Overcriminalization and Washington's Revised Criminal Code

Arval A. Morris
University of Washington School of Law
OVERCRIMINALIZATION AND WASHINGTON'S REVISED CRIMINAL CODE

Arval A. Morris*

A revised criminal code has been prepared for Washington.\(^1\) Opinions of it will vary depending, at least in part, on one's general view of the criminal law. The last time Washington's substantive criminal law was extensively revised was sixty-three years ago, in 1909. It may well be sixty-three more years before the next revision. That would make it due in 2035 A.D. Given such lapses of time everyone should take the long view and judge accordingly, eschewing pettiness, provinciality and emotional rhetoric when passing on Washington's Proposed Criminal Code. Criticisms, when warranted, should be constructive. The Proposed Code should be received warmly for it is a significant work indeed, and is a salutary step, although not a giant stride, in the right direction. It deserves a fair assessment in light of what our state is today and what it is likely to become in the next sixty years.

Whatever one may believe about the current condition of the criminal law, no one can justifiably doubt its importance to society. The criminal law is the ultimate legal foundation on which citizens place their reliance for protection from the gravest harms. Citizens depend on it to set forth and enforce the minimum standards of responsibility that a man owes to his fellows. In doing so, the criminal law uses drastic sanctions and regulates the severest forces that citizens permit to be used against individuals except during warfare. But fear of punishment is not the only reason why people obey the criminal law. Everyone has experienced situations where the criminal law easily could have been violated with impunity because the violation would have gone undetected but, nevertheless, the criminal law was not violated. Such instances illustrate citizen acceptance of the criminal law as the

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1. **Judiciary Committee of the Washington Legislative Council, Revised Washington Criminal Code (Tent. Draft 1972)** [hereinafter cited as R.W.C.C.]. Although I refer to the Code as proposed, technically the Code has only been submitted to the people by the Judiciary Committee for the purpose of obtaining their comments.
minimal standard of proper social behavior. The great bulk of our citizens take pride in living under a rule of law and acting in accordance with its and society's notions of what is right. So long as the criminal law genuinely serves humane ends and respects the citizens whom it purports to govern, it will function as a civilizing force, as well as a powerful instrument of social control.

Criminal sanctions insure that the criminal law will be feared. But to be fully respected, the criminal law itself must respect the rightful demands of individuality and freedom. The criminal law must be minimal, not maximal, and it must not embody the unique moral or religious views of any one group in our pluralistic society. The substantive criminal law should always allow "those who hold the faith [to] ... follow its precepts without requiring those who do not hold it to act as if they did." In its deepest sense, the criminal law reflects a duality: it can be a powerful instrument for human safety, and for civilizing mankind, but also it can be a powerful instrument for human destruction and debasement. If criminal law omits a necessary standard, then vital human concerns are left exposed and endangered. On the other hand, if criminal law fails to promote humane ends, or if it is obsolete, unwarrantedly broad, drastic or draconian then it becomes a vehicle for perpetuating gross injustices. Any law carrying such grave accountability should be as just, as humane and as rational as men can make it. In essence, this means that the criminal law should be restricted to its proper goals; yet within these goals, it should be thoroughly effective by protecting all human beings in their persons and property and by preventing the exploitation or corruption of youth or others in need of special care.

Although a sound criminal law is basic to a good social order, it has not always attracted the same careful attention that scholars and lawyers have given to other areas of law that touch and concern eco-

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nomic matters. The Uniform Commercial Code provides one of many possible examples. Unlike other fields of law, Anglo-American criminal law has seldom been subjected to a consistent and comprehensive treatment that orders its doctrines and rationalizes them with underlying social policies. Only recently have some of the best minds of the legal profession, displaying concerns and abilities equal to the importance of the subject, involved themselves with the criminal law. With this new activity have come many insights, including the recognition that all too often the existing criminal law is inconsistent in its inner workings or fails to attain the societal ends that it is meant to serve. Additionally, scholars in fields other than law are focusing on the criminal law and its processes, and their work is yielding tangible results. Recent attention to the problems of the criminal law has brought an interest in criminal law revision. Obsolete statutes, inconsistent doctrines and overlapping rules fail to serve humane ends and are repugnant to our sense of equality and fairness. The first fruits of change have been mainly in the areas of procedure and criminal law administration. But with the completion of the American Law Institute's Model Penal Code, under the guidance of Professor Herbert Wechsler of Columbia University, the pace of revising the substantive criminal law has quickened. Today, a large number of states as well

5. The works of Glanville Williams and Jerome Hall are the exceptions. See, e.g., G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART (1961); J. HALL, STUDIES ON JURISPRUDENCE AND CRIMINAL THEORY (1958); and J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (1947).
8. Spurred by court decisions invigorating the Bill of Rights and by the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1, 1966), many states and the federal government have revised their rules governing criminal procedure. See, e.g., FED. R. CRIM. P.
11. As of April, 1971, eleven states had revised their codes: Colorado, Connecticut, Georgia, Idaho, Illinois, Kansas, Louisiana, Minnesota, New Mexico, New York, and Wisconsin. Thirty-two states were planning substantive revisions, fourteen of which had been completed but had not yet been enacted into law. Only seven states had no overall revisions planned: Indiana, Mississippi, Nevada, South Dakota, Tennessee, West Virginia, and Wyoming. Hearings on Reform of the Federal Criminal Laws Before a Sub-
as the federal government\textsuperscript{12} are engaged in substantive penal law revision, and most of the revision has taken the Model Penal Code for its guide. The Judiciary Committee of the Washington legislature has acknowledged that it relied extensively on the Model Penal Code and on the codes of other states that recently have revised their penal law, stating that "having these other codes to rely on has made the drafting of [the Proposed Washington] Code... an immeasurably easier task."\textsuperscript{13}

The Proposed Code is comprehensive, and when one adds the criminal provisions in other chapters of the Revised Code of Washington that will not be affected by the Proposed Code, it becomes obvious that Washington's criminal law does not suffer from the defect of failing to embrace and protect vital human concerns.\textsuperscript{14} These vital concerns are not denuded of the protection of the criminal law. To the contrary, the comprehensiveness of the Code raises opposite sorts of questions. Thus, the chief purpose of this article is to render a service of constructive criticism. It will focus on several areas of the Proposed Code that are either inappropriate for the criminal sanction or too comprehensive and in need of adjustment or omission.

\section{The Crisis of Overcriminalization\textsuperscript{15}}

The proper aims of the criminal law, as indicated above, are first, to protect all human beings in their persons and property; second, to

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\item \textsuperscript{12} McClellan, \textit{Codification, Reform, and Revision: The Challenge of a Modern Federal Criminal Code}, 1971 \textit{Duke L.J.} 663.
\item \textsuperscript{13} R.W.C.C., Foreword at ii.
\item \textsuperscript{14} The Proposed Code covers such items as classes of crimes, affirmative defenses, burdens of proof, general principles of criminal liability and responsibility, anticipatory offenses such as criminal attempts, murder, manslaughter, assault, reckless endangerment of person or property, coercion, kidnapping, custodial interference, unlawful imprisonment, rape in three degrees, sexual contact in three degrees, arson, reckless burning, criminal mischief in three degrees, burglary, criminal trespass, theft, robbery, extortion, receiving stolen property, criminal fraud, forgery, impersonation, bigamy, incest, bribery, corrupt influence, perjury, intimidation, tampering with a witness or physical evidence, resisting arrest, hindering prosecution, escape, bail jumping, abuse of office, disorderly conduct, riot, public intoxication, loitering, public indecency, prostitution, communication with a minor for immoral purposes and many, many more.
\item \textsuperscript{15} Kadish, \textit{The Crisis of Overcriminalization}, 374 \textit{Annals} 137 (1967). See also H. Packer, \textit{The Limits of the Criminal Sanction} 303-312 (1968); F. Allen, \textit{The Borderland of Criminal Justice} 3-4 (1964).
prevent the exploitation or corruption of youth and others who are in special need of care and protection; and third, to accomplish these goals by fully respecting the demands of individual freedom and by assuring that the criminal law is minimal, not maximal.\textsuperscript{16} The criminal law must be confined to these goals by the legislature. One of the modern tasks of the legislature is to strip the criminal law of its excrescences so that the criminal justice system can be free to concentrate on the essentials. If the legislature does not, vital human interests, although fully covered by a criminal statute, may be left exposed and endangered by a lack of law enforcement officers because their time is spent in other activities. Such use of the criminal law to serve improper ends imposes a heavy and unnecessary cost on society and the criminal justice system.

Few decisions are more important than those determining what behavior should be made criminal. The use of the criminal law to enforce debatable and not widely shared morals, to provide social welfare services, to collect revenue by levying traffic offenses, and to avoid legal restraints on law enforcement through the use of substantive, criminal law provisions (e.g., vagrancy) to solve procedural problems (e.g., interrogation), to name but a few of the many current mis-


\textsuperscript{17} The dimensions of the problem in Washington are discussed by C. SCHMID & S. SCHMID, CRIME IN THE STATE OF WASHINGTON (1972):

It is common practice to dichotomize the seven index crimes into 'violent crimes' or 'crimes against the person' and 'crimes against property.' 'Violent crimes' include murder and nonnegligent manslaughter, forcible rape, robbery and aggravated assault. 'Crimes against property' include burglary, larceny over $50 and automobile theft. The overwhelming proportion of offenses reported to the police are property crimes.

For example, in the city of Seattle in 1970, 89.8 percent of the major crimes were property crimes and the remaining 10.2 percent, violent crimes.

\ldots For Seattle, the proportion of violent crimes fluctuated from a minimum of 5.8 percent in 1944 to a maximum of 13.1 percent in 1968.

\ldots For the state of Washington, during the thirteen-year period 1958-1970 for which data are available, the proportion of violent crimes varied from a minimum of 5.2 percent in 1959 to a maximum of 9.0 percent in 1968. For the three remaining series which pertain to various parts of the United States as a whole, the proportion of violent crimes ranged from 12.9 percent in 1963 to 20.7 percent in 1942; cities from 100,000 to 250,000 population, 10.3 percent in 1961 to 13.9 percent in 1947; and cities with populations of 250,000 or more, 12.8 percent in 1941 to 19.1 percent in 1954.

\textit{Id.} at 3-5.
uses, tends to overburden the criminal justice system, to make it inefficient, to reduce citizen respect for law and to gravely impair its proper use against serious criminal conduct such as murder, assault, theft, rape, etc.\textsuperscript{17} We have no accurate measure of the total amount of crime that occurs; however, the indicators that we have show an increase in the total amount of serious crimes.\textsuperscript{18} Over the years, easy assumptions, too frequently indulged in by legislatures, have burdened the criminal law. Legislatures have assumed that the only effective way to control behavior is to subject it to the criminal law and that if an important group of citizens, or the legislature, morally believes that "something" should be done about a subject, then that "something" is the proper work of the criminal law.\textsuperscript{19} The result is overcriminalization.\textsuperscript{20}

The criminal law is most successful when its reach is restricted to its proper aims.\textsuperscript{21} Criminal law sanctions are not the only methods avail-

\textsuperscript{18} The increase in the number of violent crimes in Washington is demonstrated by the following figures:

Cities with populations of 250,000 or over rank highest in violent crimes with a rate of 859.8 [per 100,000 persons] in 1969 and 980.4 in 1970. In recent years, the curves for both Seattle and Tacoma have moved above the curves for cities of 100,000-250,000 population and for the entire United States. During the past three years the rates per 100,000 population for violent crimes [murder, nonnegligent manslaughter, forcible rape, robbery and aggravated assault] in Seattle are 598.4 in 1968, 729.5 in 1969, and 596.8 in 1970, and for Tacoma, 415.8 in 1968, 484.8 in 1969, and 398.1 in 1970. To indicate further the steep rise in violent crimes during the past decade, the increase between 1940 and 1960 in Seattle was 39.4 percent compared to 371.0 percent between 1960 and 1970.

... For property crimes—burglary, larceny and automobile theft—... [e]xcept for a short period in the 1960's, Seattle ranks in first place [among Spokane, Tacoma, and the averages for cities over 250,000 population and for the United States]. In Seattle, the rate for all property crimes combined was 1,156.3 per 100,000 of population in 1940, 1,142.6 in 1950, 1,656.6 in 1960 and 5,283.3 in 1970. Between 1940 and 1970 combined property crimes in Seattle increased by 356.9 percent, between 1940 and 1960, 43.3 percent and between 1960 and 1970, 218.9 percent. The patterns for the remaining series... are very similar to that for Seattle.

\textit{Id.} at 17-19.

\textsuperscript{19} See Walker, \textit{Morality and the Criminal Law}, 11 \textit{Howard Soc'y J.} 215 (1961); J. \textsc{Michael} & M. \textsc{Adler}, \textit{Crime, Law and Social Science} 357 (1933).

\textsuperscript{20} Professor Allen states: "\textit{[T]}he system of criminal justice may be viewed as a weary Atlas upon whose shoulders we have heaped a crushing burden of responsibilities relating to public policy in its various aspects." \textsc{F. Allen}, \textit{The Borderland of Criminal Justice} 4 (1964).

\textsuperscript{21} The criminal sanction works best when:

(1) The conduct is prominent in most people's view of socially threatening behavior, and is not condoned by any significant segment of society.

(2) Subjecting it to the criminal sanction is not inconsistent with the goals of punishment.
Overcriminalization

able for motivating persons to comply with legal rules. There is a broad spectrum of other available sanctions including civil liability, licensing, administrative regulations and other non-criminal penalties. Regrettably, Washington's Proposed Criminal Code does not reflect a full appreciation of these alternatives. It continues to enforce highly debatable moral views and to make the criminal justice system serve as a welfare agency by encoding many of the so-called "status crimes."  

