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I have chosen to discuss three areas of the Proposed Code: the proof requirement (with primary emphasis upon the affirmative defenses), justification, and felony murder. These sections are vital underpinnings of the Proposed Code. The Code makes substantial changes in each of these provisions, all of which deserve and demand critical review.

I. PROOF BEYOND A REASONABLE DOUBT; AFFIRMATIVE DEFENSES

The Code provides that:

1. Every person charged with the commission of an offense is presumed innocent unless proved guilty. No person may be convicted of an offense unless each element of such offense is proved by competent evidence beyond a reasonable doubt.

2. Subsection (1) of this section does not:
   (a) require the disproof of an affirmative defense unless there is some evidence supporting such defense; or
   (b) require the disproof beyond a reasonable doubt of any defense which this title or another statute expressly requires the defendant to prove by a preponderance of the evidence.

3. A ground of defense is affirmative, within the meaning of subsection (2)(a) of this section, when:
   (a) it arises under a section of this Title which so provides; or
   (b) it relates to an offense defined by a statute other than this Title and such statute so provides.

Classically, subsection (1) states that innocence is presumed, a prov-
Assumption often referred to as the assumption of innocence. While this presumption probably is enshrined as a constitutional right in America, only the rankest chauvinist would identify this as either an American or Anglo-American principle. However, one wonders whether the presumption will really benefit an accused of scarred complexion, shifty countenance, unkept appearance, and a generally “guilty look,” let alone one whose past encounters with the law have been a sequence of losing ventures. While the author has no empirical evidence to suggest any particular reaction to the so-called presumption of innocence, he pauses here to register doubt as to the validity of that pious phrase. Similar doubts should be registered regarding the reality of the “proof beyond a reasonable doubt” requirement. Part of the problem would undoubtedly be solved by a concise, acceptable definition of that phrase, but inasmuch as others have abandoned that quest, this author is content to note it and pass on.

In turning to the main objective of this essay—consideration of the “affirmative defense” provisions of the new Code—a major threshold question arises: why deal with defenses, affirmative or otherwise, in a substantive criminal code? Criminal codes are statements of norms of conduct, are they not? The most obvious defense, then, is a life of rectitude. This is a forced way of looking at “defenses,” but it does suggest the broad issue confronting anyone who essays a presentation of helpful comments on criminal defenses. It seems clear that a penal code brings together not only normative guides for acceptable conduct, but also the consequences of falling below the minimum acceptable standards. Often the process of guilt determination is more

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5. See Meisenholder, Evidence Law and Practice, 5 Wash. Prac. § 554 (1965) [hereinafter cited as Meisenholder].
important than the formulation by which guilt is defined, so a sharp
distinction between substance and procedure does not exist.

A somewhat plaintive argument may be made that there is no room
in the field of criminal law for any kind of "defense," a point of view
hinted at in the beginning of this discussion.\(^6\) The argument is
described as "plaintive" for the present author is convinced that the use
of language of defense in criminal statutes is an indispensable drafts-
man's tool. The criminal process as a whole is put in a more accurate
light if certain elements are identified as matters of defense. Thus, de-
fenses are not only properly included in a criminal code, they are also
vital to the process of guilt determination.

Having decided that defenses are properly included in the Code,
the next threshold question is what precisely constitutes a defense in
the Proposed Code. Anything which bolsters the presumption of in-
occence seems to be a defense, but more importantly anything which
defeats the state's effort to rebut that presumption is a form of de-
fense. Consequently, standing mute, "taking the Fifth," or even of-
fering no evidence of any kind must be thought of as a defense. Stra-
tegic maneuvers like perceptive voir dire and constitutional objections
to various kinds of evidence are active defenses. In an analytical
sense, keeping members of the W.C.T.U. off a jury when inebriation
is an issue probably ranks very high in defense achievements. The new
Code does not concern itself with these sorts of defenses.

At the mere mention of the term "affirmative defenses," a congeries
of questions come to mind: (1) what is an affirmative defense? (2)
what considerations motivate selection of particular defenses as af-
firmative? (3) what particular defenses fall within the definition of
affirmative defense? (4) what is the ultimate effect of identifying a
particular defense as affirmative? (5) Finally, what constitutional
provisions impinge on the use of affirmative defenses? The remainder
of this essay will consider the answers to these questions.

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6. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-
puts it like this: "The second concept referred to, the doctrines, are concerned with in-
sanity, infancy, intoxication, coercion, mistake, necessity, attempt, solicitation, and
conspiracy." The definition of a crime, he says, is not the whole of it, for if a defendant is
insane no crime is committed. "Lawyers refer to them as 'defenses,' and linguistic phi-
losophers call them 'excuses.' That may be proper from a procedural or philosophical
point of view, but what is finally involved is the definition of a crime." Hall, Science and
What is an affirmative defense? In searching for a definition in available source materials, one frequently finds illustrations but seldom finds a definition of an affirmative defense. The Proposed Code in essence uses the illustration technique by stating that an affirmative defense is anything it says is an affirmative defense. This avoids definition, bringing to mind obscenity which only requires being seen, not defined. In a criminal proceeding, the phrase "affirmative defense" seems to suggest a matter not part of the state's case in the sense of not requiring specific evidence from the state until and unless the matter is raised by the accused. One is tempted to say that any issue which is identified as an affirmative defense is presumed to exist in favor of the prosecution, but such a formulation poses more threats than it removes. Probably more accurate would be a formulation that a factual matter identified as an affirmative defense is irrelevant to a disposition of the case unless and until the defendant raises it.

7. 2A WORDS AND PHRASES 364 (1955), dealing with "Affirmative Defenses," is replete with particular illustrations in the guise of definition.
8. R.W.C.C. § 9A.04.120(3).
9. The distinction between phrasing statutory matters in terms of presumption or affirmative defense is arguably one without a difference. Much critical analysis has been given to the constitutional limits on presumptions. See, e.g., Comment, Possession of Dangerous Drugs In a Car—New York's Criminal Presumption Statute, 21 BUFFALO L. REV. 188 (1971); Note, The Unconstitutionality of Statutory Criminal Presumptions, 22 STAN. L. REV. 341 (1970); Note, Abrogation of Criminal Statutory Presumptions, 5 SUFFOLK U.L. REV. 161 (1970); Soules, Presumptions in Criminal Cases, 20 BAYLOR L. REV. 277 (1968). Leland v. Oregon, 343 U.S. 790 (1952), permits the burden of persuasion in an insanity defense to be placed upon the defendant. The Leland rationale is suspect since In re Winship, 397 U.S. 358 (1970). The grammatical nature of the holding has been mentioned as depriving that decision of much true significance. See M.P.C., § 1.13, Comment at 110 (Tent. Draft No. 4, 1955), See also W. LAFAVE & A. SCOTT, CRIMINAL LAW § 21 (1972).

