii) the aggression is justified under some other provision of this Chapter or other provision of law.

(b) Under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would not be justified in using such protective force.

(2) A person may not use deadly force upon another person under the circumstances specified in Subsection (1) unless he reasonably believes that such deadly force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping.

(3) The justification afforded by this Section extends to the use of confinement as protective force provided that the actor takes all reasonable measures to terminate the confinement as soon as it is reasonable to do so.

(4) The defendant shall have the burden of injecting the issue of justification under this Section.

Comment

Based on Model Penal Code §§ 3.04, 3.05; New York Revised Penal Law § 35.15. This section combines the right of self-defense with the right to defend others as is done in the New York Code. The Model Penal Code has these in separate sections. It is felt that the combination is appropriate and avoids the frequent use of cross-references as in the Model Penal Code sections.

The section distinguishes the occasions in which a person is justified in using physical force from the occasions in which deadly force is justified. In the former, the actor must reasonably believe that another is about to employ unlawful force against him or against one whom he seeks to protect and that the use of physical force is necessary to prevent the use of such unlawful force. This is basically consistent with present Missouri law. See State v. Enyard, 108 S.W.2d 337

(Mo.1937), where the Missouri Supreme Court held that one has the right to use in self-defense such force as appears to him to be reasonably necessary under the attending circumstances.

However, if the defendant was the initial aggressor, he must, under this section and present Missouri law, in good faith withdraw from the encounter and effectively communicate such withdrawal before he is justified in using physical force to defend himself. See State v. Spencer, 307 S.W.2d 440 (Mo.1958). Presently, where the defendant is the aggressor and enters the encounter without "felonious intent" but is obliged during the encounter to kill to save his own life, he may, according to State v. Mayberry, 360 Mo. 35, 226 S.W. 2d 725 (1950), defend on the basis of "imperfect self-defense" which does not justify the homicide but reduces the grade of the offense. Under the Code the problem is handled in the sections which define the degrees of the offense.

If the defendant is a law enforcement officer and is an aggressor of necessity he is under no obligation to withdraw (or retreat). Code § 8.080(1) provides that a "law enforcement officer need not retreat or desist to effect the arrest, or from efforts to prevent escape from custody of a person he reasonably believes to have committed an offense . . ." If a law enforcement officer, in the performance of his duty, is required to take the role of the aggressor in defense of himself or other persons, the defense of justification under this section is available to him. Subsection (1)(a)(iii) provides for a similar result whenever the initial aggression is itself justifiable.

If the defendant goes to the defense of another, he is justified in using physical force to defend such person provided that under the circumstances as the actor reasonably believed them to be, the person whom he seeks to protect would be justified in using such force.

Subsection (2) limits the justifiable use of deadly force to situations where the actor reasonably believes such force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping. This limitation rests on the common law principle that the amount of force used must bear a reasonable relation to the magnitude of the harm sought to be avoided.

Under present Missouri law, one can justifiably use deadly force to protect oneself from death or serious physical injury. State v. Farrell, 320 Mo. 319, 6 S.W.2d 857 (1928). However, the use of deadly force in defense of others has been restricted to the defense of persons standing in certain relationships to the actor. In State v. Kennedy, 207 Mo. 528, 102 S.W. 57 (1907), the Missouri Supreme Court held that the

fact that a man and a woman live together in a relation of concubinage does not, of itself, justify the man in taking life in defense of the woman. This restriction is codified in § 559.040 RSMo. Under the Code, the defense of others is not limited. It is felt that the relationship of a person in need of assistance should not conclusively determine one's right to go to his aid.

Missouri, unlike the majority of jurisdictions, imposes no duty to retreat on the actor before he can resort to deadly force in self-defense. A person who is assailed in a place in which he is entitled to be is not bound to retreat before exercising his right to self-defense, State v. Barlett, 170 Mo. 658, 71 S.W. 148 (1902). Thus, the law of self defense has been held to imply a right of attack when it appears reasonably necessary for protection against an impending assault, State v. McGee, 361 Mo. 309, 234 S.W.2d 587 (1950); followed in State v. Hicks, 438 S.W.2d 215 (Mo.1969). The Code retains the "no retreat" rule. Of course, if a defendant stands his ground and uses force on another when he could have avoided injury or risk of injury by merely retreating, a jury would be entitled to take these circumstances into consideration when determining whether the defendant's belief in the necessity of using physical force was reasonable.

Subsection (3) makes clear that the use of confinement may be justified. Its use, of course, is subject to the other limitations of the section. Since confinement may be a continuing condition unless something is done to terminate it, the section requires that the actor take reasonable measures to terminate it as soon as it is reasonable to do so. Where the person confined has been arrested, the "reasonable" measures to terminate the confinement will be the use of normal legal processes.

8.060 Use of physical force in defense of premises

(1) A person in possession or control of premises or a person who is licensed or privileged to be thereon, may, subject to the provisions of Subsection (2), use physical force upon another person when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of the crime of trespass by the other person.

(2) A person may use deadly force under circumstances described in Subsection (1) only

(a) when such use of deadly force is authorized under other sections of this Chapter; or

(b) when he reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson or burglary upon his dwelling.

(3) The defendant shall have the burden of injecting the issue of justification under this Section.

Comment

Based on New York Revised Penal Law § 35.20; Michigan Proposed Criminal Code § 620 (Final Draft (1967)).

Under present Missouri law a person may lawfully use that amount of force which is necessary, under the circumstances for the protection of his property, but he will be guilty of an assault if he uses excessive force, or any force, after the necessity therefor has passed. See *e. g.*, State v. Shilling, 212 S.W.2d 96 (Mo.App.1948). With respect to the forcible ejectment of trespassers, the Kansas City Court of Appeals in State v. Webb, 163 Mo.App. 275, 146 S.W. 805 (1912), held that one in possession of land may eject intruders without being guilty of a breach of the peace provided he does not use unnecessary force.

This section provides that the use of force against a person to protect premises is justified in certain circumstances. It does not deal with the use of force against property, *i. e.* the privilege to damage another's property to protect one's own property, which is covered by Code § 8.040. It should also be noted that this section is not primarily concerned with the use of physical force by an occupant of real property to repel physical force or crime against the person by a trespasser or intruder. Such use of physical force is covered by Code § 8.050 on use of force in defense of persons, which applies whether or not there is a trespass to property. This section on use of force in defense of premises controls only the narrow category of cases where a person in possession or control of premises, or some other person lawfully present thereon, does not fear personal injury from an intruder but may fear some other type of criminal conduct, or may simply wish to prevent or terminate the trespass.

Subsection (1) dealing with prevention and termination of criminal trespass, is primarily applicable to cases of trespass not amounting to burglary and not involving arson. Absent those felonies, an owner or occupant of premises or a person privileged to be thereon—but no one else—is authorized to use any physical force other than deadly force, which he reasonably believes to be necessary to prevent or terminate the intrusion.

Subsection (2) sets forth that deadly force can be used only if such is authorized elsewhere in this chapter, or if such is

reasonably necessary to prevent what the person reasonably believes to be an attempt by the intruder to commit arson or burglary upon his dwelling. The rationale of the rule giving special protection to the dwelling is that a man should be under no obligation to submit his home or place of lodging to arson or burglary. These two crimes are specifically covered because they are the only serious felonies affecting or jeopardizing life which may not be afforded adequate protection against by Code § 8.050.

8.070 Use of physical force in defense of property

(1) A person may, subject to the limitations of Subsection (2), use physical force upon another person when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the commission or attempted commission by such person of stealing, property damage or tampering in any degree.

(2) A person may use deadly force under circumstances described in Subsection (1) only when such use of deadly force is authorized under other sections of this Chapter.

(3) The defendant shall have the burden of injecting the issue of justification under this Section.

Comment

Based on New York Revised Penal Law § 35.25; Michigan Proposed Criminal Code § 625 (Final Draft 1967).

Much of the comment on Code § 8.060 applies to this section also. The scope of this section is limited to the use of physical force by a person to prevent stealing, property damage or tampering. Under subsection (1) he may use such force (but not deadly force) as he reasonably believes necessary to prevent a person from stealing his bicycle, or from damaging his automobile with an axe. Subsection (2) reiterates the common law principle that the amount of force used must bear a reasonable relation to the magnitude of the harm sought to be avoided. Thus, deadly force cannot justifiably be used merely to protect property. Of course, if while protecting one's property the circumstances are such that deadly force is justified under some other provision, then one can use deadly force.

8.080 Law enforcement officer's use of force in making an arrest

(1) A law enforcement officer need not retreat or desist from efforts to effect the arrest, or from efforts to prevent the escape

from custody, of a person he reasonably believes to have committed an offense because of resistance or threatened resistance of the arrestee. In addition to the use of physical force authorized under other Sections of this Chapter, he is, subject to the provisions of Subsections (2) and (3), justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.

(2) The use of any physical force in making an arrest is not justified under this Section unless the arrest is lawful or the law enforcement officer reasonably believes the arrest is lawful.

(3) A law enforcement officer in effecting an arrest or in preventing an escape from custody is justified in using deadly force only

(a) when such is authorized under other sections of this Chapter; or

(b) when he reasonably believes that such use of deadly force is immediately necessary to effect the arrest and also reasonably believes that the person to be arrested

(i) has committed or attempted to commit a felony involving the use or threatened use of physical force against a person; or

(ii) is attempting to escape by use of a deadly weapon; or

(iii) may otherwise endanger life or inflict serious physical injury unless arrested without delay.

(4) The defendant shall have the burden of injecting the issue of justification under this Section.

Comment

Based on Model Penal Code § 3.07; New York Revised Penal Law § 35.30; Illinois Criminal Code, Ch. 38 § 7–5 (a)(5).

In State v. Ford, 344 Mo. 1219, 130 S.W.2d 635 (1939), the Missouri Supreme Court approvingly described a law enforcement officer as the "aggressor" in effecting an arrest of a person who flees or resists. The standard for the use of force: that which the officer "reasonably believes necessary" was enunciated in State v. Nolan, 354 Mo. 980, 192 S.W.2d 1016 (1946). The use of deadly force was seemingly justified in all arrest situations under the dictum in State v. Havens, 177 S.W.2d 625 (Mo.1944), where the Court stated that all force necessary to effect a law enforcement officer's purpose was justified. Nevertheless, in Manson v. Wabash Ry., 338

S.W.2d 54 (Mo.1960), the Court, without overruling State v. Ford, excluded deadly force for the apprehension of misdemeanants. The case may be distinguishable on the grounds that the deadly force was used by a privately employed watchman and the case was a civil action rather than criminal. However, dicta in other Missouri cases, *e. g.*, State v. Nolan, *supra.*, tends to support the conclusion that use of deadly force is restricted to the apprehension of felons. *Cf.* also § 559.040(3) RSMo.

The language, "need not retreat or desist from efforts", is particularly appropriate in light of Missouri case law, *e. g.*, State v. Ford, *supra.* The same language is employed in Illinois Criminal Code Ch. 38, § 7–5(a) and in the proposed South Carolina Penal Code § 12.4. It is imperative that a law enforcement officer not only stand his ground but be able to press forward to achieve his object, meeting force with force.

The standard for the use of force: "reasonably believes to be immediately necessary" is basically a codification of Missouri law. See State v. Nolan, *supra.* The addition of the word "immediately" makes it clear that the use of force is limited to situations where other less extreme methods of apprehension reasonably appear useless.

Subsection (1) empowers a law enforcement officer to use force to arrest and to prevent escape. Setting out the general statement of powers and then qualifying or further defining them avoids the misapplication of *ejusdem generis.*

Subsection (2) limits justification under this section to situations where the arrest is lawful or where the law enforcement officer reasonably believes the arrest is lawful. Mistakes of fact, such as that the person arrested is not the person named in a warrant or that the arrest occurs outside the geographical area in which a warrant runs, would not, under this provision, give rise to criminal liability for the use of force unless, of course, the officer's belief that the warrant was valid was unreasonable.

Subsection (3) changes the literal wording of present Missouri law by limiting the justifiable use of deadly force to fewer situations. The present statute, § 559.040(3) RSMo, seems to permit the use of deadly force when necessary to effect an arrest for *any* felony. The language of the statute goes back at least to 1845 (Ch. 47 § 4 RSMo 1845). It is clearly overbroad and does not provide much guidance to police officers as to when they may properly use deadly force. The common law distinction between felonies and misdemeanors is manifestly inadequate for modern law. Not all felonies involve danger to life and the commission of some misdemeanors may involve risk to human life. This section at-

tempts to state more precisely when an officer may use deadly force to effect an arrest. It should be noted that this section will apply primarily in situations where the other person is attempting to avoid arrest by fleeing. Where the other person is resisting arrest by fighting with the officer, the officer is privileged to use force to protect himself under Code § 8.050 and in determining how much force is necessary to protect the officer, the alternative of avoiding the use of force by desisting is not to be considered as the officer is under an obligation to press forward. If the officer's life is endangered, he may use deadly force as provided in Code § 8.050. This section, Code § 8.080, provides an additional justification for the use of force to effect the arrest. Subsection (3) sets out those situations where the use of deadly force is justified for the purpose of making an arrest. The situations are where the person being arrested has committed a felony involving danger to the person, wherein the person being arrested is using a deadly weapon, or where such person's remaining at large poses a threat to life.

One method of defining when deadly force may be used to effect an arrest is to list specific offenses and limit deadly force to arrest for those specified crimes. For example, see South Carolina Proposed Code. Such an approach was felt to be cumbersome and impractical. It may be difficult for the officer to determine the precise nature of the offense committed (or suspected) to ascertain if it falls within the enumerated list. The officer's judgment would often depend upon whether an element which distinguishes between different grades of a crime was present. The approach of the Code is to focus attention to those factors, primarily danger to life, which justify the use of deadly force; and to allow the officer's reasonable judgment as to the dangerousness of the situation to govern, rather than simply whether or not a specific offense has been committed.

The third provision is important as it permits the use of deadly force when there is a substantial risk that the person sought to be arrested will endanger human life or cause serious physical injury unless arrested without delay. This particular provision is based on Model Penal Code § 3.07(2)(b)(iv). Similar provisions can be found in the Illinois Code Ch. 38, § 7–5; and the Michigan Proposed Criminal Code § 630 (2)(b). This clause gives the necessary leeway to the judgment of law enforcement officers as to the type of person with whom they have to deal.

8.090 Private person's use of force in making an arrest

(1) A private person who has been directed by a person he reasonably believes to be a law enforcement officer to assist such

officer to effect an arrest or to prevent escape from custody may, subject to the limitations of Subsection (3), use physical force when and to the extent that he reasonably believes such to be necessary to carry out such officer's direction unless he knows or believes that the arrest or prospective arrest is not or was not authorized.

(2) A private person acting on his own account may, subject to the limitations of Subsection (3), use physical force to effect arrest or prevent escape only when and to the extent such is immediately necessary to effect the arrest, or to prevent escape from custody, of a person whom he reasonably believes to have committed an offense and who in fact has committed such offense.

(3) A private person in effecting an arrest or in preventing escape from custody is justified in using deadly force only

(a) when such is authorized under other Sections of this Chapter; or

(b) when he reasonably believes such to be authorized under the circumstances and he is directed or authorized by a law enforcement officer to use deadly force; or

(c) when he reasonably believes such use of deadly force is immediately necessary to effect the arrest of a person who at that time and in his presence

(i) committed or attempted to commit a Class A Felony, or

(ii) is attempting to escape by use of a deadly weapon.

(4) The defendant shall have the burden of injecting the issue of justification under this Section.

Comment

Based on Model Penal Code § 3.07; Illinois Criminal Code, Ch. 38, § 7–5; New York Revised Penal Law § 35.30.

In State v. Parker, 378 S.W.2d 274, 282 (Mo.1964), the Missouri Supreme Court stated:

> "The private citizen is limited in the power of arrest; but he does have the right, without warrant or other process, to arrest for certain crimes, such as the commission of a felony or the commission of petit larceny in the presence. But he should be sure of the crime and the person . . . All authorities seem to agree that a private person has the right (where not abrogated by statute) to arrest in order to prevent a breach of peace or an affray. We know of no statute which abrogates this right of the citizen in this state."

Authorities cited included Pandjiris v. Hartman, 196 Mo. 539, 94 S.W. 270 (1906) and Wehmeyer v. Melvihill, 150 Mo.App. 197, 130 S.W. 681 (1910).

This section deals with the private person acting on his own, or with other private persons, in making arrests, subsection (2); and when he is summoned or directed to assist a law enforcement officer, subsection (1). The section distinguishes the occasions when deadly force can be used.

Subsection (1) prescribes the amount of non-deadly physical force that a private person can use if summoned by a law enforcement officer. As with other sections of this Chapter, the section allows a person to act on appearances provided he does so reasonably. To be justified under subsection (1), the private person must, first, be summoned by one he reasonably believes to be a law enforcement officer; second, use only that amount of force which he reasonably believes necessary to carry out the orders of the officer; and lastly, believe the arrest lawful.

Subsection (2) prescribes the amount of non-deadly physical force a private person may use when acting on his own account, which impliedly includes acting in conjunction with other private persons. The applicability of Subsection (2) is contingent on the private person having a reasonable belief that the person to be arrested has committed an offense and that such person in fact has committed such offense. Again the defense is dependent on using physical force only as a final means of effecting an arrest.

The section makes a slight modification in Missouri law. The section authorizes the use of physical force even when the offense was committed out of the presence of the private person. However, the in presence requirement announced in State v. Parker, *supra* has not been strictly adhered to by Missouri courts. For example, in State v. Keeney, 431 S.W.2d 95 (Mo.1968), the Missouri Supreme Court held that where a private person had been advised by the victim of a crime as to the description of the robber's automobile and 16 minutes later such person observed the automobile fitting the description in another state, he had the authority to arrest the occupants of the automobile and search the same. The safeguards that a private person must reasonably believe the person sought to be arrested committed the offense and that such person did in fact commit the offense removes the need for the "in presence" requirement as to the use of non-deadly physical force.

Under subsection (3) the use of deadly force by a private person effecting an arrest is authorized only if it is allowed under another section of this Chapter, as for example in self-defense under Code § 8.050; or when he is directed by a law

enforcement officer to use deadly force and he reasonably believes such to be authorized; or when it is necessary in the arrest of a person who has committed a Class A Felony or who is attempting to escape by using a deadly weapon.

Subsection (3)(b) authorizes the use of deadly force when the private person is directed to use deadly force by the officer he has been summoned to assist. The private person must, however, reasonably believe the use of deadly force to be authorized under the circumstances. Mistakes will not vitiate the applicability of the justification unless such mistakes were unreasonable.

Subsection (3)(c) is similar to the corresponding paragraph in the preceding section, § 8.080(3)(b). However, there are two significant differences. First, as to the private person, the situations giving rise to the use of deadly force must occur "at that time and in his presence." Thus, the private person must personally detect the crime and immediately thereafter attempt to effect the arrest. Secondly, the situations in which the private person is justified in using deadly force are more limited than those in which a law enforcement officer may use deadly force. For the private person, it must involve a Class A Felony or attempted escape by use of a deadly weapon.

8.100 Use of force to prevent escape from confinement

(1) Except as provided in Section 216.445 RSMo, a guard or other law enforcement officer may, subject to the provisions of Subsection (2), use physical force when he reasonably believes such to be immediately necessary to prevent escape from confinement or in transit thereto or therefrom.

(2) A guard or other law enforcement officer may use deadly force under circumstances described in Subsection (1) only

(a) when such use of deadly force is authorized under other sections of this Chapter; or

(b) when he reasonably believes there is a substantial risk that the escapee will endanger human life or cause serious physical injury unless the escape is prevented.

(3) The defendant shall have the burden of injecting the issue of justification under this Section.

Comment

Based on Model Penal Code § 3.07(3). The use of force to prevent escape from custody is covered by Code § 8.080. This section deals exclusively with the use of force to prevent escape from confinement. Specifically exempted from limitation by this section is § 216.445 RSMo which deals with prohibitions

on striking prisoners and also allows for the use of force in maintaining discipline, etc. The authorization under § 216.-445 for the use of physical force, including deadly force, are in no way qualified or restricted by this section.

Subsection (1) permits the use of physical force, short of deadly force, when immediately necessary to prevent escape from confinement. Subsection (2) states the circumstances under which deadly force can be used. While there is a public interest in the prevention of escape this alone is not sufficient to justify the use of deadly force. Thus, a guard is justified in using deadly force only when such is authorized elsewhere in this chapter (as, for example, in self-defense) or when the guard reasonably believes there is a substantial risk that the escapee will endanger human life or cause serious physical injury unless his escape is prevented by the use of deadly force. Of course, if deadly force is authorized under § 216.445 RSMo, applicable to state penal institutions, that section governs.

8.110 Use of force by persons with responsibility for care, discipline or safety of others

(1) The use of physical force by an actor upon another person is justifiable when the actor is a parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person or when the actor is a teacher or other person entrusted with the care and supervision of a minor for a special purpose, and

(a) the actor reasonably believes that the force use is necessary to promote the welfare of a minor or incompetent person, or, if the actor's responsibility for the minor is for special purposes, to further that special purpose or to maintain reasonable discipline in a school, class or other group; and

(b) the force used is not designed to cause or believed to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain or extreme emotional distress.

(2) A warden or other authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use whatever physical force including deadly force, that is authorized by law.

(3) The use of physical force by an actor upon another person is justifiable when the actor is a person responsible for the operation of or the maintenance of order in a vehicle or other carrier of passengers and the actor reasonably believes that such

force is necessary to prevent interference with its operation or to maintain order in the vehicle or other carrier, except that deadly force may be used only when the actor reasonably believes it necessary to prevent death or serious physical injury.

(4) The use of physical force by an actor upon another person is justified when the actor is a physician or a person assisting at his direction, and

(a) the force is used for the purpose of administering a medically acceptable form of treatment which the actor reasonably believes to be adapted to promoting the physical or mental health of the patient; and

(b) the treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of the parent, guardian, or other person legally competent to consent on his behalf, or the treatment is administered in an emergency when the actor reasonably believes that no one competent to consent can be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

(5) The use of physical force by an actor upon another person is justifiable when the actor acts under the reasonable belief that

(a) such other person is about to commit suicide or to inflict serious physical injury upon himself; and

(b) the force use is necessary to thwart such result.

(6) The defendant shall have the burden of injecting the issue of justification under this Section.

Comment

Based on Model Penal Code § 3.08; Kentucky Penal Code 433C–1–110; Proposed Michigan Criminal Code § 610 (Final Draft 1967).

Subsection (1) deals with the parent or guardian of a minor or a person similarly responsible for his general care or supervision. So long as the person exercising parental authority acts for the purpose of safeguarding or promoting the child's welfare, including care or supervision for a special purpose, he is justified provided he acts reasonably and does not create a substantial risk of the excessive injuries specified in paragraph (b).

Existing law, § 559.050 RSMo, allows a privilege for the exercise of domestic authority without defining its scope. In State v. Black, 360 Mo. 261, 227 S.W.2d 1006 (1950), the court held that a parent has the right to administer proper and reasonable chastisement of a child without being guilty of assault

and battery or mistreatment of children as codified in § 559.340 RSMo. The section is consistent with this holding; it requires a true parental purpose, while not justifying extreme force however well intentioned.

In addition the section varies the standard in the case of teachers or other persons entrusted with the care or supervision of a minor for a special purpose. Here the additional criterion is the defendant's reasonable belief that physical force is necessary to further the special purpose of his trust; including but not limited to the maintenance of reasonable discipline in a school, class or group. The variation is designed to make clear the distinction between the position of a person charged with the general care of a minor and that of one performing a more limited protective function.

Subsection (2) makes no specific exclusion for § 216.445 RSMo, as is done in Code § 8.100, because the language "is authorized by law" includes any statutory authorization of the use of physical force or deadly force. The means of maintaining discipline in correctional institutions is more appropriately handled by statutes providing the guidelines for the rules and regulations which are to govern therein rather than in a general section on justification.

There is undoubtedly a need to recognize a special authority in those responsible for a vessel or aircraft to employ that force which reasonably appears necessary to prevent the interference with its operation. Subsection (3) is intended to cover this. The justification expressed in this subsection must extend in extreme cases even to the use of deadly force, as where the actor reasonably believes such force necessary to prevent death or serious physical injury.

Subsection (4) articulates existing law that doctors administering a recognized form of treatment are justified in using physical force provided such is used for the promotion of the physical or mental health of the patient *and* the patient consents. *Cf.* Code § 10.080. Paragraph (b) grants authority for surgical operations and other treatment in emergencies. Even in an emergency the privilege under this section is conditioned on the reasonableness of the doctor's belief that a person wishing to safeguard the welfare of the patient would consent.

Subsection (5), which has no counterpart in Missouri law, is designed to support the general policy of the law to discourage or prevent suicides.

It should be remembered that the justifications in this chapter apply to criminal liability. They do not, of themselves, affect civil liability. See Code § 8.020.

Chapter 9

INCHOATE OFFENSES

9.010 Attempt

(1) A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense.

(2) It is no defense to a prosecution under this Section that the offense attempted was, under the actual attendant circumstances, factually or legally impossible of commission, if such offense could have been committed had the attendant circumstances been as the actor believed them to be.

(3) **Penalty.** Unless otherwise provided, an attempt to commit an offense is a:

(a) Class B Felony if the offense attempted is a Class A Felony.

(b) Class C Felony if the offense attempted is a Class B Felony.

(c) Class D Felony if the offense attempted is a Class C Felony.

(d) Class A Misdemeanor if the offense attempted is a Class D Felony.

(e) Class C Misdemeanor if the offense attempted is a misdemeanor of any degree.

Comment

This section defines the elements of attempt and makes some change in the existing law. Attempt is presently covered by §§ 556.150 and 556.160 RSMo.

Subsection (1) does away with failure as an element of attempt offenses. Present law permits a defendant charged with attempt to argue that he is innocent because he actually went through with the crime. By eliminating failure as an element of attempt, the section avoids the problem of losing a conviction on a charge of attempt when the evidence shows that the offense was completed. Since failure is not an element, atiempt clearly is a lesser included offense. See Code § 1.090(1)(c). There will be situations where, as now, attempt convictions will not be possible because the attempt can require a higher culpable mental state than does the completed offense.

Subsection (1) limits attempt offenses to purposive conduct. However, while so doing, it expands the area of conduct that can constitute an attempt. The present attempt statute is couched in terms of preparation and perpetration. The dividing line is between mere preparation and conduct which is sufficient to constitute an attempt. Though these terms are not precise and cannot be defined with any greater degree of clarity, they have usually been interpreted to require the defendant to come very close to the actual commission of the offense before he can be guilty of an attempt. State v. Davis, 319 Mo. 1222, 6 S.W.2d 609 (1927); State v. Thomas, 438 S.W. 2d 441 (Mo.1969). Subsection (1) expands the area of conduct sufficient for attempt by requiring an act "which is a substantial step towards the commission of the offense."

The principal difficulty here lies in explaining what is meant by a "substantial step." The Final Report of the National Commission on Reform of Federal Criminal Laws states:

> "A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step towards the commission of the crime. *A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime . . .*" (emphasis added).

This language, "strongly corroborative of the firmness of the actor's intent . . ." is the gist of the "substantial step." The conduct must be indicative of the actor's purpose to complete the offense.

What act will constitute a substantial step will depend on the facts of the particular case. If the other requirements of attempt liability are met, the following, if strongly indicative of the actor's criminal purpose, should not be held insufficient as a matter of law:

> (a) lying in wait, searching for or following the contemplated victim of the offense.
>
> (b) enticing or seeking to entice the contemplated victim of the offense to go to the place contemplated for its commission.
>
> (c) reconnoitering the place contemplated for the commission of the offense.
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the offense will be committed.
>
> (e) possession of materials to be employed in the commission of the offense, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances.
>
> (f) possession, collection or fabrication of materials to be employed in the commission of the offense, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances.
>
> (g) soliciting an agent, whether innocent or not, to engage in conduct constituting an element of the offense or an attempt to commit such offense or which would establish the agent's complicity in its commission or attempted commission.

Similar provisions are in the Model Penal Code and the Proposed New Jersey Penal Code. These criteria are a matter of degree, but the basis for the indicative nature of the "substantial step" shifts the emphasis from what has yet to be done to what has already been done. The fact that further major steps must be taken by the actor to complete the offense attempted does not render an act insubstantial. However, the "substantial step" is merely part of the evidence required to go to the jury on the question of purposive conduct. The substantial step is not required in itself to be enough evidence to go to the jury on the issue of purposive conduct. If, for example, there is a confession, so that there is clear evidence of purpose, the substantial step would be merely an additional indication of the actor's purpose. The examples listed as (a) through (g) above should not be held insufficient as a matter of law on the issue of a substantial step *if the other requirements of attempt liability are met.*

The emphasis of subsection (1) is that an act need not be the "last proximate act" for a finding of attempt. Under the "last proximate act" doctrine, when an actor has done all he believes necessary to cause a particular result, it is sufficient to constitute an attempt. This is, of course, true under subsection (1) but under the subsection it is not necessary for a finding of attempt for the actor to have performed the last proximate act, if the act performed is strongly indicative of a criminal purpose to accomplish the criminal result. The policy reason underlying the shift in emphasis from what has yet to be done to what has been done, as stated in the Model Penal Code, is that the law is not interested merely in punishing dangerous acts, but also in neutralizing dangerous individuals. Thus subsection (1) represents a shift in the emphasis of Missouri law to the extent that conduct may suffice for an attempt though not coming as close to the actual commission of the offense as present Missouri law often requires.

Note that item (g) in the list of situations which are not to be held insufficient as a matter of law to constitute a substantial step is designed to cover all cases of criminal solicitation. A similar provision is in the proposed New Jersey Code. Solicitation is not included in the Code as a separate offense. It was only a misdemeanor at common law and is possibly the only common law crime still in effect in Missouri though not covered by statute. It is, however, a very minor offense at present. Under this section, instead of being a separate offense, if the other requirements of attempt liability are met, acts of solicitation can constitute a "substantial step".

Subsection (2) is based on the New York Penal Law § 110.-10. It rejects the so-called "legal impossibility" defense to attempt liability. The nature of that defense and arguments for its rejection are well stated in the commentary to the Model Penal Code, Tent. Draft No. 10 (1960) at 30–31:

> "[In several jurisdictions] attempt convictions have been set aside on the ground that it was legally impossible for the actor to have committed the crime contemplated. These decisions held: (1) that a person accepting goods which he believed to have been stolen, but which were not then 'stolen' goods, was not guilty of an attempt to receive stolen goods; (2) that an actor who offered a bribe to a person believed to be a juror, but who was not a juror, could not be said to have attempted to bribe a juror [State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939)]; (3) that an official who contracted a debt which was unauthorized and a nullity, but which he believed to be valid, could not be convicted of an attempt to illegally contract a valid debt; (4) that a hunter who shot a stuffed deer believing it to be alive had not attempted to take a deer out of season [State v. Guffey, 262 S.W.2d 152 (Mo.App.1953)]. The basic rationale of these decisions is that, judging the actor's conduct in light of the actual facts, what he intended to do did not amount to a crime. This approach, however, is unsound in that it seeks to evaluate a mental frame of reference, but to a situation wholly at variance with the actor's beliefs. In so doing, the courts exonerate defendants in situations where attempt liability most certainly should be imposed. In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone as far as he could in implementing that purpose, and (3) as a result, the actor's dangerousness is plainly manifested."

It should be noted that Missouri is one of the jurisdictions in which attempt convictions have been set aside on the ground of impossibility. Aside from the compelling policy arguments advanced by the Model Penal Code, Missouri courts have also

held the other way as to the impossibility defense. One can be guilty of an attempt to steal even if there is nothing to be stolen, State v. Scarlett, 291 S.W.2d 138 (Mo.1956); one can attempt murder even though the intended victim is not where the defendant thought him to be, State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902). It has been said that a crime need be only apparently possible and that impossibility is no bar so long as it is not obvious, State v. Block, 333 Mo. 127, 131, 63 S.W.2d 428, 430 (1933). The elimination of the impossibility defense is approved here because greater dangerousness is demonstrated by the actor's conduct than there is likelihood of his abandonment of his criminal purpose.

In eliminating impossibility as a defense, the Code follows the lead of all of the new code revisions and proposed code revisions. It is still necessary that the result desired or intended be an offense. The actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal, unless it actually is criminal.

Subsection (3) grades attempts at one level below that for the offenses attempted. The "unless otherwise provided" phrase allows for attempts defined in specific statutes to be punished at the same level as the completed offense. See *e. g.* Code § 10.060, Assault in the First Degree, where attempted murder under certain circumstances can be punished at the same level as murder. For the most part present Missouri law and the new codes punish attempts with a lesser penalty than the completed offense. This reflects the fact that the act of attempt, although potentially as dangerous as an action culminating in the completed offense, generally results in less harm.

9.020 Conspiracy

(1) A person is guilty of conspiracy with another person or persons to commit an offense if, with the purpose of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such offense.

(2) **Scope of conspiratorial relationship.** If a person guilty of conspiracy knows that a person with whom he conspires to commit an offense has conspired with another person or persons to commit the same offense, he is guilty of conspiring with such other person or persons to commit such offense, whether or not he knows their identity.

(3) **Conspiracy with multiple criminal objectives.** If a person conspires to commit a number of offenses, he is guilty of

only one conspiracy so long as such multiple offenses are the object of the same agreement.

(4) **Overt act.** Except in the cases of Class A Felonies or offenses against the person, no person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

(5) **Renunciation of criminal purpose.**

(a) No one shall be convicted of conspiracy if, after conspiring to commit the offense, he prevented the accomplishment of the objectives of the conspiracy under circumstances manifesting a renunciation of his criminal purpose.

(b) The defendant shall have the burden of injecting the issue of renunciation of criminal purpose under Subsection (5)(a).

(6) **Duration of Conspiracy.** For the purpose of time limitations on prosecutions:

(a) Conspiracy is a continuing course of conduct which terminates when the offense or offenses which are its object are committed or the agreement that they be committed is abandoned by the defendant and by those with whom he conspired.

(b) If an individual abandons the agreement, the conspiracy is terminated as to him only if he advises those with whom he has conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and of his participation in it.

(7) **Multiple convictions.** A person may not be convicted and sentenced on the basis of the same course of conduct of both the actual commission of an offense and a conspiracy to commit that offense.

(8) **Penalty.** Unless otherwise provided, a conspiracy to commit an offense is a

(a) Class B Felony if the object of the conspiracy is a Class A Felony.

(b) Class C Felony if the object of the conspiracy is a Class B Felony.

(c) Class D Felony if the object of the conspiracy is a Class C Felony.

(d) Class A Misdemeanor if the object of the conspiracy is a Class D Felony.

(e) Class C Misdemeanor if the object of the conspiracy is a misdemeanor of any degree or an infraction.

Comment

This section constitutes a major reformation of the offense of conspiracy in Missouri presently covered by §§ 556.120, 556.130 and 546.320 RSMo. It relies heavily on § 5.03 of the Model Penal Code as do the proposed Alaska, New Jersey and South Carolina Codes.

The most apparent change is that under the Code only an agreement to commit a specific offense is sufficient for conspiracy. Such a change has been adopted in Illinois and New York and is contained in a number of proposed codes. The old approach is usually defended on the ground of the increased danger of group over individual activity requires an open-ended conspiracy crime. However, it is clear that such open ended provisions are either unnecessary because civil remedies would be adequate or so vague as to fail to provide a sufficiently definite standard needed in a penal code. In Missouri, for example, it is a misdemeanor to conspire "to commit any act injurious to the public health or public morals, or for the perversion or obstruction of justice, or the due administration of the laws . . . " § 556.120 RSMo.

The section also follows the approach of the Model Penal Code and other revisions and proposals by departing from the traditional view that conspiracy is an entirely bilateral or multilateral problem, and instead focuses on each individual's culpability. The conduct of the individual becomes determinative rather than the conduct of a group. Under this formulation, one conspirator cannot escape liability because the only other one was irresponsible or has immunity from prosecution or secretly does not intend to go through with the plan, or has been found innocent of conspiracy.

Another problem in the past has been defining the crime of conspiracy. Mr. Justice Jackson said that "the modern crime of conspiracy is so vague that it almost defies definition." Krulewich v. United States, 336 U.S. 440, 445–446, 69 S.Ct. 716, 93 L.Ed. 790 (1939). Thus, traditional formulations of conspiracy say nothing of the required state of mind except what may be inferred from the concept of agreement. Courts have been forced to struggle with the problem, and with no standards to guide them, some decisions have blurred the culpability requirement. The problem is aggravated because some courts confuse the type of evidence from which the elements of conspiracy may be inferred and the elements themselves.

For example, a person may supply ingredients to producers of illicit whiskey. If there is evidence that the supplier knew

of the illegal use to which his supplies were being put, such evidence may be used to infer an agreement. Such knowledge, however, should not be equated with a purpose or desire to have the offense committed.

Under the Code, the state would have to prove in every case that the actor acted "with the purpose of promoting or facilitating" the commission of the offense. There must be a firm purpose to commit a specific offense. This purpose must be something more than a passive role in knowing about the offense and the conspiracy. There must be an interest in promoting or facilitating its commission. Not only is this essentially what conspiracy is aimed at, it also corresponds to decisions of the United States Supreme Court. In the Communist cases, the court held that mere membership is not sufficient to constitute conspiracy. Dennis v. United States, 341 U.S. 494, 499–500, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). Of course, membership may be *some evidence* of purpose to accomplish the commission of an offense—it can be interpreted as an agreement to the objectives of the organization—but it is not independently sufficient to establish liability. It should be clear that conspiracy may not be predicated merely on joining or adhering to a criminal organization.

Perhaps the most litigated aspect of conspiracy involves the scope of the offense both as to participants and objectives. The scope of conspiracy is vital for several reasons. It may determine what evidence is admissible, which persons are guilty of what substantive offenses, which persons may be tried jointly, how many separate sentences may be handed out for separate conspiracies, etc. Subsections (1), (2) and (3) deal with the scope problem. By requiring a firm purpose to promote or facilitate the commission of a specific offense, the scope of the conspiratorial agreement and the scope of the individual conspirator's liability are limited to those offenses which it (the conspiracy) and he (the conspirator) actually intended to commit or facilitate.

Central to this approach is the focus on the individual's culpability and his purpose to promote or facilitate a specific offense or offenses. Perhaps this is best explained in the context in which it can arise. United States v. Bruno, 105 F.2d 921 (2nd Cir. 1939) is an example and the Model Penal Code comments analyze the case very well: (Tent. Draft No. 10, 120 et seq. (1960).

> "In that case, 88 defendants were indicted for a conspiracy to import, sell and possess narcotics. The proof showed a vast operation extending over a long period of time, which included smugglers who brought narcotics into New York City, middlemen who paid the smugglers and distributed to retailers, and two groups of retailers

> selling to addicts—one in New York and the other in Texas and Louisiana. There was no evidence of cooperation or communication between the smugglers and either group of retailers or between the two widely separated groups of retailers. The relationship between the smugglers, the middlemen and each group of retailers consequently was a typical chain, with communication as well as narcotics passing from smuggler to middleman to retailer. The two groups of retailers, on the other hand, may be considered separate spokes of a wheel whose hub was the middlemen, since they communicated and cooperated only with the middlemen and not with each other.
>
> "The appellants argued that the evidence may have established several separate conspiracies but not the single one alleged. The court held that the jury could have found a single large conspiracy 'whose object was to smuggle narcotics into the Port of New York and distribute them to addicts both in [New York] and in Texas and Louisiana.' This required, the court reasoned, the cooperation of all the various groups—smugglers, middlemen and the two groups of retailers.
>
> "'[T]he smugglers knew that the middlemen must sell to retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was immediately concerned, was dependent upon the success of the whole.'
>
> "The only possible basis mentioned in the opinion for a finding of separate conspiracies was the fact that there was apparently 'no privity' between the two separate groups of retailers. To the argument that there were consequently two conspiracies—one including the smugglers, the middlemen and the New York retailers, and the other the smugglers, the middlemen and the Texas and Louisiana retailers—the court replied:
>
> "'Clearly, quoad the smugglers, there was but one conspiracy, for it was of no moment to them whether the middlemen sold to one or more groups of retailers, provided they had a market somewhere. So too of any retailer; he knew that he was a necessary link in a scheme of distribution, and the others,

whom he knew to be convenient to its execution, were as much parts of a single undertaking or enterprise as two salesmen in the same shop.' "

The Draft would require a different approach to a case such as *Bruno* and might produce different results.

"Since the overall operation involved separate crimes of importing by the smugglers and possession and sale by each group—smugglers, distributors and retailers—the question as to each defendant would be whether and with whom he conspired to commit *each* of these crimes, under the criteria set forth in Subsections (1) and (2). The conspiratorial objective for the purpose of this inquiry could not be characterized in the manner of the *Bruno* court, as 'to smuggle narcotics into the Port of New York and distribute them to addicts both in [New York] and in Texas and Louisiana.' This is indeed the overall objective of the entire operation. It may also be true of *some* of the participants that they conspired to commit all of the crimes involved in the operation; under Subsection (3) of the Draft as under prevailing law they would be guilty of only one conspiracy if all these crimes were the object of the same agreement or continuing conspiratorial relationship, and the objective of *that* conspiracy or relationship could fairly be phrased in terms of the overall operation. But this multiplicity of criminal objectives affords a poor referent for testing the culpability of each individual who is in any manner involved in the operation.

"With the conspiratorial objectives characterized as the particular offenses and the culpability of each participant tested separately, it would be possible to find in a case such as *Bruno*—considering for the moment only each separate chain of distribution—that the smugglers conspired to commit the illegal sales of the retailers but that the retailers did not conspire to commit the importing of the smugglers. Factual situations warranting such a finding may easily be conceived; the smugglers might depend upon and seek to foster their retail markets while the retailers might have many suppliers and be indifferent to the success of any single source. The court's approach in *Bruno* does not admit of such a finding, for in treating the conspiratorial objective and the entire series of offenses involved in smuggling, distributing and retailing it requires either a finding of no conspiracy or a single conspiracy in which all three links in the chain conspired to commit all of each other's offenses.

"It would also be possible to find, with the inquiry focused upon each individual's culpability as to each crim-

inal objective, that some of the parties in a chain conspired to commit the entire series of offenses while others conspired only to commit some of these offenses. Thus the smugglers and the middlemen in *Bruno* may have conspired to commit, promote or facilitate the importing and possession and sales of all the parties down to the final retail sale; the retailers might have conspired with them as to their own possession and sales but might be indifferent to all the steps prior to their receipt of the narcotics. In this situation, a smuggler or a middleman might have conspired with all three groups to commit the entire series of offenses, while a retailer might have conspired with the same parties but to commit few criminal objectives. Such results are conceptually difficult to reach under existing doctrine not only because of the frequent failure to focus separately upon the different criminal objectives, but because of the traditional view of the agreement as a bilateral relationship between each of the parties, congruent in scope both as to its party and its objective dimensions." (footnotes omitted).

Conspiracy being a preparatory offense, the particular result of an agreement must be intended.

Subsection (3) states the normal rules where there is more than one criminal objective. If there is only one agreement there is only one conspiracy. If various offenses are the product of a continuous relationship they should be considered part of one conspiracy. Otherwise multiplication of sentences might become almost fortuitous and, considering the extremely inchoate nature of conspiracy, oppressive and unjust.

Subsection (4) requires an overt act in pursuance of the conspiracy, committed by one of the co-conspirators, before liability attaches. It is well settled that such an act need not be a substantial step in the commission of the target offense. The overt act serves as some indication, beyond the bare agreement, that the actors are serious in their plans. An overt act is not required "in the cases of Class A Felonies or offenses against the person . . . ." This is basically consistent with present Missouri law, § 556.130 RSMo, which does not require an overt act if the target offense is a felony upon the person, arson or burglary.

Subsection (5) varies from prevailing law by providing a bar to conviction for conspiracy based on the actor's renunciation of criminal purpose and prevention of the aims of the conspiracy. This should be distinguished from abandonment or withdrawal from the conspiracy which may serve (a) as a means of commencing the running of the statute of limitations with respect to the actor, or (b) as a means of limiting the admissibility against the actor of subsequent acts and declara-

tions of the other conspirators, or (c) as a defense to substantive offenses subsequently committed by the other conspirators. Such abandonment or withdrawal does not affect the liability for the conspiracy crime already committed by the agreement. Decisions in other jurisdictions frequently fail to distinguish renunciation from all of these and have created uncertainty by applying the same terminology and the same tests interchangeably. The time limitation problem is dealt with in subsection (6) (See also Code § 1.070). The admissibility of evidence problem is not dealt with under conspiracy, but under the laws and rules governing the admissibility of evidence. Liability for subsequently committed offenses is dealt with under Code § 7.070. Under § 7.070,

> "A person is criminally responsible for the conduct of another when . . . (2) either before or during the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense. However, a person is not so responsible if . . . (c) *before the commission of the offense he abandons his purpose and gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.*" (Emphasis added).

Thus, liability for a substantive offense as an accomplice cannot be predicated solely on the fact of having been a party to a conspiracy to commit that offense, but must be measured by the tests for liability under Code § 7.070.

The traditional rule concerning renunciation and conspiracy is strict and inflexible; since the offense is complete with the agreement, no subsequent action can exonerate the conspirator of that offense. This position can be defended only if the act of agreement itself is considered sufficiently undesirable and indicative of the actor's dangerousness to warrant penal sanctions in spite of subsequent renunciation and action to defeat the purposes of the conspiracy. This is not generally supportable, especially in light of allowing an analagous exception in Code § 7.070. This judgment is based on two considerations: that the renunciation tends to negative the firmness of purpose that evidences individual dangerousness; and that the law should provide a means of encouraging persons to desist from carrying out criminal designs.

The restrictions in subsection (5) are consistent with the purposes of conspiracy. First, the circumstances must manifest renunciation of the actor's criminal purpose. Second, he must take action sufficient to prevent consummation of the criminal objective. Since conspiracy involves preparation for crime by more than one person, the objective will generally be pursued despite renunciation by one conspirator, and the sec-

tion accordingly requires for renunciation that the actor thwart the success of the conspiracy. This is an added reason for allowing renunciation, for the evil thwarted is potentially greater because of the plurality of actors. The means required to thwart the success of the conspiracy will vary from case to case and a specific rule would be unworkable. Timely notification of law enforcement authorities will normally suffice, and this is in accord with Code § 7.070. Notification of the authorities which fails to thwart the success of the conspiracy because not timely or because of failure on their part will not be sufficient under subsection (5) but will commence the running of the period of limitations under subsection (6)(b). In the case of the criminal mastermind who formulated all the plans of the conspiracy and then proclaimed his renunciation, the naked renunciation would be insufficient under subsection (5) to avoid liability. To successfully renounce, he must thwart the success of the conspiracy.

The issue of renunciation is not in the case unless some evidence that the defendant did renounce his criminal purpose and took preventive action is admitted. The state then would have the burden of proving that the defendant did not effectively renounce his criminal purpose.