II. PUBLIC DRUNKENNESS

The Proposed Code continues the status crime of public intoxication, but slightly narrows the range of its application by adding that the person must be so intoxicated in public that "he endangers himself or other persons or property, or annoys persons in his vicinity." The continuation of this crime is a mistake and a good example of overcriminalization. This crime not only uselessly burdens the administration of the criminal law, but it deceives citizens into believing that a social problem has been solved when it has not. The problem of alcoholism should be recognized for what it is—a social-welfare problem to which the appropriate response is social-welfare services. Alcoholism is not an appropriate problem for the penal-correctional processes of the criminal law. Alcoholics are neither cured nor deterred by jail or by the usual correction procedures. Indeed, by defining public drunk-

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(3) Suppressing it will not inhibit socially desirable conduct.
(4) It may be dealt with through even-handed and nondiscriminatory enforce-
ment.
(5) Controlling it through the criminal process will not expose that process to severe qualitative or quantitative strains.
(6) There are no reasonable alternatives to the criminal sanction for dealing with it.

These criteria can be used in making up a kind of priority list of conduct for which the legislature might consider invoking the criminal sanction.

Packer, supra note 15, at 296.

22. See Murtagh, Status Offenses and Due Process of Law, 36 Ford. L. Rev. 51 (1967), for a description of laws that criminalize certain types of persons within the society rather than certain types of voluntary behavior.

23. R.W.C.C. § 9A.84.050. This qualification also tends to preclude a constitutional attack on the statute as criminalizing persons solely because they suffer an illness (alcoholism). For example, would it be constitutional to make criminal everyone who is infected with tuberculosis? See Robinson v. California, 370 U.S. 660 (1962); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).
enness as a crime, alcohol deviancy can be aggravated and reinforced.\footnote{Chronic drunkenness offenders are generally excessive drinkers who may or may not be alcoholics, but whose drinking has involved them in difficulties with the police, the courts, and penal institutions. They are a group for whom the penal sanctions of society have failed and to whom existing community resources have not been applied.

\ldots The constantly incarcerated individual finds it nearly impossible to maintain a meaningful marital and familial relationship; his ability to find employment is seriously jeopardized by his arrest record coupled with his poor education. By constantly being officially labeled by the police, the courts and correctional institutions as a public drunk, he begins to see himself as a public drunk; the jail becomes little more than a shelter to regain his physical strength. Because the public intoxication offender is usually unable to support himself, he frequently turns to petty thievery.\ldots

Social policy has its greatest negative effect on excessive drinkers who are not alcoholics. An excessive drinker who confines his drinking to weekend bouts (a pattern not uncommon in the middle classes), but who does not drink secretly, may find himself frequently arrested and perhaps incarcerated. If this happens often enough, he may be conditioned by the enforcement, the judicial, and the correctional processes in such a way as to contribute to his drinking problem. Where before he confined his drinking to weekends and managed to hold a job and be a breadwinner, he now finds these roles increasingly difficult and harder to maintain, and crises arrive which encourage his drinking. Instead of arresting his excessive drinking, the social policies have modified \ldots his deviant behavior and contributed to the development of a more serious deviancy—alcoholism. Thus, the public intoxication offender confronts the society with a serious social problem which involves the total community as well as the criminal justice system."

\textit{President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report, Drunkenness} 7-11 (1967).

\footnote{The statistics in the next two paragraphs, unless otherwise noted, are from N. Morris & G. Hawkins, \textit{supra} note 16, at 6-10. See also \textit{President's Comm'n on Law Enforcement and the Administration of Justice, Task Force Report, Drunkenness} 1 (1967).}
Overcriminalization

cible rape, aggravated assault, robbery, burglary, theft of $50 or over and motor vehicle theft). These arrests are not evenly distributed across the social spectrum. In most states the middle and upper-class persons who are drunk in public are either ignored or simply taken home by the police. Most arrests involve skidroad derelict persons, primarily men. The cycle for many is from drunk tank to skidroad and back to drunk tank.\textsuperscript{26}

The estimated national average cost of each drunkenness case—arrest, court, jail time—is $50. Conservatively estimated, we spend about $100 million per year because we choose to use the criminal law to handle drunk offenders. This figure does not include a penny spent for rehabilitative treatment or subsequent prevention of drunkenness, which are the realistic approaches to this problem. Furthermore, the great number of drunkenness arrests overload police capacities and jails, as well as clog the courts. In drunkenness cases, citizens and courts are demeaned. Instead of trying each case individually on its unique merits, as required by due process of law, the courts move toward mass production models, allowing only a very few minutes for each case or trying persons collectively, thereby violating due process guarantees and reducing citizen respect for law. A good example of overcriminalization interfering with proper police activity comes from a study of public drunkenness in Washington, D.C., during a nine-month period. A special tactical police force unit officially created "to combat serious crime" made forty-four percent of its arrests for drunkenness. In another city ninety-five percent of the short-term prisoners were drunkenness offenders.

The Washington evidence is analogous to the national evidence except that American Indians are overrepresented, perhaps because of their regional circumstances of poverty and hopeless future. The statistics collected from the records of the city of Seattle provide an example.\textsuperscript{27} Seattle arrests for public drunkenness average about 3,500

\textsuperscript{26} D. PITTMAN & C. GORDON, REVOLVING DOOR: A STUDY OF THE CHRONIC POLICE CASE INEBRIATE (1958).

\textsuperscript{27} See C. SCHMID & S. SCHMID, CRIME IN THE STATE OF WASHINGTON (1972). In that study the authors determined that:

In terms of prevalence, cost and social impact, problem drinking is one of the most serious and complex of all contemporary problems. . . . First, in many areas there are more arrests for offenses involving intoxication than for all other offenses combined. For example, in 1970 in the city of Seattle 53.2 percent of all arrests were for drunkenness and driving under the influence. In Spokane and Tacoma the
each year, and about one-third of the persons arrested account for two-thirds of the arrests. In 1971, there were 3,694 arrests. Eighty-nine percent were males and eleven percent females. Sixty-five percent were white; twelve percent black; nineteen percent American Indian; two percent Mexican American; and two percent fell in all other categories. Thirty percent were aged fifty or more; twenty-seven percent were between forty and forty-nine years of age; twenty-two percent were between thirty and thirty-nine; and twenty-one percent were between ages eighteen and twenty-nine. White males accounted for 3,304 arrests (white females for 231) or almost sixty-five percent of all arrests. Washington's Supreme Court provides a sketch of "a fairly typical case history of an alcoholic" who has been uselessly subjected to the "treatment" and "correction" processes of the criminal law because of his status as an alcoholic:

In asserting the hopelessness of his predicament, and the inevitability of its consequences, defendant showed that he had been convicted of drunkenness 98 times; that his total sentences ran to 17-1/2 years although he had served only a fraction of this, being repeatedly let out of jail on suspended sentences. He refers to himself as a 'chronic

corresponding percentages were 63.8 and 39.5, respectively. For the entire United States in 1970 there was a total of 8,117,700 arrests of which 2,381,200 or 29.3 percent, were for drunkenness and driving under the influence. In addition to the 2,381,200 arrests for drunkenness and driving under the influence in the United States in 1970, there were 1,132,400 arrests for three other alcohol-related offenses—violation of liquor laws, vagrancy and disorderly conduct. These five categories represent 3,513,600 arrests, or 43.3 percent of all arrests in 1970.

During the three-year period, 1968-70, there were 28,899 persons 18 years of age and over arrested one or more times in the city of Seattle; 24,992, or 86.5 percent, were males and 3,907, or 13.5 percent were females. . . . Each person is counted only once regardless of the number of arrests. . . . Certain similarities obtain for both male and female arrestees. Drunkenness is by far the most frequent charge for both sexes with 9,505, or 38.0 percent, of the male arrestees, and 1,058, or 27.1 percent, of the female arrestees. Based on frequency of arrest, seven offenses are included among the top ten for both sexes: drunkenness, driving under the influence, larceny, nonaggravated assault, suspicion, violation of narcotic drug laws and disorderly conduct. These seven offenses account for over 75.0 percent of all the male arrestees, and over 70.0 percent of the female arrestees. . . . The seven index crimes—murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny ($50 and over) and automobile theft accounted for only 13.3 percent of the male arrestees and 18.3 percent of the female arrestees.

28. The following information in this paragraph has been taken from an unpublished study by Professor L. V. Rieke, Alcoholism and Its Correction in Seattle (1972), on file in Professor Rieke's office at the Law School, University of Washington.

drunk' and dates his serious drinking problems from 1946 when his wife divorced him. At age 62, in addition to his 98 convictions for public drunkenness, he has been twice convicted of escaping while a jail trusty. The accumulated unserved time from these convictions amounts to about five years, but there appears to be no proceedings pending or threatened to make him serve any part of this.

Public drunkenness constitutionally can be made a crime. But the cost is heavy, and the criminal law has not been effective. Jail sentences have not rehabilitated the chronic offenders nor prevented intoxication in public. Agreeing with other reports, the President's Commission on Law Enforcement and the Administration of Justice recommends that "drunkenness should not itself be a criminal offense. . . ." However, the commission qualifies its recommendation by adding that the "implementation of this recommendation requires the development of adequate civil detoxification procedures." This qualified recommendation is acceptable if funds are forthcoming for detoxification centers.

Washington appears to have taken a salutary step in 1972 when the legislature enacted the Uniform Alcoholism and Intoxication Treatment Act. The Act provides, inter alia, for detoxification centers, for voluntary and involuntary civil commitment, and that "no . . . [state] political subdivision may adopt or enforce a local law . . . that includes drinking, being a common drunkard or being found in an intoxicated condition as one of the elements of the offense giving rise to a criminal or civil penalty or sanction." This beneficial and progressive 1972 statute is in conflict with the Proposed Code's criminalization of public drunkenness. If the Proposed Code's provision were enacted it would impair and repeal parts of the 1972 statute. Clearly, the wise course is to eliminate the crime of public drunkenness from the Proposed Criminal Code.

The crime of public drunkenness should be eliminated regardless of the Uniform Alcoholism and Intoxication Treatment Act. The simple

31. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CHALLENGE OF CRIME IN A FREE SOCIETY 236 (1967).
expedient of discontinuing enforcement of public drunkenness provisions is seldom discussed in the literature, but should be considered seriously. Doing nothing is always an option. Rather clearly, arrests should not be made in circumstances where the costs to society, to the criminal system and to the arrestees are not justified by the benefits received. In such cases it is better that the criminal system do nothing. The crime of public intoxication provides a case in point. The criminal law should not be used, although a different legal scheme might be justified. Thus, the recommendation is that something may be done, but that the criminal law should do nothing.

Opposition to this recommendation is two-fold: (1) alcoholics will lose services, and (2) a community concerned with neat, tidy and clean streets will not tolerate skidroad derelicts and others being drunk in public. The first argument is irrelevant. The criminal law processes do not provide the needed welfare services to alcoholics which the argument presupposes. The second argument is really quite different. It is public officials who probably fear for themselves politically if they do not clean up the streets. But they fear without knowing the full community sentiment on the issue, and their fear is probably exaggerated. The annoyance or nuisance aspect of public drunkenness, as set forth in the Proposed Code, is easily overstated, especially when the drunk is part of the skidroad culture. If the drunk is a genuine nuisance, or a danger to himself or others or to property, any legislature can provide for short periods of civil commitment instead of criminal penalties. Periods no longer than necessary to restore sobriety should be used, such as the ones provided by the Uniform Alcoholism and Intoxication Treatment Act.

In summary, there is no solid case for using the criminal law to deal with public drunkenness, but there is a solid case for eliminating the crime from the criminal law and from Washington's Proposed Criminal Code.

III. VAGRANCY—LOITERING—DISORDERLY CONDUCT

According to the FBI's Uniform Crime Reports there were 710,000

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34. Nimmer, supra note 33, at 10.
Overcriminalization

arrests for disorderly conduct in the United States in 1970.\textsuperscript{35} More arrests are made for disorderly conduct than for any other crime except public drunkenness.\textsuperscript{36} Vagrancy, defined similarly to disorderly conduct, accounted for 113,400 arrests.\textsuperscript{37} Together, the crimes of vagrancy and disorderly conduct were responsible for 823,400 arrests, almost twice the number of the next closest classification—the 415,600 narcotic drug law violations (including marijuana possession). These totals represent an enormous commitment of tax dollars and police manpower which are not available for dealing with the more serious matters of the criminal law.

Disorderly conduct and vagrancy statutes frequently are drafted so loosely and so broadly that they vest a wide discretion in the police and allow law enforcement officers rather than the legislature to decide what conduct should be treated as criminal. Such statutes are open to abuse, and they are abused.\textsuperscript{38} They are conducive to inefficiency and police harassment.\textsuperscript{39} Many authorities see them as prime factors in poor police-community relationships\textsuperscript{40} and they bring the law into cynical disrespect. The criminal law should be carefully drafted, and the legislature should not use a blunderbuss approach. Precisely drafted statutes limited to prohibiting specific, serious misconduct enable the police to concentrate their resources on those essential situations. Criminal statutes should not delegate legislative power to police officers, permitting them to decide who and what conduct should be criminalized.\textsuperscript{41}

\begin{thebibliography}{9}
\bibitem{36} Id.
\bibitem{37} Id.
\bibitem{38} We should be given pause by the collected evidence of past police abuses. See W. LaFave, Arrest: The Decision to Take a Suspect into Custody, 338-41, 354-60, 371-72 (1965); Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603, 646 n. 162 (1956); Lacey, Vagrancy and Other Crimes of Personal Condition, 66 Harv. L. Rev. 1203 (1953); and Sherry, Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision, 48 Cal. L. Rev. 557 (1960).
\bibitem{39} Police administrators frankly admit that they respond to public pressures. This may risk unequal enforcement of the law on different parts of the population as well as loss of constitutional controls on police behavior. See Wilson, Police Authority in a Free Society, 54 J. Crim. L. C. & P.S. 175, 176 (1963).
\end{thebibliography}
laws encompass a wide range of statutory formulations in this country and include wide varieties of petty misbehavior so harmless it should not be subjected to the controls of criminal sanctions. Although the Proposed Code is much better than existing Washington laws on the subject, nevertheless, the Proposed Criminal Code provides too many examples of the blunderbuss approach.

The Proposed Code substitutes the word "loitering" for "vagrancy." The crime of loitering can be completed if a person "intentionally remains in or about a building or buildings or public premises adjacent thereto of any public or private school or institution of higher learning, without having any lawful reason or relationship involving custody of or responsibility for a pupil or any other license or privilege to be there."