Professors LaFave and Scott have a pithy paragraph:

A more convincing distinction [between presumptions (Tot v. United States, 319 U.S. 463 (1943)) and affirmative defenses] might start with the observation that one of the reasons underlying the rational connection test for presumptions—rational jury control—does not arise with affirmative defenses, as no suggestion is made to the jury that it might reach a certain conclusion based upon evidence which is not probative. Once this point is reached, the affirmative defense might then be tested by two inquiries: (1) whether the defense is defined in terms of a fact so central to the nature of the offense that, in effect, the prosecution has been freed of the burden to establish that the defendant engaged in conduct with consequences of some gravity; and (2) whether the need for narrowing the issues, coupled with the relative accessibility of evidence to the defendant, justifies calling upon him to put in evidence concerning his defensive claim. It would appear that most of the traditional affirmative defenses could be upheld on this basis, and this approach would also leave legislatures some room for innovation.

The author's struggle to define and not illustrate the affirmative defense concept has only resulted in another method of confusing the issue—the method of stating the effect of classifying a matter as an affirmative defense. Four authors may be better than one on this subject, so consider the following language from a fine discussion by Messrs. Bloom, Gipstein, Harris and Slook:

A precise yet comprehensive definition of the term "affirmative defense" is nearly impossible to formulate. In its broad sense, however, it refers to a means of vindication which is collateral to, and distinct from the prosecution's case. Generally, an affirmative defense is based upon information either peculiar to the defendant's knowledge or more readily available to him. In such a defense, the defendant is called upon to establish a positive fact, rather than merely negate one or more of the allegations against him. The defense is basically one of explanation and not one of denial.

What considerations motivate classification of a particular issue as an affirmative defense? The classification of a particular issue as an "affirmative defense" can be traced to one of several rationales. Some affirmative defenses are so classified because historically they have always been so considered. "Insanity," for example, seems to have been labelled an affirmative defense in Washington without much cavil since the memory of man. Other defenses seem inherently to be affirmative, and are recognized as such on the basis of a hunch or inference. Typically, this kind of affirmative defense operates like a plea in confession and avoidance—it adds credibility to the complainant's case, but simultaneously injects an overriding substantive defense. Coercion, compulsion, and possibly justification are examples. In addition, facts which deviate from the normal chain of events are frequently treated as affirmative defenses. The sort of explanation that would be greeted with a raised eyebrow, for example, or a gasp, or "You don't mean it," is likely to be treated as an affirmative defense. Other frequently asserted rationales for use of this mechanism include a desire to avoid requiring proof of negatives and the circumstance that the evidence is within the reach of the defendant, not the prosecution.

What particular issues fall within the affirmative defense definition? The vast majority of all defenses enumerated in the Proposed Code are affirmative defenses. In the interest of brevity, a list of the affirmative defense provisions is included in the Appendix to this article. However, there are three general categories of issues within the Code which are not classified as affirmative defenses. These are those defenses which shift the burden of persuasion to the defendant, those issues which are properly classified as affirmative defenses yet have been overlooked, and finally, those issues which are so fundamental to the state's case that they are rarely thought of as affirmative defenses. The remainder of this discussion will focus upon whether these issues are properly excluded from the affirmative defense classification.

The Proposed Code is drafted on the assumption that this Code or some other statute does indeed identify some defenses which the defendant must prove by a preponderance of the evidence. Defenses which the defendant must prove appear to be these:

(1) When the defendant is accused of "felony murder" and is not the only participant in the felony, the statute provides:

If established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(ii) was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury; and

(iii) had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(iv) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) The burglary provision provides that "any person who know-

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11. R.W.C.C. § 9A.04.120(2)(b). That subsection seems to be needlessly ambiguous, because of the inclusion of the words "beyond a reasonable doubt." No doubt what is intended really is that: "Subsection (1) of this section does not ... require the disproof of any defense which this title or another statute expressly requires the defendant to prove by a preponderance of the evidence." As the draft provision now reads, one possible construction is that the state is not bound to disprove such a defense beyond a reasonable doubt, but is nonetheless bound to disprove it to some extent. Such a construction, though permissible if examining only from a point of syntax, is surely not acceptable in context.

ingly enters or remains unlawfully in a dwelling shall be deemed to
have acted with intent to commit a crime against a person or property
therein, unless such knowing entry or remaining shall be explained by
testimony satisfactory to the jury to have been made without such
criminal intent."

The language of this provision does not track with the other provi-
sions which allocate the burden of proof. If the words "satisfactory to
the jury" mean "by a preponderance of the evidence," those words
should be substituted in order to conform to the balance of the Code.
If they mean something different, an explanation is necessary. As the
provision now is drafted, it seems to provide no clear allocation of the
burden of proof on the intent issue.

(3) The robbery provision provides that where the defendant dis-
plays what appears to be a firearm, "it is a defense, if proved by the
defendant by a preponderance of the evidence, that such pistol, re-

olver or other firearm was not a loaded weapon from which a shot,
readily capable of producing death or serious bodily harm, could be
discharged." The effect of this defense is to reduce first degree rob-

bery to second degree robbery.

The author has found no other instances in which the burden of
proof is lodged with the defendant. No constitutional principles ap-

er to preclude allocating at least some burden of persuasion on

some issues to a defendant, and this very abbreviated list of defenses

14. Since R.W.C.C. § 9A.04.120(2)(b) does not require the state to disprove any
defense if the defendant has the burden by a preponderance, the state might have the
burden since the burglary section does not require a preponderance, even though this
result is not intended by this section.
16. NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS

18 (1970) [hereinafter cited as WORKING PAPERS]:
Allocation of the burden of persuasion to the defendant raises substantial constitu-
tional questions. The courts have dealt neither extensively with the problem in gen-
eral nor specifically with reference to the variety of cases in which we intend to use
this kind of proof device. Leland v. Oregon [343 U.S. 790 (1952)] held that a state
statute that required the defendant to establish insanity beyond a reasonable doubt
by the vote of 10 jurors did not violate ordered liberty concepts. But the precedent
is hardly on firm theoretical ground, as the ordered liberty approach seems to have
fallen by the wayside. However, Leland does suggest that the constitutionality of a
defense on which the defendant has the burden of persuasion is measured under a
broad, due process standard. Thus, the ultimate question is whether the allocation
of proof is reasonable. In an appropriate case it should be possible to make a
strong showing of legality. If such an affirmative defense is an integral part of a
reasonable legislative solution to a difficult problem, and the evidence on the
matter is particularly within the control of the defendant, it is submitted that due
process standards are met.
which the defendant must prove seems to be beyond constitutional attack.