Subsection (6) defines the duration of a conspiracy for the purpose of determining the application of the period of limitations. (6)(a) covers termination as to all parties. The leading case recognizing conspiracy as a continuing offense is United States v. Kissel, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168 (1910) which held that "conspiracy continues up to abandonment or success." Missouri cases are in agreement. State v. Chernick, 280 S.W.2d 56 (Mo.1955) (abandonment and frustration); State v. Mangiaracina, 350 S.W.2d 796 (Mo. 1961). Abandonment by all the parties is usually presumed if neither the defendant nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitations, measured from the date of the agreement. For the purpose of the period of limitations, the conspiracy may also terminate by success—the commission of the offense or offenses which were its objectives.

Subsection (6)(b) governs abandonment of the agreement by an individual conspirator, which commences the running of the period of limitations as to him. This is recognized in Missouri, see State v. Bailey, 383 S.W.2d 781 (Mo.1964), and in virtually all American jurisdictions, see Hyde v. United States, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912).

Subsection (7) is based on Michigan Revised Code § 1020(2) (Final Draft 1967). It basically provides for the merger of the conspiracy into the conviction for the substantive offense that was the target of the conspiracy. Nothing in this sub-

section is designed to prohibit the state from charging both conspiracy and a substantive offense and proving both. It is intended to prevent a person's being convicted and sentenced for conspiracy when he has been convicted and sentenced for the substantive offense which was the target of the conspiracy.

Subsection (8) makes a major change in Missouri law. Under existing statutes, conspiracy is a misdemeanor only, punishable by up to one year in prison and a $1,000 fine or both. This section grades the penalty for conspiracy in the same manner as was done with attempt offenses. The comments applicable to the attempt grading are generally applicable here with one addition relating to conspiracies with more than one objective. In such instances, for the purpose of sentencing, the target offense to be considered is that of the highest degree. Of course, an individual's target offenses are limited to those objectives of the conspiracy as it applies to him.

PART IV

SPECIFIC OFFENSES

Chapter 10

OFFENSES AGAINST THE PERSON

10.010 Criminal homicide

(1) A person commits criminal homicide if he purposely, knowingly, recklessly or with criminal negligence causes the death of another person.

(2) Criminal homicide is murder, manslaughter or criminally negligent homicide.

Comment

This section indicates that a homicide with a culpable mental state is criminal and conversely that a homicide without one of the culpable mental states is not a crime. Under present Missouri law, homicides can be either criminal or non-criminal. The non-criminal homicides are those that are justifiable or excusable. In the Code justification for homicides as well as other conduct is in a separate chapter, Chapter 8. Under present Missouri law excusable homicides are often termed "accidental." This section attempts to do away with that ambiguous and confusing term by indicating clearly that a homicide without a culpable mental state is not a crime. *Cf.* Model Penal Code § 2.01 and Proposed Texas Code § 19.01.

10.020 Murder

(1) A person commits the crime of murder if

(a) he knowingly causes the death of another person; or

(b) he recklessly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or

(c) he commits or attempts to commit any of the following felonies: arson, rape, sodomy, robbery, burglary in the first degree, kidnapping or escape from custody or confinement; and in the course of and in the furtherance of such felony, or in immediate flight from the commission or attempt, he recklessly causes the death of another person; or

(d) he is criminally responsible under Section 7.070(2) for the conduct of another who is committing or attempting to commit any of the felonies listed in Subsection (c); and such other person commits murder as defined in Subsection (c) and such homicide was reasonably forseeable as a consequence of committing or attempting to commit the felony.

(2) Murder is a Class A Felony.

Comment

This section lists those homicides which are murder. Subsection (1)(a) covers those homicides which are usually termed "intentional." Such killings under circumstances where there are no factors of mitigation or extenuation are murder under present law and under current criminal code revisions in other states. The "reduction" to a lower degree of criminal homicide when factors of mitigation or extenuation are present is covered in Code § 10.030(1)(b).

Present Missouri statutes divide murder into degrees with intentional killings being first degree if the elements of premeditation and deliberation are present, and second degree if deliberation is absent. This and other efforts to distinguish between intentional killings which are thought out and in "cold blood" from those which are impulsive or "spur of the moment" killings have not been successful. The purpose of such classification was to impose a higher penalty for the more heinous killing, and it is often true that the deliberate killing is more heinous than the impulsive killing. However, some wanton spur of the moment killings display more cruelty and disregard for the value of human life than some deliberate killings. By not adopting the premeditation and deliberation formula, a greater range of penalty is available and the punishment can be based on the circumstances of the particular killing, rather than on the sometimes arbitrary factors of premeditation and deliberation. Premeditation and deliberation (or "cold blood") are relevant to the penalty to be imposed and can be considered in the setting of the penalty; but they would not be controlling, and would not be elements to be proved.

The section follows that pattern of most revisions in doing away with degrees of murder. See Model Penal Code § 210.2; Proposed Federal Code § 1601; Illinois Code Ch. 38, § 9–1; New York Code § 125.25 and Proposed Texas Code § 19.02.

Subsection (1)(b) deals with a type of killing that has caused difficulty where murder has been held to require an intent to kill. By a subjective standard this subsection describes an unintentional killing. However, consciously taking a substantial and unjustifiable risk of killing (see Code § 7.020(2)(c) for the definition of recklessly) with extreme indifference to whether that result occurs or not is very dangerous and the actor is almost as blameworthy (and in some instances more blameworthy) as the actor who intends to kill. Examples are deliberately inflicting serious bodily harm upon a person without intending to kill him but with almost complete indifference as to whether death results; or firing a gun into a house where the actor knows people are present but without any intent to kill or even harm, but with almost complete indifference to whether death results. Homicides resulting from such conduct were murder at common law. There is language in some Missouri cases that an "intent to kill is an essential element of murder in the second degree," State v. Chamineak, 343 S.W.2d 153 (Mo.1961). However, the court has found the intentional infliction of serious bodily harm a sufficient mental state for murder. See State v. Washington, 368 S.W.2d 439 (Mo.1963). However, in that case, the court never stated that such was the rule but merely recounted the facts of a very brutal beating and concluded the evidence was sufficient to support a finding of second degree murder. By specifically recognizing that a reckless killing committed with extreme indifference to the value of human life is murder, the proposal avoids some of the present confusion and clearly recognizes that some "unintentional" killings (other than felony murder) can be murder. Such an approach is better than treating such killings as always being a lesser offense or manufacturing a fictitious intent to kill.

Subsections (1)(c) and (d) deal with felony murder. (1)(c) covers the basic concept and (1)(d) deals with felony murder as a means of finding accessorial liability. The present Missouri law, § 559.010 RSMo, lists the felonies of "arson, rape, robbery, burglary or mayhem" in the first degree murder statute. The Code alters the list slightly. Mayhem is taken out as there will no longer be a separately denominated crime of mayhem. The list retains arson (see Code §§ 14.040 and 14.050), rape (see Code § 11.030), robbery (see Code §§ 14.020 and 14.030) and burglary in the first degree (see Code § 14.160). Sodomy (see Code § 11.060) under the Code involves the same elements as rape except that it involves deviate sexual intercourse and has been added to the list. Kidnapping (see Code § 10.110) is a felony which involves a high degree of danger to human life and has been added. Escape from custody (see Code § 20.200) and escape from confinement (see Code § 20.210) also involve such risks and have been added. Escape from custody or confinement can in some situations be a misdemeanor. (1)(c) is so worded to make it clear that it applies only in the felony situations.

Subsection (1)(c) basically provides that felony murder is a form of unintentional homicide and allows for the increased penalty of murder where the homicide is committed recklessly during the commission of one of the named felonies. It classifies as murder those killings, whether intentional or not, which occur as a result of the defendant taking an unjustified chance of killing someone by doing acts dangerous to human life while committing a serious crime. The section makes it clear that felony murder is a form of unintentional killing and makes it clear that the jury in appropriate circumstances can return a verdict of guilty of a lesser degree of criminal homicide. Thus, if the jury found a reckless killing but also found that no other felony was being committed or that the killing was not in the commission of a felony, they could still return a verdict of guilty of manslaughter.

The felony murder rule, in addition to being a means of assessing a higher penalty for a killing in the commission of a felony, has become a means of imposing liability for the acts of another person. That is, the felony murder rule makes all co-felons guilty for a killing committed by one of them during the commission of a felony on a basis broader than the usual rules for accessorial liability. If this approach is to be retained, it should be specifically provided for. Subsection (1)(d) does this but with a limitation to allow an individual defendant to avoid the murder liability if the killing was not reasonably foreseeable.

Subsection (2) classifies murder as a Class A Felony.

10.030 Manslaughter

(1) A person commits the crime of manslaughter if

(a) he recklessly causes the death of another person; or

(b) he causes the death of another person under such circumstances that would constitute murder under Section 10.020(1)(a) or (b) but

(i) acts under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of an ordinary person in the actor's situation under the circumstances as the actor believes them to be; or

(ii) at the time of the killing, he believes the circumstances to be such that, if they existed, would justify the killing under the provisions of Chapter 8 of this Code, but his belief is unreasonable.

(2) The defendant shall have the burden of injecting the issues of extreme emotional disturbance under Subsection (b)(i) or belief in circumstances amounting to justification under Subsection (b)(ii).

(3) Manslaughter is a Class C Felony.

Comment

The present Missouri statutory definition of manslaughter, § 559.070 RSMo, is: "Every killing of a human being by the act, procurement or culpable negligence of another, not herein declared to be murder or justifiable homicide, shall be deemed manslaughter." This is similar to the common law definition in that manslaughter is a residual category covering those homicides which are not murder and those which are non-criminal. However, such a definition does not indicate what types of killings fall into this residual category nor how an intentional killing can be manslaughter rather than murder. In short, it is not much of a definition of the offense.

Subsection (1)(a) defines reckless killings as manslaughter. This is basically consistent with present Missouri law. "Culpable negligence" under present law is more than ordinary negligence and is very close to the "recklessness" of the Code. See State v. Feger, 340 S.W.2d 716 (Mo.1960) and State v. Minter, 429 S.W.2d 762 (Mo.1968), and cases cited therein, indicating that culpable negligence requires "negligent conduct of such reckless character as to indicate 'utter indifference for human life'." 340 S.W.2d at 725, or that culpable negligence is more than ordinary negligence and "must be so great as to indicate a reckless or utter disregard for human life." 429 S.W.2d at 764. The Code requires a conscious disregard of the risk. The Missouri cases are not clear whether "culpable negligence" requires this conscious disregard or whether just extreme negligence is sufficient. It is possible that some killings which would be classified as manslaughter under present law will be criminally negligent homicide under the Code.

Subsection (1)(b) covers the situations where an intentional killing which is not justifiable will be manslaughter rather than murder. (1)(b)(i) covers what is often termed "heat of passion" killings or killings based on "adequate provocation". Until State v. Williams, 442 S.W.2d 61 (Mo.1968), Missouri recognized this as a form of manslaughter but applied a set of limited rules as to what could amount to adequate provocation. In *Williams* the court concluded that since the "heat of passion" situation was not expressly included in the statutory definition of manslaughter, it was not an element of the crime. The Code expressly provides for allowing the jury to consider the effect of extreme emotional upset for which there is a rea-

sonable explanation or excuse on the degree of criminal homicide. It allows for reduction in the grade of the crime (but not exculpation) if the jury finds that the situation was such that a reasonable man in the defendant's situation would have been extremely upset and consequently that the killing which the defendant committed was attributable in part to the situation and not entirely to the defendant's evil disposition. In general the man who kills while reasonably upset is not as blameworthy as the man who kills calmly or who is unreasonably upset and kills. This is the same sort of value judgment the jury could make under the common law category of "heat of passion". The Code does not retain the common law language and does not limit the situations that can amount to "adequate provocation" as was done prior to the *Williams* case.

Subsection (1)(b)(ii) provides that an intentional killing can be manslaughter if the actor honestly but unreasonably believed he was justified, as, for example, where he honestly thought he was acting in self-defense, but was unreasonable in his belief of being in imminent danger of death or serious bodily harm. Of course, if his belief were reasonable, although mistaken, he would be justified and would be guilty of no crime. Prior to State v. Williams, Missouri treated the claim of justification as an all or nothing proposition. That is, if the justification claim were valid the killing was not criminal and the defendant was acquitted. If, however, the justification claim was not valid, then the killing was murder, unless the defendant fell within one of the categories for manslaughter from "heat of passion". *Williams* changed this by in effect allowing the jury to consider the circumstances of the claimed justification as removing "malice". Such a view is more logical than the prior law. A man who intends to kill believing honestly but mistakenly that he is acting in self-defense is not as blameworthy as a man who intends to kill knowing he has no justification. This it true even if the mistake is unreasonable. This subsection recognizes this but states it more clearly than using the terms, "absence of malice", would.

Subsection (2) places the burden of producing evidence as to the presence of the mitigating factors on the defendant. It leaves the burden of persuasion on the state. This means that if the only evidence in the case indicates an intentional killing, and there is nothing in the case to indicate the presence of factors of mitigation or extenuation, the state is entitled to a murder instruction and the court is not obligated to instruct on manslaughter (see Code § 1.090(2)). This is different from the implication of State v. Ayers, 470 S.W.2d 534 (Mo.1971), which seemingly did away with the so-called presumption of malice from an intentional killing. The implication of *Ayers* and *Williams* is that an intentional killing which is not justifiable (or excusable) is manslaughter and that for it to be mur-

der the state must prove the additional element of malice. It is certainly true that, under present law, murder requires malice. However, the ambiguous nature of the word causes problems. Malice covers a variety of mental states which are sufficient for murder. One such sufficient mental state is the intent to kill without factors of mitigation, extenuation or justification being present. To require the state to prove this in order to have a murder instruction given would require the state to prove a negative (the absence of mitigation, extenuation and justification) in every case even though there was nothing in the case to indicate that any of these were present. It is clearer and more logical to define the intentional killing (without more) as being murder and then define manslaughter as involving the additional elements that amount to mitigation and extenuation.

Under Subsection (3) manslaughter is a Class C Felony. It should be noted that a reckless killing under circumstances manifesting extreme indifference to the value of human life is murder under § 10.020(1)(b) and a Class A Felony.

10.040 Criminally negligent homicide

(1) A person commits the crime of criminally negligent homicide if he with criminal negligence causes the death of another person.

(2) Criminally negligent homicide is a Class D Felony.

Comment

This section provides for a grade of criminal homicide below manslaughter. For most serious crimes, criminal negligence is not a sufficient mental state for liability. Most serious crimes require at least recklessness. A common exception is in the homicide area where negligent killings are punished, either as manslaughter or under a special criminal negligence statute. Such a crime arises most often from killings from the operation of motor vehicles. It should be noted that while criminal negligence does not require a conscious disregard of the risk (as recklessness does), it requires a higher degree of culpability than ordinary negligence as used for tort liability. See Code § 7.020(2)(d). Missouri presently has no such statute but would classify some negligent killings as manslaughter.

10.050 Assault in the first degree

(1) A person commits the crime of assault in the first degree if

(a) he knowingly causes serious physical injury to another person; or

(b) he attempts to kill or to cause serious physical injury to another person; or

(c) under circumstances manifesting extreme indifference to the value of human life he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes serious physical injury to another person.

(2) Assault in the first degree is a Class B Felony unless committed by means of a deadly weapon or dangerous instrument in which case it is a Class A Felony.

Comment

The Code divides assaults into three degrees. This is similar to present Missouri law which in general divides assaults into felonious assaults with malice, § 559.180 RSMo; felonious assault without malice, § 559.190; and common assault, § 559.220.

This section covers the most serious types of assaults. It covers not only the infliction of serious physical injury but also the attempt to inflict serious physical injury and grades both at the same level. This is an exception to the general approach for attempts where the attempted offense is the next lower classification of crime. The present felonious assault statutes do not distinguish between causing injury and attempting to cause injury and the Code maintains that approach. The assault crimes are graded, as are the homicide offenses, primarily according to the mental state of the actor. In addition, the assault crimes are graded according to the degree of injury and whether or not a deadly weapon or dangerous instrument was used. The Code does not specifically provide for such crimes as assault with intent to rape, assault with intent to rob, etc. Such crimes are adequately covered by attempted rape, attempted robbery, etc. With the broadening of the concept of attempt (See Code § 9.010 and comments) there is no need for separate duplicative assault crimes.

Subsection (1)(c) deals with situations of reckless conduct that would be murder if death resulted (see Code § 10.020(1)(b)). Where death does not result, it should still be a serious crime and is made so here where serious physical injury results.

Subsection (2) makes assault in the first degree a Class B Felony. However, where a deadly weapon or dangerous instrument is used, it is a Class A Felony, making such assaults of equal gravity as murder.

Note: the definitions of physical injury, serious physical injury, deadly weapon, and dangerous instrument are found in the general definitions section of Chapter 1.

10.060 Assault in the second degree

(1) A person commits the crime of assault in the second degree if

(a) he knowingly causes or attempts to cause physical injury to another person by means of a deadly weapon or dangerous instrument; or

(b) he recklessly causes serious physical injury to another person; or

(c) he attempts to kill or to cause serious physical injury or causes serious physical injury under circumstances that would constitute assault in the first degree under Section 10.050, but

(i) acts under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of an ordinary person in the actor's situation under the circumstances as the actor believes them to be; or

(ii) at the time of the act, he believes the circumstances to be such that, if they existed, would justify killing or inflicting serious physical injury under the provisions of Chapter 8 of this Code, but his belief is unreasonable.

(2) The defendant shall have the burden of injecting the issues of extreme emotional disturbance under Subsection (c)(i) or belief in circumstances amounting to justification under (c)(ii).

(3) Assault in the second degree is a Class D Felony.

Comment

This section covers the lower classifications of felonious assault. It is graded using the same factors as first degree assault, and treats the causing of physical injury and attempting to cause physical injury as the same grade of crime. Present Missouri law, § 557.215 RSMo, provides for a category of felonious assault where the victim is a police officer. Such a provision is not needed and is somewhat illogical in that it singles out one group of victims and for them makes what would be a misdemeanor into a felony. This does not mean that assaults on police officers are not criminal. It should be noted that under the Code an attack upon anyone with a deadly weapon or dangerous instrument is a felony, as is the infliction of serious physical injury upon anyone. The Code also provides for criminal liability for interfering with arrests and

interfering with arrest can, under certain circumstances, be a felony. See Code § 21.160.

Subsection (1) (c) provides for a reduction in the grade of assault where there are extenuating and mitigating circumtances. The approach is the same as provided in § 10.030(1) (b) in the homicide offenses.

Subsection (3) provides that assault in the second degree is a Class D Felony. This corresponds to the present penalty for felonious assault without malice, § 559.190 RSMo.

10.070 Assault in the third degree

(1) A person commits the crime of assault in the third degree if

(a) he attempts to cause or recklessly causes physical injury to another person; or

(b) with criminal negligence he causes physical injury to another person by means of a deadly weapon or dangerous instrument; or

(c) he purposely places another person in apprehension of immediate physical injury; or

(d) he recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; or

(e) he knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative.

(2) Assault in the third degree is a Class A Misdemeanor unless committed under Subsection (1)(e) in which case it is a Class C Misdemeanor.

Comment

This section deals with assaults that are misdemeanors. It continues the grading used in first and second degree assaults. Subsection (a) covers the infliction of and the attempt to inflict physical injury. A crime defined in terms of recklessness is also committed if the actor acts purposely or knowingly (see Code § 7.030(3)) so this subsection also covers purposely and knowingly inflicting physical injury. It also provides for the same penalty for the attempt as for the completed offense.

Subsection (b) is the only section providing punishment for assault based on criminal negligence and applies only when a deadly weapon or dangerous instrument is used.

Subsection (c) makes it clear that deliberately frightening a person is a crime. There is a split of authority among jurisdictions as to whether such conduct is a crime or only a tort. Nearly all (perhaps all) of the new codes include such a provision. Some define this as a separate offense called "menacing".

Subsection (d) also has its equivalent in nearly all (perhaps all) of the new codes. In some it is a separate offense called "reckless endangerment". If a person engages in reckless conduct and death results, he will be guilty of either murder or manslaughter depending on the presence of "extreme indifference to the value of human life". If the person engages in the same conduct but no one is killed, but someone is injured, he will be guilty of some degree of assault. This subsection simply covers the situation where he acts with the same degree of recklessness as regards human life but through no fault of his, no one is injured. In most crimes defined in terms of causing a result such as death or physical injury if the actor fails to achieve the result he will be guilty of a lesser degree of crime by virtue of the attempted crimes. However, crimes defined in terms of recklessly causing a result cannot be "attempted" and so a special section is needed to fill this gap.

With the exception of subsection (e) the assault crimes do not cover a simple offensive touching but require physical injury (or the attempt to cause physical injury). Subsection (e) makes offensive touching a minor crime. While it is open to question whether the criminal law should deal with these, such a section has advantages. It allows for official intervention into a situation which could expand into one of physical danger, and gives the offended person the opportunity to call for official protection. Some offensive touchings are covered by Code § 11.120 in the sex offenses chapter but not all touchings of a sexual nature are covered by that section.

10.080 Consent as a defense

(1) When conduct is charged to constitute an offense because it causes or threatens physical injury, consent to that conduct or to the infliction of the injury is a defense only if

(a) the physical injury consented to or threatened by the conduct is not serious physical injury; or

(b) the conduct and the harm are reasonably foreseeable hazards of

(i) the victim's occupation or profession; or

(ii) joint participation in a lawful athletic contest or competitive sport; or

(c) the consent establishes a justification for the conduct under Chapter 8 of this Code.

(2) The defendant shall have the burden of injecting the issue of consent.

Comment

Because some physical injuries are not criminal if consented to, a section dealing with consent is needed. This section allows consent as a defense if the physical injury is not serious. Where serious physical injury is involved consent as a defense is limited to the situations covered by subsections (1)(b) and (c). The major area under the justification sections will be medical treatment where serious physical injury can lawfully be consented to.

10.090 Harassment

(1) A person commits the crime of harassment if for the purpose of frightening or disturbing another person, he

(a) communicates in writing or by telephone a threat to commit any felony; or

(b) makes a telephone call or communicates in writing and uses offensively coarse language; or

(c) makes a telephone call anonymously; or

(d) makes repeated telephone calls.

(2) Harassment is a Class A Misdemeanor.

Comment

This is basically the same as § 1619 of the Proposed Federal Code and covers substantially the conduct included under § 563.910 RSMo. It is broader than the present Missouri statute in that it also covers communication by writing. It is difficult to find a more precise or better definition than "offensively coarse language" used in subsection (1)(b) and while these terms are of a general nature, it is felt they are adequate and when considered with the mental state required for the crime give sufficient warning of the type of conduct prohibited.

10.100 Lack of consent in kidnapping and crimes involving restraint

(1) It is an element of the offenses described in Sections 10.110 through 10.130 of this Chapter that the confinement, movement or restraint be committed without the consent of the victim.

(2) Lack of consent results from

(a) forcible compulsion, or

(b) incapacity to consent.

(3) A person is deemed incapable of consent if he is

(a) less than 14 years old, or

(b) incapacitated.

Comment

"Forcible compulsion" and "Incapacitated" are defined in the general definitions section of Chapter 1. The section adds the age factor as to consent in crimes involving confinement, movement and restraint.

10.110 Kidnapping

(1) A person commits the crime of kidnapping if he unlawfully removes another without his consent from the place where he is found or unlawfully confines another without his consent for a substantial period, for the purpose of

(a) holding that person for ransom or reward, or for any other act to be performed or not performed for the return or release of that person; or

(b) using the person as a shield or as a hostage; or

(c) interfering with the performance of any governmental or political function; or

(d) facilitating the commission of any felony or flight thereafter; or

(e) inflicting physical injury on or terrorizing the victim or another.

(2) Kidnapping is a Class A Felony unless committed under Subsections (1)(d) or (1)(e) in which case it is a Class B Felony.

Comment

This section is based on the Model Penal Code § 212.1 which also is the basis for the kidnapping sections in nearly all the current revisions. The section lists those factors which make the movement or confinement of a person a serious crime.

Kidnapping is designed to cover those situations where the confinement or movement of a person without his consent involves a high risk of injury or death, or where it creates a harm (including the terror of the victim) that is not adequately covered by another offe . Subsections (1)(a), (b) and (c) clearly involve these types of situations and the confinement or movement for these purposes will not necessarily involve the commission of another offense. Kidnapping is not meant to cover the confinement or movement which is merely incidental to the commission of another offense. For example,

many robberies will involve temporary confinement or movement for a short distance (as when the victim is made to move to another part of a room). To take such incidental confinement or movement and punish it as kidnapping would be making two crimes out of what is basically one offense. In these situations the movement or confinement does not add any additional danger to what is already present from the crime of robbery, and there is no purpose served by punishing this movement or confinement as the very serious offense of kidnapping. If, however, the robber forces the victim to accompany him as an aid in his escape, this movement creates a harm substantially different from that involved in the robbery and it is the type of harm normally associated with the crime of kidnapping and therefore is a proper basis for the separate offense of kidnapping. How much movement or confinement is needed as a proper basis for kidnapping cannot be defined precisely as it will vary according to the circumstances. If the defendant has as his purpose the using of the victim as a shield, or holding him for ransom, then almost any movement or confinement should suffice. Removing the victim from his place of residence or business should suffice for any of the listed purposes. Beyond this, all that can be clear is that the confinement or movement should be considerably more than that which is merely incidental to the commission of another offense. A confinement or movement which is incidental to the other offense is not kidnapping. However, if such confinement or movement, of itself, exposes the victim to a risk of serious physical injury, it would fall under the offense of felonious restraint in Code § 10.120.

For present law, see § 559.230 RSMo, Kidnapping for ransom; and § 559.240 RSMo, Kidnapping. The Code sections on kidnapping and related offenses cover the same matters covered in present Missouri law but avoid the use of old language, "seize, confine, inveigle, decoy or kidnap", and set out the purposes of the confinement with more precision.

Subsection (2) states that kidnapping under the provisions of subsections (1)(a), (b) or (c) is a Class A Felony, and under (1)(d) and (e), it is a Class B Felony. Kidnapping under subsections (1)(d) and (e) will nearly always involve the commission of an additional offense.

10.120 Felonious restraint

(1) A person commits the crime of felonious restraint if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty and exposes him to a substantial risk of serious physical injury.

(2) Felonious restraint is a Class C Felony.

Comment

This section provides for a felony conviction for substantial interference with liberty that creates a substantial risk of serious injury but which does not fall within kidnapping under Code § 10.110. It should be noted that the actor will not be guilty under this section (or under false imprisonment under Code § 10.130) if the victim consents or if the actor believed he was authorized by law to restrain the victim. However, these will not necessarily prevent prosecution under some other provision of the Code. For example, if serious physical injury results, neither consent nor an unreasonable belief of authority will prevent an assault conviction. Kidnapping and the related offenses are one area where mistake as to law (legal authority to confine or seize) can negative the mental element needed for the crimes. This is no change in present law. If mistake of law could not negative the guilt, then every arrest without legal authority by a police officer would be kidnapping or a related crime.

10.130 False imprisonment

(1) A person commits the crime of false imprisonment if he knowingly restrains another unlawfully and without consent so as to interfere substantially with his liberty.

(2) False imprisonment is a Class A Misdemeanor.

Comment

This section is new and provides for misdemeanor punishment for substantial interferences with liberty. The next section attempts to limit its application in the "child custody" situation.

10.140 Defenses to false imprisonment

(1) A person does not commit false imprisonment under Section 10.130 if the person restrained is a child under the age of eighteen and

(a) a parent, guardian or other person responsible for the general supervision of the child's welfare has consented to the restraint; or

(b) the actor is a relative of the child, and

(i) the actor's sole purpose is to assume control of the child; and

(ii) the child is not taken out of the State of Missouri.

(2) For the purpose of this Section, "relative" means a parent or stepparent, ancestor, sibling, uncle or aunt, including an adoptive relative of the same degree through marriage or adoption.

(3) The defendant shall have the burden of injecting the issue of a defense under this Section.

Comment

This section allows for restraint of children under the age of 18 in certain situations. False imprisonment under Code § 10.130 requires that the restraint be unlawful and thus that section does not apply when the restraint is authorized by law. Subsection (1)(a) makes it clear that false imprisonment also does not apply when a person who is responsible for the child's welfare consents to the restraint. Where such person does consent there is no need for a crime. This section does not limit who may lawfully restrain a child but simply indicates that in some situations the consent for restraint can be given by a parent or other person responsible for the child's welfare, and such person's consent is effective even if the child does not consent, or is too young to be able to consent. This section obviously does not apply to any situation that would be kidnapping under Code § 10.110, nor does it apply if the person restrained is exposed to a substantial risk of serious physical injury which would be felonious restraint under Code § 10.120.

Subsection (1)(b) deals with a different problem. Its purpose is to keep so far as possible the child custody disputes out of the criminal courts. This subsection simply provides that restraint of a child under 18 is not false imprisonment if it is by a relative who is only assuming control of the child and who does not take the child out of the state. A relative, which in some ways is a broader category than person responsible for the child's welfare, who takes a child under those circumstances ought not be punished simply for that. As long as the child is not taken out of the state, the proper court should be able to resolve the custody matter. It should be noted that this subsection also will not provide any defense if the child is exposed to a substantial risk of serious harm. Code § 10.150 covers taking a child in violation of a court order.

10.150 Interference with custody

(1) A person commits the crime of interference with custody if, knowing that he has no legal right to do so, he takes or entices from lawful custody any person entrusted by order of a court to the custody of another person or institution.

(2) Interference with custody is a Class A Misdemeanor.

Comment

This covers persons who are in custody of another by virtue of a court order. It is not limited to children, but would, of course, make it criminal to take or entice a child from the lawful custody of another where that custody is the result of a court order.

Chapter 11

SEXUAL OFFENSES

11.010 Chapter definitions

(1) **"Sexual intercourse"** means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

(2) **"Deviate sexual intercourse"** means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person.

(3) **"Sexual contact"** means any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

(4) A man and woman living together as man and wife are **"married"** to each other for the purposes of this Chapter, regardless of the legal status of their relationship. Spouses living apart pursuant to a judgment of nullity or legal separation are not married to each other for the purposes of this Chapter.

Comment

Much of this section is based on New York Penal Law § 130.00; Michigan Revised Criminal Code § 2301 (Final Draft 1967); the proposed Texas Penal Code § 21.01 et seq. (1970) and the proposed California Criminal Code § 900 (Staff Draft 1972), all of which have general definitions for sexual offenses.

Subsection (1) gives the ordinary common law meaning to the term "sexual intercourse." Penetration, however slight (entry into the labia), is sufficient. Penetration may be shown by circumstantial evidence, slight proof of actual penetration is sufficient, and emission is not required. State v. Ivey, 303 S.W.2d 585 (Mo.1957).

Subsection (2) defines "deviate sexual intercourse", abandoning the ambiguous and outmoded language of § 563.230 RSMo, the "detestable and abominable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth." Actual penetration into the body need not be proved as now required by § 546.330 RSMo which fixed the standard for both rape and sodomy.

Subsection (3) is based on Model Penal Code § 213.4 and Proposed California Code § 900(c). Inadvertent touching is not "sexual contact", nor are unusual fetishes not involving

the sexual areas listed in the definition. See however Code § 10.070(1)(e) covering offensive physical contact. "Sexual contact" may involve fondling through garments. The definition is intended to cover and is broad enough to cover the situation of an actor causing another person to touch him, in addition to the usual situation of the actor touching the victim's sexual areas.

Subsection (4) is based on Model Penal Code § 213.6(2) and proposed California Criminal Code § 900(f). If a man and woman live together as man and wife, even in a state that does not recognize common law marriage for other purposes, the woman should not be heard to complain that she was raped or subjected to sexual abuse on a particular occasion. The last sentence restricts the marital exclusion to spouses living together or, though living separately, who are not doing so pursuant to any judgment of nullity or legal separation.

The terms "Incapacitated" and "Forcible compulsion" which are used in this chapter are defined in the general definitions section of Chapter 1.

> "Incapacitated" means that physical or mental condition, temporary or permanent, in which a person is unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act. A person is not "incapacitated" with respect to an act committed upon him if he became unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act, after consenting to the act.

Incapacitation deals with the ability to consent and could be covered by separate definitions of being "mentally defective", "mentally incapacitated" or "physically helpless". However, separate terms are not needed so long as one term is sufficient for use in grading offenses. One who is "mentally defective" or "mentally incapacitated" is unable to appraise or appreciate the nature of his conduct and thus is unable to consent or refuse to consent. The unconscious or "physically helpless" person also is unable to consent or refuse to consent. The second sentence was added to cover the situation where the victim "passes out". A person who thus becomes "incapacitated" after consenting to a sexual act should not be heard to complain that he was incapacitated at the time of the act.

> "Forcible compulsion" means either (a) physical force that overcomes reasonable resistance, or (b) a threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another person.

§ 559.260 RSMo presently defines rape in terms of "forcibly ravishing any woman" without defining "forcible". Actual force is not necessary for the crime of rape in Missouri nor in

most states, since threats of violence should be recognized in lieu of force and resistance to show that there was a sexual assault on the victim. See State v. Cunningham, 100 Mo. 382, 12 S.W. 376 (1889); State v. Adams, 380 S.W.2d 362 (Mo.1964). "Reasonable resistance" is such resistance as is reasonable under all the circumstances; *e. g.*, it would be foolish to "resist to the utmost" in the face of a threat of death or serious physical injury. A person who is physically unable to resist would be protected by this definition, since under the circumstances he could not reasonably be expected to put up more than token resistance. The definition includes threats putting the victim in reasonable fear of death, serious physical injury or kidnapping of another person, *e. g.*, an escort or a relative.

11.020 Mistake as to incapacity or age

(1) **Mistake as to incapacity.**

(a) Whenever in this Chapter the criminality of conduct depends upon a victim's being incapacitated, no crime is committed if the actor believed that the victim was not incapacitated and believed that the victim consented to the act.

(b) The defendant shall have the burden of injecting the issue of belief as to capacity and consent under Subsection (1)(a).

(2) **Mistake as to age.**

(a) Whenever in this Chapter the criminality of conduct depends upon a child's being under the age of 14, it is no defense that the defendant believed the child to be 14 years old or older.

(b) Whenever in this Chapter the criminality of conduct depends upon a child's being 14 or 15 years of age, it is an affirmative defense that the defendant reasonably believed that the child was 16 years old or older.

Comment

This section sets out the special rules for mistake as to incapacity and age in the sexual offenses and, as to these elements, the general provision of Code § 7.050(1) would not apply. The effect of this section is to change the mental state required for these elements.

Subsection (1) in effect requires knowledge of incapacity for guilt. This is consistent with present Missouri law which requires the state to prove not only that the victim was incapacitated, because of mental disease, of consenting to or dissenting from the act, but also that the defendant knew of such

incapacity or that he intended to have carnal knowledge by force, if necessary, regardless of consent. The leading case is State v. Warren, 232 Mo. 185, 134 S.W. 522 (1911), and the law is summarized in State v. Robinson, 345 Mo. 897, 136 S.W. 2d 1008 (1940).

Subsection (2) provides for absolute liability as to the element of age when the age is less than 14. That is, if the child is under the age of 14, the defendant's belief (whether reasonable or unreasonable) as to the age is irrelevant. However, where the age element is 14 or 15 years, a reasonable mistake can be a defense. The subsection is based on Model Penal Code § 213.6(1) and Federal Criminal Code § 1648(1) (Study Draft) and is a form of compromise between the strict liability majority view that reasonable belief that the victim was older than a particular age is no defense and the minority view that reasonable mistake of fact as to age is a defense in statutory rape cases. Missouri currently follows the majority view, State v. Houx, 109 Mo. 654, 19 S.W. 35 (1892). The leading case on the minority view is People v. Hernandez, 39 Cal.Rptr. 361, 393 P.2d 673 (1964). Since Missouri cases require the state to prove the defendant knew of mental incapacity of the victim (codified in subsection (1)), it seems inconsistent not to permit at least an affirmative defense as to mistake of age where the age in question is 14 and above. The Model Penal Code and the Federal Criminal Code provisions recommend 10 as the critical age below which this defense would not be available. The Code here adopts the age of 14 or above, as it is here that a person could reasonably believe someone to be 16 or older. European law has long held that mistake of fact as to age is a defense to statutory rape. See, *e. g.*, Danish Criminal Code of 1958 §§ 222–23; German Penal Code of 1871 § 182; French Penal Code of 1957, § 65; Norwegian Penal Code § 196 (1961); Swedish Penal Code Ch. 18, §§ 7–8. England recognizes the defense when the actor has intercourse with a female 13–16 years of age if the actor is under 24, has not previously been charged with a like offense, and reasonably believes the female to be 16 or over.

11.030 Rape

(1) A person commits the crime of rape if

(a) he has sexual intercourse with another person to whom he is not married, without that person's consent by the use of forcible compulsion; or

(b) he has sexual intercourse with another person who is less than 12 years old.

(2) Rape is a Class B Felony unless in the course thereof the actor inflicts serious physical injury on any person or dis-

plays a deadly weapon in a threatening manner in which cases rape is a Class A Felony.

Comment

Based on New York Revised Penal Law § 130.35 (which makes all rape in the first degree a class B felony) and Model Penal Code § 213.1 which recommends aggravation to a first degree felony if the actor inflicts serious injury upon anyone. A major defect of the present Missouri statute, § 559.260 RSMo, is that it lumps forcible and statutory rape together and prescribes punishment of from two years to death under any circumstances. Since the statute does not distinguish more serious from less serious sexual misconduct, the court and jury now have no legislative guidance to indicate what penalty a particular type of conduct deserves. See criticism of this in Hunvald, Criminal Law in Missouri—The Need for Revision, 29 Mo.L.Rev. 521, 536–537 (1963).

Subsection (1)(a) continues the common law concept of forcible rape—intercourse by "forcible compulsion". If the compulsion is not physical force that overcomes reasonable resistance, or a threat that places a person in reasonable fear of death, serious physical injury or kidnapping, the actor should not be held guilty of the serious crime of rape, although he may be found guilty of a lesser offense, *e. g.*, an assault under Code § 10.060 or § 10.070.

Subsection (1)(b) creates an aggravated form of sexual assault which is included in the rape statute because of the very young age of the victim. At common law rape included unlawful carnal knowledge of a female under 10, with or without her consent. While present Missouri law has only a single critical age, 16, most states further limit sentencing discretion by fixing the degree of the offense according to the age group in which the victim falls.

In accord with the rationale for adopting a classification system (see comment, Model Penal Code Tent.Draft 4 at 242 (1955)) subsection (2) reserves the severe punishment authorized for Class A Felonies for situations which are the most brutal or shocking, indicating the most dangerous aberration of character and threat to public security. If the actor inflicts serious physical injury or brandishes a deadly weapon, he evinces such danger and threat.

It should be noted that a woman can be guilty of rape under this provision and that the sex of the defendant or victim is immaterial throughout the Chapter.

11.040 Sexual assault in the first degree

(1) A person commits the crime of sexual assault in the first degree if he has sexual intercourse with another person to whom he is not married, who is incapacitated or who is 12 or 13 years old.

(2) Sexual assault in the first degree is a Class C Felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a Class B Felony.

Comment

The label "rapist" is a damaging one and should not ordinarily be used in the statutory non-consent cases, *e. g.* where a fully consenting, and often fully developed and promiscuous social companion is involved. Therefore, the Code differs the approach taken in some other codes, *i. e.* adopting various degrees of rape, while continuing to label the defendant as a "rapist". The Code reserves that term for the most heinous sexual offender.

In any prosecution for sexual assault in the first degree, it is no defense that the defendant did not know the person was under 14 years of age, see Code § 11.020(2)(a). However, as to incapacitated victims, the burden remains on the state to show knowledge of the facts or conditions showing incapacitation once the issue has been raised, see Code § 11.020(1).

Again the penalty is escalated if aggravating circumstances are present. If the defendant's display of a deadly weapon in a threatening manner is found to constitute "forcible compulsion," he could be guilty of the Class A Felony of rape under Code § 11.030 instead of the Class B Felony under this section.

11.050 Sexual assault in the second degree

(1) A person commits the crime of sexual assault in the second degree if, being 17 years old or more, he has sexual intercourse with another person to whom he is not married who is 14 or 15 years old.

(2) Sexual assault in the second degree is a Class D Felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a Class C Felony.

Comment

This section is applicable to the older defendant, 17 years old or more, who has intercourse with person less than 16 years old, "the age of consent", and who is 14 or 15 years

old. If the victim is under 12, such conduct is rape, and if the victim is 12 or 13, such conduct is sexual assault in the first degree. If the defendant is under 17, sexual intercourse with a person 14 or 15 years old is sexual misconduct under Code § 11.090, a Class A Misdemeanor. When the age differential is substantial, indicating that an older person is taking advantage of a young person, such conduct is made a felony.

Again the aggravating circumstances of serious harm or displaying a deadly weapon in a threatening manner escalate the authorized penalties. If the prosecutor chooses to focus only on the non-sexual aspects of a sexual assault case, he may charge the defendant under the assault statutes, see Code §§ 10.050 through 10.070. § 10.050 provides Class A and B Felony penalties for knowingly causing serious physical injury. However, under § 10.060 assault in the second degree recklessly causing serious physical injury is a Class D Felony. Thus, the young age of the victim and the sexual nature of the assault enhance the punishment when serious physical injury is recklessly produced. The penalty is also enhanced by the display of a deadly weapon in a threatening manner. Compare this with Code § 10.070(c).

11.060 Sodomy

(1) A person commits the crime of sodomy if

(a) he has deviate sexual intercourse with another person to whom he is not married, without that person's consent by the use of forcible compulsion; or

(b) he has deviate sexual intercourse with another person who is less than 12 years old.

(2) Sodomy is a Class B Felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon, in which cases sodomy is a Class A Felony.

Comment

The provisions of this section correspond with the rape provisions of Code § 11.030. Present Missouri "sodomy" law under § 563.230 RSMo prescribes a penalty of two years to life for any person convicted of the "detestable and abominable crime against nature, committed with mankind or with beast." Under this statute the "detestable" act is the crime, and force, duress, or other lack of consent are immaterial. A modern criminal code should distinguish between deviate sexual conduct which is consensual and deviate sexual conduct which involves aggravating circumstances. The goals of the

Code proposals on sodomy and deviate sexual assault are the same as the goals of the rape and sexual assault provisions:

(1) Protection of the individual from forcible acts.

(2) Protection of the young and immature against sexual advances.

(3) Protection of the "incapacitated."

11.070 Deviate sexual assault in the first degree

(1) A person commits the crime of deviate sexual assault in the first degree if he has deviate sexual intercourse with another person to whom he is not married, who is incapacitated or who is 12 or 13 years old.

(2) Deviate sexual assault in the first degree is a Class C Felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a Class B Felony.

Comment

See comment on Code § 11.040, sexual assault in the first degree, the parallel provision.

11.080 Deviate sexual assault in the second degree

(1) A person commits the crime of deviate sexual assault in the second degree if, being 17 years old or more, he has deviate sexual intercourse with another person to whom he is not married who is 14 or 15 years old.

(2) Deviate sexual assault in the second degree is a Class D Felony unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a Class C Felony.

Comment

See comment on Code § 11.050, sexual assault in the second degree, the parallel provision.

11.090 Sexual misconduct

(1) A person commits the crime of sexual misconduct if

(a) being less than 17 years old he has sexual intercourse with another person to whom he is not married who is 14 or 15 years old; or

(b) he engages in deviate sexual intercourse with another person to whom he is not married.

(2) Sexual misconduct is a Class A Misdemeanor.

Comment

This section covers certain fact situations not covered in the preceding definitions of felony sexual offenses.

The purpose of subsection (1)(a) is to penalize intercourse between minors where the defendant is too young to be punished for sexual assault in the second degree under Code § 11.080. Unlike subsection (1)(b), it is limited to that situation as there is no general provision in the law punishing fornication—sexual intercourse between two unmarried persons.

Subsection (1)(b) authorizes punishment for deviate sexual intercourse committed by unmarried persons, whether committed with or without consent. Since felony provisions punishing sodomy and deviate sexual assault parallel the rape and sexual assault provisions, the primary purpose of the subsection is to cover all other deviate sexual intercourse, including deviate sexual intercourse by a person under 17 with a person to whom he is not married who is 14 or 15. The Committee was closely divided on whether deviate sexual intercourse between consenting adults in private should be a crime. It remains a crime under this section, unless the courts ultimately hold the provision unconstitutional as unjustified governmental interference with the developing right to sexual privacy. Since Code § 11.010(2) defines deviate sexual intercourse as any sexual act involving the genitals of one person and the mouth, tongue or anus of another person, subsection (1)(b) also covers male-female intercourse of this nature.

No provision on "bestiality" as sexual misconduct is included in the Code. The commentary to § 11–2 of the Illinois Code expresses the Committee's position.

> "The Committee felt . . . that it is no longer necessary or desirable to proscribe criminally unnatural acts between humans and animals unless such acts are covered by disorderly conduct or similar statutes. (Kinsey's studies indicate that when such acts occur, they are usually brief, youthful 'experiments' rather than part of a pattern of conduct that either contributes to or constitutes a significant degeneration of the individual involved. Kinsey, Pomeroy, Martin, Sexual Behavior in the Human Male, (1st ed. 1948) at 667–678.) Focusing public attention on the person who happens to be found in such an act serves no useful social purpose and may seriously impair the development of the accused to a normal life."

11.100 Sexual abuse in the first degree

(1) A person commits the crime of sexual abuse in the first degree if

(a) he subjects another person to whom he is not married to sexual contact without that person's consent by the use of forcible compulsion.

(b) he subjects another person who is less than 12 years old to sexual contact.

(2) Sexual abuse in the first degree is a Class D Felony unless in the course thereof the actor inflicts serious physical harm on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a Class C Felony.

Comment

Based on New York Revised Penal Law § 130.65, this section corresponds to rape, Code § 11.030, and sodomy, Code § 11.060. Subsection (1)(a) is new, except to the extent that such conduct could be punished as common assault. While common assault may result from offensive conduct, or the offer thereof, of the kind likely to cause pain of mind, a sense of shame or other disagreeable emotion resulting from undue familiarity toward the victim, State v. Higgins, 252 S.W.2d 641 (Mo.App.1952) such assault will usually be only a misdemeanor. Thus sexual abuse in the first degree is a type of aggravated assault, including protection for very young children against sexual contact. Further aggravation results if the actor inflicts serious physical injury or displays a deadly weapon in a threatening manner.

11.110 Sexual abuse in the second degree

(1) A person commits the crime of sexual abuse in the second degree if he subjects another person to whom he is not married to sexual contact, when the other person is incapacitated or 12 or 13 years old.

(2) Sexual abuse in the second degree is a Class A Misdemeanor unless in the course thereof the actor inflicts serious physical injury on any person or displays a deadly weapon in a threatening manner, in which cases the crime is a Class D Felony.

Comment

This section corresponds to sexual assault in the first degree and deviate sexual assault in the first degree, see Code §§ 11.040 and 11.070 and the comments to those sections. If the actor has sexual contact with another person, not married

to him, who is incapacitated or 12 or 13 years old, he should be punished if the purpose is to arouse or gratify the sexual desire.