While better than existing Washington law, the disorderly conduct provisions of the Proposed Code are broader, more vague and allow the police even greater subjective decisions than the proposed loitering provisions:

**Disorderly Conduct.**

(1) A person is guilty of disorderly conduct if he:
   (a) intentionally makes excessive noise which unreasonably disturbs another; or

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42. "The present Washington law in point is RCW 9.87.010, a vagrancy statute. . . . The new section makes several changes in the present law." R.W.C.C. § 9A.84.060, Comment at 346.
43. R.W.C.C. § 9A.84.060(e). Interestingly, this provision is unlike the rest of this section in that it is utterly devoid of the concept of purpose which is required by all the other provisions. Purpose is a device tending to limit statutory breadth and looseness. Failure to disperse, R.W.C.C. § 9A.84.020, is a similarly defined crime.
44. R.W.C.C. § 9A.84.030.
45. The presence of inherent subjectivity and the lack of terms susceptible of objective measurement are patently obvious. The standard prohibiting "excessively" noisy conduct that "unreasonably disturbs another" is probably unconstitutional because "excessively" noisy conduct that "unreasonably" disturbs some people is not "excessive" nor "unreasonably" disturbing to others. Thus, a person is forced to guess at the meaning of the terms—no standard of conduct susceptible of objective measurement is set forth. Also, without specificity and objectivity this statute allows the standard for free speech and assembly to be at the whim of a police officer. It invites discriminatory enforcement "against those whose association together is 'annoying' because their ideas, their lifestyle or their physical appearance is resented by a majority of their fellow citizens.” Coates v. Cincinnati, 402 U.S. 611, 615 (1971). See also Cohen v. California, 403 U.S. 15 (1971).
(b) uses abusive language and thereby recklessly creates a risk of assault; 46 or
(c) without lawful authority, intentionally disrupts any lawful assembly or meeting of persons; or
(d) intentionally obstructs vehicular or pedestrian traffic.47

(2) Disorderly conduct is a violation.48

Vagrancy-type laws are frequently used by police as justification for arresting, searching, questioning and detaining suspicious persons who are sought for reasons other than vagrancy.49 The result is that sub-

46. This provision, like the one immediately preceding, is of doubtful constitutional validity. Language that is abusive to one person may not be abusive to another, although a police officer may believe it to be such. But worse, what criteria shall the police officer use to judge (1) that a risk of assault has been created by abusive language, and (2) that the risk has been created recklessly? How would a Washington police officer respond to facts similar to those in Gooding v. Wilson, 405 U.S. 518 (1972), where a Georgia police officer seeking to restore access to a public building was taunted with: “White son of a bitch, I’ll kill you;” “You son of a bitch, I’ll choke you to death;” and “You son of a bitch, if you ever put your hands on me again, I’ll cut you all to pieces.” Id. at 519. The person who uttered these words was arrested and convicted under Georgia’s statute providing that any “person who shall, without provocation, use to or of another, and in his presence. . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.” GA. CODE ANN. § 26-6303 (1963). On appeal the Supreme Court of the United States reversed, holding that Georgia’s statute was unconstitutionally broad and vague and would tend to suppress constitutionally protected rights, especially free speech. In such circumstances, “it matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute.” Id. at 520. Washington’s proposed provision appears to contain defects of overbreadth and vagueness similar to Georgia’s.

See also Cantwell v. Connecticut, 310 U.S. 296 (1940); and Termiello v. Chicago, 337 U.S. 1 (1949), where the court said, “Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” Id. at 4.

47. There are problems with this provision as well. One who intentionally walks his dog on a leash, or intentionally congregates with others at a crowded street corner while awaiting a ride or a meeting with another person would appear to fall within the reach of this provision by his intentional obstruction of pedestrian traffic. Similar problems inhere in the provision relating to vehicular traffic. Patrolmen directing traffic always intentionally obstruct some vehicular traffic in the interests of promoting the overall traffic pattern. The point is that this provision needs careful rethinking and redrafting so it will apply only to behavior which should be prohibited.

48. In R.W.C.C. § 9A.04.040, the Proposed Code sets forth three categories of crimes: felonies, gross misdemeanors and misdemeanors. It states that “a violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.” Although it is not formally called a crime, but is rather an offense, a “violation” is subject to control by the police and to prosecution in a criminal trial where the burden of proof is beyond a reasonable doubt. A violation can subject a “violator” to a forfeiture or fine, but not to imprisonment. It seems to me that this is, in reality, a crime for which no sentence or deprivation other than fine or forfeiture is provided and that the Proposed Code really sets forth four categories of crimes. In any event, the thinking behind this category is forward looking, salutary and commendable.

49. Arresting a person “on suspicion,” like arresting a person “for investigation,” is
stantive criminal law provisions are unwisely used to solve procedural or similar problems. The President's Commission on Crime reported that "[vagrancy-type statutes] are also used by the police to clean the streets of undesirables, to harass persons believed to be engaged in crime and to investigate uncleared offenses."\textsuperscript{50} If procedural problems are present, then they should be faced and resolved as such. Substan-
tive criminal law provisions should not be used to solve procedural law-enforcement problems.

If it is necessary to... legalize arrests for mere suspicion, then the grave policy and constitutional problems posed by such suggestions should be faced. If present restrictions on the laws of attempts or arrest place too onerous a burden upon the police because of the nature of modern crime, then such propositions should be discussed and re-
solved on their merits, as, for example, the proposals in the Uniform Arrest Act.\textsuperscript{51}

In addition to being susceptible to police abuse and lacking a justifying policy basis, most existing disorderly conduct, loitering and va-
grancy-type statutes are of questionable constitutional validity. \textit{Papachristou v. Jacksonville}\textsuperscript{52} consolidated five separate cases for deci-
sion and held a Jacksonville, Florida, vagrancy-type ordinance unconsti-
tutional.\textsuperscript{53} Part of the handwriting seems to be on the wall. All de-
defendants were convicted of vagrancy, but for various reasons: four were "prowling by auto"; others were "loitering" or being a "common

alien to our constitutional system. Police are supposed to arrest only when "probable cause" is present. Johnson v. United States, 333 U.S. 10, 15-17 (1948). This is a fourth amendment standard directly applicable to the federal government, and through the fourteenth amendment it is equally applicable to the states. Whiteley v. Warden, 401 U.S. 560 (1971).

\textsuperscript{50} President's Comm'n on Law Enforcement and the Administration of Justice, Task Force Report, The Courts 103 (1967). "The underlying purpose [of va-
grancy-type laws] is to relieve the police of the necessity of proving that criminals have committed or are planning to commit specific crimes." N.Y. Law Revision Comm'n, Report 591 (1935).

\textsuperscript{51} Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603.

\textsuperscript{52} 405 U.S. 156 (1972).

\textsuperscript{53} Jacksonville, Fla., Ordinance Code § 26-57 (1965) provided at the time the arrests were made that:

Rogues and vagabonds, or dissolute persons who go about begging, common gam-
blers, persons who use juggling or unlawful games or plays, common drunkards, com-
mon night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without
Overcriminalization

thief"; others were "disorderly loitering on a street" and "disorderly conduct—resisting arrest with violence," and others were "vagabonds." The Supreme Court first noted that a legislative directive to the police that they "arrest all 'suspicious' persons would not pass constitutional muster" and that a "vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest." Moreover, the Court was influenced by "the effect of the unfettered discretion [the ordinance] places in the hands of the Jacksonville police.

The court held:

This ordinance is void-for-vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' . . . and because it encourages arbitrary and erratic arrests and convictions. . . .

Living under a rule of law entails various suppositions, one of which is that 'All [persons] are entitled to be informed as to what the State commands or forbids.'

This case indicates that the chief vice in vagrancy-type laws is their wholesale jettisoning of due process, the basic principle of legality and the foundation stone on which legitimate law enforcement rests in a free and democratic society. Departures from the principle of legality have also been criticized by the President's Crime Commission:

The practical costs of this departure from principle are significant. One of its consequences is to communicate to the people who tend to

any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

405 U.S. 156-57 n. 1.

54. 405 U.S. 169.

55. Id. at 168. The court also stated, "Where the list of crimes is so all-inclusive and generalized as that one in this ordinance, those convicted may be punished for no more than vindicating affronts to police authority:

The common ground which brings such a motley assortment of human troubles before the magistrate in vagrancy-type proceedings is the procedural laxity which permits conviction for almost any kind of conduct and the existence of the House of Corrections as an easy and convenient dumping-ground for problems that appear to have no other immediate solution. Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603, 631."

Id. at 166-68 (footnotes omitted).

56. Id. at 162.

be the object of these laws the idea that law enforcement is not a regularized, authoritative procedure, but largely a matter of arbitrary behavior by the authorities. The application of these laws often tends to discriminate against the poor and subcultural groups in the population. It is unjust to structure law enforcement in such a way that poverty itself becomes a crime. And it is costly for society when the law arouses the feelings associated with these laws in the ghetto, a sense of persecution and helplessness before official power and hostility to police and other authority that may tend to generate the very conditions of criminality society is seeking to extirpate.

Close control over the delegation of authority to employ the sanctions of the criminal law exists only when the criminal law is clearly and carefully defined. Then police, judicial and administrative responsibility can be located.

The Papachristou case had not been decided when Washington's Proposed Criminal Code was drafted. Several proposed sections are defective because they are overbroad on their faces. They have not been considered in light of these cases, nor in the full light of the proper aims of the criminal law. As a result, the entire chapter on disorderly conduct (R.W.C.C. ch. 9A.84) should not be enacted into law.58 The existing laws on the subject deserve to be repealed. The proposed provisions should be rethought, greatly narrowed or completely eliminated. All redrafted provisions should serve the proper aims of the criminal law.

58. Much of the text in this section is equally applicable to other of the Proposed Code's broad and diffuse provisions defining crimes in this chapter. For example, R.W.C.C. § 9A.84.020 (failure to disperse) provides:

(1) A person is guilty of failure to disperse if:
(a) he congregates with a group of four or more persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person or substantial harm to property; and
(b) he intentionally refuses or fails to disperse when ordered to do so by a peace officer or other public servant engaged in enforcing or executing the law.

(2) Failure to disperse is a misdemeanor.

Consider the implications of Coates v. Cincinnati, 402 U.S. 611 (1971), where an ordinance made it a criminal offense for “three or more persons to assemble...on any of the sidewalks...and there conduct themselves in a manner annoying to persons passing by...” Id. at 611 n.1. The Supreme Court held that this ordinance was violative on its face of the due process standard of vagueness and the constitutional right of free assembly and association. Consider also Palmer v. Euclid, 402 U.S. 544 (1971), where the ordinance made it a criminal offense if any “person...wanders about the streets or other public ways or...is found abroad at late or unusual hours in the night without any visible or lawful business and...does not give a satisfactory account of himself.” Id. The Supreme Court held the ordinance unconstitutional because it “is so vague and lacking in ascertainable standards of guilt that... [as applied]...it failed to give "A
IV. BIGAMY AND INCEST

One of the best books on criminal law to be published in the last decade labels bigamy and incest as the “two imaginary crimes,” adding that “it is extremely difficult to give a coherent account of why the conduct denounced by these offenses should be treated as criminal.” Washington’s Proposed Criminal Code continues these two crimes, but the question remains: By what justification?

A. Bigamy

According to the Proposed Criminal Code, bigamy, a third degree felony punishable by five years imprisonment or a fine up to $5,000, or both, is committed whenever a person “intentionally marries or purports to marry another person when either person has a living spouse.” It is no defense if both parties are fully aware of the prior marriage; thus, the purpose of this proposed revision seems to be to protect the community and not an individual interest. A person is given an affirmative defense if he “reasonably believed that the prior spouse was dead” or if he “reasonably believed that he was legally eligible to remarry.” The penalties provided by the proposed new section go beyond the Model Penal Code’s section which “grades bigamy as what would be a gross misdemeanor in Washington, whereas this section provides . . . a third degree felony designation.” What is the justification for such severity?
We are told only that the "basic reason for the higher grading is a [moral?] judgment that one who intentionally violates the statute and has no defense to the prosecution has substantially threatened the marriage institution, a secular value worthy of protection by society," and that moreover, "the disruption of the innocent party's life is itself a harm which should be prevented and deterred." The latter justification is dubious, and does not support the full breadth of the provision. Since the proposed new section applies even if both parties are cognizant of the previous marriage, that portion of the second justification invoking "the disruption of an innocent party's life" either can be dismissed as cynicism, or if sincere, the drafter failed to achieve the desired end and the provision should be narrowed.

The first justification amounts to no more than a private moral judgment that rests ultimately upon the religious teachings of Christianity which condemns all forms of marriage except monogamy. Moslems, and other peoples, have practiced polygamy for hundreds of years and seem to have a very stable marriage institution. This experien-

before the crime is completed. Thus, restricted to this analysis, the extent of the intentional element is satisfied with proof of the requirement that the actor intended to marry another, and does not include the additional requirement that he must intend to marry another knowing that he or the other has a living spouse. Seemingly, the proposed provision would apply to a person who marries another even if that other person should have a living spouse and should have successfully concealed that fact. If this were the end of the analysis this would be guilt without intent, and with a vengeance! It would go substantially farther than the existing statute which is limited to a person who marries and who, himself, has a living spouse. WASH. REV. CODE § 9.15.010 (1959).