Having compiled a list of the affirmative and "preponderance defenses available under the Code (see Appendix A), we turn to the perplexing issue of whether the list as compiled is closed. The wording of the basic statute would suggest, if not compel, an affirmative answer.\textsuperscript{17} Common sense, though, suggests that there lurk in the intricacies of the Code a variety of instances that should be treated as affirmative defenses, if one keeps in mind the effect of that classification—placing the burden of coming forward and raising the issue on the defendant and placing the burden of persuasion beyond a reasonable doubt on the state.

Three illustrations come to mind:

First, suppose one who has made a false statement which would constitute perjury retracts the statement. The crime of perjury has not been committed. Who, however, ought to sustain the risk of introduction of evidence that there was a retraction? As the Code provisions are worded,\textsuperscript{18} the prosecution bears the burden. Practically every known reason for dealing with the matter as an affirmative defense is applicable here: (1) This situation requires the prosecutor to prove a negative—that the statement was not recanted; (2) the knowledge is entirely within the possession of the defendant on this issue—surely he knows whether he withdrew his false statement before it had gone too far; and (3) it is tantamount to a plea in confession and avoidance—the defendant admits the false swearing occurred but states that there are additional relevant facts. If the present author were drafting the statute, he would resolve the matter by indicating that retraction is an affirmative defense. It is no surprise that the proposed federal code lists this matter as a "defense" (the equivalent of affirmative defense under the Proposed Code).\textsuperscript{19}

Second, consider jumping bail. The Code places the burden on the state to show that the defendant intentionally failed, without lawful excuse, to appear for trial. Let it be supposed that a prosecutor wants

\textsuperscript{17} R.W.C.C. § 9A.04.120 is a risky approach, because as Professor Jerold Israel observes: "Of course, not every special 'justification' that might offset a basic element of a particular crime can be anticipated. . . ." Israel, The Process of Penal Law—A Look at the Proposed Michigan Revised Criminal Code, 14 WAYNE L. REV. 772, 798 (1968).

\textsuperscript{18} R.W.C.C. § 9A.72.035 and § 9A.72.040.

\textsuperscript{19} NEW FEDERAL CODE § 1355(3).
to prove his case, so he introduces evidence that the defendant did not appear for the trial. The defendant can stand mute and, after all the evidence is in, can argue for an acquittal on the ground that the prosecutor failed to show that the defendant was not without lawful excuse in failing to appear. If a lawful excuse existed, the gentlemanly thing would have been for the defense to inject the issue by testimony. Otherwise, the burden on the prosecutor would be too extreme.  

For this reason, it seems clear that bail jumping should be treated as any other affirmative defense in the Proposed Code.

Third and finally, consider the situation of a person charged with public intoxication. The defendant is found "drunker than a skunk" in a public place and is duly charged consistent with the terms of the proposed statute. The evidence that the defendant was inebriated is overwhelming, and there is no evidence that the use of alcohol resulted from a physician’s prescription. Nonetheless, in closing argument the defense raises the issue and asks for an instruction that the defendant be acquitted unless the prosecution has disproved the existence of such a prescription.

Once more, common sense dictates that the defendant at least ought to raise the issue of a physician’s prescription by some evidence; yet the statutory language is otherwise. As part of the state’s case it must be shown in every case that there was no therapeutic administration. The point is not an alarming one, for the place where the alcohol is consumed will typically suggest the absence of medical intervention. The policy, though, is not trivial—the state’s burden should not be beyond accomplishment. Before the prosecutor is burdened with the necessity of introducing medical testimony negating medical use, the defendant ought to raise the issue as an affirmative defense.

If it be true that the effect of classification of a particular matter as an affirmative defense is to require that the defendant can only raise

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20. R.W.C.C. §§ 9A.76.140 and 9A.76.150. Part of the state’s burden is to show that the failure is intentional and without lawful excuse. New York, on the other hand, identifies the issue as an affirmative defense, with the extreme result that the defendant must prove the lawful excuse by a preponderance of the evidence. Bloom, Gipstein, Harris and Slook, Affirmative Defenses Under New York’s New Penal Law, 19 Syracuse L. Rev. 44, 45 (1967).


22. In defining the crime of public intoxication, R.W.C.C. § 9A.84.050 requires that the alcohol or drug not be “therapeutically administered.”
the issue after some evidence has been presented, the cost of the Code's errors of omission (as in the foregoing examples) seems to be that the onus on the prosecution to dispel will-of-the-wisp possibilities will be excessively great. The obvious conclusion is that given the weighty effect of failure to classify a particular matter as an affirmative defense, the legislature ought to be overly careful not to omit any matters which should be treated as such.

Finally, there are issues that generally are thought to be a part of the prosecution's case and thus are not classified as affirmative defenses. These issues are best illustrated by an example. Let it be supposed that an accused, in a state of epilepsy, falls from a stool in a bar and injures his drinking buddy. If he is charged with assault, what is the relevance of his epileptic seizure? An argument can be made that this is mental defect, but most likely this is not the case. The relevance of epilepsy results, it would appear, from the requirement of a voluntary act. This requirement should be so fundamental that no one would deny that the state ought to prove it, and yet one may legitimately suggest that the burden of raising the issue should rest with the accused.

23. See notes 27-38 and accompanying text, infra, for a discussion of the effect of classifying an issue as an affirmative defense.