Subsection (1) and Code § 11.100(1)(b) replace § 563.160 RSMo, "molesting minor with immoral intent" punishable as a felony or as if it were a misdemeanor. "Sexual contact" under Code § 11.010(3) is similar to the "indecent or improper liberties" coverage of § 563.160 RSMo, although the latter terminology seems broader in scope. Code § 11.130, indecent exposure, covers exposing "the person" in the presence of a minor and punishes such exposure as a misdemeanor rather than as a felony. See also § 559.360 RSMo, contributing to the delinquency of a child by committing any act "which would be injurious to the child's morals or health," punishable by a misdemeanor penalty, and Code § 13.050, endangering the welfare of a child.

11.120 Sexual abuse in the third degree

(1) A person commits the crime of sexual abuse in the third degree if he subjects another person to whom he is not married to sexual contact without that person's consent.

(2) Sexual abuse in the third degree is a Class B Misdemeanor unless in the course thereof the actor displays a deadly weapon in a threatening manner, in which case the crime is a Class A Misdemeanor.

Comment

Based on New York Revised Penal Law § 130.55, this section fixes the dividing line between criminal and non-criminal sexual contact proscribing only non-consensual touching of a person's sexual parts, either directly or through clothing, if done for the purpose of gratifying sexual desire, see Code § 11.010(3).

11.130 Indecedent exposure

(1) A person commits the crime of indecent exposure if he knowingly exposes his genitals under circumstances in which he knows that his conduct is likely to cause affront or alarm.

(2) Indecent exposure is a Class A Misdemeanor.

Comment

Based on Model Penal Code § 213.5 which treats all indecent exposure as a misdemeanor. The Model Penal Code limitation, "for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse" was

eliminated, thus making this section broad enough to cover more "open lewdness", see Model Penal Code § 251.1. Present Missouri law authorizes punishment of indecent exposure of genitals to a minor by a five year maximum term in prison, § 563.160 RSMo. Section 563.150 RSMo punishes "open, gross lewdness or lascivious behavior, or . . . any open and notorious act of public indecency, grossly scandalous" as a misdemeanor. Although some states make indecent exposure a minor misdemeanor, the Code makes the offense a Class A Misdemeanor to give judges sufficient sentencing flexibility to deal with repeat offenders. It should not be necessary to retain the felony penalty to give adequate protection to children.

Chapter 12

PROSTITUTION

12.010 Chapter definitions

(1) **"Promoting prostitution."** A person "promotes prostitution" if, acting other than as a prostitute or a patron of a prostitute, he knowingly

(a) causes or aids a person to commit or engage in prostitution; or

(b) procures or solicits patrons for prostitution; or

(c) provides persons or premises for prostitution purposes; or

(d) operates or assists in the operation of a house of prostitution or a prostitution enterprise; or

(e) accepts or receives or agrees to accept or receive something of value pursuant to an agreement or understanding with any person whereby he participates or is to participate in proceeds of prostitution activity; or

(f) engages in any conduct designed to institute, aid or facilitate an act or enterprise of prostitution.

(2) **Prostitution."** A person commits "prostitution" if he engages or offers or agrees to engage in sexual conduct with another person in return for something of value to be received by the person or by a third person.

(3) **"Patronizing prostitution."** A person "patronizes prostitution" if

(a) pursuant to a prior understanding, he gives something of value to another person as compensation for that person or a third person having engaged in sexual conduct with him or with another; or

(b) he gives or agrees to give something of value to another person on an understanding that in return therefor that person or a third person will engage in sexual conduct with him or with another; or

(c) he solicits or requests another person to engage in sexual conduct with him or with another, or to secure a third person to engage in sexual conduct with him or with another, in return for something of value.

(4) **"Sexual conduct"** occurs when there is

(a) **"sexual intercourse"** which means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results; or

(b) **"deviate sexual intercourse"** which means any sexual act involving the genitals of one person and the mouth, tongue or anus of another person; or

(c) **"sexual contact"** which means any touching, manual or otherwise, of the anus or genitals of one person by another, done for the purpose of arousing or gratifying sexual desire of either party.

(5) **"Something of value"** means any money or property, or any token, object or article exchangeable for money or property.

Comment

As in the gambling chapter (see Chapter 17), the definitions at the beginning of this chapter lay the foundation for simplifying the statutory provisions. Like the gambling laws, the present prostitution statutes are prolix and overspecific. In one basic section, § 563.010 RSMo, there are nine different kinds of conduct specifically labelled "pandering" for which the panderer may be fined or sentenced to not less than two nor more than five years in prison. No distinction is made in § 563.010 between aggravated pandering involving force or intimidation and ordinary pandering involving persuasion or encouragement to become an inmate of a house of prostitution. One must examine §§ 563.020 to 563.070 to find those factors which cause the penalty for pandering to be enhanced to maximums of 10 and 20 years.

Subsection (1) defines "promoting prostitution" and creates a new terminology which includes but is much broader than "pandering". The definition is based on New York Penal Law § 230.15(1) and (2) combined. New York separately defines "advancing prostitution" and "profiting from prostitution". Subsection (1)(e) is based on the New York "profiting from prostitution" definition. A person who "profits from prostitution" by accepting or receiving or agreeing to accept or receive something of value pursuant to an agreement or understanding under which he participates or is to participate in the proceeds of prostitution activity, is a person who ordinarily could be shown to be engaging "in . . . conduct designed to institute, aid or facilitate an act or enterprise of prostitution," subsection (1)(f). However, even if proof of the latter is lacking in a particular case, the defendant should not escape punishment as a prostitution promoter. New York recognizes this and authorizes the same punish-

ment for persons who "advance prostitution" and who "profit from prostitution."

The one term, "promoting prostitution," eliminates the need for separate statutes on procuring, pimping, transporting for purposes of prostitution, keeping a house of prostitution or leasing premises for such activity, profiting from prostitution, and includes any other "conduct designed to institute, aid or facilitate an act or enterprise of prostitution" as well as "profiting from prostitution." As in the case of the historical distinctions drawn between larceny, stealing by deceit, embezzlement and false pretenses, which no longer have criminological significance in Missouri, the statutory distinction between "advancing" and "profiting" from prostitution has no significance.

Note that subsection (1) excludes prostitutes and patrons because their conduct is specifically covered in Code §§ 12.020 and 12.030.

Subsection (1)(e) is consistent with § 563.040 RSMo, knowingly accepting "any money or other valuable thing, without consideration, from the proceeds of the earnings of any woman engaged in prostitution." Under present Missouri law a person who participates in proceeds of prostitution activity by virtue of an agreement or understanding that he will do so acts "without consideration," State v. Harris, 396 S.W.2d 585 (Mo.1965). Thus a storekeeper or physician who sells goods or renders services to a prostitute is not guilty even though he knows the source of earnings, but any person who furnishes goods or services in return for all or a percentage of the woman's earnings under an agreement which continues her in prostitution activity, and in which the amount to be received has no relation to the value of the goods or services, would be guilty under § 563.040 and would be "promoting prostitution."

Subsection (2) defines "prostitution" to mean engaging or agreeing or offering to engage in sexual conduct with another person in return for something of value. The definition covers commercial sexual conduct. As with most revised codes it does so without regard to the sex of the participants. Under present Missouri law only females can engage in prostitution. The Code covers both heterosexual and homosexual activity. Note that the definition covers solicitation and that under it an act of sexual conduct (defined in subsection (4)) need not be completed in order to find prostitution. However, the offer or agreement to engage in sexual conduct must be in return for "something of value" (defined in subsection (5)).

Subsection (3) defines "patronizing prostitution" which is made an offense under Code § 12.030. See comments following that section for the reasons why such conduct is made criminal.

Subsection (4) defines "sexual conduct" to include "sexual intercourse", "deviate sexual intercourse" and "sexual contact." These terms are also defined in Code § 11.010 but there the definition of "sexual contact" is slightly different. Since the risk of venereal infection is not limited to sexual intercourse or deviate sexual intercourse, the definition of "sexual conduct", essential to the definition of prostitution, is not so limited.

Subsection (5) defines "something of value" to mean money or property, or any token, object or article exchangeable for money or property. *Cf.* definition in Code § 18.010 dealing with gambling. Under § 563.040 RSMo a person is guilty if he knowingly receives "any money or other valuable thing" from a woman engaged in prostitution, without consideration. "Something of value" is used in defining "promoting prostitution" (subsection (1)), "prostitution" (subsection (2)) and "patronizing prostitution" (subsection (3)). While other forms of consideration might be included in the definition, *e. g.*, a promise to marry in exchange for sexual intercourse, such inclusion would extend the scope of prostitution beyond commercial sexual conduct. A man who seduces a woman by means of promises would be guilty of promoting prostitution if this were part of a scheme to procure her for prostitution.

12.020 Prostitution

(1) A person commits the crime of prostitution if he performs an act of prostitution.

(2) Prostitution is a Class B Misdemeanor.

Comment

Based on New York Revised Penal Law § 230.00 (1967), Michigan Revised Criminal Code § 6201 (Final Draft 1967) and Kentucky Penal Code § 3105 (Final Draft 1971).

Present Missouri law on prostitution, found mainly in §§ 563.010 to 563.140 RSMo, sets extremely high penalties for many types of conduct connected with prostitution but does not deal directly with prostitution itself as a crime. Section 563.080, entitled "Camping or traveling in city or near highway for purposes of prostitution," may be used against prostitutes in some circumstances, but the felony penalty and the strange scope and title of the statute have discouraged prosecutors from making greater use of it. The present vagrancy statute, § 563.340 RSMo, although probably unconstitutional in this respect, covers any person who "shall be engaged in

any unlawful calling whatever," and any person "found loitering around houses of ill fame . . . without visible means of support." This would seem to include prostitutes as vagrants, although there are no cases so holding. There are Missouri cases defining "prostitution", *e. g.*, St. Louis v. Wyatt, 189 S.W.2d 129 (St.L.App.1945) but the prosecutions were usually brought under municipal ordinances.

Although there are some arguments for legalizing prostitution, there is also medical evidence available indicating this would promote widespread venereal infection. Infected prostitutes show no signs of infection during the incubation period of syphilis (10 to 90 days) or gonorrhea (3 to 5 days) and could infect hundreds of people before the disease was detected by regular medical examinations. Model Penal Code comment, Tent.Draft No. 9 at 173 (1959). Primarily because of the medical data, the Model Penal Code follows the traditional policy of repressing commercial sexual activity.

12.030 Patronizing prostitution

(1) A person commits the crime of patronizing prostitution if he patronizes prostitution.

(2) Patronizing prostitution is a Class C Misdemeanor.

Comment

Based on New York Revised Penal Law § 230.05 (1967) and Michigan Revised Criminal Code § 6205 (Final Draft 1967). This provision would be new to Missouri law. The Model Penal Code and the revised Illinois and Wisconsin codes also include the patronizing offense.

There are good reasons for having this offense. Most important is the argument that dual proscription should aid in curtailing prostitution and in reducing venereal disease. Police who conduct a raid on a house of prostitution should not be required to distinguish between the patron and the prostitute; both should be subject to arrest and prosecution. It is also arguable that it is unjust to punish the prostitute alone. The Michigan drafters provided that the patron should be subject to the same punishment as the prostitute. However, it is doubtful if juries, judges and prosecutors (or the public) would wish to impose as severe a penalty on the patron. Having an available charge for the patron may facilitate his cooperation with the prosecuting authorities.

12.040 Prostitution and patronizing prostitution: no defense

In any prosecution for prostitution or patronizing a prostitute, the sex of the two parties or prospective parties to the sexual

conduct engaged in, contemplated or solicited is immaterial, and it is no defense that

(1) both persons were of the same sex; or

(2) the person who received, agreed to receive or solicited something of value was a male and the person who gave or agreed or offered to give something of value was a female.

Comment

This section is identical to New York Revised Penal Law § 230.10 (1967). Traditionally the term "prostitute" included only a female. Code § 12.020(1) uses the term, "person", and should be interpreted to cover both homosexual and heterosexual activity. However, this provision makes it crystal clear that the basic prostitution statutes cover situations in which a male is hired by a female, a male by a male, a female by a female, as well as a female by a male.

12.050 Promoting prostitution in the first degree

(1) A person commits the crime of promoting prostitution in the first degree if he knowingly

(a) promotes prostitution by compelling a person to enter into, engage in, or remain in prostitution; or

(b) promotes prostitution of a person less than sixteen years old.

(2) **"Compelling"** includes

(a) the use of forcible compulsion.

(b) the use of a drug or intoxicating substance to render a person incapable of controlling his conduct or appreciating its nature.

(c) withholding or threatening to withhold dangerous drugs or a narcotic from a drug dependent person.

(3) A **"drug dependent person"** is a person who is using dangerous drugs or a narcotic and who is in a state of psychic or physical dependence or both arising from the use of that substance on a continuing basis.

(4) Promoting prostitution in the first degree is a Class B Felony.

Comment

Based on New York Revised Penal Law § 230.30 (1967) and Michigan Revised Criminal Code § 6221 (Final Draft 1967). "Forcible compulsion" is defined in the general definitions

section of Chapter 1. The definition of "drug dependent person" is the same as § 195.500(2) RSMo 1971 Supp.

There are many Missouri statutes replaced by this and the next two sections, the other two degrees of this crime. Currently Missouri has a conglomerate of overlapping and repetitive statutes covering various types of "promoting prostitution" activity which authorize severe felony punishments in most instances. Most of these provisions are found in §§ 563.010 to 563.140 RSMo. However, there are some inconsistent and overlapping misdemeanor provisions found in §§ 563.630 and 563.640 which should be compared with §§ 563.-010, 563.040, 563.080, 563.100, 563.110 and 563.120, all of which provide felony penalties for the proscribed conduct.

This section covers the threat and force aspects of § 563.010 RSMo and includes age as an aggravating factor, see § 563.-020 RSMo. Merely procuring women for a house of prostitution by inducement, persuasion, or promises, unless under the age of consent, is not the type of aggravated conduct calling for Class B Felony punishment. Such conduct is covered by Code § 12.060, promoting prostitution in the second degree.

The proposed penalty under this section is greater than the five year maximum for such conduct under § 563.010 but less than the twenty year maximum for forcing a wife into a house of prostitution. The Class B Felony penalty makes the punishment for forcible prostitution consistent with the basic punishment for rape in the first degree under Code § 11.030.

Subsection (1)(a) includes "entering in" and "remaining in" prostitution as well as "engaging in". "Enter into" covers the case in which a person has been compelled to enter a house of prostitution or prostitution enterprise, but in which no prostitution has been engaged in by that person. "Remain in" covers the case of a prostitute who would like to leave prostitution, but who is compelled to remain a prostitute.

The age of 16 was chosen as the dividing line in subsection (1)(b) because that is the "age of consent" in the Sexual Offenses Chapter. See Code § 11.050.

Subsection (2) was added to define the types of compulsion that are sufficient for this offense. The common practice of using drugs to secure or keep a prostitute is treated the same as use of forcible compulsion. The definition of drug dependent person does not include alcoholics; there is not the same degree of compulsion produced by a threat to withhold alcohol which is legally available.

12.060 Promoting prostitution in the second degree

(1) A person commits the crime of promoting prostitution in the second degree if he knowingly promotes prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes.

(2) Promoting prostitution in the second degree is a Class C Felony.

Comment

Based on New York Revised Penal Law § 230.25 (1967) and Michigan Revised Criminal Code § 6222 (Final Draft 1967) which also provide Class C Felony punishment for promoting the prostitution of person less than 19 and 20 years old, respectively.

There are many other Missouri felony provisions that might be covered in this section that were omitted for various reasons. *E. g.*, § 563.060, enticing a person of previous chaste character into prostitution, and § 563.020, permitting females under 18 to enter or remain in houses of prostitution. These forms of promotion will be Class D Felonies under Code § 12.070, the residual section. Other sections not included are § 563.090, providing a 10 year maximum for setting up a bawdy house within 100 yards of a church, school, library, theater, city hall or courthouse, and § 563.070, providing a 20 years maximum merely for transporting a woman from one place to another in the state for the purpose of prostitution. Similar conduct not involving transportation carries only a five year maximum under § 563.010. Simply receiving money from the earnings of a prostitute, without lawful consideration, is now an aggravating factor under § 563.040, which has an extreme 20 years maximum. According to the Model Penal Code comments, Tent.Draft No. 9 at 181–182 (1959):

> "If the actor received money for soliciting, the maximum under present law rises very sharply to as much as 20 years (Michigan, Missouri, New York), the average maximum being in the neighborhood of 9 years. Since those who solicit for prostitutes generally do so for money, the much higher penalty for soliciting for gain has little justification. Its practical significance is that it enables prosecutors to charge some pimps with lesser offenses or to accept pleas to lesser offenses after charging more serious ones."

New York has reduced its penalty for soliciting for prostitutes from 20 to 7 years, which still gives the prosecutor a

good bargaining position. Under the Code, receiving money and participating in the earnings of a prostitute may be punished by up to 5 years in prison. See Code § 12.070, and § 12.010(1)(e).

12.070 Promoting prostitution in the third degree

(1) A person commits the crime of promoting prostitution in the third degree if he knowingly promotes prostitution.

(2) Promoting prostitution in the third degree is a Class D Felony.

Comment

Based on New York Revised Penal Law § 230.20 (1967) and Michigan Revised Criminal Code § 6223 (Final Draft 1967) under which this is a Class A Misdemeanor. The definition in Code § 12.010(1) creates terminology that permits this section to cover the entire spectrum of prohibited promotional activity. Note that this section cannot be violated by a person who is solely a prostitute or a patron unless the person also promotes the prostitution of another, Code § 12.010(1). In this respect prostitutes and patrons are like the "players" in Chapter 18 on gambling, who are not guilty of promoting gambling in the first or second degree, unless they have an additional part in a commercial gambling venture.

12.080 Prostitution houses deemed public nuisances

(1) Any room, building or other structure regularly used for any unlawful prostitution activity prohibited by this Chapter is a public nuisance.

(2) The attorney general, circuit attorney or prosecuting attorney may, in addition to all criminal sanctions, prosecute a suit in equity to enjoin the nuisance. If the court finds that the owner of the room, building or structure knew or had reason to believe that the premises were being used regularly for unlawful prostitution activity, the court may order that the premises shall not be occupied or used for such period as the court may determine, not to exceed one year.

(3) All persons, including owners, lessees, officers, agents, inmates or employees, aiding or facilitating such a nuisance may be made defendants in any suit to enjoin the nuisance, and they may be enjoined from engaging in any unlawful prostitution activity anywhere within the jurisdiction of the court.

(4) Appeals shall be allowed from the judgment of the court as in other civil actions.

Comment

This is a simplified version of §§ 563.130 and 563.140 RSMo. It also includes the penalty provision of § 563.365(3) to prevent landlords from allowing their premises to be used for prostitution activities. Some revisions include a separate offense entitled "permitting prostitution" to deal with the person who knowingly permits his premises to be used for prostitution purposes and fails to make reasonable efforts to abate that use. *E. g.*, Kentucky Penal Code § 3120 (Final Draft 1971) (Class B Misdemeanor). The section generally follows the same approach taken in Code § 18.090 on public gambling nuisances.

"Structure" in subsection (1) should be broadly construed to include structures such as mobile homes.

Subsection (3) is based on the last sentence of § 563.140(1) with the added provision that individuals may be enjoined from engaging in unlawful prostitution activities anywhere within the jurisdiction of the court. Thus if an owner of one building declared a nuisance were to permit prostitution in another building controlled by him, he would be in contempt of court under such an in personam injunction.

The procedural steps which should be covered by the Rules of Civil Procedure are not included here.

The prosecutor does not have to establish that the possessor knew his premises were being used regularly for unlawful prostitution activities to deprive him of the use of his premises. If the owner should have known of the regular use of his premises for prostitution, he may lose the use of the premises for up to one year for failing to abate the nuisance. A prosecutor could provide a basis for showing knowledge or that the landlord should have known of the prostitution by giving written notice to the landlord. This should be sufficient to get most landlords to abate the nuisance in view of the possible penalty if it is not abated.

The requirement that premises be "regularly" used for unlawful prostitution is based on the definition of bawdyhouse, excluding premises that are not frequented, *i. e.*, used a number of times for prostitution purposes. "Any unlawful prostitution activity" includes regular use of premises by one person for prostitution and use for either heterosexual or homosexual prostitution.

12.090 Preemption and standardization

The legislature by enacting this Chapter intends to preempt any other regulation of the area covered by felony Sections 12.050 through 12.070, to promote state-wide control of prostitu-

tion, and to standardize laws that governmental subdivisions may adopt in other areas covered by this Chapter. No governmental subdivision may enact or enforce a law that makes any conduct in the area covered by Sections 12.050 through 12.070 subject to a criminal or civil penalty or sanction of any kind. Cities and towns may enact and enforce laws prohibiting and penalizing conduct subject to criminal or civil penalties or sanctions under other provisions of this Chapter, but the provisions of such laws shall be the same and the authorized penalties or sanctions under such laws shall not be greater than those of this Chapter. Cities and towns may also enact and enforce laws prohibiting and penalizing public solicitation of sexual conduct, whether or not the offer to engage in sexual conduct is in return for something of value, and health laws to prevent the spread of venereal diseases.

Comment

Once the state adopts a comprehensive set of statutes covering the prostitution field in order to promote state-wide control of prostitution, total preemption of the field would be feasible. *Cf.* the preemption provision in the Chapter on gambling. However, the Committee felt that total preemption would be undesirable in the area of prostitution.

Under this section cities and towns are not permitted to enact and enforce laws in the area covered by the felony provisions of this chapter. However, they may enact and enforce laws prohibiting and penalizing any other conduct subject to criminal or civil sanctions under other provisions of this chapter. *E. g.*, a city may feel that state enforcement of the laws against prostitution is inadequate to provide sufficient local control of the problem. As a result, the city may enact an ordinance proscribing prostitution and patronizing prostitution, with authorized penalties not greater than the Class B and C Misdemeanor penalties provided in Code §§ 12.020 and 12.030. The city could not take an inconsistent approach, *e. g.*, deciding to punish prostitution but not patronizing prostitution, or deciding to define or punish the offenses more severely. A city might choose to adopt Code § 12.080, giving the city attorney authority to sue to enjoin prostitution houses.

The Committee believes that cities and towns should be given additional authority to prohibit and penalize public solicitation of sexual conduct and to enact health ordinances to prevent the spread of venereal diseases. Since the prostitute or pimp who solicits in public seldom mentions money at the time of the solicitation, a city might decide to eliminate the usual "in return for something of value" prostitution element, replacing it with a prohibition of public solicitation in order to

more effectively prevent public solicitations. The Committee does not believe that state law should proscribe all public solicitation of sexual conduct, because this is not considered a major problem in most parts of the state.

The following sections of the Revised Statutes should be repealed or amended to conform to this section: §§ 73.100 (18), 75.110(19), 77.750, 79.450(1) and 80.090(2). In general these provisions give cities the power to "prohibit and suppress houses of prostitution and other disorderly houses and practices." The provisions of this section give all cities and towns similar authority, subject to the preemption and standardization limitations.

12.100 Responsibilities of prosecuting attorneys and attorney general

In addition to the responsibility of circuit attorneys and prosecuting attorneys in their respective jurisdictions to enforce the criminal provisions of this Chapter, they shall have the duty to enforce the provisions of Section 12.080; and the attorney general shall have a concurrent duty to enforce the civil provisions of Section 12.080.

Comment

Based on § 563.610 RSMo, this section makes it clear that prosecuting attorneys have a duty to enforce the civil provisions of Code § 12.080 in addition to their normal duty to enforce any state criminal laws. The experience in Pulaski County involving the area around Fort Leonard Wood illustrates the need to retain the attorney general's concurrent duty and authority to bring civil suits to enjoin prostitution nuisances. No attempt should be made to give the attorney general special authority to prosecute prostitution offenses.

Chapter 13

OFFENSES AGAINST THE FAMILY

13.010 Bigamy

(1) **Married person.** A married person commits the crime of bigamy if he

(a) purports to contract another marriage; or

(b) cohabits in this State after a bigamous marriage in another jurisdiction.

(2) A married person does not commit bigamy if, at the time of the subsequent marriage ceremony, he reasonably believes that he is legally eligible to remarry.

(3) The defendant shall have the burden of injecting the issue of reasonable belief of eligibility to remarry.

(4) **Other party to bigamous marriage.** An unmarried person commits the crime of bigamy if he

(a) purports to contract marriage knowing that the other person is married; or

(b) cohabits in this State after a bigamous marriage in another jurisdiction.

(5) Bigamy is a Class A Misdemeanor.

Comment

Based on several revisions, including Kentucky Penal Code § 3305 (Final Draft 1971), Michigan Revised Criminal Code § 7001 (Final Draft 1967) and Model Penal Code § 230.1.

§ 563.170 RSMo speaks of a "person having a husband or wife living, who shall marry another." The Code changes this to a "married person" who "purports to contract" a subsequent marriage (which would be void under Missouri law). This is intended to include persons who underwent a previous void marriage. It is possible to purport to contract a marriage which in legal effect is a nullity and then to purport to contract a second marriage under circumstances where the actor demonstrates by his behavior a dangerous disposition to plural marriage, unless he comes within the reasonable belief exception of subsection (2). In State v. Wilson, 312 Mo. 84, 278 S.W. 679 (1925), a defendant escape conviction in a "trigamy" situation. He was able to show that the alleged prior marriage, relied upon to support the charge, was itself bigamous and void because of an even earlier marriage existing at the time, but later dissolved by divorce. Under § 451.030 RSMo, all

bigamous marriages are void unless the former marriage has been previously dissolved. This fact has apparently been used several times to defeat bigamy prosecutions in Missouri. See *e. g.*, State v. Hare, 331 Mo. 707, 56 S.W.2d 141 (1932).

Since subsection (1) does not expressly prescribe a culpable mental state for bigamy, it is sufficient if the person acts purposely, knowingly or recklessly. See Code § 7.030(2). A few states require that the defendant act "knowingly" and a bigamy statute taking this approach can be simpler in form. However, Missouri has never recognized that just a good faith belief in legal eligibility to remarry (which would negative such a knowledge requirement) as a defense. State v. Trainer, 232 Mo. 240, 134 S.W. 528 (1911). The *Trainer* decision suggests that a defense of reasonable mistake might be recognized even though § 563.180 contains no express "reasonable belief" exception. Unfortunately, few Missouri decisions have interpreted the present bigamy statutes.

Subsection (2) adopts the view of a growing number of states that one who has reasonable basis for believing himself legally eligible to marry does not become a criminal upon his purported remarriage. The Model Penal Code § 230.1(1) goes even further and does not require that the belief be reasonable when it is a belief that the spouse is dead. This is clearly a minority position. The compromise approach of subsection (2) is based on Model Penal Code § 230.1(1)(d), applying it to all cases, including cases in which there is a belief the spouse is dead. Also included are cases in which there is doubt as to the validity of a divorce or annulment. Since the validity of foreign divorces is often open to question, the layman who makes a good faith mistake for which he has reasonable ground (such as having obtained a legal opinion) should not be punished.

Although the Model Penal Code drafters rejected the crime of cohabiting within the state after a bigamous marriage without the state, the Code retains this provision which is found in § 563.190 RSMo.

Subsection (4) deals with the unmarried person who knowingly marries a married person. Most states require that the unmarried person know that the other party is married, since it is difficult to find out the other party's status. It is necessary to specify this liability as under Code § 7.070(2)(c) the unmarried person would not fall within normal accessorial liability.

The penalty for bigamy was reduced to the Class A Misdemeanor level, as recommended by Model Penal Code § 230.1.

The "prolonged absence" defense available under § 563.180 (1) and (2) RSMo was omitted. Under § 563.180(2) where the absent spouse continually remains outside the United

States for seven years, remarriage is not bigamous even if the missing spouse is known to be alive. Whether the spouse is beyond the seas or missing seven years and not known to be alive, § 563.180 now in effect authorizes what could be called an "informal divorce". As the Model Penal Code comment, Tent. Draft No. 4 at 224, puts it, "To treat absence as a justification for ignoring the marriage is probably an anachronism appropriate for a time when it was impossible to obtain a divorce by judicial decree, or on a basis other than adultery. This is not the situation today." If the divorce law is not broad enough to permit divorce in situations where a spouse has been absent for seven years without letting his spouse know that he is alive, it would be better to amend the divorce statute than to promote "informal divorce" by retaining such provisions in the bigamy statute. These arguments also apply to § 563.180(6) dealing with sentences to life imprisonment.

13.020 Incest

(1) A person commits the crime of incest if he marries or purports to marry or engages in sexual intercourse or deviate sexual intercourse with a person he knows to be, with regard to legitimacy,

(a) his ancestor or descendant by blood or adoption; or

(b) his stepchild, while the marriage creating that relationship exists; or

(c) his brother or sister of the whole or half-blood; or

(d) his uncle, aunt, nephew or niece of the whole blood.

(2) For purposes of this section:

(a) **"sexual intercourse"** means any penetration, however, slight, of the female sex organ by the male sex organ.

(b) **"deviate sexual intercourse"** means any act of sexual gratification between persons not lawfully married to one another, involving the genitals of one person and the mouth or anus of another.

(3) Incest is a Class D Felony.

Comment

Based on present Missouri law § 563.220 RSMo, Texas Penal Code § 25.02 (Final Draft 1970), Model Penal Code § 230.2, and New York Penal Law § 225.25 (1967), this section emphasizes the following rationale for the incest offense: protection of family solidarity by preventing harmful interference with relations between family members. Section 563.-

220 RSMo presently prohibits marriage, adultery, fornication and "lewdly and lasciviously" cohabiting between "parents and children, including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews." The Code section proscribes all the relationships covered by the present statute and adds some protection for adopted persons against abuses of parental or other familial influence. "Ancestor or descendant" in subsection (1)(a) replaces "parents and children, including grandparents and grandchildren of every degree" in § 563.220 RSMo and is intended to cover the same relationships, with the addition of such adoptive relationships. "Deviate sexual intercourse" is added to the types of conduct prohibited.

Section 563.220 RSMo makes incest a felony punishable by imprisonment for up to seven years. Classifying this as a Class D Felony, punishable by a maximum of five years, provides an almost equivalent penalty, considering the elimination of the three-fourths rule that applies to the sentences of most prison inmates today. In cases where there are aggravating circumstances, such as a father's act upon his young daughter, or where accompanied by force, the crime would be rape or sodomy and punishable as a Class B Felony.

Section 451.020 RSMo makes all marriages between people within the degrees of consanguinity covered by § 563.220 RS Mo "absolutely void." In addition, it makes marriages between first cousins "absolutely void" even though first cousins cannot be prosecuted for incest.

Subsection (1)(c) omits adoptive brothers and sisters in the list of persons subject to the incest law. If young adoptive brothers and sisters engage in sexual intercourse, they may still be guilty of sexual misconduct under Code § 11.090, and possibly other offenses in the Sexual Offenses Chapter.

Uncles and nieces of the half blood were held not to be within the degrees of relationship prohibited by § 563.220. State v. Bartley, 304 Mo. 58, 263 S.W. 95 (1928). Subsection (1)(d) makes this clear.

Where only one of the parties to an act of sexual intercourse is aware that a relationship exists between the parties which renders the act incestuous, only that party is guilty of incest. State v. Ellis, 74 Mo. 385 (1882). Thus, the Code requires that the actor know that he is marrying, cohabiting, or having intercourse with one of the listed relatives, in order to be guilty of incest.

The Code includes those sexual relationships which present the clearest biological risks but also focuses on those where there is likelihood of abuse of parental or other familial influence with resulting harm to the family and its members.

Sexual relationships between parents and their adopted children and between a stepparent and a stepchild, while the relationship exists, would be as disruptive to the family unit as would natural parent and child relationships. While adoptive children and stepchildren should be protected from such relationships because of the psychological and social consequences, there is some doubt whether or not the same need would extend to cases involving adoptive uncles and nieces or to cases involving uncles and nieces of the half blood.

A single act of intercourse is prohibited behavior. Marriage within the prohibited degrees is also incest without direct proof of intercourse. Nothing would be gained by allowing those married to escape punishment by testifying that they did not engage in intercourse; such marriages should be deterred in any event. See comment to Model Penal Code § 207.3, Tent. Draft No. 4 (1955).

13.030 Abandonment of child

(1) A person commits the crime of abandonment of a child if, as a parent, guardian or other person legally charged with the care or custody of a child less than eight years old, he leaves the child in any place with purpose wholly to abandon it, under circumstances which may result in serious physical injury, illness or death.

(2) Abandonment of a child is a Class D Felony.

Comment

Section 559.330 makes it a felony punishable by imprisonment up to five years or not less than six months for any father or mother of a child less than six years old, or any person to whom the child has been confided, to "expose such child in a street, field, or other place, with intent to wholly abandon it . . . ." Apparently this statute is designed to cover the situation where a person responsible for the well-being of a child that is too young to fend for itself abandons the child in a situation where it is probable that life or health of the child could be endangered. The word "expose" has been held to mean to turn or cast out, to place or leave in a probably fatal position; and the rule of *ejusdem generis* does not apply in construing § 559.330. Thus "other places" is not limited in its meaning to such places as a "street" or "field". State v. Eckhardt, 232 Mo. 49, 133 S.W. 321 (1910).

The section is partially based on Michigan Revised Criminal Code § 7030 (Final Draft 1967). Abandonment is to be distinguished from nonsupport of a child under 16, presently covered by §§ 559.353 and 559.356 RSMo. The gravamen of nonsupport is failure to provide food, clothing, lodging, or

medical attention; the gravamen of abandonment is risking the life or health of the very young. The age of eight was selected rather than six (see § 559.330) because most children of eight are able to call attention to their plight and identify themselves. Any effort to set a standard based on the ability of the particular child to care for himself would render the statute very difficult to enforce because of difficulties of proof.

13.040 Criminal nonsupport

(1) A person commits the crime of nonsupport if he knowingly fails to provide, without good cause, adequate support which he is legally obligated to provide to his spouse or to his minor child.

(2) For purposes of this section:

(a) **"Support"** means food, clothing, lodging, and medical or surgical attention.

(b) **"Child"** means any natural or adoptive, legitimate or illegitimate child.

(c) **"Good cause"** includes any substantial reason why the defendant is unable to provide adequate support. Good cause does not exist if the defendant purposely maintains his inability to support.

(3) The defendant shall have the burden of injecting the issue of good cause for nonsupport.

(4) Criminal nonsupport is a Class A Misdemeanor, unless the actor leave the State for the purpose of avoiding his obligation to support in which case it is a Class D Felony.

Comment

This section would replace §§ 559.353, 559.356 and part of the vagrancy statute, § 563.340 RSMo. It is based on Texas Penal Code § 25.07 (Final Draft 1970) and §§ 559.353 and 559.356 RSMo.

Ideally, problems of nonsupport should not be in a criminal code at all. The matter of enforcement of alimony and child support awards should, in the abstract, be left to contempt of court and the Uniform Reciprocal Enforcement of Support Act. The object of legislation in this area should be to compel recalcitrant persons to fulfill their obligations of care and support. See New York Penal Law § 260.05 Commentary (1965). Such a goal is difficult to achieve by imprisoning such persons. Imposition of punishment, particularly a fine or imprisonment, can only frustrate the object of the support statutes by guaranteeing that the defendant will be unable to meet his obligations. In spite of these arguments against the use of pena'

sanctions, practical experience has demonstrated that such sanctions serve a needed function as a deterrent and in Missouri may be the only effective means of dealing with certain situations.

Although there are effective civil remedies available under Chapter 452 RSMo in divorce and separate maintenance proceedings, Missouri is the only state that now holds support orders to be for the mere payment of money and within the constitutional prohibition against imprisonment for debt. In most jurisdictions the most effective means of enforcing support orders is through contempt proceedings. However, since 1866 and the case of Coughlin v. Ehlert, 39 Mo. 285 (1866), contempt and imprisonment for failure to comply with an order to pay alimony have been unavailable in Missouri. In the *Coughlin* case the court held that an order to pay alimony was an order for the payment of money only and went on to say: "This was imprisonment for debt only and the commitment was without authority of law." This ruling has been extended to orders to pay child support. Partney v. Partney, 442 S.W.2d 117 (St.L.App.1969). Other states uniformly hold that the duty to support a wife and child is a duty imposed by the marital relation and from which divorce does not exonerate the husband and father. These courts recognize that the purpose of the decree is maintenance and that sound public policy requires that families not be left destitute by irresponsible spouses and parents. Schoenlaub, Use of Contempt Powers in the Enforcement of Alimony and Support Decrees, 23 J.Mo.Bar 396 (1967). In Missouri alimony and child support payments are not regarded as a continuation of the husband's duty of support, but rather as damages to compensate the wife and children for the loss of support. No question concerning the restriction of the use of contempt powers in this area has been squarely presented to the Missouri Supreme Court since *Coughlin, supra.* However, all three courts of appeal have followed the *Coughlin* decision. Ex parte Kingsolving, 135 Mo. App. 631, 116 S.W. 1068 (St.L.App.1909); Harrington v. Harrington, 233 Mo.App. 390, 121 S.W.2d 291 (K.C.App.1938); Davis v. Broughton, 382 S.W.2d 219 (Spr.App.1964).

Given the inadequacy of the present civil enforcement procedures, the importance of the criminal statute becomes apparent. In State v. Davis, 469 S.W.2d 1 (Mo.1971) the court held that a prosecution under a criminal nonsupport statute was not a proceeding to enforce the terms of a divorce decree and was not a proceeding seeking imprisonment for debt. The court noted that the criminal nonsupport statute is predicated on the theory that parents have a legal obligation to provide for their children, and that a failure to do so without good cause is an offense against the state.

Almost all states make it an offense for a father to willfully fail to support his child under the age of sixteen. Some states use the age of eighteen and some the age of majority. This section uses the word "minor" in subsection (1). If the age of majority is later changed by law, this section will not need to be amended.

The Code provides flexible sentencing alternatives for the person convicted of nonsupport. Under Code § 2.010(2)(c) the judge may suspend the imposition of sentence and place the defendant on probation on condition that he pay a certain amount of support. Or he may place the defendant on probation with the condition that he be detained in jail during nonworking hours under Code § 4.040.

It should be noted that the section covers nonsupport of a spouse. The present statute, § 559.353 RSMo, only covers nonsupport of a wife by her husband. There is little justification today for punishing a husband for failing to provide support for a wife but not punishing a wife who fails to provide support for her needy husband. Also, § 559.356 RSMo makes it a felony for a man to leave the state and then fail to support his children, while a woman who does this would only be guilty of a misdemeanor under § 559.353 RSMo. This distinction is eliminated in the Code. However, no attempt is made to change the civil law which makes a woman secondarily liable for the support of the children.

The present language of § 559.353 RSMo, "without good cause", is included in the section. Subsection (2)(c) provides a definition and subsection (3) places the burden of injecting the issue on the defendant. Under present law the state must show not only the husband's failure to provide support, but also his ability to do so. State v. Akers, 287 S.W. 2d 370 (St.L.App.1956) (interpreting § 559.350, repealed in 1965). Inability to provide support which is willful is not a defense. State v. Arnett, 370 S.W.2d 169 (Spr.App.1956) (interpreting § 559.350, repealed in 1965). Under the section inability to support purposely maintained is not a defense. A person who is able to work but refuses to do so would be criminally liable for nonsupport, as under present law.

The present statute, § 559.353 RSMo, covers any man or woman who "abandons or deserts" his child under sixteen. Since the gravamen of the offense is really nonsupport and since Code § 13.030 provides abandonment coverage, this language is not included here.

Subsection (2)(a) defines "support" to include everything now covered by § 559.353 RSMo.

Subsection (2)(b) defines "child" as including an illegitimate or an adopted child.

The Model Penal Code, § 230.5 and the Michigan Revised Criminal Code § 7035 (Final Draft 1967) limit criminal liability for nonsupport to cases of persistent nonsupport. This is intended to reserve the criminal process until civil remedies have been tried. Since contempt is unavailable in Missouri for nonsupport, this limitation is not included in the section.

Subsection (5) makes nonsupport a Class D Felony if the offender leaves the state in order to avoid his support obligation. This facilitates extradition and continues the present law, § 559.356 RSMo, and, in addition, expands it to cover the out-of-state nonsupport of a spouse. It is not absolutely necessary that out-of-state nonsupport be made a felony in order to extradite. There is a provision in the Uniform Reciprocal Enforcement of Support Law, § 454.050 RSMo, which can be used even if nonsupport is a misdemeanor. However, at present, Missouri does not have funds for extradition of nonsupporting fathers, and funds may sooner be made available if the crime is a felony.

13.050 Endangering the welfare of a child

(1) A person commits the crime of endangering the welfare of a child if

(a) he knowingly acts in a manner that creates a substantial risk to the life, body or health of a child less than seventeen years old; or

(b) he knowingly encourages, aids or causes a child less than seventeen years old to engage in any conduct which causes or tends to cause the child to come within the provisions of subsections (1)(c) or (1)(d) or (2) of Section 211.031 RSMo; or

(c) being a parent, guardian or other person legally charged with the care or custody of a child less than seventeen years old, he recklessly fails or refuses to exercise reasonable diligence in the care or control of such child to prevent him from coming within the provisions of subsections (1)(c) or (1)(d) or (2) of Section 211.031 RSMo.

(2) Endangering a child is a Class A Misdemeanor.

Comment

Subsection (1)(a) partially takes the place of § 559.340 RSMo, mistreatment of children. The present section covers some conduct which should not be classified as a felony. Purposely assaulting, beating, wounding or injuring a child whereby "life shall be endangered or . . . person or health shall have been . . . injured" may call for the felony

penalty. However, if a person acts knowingly in a manner that endangers life, body or health of a child, a misdemeanor penalty seems sufficient. Code § 13.060 covers the higher crime of inflicting cruel and inhuman punishment. There is some overlap between this subsection and the assault statutes but the Committee believed it was important to have a special prohibition against endangering the welfare of a child.

Subsection (1)(b) is based on § 559.360 RSMo, contributing to delinquency, and partially replaces that section.

Subsection (1)(c) is new and is based on New York Penal Law § 260.10(2). It makes clear that a parent, guardian or other person legally charged with the care or custody of a child under 17 must exercise reasonable diligence in the care and control of the child to prevent it from becoming a neglected or delinquent child within the meaning of § 211.031(1) or (2) RSMo. Recklessness in failing to carry out these responsibilities is sufficient for criminal liability. "Reasonable diligence" requires conformity to community standards of conduct under the circumstances.

Taken together, subsections (1)(a) through (c) would provide Missouri with a broader general statute for the protection of children than is provided by the present statutes, §§ 559.340 and 559.360 RSMo.

13.060 Abuse of a child

(1) A person commits the crime of abuse of a child if he knowingly inflicts cruel and inhuman punishment upon a child less than seventeen years old.

(2) Abuse of a child is a Class D Felony.

Comment

Based on Kansas Stat.Ann. § 21-3609 (1970) with substantial modification, and § 559.340 RSMo. Lumping all mistreatment of children situations together and treating all persons who mistreat children as felons (*Cf.* § 559.340 RSMo) is not the best way to use the criminal process in the protection of children. Code § 13.050 covers the lesser offense of "endangering welfare" and this section is reserved for the extreme situations calling for greater punishment and for situations not adequately covered by other Code provisions. Some inflictions of cruel and inhuman punishment will also be felonies under the assault provisions. However, there are some situations which could come under this section and not clearly be within the assault provisions. *E. g.*, locking a child in a closet, or starving a child. Under this section, it would not be necessary for the state to prove that the child suffered.

13.070 Unlawful transactions with a child

(1) A person commits the crime of unlawful transactions with a child if

(a) being a pawnbroker, junk dealer, dealer in second-hand goods, or any employee of such person, he with criminal negligence buys or receives any personal property other than agricultural products from an unemancipated minor, unless the child's custodial parent or guardian has consented in writing to the transaction; or

(b) he knowingly permits a minor child to enter or remain in a place where illegal activity in controlled substances, as defined in Chapter 195 RSMo, is maintained or conducted; or

(c) he with criminal negligence sells blasting caps, bulk gunpowder, or explosives to a child under the age of seventeen, or fireworks as defined in Section 320.110 RSMo to a child under the age of fourteen, unless the child's custodial parent or guardian has consented in writing to the transaction. Criminal negligence as to the age of the child is not an element of this crime.

(2) Unlawful transactions with a child is a Class B Misdemeanor.

Comment

Subsection (1)(a) follows the prohibition of § 563.780 RSMo which is apparently designed to prevent children from selling or pawning goods of their parents or of disposing unwisely of their own goods.

Subsection (1)(b) is new and is based on Michigan Revised Criminal Code § 7045(1)(b) and New York Penal Law § 260.20(2).

Subsection (1)(c) is new and is based on Michigan Revised Criminal Code § 7045(1)(f). No child under 17, the age when one normally graduates from high school and enters the labor force, should be permitted to buy explosives without parental consent. However, a child 14 or older should be permitted to buy fireworks, or at least a sale to such a child without parental consent should not be a crime. The term "explosives" is not intended to cover ammunition for firearms.

A related prohibition is found in Code § 16.060(1)(b) which follows § 564.610 RSMo in prohibiting the sale or delivery of deadly weapons to a person under 21 without the written consent of the child's custodial parent or guardian. This could have been included here, but was placed in the

weapons chapter for easy reference by gun dealers and others who furnish weapons.

All unlawful transactions with a child are classified as Class B Misdemeanors.

The Code omits child labor crimes, *e. g.*, directing or authorizing a child to engage in an occupation involving a substantial risk of danger to his health or life, § 260.010 RSMo. The Committee felt that sales of liquor to minors and related offenses should be left in the liquor control law. See §§ 311.310 and 312.400 RSMo. The Code omits prohibitions against selling or supplying cigarettes, cigarette paper or cigarette wrappers to a child under 18, based on § 563.880 RSMo; against permitting a minor to play pool, based on § 318.090 RSMo; against selling or delivering arsenic, a corrosive sublimate, prussic acid or any other poison to a child, based on § 564.190 RSMo. These provisions of present law are seldom enforced.

Chapter 14

ROBBERY, ARSON, BURGLARY AND RELATED OFFENSES

14.010 Chapter definitions

(1) **"Forcibly steals."** A person "forcibly steals", and thereby commits robbery, when, in the course of stealing, as defined in Section 15.030, he uses or threatens the immediate use of physical force upon another person for the purpose of

(a) preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

(b) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

(2) **"Inhabitable structure"** includes a ship, trailer, sleeping car, airplane, or other vehicle or structure

(a) where any person lives or carries on business or other calling; or

(b) where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or

(c) which is used for overnight accommodation of persons.

Any such vehicle or structure is "inhabitable" regardless of whether a person is actually present.

(3) **"Of another."** Property is that "of another" if any natural person, corporation, partnership, association, governmental subdivision or instrumentality, other than the actor, has a possessory or proprietary interest therein.

(4) If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an "inhabitable structure of another".

(5) **"Vital public facility"** includes a facility maintained for use as a bridge (whether over land or water), dam, reservoir, tunnel, communication installation or power station.

(6) **"Utility"** means an enterprise which provides gas, electric, steam, water, sewerage disposal or communication services and any common carrier. It may be either publicly or privately owned or operated.