The proposed bigamy provision can be saved from a strict liability construction by a judicial decision and R.W.C.C. §§ 9A.08.050, 9A.08.020, and 9A.04.130(9) and (14). R.W.C.C. § 9A.08.050 sets forth the general proposition that "where a statute defining an offense does not clearly indicate a legislative intent to impose absolute liability, it should be construed as defining an offense requiring one of the mental states described in section 9A.08.020(2)." Thus, a judicial decision is needed that the legislature did "not clearly indicate a legislative intent to impose absolute liability" for bigamy. If this is obtained then one is thrown back to R.W.C.C. § 9A.08.050. But that section does not state which of the various intent concepts is required. It refers only to R.W.C.C. § 9A.08.020(2), which sets forth three categories of intent (specific intent or purpose, knowledge, or recklessness) and one of criminal negligence. Thus, another question arises: which of the three categories of intent should attach to the language of the bigamy proposal defining the required attendant circumstance, i.e., "when either person has a living spouse"? R.W.C.C. § 9A.08.020(3) states that "when a statute defining an offense prescribes as an element thereof of a specified mental state, such mental state is deemed to apply to every material element of the offense . . . ." Since the definition of bigamy requires specific intent or purpose, that category would carry throughout so long as the attendant circumstance can qualify as a "material element." R.W.C.C. § 9A.04.130(9) and (14) require that the specific intent attach to the attendant circumstance ("when either person has a living spouse") because it is made a material element by these two provisions.

Wash. Rev. Code § 9A.64.010. Comment at 274.
ence leads one to question the wisdom of the committee's view that polygamy "substantially threatens the marriage institution." It seems unsupported by evidence. Perhaps polygamy and polyandry, like bigamy, represent the triumph of hope over reality, but no secular reason has been advanced by the Judiciary Committee to justify serial monogamy as the only form of legally recognized marriage.\textsuperscript{67} One is left to conclude that the actual underlying reason is religious, but labelled secular.\textsuperscript{68} If only a religious injunction, or feeling, can be advanced as the justifying rationale for the crime of bigamy, then that alone should supply sufficient reason for the legislature to remove the crime from the statute books and preserve Washington's historic separation of church and state.

Frequently, bigamy only involves an attempt by the parties going through a ceremony to give some respect to a legally adulterous relationship. Prosecution in these cases serves no worthwhile purpose, and increases the lot of human misery.\textsuperscript{69} The offense of bigamy is not a serious part of the crime problem nor is it statistically important. It is an example of the legal stigmatization and punishment that can occur because a person offends a particular religious code that has been cast into law. One wonders if there is secular justification for the crime. The rationales usually advanced have been collected by Professor Hart.\textsuperscript{70} The crime of bigamy serves (1) to protect the public records

\textsuperscript{67} Technically analyzed, the proposed statute does not apply if a single person seeks to marry several unmarried persons simultaneously, but it does apply if the "marriages" are seriatim. Nor does the statute require that the persons involved be of opposite sexes; thus, presumably it would apply to bigamous "homosexual marriages."

\textsuperscript{68} Professor H. L. A. Hart has advanced a similar thesis. After analyzing and dismissing the reasons usually advanced to justify the crime of bigamy, he says that the real consideration that lies behind the crime is a religious feeling of propriety that seeks to be shielded by the criminal law from sham marriages which would degrade the marriage ceremony. On this theory, for Hart, the bigamist is a nuisance who threatens religious ceremonies and religious feelings of propriety. H. HART, LAW, LIBERTY AND MORALITY 38-45 (1963).

\textsuperscript{69} As Professor Packer has put it:

In addition to its utilitarian vacuity, the law is in practice enforced only sporadically, and then usually against members of minority groups or low-income people who are either culturally insensitive to the legal formalities attendant on family relationships or economically incapable of invoking them. There is substantial reason to believe that most bigamists ended their prior marriage with an informal "divorce by consent." The typical pattern is that the deserted second wife complains to a welfare agency about the absconder's nonsupport, and the ensuing investigation reveals that in addition to being a deserter he is a bigamist. The resulting mess is hardly helped by invocation of the criminal sanction. The offense is one we could do without.

Packer, supra note 15, at 314.

\textsuperscript{70} H. HART, LAW, LIBERTY AND MORALITY 38-45 (1963).
from confusion and to protect the celebrating officer from wasting his time; (2) to prevent provocation and public affront to the first spouse, and (3) to guard against bigamous marriages because they are more likely to result in desertion, divorce and nonsupport. These reasons are, to say the least, not convincing. They are trivial, and as pointed out by Professor Hart, they should be dismissed. Protection of the public records is already safeguarded by the Proposed Code which punishes both the giving of false information in relation to official processes\textsuperscript{71} and perjury.\textsuperscript{72} None of the trivial reasons advanced justify the use of the criminal law.

Professor Packer has isolated another possible justifying rationale, after carefully inspecting the fact patterns of the past bigamy prosecutions. He writes that “almost without exception, they involve fraud on the second spouse, which is discovered after her apparent husband deserts her;” thus, “viewed in this light, the offense is essentially rape by deceit, inducing a woman to enter into sexual cohabitation by misrepresenting marital status.”\textsuperscript{73} This, it seems to me, might present a secular interest worthy of protection. However, it affords no justification for the Code’s proposal which applies even if there is full divulgence. Criminal protection, if it is afforded at all, should be provided against deceit, and the crime should turn on whether or not disclosure was present. On this analysis, it does not matter whether a person had one or a hundred spouses at the time, or practiced monogamy, polygamy or polyandry. The core of the crime should be that of deceitful sexual imposition. All that is needed is an additional provision to proposed section 9A.44.060 (rape in the third degree) which provides that third degree rape is committed whenever “a person, knowing himself lawfully to have a living spouse and failing to inform the other person of this fact, intentionally marries or purports to marry that other person for the purpose of having sexual intercourse with that other person.” Bigamy is an expendable offense, and it should be removed from the proposed code.

B. Incest

The crime of incest, an offense of ecclesiastical origin, presents

\textsuperscript{71} R.W.C.C. § 9A.72.030.
\textsuperscript{72} R.W.C.C. §§ 9A.72.010, .020.
\textsuperscript{73} PACKER, supra note 15, at 314.
problems similar to bigamy. Incest taboos of one sort or another appear prominently in literature and psychiatry. Statutory definitions vary widely and often go well beyond the incest notions discussed in literature and psychoanalytic research. On the other hand, incest prosecutions are infrequent. Under the Proposed Code, the crime of incest, like bigamy, is a third degree felony carrying a penalty of five years imprisonment or $5,000 fine, or both, and it would occur whenever a person "engages in sexual intercourse with a person whom he knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant [including stepchildren and adopted children under eighteen], brother or sister of either the whole or half blood, uncle, aunt, nephew or niece." 74

The Judiciary Committee states: 75

The two social interests which are protected here are: 1) prevention or deterrence of sexual relations between persons related to one another by blood in such a way that there is a significant probability of genetic defect in any possible child which might be born as a result of their sexual relations, and 2) prevention or deterrence of sexual relations between persons whose close living relationship—step-parent, step-child—make the younger person peculiarly susceptible to undue influence.

The genetic reason is clearly insufficient, as set forth below. If the sole justifying reason for criminalizing incest is the protection of a child's personality development, the inappropriateness of the proposed statute is apparent on its face. It limits its protection of adopted persons or stepchildren to those under eighteen, an age when personality maturation has crystalized. But, contrary to this limitation, it "protects" all others throughout their lifetimes. If protection of a child's personality growth is the sole reason for the statute (absent the genetic consideration) the inconsistency shows that the proposed provision seeks to enforce a private morality. Where both parties are fully adult, e.g., a sister and brother over thirty or an uncle forty and a niece

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74. R.W.C.C. § 9A.64.020(1) and (2).
75. R.W.C.C. § 9A.64.020, Comment at 277-78. Additional commentary to this section states that the reason for limiting incest with adopted or stepchildren to those children under eighteen years of age is because "there can be no genetic defect argument made to support treating as incest sexual intercourse between a step-parent and his stepchild; thus, the law must rest on the notion that the risk of undue influence... over a stepchild who lives in the home of his step-parent requires special provision. The age specified... reflects this judgment." Id. at 277.
thirty (or vice-versa), and they privately commit incest with knowledge and complete consent, what other purpose is being served? Absent the genetic consideration, the question remains: why should the criminal law prohibit incest between consenting adults in private?

The criminal law can, and should, safeguard the interest of a child's proper psychological development. Granting this interest as legitimate does not justify including incest as a separate crime in the Proposed Code. In fact, the incest taboo and its reinforcement by defining it as a crime might be part of the problem and not part of the solution. Where a child is involved, and the seducer is a parent, surrogate parent or a close but substantially older family relative, the experience of sexual relations can, but need not necessarily, be psychologically traumatic. The psychological effect depends, in part, on whether the added element of the guilt supplied by the incest taboo is strong, weak or absent. The presence of a strong incest taboo may provide the foundation for guilt that harms the psyche. There is good reason to believe that when a society defines incest as a crime and thereby condemns it further, the added psychological guilt, first by the incest taboo and secondly by its reinforcement in the criminal law, makes more grievous the psychic wound created by incestuous sexual intercourse. This is particularly true in case of criminal prosecution. The judicial process requires that the child be interrogated repeatedly about the facts by police officers, social workers out of court and prosecutors in court. The result is to reinforce strongly the incestuous experience, repeatedly reinforcing the debilitating shame or guilt. In such circumstances the judicial process serves to harm the very interest that the criminal law seeks to protect: the growing psyche of a young child. Incest taboo damage can also be observed in cases other than where the incest has been consummated, e.g., where the desire has existed, proved intolerable and been diverted—with a "flight" into homosexuality, gerontophilia (sexual desire for persons much older than oneself; in this case, for parent-substitutes), fetishism, etc.

The guilt may be conscious, but the fear and expectation of (self-) punish-

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76. In some primitive and ancient societies young children seem capable of intercourse with adults without any serious damage, but they are always in a social setting where adult-child sexual relations are not strongly condemned by an incest taboo. See R. Masters, Forbidden Sexual Behavior and Morality (1962).

77. R. Masters, Patterns of Incest: A Psycho-Social Study of Incest Based on Clinical and Historical Data 195 (1963).
Overcriminalization

ment can be unconscious motivations, just as the guilt itself can be repressed into the unconscious along with an unrequited wish for incest. The incest involved need not be the genuine act, but, psychologically, it can be a symbolic act representing the essence of evil (as defined by society and its criminal law), and serve, for example, as a means of expressing anti-social rebellion. Thus the symbolic, but equally damaging, act of incest can be committed for reasons quite apart from the simple gratification of sexual appetite. Incest and its psychological manifestations can be the almost perfect outlet for sado-masochism. The psychological harm can be made more grievous by a strong incest taboo that is reinforced by the criminal law.

Insofar as a child may properly need the protection of law from the sexual advances or threats of seduction from parents and close relatives, the needed protection is already fully supplied by other provisions of the Proposed Code. The crime of incest is redundant and unnecessary. The Proposed Code provides that “any person who communicates with a child under the age of fourteen years of age for immoral purposes” commits a misdemeanor;\(^7\) that a person commits rape in the first degree, punishable by not less than twenty years imprisonment or by fine of $10,000, or both, or by death, (which are greater penalties than those provided for incest) if “such person engages in sexual intercourse with another person . . . who is less than eleven years old;”\(^7\) that a person commits rape in the second degree, punishable by ten years imprisonment or by fine of $10,000, or both, (which are greater penalties than those provided for incest) if “such person [who is eighteen years or more] engages in sexual intercourse with another person . . . who is less than fourteen years old;”\(^7\) that a person is guilty of rape in the third degree, punishable by five years imprisonment, or by $5,000 fine, or both, (the punishment provided for incest) if the prosecuted person is over twenty and has had intercourse with a person who is less than sixteen.\(^7\) Additional protection for a child’s personality growth and development is found in the pro-

\(^7\) R.W.C.C. § 9A.88.015.
\(^7\) R.W.C.C. § 9A.44.040.
\(^7\) R.W.C.C. § 9A.44.050.
\(^7\) R.W.C.C. § 9A.44.060. However, unlike the incest provisions, the rape offenses and the first two sexual contact provisions of the Code require corroboration of the victim’s testimony. R.W.C.C. § 9A.44.010. See note entitled “Sexual Offenses” at page 234 of this volume.
visions defining the crime of sexual contact which is an offense occurring inter alia whenever anyone touches the sexual or other intimate parts of another person under the ages of eleven or fourteen for the purpose of gratifying a sexual desire of either party even though the actor mistakenly believes the victim is older. A person can be convicted of both statutory rape and statutory sexual conduct. Further protection is provided by the criminal attempt section which punishes the attempt to commit any of the above crimes with penalties that are one step below those for the completed crime; i.e., an attempted but unsuccessful first degree felony other than murder is punished as a second degree felony. The crime of criminal solicitation affords still further protection, indicating that a person is guilty "when, with intent to promote or facilitate the commission of a specific offense, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such offense or which would establish complicity of such other person in its commission or attempted commission." The utilitarian reason for protecting the personality growth and development of a dependent child is fully, even redundantly, satisfied by the above provisions of the Proposed Code. In most instances, the punishment that is prescribed is more severe than that set forth by the incest provision. The criminal offense of incest is simply not needed to protect the legitimate secular value that is presented by a child's interest in proper psychic growth and development. Are there any other values that should be protected by an incest provision of the criminal law? As one author has put it:

There seem to be only two [more] claims. One is the genetic risk that inbreeding leads to the birth of defective children. That reason is somewhat farfetched. Incestuous relationships are rarely carried on for the purpose of procreation. And geneticists are not at all agreed that inbreeding is dysgenic: its effect is only to accentuate the recessive

82. This crime has three degrees. R.W.C.C. §§ 9A.44.070-.090.
84. R.W.C.C. § 9A.28.020. This section and the attempt section adequately protect against the fear of the Judiciary Committee that the risk of undue influence, short of force, over adopted and stepchildren would not be covered by the rape provisions of R.W.C.C. §§ 9A.44.040-060.
traits of the parents. If they share unhealthy recessive traits, the effects will be bad; if they share healthy recessive traits, the effects will be good. The other claim is that criminal punishment is required to place a secular sanction behind a widely held religious or moral tenet; and a related assertion is that the community regards incest with such intense hostility that failure to condemn it will result in loss of respect for the criminal law generally. This is simply a stark claim for the enforcement of morals through the criminal law. It must be rejected on the ground that in the absence of any claim that the conduct in question is injurious to others or to those who engage in it, people should be free of the peculiar condemnatory restraint of the criminal law. If carrying on an open and notorious incestuous relationship gives offense to the community, there may be room for its prohibition as a nuisance, although it is questionable whether the community’s injury is anything but self-inflicted, unless there is an exceptionally open flaunting of the sexual character of the relationship. Although it strikes most of us as bizarre and repugnant, there seems no good reason to prevent incestuous preferences from expressing themselves among adults. Civil sanctions such as the non-recognition of incestuous marriages should be sufficient.