26. One quizzical comment appears in the draftsmen's notes to the Code which seems worthy of mention. The crime involved is that of unlawfully and intentionally introducing contraband into a prison by giving it to a prisoner. The comment says, in pertinent part:

The new section makes several changes in the law. First, the introduction of a mental state requirement (intent) means that the actor—to be liable under these sections—must realize that the item he conveys is in fact contraband. In other words, a person will not be liable under these sections if he had no notice that the material was forbidden. Realistically, in the case of a deadly weapon (as defined in § 9A.04.130(7) it is clear that a defendant would be hard-pressed to raise the issue of lack of knowledge that such an item was not properly conveyed to a prisoner. R.W.C.C. § 9A.76.120, Comment at 328 (emphasis added).

In what sense are the italicized words used? Why is the defendant hard pressed to do anything? Is it not rather that the prosecution is hard pressed to dispel lack of intention (although the pressure, obviously, is not great in the case of a gun)? Unless the defense is an affirmative one or one which the defendant must establish by a preponderance of the evidence, the defendant need not raise any issue. The best defense is not necessarily a good offense. The state must introduce evidence on each and every element of the crime, other than defenses which are affirmative or which must be proved by the defendant. If the comment means only that the defendant would be hard put to make much of an argument, it is correct, but it is misleading as to the burden of proof.
In the Proposed Code, what is the effect of classifying an issue as an "affirmative defense"? Historically, the effect of classifying a matter as an affirmative defense was that the defendant was given the burden of proof. However, this is not the effect created by the Washington proposal. The effect in Washington would be to require the defendant to raise the issue after "some" evidence has been presented, but once the issue is raised, to require the state to bear the burden of proving its version by a quantum of evidence beyond a reasonable doubt. The affirmative defense cannot be raised solely in the opening or closing arguments, for it must rest on some evidence. The evidence need not be adduced by the defendant, as it may be introduced by the prosecutor. The quality of the evidence is undefined—it need not be convincing, but surely it must have some degree of credibility.

The requirement that "some" evidence be introduced before an affirmative defense arises will undoubtedly invite borderline cases. Let it be supposed that one Louis Johnson is being tried for stealing chickens from a hen house, and the critical witness is the owner of the establishment. He saw Johnson walking away with two of his chickens. While he is on the stand he is asked whether he can identify the person who took the chickens, to which he replies: "Of course I can. I've known Looney Louie, as we kids called him, since we were in the first grade. Surely I'd know him when I see him, and I saw him that night." The evidence for the state is open and shut, and there is no evidence adduced by the defendant, but at the close of the state's case the defendant may ask for a directed verdict. Will he get it? His argument will be that the defense of insanity has been injected into the

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28. The paradigm Model Penal Code omits the modifying term "some," but no difference is perceived from this, and the following comment seems equally apposite to the Washington proposed formulation:

The draft does not attempt to state how strong the evidence must be to satisfy the test that "there is evidence" supporting the defense. The Council of the Institute thought it the wiser course to leave this question to the courts. It may be noted, however, that Rule 1(2) of the ALI MODEL CODE OF EVIDENCE defines the "burden of producing evidence of a fact" to call for "sufficient evidence . . . to support a finding that the fact exists." We have no doubt that such a standard is too onerous to be accepted for the present purpose. It should suffice to put the prosecution to its proof beyond a reasonable doubt that the defendant shows enough to justify such doubt upon the issue. We think that most courts would construe the section in this way.

29. R.W.C.C. § 9A.04.120, Comment at 18.
case with the consequence that the state must prove, beyond a reason-
able doubt by medical testimony, that the defendant was sane. The
fact that everybody called the defendant "Looney Louie" is some
evidence that he is insane.\textsuperscript{30}

This illustration is not frivolously presented, for the issue is critical.
Can the statute be drafted in such a manner as to identify precisely
the kind and quantity of information or evidence that must be pre-
sented to give rise to an affirmative defense? One thinks of modifiers
like "convincing," "probative," "substantial,"\textsuperscript{31} or words like "scintilla,
" but no adjective will eliminate the judgmatic function of deter-
mining when an issue has passed beyond the frivolous into the critical.
The proposed Federal Criminal Code contains a standard which ap-
pears to be somewhat more definitive:\textsuperscript{32}

Subsection (1) does not require negating a defense (a) by allegation in
the indictment, information, or other charge or (b) by proof unless the
issue is in the case as a result of evidence sufficient to raise a reason-
able doubt on the issue.

The fact that this federal test is congruent with the test under which
the jury will resolve the ultimate issue appears to be the test's weak-
ness as well as its strength. The weakness may be that the federal test
is more likely to deprive the accused of a jury trial on his defense issue
because it requires the judge to determine whether "reasonable" evi-
dence has been introduced rather than merely "some" evidence. After
all, this issue is primarily one for the judge—does he or does he not
instruct the jury on the subject of the defense involved?\textsuperscript{33} In this re-
gard, the federal test well may be too restrictive. Quite obviously, this
is not yet a computerized process; vague as it is, the "some evidence"
test may be as definite as it dare be made.

Whether the Proposed Code is too soft in not requiring the de-
fendant to prove some elements of his affirmative defense is a difficult

\textsuperscript{30} This is not the way to establish insanity by lay testimony, however. See
MEISENHOLDER § 342.
\textsuperscript{31} MEISENHOLDER § 551. The number of choices for the test is essentially unlim-
ited. In commenting on the issue, the director of the study for the proposed federal
code says that the test proposed in the new federal code differs from existing law. "For
example, the Federal courts have used the following standards in deciding whether a
defense has been raised: evidence that 'fairly' raises the issue; slight evidence; and some
evidence more than a mere scintilla." WORKING PAPERS at 15.
\textsuperscript{32} NEW FEDERAL CODE, § 103(2) (emphasis added).
\textsuperscript{33} W. LAFAVE & A. SCOTT, CRIMINAL LAW 44-56 (1972).
Burden of Proof, Felony Murder and Justification

question. If the reason for listing a particular defense as affirmative is that the evidence is only available to the defense, an argument surely can be made that the defendant ought to bear the burden of digging up that evidence upon risk of nonpersuasion. However, the awful result of a criminal conviction is such that the burden probably must rest with the state to prove almost all elements.34

Directly related to the "some evidence" rule is the allocation of the burden of persuasion. In doctrinal terms an affirmative defense places the burden of going forward with some evidence on the defendant if no evidence is introduced by the state, while the burden of proof beyond a reasonable doubt rests with the state. Obviously this is not the traditional significance of affirmative defenses,35 nor is it the only way to handle the matter in a thoroughly modern Code. The proposed federal criminal code, for example, places the burden of persuasion for affirmative defenses on the defendant.36 New York, too, places the burden of proof in these matters upon the defendant.37

However, one must note that the real issue is which particular matters are treated in effect as affirmative defenses under the Code, quite apart from mere differences in terminology. For example, in providing for a "defense" (not an "affirmative defense"), the federal code probably produces precisely the same result as is achieved in the Proposed Washington Code by use of the term "affirmative defense."38 Indeed, the term "defense" might just as well be used as "affirmative defense" in the Proposed Washington Code. Whatever the nomenclature—

34. This question-begging sentence is the best the author can evolve in resolving the critical issues about the way defenses are handled by the draftsmen of the Code. A better statement of the position can be found in W. LaFave & A. Scott, Criminal Law 48 (1972).