(7) **"To tamper"** means to interfere with something improperly, to meddle with it, displace it, make unwarranted alterations in its existing condition, or to deprive, temporarily, the owner or possessor of that thing.

(8) **"Enter unlawfully or remain unlawfully."** A person "enters unlawfully or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his purpose, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or by other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.

14.020 Robbery in the first degree

(1) A person commits the crime of robbery in the first degree when he forcibly steals property and in the course thereof he, or another participant in the crime

(a) causes serious physical injury to any person; or

(b) is armed with a deadly weapon; or

(c) uses or threatens the immediate use of a dangerous instrument against any person; or

(d) displays or threatens the use of what appears to be a deadly weapon or dangerous instrument.

(2) Robbery in the first degree is a Class A Felony.

Comment

The definition of "forcibly steals" in Code § 14.010(1) is based on New York Penal Code § 160.00. The idea combines the concept of stealing with the element of force or threat of force used to accomplish the stealing. It was felt that the term "physical force" could not be further defined in such a way as to further a jury's understanding and hence no definition is included. Such physical force must be used to accomplish the theft in one of the ways specified. Note that § 14.010(1)(b) is broad enough to cover the situation where force is applied to one person and property is obtained from another as a result. See comment to Code § 14.030.

The definitions of deadly weapon and dangerous instrument are in the general definitions section of Chapter 1.

This section, robbery in the first degree, is similar to New York Penal Code § 160.15. The purpose is to single out those

situations where the victim is placed in unusually great danger or fear of bodily injury.

14.030 Robbery in the second degree

(1) A person commits the crime of robbery in the second degree when he forcibly steals property.

(2) Robbery in the second degree is a Class B Felony.

Comment

Robbery in the second degree merely proscribes all other forcible thefts which do not amount to first degree robbery. This section is essentially the same as § 160.05 of the New York Penal Code, robbery in the third degree. Both New York and Michigan have three degrees of robbery but it is felt there are not enough aggravating factors of varying degrees to warrant a third degree robbery.

Extortion and blackmail, §§ 560.125 and 560.130 RSMo, are included in the chapter on theft offenses.

Present law requires the state to prove stealing "from the person or presence of another." The Code eliminates that requirement. Use or threatened immediate use of physical force is still required to accomplish the stealing, but it clearly would be robbery for the actor to place a revolver to his victim's head and order him to telephone his wife to instruct her to place valuable property in a designated spot from which the actor later retrieves it. The essence of robbery is the use or threatened immediate use of force to steal property; the fact that the actual transfer of the property takes place out of the presence of the person injured or threatened is immaterial.

Stealing is a lesser included offense of robbery and in most cases stealing from the person will also be a lesser included offense.

14.040 Arson in the first degree

(1) A person commits the crime of arson in the first degree when he knowingly damages a building or inhabitable structure and when any person is then present or in near proximity thereto, by starting a fire or causing an explosion and thereby recklessly places such person in danger of death or serious physical injury.

(2) Arson in the first degree is a Class B Felony.

Comment

See comment after Code § 14.050.

14.050 Arson in the second degree

(1) A person commits the crime of arson in the second degree when he knowingly damages a building or inhabitable structure by starting a fire or causing an explosion.

(2) A person does not commit a crime under this section if

(a) no person other than himself has a possessory, proprietary or security interest in the damaged building, or if other persons have those interests, all of them consented to his conduct; and

(b) his sole purpose was to destroy or damage the building for a lawful and proper purpose.

(3) The defendant shall have the burden of injecting the issue under Subsection (2).

(4) Arson in the second degree is a Class C Felony.

Comment

Arson is presently proscribed by §§ 560.010 through 560.035 RSMo. Section 560.010 RSMo, entitled "Arson" defines the most serious type of arson in Missouri. A careful reading of that section reveals that it follows the traditional, and still valid, philosophy underlying the original common law offense which reflect deep concern for the danger to life presented by the burning of the homestead or one of the adjoining buildings. The Code follows this philosophy. The Code sections are based primarily on the New York Penal Code §§ 150.00 to 150.15 and the Model Penal Code §§ 220.1 to 220.2.

Of course, human life is likely to be endangered by burning structures other than a homestead. This is recognized in § 560.015 RSMo, "Dwelling house defined," and in the Code definition of "inhabitable structures," Code § 14.010(2). See also Proposed Federal Criminal Code § 1709.

But the Code limits coverage to buildings and structures in which people are likely to be found. Under § 560.025 RSMo burning virtually any type of property may constitute arson without regard to whether any people are likely to be endangered. Absent that danger, burning is merely a form of property destruction and has been treated as such in the Code sections entitled "Property Damage".

Even in cases where conduct might endanger persons, current law grades these offenses on the basis of factors which have no criminological significance. For example, a man could receive a 99 year sentence for setting fire to a jail under § 560.010 RSMo whether anyone was endangered or not. But a man who put the torch to a church on Sunday morning when he knew many persons would be worshipping could be

sentenced to no more than ten years because a church is not a "dwelling house" under § 560.015 RSMo.

The Code provides for only two grades of arson. The more severe penalties in Code § 14.040 First Degree Arson are reserved for cases in which the actor recklessly places one or more persons in danger of death or serious bodily injury. This means the State must convince the jury beyond a reasonable doubt that the actor was aware of a substantial and unjustifiable risk to one or more persons. Such advertent risk creation indicates a callous indifference to human life of a sufficiently greater magnitude than that of the ordinary arsonist to warrant the possibility of a greater penalty. The person so endangered must, however, have been present or in near proximity at the time the initial damage was incurred. Without such a limitation, nearly all arson would become aggravated arson because a fire will draw firemen and others who may be endangered as the actor is undoubtedly aware. Ordinary arson, Code § 14.050, takes that endangerment into account. It is the added factor of the actor's willingness to endanger innocent occupants or others nearby, who may be caught unaware, perhaps while sleeping or attending a concert or a play which justifies the added penalty for aggravated arson.

A homicide in the commission of either degree of arson can be murder under Code § 10.020(1)(c).

It should be noted that burning one's own property may be arson under § 560.010 and § 560.020 RSMo. Section 560.010 RSMo, however, restricts coverage to property "of another" if there is no intent to injure other property or to defraud someone. The present classifications are somewhat arbitrary. For example, it is arson to burn manufacturing machinery even if the actor owns the machinery, but it is not arson to burn a railroad car or an automobile if the actor is the owner (and does not intend to injure other property or to defraud).

Under the Code there are two situations in which an actor may be convicted of arson even though the property involved is his own. If the actor recklessly places another in danger of death or serious physical injury, he may be convicted of aggravated arson (Code § 14.040) without regard to who owns the property.

Secondly, an actor may be convicted of arson even though he owns the property or has permission to damage or destroy the property from all those who have ownership or security interests therein, if his purpose in acting is unlawful (Code § 14.050). For example, it is arson to burn one's own building in order to collect the fire insurance because it is unlawful to defraud an insurance company.

Present Missouri law prohibits burning one's own property if done "with the intent to injure or destroy any other property, or with the intent to injure or defraud any person, copartnership or corporation, government, state, county, city, school district or municipality . . ." § 560.025 RSMo. Because burning buildings and inhabitable structures is often dangerous, and because a person will seldom burn his own valuable property unless he has some unlawful purpose, the Code sections define the offense without regard to the ownership of the property, but allow the defendant a defense if his actions were lawful and proper. Under Code § 14.050(2) and (3) the state need not prove ownership or fraudulent intent unless there is some evidence before the court that defendant: 1. either owned the property outright or had secured the permission of all owners and security interest holders to destroy the property; *and* 2. was acting solely for a lawful and proper purpose. If such evidence is before the court, whether introduced by the state or by the defendant, the state must then prove beyond a reasonable doubt the negatives of 1 or 2 above in order to secure a conviction for arson.

The alternative of requiring the state in every case to prove either that someone other than the actor had an interest in the property and had not consented to the actor's conduct, or that the actor's purpose in damaging or destroying his own property was unlawful was considered and rejected. In the first place, there should be no such justification when the actor recklessly endangers one or more persons. Hence Code § 14.040 Aggravated Arson does not provide for such a defense.

Secondly, there is no need to require the state to prove ownership routinely any more than the state should be required to prove that every defendant was sane at the time of the crime. Arson is directed at conduct which poses a serious threat to life. The ownership of the property is a secondary matter which is important only infrequently.

Finally, the actor's purpose only becomes an issue when it appears that the actor is attempting to defraud an insurance company or accomplish some other unlawful end. In other cases where the actor burns his own property without recklessly endangering anyone there would be no reason to prosecute.

14.060 Reckless burning or exploding

(1) A person commits the crime of reckless burning or exploding when he knowingly starts a fire or causes an explosion and thereby recklessly damages or destroys a building or an inhabitable structure of another.

(2) Reckless burning or exploding is a Class A Misdemeanor.

Comment

This is a new offense designed to cover situations in which the actor's purpose is not to damage or destroy but that result nevertheless occurs, and the actor was aware of a substantial and unjustifiable risk that it would occur. See Model Penal Code § 220.1(2); New York Penal Code § 150.05; and Proposed Federal Criminal Code § 1702. For example, starting a brush fire near another person's barn when there is a strong wind blowing toward the barn would be covered by this section.

14.070 Causing catastrophe

(1) A person commits the crime of causing catastrophe if he knowingly causes a catastrophe by explosion, fire, flood, collapse of a building, release of poison, radio active material, bacteria, virus or other dangerous and difficult-to-confine force or substance.

(2) **"Catastrophe"** means death or serious physical injury to ten or more people or substantial damage to five or more buildings or inhabitable structures or substantial damage to a vital public facility which seriously impairs its usefulness or operation.

(3) Causing catastrophe is a Class A Felony.

Comment

This section is also new. See Model Penal Code § 220.2; and Proposed Federal Criminal Code § 1704. It is aimed at conduct which causes great personal injury (though not necessarily death) or great property damage by means which are difficult to confine.

14.080 Tampering in the first degree

(1) A person commits the crime of tampering in the first degree if, for the purpose of causing a substantial interruption or impairment of a service rendered to the public by a utility or by an institution providing health or safety protection, he damages or tampers with property or facilities of such a utility or institution, and thereby causes substantial interruption or impairment of service.

(2) Tampering in the first degree is a Class D Felony.

Comment

The comments to this and the next five sections is after Code § 14.130.

14.090 Tampering in the second degree

(1) A person commits the crime of tampering in the second degree if he

(a) tampers with property of another for the purpose of causing substantial inconvenience to that person or to another; or

(b) unlawfully operates or rides in or upon another's automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle; or

(c) tampers or makes connection with property of a utility.

(2) Tampering in the second degree is a Class A Misdemeanor.

14.100 Property damage in the first degree

(1) A person commits the crime of property damage in the first degree if

(a) he knowingly damages property of another to an extent exceeding five thousand dollars; or

(b) he damages property to an extent exceeding five thousand dollars for the purpose of defrauding an insurer.

(2) Property damage in the first degree is a Class D Felony.

14.110 Property damage in the second degree

(1) A person commits the crime of property damage in the second degree if

(a) he knowingly damages property of another to an extent exceeding five hundred dollars; or

(b) he damages property to an extent exceeding $500 for the purpose of defrauding an insurer.

(2) Property damage in the second degree is a Class A Misdemeanor.

14.120 Property damage in the third degree

(1) A person commits the crime of property damage in the third degree if

(a) he knowingly damages property of another; or

(b) he damages property for the purpose of defrauding an insurer.

(2) Property damage in the third degree is a Class B Misdemeanor.

14.130 Claim of right

(1) A person does not commit an offense by damaging, tampering with, operating, riding in or upon, or making connection with property of another if he does so under a claim of right and has reasonable grounds to believe he has such a right.

(2) The defendant shall have the burden of injecting the issue of claim of right.

Comment

Code §§ 14.080 through 14.130 represent a complete reformulation of various property offenses presently scattered through more than 50 sections of the Revised Statutes of Missouri. There is no reason to have so many separate sections. Basically, there are only two types of conduct which need to be dealt with. Tampering is defined in Code § 14.010(7). It refers to conduct which interferes with property or with the use of it. The other type of conduct is that which damages property. The approach used here is based on the Proposed Michigan Criminal Code §§ 2711 and 2712.

A felony penalty is provided for tampering in the first degree, Code § 14.080, because the conduct proscribed presents a serious danger to the community. The actor's purpose must be to disrupt an important community service, and he must have been successful.

Tampering in the second degree, Code § 14.090, covers a much wider range of less serious conduct. Tampering, as defined, is a fairly broad concept meant to cover unlawful interference with property. Under Code § 14.090(1)(a) such tampering must be combined with a purpose to cause substantial inconvenience. Thus, borrowing a neighbor's lawn mower for an hour with no purpose to cause inconvenience would not be an offense under this section, but hiding the same mower for several days might support an inference of a purpose to cause substantial inconvenience. "Substantial" has not been defined, nor could it be in any manner that would be useful.

Code § 14.090(1)(b) is a replacement for present §§ 560.175 and 560.180, tampering with motor vehicles. Felony penalties are no longer provided for joy riding.

Code § 14.090(1)(c) is self-explanatory. Tapping into telephone or power lines is prohibited. Such offenses could be quite serious, but this provision is directed toward the less serious conduct typified by the mischievous youth. Wiretapping and theft penalties, among others, are available for more serious conduct.

Code §§ 14.100 through 14.120 prohibit the knowing damage or destruction of property of another or of one's own

property if there is also a purpose to defraud an insurer. Penalties are graded on the basis of the amount of damage done, not on the basis of the value of the property.

Code § 14.130 applies to tampering, damaging, etc. property of another under Code §§ 14.080 through 14.120, and provides that no crime is committed if the defendant acted under a claim of right for which there is a reasonable basis. This section does not apply to destroying one's own property for the purpose of defrauding an insurer.

14.140 Trespass in the first degree

(1) A person commits the crime of trespass in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure or upon real property.

(2) A person does not commit the crime of trespass in the first degree by entering or remaining upon real property unless the real property is fenced or otherwise enclosed in a manner designed to exclude intruders or as to which notice against trespass is given by

(a) actual communication to the actor; or

(b) posting in a manner reasonably likely to come to the attention of intruders.

(3) Trespass in the first degree is a Class B Misdemeanor.

Comment

See comments after Code § 14.150.

14.150 Trespass in the second degree

(1) A person commits the offense of trespass in the second degree if he enters unlawfully upon real property of another. This is an offense of absolute liability.

(2) Trespass in the second degree is an infraction.

Comment

Trespass is presently covered by §§ 560.445 through 560.465 RSMo. If a person enters or remains on the real property of another without license or privilege he is guilty of trespass in the second degree under Code § 14.150. The state need not show that the defendant was aware or should have been aware that the real property was of another or that the defendant was aware of such facts as would constitute lack of license or privilege to be there. In other words the state need not prove the defendant was culpable. This is an offense of absolute

liability. It is not a crime, but is an infraction and the only penalty is a fine. Although absolute liability is not in general sanctioned in the Code, it is included here because the Committee felt that a person travels at his own risk when entering real property. It is directed at persons who do not bother to determine whether they are hunting, fishing, mushroom gathering, etc. on the property of another. The Committee felt that no prosecutor would charge totally innocuous intrusions.

Trespass in the first degree, Code § 14.140, is a more serious offense and requires the state to prove that the defendant acted knowingly. The defendant must know he is entering unlawfully or remaining unlawfully. This does not mean that he must be aware the offense of trespass exists but that the state must prove he was aware of the facts that make his entry or remaining unlawful. For example, if the defendant honestly believed he was still on property where he was authorized to be, but in fact was not; or that he had permission of the owner to enter, but in fact he did not, he would not be guilty of trespass in the first degree.

Under subsection (2) if the property is something other than a building or inhabitable structure, the state must also prove that the property was fenced in a manner designed to exclude intruders or that notice against trespass was given; or that the defendant was given notice against trespass either personally or constructively via posting in a reasonable manner. For this, the state would not have to prove that the defendant knew the property was posted, but only that he should have known. *Cf.* New York Penal Code §§ 140.05 to 140.15 and Modern Penal Code § 221.2.

14.160 Burglary in the first degree

(1) A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime

(a) is armed with explosives or a deadly weapon; or

(b) causes or threatens immediate physical injury to any person who is not a participant in the crime.

(2) Burglary in the first degree is a Class B Felony.

Comment

See comments after Code § 14.170.

14.170 Burglary in the second degree

(1) A person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

(2) Burglary in the second degree is a Class C Felony.

Comment

Burglary is presently covered in §§ 560.040 through 560.110 RSMo. The Code sections on burglary (and trespass) are based primarily on the New York Penal Code and the Model Penal Code.

The essence of burglary has traditionally been an unauthorized intrusion plus a purpose to commit some type of crime. A perusal of the present Missouri burglary statutes reveals that they are designed to protect persons as well as property and that there is a marked inchoate offense element because the crime intended need not have been completed.

Each section of the present law defining some degree of burglary is dependent upon some act of "breaking and entering" or at least "breaking". What constitutes a "breaking" has undergone considerable change over the years. Merely opening a closed window or door can be a sufficient "breaking". See State v. O'Brien, 249 S.W.2d 433 (Mo.1952) and State v. Sullivan, 452 S.W.2d 802 (Mo.1970). In O'Brien the court found persuasive evidence of a "breaking" in that the door in question had a spring closing mechanism. Without that the conviction might have been overturned because the door might have been partially open when the defendant entered.

In view of the foregoing and of the fact that "breaking" may be "out" as well as "in", the Committee decided to replace the concept of "breaking" with that of "entering or remaining unlawfully". Code § 14.010(8) defines this concept in terms of "license or privilege". Ordinarily a person is not licensed or privileged to be on or in property he does not own or possess unless the property is open to the public. Even if the premises are partially open to the public, a person is not licensed or privileged to be in any portion not open to the public or to remain in any portion after it has been closed to the public. *Cf.* New York Penal Code § 140.00(5).

Burglary in the second degree employs the same concepts discussed above in relation to trespass, but in addition requires the state to prove that the intruder acted with the purpose of committing a crime. *Cf.* New York Penal Code § 140.20. A crime is a felony or a misdemeanor. This is a change from present burglary law which generally requires

the intent to commit a felony or to steal. The intent to commit a misdemeanor other than stealing is not presently sufficient unless explosives are involved. The Committee felt there was no reason to single out stealing from other misdemeanors and therefore eliminated the distinction.

Burglary in the first degree is burglary plus one of two aggravating factors: 1) being armed with explosives or a deadly weapon; or 2) causing or threatening immediate physical injury to someone not a participant in the crime. *Cf* New York Penal Code § 140.25. Being armed does not require that the explosives or deadly weapon be displayed or used, but merely that the actor have one of them on or about his person. "Deadly weapon" is defined in the general definitions section of Chapter 1.

The conduct specified in Code § 14.160(1)(a) or (b) must occur while effecting entry, while inside, or during immediate flight in order to be sufficient for burglary in the first degree. The section makes it clear that immediate flight is part of the crime for these purposes.

14.180 Possession of burglar's tools

(1) A person commits the crime of possession of burglar's tools if he possesses any tool, instrument or other article adapted, designed or commonly used for committing or facilitating offenses involving forcible entry into premises, with a purpose to use or knowledge that some person has the purpose of using the same in the commission of an offense of such character.

(2) Possession of burglar's tools is a Class A Misdemeanor.

Comment

Possession of burglar's tools has been reduced to a Class A Misdemeanor. The section replaces § 560.115 RSMo and is based on New York Penal Code § 140.35. The section makes clear that purpose to use the tools for an unlawful entry or knowledge that someone else will so use them is required for guilt. This should require considerably more than simply evidence of prior arrests or reputation.

Chapter 15

STEALING AND RELATED OFFENSES

15.010 Chapter definitions

(1) **"Adulterated"** and **"Mislabeled"**

(a) **"Adulterated"** means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulations of this State lawfully filed, or if none, as set by commercial usage.

(b) **"Mislabeled"** means varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulations of this State lawfully filed, or if none, as set by commercial usage; or represented as being another person's product, though otherwise accurately labeled as to quality and quantity.

(2) **"Appropriate"** means to take, obtain, use, transfer, conceal or retain possession of.

(3) **"Coercion"**

(a) **"Coercion"** means a threat, however communicated

(i) to commit any crime; or

(ii) to inflict physical injury in the future on the person threatened or another; or

(iii) to accuse any person of any crime; or

(iv) to expose any person to hatred, contempt or ridicule; or

(v) to harm the credit or business repute of any person; or

(vi) to take or withhold action as a public servant, or to cause a public servant to take or withhold action; or

(vii) to inflict any other harm which would not benefit the actor.

(b) A threat of accusation, lawsuit or other invocation of official action is not coercion if the property sought to be obtained by virtue of such threat was honestly claimed as restitution or indemnification for harm done in the circumstances to which the accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful service.

(c) The defendant shall have the burden of injecting the issue of justification as to any threat under Subsection (3) (b).

(4) **"Credit device"** means a writing, number or other device purporting to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.

(5) **"Dealer"** means a person in the business of buying and selling goods.

(6) **"Deceit"** means purposely making a representation which is false and which the actor does not believe to be true and upon which the victim relies, as to a matter of fact, law, value, intention or other state of mind. The term "deceit" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed. Deception as to the actor's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise.

(7) **"Deprive"** means

(a) to withhold property from the owner permanently; or

(b) to restore property only upon payment of reward or other compensation; or

(c) to use or dispose of property in a manner that makes recovery of the property by the owner unlikely.

(8) **"Of another".** Property or services is that "of another" if any natural person, corporation, partnership, association, governmental subdivision or instrumentality, other than the actor, has a possessory or proprietary interest therein, except that property shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security arrangement.

(9) **"Property"** means anything of value whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument.

(10) **"Receiving"** means acquiring possession, control or title or lending on the security of the property.

(11) **"Services"** include transportation, telephone, electricity, gas, water or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions and use of vehicles.

(12) **"Writing"** includes printing, any other method of recording information, money, coins, negotiable instruments, tokens, stamps, seals, credit cards, badges, trademarks and any other symbols of value, right, privilege or identification.

Comment

(1) "Adulterated". By including this definition, which is similar to Model Penal Code § 224.7 and Proposed Montana Code § 94–6–309(2), a general criminal provision can be used to prohibit selling products which are not up to the necessary standard of composition. Such standard may be provided by statute or regulation of this state, and such regulations must be lawfully filed. Note that federal law is not incorporated by reference by this definition. Sometimes federal regulations are inconsistent with state regulations, and incorporation of federal regulations by reference might limit the power of Missouri administrative agencies. However, the state administrative agencies could incorporate federal regulations by reference if they choose, and this is not prohibited by this definition.

"Mislabeled" is similar to Model Penal Code § 224.7 and Proposed Montana Code § 94–6–309(3). Mislabeling is a problem closely related to adulterating. Statute, regulation and commercial usage control the standards, in that order of precedence. It also covers changing brand names. The comments to "adulterated" are generally applicable here.

(2) "Appropriate". The definition is new but it is based on the definition of exercising dominion in § 560.156 RSMo. No purpose is served by using both "appropriate" and "exercise dominion".

(3) "Coercion". This definition is new and is based on the Proposed Texas Penal Code § 31.01(1) and the Model Penal Code § 223.4 (Theft by Extortion). The definition is meant to codify and clarify related concepts used in defining blackmail-extortion type offenses. The gravamen of the concept is a communicated threat of harm. The definition lists the common types of threats which constitute coercion. In addition, a generalized principle is stated in (a)(vii) to cover the less common but inevitable cases. Some examples of situations which might occur and not be covered in the other subsections are: (a) the foreman of a plant requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination; (b) a professor obtains property from a student by threatening to give him a failing grade.

The defense of justification provided in (b) is meant to protect those who threaten to invoke legal action in order to obtain what they honestly believe to be due them.

(4) "Credit device". Missouri statutes do not now define this term as such. § 561.415 RSMo refers to credit device frauds but it is a verbose and difficult to understand provision. By adopting essentially the Model Penal Code § 224.6 definition a much simpler approach is possible. It should be clear from this definition that any device evidencing an undertaking to pay for property or services is a credit device. Obviously, this includes such things as a Master Charge or American Express card. It would also include a letter of credit from a bank or an electronic key used to obtain cash from a machine installed to provide such service.

(5) "Dealer". This definition is new and is taken from Model Penal Code § 223.6(2). The definition is necessary because a felony penalty is provided for a dealer who is convicted of receiving stolen property. The definition is aimed at the professional "fence" as well as merchants. Both of these types of dealers may have a ready market for stolen goods and therefore constitute a greater incentive for the thief than the ordinary citizen.

(6) "Deceit". Currently, Missouri statutes do not define deceit. Most of the new codes do define it, but often the definition is verbose and complicated. The Code definition is more straightforward. It makes it clear that the actor must *purposely* make a representation which is false, which he does not believe is true and upon which the victim relies. Such a representation may relate to a matter of fact, law, value, intention or other state of mind. This is an extension of current law which still clings to the hazy distinction between present fact and future intention. Intention is a present fact, as Justice Holmes realized when he compared a man's state of mind to the state of his digestion. Moreover, the common law traditionally recognized a misrepresentation of intention as sufficient for a conviction for larceny by trick. It was only when the label was "obtaining property by false pretenses" that a misrepresentation of intention would not support a conviction. The Code eliminates the distinction. What little reason existed for it has been covered by the limitation that deception as to the actor's intention is not to be inferred from the fact alone that he did not subsequently perform the promise. If this were not so, persons borrowing money and thereafter suffering financial reverses and failing to meet their obligations to repay might possibly be convicted without more; the fact of nonperformance being used to infer an intention not to perform at the time the loan was obtained. Obviously, such a result would be unjust. If, however, there were evidence that the borrower had sold out his business and made flight reservations to Brazil contemporaneously with obtaining the loan, a jury might find the requisite deceit as to his intent to repay. It should be noted that deceit requires

purpose. Recklessness is not enough. Thus, a borrower who knows there is a substantial risk, or even a high likelihood he will not be able to repay is not guilty by that alone. It must be his purpose not to perform his promise in order for there to be deceit from the making of the promise.

A second limitation relates to puffing. Many salesmen exaggerate the qualities of their product and make claims which could be construed as misrepresentations. So long as these are made in a way that ordinary persons would not be deceived, they are expected as part of the commercial world and are understood to be taken with a grain of salt. It is doubtful that the criminal law could reform such salesmen, and more important, the criminal law cannot protect someone who is seemingly set on being misled. The distinction between acceptable and non-acceptable conduct has been drawn in terms of what is likely to deceive ordinary persons in the group addressed. Thus, the jury is asked to draw on its everyday experience to decide whether the misrepresentation involved exceeds acceptable limits.

(7) "Deprive". This definition is new and is based on the Proposed Texas Penal Code § 31.01(3). It is a most important definition as it is the concept which replaces the "intent to steal" which was an element of larceny at common law and which has been found to be an element of stealing under § 560.156 RSMo. See State v. Commenos, 461 S.W.2d 9 (Mo. 1970).

In essence, the definition is a codification of the case law which has developed over the years relating to the intent to steal. The problem is drawing a line between that intent or purpose which should support a conviction of stealing and that which is less culpable. It is clear that a purpose to convert another's property to one's own use permanently is sufficient. It is equally clear that a purpose to borrow for a brief period is not sufficient. Case law indicates that a purpose to retain property on the condition of payment of reward or other compensation is sufficient, as is a purpose to use or dispose of the property in a manner that will expose it to a substantial risk of loss or destruction.

(8) "Of another". The definition is new. *Cf.* Code § 14.-010(3) and Model Penal Code § 223.0(7). The thrust of the provision is to treat as property of another any property in which someone other than the actor has a proprietary or possessory interest, but to exclude mere security interests from such proprietary or possessory interests. Since this concept is used to determine what property is capable of being stolen, it is apparent that one who appropriates property which is his own except for the security interest of another cannot be guilty

of stealing. Such conduct is dealt with under Defrauding Secured Creditors.

(9) "Property". This definition remains essentially as it appears in § 560.156 RSMo except that reference to §§ 556.080, 556.070 and 556.090 has been deleted. It is felt that these definitions add nothing to the definition as it presently exists and that the Code section is worded broadly enough to encompass those types of property named in the mentioned sections.

(10) "Receiving". This definition is new and is taken from Model Penal Code § 223.6(1). It includes not only acquiring possession, title or control, but also lending on the security of the property as in the case of a pawnbroker.

(11) "Services". There is no similar provision in the present law. The Model Penal Code § 223.7 (Theft of Services) and the Proposed Texas Penal Code § 31.01(8) are the basis for the formulation, but labor and professional services have been intentionally omitted because it was felt that including them might result in the local prosecutor becoming a collection agent.

Prior to the 1955 revision of Missouri theft offenses, such things as misappropriating electricity or gas were included by specific provisions. See §§ 560.290 and 560.295 RSMo 1949. By combining current statute law with case law, similar results could probably be attained since the 1955 revision has been interpreted not as changing, but as consolidating previous law. State v. Zammar, 305 S.W.2d 441 (Mo.1957). By including a definition of services the Code comes closer to the ideal of defining crimes clearly and concisely.

(12) "Writing". This section was taken from § 224.1 of the Model Penal Code and will replace the general characteristics of a writing outlined in § 561.011(1) and (2) RSMo. This definition does not work a change in the theory of the present Missouri law. It merely makes more specific and clear those items to be considered writings.

15.020 Determination of value

For the purposes of this Chapter, the value of property shall be ascertained as follows:

(1) Except as otherwise specified in this Section, value means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime.

(2) Whether or not they have been issued or delivered, certain written instruments, not including those having a readily as-

certainable market value such as some public and corporate bonds and securities, shall be evaluated as follows:

(a) The value of an instrument constituting evidence of debt, such as a check, draft or promissory note, shall be deemed the amount due or collectable thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

(b) The value of any other instrument which creates, releases, discharges or otherwise affects any valuable legal right, privilege or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(3) When the value of property cannot be satisfactorily ascertained pursuant to the standards set forth in Subsections (1) and (2) of this Section, its value shall be deemed to be an amount less than one hundred fifty dollars.

Comment

This section is based on New York Penal Law § 155.20. Current Missouri law has no comparable provision. Problems of valuation in the area of theft offenses are continuing and vexing. This section sets out reasonably clear standards for ascertaining value. Generally, fair market value at the time and place of the crime is the standard. If fair market value cannot be satisfactorily determined, replacement cost within a reasonable period after the offense is to be used.

Special rules are set out for valuing written instruments which do not have a readily ascertainable market value. If the instrument evidences a debt, its value is deemed to be the amount due or collectable on it. The value of instruments which are not readily marketable and which do not evidence debt is determined by the amount of economic loss the owner might reasonably suffer by virtue of the loss of the instrument.

If value cannot be satisfactorily ascertained by the use of any of the enumerated standards, the value is deemed to be less than $150.00 which is the amount used to distinguish between the two degrees of stealing.

15.030 Stealing

(1) A person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him thereof, either without his consent or by means of deceit or coercion.

(2) Stealing is a Class C Felony if

(a) the value of the property or services appropriated is one hundred fifty dollars or more; or

(b) the actor physically takes the property appropriated from the person of the victim; or

(c) the property appropriated consists of

(i) any motor vehicle, water craft or aircraft; or

(ii) any will or unrecorded deed affecting real property; or

(iii) any credit card or letter of credit; or

(iv) any firearm; or

(v) any original copy of an act, bill or resolution, introduced or acted upon by the legislature of the State of Missouri; or

(vi) any pleading, notice, judgment or any other record or entry of any court of this State, any other state or of the United States; or

(vii) any book of registration or list of voters required by Chapter 116 RSMo; or

(viii) any narcotic drugs as defined by Section 195.-010 RSMo;

otherwise, stealing is a Class A Misdemeanor.

Comment

In 1955, the legislature extensively revised theft law in Missouri, with the enactment of §§ 560.156 and 560.161. While this did much to improve the law of theft (if nothing else, it eliminated a multitude of overlapping statutes), the case law interpreting these new sections indicates there is still a good deal of confusion.

The first case to interpret the 1955 revision was State v. Zammar, 305 S.W.2d 441 (Mo.1957). The court stated that the purpose of the revision was to eliminate the technical distinctions among the offenses of larceny, embezzlement and obtaining property under false pretenses. This was, of course, one of the purposes of the revision but it was not necessarily the only one. In any event, State v. Zammar has become the leading case on the issue of what the legislature intended to accomplish by the revision. The subsequent cases indicate there is still a good deal of confusion as to the law of theft. These cases fall uneasily into two categories: (1) what must be alleged in an information or indictment and (2) what proof is required for conviction.

After State v. Zammar, one would think there would no longer be much difficulty in drafting an information or indictment because of the elimination of the common law "technical distinctions." Such was not the case. Although not entirely clear, the language of State v. Mace, 357 S.W.2d 923 (Mo. 1962), State v. Fenner, 358 S.W.2d 867 (Mo.1962) and State v. Miles, 412 S.W.2d 473 (Mo.1967) comes close to requiring that a common law label, such as "larceny" or "embezzlement", be included in the information or indictment.

Of course, a defendant is entitled to know with what offense he is charged. Under the Code provision, a defendant may be charged with stealing without consent or stealing by deceit or stealing by coercion. No other labels are necessary or desirable. The common law theft offenses no longer exist in Missouri. The Code re-defines the theft offenses. These offenses may encompass conduct covered by the old common law offenses, but the elements of the Code offenses are the only relevant elements.

This is not to say that if an information or indictment specifies one of the forms of stealing under the Code, the defendant is entitled to no more. He is entitled (either in the information or indictment or in a bill of particulars) to such specificity in terms of alleged facts as to enable him to prepare his defense and to avail himself of his conviction or acquittal for protection against a further prosecution for the same cause. In addition, sufficient facts must be alleged so that the court may decide whether they are sufficient in law to support a conviction. State v. Mace, 357 S.W.2d 923 (Mo. 1962). But the allegations need only be sufficient to allege a form of stealing under the Code provision, and need not relate to a common law form of stealing.

As to the proof required for conviction, it is hornbook law that the State must prove each element of the offense beyond a reasonable doubt. The problem, of course, is determining what those elements are. The old theft offenses each had specific elements. When these were eliminated in the 1955 revision, one might have thought that the elements of the theft offenses would be found exclusively in the new statute. However, the court, in State v. Zammar, viewed the revision as basically only an effort to avoid the problems arising from the technical distinctions among the old theft offenses, and the court seems to have taken the view that the elements of the theft offenses are determined, at least in part, by reference to the former theft offenses. See State v. Miles, 412 S.W.2d 472 (Mo.1967) indicating that the State must prove a taking and carrying away even though the statute refers only to taking, and State v. Commenos, 461 S.W.2d 9 (Mo.1970), indicating that the "intent to steal" as in the offense of larceny was still required.

Because of these problems, the Code provides for a new stealing statute, which more clearly lists the elements of the offense.

Under the Code, the following are the essential elements:

1. There must be an *appropriation*
2. of *property* or *services*
3. *of another*
4. with the *purpose to deprive* the other thereof
5. accomplished
   a. *without* the owner's *consent*, or
   b. *by means of deceit*, or
   c. *by means of coercion*.

These are the only essential elements under the proposed statute, and are defined by statute. See definitions in Code § 15.010.

Under the Code, stealing without consent includes, but is not necessarily limited to, conduct which would have constituted larceny, larceny by bailee and embezzlement under prior law. Stealing by deceit includes, but is not necessarily limited to conduct which would have constituted larceny by trick and false pretenses. Stealing by coercion includes, but is not necessarily limited to, conduct which would have constituted extortion and blackmail. The important thing is that the elements of the crime of stealing are to be determined by reference to the statute, not to the former definitions of the various theft offenses.

The penalty provision is similar to that presently in force, with some changes. The first change is that the value distinction between felony and misdemeanor stealing is raised from $50.00 to $150.00. Under present day conditions this is a more appropriate figure. The other new codes have made similar upward revisions.

Section 560.161(2) RSMo lists a number of types of property the stealing of which is a felony without regard to the monetary value of the property. Subsection (2)(c) retains most of that listing.

Subsection (2)(b) is based on § 560.161(2)(1) RSMo which made it a felony to steal if the property stolen was "taken from a dwelling house or a person." With the enlargement of the crime of burglary, see Code § 14.170 and comments, there is no need for a special offense of stealing by taking from a dwelling. The taking from the person, however, is retained, as this will not, in all cases, be robbery. Stealing, and this form of stealing, can be lesser included offenses of robbery.

15.040 Stealing, fourth offense

(1) Every person who has been previously convicted of stealing three times, and who is subsequently convicted of stealing is guilty of a Class C Felony and shall be punished accordingly.

(2) Evidence of prior convictions shall be heard by the court, out of the hearing of the jury, prior to the submission of the case to the jury, and the court shall determine the existence of the prior convictions.

Comment

This corresponds to § 560.161(3). It provides for a felony penalty for the fourth offense of stealing, whether or not that offense would otherwise be a felony.

15.050 Aggregation of amounts involved in stealing

Amounts stolen pursuant to one scheme or course of conduct, whether from the same or several owners and whether at the same or different times, constitute a single criminal episode and may be aggregated in determining the grade of the offense.

Comment

The grading of theft offenses is primarily based on the value of the property stolen. If more than one item is stolen as part of a single scheme or course of conduct, it should be possible to impose felony penalties if the total value is $150.00 or more. But by the same token penalties should not be combined by artificially breaking up a single course of conduct into separate offenses.

15.060 Lost property

(1) A person who appropriates lost property shall not be deemed to have stolen said property within the meaning of Section 15.030 unless such property is found under circumstances which gave the finder knowledge of or means of inquiry as to the true owner.

(2) The defendant shall have the burden of injecting the issue of lost property.

Comment

This section corresponds to § 560.156(4) RSMo. Since it reflects the common law rule on the subject as well as good policy, it was retained.

15.070 Claim of right

(1) A person does not commit an offense under Section 15.030 if, at the time of the appropriation, he

(a) acted in the honest belief that he had the right to do so; or

(b) acted in the honest belief that the owner, if present, would have consented to the appropriation.

(2) The defendant shall have the burden of injecting the issue of claim of right.

Comment

This section is based on § 31.10 of Proposed Texas Penal Code and § 206.10, Model Penal Code. The object of the theft offense is to deter those who would acquire something of value knowing they have no right to it. "Persons who take only what they believe themselves entitled to constitute no significant threat to our property system and manifest no character trait worse than ignorance." Model Penal Code comment, Tent.Draft No. 2 at 98 (1954).

15.080 Receiving stolen property

(1) A person commits the crime of receiving stolen property if for the purpose of depriving the owner of a lawful interest therein, he receives, retains or disposes of property of another knowing that it has been stolen, or believing that it has probably been stolen.

(2) Evidence of the following is admissible in any criminal prosecution under this Section to prove the requisite knowledge or belief of the alleged receiver:

(a) That he was found in possession or control of property stolen on separate occasions from two or more persons.

(b) That he received stolen property in another transaction within the year preceding the transaction charged.

(c) That he acquired the stolen property for a consideration which he knew was far below its reasonable value.

(3) Receiving stolen property is a Class A Misdemeanor unless the property involved has a value of one hundred fifty dollars or more, or the person receiving the property is a dealer in goods of the type in question, in which cases receiving stolen property is a Class C Felony.

Comment

This section replaces § 560.270 RSMo. Controlling the "fencing" of stolen property is a serious and difficult problem. Many believe that reducing the market for stolen goods is an effective deterrent to theft. Convictions for receiving stolen goods are difficult to obtain under present law which requires the state to prove both that the defendant had the intent to defraud and the knowledge that the property was stolen. The Code changes these requirements slightly. The intent to defraud is replaced by a phrase which is the definition of the intent to defraud: the purpose to deprive the owner of a lawful interest in his property. See State v. Ciarelli, 366 S.W.2d 63 (K.C.App.1963).

The state can make its case by proving that the defendant knew the property had been stolen or believed it probably had been stolen. The second is a lesser burden, but is justified because it corresponds more closely to reality. The fence "knows" the property was stolen in the sense that he has good reason to believe it was stolen. By putting the standard in terms of belief as well as knowledge, the section avoids the problem of a juror putting too restrictive a meaning to "know".

Prosecutors have faced major problems in proving the offense, no matter what the standard is. As an aid, some jurisdictions and the Model Penal Code, § 223.6(2) have resorted to presumptions. Such, however, raise serious constitutional problems, and the Committee, in general, is not in favor of using statutory presumptions in criminal cases. Nevertheless, it seems appropriate to set out rules of evidence relating to proving the mental state in this crime. Hence, subsection (2) makes it clear that evidence that the person charged has been found in possession of stolen property (stolen from more than one person and on separate occasions); that he received stolen property in another transaction during the preceding year; or that he received the stolen property in question for a consideration which he knew was far below its reasonable value, is admissible on the issue of his knowledge or belief.

The grading of the offense is similar to that of stealing except that the dealer in goods of the type involved, may be sentenced as for a Class C Felony without regard to the value of the goods. This special penalty is provided because dealers present a special problem by virtue of the fact they presumably have a regular clientele and perhaps a legitimate business to facilitate their illegal trade.

15.090 Forgery

(1) A person commits the crime of forgery if, with the purpose to defraud, he

(a) makes, completes, alters or authenticates any writing so that it purports to have been made by another or at another time or place or in a numbered sequence other than was in fact the case or with different terms or by authority of one who did not give such authority; or

(b) erases, obliterates or destroys any writings; or

(c) makes or alters anything other than a writing, so that it purports to have a genuineness, antiquity, rarity, ownership or authorship which it does not possess; or

(d) uses as genuine, or possesses for the purpose of using as genuine, or transfers with the knowledge or belief that it will be used as genuine, any writing or other thing which the actor knows has been made or altered in the manner described in Subsections (1)(a), (b) or (c).

(2) Forgery is a Class C Felony.

Comment

This section is essentially similar to § 561.011(1), (2), (3) and (4) RSMo with some changes in form. The present section was adopted in 1955 and covers forgery of documents having legal or commercial significance. Included within this definition would be the forging of false coins and slugs. It also covers a thing other than a writing when it is made or altered so as to appear to have some valuable attribute which it does not in fact have.

The Committee felt that the coverage of the present statute did not require much alteration. The language, although perhaps not as simple as it could be, has the advantage of being familiar and therefore was not substantially changed.

15.100 Possession of a forging instrumentality

(1) A person commits the crime of possession of a forging instrumentality if, with the purpose of committing forgery, he makes, causes to be made or possesses any plate, mold, instrument or device for making or altering any writing or anything other than a writing.

(2) Possession of a forging instrumentality is a Class C Felony.

Comment

This section is based on § 561.011(4), (5) and (6) RSMo, and prohibits making or possessing instrumentalities that can be used for forgery, if there is an accompanying purpose to use them to commit forgery. It is felt that the language "with the purpose of committing forgery" is more appropriate than "with the purpose to defraud" in the present law.

15.110 Issuing a false instrument or certificate

(1) A person commits the crime of issuing a false instrument or certificate when, being authorized by law to take proof or acknowledgment of any instrument which by law may be recorded, or being authorized by law to make or issue official certificates or other official written instruments, he issues such an instrument or certificate, or makes the same with the purpose that it be issued, knowing

(a) that it contains a false statement or false information; or

(b) that it is wholly or partly blank.

(2) Issuing a false instrument or certificate is a Class A Misdemeanor.

Comment

This section is based on New York Revised Penal Code § 175.40 and §§ 561.060 (False Acknowledgment of a Deed) and 561.220 (Affixing False Jurat). It covers any instrument which, under law, is recordable. It also covers the issuing of any official certificates or other written instruments, e. g. jurats, affidavits, statements. The section covers attesting to false statements or false information, as well as the issuing of instruments which are wholly or partly blank.

The section is intended to cover all of the conduct currently proscribed under §§ 561.060 and 561.220. It has the advantage of being much shorter and easier to understand. The mental state required is "knowingly" and the crime has been made a Class A Misdemeanor.

15.120 Passing bad checks

(1) A person commits the crime of passing a bad check when, with purpose to defraud, he issues or passes a check or other similar sight order for the payment of money, knowing that it will not be paid by the drawee, or that there is no such drawee.

(2) If the issuer had no account with the drawee or if there was no such drawee at the time the check or order was issued, this fact shall be prima facie evidence of his purpose to defraud and of his knowledge that the check or order would not be paid.

(3) If the issuer has an account with the drawee, failure to pay the check or order within ten days after notice in writing that it has not been honored because of insufficient funds or credit with the drawee is prima facie evidence of his purpose to defraud and of his knowledge that the check or order would not be paid.

(4) Notice in writing means notice deposited as first class mail in the United States Mail and addressed to the issuer at his address as it appears on the dishonored check or to his last known address.

(5) The face amounts of any bad checks passed pursuant to one course of conduct within any ten day period, may be aggregated in determining the grade of the offense.

(6) Passing bad checks is a Class A Misdemeanor, unless the face amount of the check or sight order or the aggregated amounts is one hundred fifty dollars or more, in which case passing bad checks is a Class D Felony.

Comment

This section is based on §§ 561.450, 561.460 and 561.470 RSMo. They have been revised to facilitate the prosecuting attorney's job.

Subsection (1) replaces § 561.460, and requires a person to act "with purpose to defraud" and "knowing" that the check "will not be paid by the drawee". The terms "check" and "pass" have not been defined because they are sufficiently familiar concepts. The section is intended to cover checks written with no funds, insufficient funds, no account and no bank.

Subsections (2) and (3) make it clear that the state fulfills its initial burden of proving purpose to defraud and knowledge that the check will not be honored, if it shows either that the issuer had no account with the drawee, or there was no drawee or that the check was not paid within ten days after notice of dishonor. If a person has no account at a given bank, the inference is strong that he knew that a check drawn on such bank by him would be dishonored and that he had a purpose to defraud by drawing such check. If a person is shown not to have had sufficient funds on deposit at the time a check is written, there is an inference that he knew that fact simply because it was his account.

Under subsection (3), the state need not wait to prosecute until after the ten day period has elapsed. What subsection (3) means is simply that the prima facie evidence provisions are not available in the case of a defendant who has an account with the drawee until this time period has gone by. This approach is followed by the Michigan Revised Criminal Code § 4040 (Final Draft 1967).

Subsection (4) is intended to clarify the notice provision. All that is meant by this subsection is that certain steps must be taken in order to notify the issuer of the dishonor of his check, and this includes notice in writing as defined.

Subsection (5) is intended to cover the "check writing spree" cases. Bad check artists may write a series of small checks over a short period of time and then leave town. If the checks are kept under $150 each, there would be only a series of misdemeanors without this subsection. This permits aggregation of the amounts of checks within a ten day period.

Subsection (6) provides the penalties for passing bad checks. Its provisions are substantially similar to existing Missouri law.

15.130 Fraudulent use of a credit device

(1) A person commits the crime of fraudulent use of a credit device if he uses a credit device for the purpose of obtaining services or property, knowing that

(a) the device is stolen, fictitious or forged; or

(b) the device has been revoked or cancelled; or

(c) for any other reason his use of the device is unauthorized.