V. OTHER SEXUAL OFFENSES

Nowhere does overcriminalization more obviously demonstrate the improper use of the criminal law to enforce a particular set of morals than in the definitions of the sexual crimes, especially those criminalizing extramarital or “abnormal” sexual intercourse. On the other hand, these crimes are seldom enforced. Thurman Arnold may have perceived the truth when he wrote that these crimes “are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.” No one believes that the requirements set by our sex laws are fulfilled by the vast majority of our citizens,

86.  *E.g.*, WASH. REV. CODE § 9.79.100 (1959):
Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished as follows:
(1) When such act is committed upon a child under the age of fifteen years, by imprisonment in the state penitentiary for not more than twenty years.
(2) In all other cases by imprisonment in the state penitentiary for not more than ten years.

including the most respectable, or by the police officers who may be called upon to enforce them. Kinsey has estimated that as many as ninety-five percent of American males may be potential criminals under the definitions of these laws. An excellent book on the criminal law describes the sex laws that currently exist in Washington and in other states as follows:

With the possible exception of sixteenth-century Geneva under John Calvin, America has the most moralistic criminal law that the world has yet witnessed. One area in which this moralism is most extensively reflected is that of sexual behavior. In all states the criminal law is used in an egregiously wide-ranging and largely ineffectual attempt to regulate the sexual relationships and activities of citizens. Indeed, it is as if the sex offense laws were designed to provide an enormous legislative chastity belt encompassing the whole population and proscribing everything but solitary and joyless masturbation and 'normal coitus' inside wedlock.

When considering the possible criminalization of sex acts, the subject area must be divided into at least two separate parts: (1) those sex acts occurring between consenting adults in private, and (2) all others. When dealing with the restricted question of which, if any, sex acts occurring between consenting adults in private should be criminalized, the beginning point of wisdom is the recognition that the enforcement of one particular group's morals upon other social groups through the criminal law is a dubious business at best. And where a broad community consensus does not exist about a specific act of sexual behavior, then the subject area is not proper for the criminal law. The

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88. See generally J. SKOLNICK, JUSTICE WITHOUT TRIAL Ch. 3 (1966).
89. KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 392 (1948).
91. "Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which, in brief and crude terms, is not the law's business." 14 REPORTS FROM COMMISSIONERS, INSPECTORS AND OTHERS, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 48, paras. 61 and 62 [Cmnd. 247, London] (Wolfenden Report 1957). See also P. DEVLIN, THE ENFORCEMENT OF MORALS (1959), and H. HART, LAW, LIBERTY AND MORALITY (1963).
92. Professor Packer has set forth the conditions under which the criminal law can work best or worst, and the enforcement of almost all the sex crimes requires the criminal law to function at its worst! PACKER, supra note 15, at 304:

Some of the reasons listed below for not invoking the [criminal] sanction where such behavior is concerned are self-explanatory; others will require some comment.
Overcriminalization

basic reasons are: (1) no serious community harm results from usual
sex acts occurring between consenting adults in private; (2) there is
little evidence that criminal law has functioned as a deterrent in this
area; (3) law enforcement is most difficult and is frequently degrading
to both the suspects and law enforcement personnel (what should be
proper police surveillance and detection methods?) and (4) there
seldom are any complainants—only the indiscreet need worry about
being prosecuted. Moreover, imprisonment frequently does nothing to
reform the offender. For example, the consequence of criminalizing
private, adult acts of homosexuality is, in Judge Craven's words, "a
little like throwing Bre'r Rabbit into the briarpatch."

Concern for these problems of overcriminalization underlie the
provisions of the Model Penal Code which has served as the model

1. Rarity of enforcement creates a problem of arbitrary police and prosecu-
torial discretion.
2. The extreme difficulty of detecting such conduct leads to undesirable police
practices.
3. The existence of the proscription tends to create a deviant subculture.
4. Widespread knowledge that the law is violated with impunity by thousands
every day creates disrespect for law generally.
5. No secular harm can be shown to result from such conduct.
6. The theoretical availability of criminal sanctions creates a situation in which
extortion and, on occasion, police corruption may take place.
7. There is substantial evidence that the moral sense of the community no
longer exerts strong pressure for the use of criminal sanctions.
8. No utilitarian goal of criminal punishment is substantially advanced by pro-
scribing private adult consensual sexual conduct.

93. E.g., Project, The Consenting Adult Homosexual and the Law: An Empirical
Study of Enforcement and Administration in Los Angeles County, 13 U.C.L.A. L. REV.
643 (1966).
95. As the drafters of the Model Penal Code state:

As in the case of illicit heterosexual relations, existing law is substantially unen-
forced, and there is no prospect of real enforcement except against cases of vio-
ence, corruption of minors and public solicitation. Statutes that go beyond that
permit capricious selection of a very few cases for prosecution and serve primarily
the interest of blackmailers. Existence of the criminal threat probably deters some
people from seeking psychiatric or other assistance for their emotional problems;
certainly conviction and imprisonment are not conducive to cures. Further, there is
the fundamental question of the protection to which every individual is entitled
against state interference in his personal affairs when he is not hurting others.
Lastly, the practicalities of police administration must be considered. Funds and
personnel for police work are limited, and it would appear to be poor policy to use
them to any extent in this area when large numbers of atrocious crimes remain
unsolved. Even the necessary utilization of police in cases involving minors or
public solicitation raises special problems of police morale, because of the entrap-
ment practices that enforcement seems to require, and the temptation to bribery
and extortion.

for many of the recently revised criminal laws of other states. Washington's Judiciary Committee took a step toward the development of a sane sex code for this state when it too adopted the principle, candidly stated, that its proposed chapter on sex crimes "rests on a view that the criminal law is an ineffective and injurious device for attempting to regulate private, consensual adult sexual behavior" and that "whatever society may think of, for instance, private consensual adult homosexual conduct, experience indicates that the imposition of criminal sanctions has not changed homosexuals' inclinations, nor has it produced any notable decrease in homosexuality in our society."

96. See, e.g., Part V, Sexual Offenses, H.R. 20, 1972 Legislature, Hawaii (signed by the Governor as Act 9 on April 7, 1972).

97. R.W.C.C. § 9A.44.060, Comment at 189. Thus, the crimes of sodomy (WASH. REV. CODE § 9.79.100 (1959) and adultery (WASH. REV. CODE § 9.79.110 (1959)) are dropped; other crimes are covered elsewhere. An example is lewdness (WASH. REV. CODE § 9.79.120 (1959)), which is covered by the chapter on public indecency (R.W.C.C. ch. 9A.88) as is indecent exposure. Clearly, this is the right course. For example, consider adultery, which is in reality another imaginary crime: "Analysis of Reports of Washington Appellate cases indicated that no adultery case has reached the Washington Supreme Court since 1923." R.W.C.C. §§ 9A.64.010-.020, Comment at 279. There is considerable room for doubt that the criminalization of adultery in Washington can be shown to have had any appreciable impact on the behavior of married persons in this state. The rarity of prosecution for adultery in light of its occurrence creates problems of arbitrary police and prosecutorial discretion, as well as contempt and cynical disrespect for law. It is a crime in which all police detection methods are suspect and generally involve invasions of privacy. When it is made known, adultery is brought to a prosecutor's attention by a hurt, irate and jealous spouse bent on using the criminal law as a means of revenge. There seems to be little public pressure in favor of the criminalization of adultery. It is one thing to retain crimes, even though difficult of enforcement, but quite another to have crimes which are not intended to be taken seriously. The Judiciary Committee wisely decided that adultery is a crime we can do without.

98. I do not deal with the three proposed crimes of sexual contact in the first, second and third degrees. R.W.C.C. §§ 9A.44.070-.090. Sexual contact "means any touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying sexual desire of either party." R.W.C.C. § 9A.44.005(a). This definition is quite broad and includes much behavior that also is included under the rape definitions. Basically, sexual contact seems to encompass all rape behavior up to but not including penetration, which is the additional element required for rape. Apparently, in the usual rape situation the rapist would be guilty of both crimes. Since corroboration of testimony is required for a conviction of rape but not for a conviction of sexual contact in the third degree (R.W.C.C. § 9A.44.010), prosecutors may choose to charge defendants with this crime as well as third degree rape and attempted rape where the corroborating evidence is weak.

A. Rape (Homosexual, Heterosexual, Statutory and Viking)

The Proposed Code's overall treatment of rape reflects the aforementioned principle and is enlightened. It defines "sexual intercourse"
broadly, encompassing the usual genital relations plus "any act of sexual conduct between persons not married to each other involving the sex organs of one person and the mouth or anus of another." Thus, with the exception of masturbating another (which is included under the definition of "sexual contact"); this concept of "sexual intercourse" includes homosexual as well as heterosexual acts. The Proposed Code then proceeds to criminalize all types of genuine, involuntary rape with a catchall crime of "sexual misconduct" which is completed whenever any "person engages in sexual intercourse with another person without the latter's consent." Moreover, forcible rape, homosexual or heterosexual, regardless of adult or minor status, is made a separate first-degree crime punishable by twenty years imprisonment or a $10,000 fine, or both. Statutory rape is divided into two basic crimes, and several additional crimes which admit as a defense a reasonable belief of fact as to the ages of sixteen and eighteen. Statutory rape in the first degree is a strict liability crime, occurring whenever any person regardless of age, engages in sexual intercourse with another "who is less than eleven years old." Second degree statutory rape, also a strict liability of-
fense, occurs when the sexual intercourse is with another "who is less than fourteen years old"\textsuperscript{106} if "the actor is eighteen years old or more."\textsuperscript{107}

Thus, since persons under sixteen are deemed incapable of consent, voluntary heterosexual intercourse between young persons over sixteen and under eighteen years of age is not criminalized. One can sympathize with the Judiciary Committee's laudable intent not to criminalize heterosexual relations between teenagers between the ages of sixteen and eighteen as statutory rape. It serves no utilitarian purpose to do so. However, the defining language may create a construction problem when determining who qualifies as an "actor," especially where the criminally forbidden sexual intercourse takes place between consenting teenagers in the usual situation. Nowadays young boys and girls are more sexually aggressive, knowledgeable and sophisticated than this provision reflects. It is not always true that the girl or boy who is almost sixteen is a bewildered, passive person who is seduced by a male or female who invariably is the aggressive "actor." The moving party, or "actor," may well be under sixteen. Assuming that it is proper to use the criminal sanction in this situation, the problem can be eliminated by striking the word "actor" and in its place inserting the words "other person." A second problem exists in the relationship between the two statutory rape statutes. If an "actor" over eighteen years engages in sexual intercourse with a person less than eleven, then the prosecutor seems to have full discretion to choose between the two crimes, with important differences in penalty hanging in the balance.

A third problem is presented by an anomaly in the Proposed Code. Since a person under sixteen years of age is deemed incapable of consenting, voluntary heterosexual intercourse between teenagers under

\footnotesize{\textsuperscript{106} R.W.C.C. § 9A.44.050(1)(b).
\textsuperscript{107} Id. This crime also occurs when sexual intercourse takes place between persons of any age, but without consent because one of the persons "is incapable of consent by reason of being physically helpless." R.W.C.C. § 9A.44.050(1)(a). Another crime, rape in the third degree, R.W.C.C. § 9A.44.060(1)(a), occurs when sexual intercourse takes place with a person "who is incapable of consent by reason of being mentally defective or mentally incapacitated." Finally, if a person is less than sixteen years and voluntarily engages in sexual intercourse with another who is twenty years or more, rape in the third degree occurs. R.W.C.C. § 9A.44.060(1)(b). However, in this last situation a reasonable belief that the person was sixteen years of age functions as a defense. R.W.C.C. § 9A.44.020(2)(b).}
sixteen is criminalized as "sexual misconduct," a gross misdemeanor. On the other hand, if the teenage "actor" in this situation is not more than five years older than the "other person" who, in turn, is under sixteen but over fourteen, then they do not commit the crime of "sexual contact," which includes all the behavior of sexual foreplay up to penetration. The reason is that R.W.C.C. § 9A.44.090 affords an affirmative defense to the crime of "sexual contact" when "the other person's lack of consent was due solely to incapacity to consent because he was less than sixteen years old; and such other person was fourteen years old or more; and the actor was less than five years older than such other person." Thus, the Proposed Code presents the anomalous situation that heterosexual teenagers under sixteen can voluntarily fondle each other in all types of erotic sexual foreplay, including masturbating another to orgasm, without any possibility of criminality; however, if they take the step of penetration and engage in voluntary heterosexual intercourse, they immediately commit the crime of "sexual misconduct." The commentary to the Proposed Code nowhere discusses the justifications for this strange set of affairs. I can only believe that it must have been due to an oversight that will be corrected. The proper way to harmonize the proposed provisions and to eliminate the anomaly is to provide that the affirmative defense afforded by R.W.C.C. § 9A.44.090 applies also to "sexual misconduct" and to "rape in the third degree," as well as to "sexual contact." This harmonization takes due account of the actual facts of modern-day teenage sexual behavior.

B. Prostitution

Regrettably, the Judiciary Committee was not consistent in the application of its principle that private, consensual acts of sexual behavior by adults should not be criminalized. In a chapter different from that on sex crimes (i.e., the chapter on public indecency) the Committee proposes to criminalize the act of prostitution,\footnote{R.W.C.C. § 9A.88.020. Prostitution is a misdemeanor (ninety days or $500, or both) except when the person has been convicted of the offense on three or more previous occasions. Then it is a gross misdemeanor carrying a penalty of one year's imprisonment or a fine of $1,000, or both.} whether
heterosexual or homosexual,\textsuperscript{109} patronizing a prostitute,\textsuperscript{110} and promoting\textsuperscript{111} or permitting\textsuperscript{112} prostitution.