35. State v. Clark, 34 Wash. 485, 76 P. 98 (1904).


An argument for treating the affirmative defense as does the Proposed Code is that any effort to explain to the jury the effect of a requirement that on some elements the defendant has the burden of proof by a preponderance of the evidence is bound to conceal more than it reveals. A fast, glib statement of the rule will usually be found to be double-talk, as in the following instruction on intoxication: "The [state] has to prove intent beyond a reasonable doubt, therefore if the defendant proves by a preponderance of the evidence that he was so drunk that he was incapable of the required intent he must be acquitted." Murphy, The Intoxication Defense: An Introduction to Mr. Smith's Article, 76 Dick. L. Rev. 1, 11 (1971).

38. The proposed federal criminal code seems to use more conventional terminology than does the Washington version, for it uses the term "defense" to describe those issues which the Proposed Washington Code terms "affirmative defenses." New Federal Code § 103(2).
ture, there will be some particular defense issues which the state must prove if the issue is fairly presented on the facts, and some which the defendant must prove. The real concern is to whom the burden of persuasion attaches in each case.

Do any constitutional provisions impinge on the use of affirmative defenses? Having already discussed the presumption of innocence and the affirmative defenses, it should be clear that a requirement that the defendant establish an important fact in defense of himself comes perilously close to presuming the fact against him. Perhaps the drafters had this in mind when they specified that only "some evidence" need be introduced in order to permit defendant to raise an affirmative defense.

The discussion of the proof requirement, in light of the presumption of innocence, brings to focus a vast amount of learning on the constitutional issues involved. It must be emphasized that the treatment of affirmative defenses as requiring only "some evidence" instead of enough evidence to persuade the jury on the issue may eliminate some but certainly not all problems implicit in the presumption of innocence. One would think that the policy of the fifth amendment against self incrimination contradicts any forcing of the defendant to speak. If the "some evidence" required to raise an affirmative defense must come from the mouth of the defendant, fifth amendment protections may override and protect him. Further, if the requirement of "some evidence" is such that the defendant's previous life of crime is opened up for scrutiny by the jury, the defendant's dilemma is acute. The defense of "entrapment," if it presents the issue of the defendant's capacity to be induced (i.e., was he a willing actor?), is precisely in point. In short, minimal as it appears to be, the burden of

39. For discussion of the effect of the due process clause on the "affirmative defenses," see note 9, supra.
producing some evidence to raise a critical issue may, in particular cases, be strategically insuperable and constitutionally impermissible.

The classification of defenses into those which the defense must prove, those which the defense must only inject into the case by some evidence, and those which are so obvious that the state must negate them is a precarious balancing process. There is no Plimsoll line to separate the fundamental elements of the state's case from other kinds of matters. The affirmative defense is not clearly distinguishable from other matters, though one would wish for a lodestone to determine positive and negative.

There may, indeed, be a need in some other section of the Revised Code of Washington, or perhaps in the Court Rules, to inject a procedural step to implement a requirement similar in effect to the affirmative defense mechanism. The point is best illustrated by a defense that historically has been wrongly classified as affirmative, even to the point of unconstitutionality. The defense is alibi. No one would currently argue that this is a defense, affirmative or otherwise. Clearly, it seems that showing that the defendant was at the scene of the crime, except in vicarious liability situations, is the state's burden, and the issue need not be raised by the defendant. Well and good, but if the defendant foresees an alibi situation, is it not reasonable to require him to raise that issue early enough for the prosecution to check it out? As this illustration shows; the proposed treatment of affirmative defenses is only the beginning. Procedural rules may be required to foster the goal of fairness which the substantive rules create. Fairness both to the accused and to the state obviously can only be judged based on the total substantive/procedural pattern.

II. FELONY MURDER

The topic of felony murder is usually introduced by remarking that since all felonies once were capital offenses in England, the felony murder doctrine is not unacceptable, considering its origins. Most law...
students find the topic more interesting than much that occurs in school because of the dramatic and often bizarre nature of the killings. The factual situations and ramifications are quite complex, so much so that the courts, particularly those of Pennsylvania and California, have experienced exceptional difficulty in marking out acceptable limits of liability. The statutory draftsman's task is no less challenging, and there are three acceptable current approaches: (1) abolish the doctrine,\textsuperscript{45} (2) subsume it under reckless homicide,\textsuperscript{46} or (3) as is proposed for Washington, codify a specific provision.\textsuperscript{47}

From the felon's point of view, the emphasis of the statute is directed toward increased punishment for a death which occurs in the course of the felony. From the point of view of society, one must seek to determine precisely what is being punished under the felony murder provision. Undoubtedly the goal of society is, by increasing punishment, to dissuade certain conduct. The objective of treating felony murder as a particular crime obviously seems to dissuade commission of felonies under circumstances characterized by a grave risk of death. The difficult problem areas center around the kinds of felonies so identified and the kinds of causal circumstances which must be found to trigger conviction.

The proposed Washington provision would, first of all, apply to either perpetration of or attempts to perpetrate certain crimes.\textsuperscript{48}

\textsuperscript{45} England is most frequently cited as having taken this approach, see Moreland, \textit{A Re-examination of the Law of Homicide in 1971: The Model Penal Code}, 59 Ky. L.J. 788 (1971) [hereinafter cited as \textsc{Moreland}].