(2) Fraudulent use of a credit device is a Class A Misdemeanor unless the value of the property or services obtained or sought to be obtained within any thirty day period is one hundred fifty dollars or more, in which case fraudulent use of a credit device is a Class D Felony.

Comment

This section replaces § 561.415 RSMo and is based on Model Penal Code § 224.6, proposed New Jersey Code § 2C:21–6 and proposed Montana Code § 94–6–508. The definition of "credit device" is in Code § 15.010(4) and covers not only the standard charge cards, but also electronic keys that can be used at a bank for money, or anything used to evidence an undertaking to pay for property or services delivered or rendered.

The present Missouri statute is cumbersome at best. The first sentence of § 561.415 is over twenty lines long. The Code section prohibits use of a credit device for the purpose of obtaining property or services when the actor knows he has no right to do so. The government need not prove a purpose to defraud, but must prove the defendant knew one of the three things listed in subsection (1). The fact that success in the venture is not a prerequisite to conviction represents no change from present law.

Subsection (2) is intended to put a time limit on aggregating instances of use of credit devices. The thirty day period is appropriate and conforms to standard billing procedures.

The penalties are comparable to present law.

15.140 Deceptive business practice

(1) A person commits the crime of deceptive business practice if in the course of engaging in a business, occupation or profession, he recklessly

(a) uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or

(b) sells, offers or exposes for sale, or delivers less than the represented quantity of any commodity or service; or

(c) takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure; or

(d) sells, offers or exposes for sale adulterated, or mislabeled commodities; or

(e) makes a false or misleading written statement for the purpose of obtaining property or credit.

(2) Deceptive business practice is a Class A Misdemeanor.

Comment

This section is based on Model Penal Code § 224.7, proposed South Carolina Code § 19.1, proposed Montana Code § 94–6–309 and proposed New Jersey Code § 2C:21–7, and will replace § 561.400 RSMo.

Subsections (1)(a), (b) and (c) cover situations where either the consumer or a merchant may be defrauded by the use of inaccurate weights, measuring devices, or packages labeled with false quantities. In simple terms, this covers the butcher with his thumb on the scale.

No specific intent to cheat or defraud is required by this section. All that is required is a knowledge that a false weight is being used, or recklessness in regard to its use. Neither must there be any actual damage incurred for a conviction under this section. The penalty provided is relatively small and it is sufficient for conviction that these devices or weights are recklessly used. If actual loss occurs the possibility of prosecution for theft by deceit is present, except in the case where the practice occurs through recklessness and there is no purpose to misrepresent which is required for deceit.

Subsection (1)(d) is intended to proscribe the sale of or offering for sale items which are not what they seem to be. Either the quality of the goods does not meet the standards prescribed by law or they are mislabeled. This section is designed to complement those sections of the Food and Drug chapter which prescribe the quality of certain items of food and drugs. Examples would include the amount of butterfat required in goods labeled as butter, or the amount of beef present in items marked "all beef" hamburger.

It is felt that subsection (1)(e) covers adequately the conduct presently prohibited by § 561.400 (False Statements to Obtain Property or Credit, or Discount, Prohibited).

15.150 Altering mileage registering devices

(1) A person commits the crime of altering a mileage registering device if, with the purpose of misrepresenting to a prospective or eventual purchaser the number of miles traveled by a motor vehicle, he disconnects, changes or causes to be disconnected or changed, any mileage registering device on a motor vehicle so as to thereby indicate a different mileage than such motor vehicle has actually traveled.

(2) For purposes of this section **"motor vehicle"** means any self-propelled vehicle not operated exclusively upon tracks.

(3) Altering a mileage registering device is a Class A Misdemeanor.

Comment

This section is based on New York General Business Law § 392–e and Massachusetts General Laws, c. 266, § 141. The definition of motor vehicle is based on a similar definition in § 301.010(17) RSMo. There are no Missouri statutes presently dealing with this topic. However, it is felt there is a need for criminal sanctions in this area. The conduct proscribed includes altering the existing mileage, installing a de-

vice which causes the odometer to register erroneously, and causing the mileage registering device to cease registering at all.

15.160 False advertising

(1) A person commits the crime of false advertising if, in connection with the promotion of the sale of, or to increase the consumption of, property or services, he recklessly makes or causes to be made a false or misleading statement in any advertisement addressed to the public or to a substantial number of persons.

(2) False advertising is a Class A Misdemeanor.

Comment

This section is based on §§ 561.660 and 561.663 RSMo. False advertising and misleading advertising is prohibited if it is done recklessly (or purposely or knowingly). A representation is not prohibited unless addressed to a substantial number of persons. It is felt this section covers the misrepresentation that goods are "blind-made" within the meaning of § 561.663 RSMo and therefore no special mention of this is made.

15.170 Bait advertising

(1) A person commits the crime of bait advertising if he advertises in any manner the sale of property or services with the purpose not to sell or provide the property or services

(a) at the price which he offered them; or

(b) in a quantity sufficient to meet the reasonably expected public demand, unless the quantity is specifically stated in the advertisement; or

(c) at all.

(2) Bait advertising is a Class A Misdemeanor.

Comment

The form of this section is based on the proposed South Carolina Code § 19.3, but the substance is very close to § 561.665 RSMo. This crime could have been put under Code § 15.160 but because it is a somewhat specialized form of false advertising and is currently dealt with in a separate section, it was retained in a separate section. Note that bait advertising can be committed by communicating with one person, unlike false advertising which requires addressing a substantial number of persons.

15.180 Defrauding secured creditors

(1) A person commits the crime of defrauding secured creditors if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with purpose to defraud the holder of the security interest.

(2) Defrauding secured creditors is a Class A Misdemeanor unless the amount remaining to be paid on the secured debt, including interest, is five hundred dollars or more, in which case defrauding secured creditors is a Class D Felony.

Comment

The section is based on Model Penal Code § 224.10. Similar provisions are found in several codes. The section replaces § 561.570 (Disposing of Chattels Subject to Security Agreement). Note that the purpose to defraud need not exist at the time the property is acquired. It is sufficient if it exists at the time of the disposition of the property.

Under subsection (2) there is no felony penalty unless a substantial security interest, $500.00 or more, is involved.

Chapter 16

WEAPONS

16.010 Chapter definitions

(1) **"Blackjack"** means any instrument that is designed or adapted for the purpose of stunning or inflicting physical injury by striking a person, and which is readily capable of lethal use.

(2) **"Deface"** means to alter or destroy the manufacturer's or importer's serial number or any other distinguishing number or identification mark.

(3) **"Explosive weapon"** means any explosive, incendiary, or poison gas bomb or similar device designed or adapted for the purpose of inflicting death, serious physical injury, or substantial property damage; or any device designed or adapted for delivering or shooting such a weapon.

(4) **"Firearm"** means any weapon that is designed or adapted to expel a projectile by the action of an explosive.

(5) **"Firearm silencer"** means any instrument, attachment, or appliance that is designed or adapted to muffle the noise made by the firing of any firearm.

(6) **"Gas gun"** means any gas ejective device, weapon, cartridge, container or contrivance other than a gas bomb, that is designed or adapted for the purpose of ejecting any poison gas that will cause death or serious physical injury, but not any device that ejects mace or other such repellant or temporary incapacitating substance.

(7) **"Intoxicated"** means substantially impaired mental or physical capacity resulting from introduction of any substance into the body.

(8) **"Knife"** means any dagger, dirk, stiletto, or bladed hand instrument that is readily capable of inflicting serious physical injury or death by cutting or stabbing a person. For purposes of this Chapter, "knife" does not include an ordinary pocket knife with no blade more than four inches in length.

(9) **"Knuckles"** means any instrument that consists of finger rings or guards made of a hard substance that is designed or adapted for the purpose of inflicting serious physical injury or death by striking a person with a fist enclosed in the knuckles.

(10) **"Machine gun"** means any firearm that is capable of firing more than two shots automatically, without manual reloading, by a single function of the trigger.

(11) **"Projectile weapon"** means any bow, crossbow, pellet gun, slingshot or other weapon that is not a firearm, which is capable of expelling a projectile that could inflict serious physical injury or death by striking or piercing a person.

(12) **"Rifle"** means any firearm designed or adapted to be fired from the shoulder and to use the energy of the explosive in a fixed metallic cartridge to fire a projectile through a rifled bore by a single function of the trigger.

(13) **"Shotgun"** means any firearm designed or adapted to be fired from the shoulder and to use the energy of the explosive in a fixed shotgun shell to fire a number of shot or a single projectile through a smooth-bore barrel by a single function of the trigger.

(14) **"Short barrel"** means a barrel length of less than 16 inches for a rifle and 18 inches for a shotgun, or an overall rifle or shotgun length of less than 26 inches.

(15) **"Spring gun"** means any fused, timed or nonmanually controlled trap or device designed or adapted to set off an explosion for the purpose of inflicting serious physical injury or death.

(16) **"Switchblade knife"** means any knife which has a blade that folds or closes into the handle or sheath, and

(a) that opens automatically by pressure applied to a button or other device located on the handle; or

(b) that opens or releases from the handle or sheath by the force of gravity or by the application of centrifugal force.

Comment

Lack of statutory definitions constitutes one of the major problems with present Missouri weapons laws. For example, § 564.610 RSMo refers to "any kind of firearms, bowie knife, springback knife, razor, metal knucks, billy, sword cane, dirk, dagger, a slungshot or other similar deadly weapons" in defining those weapons which may not be carried in certain public places. The same section refers to "dangerous or deadly weapon of any kind or description" in defining those weapons which may not be concealed.

The Code definitions are based on definitions found in other revised codes, with heavy reliance on the Proposed Texas Penal Code § 46.01 (Final Draft 1970), the Michigan Criminal

Code § 5701 (Final Draft 1967), and the proposed Montana Criminal Code § 94–8–202 (1970 Draft).

Some of the defined terms, including "explosive weapon", "machine gun", "firearm silencer", "switchblade knife" and "knuckles", were defined to make clear what weapons are ordinarily prohibited. Some terms are defined. Although a comprehensive listing of "deadly weapons" might be attempted, it would be insufficient to cover the category and is not needed in this chapter. See general definitions section of Chapter 1 for definition of "deadly weapon" for purposes of burglary and robbery.

16.020 Prohibited weapons

(1) A person commits a crime if he knowingly possesses, manufactures, transports, repairs, or sells:

(a) An explosive weapon.

(b) A machine gun.

(c) A gas gun.

(d) A short barreled rifle or shotgun.

(e) A firearm silencer.

(f) A switchblade knife.

(g) Knuckles.

(2) A person does not commit a crime under this Section if his conduct

(a) was incident to the performance of official duty by the armed forces, national guard, a governmental law enforcement agency, or a penal institution; or

(b) was incident to engaging in a lawful commercial or business transaction with an organization enumerated in Subsection (2)(a); or

(c) was incident to using an explosive weapon in a manner reasonably related to a lawful industrial or commercial enterprise; or

(d) was incident to displaying the weapon in a public museum or exhibition; or

(e) was incident to dealing with the weapon solely as a curio, ornament, or keepsake, or to using it in a manner reasonably related to a lawful dramatic performance; but if the weapon is a type described in Subsection (1)(a), (c), (d) or (e) it must be in such a non-functioning condition that it cannot readily be made operable. No machine gun may be possessed, manufactured, transported, repaired or sold as a

curio, ornament, or keepsake even if it is inoperable and cannot readily be made operable.

(3) The defendant shall have the burden of injecting the issue of an exemption under Subsection (2).

(4) A crime under Subsection (1)(a), (b), (c), (d) or (e) is a Class C Felony; a crime under Subsection (1)(f) or (g) is a Class A Misdemeanor.

Comment

Based on Proposed Texas Penal Code § 46.03 (Final Draft 1970), this section concerns weapons that have little or no lawful use.

Explosive weapons, defined in Code § 16.010(3) ordinarily serve no lawful purpose. See § 564.580 RSMo prohibiting the possession or control of a "bomb or bombshell". At present there are only two exceptions to the broad prohibition against bombs and bombshells. It does not apply to "peace officers or members of military forces in the regular discharge of their duties as such." Code § 16.020(2) recognizes other legitimate excuses for controlling or possessing explosive weapons. The Code covers "bombing" now covered by §§ 564.560 and 564.570 in the arson sections. Scattered throughout the present statutes are provisions on explosives. See §§ 73.110(50), 75.110(59), 77.570, 79.450(2), 252.220, 292.080, 320.110 to 320.190 (fireworks regulations), 414.130, 560.100, 560.400, 562.285, 562.290, 562.300, 564.380, 564.390 and 564.410 RSMo. Since explosive weapons are outlawed, devices principally designed or adapted for delivering or shooting an explosive weapon are also prohibited. See definition of "explosive weapon", Code § 16.010(3).

Machine guns are presently prohibited by § 564.590 RSMo. The definition of machine gun in § 564.600 RSMo is rather ambiguous and is replaced by Code § 16.010(10). Any firearm which fires more than two shots automatically with a single pull of the trigger (thus excluding double barrel shotguns) should be considered a machine gun, whether or not the ammunition is fed to the firearm "by means of clips, disks, drums, belts or other separable mechanical device." Under Subsection (2)(e) even inoperable machine guns are outlawed as curios, ornaments or keepsakes because of their dangerous potential. Most inoperable machine guns can be made operable.

Subsection (1)(c) is new. Gas guns are being sold in Missouri and should be prohibited at least where their use could cause death or serious physical injury. This provision is needed, since the definition of "explosive weapon" only includes poison gas bombs or projectiles and the like. Section

562.300 RSMo on "possession, manufacture or sale of stink bombs" was not designed to cover these modern gas devices, although the language might cover such things as gas pistols or pens. The definition in Code § 16.010(6) covers those gas devices which the average citizen should be prohibited from using to defend himself.

Subsection (1)(d) prohibits "sawed-off" rifles and shotguns. When the barrel length is less than 16 inches for a rifle or 18 inches for a shotgun, or the overall length is less than 26 inches, the rifle or shotgun is not designed for accuracy, can be more easily concealed, and does not have enough lawful utility to justify its existence. The definition in Code § 16.010(14) is based on the proposed Texas Code and several other codes. See also 18 U.S.C.A. § 921(a)(6) and (8). Section 564.620 RSMo presently covers some of these weapons if they are of "a size which may be concealed upon the person."

Subsection (1)(e) is new. Most states with weapons prohibitions outlaw silencers for firearms, which serve little or no legitimate purpose.

Subsections (1)(f) and (g) are new, although § 564.610 RSMo in effect outlaws switchblade knives and metal knuckles by prohibiting a person from going any "place where people are assembled for educational, political, literary or social purposes," etc. with such items "or other similar deadly weapons," whether "concealed or exposed." Note that the definition of "knuckles" in Code § 16.010(9) is not limited to metal knuckles, and that the definition of "switchblade knife" in Code § 16.010(16) also covers gravity knives.

Subsection (2) continues the present Missouri "defenses" for the military and law enforcement agencies and states other exemptions.

16.030 Unlawful use of weapons

(1) A person commits the crime of unlawful use of weapons if he knowingly

(a) carries concealed on or about his person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use; or

(b) sets a spring gun; or

(c) discharges or shoots a firearm into a dwelling house, a railroad train, boat, aircraft, or motor vehicle as defined in Section 302.010 RSMo, or any building or structure used for the assembling of people; or

(d) aims a firearm or projectile weapon at another person in an angry or threatening manner, or possesses a knife, firearm, blackjack or any other weapon readily capable of lethal use with purpose to unlawfully use such weapon against another person; or

(e) possesses or discharges a firearm or projectile weapon while intoxicated; or

(f) discharges a firearm within one hundred yards of any occupied school house, courthouse, or church building; or

(g) discharges or shoots a firearm at a mark, at any object, or at random, on, along or across a public highway or discharges or shoots a firearm into any out-building; or

(h) carries a knife, firearm, blackjack or any other weapon readily capable of lethal use into any church or place where people have assembled for worship, or into any school, or into any election precinct on any election day, or into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof, or into any public assemblage of persons met for any lawful purpose.

(2) Exemptions.

(a) Subsections (1)(a), (c), (d), (f), (g) and (h) of this Section shall not apply to or affect any of the following:

(i) Peace officers, or any person summoned by such officers to assist in making arrests or preserving the peace while actually engaged in assisting such officer.

(ii) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime.

(iii) Members of the armed forces or national guard while performing their official duty.

(b) Subsection (1)(a) does not apply when the actor is transporting such weapons in a non-functioning state or when not readily accessible.

(3) The defendant shall have the burden of injecting the issue of an exemption under Subsection (2).

(4) Unlawful use of weapons is a Class D Felony unless committed under Subsection (1)(e), (f), (g) or (h) in which cases it is a Class B Misdemeanor.

Comment

This section brings together most of the "unlawful use of weapons" offenses recognized under present law and some

new provisions are added. The format is based on Illinois Revised Criminal Code Ch. 38, § 24–1 (1961).

The present Missouri law, § 564.610 RSMo, on concealed weapons, is not clear as to whether there must be an actual "intent to conceal". Under one line of cases consciously concealing the weapon must be shown. The Code requires that the actor "knowingly" carry a concealed weapon. The requirement that the weapon be "on or about his person" has also been defined by Missouri case law as either on the person or within easy reach and convenient control. See State v. Conley, 280 Mo. 21, 217 S.W. 29 (1919). Note that under Subsection (2)(b), Subsection (1)(a) does not apply when the weapon is being transported in a non-functioning state or when not immediately accessible. The danger of carrying concealed weapons does not exist if the weapon is non-functional or not readily accessible. "Non-function" means broken down or incapable of being fired if loaded. It remains a felony to carry a concealed but unloaded, functional firearm. The concealed weapon section is consistent with present law.

Subsection (1)(b) is new and covers more than the typical "spring gun" situation. See Code § 16.010(15). If a person rigs a fused, timed or nonmanually controlled device so that a bomb explodes, there is as much reason to prohibit such conduct as to prohibit the rigging of a spring shotgun.

Subsection (1)(c) is based on § 562.070 RSMo, "Shooting into dwelling, building or vehicle," but is broadened to include shooting into any building or structure used for the assembling of people. "Projectile weapons" which comprehend pellet guns, bows and arrows, etc. are not included because of the lesser danger. Although not specifically expressed, § 562.070 RSMo is limited to shooting with a firearm. See State v. Woolsey, 33 S.W.2d 955 (Mo.1930), where the court indicated that the particular type of firearm used is not material.

Subsection (1)(d) is based on Proposed Michigan Revised Criminal Code § 5740(1)(a) and § 564.610 RSMo and includes both firearms and projectile weapons. While the aiming might also be an assault it seems appropriate to prohibit such conduct in the weapons chapter when the aiming is in an angry or threatening manner. Of course, if there is justification for the conduct (such as self-defense) no crime would be committed. The last part of this subsection was added to cover situations in which the actor does not "aim" the weapon but intends to use it.

Subsection (1)(e) is based on § 564.610 RSMo which prohibits the possession of deadly weapons while intoxicated and makes it a felony. The definition in Code § 16.010(7)

requires "substantial impairment" of mental or physical capacity.

Subsection (1)(f) is based on § 562.080 RSMo which is more complicated in that it prohibits such discharge within the "immediate vicinity" and then defines "immediate vicinity" to mean "a distance not exceeding two hundred yards."

Subsection (1)(g) is based on § 564.520 RSMo with the addition of the word "on" and the inclusion of shooting into out-buildings, now covered by § 562.070 RSMo. The maximum penalty under § 564.520 is a fine of five dollars which is hardly sufficient for this kind of conduct.

Subsection (1)(h) is based on § 564.610 RSMo, which provides a felony penalty for this kind of conduct and equates it with carrying a concealed weapon. The Code uses the descriptive phrase "weapon readily capable of lethal use" rather than "deadly weapon" used in § 564.610 RSMo. An unloaded firearm would be readily capable of lethal use, since it can be loaded quickly. The Code provisions specifically mention "weapon readily capable of lethal use" whenever the "deadly weapon" limitation is needed. Cf. Subsections (1)(a) and (d). Public buildings owned or occupied by any government are included in subsection (1)(h).

Subsection (2) sets out the various exceptions to unlawful use of weapons. The present exemptions for peace officers and members of the armed forces or national guard, which are not contained in each weapons section, are preserved for the most part. However, note that all persons are prohibited from setting spring guns and possessing or discharging a firearm or projectile weapon while intoxicated. Subsections (1)(b) and (e). Inclusion of wardens, superintendents and keepers of prisons, etc. is based on § 216.240 RSMo. Inclusion of persons "summoned . . . to assist in making arrests or preserving the peace" is new. Subsection (2)(b) permits a person to transport a deadly weapon in a non-functioning state or when it is not immediately accessible. This is consistent with present Missouri law.

Subsection (3) places the burden of injecting the issue of an exemption on the defendant. This is consistent with present Missouri law. The state should not have the burden of showing that the defendant is not a peace officer, member of the national guard, etc. until the issue has been raised.

Under Subsection (4) violation of (1)(a) is a Class D Felony, comparable to the maximum five year penalty under § 564.610 RSMo. Violations of subsections (1)(b) to (d) are also Class D Felonies. The less serious kinds of unlawful use are made Class B Misdemeanors.

16.040 Defacing a firearm

(1) A person commits the crime of defacing a firearm if he knowingly defaces any firearm.

(2) Defacing a firearm is a Class A Misdemeanor.

Comment

Based on Kentucky Penal Code § 2814 (Final Draft 1971). In order to have effective gun control and to aid in crime detection, all firearms should have identifying marks which will enable tracing. 18 U.S.C.A. § 923(1) (1971) requires serial number identification on every firearm imported or manufactured. Present Missouri law is limited in this area of defacing to firearms that can be concealed upon the person. Sections 564.620 and 564.640 RSMo. Defacing also prevents the tracing of rifles and shotguns, and ordinarily prevents the prosecution from showing that a firearm has been stolen. No reason exists for anyone to deface a firearm other than to obscure its identity. This and the next section complement the federal weapons control law. 18 U.S.C.A. § 922(k) makes it unlawful for any person to knowingly transport or receive, in interstate or foreign commerce, any firearm with the importer's or manufacturer's serial number removed, obliterated, or altered. Intrastate dealings in such weapons should also be prohibited. See Code § 16.010(2) for the definition of "deface".

16.050 Possession of a defaced firearm

(1) A person commits the crime of possession of a defaced firearm if he knowingly possesses a firearm which does not have the manufacturer's or importer's serial number engraved or cast on the receiver or frame of the firearm.

(2) Possession of a defaced firearm is a Class B Misdemeanor.

Comment

Based on Kentucky Penal Code § 2820 (Final Draft 1971) and 18 U.S.C.A. § 923(i) (1971), this section complements Code § 16.040. Defacing ordinarily prevents the prosecution from showing that a firearm has been stolen making it difficult to prove the possessor is the thief or a receiver of stolen property. Thus, the need for this section.

Under this section, the state must prove the defendant knew the weapon was defaced. If a person knowingly possesses a defaced firearm he should destroy it, make it inoperable, or turn it over to law enforcement authorities. The goal is to get all functional firearms that are defaced out of commerce.

16.060 Unlawful transfer of weapons

(1) A person commits the crime of unlawful transfer of weapons if he

(a) knowingly sells, leases, loans, gives away or delivers a firearm or ammunition for a firearm to any person who, under the provisions of Section 16.070, is not lawfully entitled to possess such,

(b) knowingly sells, leases, loans, gives away or delivers a knife, rifle, shotgun or blackjack to a person less than 21 years old without the consent of the child's custodial parent or guardian, or recklessly sells, leases, loans, gives away or delivers any other firearm to a person less than 21 years old; provided, that this does not prohibit the delivery of such weapons to any peace officer or member of the armed forces or national guard while performing his official duty; or

(c) recklessly sells, leases, loans, gives away or delivers a firearm or ammunition for a firearm to a person who is intoxicated.

(2) Unlawful transfer of weapons under Subsection (1)(a) is a Class D Felony; unlawful transfer of weapons under Subsections (1)(b) and (c) is a Class A Misdemeanor.

Comment

Most of this section is new. It is based on federal weapons law and similar statutes in Missouri and several other states. Often such provisions are scattered throughout a code, making it difficult for a seller or possessor of weapons to discover all of the prohibited transfers.

Subsection (1)(a) is based on South Carolina Criminal Code § 22.6 (Proposed Draft 1971) which is apparently a narrower version of 18 U.S.C.A. § 922(h). Code § 16.070 lists those persons who commit a crime by possessing a firearm or ammunition. By restricting access to firearms by persons recently convicted of dangerous felonies, fugitives from justice, habitual drunkards, drug addicts and persons adjudged mentally incompetent, the disproportionate share of offenses involving firearms committed by such persons should be reduced. Section 564.610 RSMo prohibiting intoxicated persons from possessing deadly weapons was probably passed for similar reasons. However, no present provision punishes the person who knowingly supplies a firearm or ammunition to an inebriate, dangerous felon, fugitive, drug addict or mentally incompetent person. At present, unless the supplier of the firearm knows it will be used in connection with a crime,

he may not be convicted of an offense. Even if the supplier has such knowledge, it is still difficult to establish complicity.

The fact that a firearm or ammunition shipped in interstate commerce was supplied to a felon, etc., can always be brought to the attention of the federal authorities. Nevertheless, a Missouri prosecutor should not be forced to rely solely on federal enforcement to prevent firearms and ammunition from reaching potentially dangerous persons. It would seem that the state constitutional guarantee permitting every citizen to keep and bear arms in defense does not apply to recently convicted felons, fugitives, drug addicts, etc. The second amendment to the federal constitution, protecting the right of the people to keep and bear arms, has not prevented Congressional legislation in this area.

Subsection (1)(b) is based on § 564.610 RSMo, which prohibits the sale, delivery, loan or barter of any kind of "firearms, bowie knife, springback knife, razor, metal knucks, billy, sword cane, dirk, dagger, slungshot or other similar deadly weapons" to a minor. Since Code § 16.020 absolutely prohibits the sale or possession of some of the weapons listed in § 564.610, a provision is only needed to cover weapons not prohibited to adults, which should not be transferred to children without the parent's consent. Arguably, a person seventeen years old (as contrasted to 21) should be sufficiently responsible to possess firearms not capable of being concealed on the person, but most parents probably would prefer to see the present law retained. This subsection does not apply to the issuance of such weapons to peace officers or members of the armed forces, ROTC, etc. when on duty. Under 18 U.S.C.A. § 9.22(b) and Code § 16.080(1)(b), a person under 21 years old cannot purchase a firearm other than a rifle or shotgun.

Subsection (1)(c) is based on Proposed Texas Penal Code § 46.04(a)(2) (Final Draft 1970). The Texas provision only prohibits the sale of firearms or ammunition to persons who are intoxicated. Section 564.610 RSMo prohibits intoxicated persons from possessing deadly weapons, and Code § 16.030 (1)(e) retains this prohibition. This subsection requires only recklessness. A supplier who "consciously disregards a substantial and unjustifiable risk that [intoxication] exists" (see Code § 7.020(2)(c)) should be held criminally liable. There will usually be sufficient indicia of intoxication that the supplier should not be permitted the defense that he did not "know" the person was intoxicated.

These provisions should not slow down the legitimate sale of weapons. If a weapons dealer is aware of a person's mental deficiencies, past criminal record, instability, or apparent young age, he should check on the person before

completing the sale. This should be done even though a permit is not required for the sale under the limited provisions of Code § 16.080.

Except for knowing sales to certain felons, etc., violation of this section is a Class A Misdemeanor. Present Missouri law, § 564.610 RSMo, makes it a felony to furnish a deadly weapon to any minor, or for an intoxicated person to possess such a weapon. This is very harsh, and the statute is probably seldom used for that reason.

16.070 Unlawful possession of firearms and firearm ammunition

(1) A person commits the crime of unlawful possession of a firearm or firearm ammunition if he has any firearm or firearm ammunition in his possession and

(a) he has been convicted of a dangerous felony or confined therefor in this state or elsewhere during the five year period immediately preceding the date of such possession; or

(b) he is a fugitive from justice, an habitual drunkard, a drug addict, or is currently adjudged mentally incompetent.

(2) Unlawful possession of a firearm or firearm ammunition is a Class C Felony.

Comment

This provision is very similar to Ill.Criminal Code Ch. 38 § 24–3 (1971) which makes this offense a Class A Misdemeanor. The purpose of the provision is to deter potentially dangerous persons from obtaining firearms. See comment to Code § 16.060(1). The term "dangerous felony" is defined in the general definitions section of Chapter 1.

16.080 Transfer of concealable firearm without permit

(1) A person commits the crime of transfer of a concealable firearm without a permit if

(a) he buys, leases, borrows, exchanges or otherwise receives any concealable firearm, unless he first obtains and delivers to the person delivering the firearm a valid permit authorizing the acquisition of the firearm; or

(b) he sells, leases, loans, exchanges, gives away or otherwise delivers any concealable firearm, unless he first demands and receives from the person receiving the firearm a valid permit authorizing such acquisition of the firearm.

(2) For purposes of this Section, "concealable firearm" means a firearm with a barrel less than eighteen inches in length.

(3) A permit to acquire a concealable firearm shall only be valid for thirty days after the issuance thereof.

(4) Subsection (1) shall not apply to the transfer of concealable firearms among manufacturers, wholesalers or retailers of firearms for purposes of commerce; nor shall it apply to antique firearms or replicas thereof. The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(5) The defendant shall have the burden of injecting the issue of nonapplication of Subsection (1) under the provisions of Subsection (4).

(6) Transfer of concealable firearms without a permit is a Class D Felony.

Comment

This is based on § 564.630(1) RSMo, substantially reworded to make the law clearer and consistent with the form of the Code. Section 564.630(1) does not apply to transfers among manufacturers, wholesalers and retailers of firearms, nor to antique firearms (as the result of a 1967 amendment). The present section applies to "a firearm of a size which may be concealed upon the person." The Code provision makes this more explicit. Any firearm with a barrel longer than 18 inches would be difficult to conceal. Since Code § 16.020(1)(d) outlaws short-barreled rifles and shotguns, this provision only applies to firearms that are not designed to be fired from the shoulder. This is consistent with § 564.630(1) which applies basically to pistols and revolvers.

Section 564.660 RSMo makes violation of any of the firearm permit provisions a felony punishable by up to five years in prison. This is very harsh when applied to the more technical permit provisions. The Code makes the transfer of the weapon without a permit a Class D Felony, but treats the violation of the permit rules as a Class A Misdemeanor.

16.090 Obtaining permit to transfer concealable firearm

(1) **Eligibility.** A permit to acquire a firearm with a barrel of less than eighteen inches shall be issued by the sheriff of the county in which the applicant resides, if after inquiry, the sheriff finds that all of the statements in the application are true, and that the applicant

(a) is of good moral character;

(b) is 21 years of age, a citizen of the United States and has resided in this state for at least six months;

(c) has not been convicted of a dangerous felony or an attempt to commit a dangerous felony, or confined therefore, in this state or elsewhere during the five year period immediately preceding the date of such application;

(d) is not an habitual drunkard or drug addict; and

(e) is not currently adjudged mentally incompetent and has not been a patient in a mental hospital within the five year period immediately preceding the date of such application.

(2) **Applications.** Applications shall be made to the sheriff of the county in which the applicant resides. An application shall be filed in writing, signed and verified by the applicant, and shall state the name, occupation, age, height, color of eyes and hair, residence and business addresses of the applicant, the reason for desiring the permit, whether the applicant complies with each of the requirements specified in Subsection (1) and any other facts that may be required to show his good moral character.

(3) **Inquiry.** Before a permit is issued, the sheriff shall make such inquiry as he deems necessary into the accuracy of the statements made in the application. In conducting such inquiry, the sheriff may take into account his personal knowledge of the character and background of the applicant. In order to ascertain if the applicant has a previous criminal record, the sheriff may take the fingerprints of the applicant. If the applicant's fingerprints are taken, two copies shall be taken on standard fingerprint cards. An additional copy may be taken on a card approved or supplied by the Federal Bureau of Investigation. One standard card shall be forwarded to, and retained by, the Division of Intelligence and Investigation of the State Highway Patrol. Upon receipt of such, without unnecessary delay, the files of such division shall be searched, followed immediately by a written report to the sheriff of all data and information pertaining to the applicant there on file. The card

approved by the Federal Bureau of Investigation may be forwarded to the Bureau in Washington, D.C., with a request that the files of the Bureau be searched, and that all data and information pertaining to the applicant there on file be sent promptly to the sheriff. The sheriff shall retain the remaining fingerprint card in his file. No such fingerprints may be inspected by any person other than a law enforcement officer, except on order of a judge of a court of record, and after notice to the applicant. The sheriff may also make a written inquiry about the applicant to the chief of police of any municipality in the county, and upon such inquiry the chief of police shall promptly report in writing about the applicant. The sheriff may also request the Division of Mental Diseases to search its records for information concerning any previous or present mental deficiency or illness of the applicant. Upon such request the Division shall make this search without unnecessary delay and report on all data and information pertaining to the applicant in its files. Upon completion of the inquiry, including such further investigation deemed necessary, the sheriff shall promptly approve or reject the application. If the application is approved, the sheriff shall issue a permit and a copy thereof to the applicant.

(4) **Contents of permit.** The permit shall recite the date of issuance, that it is invalid after thirty days, the name and address of the person to whom granted, the name and address of the person from whom the weapon is to be acquired, the nature of the transaction, and a physical description of the applicant. The applicant shall sign the permit in the presence of the sheriff.

(5) **Use and return of permit.** If the permit is used, the person who receives the permit shall return it to the sheriff within thirty days after its expiration, with a notation thereon showing the date and manner of disposition of the firearm. The sheriff shall keep a record of all applications for permits, his action thereon, and shall preserve all returned permits.

(6) **False transactions.** No person shall in any manner transfer, alter or change a permit, or make a false notation thereon, or obtain a permit upon any false representation, or use, or attempt to use a permit issued to another.

(7) **Violations.** Violation of any provision of this Section is a Class A Misdemeanor.

Comment

This section is based on § 564.630 RSMo, which has been revised to improve the operation of the present permit law. The effectiveness of the present law in keeping concealable

weapons out of the hands of persons who are likely to use them illegally is open to question. This is particularly true in urban areas where the sheriffs are not as likely to know personally the applicants for permits. The code provision retains the "good moral character" requirement, but also lists certain types of persons who should not be permitted to buy concealable weapons. This gives more guidance to the sheriff but still requires the sheriff to make the basic judgment as to the advisability of issuing the permit.

More important, the Code provision allows the sheriff, at his discretion, to take the fingerprints of the applicant and send them to the highway patrol and the F.B.I. The sheriff may also inquire of the chiefs of police of the municipalities in the county concerning information of the applicant. In counties containing sizable communities, the police department in the municipality where the applicant lives or works is more apt to have current information about the applicant than is the sheriff's office. Further, the sheriff can get information about the applicant from the Division of Mental Diseases. While the sheriff can act on the basis of his own knowledge of the character and background of the applicant, these additional investigative methods can be used when the sheriff thinks it advisable.

If the sheriff uses these additional investigation methods, there will be some delay in the issuing of the permit. This, particularly where the applicant is not personally known to the sheriff, is desirable in that it provides a "cooling off" period for the applicant who is impulsively buying a pistol for immediate use. This delay should not unreasonably show the purchase and sale of firearms from a commercial standpoint. The risks involved in felons and insane persons having such firearms is sufficient justification to give the sheriff the means of making an adequate investigation.

Chapter 17

GAMBLING

Introductory Comment

This Chapter basically follows the present Missouri approach to gambling, comprehensively proscribing gambling activities. However, noncommercial gambling in private cannot be suppressed successfully and arguably is not harmful enough to be made criminal. The person who confines his gambling to the friendly poker game in someone's home will not be subject to criminal prosecution under this chapter; nor will the person who privately wagers on athletic events with friends. Such gambling does not threaten the health, wealth, and well-being of society, at least not to a sufficient degree to be criminally prohibited. Also, there are no true "victims" deserving of criminal protection in such friendly wagers or private games of chance, unless professional gamblers are involved.

The trend in the criminal law of gambling is away from strict prohibition. Distinctions between criminal and noncriminal gambling are usually based on the conditions under which gambling games are played and no longer on the types of games played. Thus gambling in public and commercial gambling are generally considered sufficiently harmful to be prohibited; private gambling is not. At common law any game of chance played by a group of persons in a private place was not criminal if there was no breach of the peace or corruption of public morals, no general invitation to the public to play, and no cheating. Gambling was a crime only when conducted openly and notoriously, or where it tended to be a breach of the peace, *e. g.*, because inexperienced persons were fleeced. Thus the gambling house was considered a public nuisance, as it is today, see § 563.365 RSMo. Ploscowe, "The Laws of Gambling", 269 Annals of the American Academy of Political and Social Science 1 (1950).

There is one area of gambling in which even private gambling of a noncommercial nature cannot be lawful. Art. III, § 39(9) of the Missouri Constitution deprives the legislature of the power "to authorize lotteries or gift enterprises for any purpose." However, many forms of gambling do not fall within the definitions of "lotteries" or "gift enterprises."

Removing the criminal sanctions for private gambling does not require the removal of civil remedies for those who may be victimized. Sections 434.010 to 434.060 RSMo contain various provisions permitting recovery of money or property

lost through gambling. These provisions are not touched by the Code.

Present Missouri laws lump public and private, commercial and noncommercial gambling together and specifically prohibit all gambling of most types. See § 563.390 RSMo, specifically prohibiting betting on billiard and pool games; § 563.400, prohibiting betting on elections; § 563.410, prohibiting "playing any game for money, property or gain, with cards, dice, or any other device which may be adapted or used in playing any game of chance . . . ." Apparently these are not considered very serious offenses, because the maximum penalty is a fine ranging from a maximum of $50 to $200. However, when a person is directly involved in public and commercial gambling, he is guilty of a felony. See *e. g.*, § 563.370 RSMo, keeping gaming device; § 563.445, weather ticket game; § 563.450, setting up bucket shop.

The present laws of Missouri include approximately 35 statutes dealing specifically with various forms of prohibited gambling activity. Some are very prolix and overspecific and attempt to cover every type of act by which a given form of gambling may be promoted (*e. g.*, §§ 563.450 to 563.520 RSMo dealing with "bucket shops" and §§ 563.530 to 563.560 RSMo proscribing "option dealing"). This chapter is based on the premise that formulation of the gambling offenses does not require one or more statutes covering each form of gambling, or detailed explanations in each section of the kinds of conduct proscribed. The definitions in Code § 17.010 lay the foundation for simplifying the gambling provisions. Instead of defining "bucket shops" and "option dealing", Code § 17.010 defines "gambling" in such a manner that these forms of gambling are covered generally rather than specifically.

17.010 Chapter definitions

(1) **"Advance gambling activity."** A person "advances gambling activity" if, acting other than as a player, he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, lottery, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement or communication of any of its financial or recording phases, or toward any other phase of its operation. A person advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his

knowledge for purposes of gambling activity, he permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation.

(2) **"Bookmaking"** means advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events.

(3) **"Contest of chance"** means any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor therein.

(4) **"Gambling".** A person engages in "gambling" when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health or accident insurance; nor does gambling include playing an amusement device that confers only an immediate right of replay not exchangeable for something of value.

(5) **"Gambling device"** means any device, machine, paraphernalia or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person with a machine. However, lottery tickets, policy slips and other items used in the playing phases of lottery and policy schemes are not gambling devices within this definition.

(6) **"Gambling record"** means any article, instrument, record, receipt, ticket, certificate, token, slip or notation used or intended to be used in connection with unlawful gambling activity.

(7) **"Lottery" or "policy"** means an unlawful gambling scheme in which for a consideration the participants are given an opportunity to win something of value, the award of which is determined by chance.

(8) **"Player"** means a person who engages in any form of gambling solely as a contestant or bettor, without receiving or

becoming entitled to receive any profit therefrom other than personal gambling winnings, and without otherwise rendering any material assistance to the establishment, conduct or operation of the particular gambling activity. A person who gambles at a social game of chance on equal terms with the other participants therein does not otherwise render material assistance to the establishment, conduct or operation thereof by performing, without fee or remuneration, acts directed toward the arrangement or facilitation of the game, such as inviting persons to play, permitting the use of premises therefor and supplying cards or other equipment used therein. A person who engages in "bookmaking" as defined in Subsection (2) is not a "player".

(9) **"Professional player"** means a player who engages in gambling for a livelihood or who has derived at least twenty per cent of his income in any one year within the past five years from acting solely as a player.

(10) **"Private place"** means a place to which the public does not have access, and excludes, among other places, streets, highways, restaurants, taverns, nightclubs, schools, hospitals, and the common areas of apartment houses, hotels, motels, office buildings, transport facilities, and shops, and any place primarily used for the purpose of gambling.

(11) **"Profit from gambling activity".** A person "profits from gambling activity" if, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

(12) **"Slot machine"** means a gambling device that as a result of the insertion of a coin or other object operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value. A device so constructed or readily adaptable or convertible to such use is no less a slot machine because it is not in working order or because some mechanical act of manipulation or repair is required to accomplish its adaptation, conversion or workability. Nor is it any less a slot machine because apart from its use or adaptability as such it may also sell or deliver something of value on a basis other than chance.

(13) **"Something of value"** means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein or in-

volving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.

(14) **"Unlawful"** means not specifically authorized by law.

Comment

The definition of "advance gambling activity", subsection (1), is taken from Michigan Revised Criminal Code § 1601(a) (Final Draft 1967). While private social games are not criminal, because a person does not promote or advance gambling if he merely invites friends in for a poker game, all exploitative gambling is made criminal. One of two basic kinds of exploitative gambling is "advancing" unlawful gambling activity. The other is "profiting from gambling activity," see subsection (11). Gambling by a professional player is also a crime under Code § 17.020. One does not advance unlawful gambling merely by being a "player", subsection (8) but if one goes beyond the actions of a player in aiding gambling activity, he will be subject to punishment under Code §§ 17.030 or 17.040. These provisions and this definition take the place of present statutes covering knowingly providing equipment or premises, *e. g.*, § 563.350 RSMo, establishing or advertising a lottery, §§ 563.430 and 563.440 RSMo, plus anything that falls outside the present statutes which facilitates any gambling enterprise "or any phase of its operation." Under Code §§ 17.030 and 17.040 the advancing must be "knowingly."

The definition of "bookmaking", subsection (2), is taken from New York Revised Penal Code § 225.00(9) (1967). It is defined as taking bets as a business. "Bookmaking" is an aggravating factor in the offense of promoting gambling and an important term in defining the crime of possession of gambling records.

The definition of "contest of chance", subsection (3), is critical to the comprehensive definition of "gambling" in subsection (4). It is taken from New York Revised Penal Code § 225.00(1) (1967). While there is no statutory definition of this term in Missouri, the proposed definition changes the degree of chance necessary to make an activity a contest of chance. The Missouri rule is that the "dominant element" must be chance. State ex rel. Igoe v. Joynt, 341 Mo. 788, 110 S.W.2d 737, 740 (1937) (some skill required to win consistently from particular type of slot machine); State v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S.W.2d 705, 713 (Mo. 1937) (chance was the dominant factor in a lottery). The Code rejects the "dominating element" test because in many instances it will be virtually impossible to prove or determine whether chance or skill dominates. "It should be sufficient, that, despite the importance of skill in any given game, the

outcome depends *in a material degree* upon an element of chance." New York Revised Criminal Code § 225.00 commentary (1967).

The definition of "gambling", subsection (4), is based mainly on Michigan Revised Criminal Code § 6101(d) (Final Draft 1967) and is comprehensive enough to include any activity that brings a profit based on chance, including the ordinary lottery involving the risk of "something of value" as defined in subsection (12). The constitutional definition of "lottery" extends beyond the definition of "gambling" because of a broader case law and attorney general opinion definition of "something of value" (any consideration) followed in the case of lotteries. See definition of lottery in subsection (7). After broadly describing gambling, it is unnecessary to list gambling games by name. Games of pure skill, as chess, will not be considered gambling if the contestants bet against each other. However, one placing a side bet on a game of chess would be gambling because from the onlooker's point of view the outcome depends on "chance" in the sense that he has no control over the outcome.

The exceptions to the definition of "gambling" are necessary to exclude legitimate stock, commodity, and insurance transactions from the scope of the gambling definition. Bona fide stock, commodity and insurance transactions are, of course, subject to control under special laws. However, "bucket shop" activities defined in § 563.460 RSMo, "wherein there is in fact no actual purchase and sale" of stocks and commodities, are covered as "gambling" to the extent that no "bona fide business transactions valid under the law of contracts" are involved. The same is true of "option dealing" defined in § 563.530 RSMo.

The final exception to the "gambling" definition was added to exclude pinball machines. State v. One "Jack and Jill" Pinball Machine, 224 S.W.2d 854 (Spr.App.1949) held that a pinball machine is not a gambling device under § 563.370 RSMo because it is not "devised and designated for the purpose of playing . . . for money or property." A free game was considered a "useless thing" not amounting to property. *Id.* at 861. The definition of "something of value", subsection (13), follows the majority view that amusement is a "thing of value" because anything which affords the necessary lure to indulge the gambling instinct should be held to be a sufficient prize to find gambling. There comes a point, however, when trivial amusement such as an additional pinball game might be excluded. Most states that have exp sly dealt with the status of the free pinball replay in legislation have excluded it from illegal gambling. Prohibiting the exchange of free games for value covers the

primary means of evading the gambling laws through the operation of pinball machines.

The definition of "gambling device", subsection (5), is taken from New York Revised Criminal Code § 225.00(7) (1967). It includes items such as dice and playing cards. However, possession of gambling devices is not criminal unless the possessor has reason to believe they will be used in advancing gambling activity. See Code § 17.070. Lottery tickets and policy slips, though constituting "playing" articles, are placed in the "gambling record" category of subsection (6). Except for the differences in authorized punishment, possession of gambling devices and records could be covered in one section.

The definition of "gambling record", subsection (6) is based on the Proposed Montana Criminal Code § 94-8-304(2) (e) (1970). The terms "article" and "instrument" were added to ensure that all types of gambling records are covered. See New York Revised Penal Law § 225.20 (1967).

The definition of "lottery", subsection (7), is very general and is based on present Missouri case law. "Policy" is added to make sure that schemes like the "weather ticket game" described in § 563.445 RSMo and other games like "mutual" and "the numbers game" are covered when they are simply different forms of lottery. The elements of a lottery are: 1) consideration; 2) price; and 3) chance. State ex inf. Mckittrick v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S.W. 2d 705, 713 (1937). Any effort to redefine these elements will be difficult. In Mobil Oil Corporation v. Danforth, 455 S.W. 2d 505 (Mo.1970), § 563.430 RSMo was construed broadly to cover an oil company's promotional game even though the participant was not required to purchase anything at the station and the statute had been amended in 1963 to define "consideration" as "money, or its equivalent, paid to or received by the person awarding the prize." The court stated that it could not believe the legislature meant to abrogate the holding of State v. McEwan, 343 Mo. 213, 120 S.W.2d 1098 (1938) and that "The prohibition against lotteries must be considered by the courts on a case-to-case basis." *Id.* at 508.