The criminalization of the sexual act of prostitution, itself, is essentially the enforcement of morals, usually promoted by those who see it as sin. Some persons, seeking to avoid this charge, focus on prostitution's commercial aspects and its relation to organized crime. But organized crime seems to have moved on to more lucrative areas and those who advance this argument refuse to criminalize other business practices on this ground, including those that have been infiltrated by organized crime, \textit{e.g.}, the business of making loans.\textsuperscript{113} In any event, the Proposed Code gives no justifying reason for the Judiciary Committee’s breach of its own principle. We are left with two nagging questions. What is the specific, secular harm that should be protected against by criminalizing the act of prostitution when done in private and between consenting adults? Does this harm provide a compelling, secular reason for overriding our traditional preference for adult freedom? It should always be remembered that in a free society the burden of justifying a restriction on freedom is on those who seek to do so, and not vice-versa.

Prostitution has endured in all ages and has survived all types of attack. Strict criminal law enforcement seems not to have deterred prostitution but rather to have changed its modes of operation.\textsuperscript{114} Given its persistence throughout human history, prostitution must

\begin{footnotesize}
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  \item \textsuperscript{109} R.W.C.C. § 9A.88.035 provides that it is no defense to the crimes of prostitution and patronizing a prostitute if the sex partners are of the same sex or if a female agrees to pay the fee to a male.
  \item \textsuperscript{110} R.W.C.C. § 9A.88.030. Patronizing is a violation and occurs when one solicitor agrees to pay a fee to any other person for sexual intercourse to be engaged in by himself and the recipient or by a third party.
  \item \textsuperscript{111} Promoting prostitution in the first degree, punishable as a second degree felony, occurs whenever a person either uses force or intimidation or profits from the prostitution of a person less than seventeen. It is a second degree offense, punishable as a third degree felony, when a person "advances prostitution" by managing, supervising, controlling or owning, in whole or in part, a house of prostitution, and it is third degree prostitution, punishable as a gross misdemeanor, when a person knowingly profits from prostitution. R.W.C.C. §§ 9A.88.050-070.
  \item \textsuperscript{112} This crime is a misdemeanor and occurs when a person has possession or control of premises which he knows are being used for prostitution and fails to make a reasonable effort to halt such use. R.W.C.C. § 9A.88.080.
  \item \textsuperscript{113} See S. Hills, CRIME, POWER AND MORALITY 102-44 (1971) and P. Maas, THE VALACHI PAPERS 274-75 (1968) for discussions of the sources of income of organized crime.
  \item \textsuperscript{114} See G. Scott, THE HISTORY OF PROSTITUTION (1936); J. McCabe, THE STORY OF THE WORLD'S OLDEST PROFESSION (1932); W. Sanger, THE HISTORY OF PROSTITUTION (1921).
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\end{footnotesize}
serve a social function fulfilling a human need. It will probably continue to exist. An argument advanced favoring prostitution is that it provides an outlet for sexual impulses that otherwise would be manifested by rape or other kinds of anti-social behavior. Definitive research remains to be done on this argument, but treating it as an hypothesis, one must grant its initial plausibility. If it should prove to be true, then the prostitute is a valuable citizen indeed, ranking equally with some of the police, providing the community with a large measure of protection from sexual depredations.

Criminalizing prostitution produces unfortunate effects on law enforcement which may well outweigh whatever secular good the Judiciary Committee sought to achieve by criminalizing it. Kinsey estimates that more than two-thirds of America's white males will have at least one sexual experience with a prostitute. Facing the magnitude of the law enforcement problem posed by prostitution, Professor Kadish writes:

The costs, on the other hand, of making the effort are similar to those entailed in enforcing the homosexual laws—diversion of police resources; encouragement of use of illegal means of police control (which, in the case of prostitution, take the form of knowingly unlawful harassment arrests to remove suspected prostitutes from the streets; and various entrapment devices, usually the only means of obtaining convictions); degradation of the image of law enforcement; discriminatory enforcement against the poor; and official corruption.

Graphic illustration of the accuracy of Professor Kadish's views on the misuse of the police is provided by Professor Jerome Skolnick who presents a vivid description of "trolling," the technique used by customers and police of driving slowly in areas frequented by prostitutes in an attempt to pick them up without requiring them to solicit the drivers. It all gets to be quite sophisticated. But is it a proper use of our limited numbers of law enforcement personnel during a time when so much serious crime is occurring? Can this degrading use of the police be justified on the ground that it promotes moral virtue? The speaker is a police officer with the vice squad:

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115. Kinsey, Pomeroy & Martin, Sexual Behavior in the Human Male 597 (1948). While the statistics are twenty-four years old and times have changed, the general point still holds.
117. J. Skolnick, Justice without Trial 103 (1966). Another example:
The broads are wisening up, getting real hanky. One of them told me she can always spot a cop because we never say, “Hey, baby, how would you like to turn a trick for ten bucks?” which is what a lot of these trollers say when one of these broads looks good to them. We got to wait for them to set the price, otherwise we don't stand a chance in court. It doesn't matter how many times a broad's been convicted for prostitution. If we set the price, we got no case. The law says we entrapped her.

I was trolling one night and a broad walked over to the car and said, “Mister, I'm in trouble, I could use a little money.”

I said, “Well, I might be able to help you out, provided I get something for my money.”

She said, “You'll get something, but how much you givin’?”

I said, “How much you asking?”

She said, “How much you offerin’ to pay?”

“Well,” I said, “how's about a dollar?”

“Oh, mister,” she said, “you must be a policeman”—and walked off.

You see, Jerry, we got to get them to set the price and for what, straight date, half-and-half, French or Greek. Otherwise, we're doing the soliciting.

We are not going to stamp out prostitution by using our police in this manner. Neither are we going to stop the spread of venereal disease through infrequent and haphazard law enforcement. Complete enforcement is out of the question because it would place too great a burden on the police and the law enforcement techniques frequently invade the right to privacy. Furthermore, illegal prostitution always presents the possibility of police corruption through bribes given by pimps, prostitutes, owners of bars the prostitutes frequent and owners of hotels where the sex act occurs. Even when arrested prostitutes are

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“One of the now more experienced vice control officers reported that on his first night with the squad he used his own station wagon to pick up a girl, while an experienced vice control man was hidden in a large cardboard carton in the rear seat. He said that this was probably his most difficult arrest. As he put it:

'I took the car to a vacant lot that she picked out. After I stopped the car, I paid her the ten dollars that we'd agreed on for a straight fuck. She took the money and stashed it in her bra, and then pulled her Capri pants way the hell off. Just then Rogers stuck his head out of the cardboard box. Rogers was smiling and when she saw him she flipped. She began screaming and biting and scratching. She tore my shirt and she tore my jacket... we practically had to carry her into the station.'

Id. at 105-06. What is society's gain because of this kind of law enforcement?
not often convicted. Since judges are not moral monsters, prostitutes frequently receive light jail sentences when they are convicted. If the penalty is a fine, many immediately return to prostitution to get the necessary money. Finally, a double standard exists because the prostitute's customers are not prosecuted equally. The overall result is a tedious, degrading, expensive process of law enforcement that produces few, if any useful results. Prostitutes are not deterred, nor are they reformed; many are drug addicts who prostitute themselves to get money to buy illegal drugs which are expensive because they are illegal.

Prostitution continues on as it has in all ages of human history. Unless the Judiciary Committee can produce reasons sufficiently compelling to override the considerations advanced here, and sufficient to justify criminalizing prostitution that occurs privately between consenting adults, then that sex act itself\(^\text{118}\) should not be made a crime. The legislature should follow the English practice which criminalizes neither the sex act nor an inoffensive act of solicitation, whether by male or female.\(^\text{119}\) The act of an offensive public solicitation could be made a public nuisance. The legislature may also want to establish controls to guard against venereal disease and other problems related to prostitution.

VI. MARIJUANA, NARCOTICS AND OTHER DRUGS

America's approach to the problems presented by drug abuse\(^\text{120}\) is chaotic, reflecting fundamental ambivalences. We freely allow the use

\(^{118}\) I make no argument that other aspects of the process should not be criminalized, \textit{e.g.}, offensive public solicitation. But neither the act itself nor its necessary features, \textit{e.g.}, using a room, should be criminalized without a sufficiently compelling reason.

\(^{119}\) This is discussed in Packer, \textit{supra} note 15, at 331:

It seems that prostitution, like obscenity and like other sexual offenses, should be viewed as a nuisance offense whose gravamen is not the act itself, or even the accompanying commercial transaction, but rather its status as a public indecency. That is the approach taken in England, where law enforcement does not seem to be plagued with the self-imposed problems that our prostitution controls engender. In order to curb effectively the use of undesirable police techniques, it might also be desirable to provide that a conviction for public solicitation should require evidence that the person solicited was offended thereby and was neither a policeman nor someone in the hire of the police.

\(^{120}\) By drug abuse I mean the use of any drug to such an extent that it interferes with the user's physical or mental health, or his capacity to adjust successfully to surrounding society.
of one addictive drug: alcohol, which takes a huge social toll and also produces large numbers of user-deaths from cirrhosis and other alcohol-related diseases.\textsuperscript{121} Heavy tobacco use produces emphysema, lung cancer and circulatory diseases, all of which do vast amounts of damage.\textsuperscript{122} Even the caffeine found in coffee\textsuperscript{123} and tea may be addictive,\textsuperscript{124} potentially causative of genetic damage\textsuperscript{125} and otherwise as dangerous\textsuperscript{126} as the banned cyclamates.\textsuperscript{127} On the other hand, we criminalize the possession and use of marijuana,\textsuperscript{128} a non-narcotic, about which the Report of the National Commission on Marihuana and Drug Abuse states, "neither the marihuana user nor the drug itself can be said to constitute a danger to public safety."\textsuperscript{129} The entire role of the law in drug control needs to be rethought.\textsuperscript{130} Special consideration should be given to the creation of a new system of controls that is radically different from our current, ineffective approach. The control system should not tempt law enforcement officers to violate the guarantees of the fourth and fourteenth amendments. Observations made by Thurmond Arnold during Prohibition, in 1935, have been further corroborated in the subsequent thirty-seven years and remain applicable to current marijuana and drug control practices:\textsuperscript{131}

\textsuperscript{121} "[A]lcohol has probably caused more disease than any other drug in man's history... There are at least 2,500,000 socially useless alcoholics in this country and about as many more whose productivity is curtailed by alcohol..." Model, Mass Drug Catastrophes and the Roles of Science and Technology, 156 SCIENCE 346, 347 (1967). See also E. Bloomquist, Marijuana: The Second Trip 180-81 (1971); L. Goodman & A. Gilman, The Pharmacological Basis of Therapeutics 135-44 (1970); R. Blum, Society and Drugs 284-85 (1969).


\textsuperscript{123} The use of coffee was once criminalized and made punishable by imprisonment or death. R. Blum, Society and Drugs 11-12 (1969).

\textsuperscript{124} See Goldstein, Kaizer and Whitby, Psychotropic Effects of Caffeine in Man, IV. Quantitative and Qualitative Differences Associated with Habituation to Coffee, 10 Clinical Pharmacology & Therapeutics 489 (1969).

\textsuperscript{125} See Goldstein and Warren, Lack of Relationship Between Gastric Carcinoma and Intake of Beverages Containing Coffee, 15 Cancer 1261 (1962); and Kuhlmann, Fromme, Heege and Ostertag, The Mutagenic Action of Caffeine in Higher Organisms, 28 Cancer Research 2375 (1968).


\textsuperscript{129} National Comm'n on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding 78 (1972).

\textsuperscript{130} An excellent article doing much rethinking is Kaplan, The Role of the Law in Drug Control, 1971 DUKE L. J. 1065.

\textsuperscript{131} T. Arnold, The Symbols of Government 164 (1935).
Before [prohibition] the problem of search and seizures was a minor one. Thereafter, searches and seizures became the weapon of attack which could be used against prohibition enforcement. For every 'dry' speech on the dangers of disobedience, there was a 'wet' oration on the dangers of invading the privacy of the home. Reflected in the courts the figures are startling. In six states selected for the purpose of study we find 19 search and seizure cases appealed in the 12 years preceding Prohibition and 347 in the 12 years following.

Washington's Proposed Code does not face squarely the problem of drug abuse. It addresses parts of the problem in a piecemeal fashion. Under one proposed provision a person is guilty of a misdemeanor of public intoxication if he appears in public under the influence of alcohol, or if he appears in public under the influence of "narcotics or other drug [sic], not therapeutically administered, to such a degree that he endangers himself or other persons or property, or annoys persons in his vicinity." A person commits the violation of loitering if he "remains in any place with one or more persons for the purpose of unlawfully using or possessing a narcotic or dangerous drug." Non-pathological intoxication, including intoxication by alcohol, drugs or other "substances," is not a defense to any crime unless it negates an element of the offense or unless it is induced involuntarily. Basically, this piecemeal approach relies on the existing framework of ineffective laws.

A. Marijuana

Washington's basic approach to the problems of marijuana and narcotic drugs is not found in the Proposed Criminal Code where it should be, nor in the crimes and punishment chapter of the Revised Code of Washington (R.C.W.). It is in the R.C.W. chapter on food and drugs. In 1969, the legislature passed the Uniform Narcotic Drug Act which does not include marijuana, and it also amended the chapter on poison and dangerous drugs to include marijuana, criminalizing its possession, sale, gift, barter, exchange or distribution in

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132. R.W.C.C. § 9A.84.050(1).
133. R.W.C.C. § 9A.84.060(1)(c).
134. R.W.C.C. § 9A.08.080.
any way. Marijuana, a non-narcotic drug, should be considered separately from the narcotic drugs.\textsuperscript{137} But Washington's law should be more extensively revised in light of recent developments. For example, the National Commission on Marihuana and Drug Abuse\textsuperscript{138} recommends that "possession in private of marihuana for personal use... no longer be an offense," and that "distribution in private of small amounts of marihuana for no remuneration or insignificant remuneration not involving a profit... no longer be an offense."\textsuperscript{139} Given these recommendations and the important findings of the Commission,\textsuperscript{140} plus a desire to remove marijuana's profits from criminal elements, it is appropriate for Washington to handle the problem of marijuana the same way it handles the problem of alcohol: through its state liquor stores. A similar recommendation is set forth by Professor Kaplan, one of America's leading experts on the role of law in drug control. He sees many social advantages:\textsuperscript{141}

\textsuperscript{137} The Illinois Supreme Court in People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407 (1971) has ruled that a state classification of marijuana under its Narcotic Drug Act (ILL. REV. STAT. ch. 38, §§ 22-1 et seq. (1969)) instead of under its Drug Abuse Control Act (ILL. REV. STAT. ch. 111-1/2, §§ 801 et seq. (1969)) constituted a violation of the equal protection clause of the fourteenth amendment. The court compared marijuana with the opiates and cocaine, the drugs embraced by the Narcotic Drug Act which required a mandatory ten-year sentence on first conviction, and with the barbituates, amphetamines and hallucinogens, the drugs embraced by the Drug Abuse Control Act which provided for a maximum sentence of one year and allowed probation for a first offender, and found that the classification of marijuana with the "hard" drugs was unconstitutional.