\textsuperscript{46} M.P.C. § 201.2. Professor Moreland describes this as follows:

The 1957 English Homicide Act expressly abolished the felony murder rule in England. This is the logical and proper way to handle the felony murder . . . [But it has not happened that way in the United States.] The Model Penal Code continues the transition feature, adding two or three felonies [to the usual four], and raising a presumption of "recklessness and violence," if a killing is committed in the commission or attempt to commit any of these felonies. To one who is no friend of "presumptions of law," the device in the Model Penal Code appears as an attempt to preserve a portion of the historic survivor, the felony murder rule. Taken as a compromise, as a transition statute, it may well serve a temporary purpose. It would be better to abolish the felony murder rule and prosecute such killings as negligent murders.

\textsc{Moreland} at 803-04.


\textsuperscript{48} R.W.C.C. § 9A.32.020(1)(c).
crimes so specified are identified as forcible felonies.\textsuperscript{49} This is a defined term, meaning "any felony which involves the use or threat of physical force or violence against any person."\textsuperscript{50} Clearly the Code's definition does not appear to relate to a closed list of felonies expressly enumerated in the felony murder provision. Although ambiguous, the emphasis of this provision in determining the ambit of "forcible felonies" appears to be on the means used by the particular defendant or his colleagues in committing the crime rather than on only those crimes whose nature is always such as to involve force or violence, so-called inherently dangerous felonies.\textsuperscript{51} The use of a gun in a robbery is an obvious included situation, and so may be the use of a high speed auto in a reckless manner when used to flee from the scene of the crime. Arson, the burning of a building likely to be inhabited, may be included, depending on whether "physical force or violence" includes fire.\textsuperscript{52} The emphasis of the felony murder provision upon the risk creating conduct of the actor, rather than upon a closed list of included felonies, is creditable.\textsuperscript{53}

Manslaughter and assault, though dangerous felonies, are explicitly excluded from the kinds of felonies encompassed in felony murder because they are, or may be, lesser included offenses.\textsuperscript{54} An assault resulting in death may be murder or manslaughter, depending upon the substantiality of the risk of serious bodily harm accompanying the assault. Thus, there is no need to treat the offenses against the person separately, at least where death results. Indeed, if the felony-murder rule were to include these offenses, there would be no crime of manslaughter, because every manslaughter is a forcible felony, recklessly resulting in death.

The next phrase of the statute—"in the course of and in further-

\textsuperscript{49} Id.

\textsuperscript{50} R.W.C.C. § 9A.04.130(10).


\textsuperscript{52} Regina v. Serné, 16 Cox Crim. Cas. 311 (1887). A closer question is whether the use of explosives, also defined as arson, is included within the "physical force" definition.

\textsuperscript{53} Cf. W. LAFAVE & A. SCOTT, CRIMINAL LAW 548 (1972).

\textsuperscript{54} The elaborate California variations on this theme are reviewed in Note, The California Supreme Court Assaults the Felony-Murder Rule, 22 STAN. L. REV. 1059 (1970).
ance of such crime or of immediate flight therefrom”—may contain an undue restriction on the ambit of felony murder. The language "In the course of..." seems innocuous and reasonable, but what of the requirement that the act be "in furtherance of such crime or of immediate flight therefrom"? This seems to suggest a purposefulness about the killing which ought not be a requisite of the offense. The crime of arson hardly can be said to be "furthered" by the presence of a human being in the building in which a bomb explodes. Indeed, the person who causes the explosion could very well find human presence an irrelevant nuisance. Firemen who come to extinguish the ensuing fire and who are unfortunate casualties of the fire are not killed "in furtherance" of the arson, although their deaths impede the control and extinguishing of the fire. Yet the death of a fireman under these circumstances has been held to constitute felony murder. The point is that the act done in furtherance of the crime need not be the homicidal act, but rather an act which causes the death.

One suspects that the kind of killings sought to be excluded by the "in furtherance of" language are those caused by co-felons unrelated to the underlying felony. The coincidence that an accomplice takes advantage of the excitement of the criminal act to shoot and kill his wife ought not make his co-felon guilty of felony murder. The killer would not be guilty of felony murder either, for his crime is within the murder provision. However, the means of protecting against this overreach of felony murder lie in the provisions respecting co-participants, discussed infra. While strong arguments are needed to extend the application of the felony murder doctrine, and while other modern versions include the "furtherance" requirement, the suggestion is proffered that inclusion of "in furtherance of" in the Washington version will likely produce more undesirable results than desirable ones.

The person who causes the death must be the felon or another par-

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55. At least the problems the phrase presents are inherent in the space-time-circumstance conundrum of identifying when the crime occurs. See W. LaFave & A. Scott, Criminal Law 555 (1972).
56. State v. Glover, 330 Mo. 709, 50 S.W.2d 1049 (1932).
57. For a discussion of the causal requirement, see note 60, and accompanying text, infra.
59. The "furtherance" requirement does carry implications of another kind of situation, that of killings by third persons such as police or victims. While such killings clearly are not in furtherance of the basic felony they are included within the ambit of felony murder. See W. LaFave & A. Scott, Criminal Law 550 (1972).
participant. This language would appear to lay to rest unsettlement in other states about whether killings by the victim or policeman are attributable to the felon. That the matter is not categorically closed is due to the lawyer’s habit of circumlocution, or a draftsman’s penchant for euphemism. The language of the statute is “causes the death,” not “kills.” The extent to which something is required beyond a “but for” connection between the felony and the death is a hornet’s nest, but the point is that a robber who instigates an exchange of shots may, in this author’s opinion, be said to have “recklessly caused” the death of a bystander shot by the police in returning his fire.\textsuperscript{61} If that is not the intended outcome of such a factual pattern, the word “kills” ought to be substituted for “causes the death of;” however, even that substitution might not guarantee a restricted judicial construction.