The concept of "player", subsection (8), is essential in distinguishing the mere player of a game from the promoter in distinguishing private, social games of chance which are not prohibited gambling. The mere player is not subject to punishment for "advancing gambling activity", subsection (1), nor for "profiting from gambling activity", subsection (11), and can be exempt from "gambling" in violation of Code § 17.020.

Subsection (9), "professional gambler" was added to deter the use of the so-called "friendly card games" involving pro-

fessional players who fleece the other players. See Code § 17.020. Ordinarily it will be easier for a prosecutor to establish that a player was a "professional player" than that he had rigged the game so that "the risks of losing and the chances of winning were [not] the same for all participants, except for the advantage of skill and luck." Code § 17.020(2) (d). Note that the definition of "professional player" also covers the person who makes a livelihood wagering on sporting (and other) events, who is likely to become very skilled in getting the odds in his favor.

"Private place" is defined in subsection (10) to include all places to which the public does not have access. In addition to the public places listed, "any place primarily used for the purpose of gambling" is included even though the public does not have direct access.

The second basic kind of exploitative gambling prohibited is "profiting from gambling activity." Subsection (11) defines "profiting" as receiving money or other property, other than as a player, as proceeds from unlawful gambling activity based on a prior agreement or understanding to that effect. A person may "profit" from gambling activity without "advancing" that activity.

Although slot machines are outlawed by §§ 563.370 and 563.374 RSMo, there is no present definition of the term. The definition in subsection (12) is based on New York Revised Penal Law § 225.00(8) (1967) and is comprehensive and covers broken and converted slot machines which might be used for gambling. Manufacturers and distributors of slot machines are constantly seeking ways to circumvent the prohibitions of gambling statutes. The courts, however, have been vigilant and have generally given a broad meaning to the term "slot machine". A clear statutory definition is an aid in preventing efforts to circumvent the law and puts the public on notice that any machine that ejects something of value depending on chance is a slot machine.

The definition of "something of value", subsection (13), is designed to close loopholes that would exist and would be exploited if a thing of value were limited to money and tangible property. It will prevent the extension of the idea that "entertainment" is not anything of value. See State v. One "Jack and Jill" Pinball Machine, 224 S.W.2d 854 (Spr.App.1949).

Subsection (14), defining "unlawful", makes it clear that no gambling is lawful unless, as in the case of social gambling in private authorized under Code § 17.020(2), it is expressly authorized by statute. It is taken from New York Revised Penal Law § 225.00(12) (1967).

17.020 Gambling

(1) A person commits the crime of gambling if he knowingly engages in gambling.

(2) A player, other than a professional player, does not commit a crime under Subsection (1) if

(a) the gambling occurred in a private place; and

(b) no participant received any economic benefit other than personal winnings; and

(c) he had no reason to believe a minor was a participant; and

(d) he believed the risks of losing and the chances of winning were the same for all participants, except for the advantage of skill and luck.

(3) The defendant shall have the burden of injecting the issue under Subsection (2).

(4) Gambling is a Class C Misdemeanor unless

(a) it is committed by a professional player in which case it is a Class D Felony; or

(b) the person knowingly engages in gambling with a minor in which case it is a Class B Misdemeanor.

Comment

Based on Proposed Texas Penal Code § 47.02 (Final Draft 1970) and § 563.410 RSMo, and definitions from the New York code and the proposed Michigan code. It prohibits every form of gambling except the "friendly poker game" and the "friendly bet".

Subsection (2) in effect defines the friendly game or bet by requiring that it be in private, by persons who are not professional players, with no minors involved and no one exploiting the gambling by receiving economic benefit, or charging for the use of the facilities or having the "odds" of the game stacked in his favor. The equal risks and chances provision of subsection (2)(d) does not refer to an advantage enjoyed by a skilled player but to advantages because of the rules of the game. If the "house" or "banker" has an advantage because of the rules of the game, it is not a "friendly" game. Social gambling in public places and in private "gambling places" is prohibited. Gambling in a private club is permissible unless the club is only nominally private. A club that promoted gambling could be guilty under § 17.030 and § 17.040.

Section 563.410 RSMo presently provides a penalty of no more than $200 for ordinary gambling. Subsection (4) increases this to $300 and also allows 15 days in jail. Following the pattern of § 563.410 RSMo, the penalty is increased for gambling with a minor. Note that no mention is made regarding the consent of the minor's parents and so that factor is irrelevant. The professional player is singled out for felony penalty. The idea is to protect people from such players (see definition in Code § 17.010(9)) who may lead an unsuspecting player into losing a substantial amount of his money or property. Depriving such "professional players" of the law authorizing "friendly games" and adding the felony penalty may deter this abnormal gambling activity. Note that the professional gambler is not being punished for his status but for his acts of gambling.

17.030 Promoting gambling in the first degree

(1) A person commits the crime of promoting gambling in the first degree if he knowingly advances or profits from unlawful gambling or lottery activity by

(a) setting up and operating a gambling device to the extent that more than one hundred dollars of money is gambled upon or by means of the device in any one day, or setting up and operating any slot machine; or

(b) engaging in bookmaking to the extent that he receives or accepts in any one day more than one bet and a total of more than one hundred dollars in bets; or

(c) receiving in connection with a lottery or policy or enterprise

(i) money or written records from a person other than a player whose chances or plays are represented by such money or records, or

(ii) more than one hundred dollars in any one day of money played in the scheme or enterprise, or

(iii) something of value played in the scheme or enterprise with a fair market value exceeding one hundred dollars in any one day.

(2) Promoting gambling in the first degree is a Class D Felony.

Comment

Based on Michigan Revised Criminal Code § 6105 (Final Draft 1967), which was based on New York Revised Penal Law § 225.010 (1967), this section provides for felony penalties for those who exploit the popular urge to gamble and who do so on a scale of any magnitude.

Subsection (1)(a) retains Missouri's felony penalty for setting up and operating any gambling device or slot machine.

This includes setting up and operating a dice or card game. Any operation of a slot machine is a felony. Section 563.370 RSMo places no minimum dollar limit on the applicability of the felony penalty, although § 563.374 RSMo makes it a misdemeanor to sell, store, possess or transport gaming devices.

Although § 563.430 RSMo makes it a felony to establish "any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business . . . or (to) advertise . . . any such lottery, . . .". § 563.440 provides only an infraction type penalty of up to $1,000 for a person who advertises or sells any lottery ticket. In view of subsection (1)(c) which establishes a method of defining a large-scale lottery scheme, it should not be necessary to add another subsection on "establishing and advertising a lottery."

17.040 Promoting gambling in the second degree

(1) A person commits the crime of promoting gambling in the second degree if he knowingly advances or profits from unlawful gambling or lottery activity.

(2) Promoting gambling in the second degree is a Class A Misdemeanor.

Comment

Derived from Michigan Revised Criminal Code § 6106 (Final Draft 1967), this provision deals with the smaller scale gambling promotion and provides for a misdemeanor penalty. This is the most comprehensive provision on exploitation of gambling. Any person who is not in the pure "player" category who promotes any kind of gambling or lottery activity will come under this section.

17.050 Possession of gambling records in the first degree

(1) A person commits the crime of possession of gambling records in the first degree if with knowledge of the contents thereof, he possesses any gambling record of a kind used

(a) in the operation or promotion of a bookmaking scheme or enterprise, and constituting, reflecting or representing more than five bets totaling more than five hundred dollars; or

(b) in the operation, promotion or playing of a lottery or policy scheme or enterprise, and constituting, reflecting or representing more than five hundred plays or chances therein.

(2) A person does not commit a crime under Subsection (1)(a) if the gambling record possessed by the defendant constituted, reflected or represented bets of the defendant himself in a number not exceeding ten.

(3) The defendant shall have the burden of injecting the issue under Subsection (2).

(4) Possession of gambling records in the first degree is a Class D Felony.

Comment

This section is based on Michigan Revised Criminal Code § 6115 (Final Draft 1967) which was based on New York Revised Penal Law § 225.20 (1967).

Several Missouri statutes now directly or indirectly prohibit the possession of gambling records. Under § 563.350 RSMo, a person who occupies a room with any book for the purpose of recording bets is guilty of a felony. § 563.360 RSMo is an almost identical section covering "sheets" and "blackboards" as well as books used for recording bets. Section 463.445 RSMo prohibits as a misdemeanor the knowing possession of items used in the "weather ticket" game and similar schemes.

The proposed section expands the basic coverage of the Missouri statutes in order to better suppress bookmaking and lottery activities. The items possessed need not actually be in use to provide a basis for prosecution under this section or Code § 17.060. If the record, as defined in Code § 17.010(6) was "used or intended to be used in connection with unlawful gambling activity" the possessor is guilty if he had knowledge of the contents.

The grading of this offense is similar to that used in Code §§ 17.030 and 17.040, promoting gambling activities. Possession of extensive records indicates implication in large-scale gambling operations or preparations for such activities. It is likely these sections (Code §§ 17.050 and 17.060) will be used more often than the promoting gambling sections as those offenses will often be more difficult to prove.

Subsection (2) is a limited exception permitting the private bettor to show that he is not a bookmaker. However, if he possesses records of more than ten bets, he is always considered "commercial" for purposes of this section.

17.060 Possession of gambling records in the second degree

(1) A person commits the crime of possession of gambling records in the second degree if with knowledge of the contents thereof, he possesses any gambling record of a kind used

(a) in the operation or promotion of a bookmaking scheme or enterprise; or

(b) in the operation, promotion or playing of a lottery or policy scheme or enterprise

(2) A person does not commit a crime under Subsection (1) (a) if the gambling record possessed by the defendant constituted, reflected or represented bets of the defendant himself in a number not exceeding ten.

(3) The defendant shall have the burden of injecting the issue under Subsection (2).

(4) Possession of gambling records in the second degree is a Class A Misdemeanor.

Comment

This section is based on Michigan Revised Criminal Code § 6116 (Final Draft 1967). See comment to Code § 17.050 on background and scope of this section. It is designed to cover the small scale operator of a bookmaking, lottery or policy scheme.

17.070 Possession of a gambling device

(1) A person commits the crime of possession of a gambling device if with knowledge of the character thereof he manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of

(a) a slot machine; or

(b) any other gambling device, knowing or having reason to believe that it is to be used in the advancement of unlawful gambling activity.

(2) Possession of a gambling device is a Class A Misdemeanor.

Comment

Based on Michigan Revised Criminal Code § 6125 (Final Draft 1967), which was adapted from New York Revised Penal Law § 225.30 and on § 563.374 RSMo entitled "Sale, possession or transportation of gaming devices . . ."

17.080 Lottery offenses: no defense

It is no defense under any section of this Chapter relating to a lottery that the lottery itself is drawn or conducted outside Missouri and is not in violation of the laws of the jurisdiction in which it is drawn or conducted.

Comment

Adapted from New York Revised Penal Law § 225.40 (1967). See also § 563.340 RSMo. It takes account of enterprises like the Irish Sweepstakes and the New Hampshire lottery and also covers "policy" and related enterprises. The definition of bookmaking in Code § 17.010(2) is broad enough to cover taking bets on the outcome of events occurring outside Missouri and so no specific provision is needed.

17.090 Gambling houses, public nuisances—abatement

(1) Any room, building or other structure regularly used for any unlawful gambling activity prohibited by this Chapter is a public nuisance.

(2) The attorney general, circuit attorney or prosecuting attorney may, in addition to all criminal sanctions, prosecute a suit in equity to enjoin the nuisance. If the court finds that the owner of the room, building or structure knew or had reason to believe that the premises were being used regularly for unlawful gambling activity, the court may order that the premises shall not be occupied or used for such period as the court may determine, not to exceed one year.

(3) Appeals shall be allowed from the judgment of the court as in other civil actions.

Comment

This is a much simplified version of § 563.365 RSMo covering the same area. The procedural steps which should be covered by the Rules of Civil Procedure are omitted. Although the possessor may be enjoined from conducting the nuisance, the owner should not be prevented from using the premises unless he knew or should have known of the unlawful gambling use. *Cf.* Code § 12.080 dealing with houses of prostitution.

17.100 Preemption

The legislature by enacting this Chapter intends to preempt any other regulation of the area covered by this Chapter. No governmental subdivision or agency may enact or enforce a law that regulates or makes any conduct in the area covered by this Chapter an offense, or the subject of a criminal or civil penalty or sanction of any kind.

Comment

Based on Proposed Texas Penal Code § 47.08 (Final Draft 1970), this provision prevents municipalities from enacting

gambling ordinances. See §§ 73.110(18) and 75.110(19) RSMo for present grant of authority. To eliminate the conflict and confusion between state and local law this section makes clear that the state intends to preempt the area of gambling. This provides for a uniform and comprehensive set of laws on gambling throughout the state.

17.110 Duties of prosecuting attorneys

It shall be the duty of the circuit attorneys and prosecuting attorneys in their respective jurisdictions to enforce the provisions of this Chapter, and the attorney general shall have a concurrent duty to enforce the provisions of this Chapter.

Comment

This is basically the same as § 563.610 RSMo which gives the attorney general power to enforce the gambling laws along with prosecuting attorneys. This is particularly important in view of the preemption under Code § 17.100.

17.120 Forfeiture of gambling devices, records and money

Any gambling device or gambling record, or any money used as bets or stakes in unlawful gambling activity, possessed or used in violation of this Chapter may be seized by any peace officer and is forfeited to the State. Forfeiture procedures shall be conducted as provided by rule of court. Forfeited money and the proceeds from the sale of forfeited property shall be paid into the school fund of the county. Any forfeited gambling device or record not needed in connection with any proceedings under this Chapter and which has no legitimate use shall be ordered publicly destroyed.

Comment

Based on the last part of § 563.374 and part of § 563.375 RSMo, § 563.374 provides that gambling devices are contraband and may be seized by any peace officer to be disposed of as provided by § 563.375. Rule of Criminal Procedure 33.05 presently provides procedures for forfeiture and destruction proceedings when any item has been seized under authority of a search warrant. It seems appropriate to leave the forfeiture procedures to rule of court rather than setting up procedures for gambling devices in the Code.

Chapter 18

PORNOGRAPHY AND RELATED OFFENSES

Introductory Comment

The major bases for the provisions of this chapter are the guidelines set forth in the latest decisions on pornography by the United States Supreme Court handed down on June 21, 1973. In those cases five members of the Court agreed on a general definition of obscenity or what the court calls "hard core pornography."

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed.
>
> . . .
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> " . . .
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> " . . . [T]oday, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."

Miller v. California, 93 S.Ct. 2607, 2616–2617 (1973).

Prior to *Miller* the most commonly used definition of obscenity was based on the plurality opinion of Memoirs v. Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977 (1966) which stated

> " . . . it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

In *Miller* the court abandoned the *Memoirs* test and it is no longer acceptable as a definition because it is in some respects too broad and in other respects to narrow. In *Miller* the court prescribed a new test to determine what state laws may provide to regulate "patently offensive 'hard core' material". Works or performances which depict or describe sexual conduct may be (but need not be) banned if the following tests are met:

(1) The work, taken as a whole, must appeal to the prurient interest in sex; and

(2) it must portray sexual conduct in a patently offensive way; and

(3) taken as a whole, it must not have serious literary, artistic, political or scientific value.

The court then proceeded to set out basic guidelines for the trier of fact, which must be

(a) whether the average person applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest; and

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The changes between *Memoirs* and *Miller* may be summarized as follows:

The court abandoned any idea that all parts of the country must follow a national standard. Thus "contemporary community standards" means to some degree local standards, but this is not necessarily the standards of a specific isolated community. In both *Miller* and Kaplan v. California, 93 S.Ct. 2680 (1973) the Court approved the California approach of instructing the jury that they must evaluate the materials by the contemporary community standards of the State of California.

(2) No longer must the state prove that a work is "utterly without redeeming social value" before it can be prohibited. Instead, the state has the burden of proving another negative, that the work, taken as a whole, does not have "serious literary, artistic, political or scientific value."

(3) The *Miller* test requires that the material depict or describe "in a patently offensive way, sexual conduct specifically defined by applicable state law." *Memoirs* spoke only of "description or representation of sexual matters" without requiring the state to define the physical sexual conduct that is covered.

The sections that follow are designed to follow these guidelines.

18.010 Chapter definitions

(1) **"Pornographic."** Any material or performance is "pornographic" if, considered as a whole, applying contemporary community standards:

(a) Its predominant appeal is to prurient interest in sex; and

(b) It depicts or describes sexual conduct in a patently offensive way; and

(c) It lacks serious literary, artistic, political or scientific value.

In determining whether any material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults.

(2) **"Material"** means anything printed or written, or any picture, drawing, photograph, motion picture film, or pictorial representation, or any statute or other figure, or any recording or transcription, or any mechanical, chemical, or electrical reproduction, or anything which is or may be used as a means of communication. "Material" includes undeveloped photographs, molds, printing plates and other latent representational objects.

(3) **"Performance"** means any play, motion picture film, dance or exhibition performed before an audience.

(4) **"Promote"** means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(5) **"Furnish"** means to issue, sell, give, provide, lend, mail, deliver, transfer, circulate, disseminate, present, exhibit or otherwise provide.

(6) **"Wholesale promote"** means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or to offer or agree to do the same for purposes of resale.

(7) **"Minor"** means any person under the age of eighteen.

(8) **"Pornographic for minors."** Any material or performance is "pornographic for minors" if it is primarily devoted to description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and

(a) its predominant appeal is to prurient interest in sex; and

(b) it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) it lacks serious literary, artistic, political, or scientific value for minors.

(9) **"Nudity"** means the showing of post-pubertal human genitals or pubic area, with less than a fully opaque covering.

(10) **"Sexual conduct"** means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area,

buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification.

(11) **"Sexual excitement"** means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(12) **"Sadomasochistic abuse"** means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

(13) **"Explicit sexual material"** means any pictorial or three dimensional material depicting human masturbation, deviate sexual intercourse, sexual intercourse, direct physical stimulation of unclothed genitals, sadomasochistic abuse, or emphasizing the depiction of post-pubertal human genitals; provided however, that works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

(14) **"Displays publicly"** means exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a street, highway or public sidewalk, or from the property of others.

Comment

The definition of "pornographic" in subsection (1) is based on the constitutional definition in Miller v. California, 93 S.Ct. 2607 (1973). The definition of "sexual conduct" required by the *Miller* decision is found in subsection (10).

Subsection (2) defining "material" is based on Proposed California Criminal Code § 960(a) (Staff Draft 1972) and would encompass the articles prohibited by §§ 563.270, 563.280, 563.285 and 563.290 RSMo.

Subsection (3) defining "performance" is based on Proposed Michigan Revised Criminal Code § 6301(e) except there is no requirement that it be for pecuniary consideration.

Subsection (4) defining "promote" is based on New York Penal Law § 235.00(4). As in the case of subsection (2), this definition covers all prohibited activities covered by current Missouri law and is more comprehensive. Defining "promote", as was done in the chapters on gambling and prostitution, avoids having to define the term in the substantive sections.

Subsection (5) has been added to cover "furnishing material pornographic for minors" situations. "Promote" is too broad a term as it covers manufacturing, publishing and advertising as well as actually furnishing.

Subsection (6) "wholesale promote" is based on New York Penal Law § 235.00(5) and is used to create a higher degree of pornography crime. The key words which distinguish "promote" from "wholesale promote" are "for purposes of resale."

Subsection (7) defines minor as a person under the age of 18.

Subsection (8) creates a category of "pornographic for minors" which is defined so as to include anything that would be "pornographic" under subsection (1), and to also include material that would not be pornographic for adults under subsection (1). It is based on New York Penal Law § 235.20. While *Miller* does not squarely deal with the question, there is authority for the proposition that a state, in the interest of protecting juveniles, may prohibit distribution to juveniles of material which the state cannot constitutionally prohibit to adults. See Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) dealing with the New York statute. Subsections (9) through (12) further define the terms used in the definition of what is pornographic for minors.

Subsection (10) defining "sexual conduct" is, of course, also an essential part of the definition of "pornographic" under subsection (1). It is specific in order to conform to the intent of *Miller* to limit regulation of obscenity to "hard core pornography" and to meet the specific requirement of *Miller* that the material depict or describe "in a patently offensive way, *sexual conduct specifically defined by applicable state law*" (emphasis added). The definition is similar to that used in Oregon (see Oregon Laws, 1971, c. 743, Art. 29, § 255) and Hawaii (see Hawaii Session Laws pp. 126–127). In *Miller*, Chief Justice Burger cited the Oregon and Hawaii laws as "examples of state laws directed at depiction of defined physical conduct, as opposed to expression." He then added, "In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving them in all other respects nor as establishing their limits as the extent of state power."

Subsections (13) and (14) are based on the recommendation of The Report of the Commission on Obscenity and Pornography (1970) for criminal prohibition against public displays of explicit sexual materials. See Report at 67. These definitions of "explicit sexual material" and "displays publicly" lay the foundation for the protection of juveniles and unconsenting adults from displays of pornography.

18.020 Promoting pornography in the first degree

(1) A person commits the crime of promoting pornography in the first degree if, knowing its content and character

(a) he wholesale promotes or possesses with the purpose to wholesale promote any pornographic material; or

(b) he wholesale promotes for minors or possesses with the purpose to wholesale promote for minors any material pornographic for minors.

(2) Promoting pornography in the first degree is a Class D Felony.

Comment

Based on New York Penal Law § 235.06, this provision is designed to provide a felony penalty for the wholesaler and distributor of obscene material. See comments on Code § 18.030.

18.030 Promoting pornography in the second degree

(1) A person commits the crime of promoting pornography in the second degree if, knowing its content and character, he

(a) promotes or possesses with the purpose to promote any pornographic material for pecuniary gain; or

(b) produces, presents, directs or participates in any pornographic performance for pecuniary gain.

(2) Promoting pornography in the second degree is a Class A Misdemeanor.

Comment

Based on New York Penal Law § 235.05, this will no doubt be the most utilized criminal statute in the obscenity area. *Cf.* § 563.280 RSMo. Knowledge of the content and character of the material or performance is a necessary element of the crime. In Mishkin v. New York, 383 U.S. 502, 511, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966), the United States Supreme Court observed that the "Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity."

The "pecuniary gain" language is based on Proposed Michigan Revised Criminal Code § 6305 (Final Draft 1967). The emphasis in this area should be on the commercial distribution of pornography. This requirement should not exempt "private clubs" that promote pornographic performances, as the concept of pecuniary gain is broad enough to cover indirect consideration via additional sales of liquor, food, etc. Note also that the element of pecuniary gain is not a requirement in Code § 18.040 dealing with minors.

18.040 Furnishing pornographic materials to minors

(1) A person commits the crime of furnishing pornographic material to minors if, knowing its content and character, he

(a) furnishes any material pornographic for minors, knowing that the person to whom it is furnished is a minor or acting in reckless disregard of the likelihood that such person is a minor; or

(b) produces, presents, directs or participates in any performance pornographic for minors that is furnished to a minor knowing that any person viewing such performance is a minor or acting in reckless disregard of the likelihood that a minor is viewing the performance.

(2) Furnishing pornographic material to minors is a Class A Misdemeanor.

Comment

The decisions of the United States Supreme Court indicate the state has the power to establish more stringent standards prohibiting the distribution of materials to minors. Since the purpose of this section is to protect children from exposure to materials or performances, it does not require furnishing for pecuniary gain. The purpose is broader than merely combatting commercial exploitation of obscenity.

The penalty provision for violation of this section and for violation of Code § 18.030 (promoting pornography in the second degree) is consistent with present Missouri law under §§ 563.270 (fine of not less than $100 or one year in jail or both), 563.280 and 563.290 (fine of not more than $1,000 or one year in jail or both).

18.050 Evidence in pornography cases

(1) In any prosecution under this Chapter evidence shall be admissible to show:

(a) What the predominant appeal of the material or performance would be for ordinary adults or minors.

(b) The literary, artistic, political or scientific value of the material or performance.

(c) The degree of public acceptance in this State and in the local community.

(d) The appeal to prurient interest in advertising or other promotion of the material or performance.

(e) The purpose of the author, creator, promoter, furnisher or publisher of the material or performance.

(2) Testimony of the author, creator, promoter, furnisher, publisher, or expert testimony, relating to factors entering into the determination of the issues of pornography shall be admissible.

Comment

This section, of course, applies to both the prosecution and defense. Under subsection (1)(b) the defense may introduce evidence showing that the material in question has literary value, and conversely, the prosecution may introduce evidence that it has no literary value.

Subsection (2) does change Missouri law particularly with regard to the use of expert testimony. See State v. Hartstein, 469 S.W.2d 329, 339 (Mo.1971). This change is necessary to comply with the language of Kaplan v. California, 93 S.Ct. 2680, 2685 (1973) where the court stated that "The defense should be free to introduce appropriate expert testimony, see Smith v. California, 361 U.S. 147, 164–165 . . . (Frankfurter, J., concurring) . . . ."

The prosecution, however, is not required to produce expert testimony provided the allegedly obscene materials are themselves introduced in evidence. The materials themselves are sufficient for determination of the question. Kaplan v. California, *supra*, and see Paris Adult Theatre I v. Slaton, 93 S.Ct. 2628, 2634–2635 (1973). Thus, while the state does not have to use expert testimony, the defense should be free to use it. The state, of course, should also be free to use expert testimony.

18.060 Public display of explicit sexual material

(1) A person commits the crime of public display of explicit sexual material if he knowingly

(a) displays publicly explicit sexual material; or

(b) fails to take prompt action to remove such a display from property in his possession after learning of its existence.

(2) Public display of explicit sexual material is a Class A Misdemeanor.

Comment

Based on the Obscenity Commission's recommendation, the purpose of this section is to prohibit the open public display of certain sexual materials, in order to protect persons from involuntary exposure to such materials. Apparently, there are no constitutional problems in this area if the offense is sufficiently defined. See Rabe v. Washington, 405 U.S. 313,

92 S.Ct. 993, 31 L.Ed.2d 258 (1972), a per curiam opinion using a "void for vagueness" approach to strike down a conviction because the statute in question did not give fair notice that the location of the exhibition was an essential element of the offense. In a concurring opinion, Chief Justice Burger said, "Public displays of explicit materials . . . are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and . . . involve no significant countervailing First Amendment considerations."

18.070 Injunctions and declaratory judgments

(1) **Creation of remedy.** Whenever material or a performance is being or is about to be promoted, furnished or displayed in violation of Sections 18.030, 18.040 or 18.060, a civil action may be instituted in the circuit court by the prosecuting or circuit attorney or the city attorney of any city, town or village against any person violating or about to violate said sections in order to obtain a declaration that the promotion, furnishing or display of such material or performance is prohibited. Such an action may also seek an injunction appropriately restraining promotion, furnishing or display.

(2) **Venue.** Such an action may be brought only in the circuit court of the county in which any such person resides, or where the promotion, furnishing or display is taking place or is about to take place.

(3) **Parties entitled to intervene.** Any promoter, furnisher or displayer of, or a person who is about to be a promoter, furnisher or displayer of the material or performance involved may intervene as of right as a party defendant in the proceedings.

(4) **Procedure.** The trial court and the appellate court shall give expedited consideration to actions and appeals brought under this section. The defendant shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. No restraining order or injunction of any kind shall be issued restraining the promotion, furnishing or display of any material or performance without a prior adversary hearing before the court.

(5) **Use of declaration.** A final declaration obtained pursuant to this section may be used to form the basis for an injunction and for no other purpose.

(6) **Inconsistent laws superceded.** All laws regulating the procedure for obtaining declaratory judgments or injunctions

which are inconsistent with the provisions of this section shall be inapplicable to proceedings brought pursuant to this section. There shall be no right to jury trial in any proceedings under this section.

Comment

This is based on § 563.285 RSMo. In many instances there will be serious questions whether or not the material sought to be suppressed is pornographic. This section provides a method outside of the criminal prosecution for the determination of that question. In addition, it can provide a more effective method of getting rid of pornographic material. Note, however, that an adversary hearing before a court is required before any restraining order of injunction of any kind may be issued. This is constitutionally required, and definite time limits for having a trial are also constitutionally required under the doctrine of Freedman v. Maryland, 380 U.S. 51, 58–59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). This decision has been repeatedly cited in striking down civil censorship procedures which in effect turn temporary injunctions into final ones because of extended delays in securing final court adjudication. See discussion in United States v. Thirty-seven Photographs, 402 U.S. 363, 367–368, 91 S.Ct. 1400, 29 L.Ed.2d 702 (opinion of Justice White) (1971).

18.080 Preemption and standardization

The legislature by enacting this Chapter intends to preempt any other regulation of the area covered by Section 18.020, to promote state-wide control of pornography, and to standardize laws that governmental subdivisions may adopt in other areas covered by this Chapter. No governmental subdivision may enact or enforce a law that makes any conduct in the area covered by Section 18.020 subject to a criminal or civil penalty of any kind. Cities and towns may enact and enforce laws prohibiting and penalizing conduct subject to criminal or civil sanctions under other provisions of this Chapter, but the provisions of such laws shall be the same and authorized penalties or sanctions under such laws shall not be greater than those of this Chapter.

Comment

Cf. Code § 12.090 dealing with preemption and standardization in the area of prostitution. This section prohibits cities and towns from enacting and enforcing pornography laws in the felony area. However, if a city or town believes that the state enforcement of the criminal laws against pornography is inadequate to provide sufficient control of a local problem, the city may enact an ordinance proscribing anything proscribed by this Chapter, but no more. Thus a city or town could not define pornography in broader terms than those found in state law. Since a city attorney of a city, town or village may bring a declaratory judgment action or seek an injunction under Code § 18.070, no local legislation is required for that.

Chapter 19

OFFENSES AGAINST PUBLIC ORDER

19.010 Peace disturbance

(1) A person commits the crime of peace disturbance if:

(a) he unreasonably and knowingly causes alarm to another person or persons not physically on the same premises by

(i) loud and unusual noise; or

(ii) loud and abusive language; or

(iii) threatening to commit a crime against any person; or

(iv) fighting; or

(v) creating a noxious and offensive odor.

(b) he is in a public place or on private property of another without consent and unreasonably and knowingly causes alarm to another person or persons by

(i) loud and unusual noise; or

(ii) loud and abusive language; or

(iii) threatening to commit a crime against any person; or

(iv) fighting; or

(v) creating a noxious and offensive odor.

(c) he is in a public place or on private property of another without consent and purposely causes inconvenience to another person or persons by unreasonably and physically obstructing

(i) vehicular or pedestrian traffic; or

(ii) the free ingress or egress to or from public or private places.

(2) Peace disturbance is a Class B Misdemeanor.

Comment

See comment after Code § 19.030.

19.020 Private peace disturbance

(1) A person commits the crime of private peace disturbance if he is on private property and unreasonably and purposely

causes alarm to another person or persons on the same premises by

(a) threatening to commit a crime against any person; or

(b) fighting.

(2) Private peace disturbance is a Class C Misdemeanor.

Comment

See comment after Code § 19.030.

19.030 Peace disturbance definitions

For the purposes of Sections 19.010 and 19.020

(1) **"Property of another"** means any property in which the actor does not have a possessory interest.

(2) **"Private property"** means any place which at the time is not open to the public. It includes property which is owned publicly or privately.

(3) **"Public place"** means any place which at the time is open to the public. It includes property which is owned publicly or privately.

(4) If a building or structure is divided into separately occupied units, such units are separate premises.

Comment

In some codes the area covered by §§ 19.010, 19.020 and 19.030 is called "disorderly conduct." Section 562.240 RSMo is entitled "Disturbing the Peace" and this terminology has been retained. The Code divides the crime into two offenses. This is a compromise between two points of view. One extreme would have been to limit peace disturbance to loud, unusual, abusive or threatening noise, language or conduct in a public place which alarmed other persons. Such a limitation would have left the authorities powerless to dampen quarrels between neighbors on their own property until violence occurred. The other extreme would have been to criminalize all language or conduct which annoys. Thus, a whispered obscenity in one's own home could have invoked penal sanctions. The Code compromises by covering alarming conduct which occurs in public, or which alarms persons in the vicinity, and limits interference into purely private matters to truly threatening situations.

Subsection (1)(a) of § 19.010 covers the situation where a person is on his own property, or visiting friends, and un-

reasonably and knowingly causes alarm to persons who are not on the same premises.

Subsection (1)(b) of § 19.010 covers the same type of behavior in public or in a place where the actor should not be. This covers persons both on and off the premises. Thus the "hi-fi nut" who plays his stereo in the wee hours at such a volume that it bothers the neighbors would fall under subsection (1)(a); and the loud and obnoxious drunk in a public bar or on the street would fall under subsection (1)(b).

Note that subsection (1)(a) does not specify that the actor must be on his own property or on property of another with consent although it is intended to cover those situations. To have added these would have added additional elements that the state would have to prove and there is no need to impose that burden. In order to convict under § 19.010(1)(a) the state must prove the person alarmed was on different premises. To convict under subsection (1)(b) there is no need to prove where the person alarmed was (that is, whether he was on the same or different premises) but the state must prove the defendant was in a public place or on property of another without permission.

If the person alarmed is on the same premises as the defendant and the defendant is on private property the state must proceed under § 19.020, private peace disturbance, where the conduct involved is also more limited than under § 19.010. Section 19.020 is designed to cover the situation where the actor is at home (or visiting friends) and alarms someone else on the premises by threatening to commit a crime or by fighting. Under this section it must be the actor's "purpose" to alarm. Under § 19.010(1)(a) and (b) "knowingly" causing alarm is required. Such knowledge could be shown by prior complaints made to the defendant.

Under these sections, only one person need be "alarmed". This is apparently consistent with present law. *Cf.* State v. Rogers, 8 S.W.2d 1073 (Spr.App.1928).

The types of conduct covered are based on present law. "Loud and unusual noise" is taken from the present statute. "Abusive language" is substituted for "offensive or indecent conversation". "Threatening to commit a crime against any person" replaces "threatening, quarreling" or "challenging". "Fighting" remains the same. The "creating noxious and offensive odors" language replaces the statutes dealing with "stink bombs". See §§ 562.290, 562.300 and 562.310 RSMo.

Subsection (1)(c) of § 19.010 dealing with obstructing traffic and entrances is based on Michigan Revised Criminal Code § 5525 (Final Draft 1967) and Proposed Montana Criminal Code § 94–8–101. By requiring "physically obstructing" it is

clear the section does not apply to picket lines where persons are not physically prevented from crossing. *Cf.* St. Louis v. Goldman, 467 S.W.2d 99 (St.L.App.1971).

The definitions in § 19.030 are needed to clarify the distinctions between public and private places and property of another.

19.040 Unlawful assembly

(1) A person commits the crime of unlawful assembly if he knowingly assembles with six or more other persons and agrees with such persons to violate any of the criminal laws of this State or of the United States with force or violence.

(2) Unlawful assembly is a Class B Misdemeanor.

Comment

Based on § 562.150 RSMo, this section increases the number needed for unlawful assembly from three to seven. This is reasonable in light of the limited danger posed by three persons and it limits potential abuse of the statute. It is a compromise between present law and § 542.150 RSMo which requires the dispersal of 12 or more armed persons or 20 unarmed persons.

The present statute prohibits agreement "to do any unlawful act with force or violence." In Rollins v. Shannon, 292 F.Supp. 580 (E.D.Mo.1968) the court met a challenge that the act was unconstitutionally vague by holding that this was limited to "criminal acts."

19.050 Rioting

(1) A person commits the crime of rioting if he knowingly assembles with six or more other persons and agrees with such persons to violate any of the criminal laws of this State or of the United States with force or violence, and thereafter, while still so assembled, does violate any of said laws with force or violence.

(2) Rioting is a Class A Misdemeanor.

Comment

This is a revision of § 562.160 RSMo. As with unlawful assembly, the number required has been increased from three to seven, and "any unlawful act" has been changed to "any of the criminal laws . . . ." The phrase "to the terror or disturbance of peaceful citizens" has been eliminated as an unnecessary element for the State to prove. The phrase

"every person . . . who shall aid or assist in doing any unlawful act" has been omitted as this is covered by the general provisions on accessories in Chapter 7. The clause "provided, that nothing in this section . . . shall be construed to exempt any person offending against its provisions from any higher or heavier punishments annexed by law to any felony which may be committed by such rioters" was eliminated as surplusage.

19.060 Refusal to disperse

(1) A person commits the crime of refusal to disperse if, being present at the scene of an unlawful assembly, or at the scene of a riot, he knowingly fails or refuses to obey the lawful command of a law enforcement officer to depart from the scene of such unlawful assembly or riot.

(2) Refusal to disperse is a Class C Misdemeanor.

Comment

This is based on §§ 542.150 and 542.200 RSMo. Section 542.150 directs "conservators of the peace" such as mayors, aldermen, legislators, sheriffs, etc. to disperse rioters. Section 542.200 states that "every person who shall fail to disperse forthwith on being commanded as aforesaid, shall be deemed to be one of the unlawful assembly" and shall be guilty of a misdemeanor. This section in the Code requires a "knowing" failure to obey and is limited to commands of law enforcement officers.

Chapter 20

OFFENSES AGAINST THE ADMINISTRATION OF JUSTICE

20.010 Definitions

The following definitions shall apply to Chapters 20 and 21.

(1) **"Affidavit"** means any written statement which is authorized or required by law to be made under oath, and which is sworn to before a person authorized to administer oaths.

(2) **"Government"** means any branch or agency of the government of this State or of any political subdivision thereof.

(3) **"Judicial proceeding"** means any official proceeding in court, or any proceeding authorized by or held under the supervision of a court.

(4) **"Juror"** means a grand or petit juror, including a person who has been drawn or summoned to attend as a prospective juror.

(5) **"Jury"** means a grand or petit jury, including any panel which has been drawn or summoned to attend as prospective jurors.

(6) **"Official proceeding"** means any cause, matter, or proceeding where the laws of this State require that evidence considered therein be under oath or affirmation.

(7) **"Public record"** means any document which a public servant is required by law to keep.

(8) **"Testimony"** means any oral statement under oath or affirmation.

Comment

These definitions apply both to this Chapter, Offenses Against the Administration of Justice and Chapter 21, Offenses Against Government. Other terms used in these chapters, such as "confinement", "custody", "place of confinement", "public servant", etc., are defined in the definitions section of Chapter 1.

20.020 Concealing an offense

(1) A person commits the crime of concealing an offense if

(a) he confers or agrees to confer any pecuniary benefit or other consideration to any person in consideration of that person's concealing of any offense, refraining from

initiating or aiding in the prosecution of an offense, or withholding any evidence thereof; or

(b) he accepts or agrees to accept any pecuniary benefit or other consideration in consideration of his concealing any offense, refraining from initiating or aiding in the prosecution of an offense, or withholding any evidence thereof.

(2) Concealing an offense is a Class D Felony if the offense concealed is a felony; otherwise concealing an offense is a Class A Misdemeanor.

Comment

This crime is often called "compounding." See §§ 557.170, 557.180 and 557.190 RSMo. Those statutes cover both felonies and misdemeanors as does the Code provision. Note the Code provision also covers concealing infractions. The Code section expands the crime to cover the person giving the benefit as well as the person receiving it. *Cf.* New York Penal Code § 415.45; Ill. Criminal Code Ch. 38 § 32–1; and Proposed New Jersey Penal Code § 2C:29–4.

20.030 Hindering prosecution

(1) A person commits the crime of hindering prosecution if for the purpose of preventing the apprehension, prosecution, conviction or punishment of another for conduct constituting a crime he

(a) harbors or conceals such person; or

(b) warns such person of impending discovery or apprehension, except this does not apply to a warning given in connection with an effort to bring another into compliance with the law; or

(c) provides such person with money, transportation, weapon, disguise or other means to aid him in avoiding discovery or apprehension; or

(d) prevents or obstructs, by means of force, deception or intimidation, anyone from performing an act that might aid in the discovery or apprehension of such person.

(2) Hindering prosecution is a Class D Felony if the conduct of the other person constitutes a felony; otherwise hindering prosecution is a Class A Misdemeanor

Comment

Based on Michigan Revised Criminal Code (Final Draft 1967) §§ 4635, 4636 and 4637 which is derived from New

York Revised Penal Law §§ 205.55–205.60 and Model Penal Code § 242.3, this section replaces § 556.180 RSMo dealing with "accessory after the fact." Such liability is based on the obstruction of justice rather than assisting the commission of a crime and so has been moved to this Chapter. This section differs from the present law in that it defines the acts of assistance; it eliminates the exemption from liability of certain relations (as husband and wife, child, etc.); and it applies to aiding persons who have committed misdemeanors as well as felonies. "Aiding" by destroying, etc., evidence is covered by Code § 20.100, which applies to an individual destroying evidence to protect himself. Note that the crime of hindering prosecution requires the purpose of preventing the apprehension, etc. of another.

20.040 Perjury

(1) A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths.

(2) A fact is material, regardless of its admissibility under rules of evidence, if it could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding.

(3) Knowledge of the materiality of the statement is not an element of this crime, and it is no defense that

(a) the defendant mistakenly believed the fact to be immaterial; or

(b) the defendant was not competent, for reasons other than mental disability or immaturity, to make the statement.

(4) It is a defense to a prosecution under Subsection (1) that the actor retracted the false statement in the course of the official proceeding in which it was made provided he did so before the falsity of the statement was exposed. Statements made in separate hearings at separate stages of the same proceeding, including but not limited to, statements made before a grand jury, at a preliminary hearing, at a deposition or at previous trial, are made in the course of the same proceeding.

(5) The defendant shall have the burden of injecting the issue of retraction under Subsection (4).

(6) Penalty.

(a) Perjury committed in any proceeding not involving a felony charge is a Class D Felony.

(b) Perjury committed in any proceeding involving a felony charge is a Class C Felony unless

(i) it is committed during a criminal trial for the purpose of securing the conviction of an accused for murder in which case it is a Class A Felony; or

(ii) it is committed during a criminal trial for the purpose of securing the conviction of an accused for any other felony in which case it is a Class B Felony.

Comment

The elements of perjury are not changed substantially from present law. See §§ 557.010 and 557.020 RSMo. The present statute requires the false statement to be made "willfully and corruptly". The Code uses "with the purpose to deceive."

The definition of "testimony" in Code § 20.010(8) limits perjury to oral statements. *Cf.* New York Penal Code § 210.30. The definition of "official proceeding" Code § 20.010 (8) is intended to be as broad as the proceedings presently included under § 557.010 RSMo.

Present Missouri law requires for perjury that the statement must be false as to a material fact. The definition in subsection (2) is drawn from the Model Penal Code § 241.1 (2) and is similar to that found in many other codes. Subsection (3) makes it clear that the state does not have to prove the defendant knew the statement was material and that his mistaken belief as to materiality is no defense. He does, of course, have to know the statement is false.

Subsection (4) is new. There are no Missouri cases as to whether this defense is available. But see State v. Brinkley, 354 Mo. 337, 189 S.W.2d 314, 320 (1945) where it is discussed. The comments to the Michigan Revised Criminal Code (Final Draft 1967) are appropriate.

> ". . . The common law rule is that while retraction may be used to show inadvertence in making the statement, perjury once committed cannot be purged even by a correction during the same hearing. . . . There is, however, some contrary authority based on the theory that it is socially desirable to keep the door open as an incentive for a witness to correct his misstatement and tell the truth before the end of the proceeding."

The strict viewpoint is set forth in United States v. Norris, 300 U.S. 564, 57 S.Ct. 535, 81 L.Ed.2d 808 (1937) stating that allowing retraction as a defense would encourage "false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by

resuming his role as witness and substituting the truth for his previous falsehood."

The Committee agreed that encouraging retraction is sufficiently desirable to justify the purported risk of encouraging perjury in the first instance, and followed the approach of the Model Penal Code § 241.1(4); Colorado Rev.Stat. § 40–8–508; New York Penal Code § 210.25 and the proposed codes in Michigan, Alaska, Montana, South Carolina and Texas.

The penalty provisions, Subsection (6), follow, in general, the present scheme. Perjury committed for the purpose of securing a conviction is more reprehensible and is punished more severely.

See Code § 20.070 for the limitations on the methods of proving perjury.

The Code does not specifically include the crime of "Subornation of Perjury." See §§ 557.040 and 557.050 RSMo. Such offense is adequately covered by the general rules on accessorial liability in Chapter 7.

20.050 False affidavit

(1) A person commits the crime of making a false affidavit if, with purpose to mislead any person, he, in any affidavit, swears falsely to a fact which is material to the purpose for which said affidavit is made.

(2) The provisions of Sections 20.040(2) and 20.040(3) shall apply to prosecutions under Subsection (1) of this Section.

(3) It is a defense to a prosecution under Subsection (1) that the actor retracted the false statement by affidavit or testimony but this defense shall not apply if the retraction was made after

(a) the falsity of the statement was exposed; or

(b) any person took substantial action in reliance on the statement.

(4) The defendant shall have the burden of injecting the issue of retraction under Subsection (3).

(5) Making a false affidavit is a Class A Misdemeanor if done for the purpose of misleading a public servant in the performance of his duty; otherwise making a false affidavit is a Class C Misdemeanor.

Comment

This presently is covered by § 557.070 RSMo. Code § 20.-010(1) defines "affidavit" as "any written statement which is authorized or required by law to be made under oath, and which is sworn to before a person authorized to administer

oaths." It thus includes certificates and other documents. Other codes have similar provisions. See Colo.Rev.Stat. §§ 40–8–503 and 40–8–504 and Michigan Revised Criminal Code §§ 4906 and 4907 (Final Draft 1967).

The application of subsections (2) and (3) of Code § 20.040 (perjury) is new, as is the requirement that the false statement be material. There is no sound policy reason for punishing non-material false statements in writing when non-material false oral statements are not punished.

The defense of retraction is also allowed here as it is for perjury. As with perjury retraction, the defense is limited in that the retraction must be made before the falsity of the statement is exposed. In addition, here the retraction must be made before any person takes substantial action in reliance on the statement.

20.060 False declarations

(1) A person commits the crime of making a false declaration if, with the purpose to mislead a public servant in the performance of his duty, he

(a) submits any written false statement, which he does not believe to be true,

(i) in an application for any pecuniary benefit or other consideration; or

(ii) on a form bearing notice, authorized by law, that false statements made therein are punishable; or

(b) submits or invites reliance on

(i) any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(ii) any sample, specimen, map, boundary mark, or other object which he knows to be false.

(2) The falsity of the statement or the item under Subsection (1) must be as to a fact which is material to the purposes for which the statement is made or the item submitted; and the provisions of Sections 20.040(2) and 20.040(3) shall apply to prosecutions under Subsection (1) of this Section.

(3) It is a defense to a prosecution under Subsection (1) that the actor retracted the false statement or item but this defense shall not apply if the retraction was made after

(a) the falsity of the statement or item was exposed; or

(b) the public servant took substantial action in reliance on the statement or item.

(4) The defendant shall have the burden of injecting the issue of retraction under Subsection (3).

(5) Making a false declaration is a Class B Misdemeanor.

Comment

In general, this section is new to Missouri law. Section 561.400 RSMo prohibits generally "false statements to obtain property or credit, or discount." This would cover such when made to mislead a public servant. See also § 288.380(3) on filing false unemployment insurance claims. This section is based on Model Penal Code § 241.3 and partially on Michigan Revised Criminal Code § 4940 (Final Draft 1967). This section covers basically the making of false statements or supplying false items to public servants for the purpose of misleading them.