\textsuperscript{139} NATIONAL COMM'N ON MARIHUANA AND DRUG ABUSE, supra note 129, at 154.

\textsuperscript{140} For example, the Commission found: "In sum, the weight of the evidence is that marihuana does not cause violent or aggressive behavior; if anything marihuana generally serves to inhibit the expression of such behavior." \textit{Id.} at 73. "Similarly, previous estimates of marihuana's role in causing crime and insanity were based on quite erroneous information." \textit{Id.} at 23. "The fact should be emphasized that the overwhelming majority of marihuana users do not progress to other drugs. They either remain with marihuana or forsake its use in favor of alcohol." \textit{Id.} at 87-88. "In all its studies, the Commission found no evidence of chromosome damage or teratogenic or mutagenic effects due to cannabis at doses commonly used by man." \textit{Id.} at 84. "No objective evidence of specific pathology of brain tissues has been documented. This fact contrasts sharply with the well-established brain damage of chronic alcoholism." \textit{Id.} at 85. "Early findings [were made in] studies of chronic (up to 41 years), heavy (several ounces per day) cannabis users in Greece and Jamaica... These studies in Greece and Jamaica report minimal physical abnormalities in the cannabis users as compared with their non-using peers. Minimal abnormalities in pulmonary function have been observed in some cases of heavy and very heavy smokers of potent marihuana preparations (ganja or hashish). However, one study concluded the cause was smoking in general, no matter what the substance. The other study could not express any conclusion..." \textit{Id.} at 84-85.

The application to marijuana, however, of a licensing system similar to that presently applied to alcohol changes [the prospects] drastically. First, marijuana would no longer be the most widely used illegal drug in the United States; nor, for that matter, would it be the most widely used legal drug—alcohol, and tobacco would still vie for that distinction. Second, marijuana would no longer be the first illegal, or the first legal, drug used by those who later use more dangerous substances. Third, marijuana, once classified with the legal drugs, would no longer reflect its popularity upon the illegal drugs. Fourth, the removal of the disparity between the legal treatment of marijuana and alcohol would allow more honesty in educating about both—while at the same time increasing the credibility of presently honest warnings about the more dangerous drugs. And, fifth, nothing will damage the illegal drug dealing subculture as much as exposure to honest competition by legitimate businessmen.

One of the many advantages of decriminalizing marijuana is the impact that it would have on youth. Today, in large part because marijuana use is illegal, the marijuana user is frequently seen by teenagers as an adventurous hero of the counterculture; his image is that of a bold challenger of the Establishment's authority and of society's conventions. This view fits nicely with the psychology of adolescent rebellion, and can carry over to other drugs, including heroin. Severe criminal sanctions serve to create the myth of a persecuted minority, and an ideology springs up around marijuana. Decriminalization would eliminate this myth and status, tending to reduce it more to the level of alcoholism—an addiction more to be pitied and treated as sick, rather than idolized. Moreover, the popularity of marijuana would no longer carry over to the other drugs.

Controlled legalization of marijuana is the path of wisdom. If the current approach proves anything, it proves the inefficacy of the criminal law to control marijuana. The costs of our existing policy are growing, and, especially among the young, respect for law is eroding because of disparate enforcement of the law.\textsuperscript{142} There is a serious question whether the marijuana laws can be enforced in a manner

\footnotesize{\textsuperscript{142.} Expressions of concern have been registered about the extent to which current marijuana laws encourage police misconduct, especially in the search and seizure areas. See Bonnie and Whitebread, \textit{The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marihuana Prohibition}, 56 \textit{Va. L. Rev.} 971 (1970).}
consistent with constitutional definitions of fairness. Moreover, short of creating a police state, it will be impossible to enforce the existing laws strictly enough to stamp out use of the drug. Our most strenuous attempts to control the importation and distribution of marijuana have proved ineffective. Seldom a month passes without a newspaper proclaiming that a “major source” of marijuana has been located or destroyed, yet marijuana continues to be abundantly available. Severe criminal penalties serve to increase the risk, the price and the rewards that flow to the criminal element. Severe penalties may deter a few potential new users: the middle-class man who fears a conviction, or the occasional college student. But overall, severe penalties have done little to deter the use of marijuana and much to promote nullification of the law. Every aspect of discretion is used to minimize the impact of severe sanctions that are not, and cannot be equally enforced. A considerable amount of police, prosecutorial and judicial time, effort, personnel and other resources are used to enforce laws against sale, possession and use of marijuana. At a time when the volume of serious crime is steadily increasing and the burden on law enforcement agencies is growing more onerous, this use of resources impairs the ability of criminal law enforcement to deal effectively with more dangerous and threatening conduct.

B. Narcotics and Other Drugs

After prohibition, various crime organizations turned to illegal gambling and to the illegal drug market where enormous profits could, and still can, be made because of our current, ineffective approach to drug control. According to the estimates of the President's Crime Commission, about 3,300 pounds of pure heroin a year are smuggled into the United States and, on the average, “less than one-tenth of this amount is seized by all enforcement agencies combined.” It takes about twenty-two pounds of opium, which can be purchased on the black market for roughly $350, to make 2.2 pounds.

145. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, NARCOTICS AND DRUG ABUSE 6 (1967).
Overcriminalization

of pure heroin which will sell for at least $225,000 on the American
market when divided into doses containing from one to thirty percent
heroin.146 Under these economic conditions, it is in the rational
self-interest of the organized suppliers actively to expand their market
by seeking new user-customers through a vigorous program of
pushing heroin. Pushers are usually addicts who get their supply of
heroin by pushing it. Addiction itself is the result of a complex inter-
action of physical and psychological factors. Most addicts suffer from
various mental illnesses that can lead to a strong psychological need
for drugs; in this sense, some persons can be said to be addiction
prone.147 They tend to have personalities that blend together a mix-
ture of traits associated with neurosis, personality disorders and inade-
quate psyches.148 Generally, addicts are weak persons susceptible to
exploitation.149

Drug addition is expensive, and it stimulates other types of crime as
addicts seek income to pay for their habit: prostitution, theft, burglary

146. Id.
147. The "intensity of the pleasure from opiates seems to vary with the degree to
which the individual may be called a neurotic or psychopath." MAURER & VOGEL,
NARCOTICS AND NARCOTIC ADDICTION 74 (2d ed., 1962). Some people can use addictive
drugs over long periods of time without becoming addicted:

The addiction-prone type, however, experiences much more than physical gratifica-
tion from his first experience with narcotics. He develops a psychological need or
craving which he is probably powerless to ignore and it is this psychological de-
pendence, also called habituation, which renders his subsequent addiction virtually
inevitable.

BOWMAN, Narcotic Addiction and Criminal Responsibility Under Durham, 52 GEO.
L.J. 1017, 1036 (1965). But when addiction takes hold its impact is debilitating because
the addicting drugs are psychotoxic (mind poisoning):

A psychotoxic drug is any chemical substance capable of adducing mental effects
which leads to abnormal behavior. They affect or alter to a substantive extent, con-
sciousness, the ability to think, critical judgment, motivation, psychomotor coordi-
nation, and sensory perception.

PRESIDENT'S ADVISORY COMM'N ON NARCOTICS AND DRUG ABUSE, FINAL REPORT 1
(1963). Thus, where full addiction is present, and the addict lacks substantial capacity
either to appreciate his criminality as would a normal person or to conform his conduct
to the requirements of law, the addict should have the defense of mental disease or de-
fect.

149. Support for this proposition may be found in the article by Chein and Rosen-
feld, Juvenile Narcotics Use, 22 LAW & CONTEMP. PROB. 52 (1957):

Psychiatric research into the personality of juvenile addicts indicates that adoles-
cents who become addicts have deep-rooted major personality disorders. These dis-
orders were evident in overt adjustment problems or in serious intrapsychic con-
licts, usually ... prior to their involvement with drugs.... In terms of personality
structure, one may say that the potential addict suffers from a weak ego, an inade-
quately functioning superego, and an inadequate masculine identification.

Id. at 59-60.
and robbery. Almost half of the serious crimes that occur in America's urban areas can be attributed to the activities of narcotic addicts, especially heroin addictions. About $500 million a year in property crimes is attributed to addicts in the New York area alone.\textsuperscript{150} The Washington State Patrol's Drug Control Assistance Unit estimates that "there are 5,000 heroin users in the state who steal $392 million worth of property each year to support their habits."\textsuperscript{151} The basic reason for the magnitude of crime associated with addiction is the high price of heroin. The basic reason for the high price of heroin is our current criminal law. By criminalizing possession, use and sale of narcotics, the government confers a monopoly position on organized criminals willing to run the risks involved in supplying the drug. Enormous profits are made because an addict's need is constant and he will pay almost any price to buy narcotics. The black market enjoys a steady demand.\textsuperscript{152} The current criminal law operates very much like a tariff—a crime tariff—serving to drive the price upwards.\textsuperscript{153}

To compound this irony, strict enforcement, or "war" on heroin, is counterproductive. It has the consequence of increasing the risks to the organized suppliers and the price of heroin to the addict. The addict must commit greater amounts of secondary crime to get the additional money needed to support his habit. On this analysis, a "war" on heroin and a strict enforcement of existing law results in greater, not lesser, amounts of total crime, increasing the rates of burglary and robbery, as well as the danger to persons, making city life intolerable.

The magnitude of the figures shows that the current approach of our criminal law grossly has failed to solve the social problem. Ironically, the "brunt of enforcement has fallen heavily on the user and the addict,"\textsuperscript{154} rather than on the organized suppliers. Effective law enforcement against the organizations is extremely difficult. Police corruption thrives on heroin traffic, and organized crime seems to have increased its effectiveness by engaging in other types of crime: bribing

\textsuperscript{150} \textit{President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report, Narcotics and Drug Abuse} 6 (1967).

\textsuperscript{151} The Seattle Post-Intelligencer, May 17, 1971, at 1, col. 1.


\textsuperscript{154} \textit{President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report, Narcotics and Drug Abuse} 8 (1967).
Overcriminalization

and corrupting higher public officials, as well as diversifying its risks and activities by moving into loan sharking and labor racketeering.\textsuperscript{155} The law enforcement techniques are often of questionable constitutional validity and some involve the police in committing criminal acts; such as intrusions that amount to illegal searches and seizures or various forms of wiretapping, bugging or electronic eavesdropping.

Given the woeful consequences of our current criminal laws, given that law enforcement has been criminogenic and given that there has been no appreciable diminution in either the supply of narcotic drugs or the drug problem, there is good reason to doubt that the existing scheme of legal controls is worth preserving.

One fact is crucial: enormous amounts of money are involved in illegal drug traffic. The initial energy that accounts for much drug addiction and that stimulates secondary crime comes from the organized suppliers. The way to end addict crime and to eliminate the criminal organizations engaged in the illegal drug trade is to take the profit away by decriminalizing narcotic drugs, especially heroin, making them, or their substitutes such as methadone,\textsuperscript{156} easily and cheaply available to addicts. Stimulated addict crime makes it more important that narcotics be decriminalized than marijuana, but a rational criminal code would decriminalize both.\textsuperscript{157} If private use and possession of very small amounts of the drugs were not criminalized, and if drugs were cheaply available, there would be neither a black market nor a

\textsuperscript{155} For a full description see President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report, Organized Crime (1967).

\textsuperscript{156} Methadone has been proven an effective means of treatment in Canada, according to the President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report, Narcotics and Drug Abuse 139 (1967):

In Canada, programs vary from Province to Province. Both British Columbia and Ontario have been utilizing methadone treatment with some reported success. In Vancouver, this drug is given to older addicts for a few months to ease the transition to abstinence. A committee of the Canadian Medical Association, in a statement published in the CMA Journal (vol. 92, p. 1040, 1965), concluded that methadone could be used for gradual withdrawal or prolonged maintenance and recommended a series of safeguards to be followed by any physician attempting maintenance therapy to insure that he was the only source of methadone for each patient. Canadian law, as ours, is bound to good medical practice; the exact wording is that doctors must be able to present credible evidence that the narcotic is 'required for the condition for which the patient is receiving treatment.' See also Goldstein, Heroin Addiction and the Role of Methadone in its Treatment, 26 Arch. Gen. Psychiat. 291 (1972); Lennard, Epstein & Rosenthal, The Methadone Illusion, 176 Science 881 (1972).

\textsuperscript{157} A contrary and disturbing trend exists toward criminalizing the possession and use of many other drugs, such as LSD, amphetamines, barbiturates and tranquilizers. Examples in Washington are Wash. Rev. Code §§ 69.40.060-.150 (1961) and Wash.
crime tariff. The economic incentive for pushing narcotics would be reduced to that of a druggist selling aspirin. This proposal does not mean that our criminal laws controlling importation, manufacture, distribution or pushing of drugs should be changed or left unenforced. Unauthorized persons engaging in the drug business for profit should be vigorously prosecuted, and the knowing possession of excessive quantities of a drug could be made a presumption of intent to sell. But we could take a giant step forward if strict controls over the supply of drugs were maintained while leaving the care of addicts in the hands of governmentally controlled social-welfare agencies specifically created for that purpose.