In testing the proposed statute, other sorts of unintended deaths come to mind. A victim’s death as a result of a heart attack has been held to be felony murder;\textsuperscript{62} but the statute seems not to go this far; the unforeseen heart attack could not readily be described as having been “recklessly” caused by the robber’s display of a gun, unless the robber knew of and consciously disregarded the risk of heart attack.\textsuperscript{63}

Clear beyond argument seems to be the limitation in the Proposed Code as to the identity of the victim. Historically, the question of whether a co-felon’s death falls within the felony murder doctrine has been a much discussed point. No suggestion is intended that felons are not protected from being killed, or that they are beyond the law’s care or concern in the Proposed Code; nonetheless, one felon is not a felony murderer should his co-felon be killed, because of the restricted definition of the victim in the Proposed Code.\textsuperscript{64}

Finally, the greatest contribution of the proposed provision is in the area of responsibility of one felon for deaths caused by his co-felons. The emphasis is, as it should be, on the recklessness of the particular

\textsuperscript{60} R.W.C.C. § 9A.08.030.
\textsuperscript{63} R.W.C.C. § 9A.08.020(2)(c).
\textsuperscript{64} R.W.C.C. § 9A.32.020 requires the victim be a person other than one of the participants. This seems to be the trend of modern enactments. \textit{See, e.g.}, \textit{Comment, The Felony-Murder Doctrine Under the Oregon Criminal Code of 1971}, 31 ORE. L. REV. 603, 605 (1972).
co-felon and his willingness to create the risk of death. A felon is given an opportunity to prove by a preponderance of the evidence that his conduct was unrelated to the reckless act. If he is successful, he establishes a defense to felony murder.\textsuperscript{65} The elements of the defense are conjunctive, and they suggest that a defendant who does not himself directly cause the killing, does not prepare himself to inflict serious bodily harm, does not have reason to believe that any co-felon is so prepared or intends in any way to harm seriously a human being, and who does not "solicit, request, command, importune" the killing, is not guilty of the offense. However, since the elements are conjunctive, it is unlikely that this defense will prove useful in the typical felony murder case.

III. JUSTIFICATION

The justification chapter in the Proposed Code gathers together subjects that appear to make rather strange bed-fellows. Partly this may be due to the fact that the term justification does not have precise limits.\textsuperscript{66} Typically one thinks of justification in the sense of privilege—for example one is justified or privileged to defend oneself in certain circumstances.\textsuperscript{67} Insofar as the chapter covers matters of self defense, defense of property, execution of public duty, and the like, it appears to be in the classic mold. However, subsuming duress\textsuperscript{68} and entrapment\textsuperscript{69} under the rubric of justification will not meet with uniform acceptance. These matters are more properly considered de-

\textsuperscript{65} R.W.C.C. § 9A.32.020 (1)(c).
\textsuperscript{66} Strangely, it does not appear in either the Table of Contents or the Index to one of the classic treatises on the subject of criminal law. G. Williams, Criminal Law: The General Part (2d ed. 1961).
\textsuperscript{67} Justification is sometimes further subdivided into "perfect" and "imperfect" privilege. See R. Perkins, Criminal Law 1013 (1969).
\textsuperscript{68} Working Papers 278 (1970) states: "Duress is an excuse for criminal conduct, not a justification."
\textsuperscript{69} The Penal Law of New York, as enacted in 1965, effective since September 1, 1967, combined under the heading "Defenses Involving Lack of Culpability" provisions on "self-defense," the "defense of others," of "premises," on "necessity," acts of "authority," etc., on the one hand, and "duress," "entrapment" and "renunciation" on the other. This classification was amended in 1968, and the first mentioned group now appears under the heading "Defense of Justification," whereas the last mentioned one appears under the label "Other Defenses Involving Lack of Culpability"....

fenses of “excuse.” But the effect of justification and excuse is the same, non-culpability, and the concepts are so similar that no one can strenuously protest the Code’s inclusion of both under the “justification” heading.

That justification and excuse are defenses to criminal sanction is not denied. Whether the basic formulation of the norm is such that the standards of guilt include as an element of the crime the absence of justification, or whether the presence of justification is such that the defendant ought to bear the burden of proof or at least the burden of persuasion are matters on which reasonable minds may differ. The Proposed Code deals with justification in all its forms as an affirmative defense; the significance of this classification is explained supra.

A general question might be asked, further, as to the kinds of conduct which the concept of justification encompasses. The bulk of the cases probably will deal with conduct which is intentional or knowing, but reckless conduct is not inherently beyond justification. On the other hand, recklessness or negligence in reaching a determination that particular conduct is justified will not itself be justified.

Throughout the sections dealing with justification, the test used is the reasonable belief of the actor. Support for this test is found in the prevalence of its use elsewhere, but one wonders whether the test ought not be good faith or honesty. If the present author is ever selected for jury, let it be known that any belief which does not comport with his is unreasonable and ipso facto dishonest. In view of the circumstance that modern statutes, even commercial statutes, recognize good faith as simple honesty, one might think a jury should at least be told that the criterion is honesty, not care. If the “white heart and

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70. See W. LaFave & A. Scott, Criminal Law 356-408 (1972). There does not seem to be a difference, though, between justified conduct which constitutes no wrong, and excusable conduct which connotes that it is wrongful, but implies society's willingness to overlook it. At an earlier time, a man's life might, indeed, turn on the difference, according to R. Perkins, Criminal Law 1001 (1969).

73. Id.
74. WORKING PAPERS, supra note 16, at 262 n.1.
75. R.W.C.C. § 9A.16.020(2). The Model Penal Code has an additional detail: recklessness or negligence in placing oneself in a position in which justification is necessary. M.P.C. § 3.02(2).
77. The draftsmen cite several other states, and LaFave and Scott outline the split of authority. R.W.C.C. § 9A.16.020, Comment at 66. W. LaFave & A. Scott, Criminal Law 393 (1972).
empty head" doctrine permits the due course holding of a check, it might at least do the same for a spouse in an alleged bigamous relationship. The draftsmen of the Code rejected the test of honesty partly because it is not used by the Restatement of Torts, but with due deference, the test for criminal culpability need not be the same as that applied in the adjustment of losses in a civil law matter. The solace may be that the choice of wording between "honest" and "reasonable" will not produce different outcomes in particular cases. Surely "reasonable" should be construed to mean reasonable under the circumstances, for everybody knows, if only a Holmes can articulate it, that "Detached reflection cannot be demanded in the presence of an uplifted knife." And as noted above, if the determination that conduct is justified is made recklessly or negligently, the consequent conduct is punished, although the punishment is limited to a lesser included offense with a reckless or negligent culpability requirement. The remainder of this discussion will focus upon the provisions which comprise the justification chapter, highlighting both their strengths and weaknesses.

A. Execution of Public Duty

The initial problem found in the justification by execution of a public duty provision is that the Code requires the actor to have a reasonable belief in the validity of the action. The possibility does seem to exist of a defendant who was in fact authorized by law to perform a certain act but who entertained no belief on the question at all or who, in fact, believed he was not so authorized. Theoretically, it would appear that his conduct is not justified under the proposed statute.