Subsection (1)(a)(ii) is based on Model Penal Code. The comments in Tent. Draft No. 6 at 143 (1957) explain:

> "[This section] . . . picks up a common modern device by which the government indicates the special gravity which it attaches to truth in a particular document. It is especially useful as an alternative to prescribing oaths before notaries, avoiding inconvenience and expense. . . . The specification that this device can be used only by legislative authority is intended to make sure that it is not overused, merely on the whim of officials, with consequent depreciation of its value."

The section provides that the falsity must be material and for the limited defense of retraction, similar to Code § 20.050.

20.070 Proof of falsity of statements

No person shall be convicted of a violation of Sections 20.040, 20.050 or 20.060 based upon the making of a false statement except upon proof of the falsity of the statement by

(1) the direct evidence of two witnesses; or

(2) the direct evidence of one witness together with strongly corroborating circumstances; or

(3) demonstrative evidence which conclusively proves the falsity of the statement; or

(4) a directly contradictory statement by the defendant under oath together with

(a) the direct evidence of one witness; or

(b) strongly corroborating circumstances; or

(5) a judicial admission by the defendant that he made the statement knowing it was false. An admission, which

is not a judicial admission, by the defendant that he made the statement knowing it was false may constitute strongly corroborating circumstances.

Comment

This section provides for a significant change in the evidence sufficient to prove perjury. Missouri follows the common law "quantum of evidence" rule with regard to proof of the falsity of the statement. Under this rule, the falsity of the statement can be proved only by the direct evidence of two witnesses, or by the direct evidence of one witness plus strongly corroborating circumstances. These methods are covered by subsections (1) and (2). The succeeding sections broaden the rule and ease the prosecutor's burden by providing for three other methods of proof.

Subsection (3) allows the state to prove falsity solely on the basis of "demonstrative evidence which conclusively proves the falsity." Fingerprint and firearms identification evidence are two examples which, though technically "circumstantial evidence", are far more reliable than the "direct" evidence of an eyewitness. If the defendant has denied being inside a certain vehicle, but his fingerprints are found inside, it is unreasonable to say the state cannot prove the falsity of his denial. In using the phrase "conclusively proves" the intent is to use the strongest language possible to indicate that any ordinary circumstantial evidence will not suffice.

Subsection (4) allows the state to prove falsity by means of "directly contradictory statement" under oath *plus* strongly corroborating circumstances or the direct evidence of one witness. In effect, this substitutes the contradiction for the direct evidence of one witness under subsection (1). This approach is a compromise between the present law and proposals which would allow the direct contradiction under oath to be sufficient without the necessity of having to prove which statement was false. See Model Penal Code § 241.1(5); Colo.Rev.Stat. § 40–8–505; Ill. Criminal Code Ch. 38, § 32–2(b); Michigan Revised Criminal Code § 4915 (Final Draft 1967) and New York Penal Code § 210.20.

The choice of subsection (4) was based on several considerations. First, the Model Penal Code approach would allow the state to charge perjury as an either/or type of crime and force the defendant to defend himself against two inconsistent charges. This violates the concept that the defendant is entitled to be charged with specific acts violating the law and that he is entitled to notice of what he is charged with, and that the state must elect where it has alternative theories of prosecution. Second, as a practical matter, the situations where the contradiction would be completely clear cut would

be rare, and the defendant in many instances would be placed in the position of having both to negate the inconsistency and to prove the truth of both statements. Third, most perjury prosecutions arise out of criminal cases, and the state will have taken a position in most cases of urging the truth of one of the two statements in the prior case. It does not appear just to allow the state to urge conviction of a defendant in one case by urging the falsity of a statement which it relied upon to convict someone in a former case. Finally, if one of the statements in fact contradicts the state's position in another case, as it often will, the state should have little difficulty corroborating the other statement. For these reasons, the Model Penal Code approach was not adopted. However, where a witness has made contradictory statements under oath, and the state has corroborative proof of the falsity of one of the statements, the present quantum of evidence rule, which would preclude conviction based on those facts alone, is simply a loophole for the guilty, and not a protection for the innocent. The proposal thus comports with reality without creating an insoluble dilemma for defendants.

Subsection (5) is also new. The general rule is that a judicial admission of a specific crime does away with the requirement that a corpus delicti be proved and is itself sufficient for a submissible case. The factors that distinguish perjury from other crimes do not justify a different standard of proof insofar as judicial admissions are concerned. The second sentence indicates that a non-judicial admission may satisfy the requirement of "strongly corroborating circumstances" even though it would not be sufficient evidence by itself.

Under present Missouri law the "quantum of evidence" rule also applies to the conduct involved in making a false affidavit. This section also applies to that offense as well as the new offense of making a false declaration. Note that it does not apply to a false declaration made under subsection 20.060 (1)(b) as that does not involve making a false statement.

20.080 False reports

(1) A person commits the crime of making a false report if he knowingly

(a) gives false information to a law enforcement officer for the purpose of implicating another person in a crime; or

(b) makes a false report to a law enforcement officer that a crime has occurred or is about to occur; or

(c) makes a false report or causes a false report to be made to a law enforcement officer, security officer, fire department or other organization, official or volunteer, which deals with emergencies involving danger to life or property that a fire or other incident calling for an emergency response has occurred.

(2) It is a defense to a prosecution under Subsection (1) that the actor retracted the false statement or report before the law enforcement officer or any other person took substantial action in reliance thereon.

(3) The defendant shall have the burden of injecting the issue of retraction under Subsection (2).

(4) Making a false report is a Class A Misdemeanor.

Comment

This section is based on Model Penal Code § 241. Similar sections are found in some other codes. Present Missouri law covers part of this section. See § 562.285 and § 564.535 RSMo. The former deals with making false reports of crimes or destructive substances, the latter with false reports of fires and accidents.

20.090 False bomb report

(1) A person commits the crime of making a false bomb report if he knowingly makes a false report or causes a false report to be made to any person that a bomb or other explosive has been placed in any public or private place or vehicle.

(2) Making a false bomb report is a Class A Misdemeanor.

Comment

This is a type of aggravated false report and has been placed in a separate section with an increased penalty. Under an appropriate set of facts making a false report under Code § 20.080(1)(c) could be a lesser included offense. This offense is presently covered by § 562.285 RSMo except that section is limited to false reports to law enforcement authorities.

Making a false bomb report can be highly dangerous. If a death resulted it is possible the individual could be guilty of manslaughter under Code § 10.030(1)(a). If serious physical injury resulted, he could be guilty of the felony of assault in the second degree under Code § 10.060(1)(b).

20.100 Tampering with physical evidence

(1) A person commits the crime of tampering with physical evidence if he

(a) alters, destroys, suppresses or conceals any record, document or thing with purpose to impair its verity, legibility or availability in any official proceeding or investigation; or

(b) makes, presents or uses any record, document or thing knowing it to be false with purpose to mislead a public servant who is or may be engaged in any official proceeding or investigation.

(2) Tampering with physical evidence is a Class D Felony if the actor impairs or obstructs the prosecution or defense of a felony; otherwise, tampering with physical evidence is a Class A Misdemeanor.

Comment

This section is new to Missouri. It forbids tampering with evidence for the purpose of obstructing justice. Under an appropriate set of facts making a false declaration under Code § 20.060 or making a false report under Code § 20.070 could be a lesser included offense. This crime, of course, carries a much higher penalty. The section is based on Model Penal Code § 241.7 and similar provisions are found in many other codes. Note that the section requires a purpose to affect an official proceeding or investigation or to mislead a public servant.

20.110 Tampering with a public record

(1) A person commits the crime of tampering with a public record if with the purpose to impair the verity, legibility, or availability of a public record

(a) he knowingly makes a false entry in or falsely alters any public record; or

(b) knowing he lacks authority to do so, he destroys, suppresses or conceals any public record.

(2) Tampering with a public record is a Class A Misdemeanor.

Comment

This section is new and is based on Model Penal Code § 241.8 which also is the basis for similar provisions in other codes. The major problem in defining this crime is the definition of

"public record" which under Code § 20.010(7) is limited to "any document which a public servant is required by law to keep."

20.120 False impersonation

(1) A person commits the crime of false impersonation if he

(a) falsely represents himself to be a public servant with purpose to induce another to submit to his pretended official authority or to rely upon his pretended official acts, and

(i) performs an act in that pretended capacity; or

(ii) causes another to act in reliance upon his pretended official authority; or

(b) falsely represents himself to be a person licensed to practice or engage in any profession for which a license is required by the laws of this State with purpose to induce another to rely upon such representation, and

(i) performs an act in that pretended capacity; or

(ii) causes another to act in reliance upon such representation.

(2) False impersonation is a Class B Misdemeanor unless the person represents himself to be a law enforcement officer in which case false impersonation is a Class A Misdemeanor.

Comment

Under this section, which is new, anyone who impersonates a law enforcement officer, public servant or licensed professional with the purpose that his impersonation be relied on by another and who performs an act while playing that role is guilty of a crime. *Cf.* Model Penal Code § 241.9; Colo.Rev. Stat. §§ 40–8–112 and 40–8–113; and Michigan Revised Criminal Code §§ 4545 and 4550 (Final Draft 1967). Most, if not all, codes have a similar provision but some are limited to public servants and apply to simply impersonation. This section includes all public servants and licensed professionals because the potential harm from impersonation of either can be great. The element of intended reliance is included because the offense is in the nature of fraud, and this eliminates the harmless practical joke situation. The requirement of an act being performed helps to distinguish innocent from guilty conduct.

20.130 Simulating legal process

(1) A person commits the crime of simulating legal process if, with purpose to mislead the recipient and cause him to take action in reliance thereon, he delivers of causes to be delivered

(a) a request for the payment of money on behalf of any creditor that in form and substance simulates any legal process issued by any court of this State; or

(b) any purported summons, subpoena or other legal process knowing that said process was not issued or authorized by any court.

(2) This section shall not apply to a subpoena properly issued by a notary public.

(3) Simulating legal process is a Class B Misdemeanor.

Comment

This section is new and is based on Colo.Rev.Stat. § 40–8–611; Ill. Criminal Code Ch. 38 § 32–7; Michigan Revised Criminal Code § 5055 (Final Draft 1967). Similar sections are found in the other codes. Subsection (2) makes it clear that a notary public subpoena which can resemble legal process issued by a court is not included so long as it is a properly issued notary public subpoena.

[**Note**: A section originally numbered 20.140 has been taken out. Because of cross-references already made, subsequent sections have not been renumbered.]

20.150 Resisting or interfering with arrest

(1) A person commits the crime of resisting or interfering with arrest if, knowing that a law enforcement officer is making an arrest, for the purpose of preventing the officer from effecting the arrest, he

(a) resists the arrest of himself by using or threatening the use of violence or physical force or by fleeing from such officer; or

(b) interferes with the arrest of another person by using or threatening the use of violence, physical force or physical interference.

(2) This Section applies to arrests with or without warrants and to arrests for any crime or ordinance violation.

(3) It is no defense to a prosecution under Subsection (1) that the law enforcement officer was acting unlawfully in mak-

ing the arrest. However, nothing in this Section shall be construed to bar civil suits for unlawful arrest.

(4) Resisting, by means other than flight, or interfering with an arrest for a felony is a Class D Felony; otherwise, resisting or interfering with arrest is a Class A Misdemeanor.

Comment

Sections 557.200 and 557.210 RSMo presently make it criminal to "knowingly and willfully obstruct, resist or oppose any sheriff or other ministerial officer" in the service or execution of process or in the discharge of other duties. Section 557.200 applies to felonies and § 557.210 to all other cases. This section and the next retain the basic structure of the present law except the division is between arrest (not limited to felonies) in Code § 20.150 and "civil process" in Code § 20.160.

Resistance to warrantless arrests, which make up well over 90% of the resisting arrest cases, have been prosecuted under the "discharge of duty" clauses. This section makes it clear that resisting or interfering with arrest applies to arrests with or without warrants. Service of other process in criminal cases (*e. g.*, subpoenas) is covered in Code § 20.160.

Another problem with the present statutes is that they are in terms of protecting "sheriffs" and "other ministerial officers." Using the term "law enforcement officer, defined in the general definitions section of Chapter 1 as one having the power and duty to arrest, eliminates any question as to whether the protection extends to police officers.

This section applies to resisting or interfering with both lawful and unlawful arrests. Making it a crime to resist an unlawful arrest may be a major change in Missouri law. No cases have been found squarely in point, although the language seems to indicate that the present statute does not apply to resistance to an unlawful arrest.

The Model Penal Code limits this crime to lawful arrests. Other codes vary. This section is based on Colo.Rev.Stat. § 40–8–103 and Michigan Revised Criminal Code § 4625 (Final Draft 1967) both of which make resisting an unlawful arrest a crime so long as the officer is acting under color of his official authority. The comments to the Michigan proposal explain at 365:

> ". . . Under present law . . . there is no liability if the peace officer was acting without lawful authority. On this issue, however, the defendant must take his chances. He is still liable if he forcibly resists the arrest, believing it to be unlawful, and later finds that it was in fact a legal arrest. The Committee believes, however, that persons should not resort to self-help to resist an arrest which they know is being made by a peace officer in his official capacity. Even if a citizen feels the arrest is unlawful, he should submit and rely upon his legal remedies. The resort to force is an improper remedy that will usually only lead to an escalation of force by the officer and result in far greater injury to the actor than the improper arrest."

It should be noted, however, that this section applies only to resistance for the purpose of preventing the officer from effecting the arrest. It does not apply to the use of force for other purposes. It would not, for example, affect the lawful use of force in self-defense against a police officer who is using excessive force and illegally threatening serious harm.

The proposal is broader than that found in most codes in that it applies to fleeing as well as using force to prevent an arrest.

20.160 Interference with legal process

(1) A person commits the crime of interference with legal process if, knowing any person is authorized by law to serve process, for the purpose of preventing such person from effecting the service of any process, he interferes with or obstructs such person.

(2) **"Process"** includes any writ, summons, subpoena, warrant other than an arrest warrant, or other process or order of a court.

(3) Interference with legal process is a Class B Misdemeanor.

Comment

This is basically present § 557.210 RSMo excluding misdemeanor and ordinance violation arrest warrants which are covered under Code § 20.150. A person "authorized by law to serve process" has been substituted for "sheriff or any other ministerial officer." The term "resist" has been removed to make it clear that mere avoidance of civil process is not a crime.

20.170 Refusing to make an employee available for service of process

(1) Any employer, or any agent who is in charge of a business establishment, commits the crime of refusing to make an employee available for service of process if he knowingly refuses to assist any officer authorized by law to serve process who calls

at such business establishment during the working hours of an employee for the purpose of serving process on such employee, by failing or refusing to make such employee available for service of process.

(2) Refusing to make an employee available for service of process is a Class C Misdemeanor.

Comment

This is basically § 557.225 RSMo. It has been changed to make it clear that if the agent is the one who refuses to assist, it is the agent who is guilty. The present statute states that in such circumstances it is the employer who is guilty.

20.180 Failure to execute an arrest warrant

(1) A law enforcement officer commits the crime of failure to execute an arrest warrant if, with the purpose of allowing any person charged with or convicted of a crime to escape, he fails to execute any arrest warrant, capias, or other lawful process ordering apprehension or confinement of such person, which he is authorized and required by law to execute.

(2) Failure to execute an arrest warrant is a Class D Felony if the offense involved is a felony; otherwise failure to execute an arrest warrant is a Class A Misdemeanor.

Comment

This is a revision of § 557.440 RSMo. It adds the requirement that the failure to execute the warrant must be for the specific purpose of permitting escape. Under the present statute, the other person must escape for the crime to occur, and the penalty is the same as for "persons convicted of aiding or assisting such escape." Under the proposal, failure to serve a misdemeanor warrant is a Class A Misdemeanor and failure to serve a felony warrant is a Class D Felony.

20.190 Refusal to identify as a witness

(1) A person commits the crime of refusal to identify as a witness if, knowing he has witnessed any portion of a crime, or of any other incident resulting in physical injury or substantial property damage, upon demand by a law enforcement officer engaged in the performance of his official duties, he refuses to report or give a false report of his name and present address to such officer.

(2) Refusal to identify as a witness is a Class C Misdemeanor.

Comment

This section is new and is based on Proposed Texas Penal Code § 38.02. It imposes a limited duty upon persons to identify themselves to law enforcement officers.

20.200 Escape from custody

(1) A person commits the crime of escape from custody if, while being held in custody after arrest for any crime, he escapes from custody.

(2) Escape from custody is a Class A Misdemeanor unless:

(a) It is effected by means of a deadly weapon or dangerous instrument or by holding any person as hostage, in which case escape from custody is a Class A Felony.

(b) The person escaping is under arrest for a felony, in which case escape from custody is a Class D Felony.

Comment

Basically this is a new section. See comments after Code § 20.210.

20.210 Escape from confinement

(1) A person commits the crime of escape from confinement if, while being held in confinement after arrest for any crime, or while serving a sentence after conviction for any crime, he escapes from confinement.

(2) Escape from confinement is a Class A Misdemeanor except that it is:

(a) A Class A Felony if it is effected by means of a deadly weapon or dangerous instrument or by holding any person as hostage.

(b) A Class D Felony if

(i) the person escapes while being held on a felony charge or while serving a sentence after conviction of a felony; or

(ii) the escape is facilitated by striking or beating any person.

Comment

Present Chapter 557 RSMo contains a multitude of sections dealing with rescuing prisoners, aiding escapes, and escape. These sections and the succeeding sections are an effort to

simplify this law. Code §§ 20.200 and 20.210 deal with escape from custody and escape from confinement. While the penalties are very similar, the distinction is made between custody, which is basically that period after arrest and before confinement, and confinement which also includes a person confined while serving a sentence. Under the definitions, see Code §§ 20.010(2), (3) and (9), the distinction is based on the place of confinement. This is consistent with present law which defines escape almost completely in terms of custody confinement although neither is clearly defined. The present provisions against escape apply only to persons charged with crimes (except for attempted escape by force under § 557.410 RSMo) and this limitation is retained. Thus, a person charged with or convicted of a municipal ordinance violation cannot violate these sections.

Present §§ 557.351 and 557.410 RSMo require that the custody, confinement or imprisonment be "lawful". This word is not used in the Code sections. If the confinement were not lawful and the individual escaped, the unlawful nature of the confinement would certainly be a mitigating factor. However, it would not be a complete defense. This follows the general approach of the Code that persons should not take the law into their own hands but should follow legal methods of testing the legality of arrest, detention and confinement. If the conditions of a confinement were such that the individual risked death by not escaping, then the general principles of justification under Chapter 8 could be used.

Present § 557.351 RSMo also includes "willfully failing . . . to return to an institution . . . when permitted to go at large." This is covered by Code § 20.220.

Note that under Code § 20.010(2), confinement does not include persons on bond, recognizance, probation or parole. It does not apply where a prisoner is mistakenly released by jail authorities. It does apply to all actual confinement in a place of confinement, and once an individual is in confinement, he remains in confinement while in transit from one location to another, while outside the place of confinement for court appearances, work details, etc., or while on an emergency "leave" for humanitarian purposes because of death or illness in the family. However, where the prisoner is serving a sentence which is not continuous (*e. g.* he is confined on weekends only), or is participating in a work-release program (the "Huber Plan") whereby he is free without guard to work during the day and returns to his cell at night, he is "in confinement" only during the periods of actual confinement. It is believed that this approach captures the sense of § 557.351 RSMo but clarifies some of the ambiguities.

In general under the Code escape while being held for a felony is a Class D Felony, and escape while being held for a misdemeanor is a misdemeanor. This is a slight change from present law which treats all the escapes that are covered as felonies with the penalties varying according to whether the escape was from the penitentiary, the jail, or was before or after conviction. The Code, however, severely aggravates the penalty if the escape is by means of a deadly weapon or dangerous instrument or by use of a hostage. This makes such escapes aggravated forms of assault and kidnapping. *Cf.* Code §§ 10.110(1)(b) and 10.060. It should also be noted that escape from custody and confinement are among the listed felonies in Code § 10.020(1)(c) dealing with murder.

20.220 Failure to return to confinement

(1) A person commits the crime of failure to return to confinement if, while serving a sentence for any crime under a work-release program, or while under sentence of any crime to serve a term of confinement which is not continuous, or while serving any other type of sentence for any crime wherein he is temporarily permitted to go at large without guard, he purposely fails to return to confinement when he is required to do so.

(2) This section does not apply to persons who are free on bond, bail or recognizance, personal or otherwise, nor to persons who are on probation or parole, temporary or otherwise.

(3) Failure to return to confinement is a Class C Misdemeanor unless

(a) the sentence being served is to the Missouri Department of Corrections in which case failure to return to confinement is a Class D Felony; or

(b) the sentence being served is one of confinement in a county jail on conviction of a felony in which case failure to return to confinement is a Class A Misdemeanor.

Comment

This section replaces the language of § 557.351 RSMo on failing to return. See Comments on Code § 20.210. While it is desirable that the penalty for this offense be less than that for escape, this is a practical impossibility where confinement in the department of corrections is concerned. Under Code § 20.210 non-aggravated escape from confinement to the department of corrections is a Class D Felony. Making failure to return to the penitentiary a misdemeanor would create the anomaly that the defendant could be sentenced to a county jail while serving a sentence in the penitentiary. Serving such

sentences consecutively if nothing else, would be bad penology. By making failing to return under these circumstances a felony, the sentences, whether consecutive or concurrent will be served in the same place.

20.230 Aiding escape of a prisoner

(1) A person commits the crime of aiding escape of a prisoner if he

(a) introduces into any place of confinement any deadly weapon or dangerous instrument, or other thing adapted or designed for use in making an escape, with the purpose of facilitating the escape of any prisoner confined therein, or of facilitating the commission of any other crime; or

(b) assists or attempts to assist any prisoner who is being held in custody or confinement for the purpose of effecting the prisoner's escape from custody or confinement.

(2) Aiding escape of a prisoner by introducing a deadly weapon or dangerous instrument into a place of confinement is a Class B Felony. Aiding escape of a prisoner being held in custody or confinement on the basis of a felony charge or conviction is a Class D Felony. Otherwise, aiding escape of a prisoner is a Class A Misdemeanor.

Comment

This section combines present §§ 557.290, 557.300, 557.310, 557.320, 557.330 and 557.340 RSMo. It also replaces §§ 557.230, 557.240, 557.250, 557.260, 557.270 and 557.280 RSMo. These latter sections deal with rescuing prisoners. Section 557.310 covers aiding persons charged with felonies; § 557.320 applies to aiding prisoners charged with misdemeanors; and § 557.340 applies to fellow prisoners aiding escape.

The Code section applies to aiding the escape of a prisoner in custody or confinement on a charge of any crime or serving a sentence after conviction of any crime.

Present §§ 557.310 and 557.320 apply only to persons lawfully detained. As with prior sections, this section does not include that element and thus is a change in the law.

It should be noted that there is no requirement that an escape occur in order for there to be a conviction for aiding escape. This is consistent with present law.

The provision on introduction of weapons or instruments of escape is based on §§ 557.290 and 557.300 RSMo. The proviso that the thing introduced must be "disguised" has been eliminated. The requirement that it be done with the intent to facilitate escape is explicit in § 557.290 and implicit in §

557.300 and, together with the new alternative that it may be intended to aid in the commission of some other crime, is retained as the simplest means of distinguishing between the lawful and unlawful introduction of such items.

Introducing a weapon is a Class B Felony. Under present law, it is a felony if intended to aid a felon and a misdemeanor if intended to aid a misdemeanant. Aiding escape of a prisoner charged with or convicted of a felony is a Class D Felony. It is presently a felony in Missouri. Aiding escape of a person charged with or convicted of a misdemeanor has been reduced to a misdemeanor.

20.240 Permitting escape

(1) A public servant who is authorized and required by law to have charge of any person charged with or convicted of any crime commits the crime of permitting escape if he knowingly

(a) suffers, allows or permits any deadly weapon or dangerous instrument or anything adapted or designed for use in making an escape, to be introduced into or allowed to remain in any place of confinement, in violation of law, regulations or rules governing the operation of the place of confinement; or

(b) suffers, allows or permits a person in custody or confinement to escape.

(2) Permitting escape by suffering, allowing or permitting any deadly weapon or dangerous instrument to be introduced into a place of confinement is a Class B Felony; otherwise, permitting escape is a Class D Felony.

Comment

This section combines and amends §§ 557.420 and 557.430 RSMo. The adjective "disguised" has been removed from "arms" or "instruments", and "in violation of law, regulations or rules governing the operation of the place of confinement" has been substituted to distinguish between lawful and unlawful introductions. Present § 557.430 RSMo requires that the custody be lawful. Again, this has been changed.

The section makes allowing the introduction of a weapon a Class B Felony. Under present law, it is a felony if a felon is the proposed recipient and a misdemeanor otherwise.

Any other violation of this section is a Class D Felony. Under present law, the conduct covered is a felony except that allowing the introduction of instruments for escape to benefit a misdemeanant is only a misdemeanor. Even though escape or

aiding escape of a misdemeanant has been reduced to a misdemeanor under Code §§ 20.200, 20.210 and 20.230, it is retained as a felony for a public servant to aid such an escape.

20.250 Disturbing a judicial proceeding

(1) A person commits the crime of disturbing a judicial proceeding if, with purpose to intimidate a judge, attorney, juror, party or witness, and thereby to influence a judicial proceeding, he disrupts or disturbs a judicial proceeding by participating in an assembly and calling aloud, shouting, or holding or displaying a placard or sign containing written or printed matter concerning the conduct of the judicial proceeding, or the character of a judge, attorney, juror, party or witness engaged in such proceeding, or calling for or demanding any specified action or determination by such judge, attorney, juror, party or witness in connection with such proceeding.

(2) Disturbing a judicial proceeding is a Class A Misdemeanor.

Comment

This section is based on New York Penal Code § 215.50(7) which provides:

"A person is guilty of criminal conduct when he engages in any of the following conduct:

". . .

"(7) On or along a public street or sidewalk within a radius of two hundred feet of any building established as a courthouse, he calls aloud, shouts, holds or displays placards or signs containing written or printed matter, concerning the conduct of a trial being held in such courthouse or the character of the court or jury engaged in such trial or calling for or demanding any specified action or determination by such court or jury in connection with such trial."

In Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), the United States Supreme Court considered a statute which prohibited the above conduct "near" a courthouse. The Court declined to rule that such a statute was a violation of the right of free speech, but did hold that the term "near" was unconstitutionally vague. New York has attempted to remedy this by placing the specific limitation of two hundred feet in the statute. However, this arbitrary limit is not necessarily related to the potential problems which the section seeks to avert. The Code provision avoids the problems of both these statutes by eliminating the element of nearness or a specific distance and focusing upon the effect of the conduct of the participants on the judicial proceeding.

The Code section differs from the New York provision in two other material respects. First, it adds the element of a "purpose to intimidate" and second, the actor must both "participate in an assembly" *and* shout or carry a sign, etc. Thus, a single person cannot violate the statute. Nor is it violated by a member of a group who does nothing more than be present. The committee considered specifying that mere presence at the scene where a disturbance takes place is insufficient for arrest, prosecution or conviction. However, since this is merely a restatement of existing case law, it was rejected as superfluous.

20.260 Tampering with a judicial proceeding

(1) A person commits the crime of tampering with a judicial proceeding if, with purpose to influence the official action of a judge, juror, special master, referee or arbitrator in a judicial proceeding, he

(a) threatens or causes harm to any person or property; or

(b) engages in conduct reasonably calculated to harass or alarm such official or juror; or

(c) offers, confers or agrees to confer any benefit, direct or indirect, upon such official or juror.

(2) Tampering with a judicial proceeding is a Class C Felony.

Comment

This is a revision of § 557.110 RSMo with the addition of judges and masters to the potential subjects of improper influences. Note that juror as defined in Code § 20.010(6) includes both present and prospective jurors for grand or petit juries.

All the current codes cover this type of conduct. Some do so in general provisions applicable to all public servants or governmental processes. See Code Chapter 50 which contains similar provisions. Because interference with the judicial process is very serious, the Code provides for separate offenses in this area and, in general, provides for greater penalties.

The phrase "benefit, direct or indirect" in subsection (1)(c) is intended to cover not only benefits made directly to the official or juror, but also benefits made to others, such as members of his family, which would indirectly benefit such official or juror.

20.270 Tampering with a witness

(1) A person commits the crime of tampering with a witness if, with purpose to induce a witness or a prospective witness in an official proceeding to disobey a subpoena or other legal process, or to absent himself or avoid subpoena or other legal process, or to withhold evidence, information or documents, or to testify falsely, he

(a) threatens or causes harm to any person or property; or

(b) uses force, threats or deception; or

(c) offers, confers or agrees to confer any benefit, direct or indirect, upon such witness.

(2) Tampering with a witness in a felony prosecution, or tampering with a witness with purpose to induce the witness to testify falsely is a Class D Felony. Otherwise, tampering with a witness is a Class A Misdemeanor.

Comment

This is a revision of part of § 557.090 RSMo which forbids inducing a witness not to testify "by bribery, menace or other means." The Code section provides a little more specific listing of the conduct that is prohibited and uses a listing similar to Code § 20.260. However, Code § 20.260 is limited to official and jurors in a judicial proceeding. This section covers witnesses in an official proceeding, which is a broader category. See definition in Code § 20.010(8).

20.280 Acceding to corruption

(1) A person commits the crime of acceding to corruption if

(a) he is a judge, juror, special master, referee or arbitrator and knowingly solicits, accepts, or agrees to accept any benefit, direct or indirect, on the representation or understanding that it will influence his official action in a judicial proceeding pending in any court or before such official or juror.

(b) he is a witness or prospective witness in any official proceeding and knowingly solicits, accepts, or agrees to accept any benefit, direct or indirect, on the representation or understanding that he will disobey a subpoena or other legal process, or absent himself or avoid subpoena or other legal process, or withhold evidence, information or documents, or testify falsely.

(2) Acceding to corruption under Subsection (1)(a) is a Class C Felony. Acceding to corruption under Subsection (1)(b) in a felony prosecution, or on the representation or understanding of testifying falsely is a Class D Felony. Otherwise, acceding to corruption is a Class A Misdemeanor.

Comment

Subsection (1)(a) is an expansion of § 557.100 RSMo. It adds judges and special masters to the class of offenders, and broadens the crime to include solicitation of bribes and agreement to accept bribes. See Code § 50.020 for provision covering acceding to corruption by public servants.

Subsection (1)(b) is a revision of the last half of § 557.090 RSMo with no substantial change.

20.290 Improper communication

(1) A person commits the crime of improper communication if he communicates, directly or indirectly with any juror, special master, referee, or arbitrator in a judicial proceeding, other than as part of the proceedings in a case, for the purpose of influencing the official action of such person.

(2) Improper communication is a Class B Misdemeanor.

Comment

This is a revision of § 557.130 RSMo. Special Masters have been added to the class of person covered. Judges have not been included because it is felt that contempt powers are totally adequate to control the conduct proscribed as far as communication with judges is concerned. Also to include judges could make a casual social conversation with a judge fraught with danger for both parties.

Under appropriate circumstances, this will be a lesser included offense of Code § 20.260, tampering with a judicial proceeding.

20.300 Misconduct by a juror

(1) A person commits the crime of misconduct by a juror if, being a juror, he knowingly

(a) promises or agrees, prior to the submission of a cause to the jury for deliberation, to vote for or agree to a verdict for or against any party in a judicial proceeding; or

(b) receives any paper, evidence or information from anyone in relation to any judicial proceeding for the trial of which he has been or may be sworn, without the authority

of the court or officer before whom such proceeding is pending, and does not immediately disclose the same to such court or officer.

(2) Misconduct by a juror is a Class A Misdemeanor.

Comment

This is a revision of § 557.120 RSMo with little substantive change. Under appropriate circumstances this will be a lesser included offense of Code § 20.280, acceding to corruption.

20.310 Misconduct in selecting or summoning a juror

(1) A public servant authorized by law to select or summon any juror commits the crime of misconduct in selecting or summoning a juror if he knowingly acts unfairly, improperly or not impartially in selecting or summoning any person or persons to be a member or members of a jury.

(2) Misconduct in selecting or summoning a juror is a Class B Misdemeanor.

Comment

This is a revision of § 557.150 RSMo, with little substantive change.

20.320 Misconduct in administration of justice

(1) A public servant, in his public capacity or under color of his office or employment, commits the crime of misconduct in administration of justice if:

(a) He is charged with the custody of any person accused or convicted of any crime or municipal ordinance violation and he coerces, threatens, abuses or strikes such person for the purpose of securing a confession from him.

(b) He knowingly seizes or levies upon any property or dispossesses any one of any lands or tenements without due and legal process, or other lawful authority.

(c) He is a judge and knowingly accepts a plea of guilty from any person charged with a violation of a statute or ordinance at any place other than at the place provided by law for holding court by such judge.

(d) He is a jailer or keeper of a county jail and knowingly refuses to receive, in the jail under his charge, any person lawfully committed to such jail on any criminal charge or criminal conviction by any court of this State, or on any

warrant and commitment or capias on any criminal charge issued by any court of this State.

(e) He is a law enforcement officer and violates the provisions of Section 544.170 RSMo by knowingly

(i) refusing to release any person in custody who is entitled to such release; or

(ii) refusing to permit a person in custody to see and consult with counsel or other persons; or

(iii) transferring any person in custody to the custody or control of another, or to another place, for the purpose of avoiding the provisions of that section; or

(iv) preferring against any person in custody a false charge for the purpose of avoiding the provisions of that section.

(2) Misconduct in the administration of justice is a Class A Misdemeanor.

Comment

This section and Code § 21.040 cover most of the present sections of Chapter 558 RSMo relating to specific types of official misconduct. See comments to Code § 21.040.

Subsection (1)(a) is basically § 558.360 without substantive change.

Subsection (1)(b) is based on part of § 558.190 RSMo. It has been expanded to cover all public servants.

Subsection (1)(c) is present § 558.380 RSMo.

Subsection (1)(d) is present § 557.450 RSMo. The phrase "on any lawful process whatever" has been replaced by "on any warrant and committment or capias on any criminal charge issued by any court of this State." This would allow the person in charge of a county jail to refuse to receive persons charged with or convicted of ordinance violations, but does not, of course, require him to do so.

Subsection (1)(e) is a redrafting of the present penalty provisions of § 544.170 RSMo without substantive change.

Some existing statutes dealing with misconduct have not been included either here or in Code § 21.040, official misconduct.

Section 558.310 prohibits a prosecuting attorney who has been involved in a case from later acting in the defense of that case. This is adequately covered by the canons of ethics and the machinery for enforcing them.

The Committee considered and rejected a section which made "any judge, referee, or special master who communi-

cates privately with one of the parties to a judicial proceeding pending before him, or with a witness in said proceeding, and discusses the merits of said proceeding or the party's or witness's testimony therein" guilty of misconduct. This proposal was based upon the prosecution for oppression in office (under § 558.110 RSMo) in State v. Hasler, 449 S.W.2d 881 (St.L.App.1969). The proposal was rejected because of the new machinery available to take care of judicial misconduct.

The Committee also considered and rejected a section which made "any law enforcement officer arresting or detaining any person against his will without warrant, or causing another officer to effect such an arrest, who has no probable cause for such arrest and who knows that he has no probable cause" guilty of misconduct. This is presently part of § 558.190 RS Mo. It was not included because there is no record of its use, but primarily because such conduct would be covered by false imprisonment under Code § 10.130.

Chapter 21

OFFENSES AFFECTING GOVERNMENT

21.010 Bribery of a public servant

(1) A person commits the crime of bribery of a public servant if he knowingly offers, confers or agrees to confer upon any public servant any benefit, direct or indirect, in return for

(a) the recipient's official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant; or

(b) the recipient's violation of a known legal duty as a public servant.

(2) It is no defense that the recipient was not qualified to act in the desired way because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

(3) Bribery of a public servant is a Class D Felony.

Comment

This replaces §§ 558.010, 558.020, 558.030, 558.040, 558.050, 558.060, 558.070, 558.080, 558.090 and 558.100 RSMo. It also replaces the various bribery statutes outside Chapter 558 RS Mo which affect public servants, except the special statutes on bribery in connection with election laws. Unlawful compensation for past official actions, as covered presently by the case-law interpretation of § 558.020 RSMo, was considered by the Committee and rejected.

Subsection (1) is basically a codification of present Missouri law, and is similar to provisions in other codes. See Model Penal Code § 240.1. Some codes are written in terms of "influencing" official decisions. The Code language, while more limited, is clear and more specific. To constitute a violation of this section, the benefit must be offered or given in the expectation that specific action or inaction will ensue, not in the hope that the official will in some vague, undefined way be "influenced" thereby. Although the present Missouri statutes use the term "influence", the case law requires allegation and proof of specific action or inaction sought or promised.

This crime is similar to Code § 20.260(1)(c), tampering with judicial proceeding, and in an appropriate set of circumstances could be a lesser included offense.

Subsection (2) changes present Missouri law and is based on Model Penal Code § 240.1, Colo.Rev.Stat. § 40–8–302(2)

and Michigan Revised Criminal Code § 4705(3) (Final Draft 1967).

The Committee considered and rejected a provision that:

> "It is a defense to prosecution under this section if a person conferred or agreed to confer a benefit upon a public servant as a result of coercion or attempted coercion, or extortion or attempted extortion by the latter."

Such a section is found in Michigan Revised Criminal Code § 4705(2) (Final Draft 1967); New York Penal Code § 200.5; and Proposed South Carolina Criminal Code § 20.19. Such a defense is specifically negated in the Proposed New Jersey Criminal Code § 2C:27–2. The rationale for such a provision is twofold. First, a public servant with authority to deny permits and licenses might have such overwhelming power in a community as to leave a businessman no real choice but to cooperate or go out of business. Second, a person who had been placed in such a position by a public servant would be more willing to report the matter to authorities and cooperate if he were not subject to prosecution. The Committee, however, rejected the provision because it felt it rewarded wrongdoing. However, such pressure put upon a person would be a relevant consideration in the determination of the penalty, and his cooperation in reporting a bribe, etc. would certainly be a valid consideration in the prosecutor's decision whether or not to prosecute.

21.020 Public servant acceding to corruption

(1) A public servant commits the crime of acceding to corruption if he knowingly solicits, accepts or agrees to accept any benefit, direct or indirect, in return for

(a) his official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant; or

(b) his violation of a known legal duty as a public servant.

(2) Acceding to corruption by a public servant is a Class D Felony.

Comment

See comments to Code § 21.010. Note also that this can, under appropriate circumstances, be a lesser included offense of Code § 20.280(1)(a).

21.030 Obstructing government operations

(1) A person commits the crime of obstructing government operations if he purposely obstructs, impairs, hinders or perverts

the performance of a governmental function by the use or threat of violence, force, or other physical interference or obstacle.

(2) Obstructing government operations is a Class B Misdemeanor.

Comment

This section is new. It is based on Model Penal Code § 242.1; Colo.Rev.Stat. § 40–8–102; New York Penal Code § 195.05 and is found in several other codes. Note that under appropriate circumstances it could be a lesser included offense to a number of more serious crimes, such as Code §§ 20.090 (making false bomb threat), 20.150 (resisting or interfering with arrest), 20.160 (interference with legal process), 20.250 (disturbing judicial proceeding) and 20.270 (tampering with witness).

21.040 Official misconduct

(1) A public servant, in his public capacity or under color of his office or employment, commits the crime of official misconduct if:

(a) He knowingly discriminates against any employee or any applicant for employment on account of race, creed, color, sex or national origin, provided such employee or applicant possesses adequate training and educational qualifications.

(b) He knowingly demands or receives any fee or reward for the execution of any official act or the performance of a duty imposed by law or by the terms of his employment, that is not due, or that is more than is due, or before it is due.

(c) He knowingly collects taxes when none are due, or exacts or demands more than is due.

(d) He is a city or county treasurer, city or county clerk, or other municipal or county officer, or judge of a municipal or county court, and knowingly orders the payment of any money, or draws any warrant, or pays over any money for any purpose other than the specific purpose for which the same was assessed, levied and collected; unless it is or shall have become impossible to use such money for that specific purpose.

(e) He is an officer or employee of any court and knowingly charges, collects or receives less fee for his services than is provided by law.

(f) He is an officer or employee of any court and knowingly directly or indirectly buys, purchases or trades for any fee taxed or to be taxed as costs in any court of this State, or any county warrant, at less than par value, which may be by law due or to become due to any person by or through any such court.

(g) He is a county officer, deputy or employee and knowingly trafficks for or purchases at less than the par value or speculates in any court warrant issued by order of the county court of his county, or in any claim or demand held against such county.

(2) Official misconduct is a Class A Misdemeanor.

Comment

This section replaces §§ 558.110, 558.140, 558.150, 558.155, 558.160, 558.180, 558.200, 558.210, 558.260, 558.280 and 558.300 RSMo. This section, and Code § 20.320, reflect the choice between a general statute prohibiting oppression or misconduct in office, and a statute which spells out specific acts of misconduct that are to be punished. Present Missouri law jumbles these alternatives by specifically prohibiting many types of official misconduct yet overlapping these with a general prohibition against "oppression in office". Most recent codes purport to resolve the question with general prohibitions against misconduct in office. But even these codes will contain specific prohibitions against public servants soliciting or receiving bribes, receiving compensation for past official behavior, accepting gifts from persons subject to their jurisdiction, etc. The difficulty with the general section as a catch-all is one of definition. To make it a crime for a public servant to fail to do an act which he is required to perform, or to do an act in excess of his authority, or to violate any statute or regulation pertaining to his office is to create a broad and vague crime. If strictly enforced, it would be very difficult to be a public servant, and if selectively enforced, it would be difficult for a public servant to know what he could or could not do without criminal prosecution. The choice made in the Code is to specify certain behavior as being prohibited and to omit a general "misconduct" or "oppression" section such as present § 558.110 RSMo, which does not give adequate warning to a public servant as to what conduct is prohibited.

This section and Code § 20.320 cover most of the present sections of Chapter 558 RSMo relating to specific types of official misconduct.

Subsection (1)(a) is present § 558.155 RSMo with the addition of a ban on discrimination on account of sex to comport with present federal law.

Subsection (1)(b) is present § 558.140 without substantive change.

Subsection (1)(c) is present § 558.150 with slight change in wording.

Subsection (1)(d) is a combination of present §§ 558.260 and 558.280 RSMo.

The offense is changed from a felony to a misdemeanor. The sections have been completely rewritten and simplified. The portion dealing with administrators of "any charity or fund of a public nature" has been removed. Such activity if fraudulent is covered by the theft crimes. If not fraudulent, it does not belong in the criminal code. The Code section does not apply to members of boards, councils, etc. who vote for disbursements but applies only to the judge or officer who orders or makes such payments.

Subsections (1)(e) and (f) are based on § 558.200 RSMo without substantive change.

Subsection (1)(g) is § 558.300 RSMo without substantive change.

Section 558.180 RSMo deals with a person taking upon himself any office of public trust and acting without lawful authority. This is not included here as it is adequately covered by Code § 20.120, false impersonation.

21.050 Misuse of official information

(1) A public servant commits the crime of misuse of official information if, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he knowingly

(a) acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; or

(b) speculates or wagers on the basis of such information or official action; or

(c) aids, advises or encourages another to do any of the foregoing with purpose of conferring a pecuniary benefit on any person.

(2) Misuse of official information is a Class A Misdemeanor.

Comment

This section is new. It is based on Colo.Rev.Stat. § 40–8–402. Similar provisions are found in the Model Penal Code § 243.2; Michigan Revised Criminal Code § 4810 (Final Draft 1967); Proposed New Jersey Criminal Code § 2C:30–3 and Texas Penal Code § 39.03.

21.060 Failure to give a tax list

(1) A person commits the crime of failure to give a tax list if, when requested by a government assessor, he knowingly fails to give a true list of all his taxable property, or to take and subscribe an oath or affirmation to such list as required by law.

(2) Failure to give a tax list is a Class A Misdemeanor.

Comment

This is presently § 557.510. There is no change in substance.

21.070 Treason

(1) A person owing allegiance to the State commits treason if he purposely levies war against the State, or adheres to its enemies by giving them aid and comfort.

(2) No person shall be convicted of treason unless one or more overt acts are alleged in the indictment or information.

(3) In a trial on a charge of treason, no evidence shall be given of any overt act that is not specifically alleged in the indictment or information.

(4) No person shall be convicted of treason except upon the direct evidence of two or more witnesses to the same overt act, or upon his confession under oath in open court.

(5) Treason is a Class A Felony.

Comment

This section is based on Missouri Constitution, Art. I, Section 30, and on §§ 562.010 and 546.350 RSMo. See also Ill. Criminal Code Ch. 38, § 30–1; Proposed Montana Criminal Code § 94–7–501; Proposed Oklahoma Criminal Code § 2–601; and Proposed South Carolina Criminal Code § 21.1. No provisions concerning treason are contained in the Model Penal Code, nor in the Alaska, Colorado, Michigan, New Jersey, New York or Texas codes. There are no reported cases in Missouri indicating any prosecutions under the present laws.

Subsection (1) is basically present § 562.010 RSMo. The only change is that of expressly limiting the class of potential violators to persons "owing allegiance to this State" which is inherent in the concept of treason. *Cf.* Mo. Const. Art. I, Sec. 30 which states "That treason against the state can consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; . . . ."

Subsection (2) is taken from the first two lines of § 546.350 RSMo with the words "or information" added.

Subsection (3) is taken from the third and fourth lines of § 546.350 RSMo with the words "or information" added.

Subsection (4) is taken from the last part of § 546.350 RSMo and the same requirement is in the Missouri Constitution.

Chapter 22

MISCELLANEOUS OFFENSES AFFECTING PUBLIC SAFETY

22.010 Driving while intoxicated

(1) A person commits the crime of driving while intoxicated if he operates a motor vehicle while in an intoxicated or drugged condition.

(2) Driving while intoxicated is:

(a) For the first offense, a Class B Misdemeanor.

(b) For the second offense, a Class A Misdemeanor.

(c) For the third and subsequent offenses, a Class D Felony.

(3) Evidence of prior convictions shall be heard and determined by the trial court, out of the hearing of the jury, prior to the submission of the case to the jury, and the court shall enter its findings thereon.

Comment

This is essentially the same as present § 564.440 RSMo. The language has been changed to conform to the rest of the Code. The only significant change is the addition of "drugged condition" which in effect combines § 564.445 RSMo with driving while intoxicated.

22.020 Breath test for determining alcoholic content of blood

(1) Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 22.020, 22.030 and 22.050, a chemical test of his breath for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while intoxicated. The test shall be administered by or at the direction of a law enforcement officer whenever the person has been arrested for the offense.

(2) Chemical analysis of the person's breath, to be considered valid under the provisions of sections 22.020, 22.030 and 22.050, shall be performed according to methods approved by the state division of health by a person possessing a valid permit issued by the state division of health for this purpose. The state division of health is authorized to approve satisfactory techniques or methods, to ascertain the qualifications and competence of individuals to conduct analysis and to issue permits which shall be subject to termination or revocation by the state division of health.