The Judiciary Committee should have faced this task squarely. It should have decriminalized the acquisition, possession and use of small amounts of drugs and their substitutes, and it should have set forth detailed, careful controls over all aspects of supply. Such action would have created a sounder, more effective system than any state has yet evolved. Law enforcement officials would no longer be called upon to dissipate their energies against drug users or addicts, nor be

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REV. CODE §§ 9.47A.010-050 (1969) on glue sniffing. The problem is wisely discussed in PACKER, supra note 15, at 341-42:

Our woeful experience with narcotics and marijuana controls should have made us a little more wary about this rush to invoke the criminal sanction. It seems particularly inappropriate in the case of drugs like the amphetamines, tranquilizers, and barbiturates, all of which have acceptable medical uses. Ours is a drug-using society, and self-medication is an important aspect of that use. Nothing but gratuitous misery will result from the occasional imposition of criminal conviction on a person who possesses for his own use drugs for which he does not have a medical prescription. Recent federal drug control legislation, although probably more far-reaching than is desirable, sets a useful precedent by failing to make possession, unaccompanied by intent to sell or use, a criminal offense. Unfortunately, many of the states have ignored this precedent, and have passed highly restrictive legislation of their own.

In addition to running counter to well-established habits in the population, repressive criminal legislation in this field creates an impossible enforcement problem. Heroin and marijuana, at least, have to run the gauntlet of border control, since substantially all the supply comes in from abroad. The various 'dangerous drugs' are all manufactured domestically. Furthermore, many of these drugs can be synthesized at low cost in relatively simple laboratory operations. There is, in short, very little prospect of effective control over the total supply and therefore no prospect at all of keeping significant amounts of the supply out of illegal channels of distribution. Although the greatest possible control should be exerted through federal licensing and inspection of manufacturing facilities, record-keeping requirements for manufacturers and distributors, and other regulatory devices, it seems quite inexpedient to rely on the criminal sanction as the primary means of control. Sanctions such as injunctions, license revocations, and civil fines are much better adapted to backing up those regulatory controls that can realistically be enforced.
tempted to engage in illegal searches and seizures. They could concentrate their efforts against unauthorized suppliers and organized distributors who would have much less economic incentive to engage in the activity.

VII. GAMBLING

Although gambling may be "a form of conduct unbefitting a being with human capacities,"158 "law enforcement officials agree almost unanimously that gambling is the greatest source of revenue for organized crime."159 It takes many forms ranging from lotteries, to off-track horse betting, to betting on sporting events such as college football games, to large dice games and illegal casinos. Although there is no accurate way of knowing the gross revenue derived from gambling by organized crime, "estimates of the annual intake have varied from $7 to $50 billion."160 The magnitude of the figures indicates the criminal law has grossly failed to control gambling. Loan sharking is the second largest source of money for organized crime, and gambling profits provide the necessary capital for loan-shark operations.161 The narcotics trade is probably the third most lucrative source, again based on the large amounts of money available to organized crime.162 "Prostitution and bootlegging play a small and declining role in organized crime's operations," while the infiltration of legitimate business is on the upswing.163

Illegal gambling is extremely difficult to detect and deter. It takes place by consent so it is easily concealed. There is an absence of complaining victims. Moreover, the transaction is quickly and privately made. It is far simpler to place a bet than to buy heroin. The public tends not to regard gambling as particularly wrongful. Who hasn't made a friendly bet? Law enforcement is sporadic, falling "with

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160. Id. at 3-4.
161. Id. at 4.
grossly unequal force on the inhabitants of urban ghettos.”\textsuperscript{164} It frequently involves the same questionable techniques used in detecting drug violations. Bribery and corruption of local government officials takes place more frequently than generally believed.\textsuperscript{165} Widespread disregard for the law results. There is no reason to believe that Washington is immune to organized crime.

The Judiciary Committee did not address itself to the problem of gambling, and Washington’s existing position on gambling is highly irrational. On the one hand, a person can gamble away every penny that he has or that he can beg, borrow or steal so long as he bets on horses through the legalized “parimutuel method.”\textsuperscript{166} On the other hand, almost every other form of gambling is prohibited. A person commits a crime if he makes side bets on the horses in any way not using the legalized parimutuel method\textsuperscript{167} or submits guesses to a newspaper about which football teams may prevail so that he might thereby win a prize.\textsuperscript{168} If Washington is to avoid organized crime and the fate of some eastern states, it must immediately develop an imaginative and careful scheme to legalize and control certain forms of gambling. A state lottery should be instituted and,\textsuperscript{169}

in addition to the provision of state lotteries, off-track betting can be controlled by the establishment of state-run betting shops as in Australia. Insofar as gambling is harmful, the harm can at least be reduced by fixing limits to wagers and other measures of control. As for other forms of gambling, the Nevada solution whereby the state tax commission administers gambling by supervising a license system under which all applicants have to be cleared by the commission—and state, county, and city taxes and license fees represent a substantial revenue—has operated with success for many years. The infiltration of organized criminals has been blocked by screening all applicants for criminal records. The tax commission employs inspectors and has held hearings and revoked several licenses. The principal lesson to be learned from Nevada is that gambling can be kept clean and does not have to be run by criminals.

There is no reason why organized crime should find fertile fields in

\textsuperscript{164} Packer, \textit{supra} note 15, at 349.
\textsuperscript{165} See President’s Comm’n on Law Enforcement and Administration of Justice, \textit{Task Force Report, Organized Crime} 61-69 (1967).
\textsuperscript{167} Id.
\textsuperscript{168} Seattle Times Co. v. Tielsch, 80 Wn.2d 502, 495 P.2d 1366 (1972).
Overcriminalization

Washington, and there is no reason why the income of Washingtonians should be used to line the pockets of organized criminals and their crooked political allies. Our current ostrich-like approach to gambling must be changed.

It would also be wise for the legislature to provide for an overall "watchdog" commission with jurisdiction and full investigatory powers over gambling, drugs, and prostitution. The purposes of the commission should be to expose all abuses and to make recommendations for improving the legal controls over gambling, drugs, and prostitution. Its members should have overlapping terms (three years?) and be appointed by the governor with at least three-fourths of the commissioners coming from the ranks of reporters currently working in the mass media. However, there should not be more than one reporter coming from each firm, and no member should be allowed to succeed himself or to serve more than twice.

VIII. STANDING CRIMINAL LAW REVISION COMMISSION

Washington's existing criminal code has been the piecemeal product of emotional actions and reactions, historical accidents and political attitudes seeking a punishment for almost every legislative measure. It is old, unorganized, sometimes accidental in its coverage, and largely a combination of deliberate enactment and common law that history explains, but does not justify. The Judiciary Committee's Revised Washington Criminal Code is a healthy corrective step. It has been sixty-three years coming. It does not cover the entire field of criminal law. Moreover, much decriminalization remains to be done besides other necessary tasks. A vast number of crimes are scattered throughout the other chapters of R.C.W. They should be collected, rationalized, evaluated, harmonized with the Proposed Code, re-drafted where necessary, and put into one place: in the criminal code.

There are additional concerns. For example, the Judiciary Committee's Proposed Code does not address itself to compensation for victims of crimes—a question whose consideration is long overdue. It

170. My colleague, Professor P. Richard Cosway, Chairman, Special Committee on Crime Victims Reparations Act, tells me that a third draft proposal has been prepared for discussion by the Uniform Law Commissioners; see also, Symposium—Governmental Compensation for Victims, 43 S. Cal. L. Rev. 1 (1970).
fails to deal adequately with the question of voluntary euthanasia,\textsuperscript{171} and its treatment of capital punishment could not have taken into account the recently decided cases of the Supreme Court of the United States.\textsuperscript{172} The Judiciary Committee's sweeping provision on criminal solicitation creates serious problems of overbreadth,\textsuperscript{173} as does its proposed statute on conspiracy.\textsuperscript{174} The Supreme Court of the United States has held Washington's obscenity statute defective in certain

\textsuperscript{171} For a proposed statute see Morris, \textit{Voluntary Euthanasia}, 45 \textit{WASH. L. REV.} 239 (1970).
\textsuperscript{172} \textit{E.g.}, Furman v. Georgia, 92 S.Ct. 2726 (1972). (Discretionary imposition of death penalty, which is so infrequently and randomly imposed that it loses its deterrent value, constitutes cruel and unusual punishment in violation of eighth and fourteenth amendments.)
\textsuperscript{173} The act of criminal solicitation is defined in R.W.C.C. § 9A.28.020(1): "A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a specific offense, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such offense or which would establish complicity of such other person in its commission or attempted commission." It should be remembered that solicitation involves conduct even more remote from the commission of an offense than an attempt. The Committee's provision fails to require as an element of the crime either an overt act committed in response to the solicitation or an actual ability to give "money or other thing of value to another..." The crime is completed by the mere utterance of certain words. A serious civil liberty problem is presented by this provision with respect to its application in first amendment contexts. The section does not distinguish between the conduct sought to be prohibited and the advocacy or expression of approval of the crime allegedly solicited, \textit{e.g.}, prostitution or gambling. Under the Committee's proposal, advocacy of action could be punished even though that advocacy was neither directed toward incitement nor productive of imminent lawless action, nor likely to incite or produce such action, both of which are constitutional prerequisites for impairing freedom of speech. \textit{See} Brandenburg v. Ohio, 395 U.S. 444 (1969). As the Supreme Court said in another case, Speiser v. Randall, 357 U.S. 513, 526 (1958), "Where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized."

\textsuperscript{174} R.W.C.C. § 9A.28.030(1) defines criminal conspiracy:
A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such agreement:
(a) which act is an unequivocal step toward the performance of that crime; and
(b) which act corroborates the actor's intent that such crime be committed.

Conspiracy laws require conduct that occupies a position more remote from the commission of an offense than an attempt and less remote than solicitation. This proposed conspiracy law and its prosecutions could threaten and deter first amendment liberties in at least three ways. First, it allows imposition of heavy criminal penalties for conduct that goes little beyond thoughts and talking and having only the most peripheral relation to criminal conduct. The act required need only be clear; it need not be a substantial step as required by the law of attempt. Second, it imposes criminal liability for non-dangerous conduct on all joint activity, basing the imposition of speech and association; third, the procedures by which criminal cases are tried make it almost impossible for an individual defendant to have his case considered independently by the jury or to defend himself adequately. For discussion of much which applies to this proposed statute, see Montgomerie, \textit{Conspiracy: Legitimate Instrument or An Unconstitutional Weapon?}, 3 \textit{COL. SURVEY OF HUMAN RIGHTS LAW} 94 (1971).
applications. Corrective needs cannot wait sixty-three more years for another code revision. Although the Proposed Code is good, the complete reform and rationalization of Washington's criminal law has not been attempted or accomplished by the Judiciary Committee. That is a long-term project to which we should now turn. Furthermore, Washington needs a relevant and statewide program for collecting crime information. A fully effective system of criminal justice is impossible without an adequate crime information system. However, in this respect, Washington is "one of the most backward states in the Union." Thus, I recommend that the legislature establish a Standing Criminal Law Revision Commission, charging it to collect crime information, constantly to assess the adequacy and fitness of criminal law sanctions for our social needs, and regularly to make recommendations for legislation.


176. C. SCHMID & S. SCHMID, CRIME IN THE STATE OF WASHINGTON 333 (1972). The authors also state:

Washington occupies the unenviable position of being one of the most backward states in the Union with respect to the availability of systematic and reliable crime data. In fact, according to a recent survey, Washington is one of only two states without a central records and identification system. Neither does Washington have a centralized program for compiling crime statistics. Most states have such programs or are in the process of establishing them.

If a state establishes a statistical reporting system which reveals all aspects of the crime situation and gives sufficient leadership to collecting and processing such data, it will go a long way in carrying out its responsibilities to its citizens. Good management, good government—in short, an effective system of criminal justice is impossible without an adequate crime information program.

In addition to the administrative value of an efficient crime information system, its importance in basic research cannot be overemphasized. There is a growing realization that crime and other serious problems that constantly press for solution cannot be dealt with effectively without a wider and deeper understanding of the forces and conditions producing them, and that this understanding can be attained only by thorough and scientific study. Id. at 333-34. (footnotes omitted).
CONCLUSION

The criminal law is a highly specialized social instrument. It is useful for achieving some ends, but not others. It can be used successfully for protecting the lives and property of persons and for preventing the exploitation and corruption of youth and others who are in special need of care and protection. But when it is improperly used, the criminal law can produce more harm than good. We presently suffer from a crisis of overcriminalization which results in the costly misuse of law enforcement personnel at a time of rising crime rates among the more serious crimes. Overcriminalization tends to breed cynicism and indifference to criminal law processes, to allow enforcement of the criminal law on a discriminatory basis, to enforce one group's private morality onto other citizen groups. With Professor Kadish, "one hopes that attempts to set out the facts and to particularize the perils of overcriminalization may ultimately affect the decisions of the legislatures" and that "it may be that the best hope for the future lies in efforts to understand more subtly and comprehensively than we do now the dynamics of the legislative (and, it must be added, popular) drive to criminalize." 177 The obvious point is that much de-criminalization is needed. 178 This truth was fully recognized by the President's Crime Commission when it reported that "only when the load of law enforcement has been lightened by stripping away those responsibilities for which it is not suited will we begin to make the criminal law a more effective instrument of social protection." 179 It is in this spirit that I have proposed the above limitations on the use of the criminal sanction in Washington, limitations which I believe are not only unobjectionable, but necessary and desirable.

178. "The first principle of our cure for crime is this: we must strip off the moralistic excrences on our criminal justice system so that it may concentrate on the essential. The prime function of the criminal law is to protect our persons and our property: these purposes are now engulfed in a mass of other distracting, inefficiently performed, legislative duties. When the criminal law invades the sphere of private morality...it exceeds its proper limits at the cost of neglecting its primary tasks. This unwarranted extension is expensive, ineffective and criminogenic." Morris and Hawkings, The Overreach of the Criminal Law, 9 MIDWAY 71 (1969).