(3) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a test in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer.

(4) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test shall be made available to him.

Comment

This section is identical to present § 564.441 except for the section numbers referred to in the section. See comment after Code § 22.050.

22.030 Effect of chemical analysis as evidence

(1) Upon the trial of any criminal action or violations of county or municipal ordinances arising out of acts alleged to have been committed by any person while driving a motor vehicle while intoxicated, the amount of alcohol in the person's blood at the time of the act alleged as shown by chemical analysis of the person's blood, breath, saliva or urine is admissible in evidence. Such evidence shall be given the following effect:

(a) If there was five-hundredths of one percent or less by weight of alcohol in his blood, it shall be presumed that the person was not intoxicated at the time the specimen was obtained.

(b) If there was in excess of five-hundredths of one percent but less than ten-hundredths of one percent by weight of alcohol in his blood, the fact shall not give rise to any presumption that the person was or was not intoxicated, but the fact may be considered with other competent evidence in determining whether the person was intoxicated.

(c) If there was ten-hundredths of one percent or more by weight of alcohol in the person's blood, this shall be prima facie evidence that the person was intoxicated at the time the specimen was taken.

(2) Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred milliliters of blood.

(3) The foregoing provisions of this section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether the person was intoxicated.

Comment

This section is identical in language to § 564.442 RSMo as amended in 1972.

22.040 Arrest without warrant, when

An arrest without a warrant by a law enforcement officer, including a uniformed member of the state highway patrol, for a violation of Section 22.010 is lawful whenever the arresting officer has reasonable grounds to believe that the person to be arrested has violated the section, whether or not the violation occurred in the presence of the arresting officer; provided, however, that any such arrest without warrant must be made within one and one-half hours after such claimed violation occurred.

Comment

Identical in language with present § 564.443, except that "law enforcement officer" is used instead of "peace officer", and the cross-reference section number has been changed.

22.050 Refusal to submit to chemical test—revocation of license—hearing

(1) If a person under arrest refuses upon the request of the arresting officer to submit to a chemical test, which request shall include the reasons of the officer for requesting the person to submit to a test and which also shall inform the person that his license may be revoked upon his refusal to take the test, then none shall be given. In this event, the arresting officer, if he so believes, shall make a sworn report to the director of revenue that he has reasonable grounds to believe that the arrested person was driving a motor vehicle upon the public highways of this state while in an intoxicated condition and that, on his request, refused to submit to the test. Upon receipt of the officer's report, the director shall revoke the license of the person refusing to take the test for a period of not more than one year; or if the person arrested be a non-resident, his operating permit or privilege shall be revoked for not more than one year; or if the person is a resident without a license or permit

to operate a motor vehicle in this state, an order shall be issued denying the person the issuance of a license or permit for a period of not more than one year.

(2) If a person's license has been revoked because of his refusal to submit to a chemical test, he may request a hearing before a court of record in the county in which he resides or in the county in which the arrest occurred. Upon his request the clerk of the court shall notify the prosecuting attorney of the county and the prosecutor shall appear at the hearing on behalf of the arresting officer. At the hearing the judge shall determine only:

(a) Whether or not the person was arrested;

(b) Whether or not the arresting officer had reasonable grounds to believe that the person was driving a motor vehicle while in an intoxicated condition; and,

(c) Whether or not the person refused to submit to the test.

(3) If the judge determines any issue not to be in the affirmative, he shall order the director to reinstate the license or permit to drive.

(4) Requests for review as herein provided shall go to the head of the docket of the court wherein filed.

Comment

This section is identical in language to present § 564.444 RSMo. Code §§ 22.020, 22.030, 22.040 and 22.050 are almost identical to the present breath test law, which has been retained in the Code without change.

22.060 Leaving the scene of a motor vehicle accident

(1) A person commits the crime of leaving the scene of a motor vehicle accident when being the operator or driver of a vehicle on the highway and knowing that an injury has been caused to a person or damage has been caused to property, due to his culpability or to accident, he leaves the place of said injury, damage or accident without stopping and giving his name, residence, including city and street number, motor vehicle number and chauffeur's or registered operator's number, if any, to the injured party or to a police officer, or if no police officer is in the vicinity, then to the nearest police station or judicial officer.

(2) Leaving the scene of a motor vehicle accident is a Class D Felony.

Comment

This section is essentially the same as present § 564.450 RSMo. A slight change has been made in the wording to conform to the rest of the Code.

22.070 Littering

(1) A person commits the crime of littering if he throws or places, or causes to be thrown or placed, any glass, glass bottles, wire, nails, tacks, hedge, cans, garbage, trash, refuse, or rubbish of any kind, nature or description on the right-of-way of any public road or state highway or on or in any of the waters in this state or on the banks of any stream, or on any land or water owned, operated or leased by the state, any board, department, agency or commission thereof or on any land or water owned, operated or leased by the federal government or on any private real property owned by another without his consent.

(2) Littering is a Class A Misdemeanor.

Comment

This section is almost identical to present § 564.480 RSMo except for slight changes in wording to conform to the rest of the Code and the deletion of the portion dealing with abandoning automobiles which has been covered in a separate Code section, § 22.080.

22.080 Abandoning motor vehicle

(1) A person commits the crime of abandoning a motor vehicle if he abandons any motor vehicle on the right-of-way of any public road or state highway or on or in any of the waters in this state or on the banks of any stream, or on any land or water owned, operated or leased by the state, any board, department, agency or commission thereof, or any political subdivision thereof or on any land or water owned, operated or leased by the federal government or on any private real property owned by another without his consent.

(2) Abandoning a motor vehicle is a Class A Misdemeanor.

Comment

This offense was formerly included in § 564.480 RSMo. See comment to Code § 22.070.

22.090 Arrest for littering and abandoning motor vehicles

Any law enforcement officer shall and any agent of the conservation commission or deputy or employee of the boat commission may enforce the provisions of Sections 22.070 and 22.080 and arrest violators thereof; except that conservation agents and deputy boat commissioners may enforce such provisions only upon the water, the banks thereof or upon public land.

Comment

This section is identical to subsection (3) of § 564.480 RSMo except for the substitution of the phrase "law enforcement officer".

Note: Present § 564.010 RSMo 1971 Supp. "Polluting streams—penalty" and § 564.025 RSMo 1971 Supp. "Waste disposal wells prohibited—term defined—permitted acts—penalty" should both be moved to Chapter 204 Water Pollution.

Present § 564.470 RSMo "Person operating vehicle while under sixteen years of age" should be moved to Chapter 302 Drivers' and Chauffeurs' Licenses.

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APPENDIX

This appendix includes the committee drafts of sections dealing with capital punishment, abortion and wiretapping. These have been omitted from the basic Code package not because they are unimportant but because there are such extreme differences of opinion regarding them and they are quite often considered in highly emotional terms. The major purpose of the Code is to put Missouri's criminal law into an organized coherent body and to update the law so that it serves today's needs. We do not want the issue of revision to become confused with the issues of the death penalty, abortion and wiretapping. They are separate matters and should be considered separately. As the National Advisory Commission on Criminal Justice Standards and Goals warns in A National Strategy to Reduce Crime:

> Those who revise criminal codes should be warned of the potential danger to the revision process posed by emotional issues such as abortion or the death penalty. Because criminal code revision efforts too frequently founder on one or two such issues that may be quite incidental to the overall revision effort, States should consider these issues in legislation that is introduced separately from legislation calling for criminal code revision.

We ask that the Code be considered separately from legislation on capital punishment, abortion and wiretapping. This is feasible because at present Missouri has no effective laws on these subjects. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) has rendered inoperative the former capital punishment provisions in the Missouri statutes. Similarly, under the authority of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), Missouri's abortion law has been declared to be unconstitutional. Missouri does not have specific statutes dealing with either making wiretapping and eavesdropping criminal nor allowing law enforcement authorities to make lawful use of such. In other words, passing the Code without provisions on these subjects will make no change in present Missouri law, for there is no present Missouri law on these subjects.

The sections that follow are drafted in a fashion that will allow them to be added to the Code should they be desired.

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THE DEATH PENALTY

Introductory Comment

The committee makes no recommendation as to whether or not Missouri should have the death penalty as a part of its criminal law. The Code is so drafted that a death penalty section can be added if the legislature decides to reinstate capital punishment. The committee has prepared a death penalty section which is consistent in form and content with the organization of the Code. If the decision is to have the death penalty we suggest this provision be considered. If the decision is not to have the death penalty this section can be omitted without affecting the rest of the Code. In short, the issue of the death penalty can and should be considered separate from the rest of the Code. We make no recommendation on the question but only ask that the Code be considered as a separate matter from the death penalty.

Anyone who has studied Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) realizes the difficulty in drafting a death penalty provision that will be constitutional under that decision. It may well be there cannot be a constitutionally valid death penalty provision. If there can be a constitutional death penalty provision, it must avoid arbitrariness and discretion in the imposition of the death penalty and at the same time be sufficiently limited so that it is imposed only in those cases where there is a clear rational basis for it. While we cannot be certain, we believe the following proposal meets the constitutional standards. However, as stated above, we make no recommendation as to its being adopted or not.

The section is numbered to indicate the appropriate location should it be later added to the Code.

10.025 Capital murder

(1) A person is guilty of capital murder if he is over seventeen years of age and commits murder as defined in Section 10.-020(1)(a) and one or more of the following aggravating factors is charged and proved:

(a) The defendant procured the commission of the murder by payment, or promise of payment, of anything of pecuniary value.

(b) The defendant by his own act committed the murder as consideration for the receipt of anything of pecuniary value.

(c) The defendant by his own act committed the murder during the commission or attempt to commit arson, rape, sodomy, robbery, burglary in the first degree, kidnapping, or escape from custody or confinement, for the purpose of preventing identification or apprehension of the defendant or another as a participant in the felony being committed or attempted.

(d) The defendant by his own act committed the murder while serving a term of imprisonment of more than ten years or for life.

(2) A person convicted of capital murder shall be sentenced to death.

Comment

This proposal would make the death penalty mandatory in certain specific situations. A mandatory death penalty statute avoids as much as possible the arbitrary or discretionary infliction of the penalty of death. However, prior experience with mandatory penalties and in particular with a mandatory death penalty has not been satisfactory. It is far too easy for situations to arise in which the circumstances are such that the death penalty is in fact too extreme even though the situation meets the "letter of the law." See, *e. g.*, Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) and the discussion of the history of that case in Prettyman, Death and the Supreme Court 47–89 (1961). Thus, it is necessary if there is to be a mandatory death penalty that the situations in which it will be applied are defined as precisely as possible to include only situations where there is a strong rational basis for the use of the death penalty. This provision attempts to do this.

The proposal in effect creates a new degree of murder by listing aggravating factors as elements of the crime, which elements must be charged and proved, the same as the elements of any crime, before an individual can be convicted of this particular type of murder. In other words, these are not factors to be taken into consideration in assessing the penalty, but rather are part of the definition of the crime and which must be found beyond a reasonable doubt before an individual can be convicted of capital murder. However, once he has been so convicted, there is only one possible penalty.

Several points should be noted.

First, capital murder can result only from an intentional killing. Before there can be capital murder, there must be murder as defined in Code § 10.020(1)(a) and this is murder from "knowingly" killing another person.

Second, the defendant must be 18 years old or older at the time of the crime. While any age classification is to some extent arbitrary, this does prevent the imposition of the death penalty upon a very young offender.

Third, with one exception, in subsection (1)(a), the defendant must do the act of killing himself. Only in the case of hiring a murder can the defendant receive the death penalty for a killing performed by someone else.

Fourth, the situations described in the subsections are all situations where there is a particular aggravating circumstance that is related to deterrence. While there is considerable dispute as to whether or not the death penalty is a deterrent, it is clear that it cannot be a deterrent (above the ordinary penalty for the crime of murder) unless the situation is one where there is actual reflection upon the consequences of killing another person.

Subsections (1)(a) and (b) deal with killing for hire. Such cannot occur without considerable reflection by both the person doing the hiring and the hired killer. In such a situation there is the possibility that the presence of the death penalty as a mandatory penalty will bear on the individual's decision.

Subsection (1)(c) deals with a type of felony-murder. Making all felony-murders capital offenses is too broad as felony-murder can be committed unintentionally. Making all intentional felony-murders capital offenses is also too broad, for such can occur on the spur of the moment and without any real chance for the additional penalty of death to have a deterrent effect. The proposal requires that the killing be for the purpose of preventing identification or apprehension which does require additional choice and reflection.

Subsection (1)(d) is similar to subsection (1)(a) and (b) in that it cannot occur without considerable reflection as the killing must be for the purpose of preventing the victim from giving testimony.

Subsection (1)(e) is slightly different from the rest in that the aggravating factor is not one directly related to reflection at the time of the killing, but rather upon the status of the defendant. He must be serving a term of imprisonment greater than 10 years or for life. This is based upon the idea of the need for control over a group that may "have nothing else to lose." The extremely controlled environment of the long term inmate is a sufficiently arguable basis for the deterrent effect of a mandatory death penalty.

The committee considered other possibilities but decided that they did not meet the standards required for the mandatory imposition of death.

APPENDIX

Note: If the death penalty provision is added to the Code, the following minor changes in wording should be made by adding the underlined words to the indicated section.

1.030 Classes of crimes

(1) An offense defined by this Code or by any other statute of this State, for which a sentence *of death or* of imprisonment is authorized, constitutes a crime.

Crimes are classified as felonies and misdemeanors.

(2) A crime is a felony if it is so designated or if persons convicted thereof may be sentenced *to death or* to imprisonment for a term which is in excess of one year.

(3) * * *

2.010 Authorized dispositions

(1) * * *

(2) Felonies and Misdemeanors. Whenever any person has been found guilty of a felony or a misdemeanor *and an authorized sentence of death is not imposed* the court shall make one or more of the following dispositions of the offender in any appropriate combination. * * *

ABORTION AND RELATED OFFENSES

Introductory Comment

Abortion, like the death penalty, is a subject with widely differing points of view and a subject which arouses highly emotional reactions and for these reasons, the Committee's proposal is presented as a matter separate from the Code, to be considered separate from the Code. Also, as is the case with the death penalty, the state's power to act with regard to abortion has been limited by decisions of the United States Supreme Court. However, with regard to abortion, the decisions of the Supreme Court provide much more definite guidelines than is the case with capital punishment.

The following sections are, of course, based largely on the decisions of the United States Supreme Court in Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). By these decisions the Supreme Court has narrowly confined the power of a state to prohibit and regulate abortions. The following provisions are designed to meet the requirements of those decisions.

Roe v. Wade indicated that a state cannot go very far in restricting abortions. The broad outlines of that decision can be summarized as follows:

1. The right to privacy, though not explicitly mentioned in the Constitution, is protected by the Due Process Clause of the Fourteenth Amendment. This right is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The right to an abortion is "fundamental" and therefore can be regulated only on the basis of a "compelling" state interest.

2. The states have two "important and legitimate" interests here: (1) protecting maternal health, and (2) protecting the life (or potential life) of the fetus. But neither interest can be considered "compelling" throughout the entire pregnancy. Each matures along with the unborn child. The interests are separate and distinct. Each grows as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

3. During the first trimester of pregnancy, neither interest is sufficiently compelling to justify *any* interference with the decision of the woman and her physician. The Court cites medical data indicating that mortality rates for women undergoing early abortions, where abortion is legal, "appear to be as low as or lower than the rates for normal childbirth." Thus, the state's interest in protecting maternal health is not

compelling during the first trimester. Since the interest in protecting the fetus is not yet compelling either, during the first trimester the state can neither prohibit an abortion nor regulate the conditions under which one is performed. The most a state can require is that abortions during this period be performed following consultation with an attending physician, i. e., a person to practice medicine and surgery or osteopathic medicine and surgery. The presumption is that the physician will take proper care of the woman so that no compelling interest of the state will arise which calls for any other regulation. The state cannot even require that abortions during this period be performed in a licensed hospital or in any hospital because abortions during this period can be performed safely elsewhere.

4. In the second trimester, the interest in protecting the fetus remains less than compelling, and the decision of the woman and her physician to permit an abortion thus continues to control. However, at this point the health risks of abortion begin to exceed those of childbirth (this is when the "salting out" procedure, which can be dangerous, is used). "It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 92 S.Ct. at 732. However, abortion may not be prohibited during the second trimester.

5. At the point at which the fetus becomes viable, which the court says is somewhere between the 24th and 28th weeks of pregnancy, the interest in protecting the fetus becomes compelling. Therefore, from that point the state can prohibit abortions *except* (and this limitation is apparently also a constitutional command) when necessary to protect maternal "life or health." Thus Missouri's present abortion statute would be unconstitutional even as to the final trimester since it permits abortion only for the purpose of saving the mother's life. "Health" apparently will be defined broadly as Chief Justice Burger, concurring stated: "I agree that . . . the abortion statutes of Georgia and Texas impermissibly limit the performance of abortions necessary to protect the health of pregnant women, using the term health in its broadest medical context. See United States v. Vuitch, 402 U.S. 62, 71–72 (1971)." 93 S.Ct. at 755.

The following proposal permits such regulation of abortion as can be done consistent with the decisions of the United States Supreme Court.

The sections are numbered to indicate the appropriate location should they be later added to the Code.

13.080 Abortion definitions

(1) **"Abortion"** means the termination of human pregnancy for purposes other than delivery of a viable fetus.

(2) **"Physician"** means a person licensed to practice medicine and surgery or osteopathic medicine and surgery in this State as provided in Chapter 334 RSMo.

(3) **"Hospital"** means a hospital licensed as provided in Chapter 197 RSMo which meets standards of the Division of Health designed to promote safe abortions and to provide adequate care required by complications or emergencies.

(4) **"First trimester of pregnancy"** means the first thirteen weeks of a pregnancy.

(5) **"Second trimester of pregnancy"** means that portion of a pregnancy following the thirteenth week and preceding the twenty-fourth week of pregnancy.

(6) **"Third trimester of pregnancy"** means that portion of a pregnancy after the twenty-third week of pregnancy and includes the entire period after the fetus is or may be viable.

(7) **"Viable fetus"** means a fetus potentially able to live outside the mother's womb, even though artificial aid may be required.

Comment

These definitions are, of course, based primarily on the legislative guidance found in Roe v. Wade and Doe v. Bolton.

13.090 Unlawful abortion

(1) A person commits the crime of unlawful abortion if he uses any instrument or device or prescribes or administers any medicine, drug or other substance which is likely to produce an abortion of a pregnant woman, with purpose to produce an abortion; unless the abortion is authorized under the provisions of Section 13.100.

(2) The defendant shall have the burden of injecting the issue of authorized abortion.

(3) Unlawful abortion is a Class D Felony.

Comment

The penalty for unlawful abortion is approximately the same as under the present statute, § 559.100 RSMo. The specific provisions concerning death of the woman have been omitted consistent with the idea of eliminating special homi-

cide crimes. If an unlawful abortion results in the death of the woman, the defendant could be prosecuted for manslaughter under Code § 10.030(1)(a) or for negligent homicide under Code § 10.040.

13.100 Authorized abortions

(1) An authorized abortion is an abortion performed by a physician upon a consenting woman under the following conditions:

(a) When performed upon a woman who is in the first trimester of pregnancy, the abortion is performed following the attending physician's consultation with the patient and a determination by the physician, based on his best clinical judgment after consideration of all factors he deems pertinent, that an abortion will not subject the woman to an unreasonable medical risk.

(b) When performed upon a woman who is in the second trimester of pregnancy, the abortion is performed in a hospital following the attending physician's consultation with the patient and a determination by the physician, based on his best clinical judgment after consideration of all factors he deems pertinent, that an abortion will not subject the woman to an unreasonable medical risk.

(c) When performed upon a woman who is in the third trimester of pregnancy, the abortion is performed in a hospital following the attending physician's consultation with and medical examination of the patient and a determination by the physician, based on his best medical judgment, that the abortion is necessary because

(i) the life of the patient would be endangered by continuance of the pregnancy; or

(ii) the continuance of the pregnancy would substantially impair the physical or mental health of the patient.

(2) Third trimester abortions must, consistent with accepted medical practice and with the well-being and safety of the patient, be performed in a manner consistent with the preservation of any reasonable potential for survival of a viable fetus.

(3) It shall not be a crime for a physician to perform an abortion upon a woman at any stage of pregnancy without complying with the requirements of Subsection (1) if the physician reasonably believes that the life of the woman is in imminent danger and there is insufficient time to comply with the requirements of Subsection (1).

Comment

Subsection (1) requires that any authorized abortion be performed by a physician on a consenting woman, unless it is an emergency situation where action needs to be taken immediately to save the life of the woman. See subsection (3).

During the first trimester, there is very little the state can do to regulate abortions. Subsection (1)(a) does, in effect, require that the decision by the physician to perform an abortion during this period be a sound medical decision. Regardless of one's views on the question of legalized abortion, one of the advantages is that if abortions can be performed lawfully by physicians, the woman who wants an abortion will seek legitimate medical assistance and receive sound medical advice and counseling on the advisability of having an abortion.

Subsection (1)(b) uses the same standards as subsection (1)(a) for determining whether an abortion should be performed, but under this subsection, abortions in the second trimester must be performed in a hospital. At this point, under the decisions of the United States Supreme Court, there is still no "compelling" state interest in protecting the fetus that would permit a different standard to restrict the woman, in consultation with her physician, from terminating a pregnancy. However, in the interest of protecting the woman, the state may require abortions during this period to be performed in a hospital.

Finally in subsection (1)(c) the state's interest in protecting a viable fetus is recognized. The third trimester is defined as broadly as possible to include any possible viability situation. Note that under subsection (1)(c) the physician must not only consult with the patient but must also see that a medical examination is performed prior to making a determination of whether there is a need to abort. Subsection (1)(c)(i) permits abortion during the third trimester if the continuation of the pregnancy endangers the life of the patient. More important is subsection (1)(c)(ii) which permits abortions if continuance of the pregnancy (not events subsequent to birth, such as having to raise the child) would substantially impair the physical or mental health of the patient. There must be a serious health problem that has been or will be created by the continuation of the pregnancy. Under the court's decisions, this much protection, but probably not more, can be provided for the fetus.

It is possible to provide other exceptions than the life and health of the woman to the restrictions on abortions in the third trimester. The life and health exception is required to meet the mandates of the Supreme Court. The Code proposal

limits abortions to the extent it believes it is constitutionally permissible. Many persons favor additional exceptions to abortions during the third trimester. Two quite often urged are (1) where there is a substantial risk that the child would be born with a grave physical or mental defect; and (2) where the pregnancy resulted from rape, incest, or unlawful intercourse with a girl under the age of 16. While such provisions may be desirable, the Committee was attempting to draft a statute that would meet constitutional standards and therefore left the question of additional exceptions to the judgment of the legislature.

Subsection (2) was included to require that everything possible, consistent with accepted medical practice and with the well-being and safety of the patient, must be done to preserve any reasonable potential for survival of a fetus aborted in the third trimester to protect the life or health of the patient. Since the state has a compelling interest in protecting a viable fetus, it should be able to impose a duty on physicians to protect the fetus.

Subsection (3) is necessary to allow for emergency treatment to save the life of the woman. Such treatment would not be unlawful under the old abortion statute.

13.110 Concealing birth of an infant

(1) A person commits the crime of concealing the birth of an infant if he conceals the body of a child with the purpose to conceal the fact of its birth or to prevent a determination of whether it was a live birth or stillbirth.

(2) Concealing the birth of an infant is a Class D Felony.

Comment

This is basically a revision of present § 559.170 RSMo, mother disposing of child to conceal birth. The Code section is broader in that it is not limited to the mother but applies to any person. "Live birth" is defined in § 193.020(4) RSMo as "the birth of a child who shows evidence of life (breathing, action of heart or movement of voluntary muscles) after the child is entirely outside the mother even though the cord is uncut and the placenta is still attached." "Stillbirth" means a birth after 20 weeks of pregnancy which is not a live birth, § 193.020(7) RSMo.

13.120 Distributing abortifacients

(1) A person commits the crime of distributing abortifacients if he gives, distributes or sells any drug, medicine, or other abortifacient or anything specially designed to terminate a pregnancy and

(a) he knows it to be an abortifacient or something specially designed to terminate a pregnancy; or

(b) he reasonably believes it will be used as an abortifacient or to terminate a pregnancy.

(2) Subsection (1) does not apply to any gift, distribution or sale to a physician or a licensed pharmacist or to an intermediary in a chain of distribution to physicians or pharmacists, nor to any gift, distribution or sale made upon the prescription of a physician.

(3) The defendant shall have the burden of injecting the issue of lawful distribution under Subsection (2).

(4) Distributing abortifacients is a Class A Misdemeanor.

Comment

Based on Michigan Revised Criminal Code § 7020 (Final Draft 1967), this provision is aimed at the abortion facilitator who supplies drugs or medicine to persons not licensed to practice medicine or osteopathy or not licensed as a pharmacist. Pharmacists could only supply abortifacients to physicians or upon prescription. The language of the Michigan Draft was adapted from the Illinois Criminal Code, Ch. 38, § 23–2. *Cf.* § 563.300 RSMo, entitled "Advertising secret drug", which prohibits the advertising, sale or gift of any secret drug or nostrum purporting to be for the use of females, which includes drugs "for the purpose of procuring abortion or miscarriage."

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WIRETAPPING AND EAVESDROPPING

The third subject which should be considered separately is a separate chapter entitled "Privacy of Communications". In general, the sections of this chapter make eavesdropping and related activities a crime unless done lawfully. Most of the sections are devoted to the procedures and requirements for lawful eavesdropping, i. e., application for and issuance of warrants to law enforcement officials.

The basic question is whether or not Missouri should permit its law enforcement officials to wiretap and eavesdrop. If the decision is that they should be able to do so, then the method of providing for such lawful eavesdropping is controlled by federal legislation which sets out specific limitations on authorized eavesdropping. The following sections are based on the limitations of that federal legislation. If the decision is to have authorized eavesdropping in Missouri, this chapter is consistent with the restraints that must be complied with in order to meet federal standards.

The following is a list of the section headings of this chapter:

Chapter 23 Privacy of Communications

23.010 Chapter Definitions
23.020 Eavesdropping
23.030 Installing an Eavesdropping Device
23.040 Tampering With Private Communications
23.050 Mistake as to Legal Authority

[The remainder of the sections deal with warrants for eavesdropping]

23.060 Eavesdropping Warrants—In General
23.070 Eavesdropping Warrants—When Issuable
23.080 Eavesdropping Warrants—Application
23.090 Eavesdropping Warrants—Determination of Application
23.100 Eavesdropping Warrants—Contents
23.110 Eavesdropping Warrants—Manner and Time of Execution
23.120 Eavesdropping Warrants—Order of Extension
23.130 Eavesdropping Warrants—Progress Reports and Notice
23.140 Eavesdropping Warrants—Custody of Warrants, Applications and Recordings
23.150 Eavesdropping Warrants—Reports to the Administrative Office of the United States Courts and the Judicial Conference
23.160 Eavesdropping Warrants—Notice Before Use of Evidence
23.170 Eavesdropping Warrants—Disclosure and Use of Information
23.180 Eavesdropping Warrants—Motion to Suppress

Chapter 23

PRIVACY OF COMMUNICATIONS

23.010 Chapter definitions

(1) **"Aggrieved person"** means a person who was a party to any intercepted communication or a person against whom the interception was directed.

(2) **"Applicant"** means a circuit attorney, a prosecuting attorney or the attorney general of this State. If a circuit attorney, a prosecuting attorney or the attorney general is absent from his jurisdiction or disabled, the term "applicant" means that person designated to act for him and perform his official function in and during his absence or disability.

(3) **"Designated offense"** means a felony involving murder, kidnapping, gambling, robbery, bribery, stealing by coercion, narcotic drugs, or other felony dangerous to life, limb or property, or any conspiracy to commit any of the foregoing felonies.

(4) **"Eavesdrop"** means to purposely overhear, record, amplify or transmit any part of the discourse of others who are in a private place, without the consent of at least one of the persons engaged in the discourse. "Eavesdrop" does not include

(a) the normal overhearing of messages through a regularly installed instrument on a telephone party line or on an extension, or

(b) interception by the telephone company or subscriber incident to enforcement of regulations limiting use of facilities or to other normal operation and use.

(5) **"Eavesdropping warrant"** means an order of a judge authorizing or approving eavesdropping.

(6) **"Exigent circumstances"** means conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to observation to the fact that such observation had occurred.

(7) **"Intercepted communication"** means any part of the private discourse of others which was purposely overheard, recorded, amplified or transmitted by a person, without the consent of at least one of the persons engaged in the discourse. This includes any information concerning the identity of the persons engaged in the discourse.

(8) **"Judge"**, except as otherwise provided herein, means any circuit judge of the judicial circuit of this State in which the eavesdropping warrant is to be executed.

(9) **"Law enforcement officer"** means any public servant who is impowered by law to conduct an investigation of or to make an arrest for a designated offense, and any attorney authorized by law to prosecute or participate in the prosecution of a designated offense.

(10) **"Private place"** means a place where one may reasonably expect to be safe from casual or hostile intrusion or observation, but does not include a place to which the public or a substantial group of the public has access.

(11) **"Unlawfully"** means not specifically authorized pursuant to the provisions of this Chapter.

Comment

This section contains the basic terms used in defining the substantive offenses in this Chapter and in the issuance of eavesdropping warrants. Subsections (1), (2), (3), (5), (6), (7), (8) and (9) are used in the warrant sections and are discussed in the comments at the end of those sections.

Subsections (4), (10) and (11) deal with the substantive offenses and are based on Michigan Revised Criminal Code (Final Draft 1967) and New York Revised Penal Law (1967). Subsection (4) defines "eavesdrop" as to purposely overhear, record, amplify or transmit discourse of others who are in a private place *without the consent of at least one of the parties*. This is in order to allow a person to record conversations in which he is one of the conversing parties, such as incoming threats or obscene phone calls. It also makes it legitimate to maintain records for business purposes. The second sentence of the subsection makes it clear that incidental party line or extension interruption is not covered by "eavesdrop." However, such conduct would be covered if done to purposely overhear, etc. as such conduct is not part of the normal overhearing of messages. Also exempted is interception by the telephone company or subscriber in circumstances set forth in subsection (4)(b). The telephone company may enforce regulations concerning the normal operation and use of telephones, and the individual subscriber may monitor the use of his own line for the purpose, e. g., of determining whether forbidden toll calls are being made. A wiretap by a subscriber would not, however, be lawful if done for such a purpose as securing evidence against a spouse or employee.

Subsection (10) defines "private place" as a place where one may reasonably expect to be safe from casual or hostile

intrusion or observation, as long as the public or a substantial group of the public has no access to the place in question. This is meant to include all places where a person would reasonably expect privacy, except that a highway or open land, or a store or other place where people congregate, does not become a "private place" for purposes of this section merely because an individual believes himself to be alone there.

The term "unlawfully" in subsection (11) is designed to function in the definitions of the substantive offenses of this chapter. As such, it has the specific meaning of not being authorized by the provisions of this Chapter authorizing eavesdropping. As discussed in the comments to those sections, the Omnibus Crime Control and Safe Streets Act of 1968 requires states to pass very detailed and complete authorizations for wiretapping, in order not to violate federal criminal laws.

23.020 Eavesdropping

(1) A person commits the crime of eavesdropping if he uses any device to unlawfully eavesdrop, whether or not he is present at the time.

(2) Eavesdropping is a Class D Felony.

Comment

This section makes it a crime to use any device to unlawfully eavesdrop, whether or not the actor is present at the time. An essential requirement of the section is the use of a device and the use of anything other than natural hearing is the gist of the offense. The device must be used to eavesdrop, which as defined in Code § 23.010(4) requires purposely overhearing, recording, etc. Mere overhearing of a conversation, without the use of some device, is not an offense under this section.

The person or persons who are the victims of the eavesdropping must be in a private place as required by the definition in Code § 23.010(4). However, the actor's presence at the time of the eavesdropping is not required. Thus, concealing a tape recorder in a private place and recording a conversation there is eavesdropping under this section. This eliminates the need to distinguish a category of trespassing for the purpose of eavesdropping. The overhearing, recording, etc. is the essential aspect of the offense, and liability should not be predicated on the geographic location of the actor at the time of the offense.

Finally, the person must be using the device to unlawfully eavesdrop. This will exempt law enforcement officers acting

with authorization of law as provided in the subsequent sections of this chapter.

23.030 Installing an eavesdropping device

(1) A person commits the crime of installing an eavesdropping device if, unlawfully, he knowingly installs or places a device to be used for eavesdropping.

(2) Installing an eavesdropping device is a Class A Misdemeanor.

Comment

This section covers the preparatory act of knowingly installing a device to be used for eavesdropping. As with the substantive offense of eavesdropping, there is the requirement that the person act unlawfully; thus a law enforcement officer acting pursuant to authorization of this chapter will also not be liable under this section.

The section covers conduct which may also be covered under the attempt section of the inchoate offenses, see Code § 9.010. However, the type of conduct proscribed here is of a specific nature and should be a distinct offense.

23.040 Tampering with private communications

(1) A person commits the crime of tampering with private communications when without authority of law and

(a) knowing that he does not have the consent of the sender or receiver, he opens or reads a sealed letter or other sealed private communication; or

(b) knowing that a sealed letter or other sealed private communication has been opened or read in violation of Subsection (1)(a), he divulges without the consent of the sender or receiver, the contents of such letter of communication, in whole or in part, or a resume of any portion of the contents thereof; or

(c) being an employee, officer or representative of a telephone or telegraph company, he knowingly divulges to another person the contents or nature of a telephonic or telegraphic communication without the consent of the sender or receiver.

(2) Tampering with private communications is a Class A Misdemeanor.

Comment

This section is based on New York Revised Penal Law § 250.25. The Model Penal Code and Kansas Criminal Code contain similar provisions. Under present Missouri law, § 560.360 RSMo, it is a misdemeanor to wilfully open or read, or cause to be read, any sealed letter not addressed to oneself without the consent of the writer or the addressee. § 560.365 RSMo makes it a misdemeanor for a person to publish all or any part of a letter not addressed to himself, without authority from the writer or addressee. § 560.370 RSMo limits prosecutions under the above sections to acts not punishable under the laws of the United States. Under § 560.375 RSMo it is a misdemeanor for an agent of a telegraph company to divulge the contents of any message to any person other than the one to whom it is addressed, or to wilfully refuse or neglect to deliver a message, or to knowingly transmit a false message with intention to injure. § 392.170 RSMo provides civil remedies for the negligent handling of messages. The proposed section preserves the basic existing Missouri law concerning intercepting and divulging private communications.

23.050 Mistake as to legal authority

(1) It is a defense to a prosecution under Sections 23.020, 23.030 and 23.040 that the actor reasonably believed he was authorized by law to engage in the conduct.

(2) The defendant shall have the burden of injecting the issue of reasonable belief of authority.

Comment

Since there will be times when eavesdropping and tampering with private communications will be lawful, this section gives a limited defense to persons who mistakenly believe they are authorized by law. The mistake must not only be honest, it must also be reasonable.

Introductory Comment

The remaining sections of this chapter deal with warrants for eavesdropping. The comments are at the end of the chapter.

23.060 Eavesdropping warrants—in general

(1) Under circumstances prescribed in this Chapter, a judge may issue an eavesdropping warrant upon ex parte application of an applicant who is authorized by law to investigate, prose-

cute or participate in the prosecution of the particular designated offense which is the subject of the application.

(2) No eavesdropping warrant may authorize or approve the interception of any communication for any period longer than is necessary to achieve the objective of the information, or in any event longer than thirty days.

23.070 Eavesdropping warrants—when issuable

An eavesdropping warrant may issue only

(1) upon an appropriate application made in conformity with this Chapter; and

(2) upon probable cause to believe that a particularly described person is committing, has committed or is about to commit a particular designated offense; and

(3) upon probable cause to believe that particular communications concerning such offense will be obtained through eavesdropping; and

(4) upon a showing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ; and

(5) upon probable cause to believe that the facilities from which, or the place where, the communications are to be intercepted, are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

23.080 Eavesdropping warrants—application

(1) An ex parte application for an eavesdropping warrant must be made to a judge in writing, and must be subscribed and sworn to by an applicant.

(2) The application must contain

(a) the identity of the applicant and a statement of the applicant's authority to make such an application; and

(b) a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an eavesdropping warrant should be issued, including

(i) a statement of facts establishing probable cause to believe that a particular designated offense has been, is being, or is about to be committed,

(ii) a particular description of the nature and location of the facilities from which or the place where the communications is to be intercepted,

(iii) a particular description of the type of communications sought to be intercepted, and

(iv) the identity of the person, if known, committing such designated offense and whose communications are to be intercepted; and

(c) a statement that such communications are not otherwise legally privileged; and

(d) a full and complete statement of facts establishing that normal investigative procedures have been tried and have failed to reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought; and

(e) a statement of the period of time for which the eavesdropping is required to be maintained. If the nature of the investigation is such that the authorization for eavesdropping should not automatically terminate when the described type of communication has been first obtained, the statement must contain a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; and

(f) a full and complete statement of the facts concerning all previous applications, known to the applicant, for an eavesdropping warrant involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application.

(3) Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts stated in the application are derived in whole or in part from statements of persons other than the applicant, the sources of such facts must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The application must also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the affiant, or information and belief with the source thereof and the reason therefor specified.

23.090 Eavesdropping warrants—determination of application

(1) If the application conforms to Section 23.080, the judge may require the applicant to furnish additional testimony or documentary evidence in support of the application. He may examine under oath, any person for the purpose of determining whether grounds exist for the issuance of the warrant pursuant to Section 23.070. Any such examination must be either recorded or summarized in writing.

(2) If the judge determines on the basis of the facts submitted by the applicant that grounds exist for the issuance of an eavesdropping warrant pursuant to Section 23.070, the judge may grant the application and issue an eavesdropping warrant, in accordance with Section 23.100.

(3) If the application does not conform to Section 23.080, or if the judge is not satisfied that grounds exist for the issuance of an eavesdropping warrant, the application must be denied.

23.100 Eavesdropping warrant—contents

An eavesdropping warrant must contain

(1) the name of the applicant, date of issuance, and the subscription and title of the issuing judge; and

(2) the identity of the person, if known, whose communications are to be intercepted; and

(3) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; and

(4) a particular description of the type of communications sought to be intercepted, and a statement of the particular designated offense to which it relates; and

(5) the identity of the enforcement agency authorized to intercept the communications; and

(6) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained; and

(7) a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this Chapter, and must

terminate upon attainment of the authorized objective, or in any event in thirty days; and

(8) if it is necessary to make secret entry upon a private place to install an eavesdropping device, an express authorization to make such entry.

23.110 Eavesdropping warrants—manner and time of execution

(1) An eavesdropping warrant must be executed according to its terms by a law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications.

(2) Upon termination of the authorization in the warrant, eavesdropping must cease and any device installed for such purposes must be removed or permanently inactivated as soon as practicable. Entry upon a private place for the removal or permanent inactivation of such device is deemed to be authorized by the warrant.

(3) The contents of any communication intercepted by any means authorized by this Chapter must, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any such communication must be done in such a way as will protect the recording from editing or other alterations.

23.120 Eavesdropping warrants—order of extension

At any time prior to the expiration of an eavesdropping warrant, the applicant may apply to the issuing judge, or, if he is unavailable, to another judge, for an order of extension. The period of extension shall be no longer than the judge deems necessary to achieve the purposes for which it was granted and in no event longer than thirty days. The application for an order of extension must conform in all respects to the provisions of Section 23.080 and, in addition, must contain a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results. The provisions of Sections 23.070 and 23.090 are applicable in the determination of such application. The order of extension must conform in all respects to the provisions of Section 23.100. In the execution of such order of extension, the provisions of Section 23.110 are applicable.

23.130 Eavesdropping warrants—progress reports and notice

(1) An eavesdropping warrant may require reports to be made to the issuing judge showing what progress has been made toward achieving the authorized objective and the need for continued eavesdropping. Such reports shall be made at such intervals as the judge may require.

(2) Immediately upon the expiration of the period of an eavesdropping warrant, the recordings of communications made pursuant to Subsection (3) of Section 23.110 must be made available to the issuing judge and sealed under his directions.

(3) Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in Subsection (4) of this Section, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the communications as the judge may determine in his discretion is in the interest of justice. The judge, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications applications and warrants as the judge determines to be in the interest of justice.

(4) On a showing of exigent circumstances to the issuing judge, the service of the notice required by Subsection (3) of this Section may be postponed by an order of the judge for a reasonable period of time. Renewal of an order of postponement may be obtained on a new showing of exigent circumstances.

23.140 Eavesdropping warrants—custody of warrants, applications and recordings

(1) Applications made and warrants issued under this Chapter shall be sealed by the judge. Any eavesdropping warrant, together with a copy of papers upon which the application is based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A copy of such eavesdropping warrant, together with all the original papers upon which the application was based, must be retained by the judge issuing the same, and, in the event of the denial of an application for such an eavesdropping warrant, a copy of the papers

upon which the application was based must be retained by the judge denying the same. Such applications and warrants may be disclosed only upon a showing of good cause before a court and may not be destroyed except on order of the issuing or denying judge, and in any event must be kept for ten years.

(2) Custody of the recordings made pursuant to Subsection (3) of Section 23.110 may be wherever the judge orders. They may not be destroyed except upon an order of the judge who issued the warrant and in any event must be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of Subsections (1) and (2) of Section 23.170.

23.150 Eavesdropping warrants—reports to the administrative office of the United States courts and the judicial conference

(1) Within thirty days after the termination of an eavesdropping warrant or the expiration of an extension order, the issuing or denying judge must submit such report to the administrative office of the United States courts as is required by federal law, 18 U.S.C. § 2519(1). A duplicate copy of such report must be forwarded to the judicial conference.

(2) In January of each year, the attorney general and each prosecuting and circuit attorney of the State must submit such report to the administrative office of the United States courts as is required by federal law, 18 U.S.C. § 2519(2). A duplicate copy of such report must be forwarded to the judicial conference.

23.160 Eavesdropping warrants—notice before use of evidence

The contents of any intercepted communication, or evidence derived therefrom, may not be received in evidence or otherwise disclosed upon a trial of a defendant unless the State, not less than ten days before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant, and accompanying application, under which interception was authorized or approved. This ten day period may be waived by the trial court if it finds that it was not possible to furnish the defendant with such papers ten days before the trial and that the defendant will not be prejudiced by the delay in receiving such papers.

23.170 Eavesdropping warrants—disclosure and use of information

(1) Any law enforcement officer who, by any means authorized by this Chapter, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any law enforcement officer who, by any means authorized by this Chapter, has obtained knowledge of the contents of any intercepted communication, or evidence derived therefrom, may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this Chapter, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this Chapter, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by Subsection (2) of Section 23.130, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom.

(4) When a law enforcement officer, while engaged in intercepting communications in the manner authorized by this Chapter, intercepts a communication which was not otherwise sought and which constitutes evidence of any offense that has been, is being or is about to be committed, the contents of such communications, and evidence derived therefrom, may be disclosed or used as provided in Subsections (1) and (2) of this Section. Such contents and any evidence derived therefrom may be used under Subsection (3) of this Section when a judge amends the eavesdropping warrant to include such contents. The application for such amendment must be made by the applicant as soon as practicable. If the judge finds that such contents were otherwise intercepted in accordance with the provisions of this Chapter, he may grant the application.

23.180 Eavesdropping warrants—motion to suppress

(1) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regula-

tory body or other authority of this State, may move to suppress the contents of any intercepted discourse, or evidence derived therefrom, on the grounds that

(a) the communication was unlawfully intercepted; or

(b) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(c) the interception was not made in conformity with the order of authorization or approval.

(2) Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted discourse, or evidence derived therefrom, shall be treated as having been obtained in violation of this Chapter. The judge, upon the filing of such motion of the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted discourse or evidence derived therefrom as the judge determines to be in the interests of justice.

Comment

These lengthy sections set out the procedure which must be followed in order to obtain a valid eavesdropping warrant. They are in conformity with the requirements set forth in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510–2520, and are based on the New York Criminal Procedure Law, Article 700 (1969).

Eavesdropping covers, roughly, two kinds of activity: (1) wiretapping and (2) overhearing or recording of a conversation by use of a device, commonly referred to as "bugging." Wiretapping was made a federal crime (Federal Communications Act § 605, 47 U.S.C.A. § 605 (1934)) whether performed by state or by federal agents. Weiss v. United States, 308 U.S. 321, 60 S.Ct. 269, 84 L.Ed. 298 (1939) made it clear that § 605 of the Federal Communications Act prohibited interception and divulgence of intrastate as well as interstate communications.

Until 1968 there was no federal statute covering the "bugging" aspect of eavesdropping. In June of 1967, the United States Supreme Court declared a New York statute authorizing "bugging" to be invalid as violative of the Fourth and Fourteenth Amendments, Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). A few months later, however, the Court indicated in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) that it would be possible to have a statute authorizing bugging that would

meet federal constitutional standards. In the following year, the Supreme Court imposed the exclusionary rule on the states' use of wiretap evidence, Lee v. Florida, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1166 (1968).

In that same year, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 (hereafter referred to as the Act) which makes it a federal offense to wiretap or bug unless authorization is obtained pursuant to provisions of the Act. The Act also exempted state eavesdropping activity (wiretap and bugging) from the operation of the federal penal provisions, and abated the operation of the exclusionary rule in a state court with respect to evidence so obtained, provided that the state establishes statutory procedures for obtaining judicial eavesdropping warrants conforming to the very detailed requirements and restrictions contained in the Act.

The effect of the Act on Missouri and on all states is direct. Section 2511 of the Act makes eavesdropping by any person a crime "except as otherwise specifically provided in this chapter." Section 2516 states:

> "(2) The principal prosecuting attorney of any State, or principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with § 2518 of this chapter and with the applicable State statute an order authorizing or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb or property and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses."

Section 2518 sets out the detailed requirements for obtaining an eavesdropping order. The Code sections, based on the New York Criminal Procedure Law, follow the Act's requirements.

Two things are clear. If Missouri is to allow any eavesdropping (1) there must be a statute authorizing the eavesdropping; there is no legal alternative procedure. Any wiretapping or bugging by state officials that has occurred in

APPENDIX

Missouri since passage of the Act in 1968 has been in violation of federal penal law; and (2) the authorizing statute must satisfy not only federal constitutional standards, but also the federal statutory standards of §§ 2517, 2518 and 2519 of the Act. The Code statute meets these requirements.

Briefly, the Code requires an application by a circuit or prosecuting attorney or the State attorney general, to the circuit court of the circuit in which the warrant is to be executed, for an eavesdropping warrant of no longer than 30 days duration, which may be extended for an additional 30 days. The warrant may be issued only upon probable cause to believe that one of a specific list of felonies has been, is being or is about to be committed. Great specificity is demanded in the application and in the warrant itself. There are various safeguard requirements of notice and reporting, a notice requirement before anything intercepted can be used in evidence, and regulation of disclosure of information lawfully obtained through an eavesdropping warrant.

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