78. R.W.C.C. § 9A.16.020(1), Comment at 64.
79. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 209 (1961). The same author makes the same point in commenting on the Model Penal Code. M.P.C. § 3.09, Comment at 79 (Tent. Draft No. 8, 1958). However, the Code does define "reasonable belief" as "a belief which the actor is not reckless or criminally negligent in holding." R.W.C.C. § 9A.04.130(22). Criminal negligence requires, among other things, a gross deviation from the reasonable man standard. See R.W.C.C. § 9A.08.020(2)(d). Thus the "reasonable belief" requirement of the Code is analogous to gross negligence in the civil law.
82. Only the domestic authority provision is not discussed. R.W.C.C. § 9A.16.080.
See W. LAFAVE & A. SCOTT, CRIMINAL LAW 389-91 (1972).
Burden of Proof, Felony Murder and Justification

This may be the desired result since criminal culpability would then turn on his attitude plus the act. However, as a practical matter, no culprit worth saving will arrive at the scene of trial without a belief in the existence of the justifying rule of law, and the devil himself probably could not determine whether this was "nunc pro tunc" or "ex post facto." Thus the defendant in the hypothetical probably would be found to be justified in his actions. At any rate, the emphasis upon the belief rather than reality is an about face from the wording (at least) of previous statutes.\textsuperscript{84}

Subsection (2) of this provision separates the general justification by public duty rule from the separate provisions on use of force. Although ambiguous, this section only justifies action under the public duty rule which does not involve the use of force upon a person.\textsuperscript{85} In addition, the legal effect of a killing in Viet Nam seems to be uncertain under the requirement of that subsection that use of force toward another person is privileged if it occurs in "the lawful conduct of war." This sounds like strict liability, as there are no modifiers relating to reasonable belief of the legality of the war. Finally, a far less troublesome concern is the effect of this language upon the official public executioner. His killing would be justified only if "expressly authorized by law." The present statute which expressly justifies such action will be repealed.\textsuperscript{86} Perhaps the executioner's "express" authority is derived from the provisions respecting capital punishment.\textsuperscript{87}

B. Self Defense

1. The Use of Deadly Force

The fact that the Proposed Code distinguishes between the privilege to use deadly and non-deadly force compels a definition of deadly force. Often the issue will arise only if death actually ensues, but does the fact of death establish that the force used was deadly? The Code

\begin{itemize}
  \item \textsuperscript{84} \textit{See}, e.g., \textsc{Wash. Rev. Code} \textsection{} 9.48.160-.170 (1959). The Model Penal Code also starts with the premise of actual authority. \textsc{M.P.C.} \textsection{} 3.03.
  \item \textsuperscript{85} \textit{See} \textsc{R.W.C.C.} \textsection{} 9A.16.030, Comment. This section would apply only if the force used by the actor is "expressly authorized by law."
  \item \textsuperscript{86} \textsc{Wash. Rev. Code} \textsection{} 9.48.160 (1956) would be repealed by \textsc{R.W.C.C.} \textsection{} 9A.92.010(66).
  \item \textsuperscript{87} \textsc{R.W.C.C.} \textsection{} 9A.32.025. However, the public executioner may be permanently unemployed as a result of the U.S. Supreme Court's decision in Furman v. Georgia, 92 S. Ct. 2726 (1972).
\end{itemize}

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defines "deadly force" as force which "creates a substantial risk of causing death or serious bodily injury." 88 A slight push by a diminutive girl, exerted in order to prevent a 300 pound bully from kissing her, would not be deadly, even though it might culminate in death should his head strike some hard object. However, should she be the old-fashioned type and possess a hat pin, a jab with a hat-pin in a proper spot might be deadly force, even though intended only as defensive acupuncture. 89 Similarly, a boxer’s hands can be weapons of deadly force. Of importance is that the Proposed Code’s test is objective, looking toward the fact of the risk rather than the actor’s awareness of the risk. The Model Penal Code is markedly different, defining deadly force as “force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm ....” 90 By that definition, force is not necessarily deadly even if a reasonable person would so appraise it; the test is what the actor knows. This is probably another of those dreadfully important issues which a jury muddles through without too much regard for the technicalities of the instructions. However, to the extent that there is a difference, the Model Penal Code version seems preferable, 91 largely because the increased penalty for use of deadly force should turn on increased culpability, which is shown most clearly through proof of the actor’s mental state.

Thus defined, deadly force can be used under the Code to the extent that the actor reasonably believes it is necessary to ward off death, serious bodily harm, kidnapping or forcible rape. The young lady in the previous paragraph would not be justified in using deadly force to fend off a kiss, however unwelcome the kiss might be. The force used, in short, must be somewhat proportionate to the harm prevented.

Historically, there have been two limits on the privilege of using deadly force. First, the aggressor who initiates an affray with deadly force is not privileged to defend himself with deadly force from a counterattack, unless there is a definite break between attack and counterattack. 92 Second, the victim has been to some degree limited

88. R.W.C.C. § 9A.04.130(6).
89. The situation of the girl who does not want to be kissed is hypotheticated in Howard, Two Problems in Excessive Defense, 84 LAW. Q. REV. 343 (1968).
90. M.P.C. § 3.11(2).
by a duty to retreat. The Code adopts the civilized attitude that there is a duty to retreat, except (1) when one is at his dwelling, (2) when one is at his place of work, or (3) when a person justified in using force to effect or assist an arrest is making an arrest. If the assailed person cannot retreat with complete safety, no such duty exists.

2. Use of Non-Deadly Force

With one exception, an actor, without retreating, may use whatever non-deadly force he reasonably believes to be necessary to protect against "unlawful force." The phrase "unlawful force" is not precisely defined, so we may interpret it in its dictionary sense. Thus the unwanted kiss of a previous illustration is "unlawful force." The one rather significant limitation on the use of non-deadly force is that no force may be used to resist arrest by one the arrestee knows to be a peace officer, even though the arrest is wrongful. This provision parallels the doctrine emerging elsewhere that there are other remedies for wrongful arrest. However rational this provision may be, the ghetto resident may view this as another incursion on his limited number of effective rights.

C. Defense of Others

If, under the circumstances as the actor reasonably believes them to be, a third person would be justified in using force for self-protection and the actor reasonably believes his intervention to be necessary, the actor may use the same force to protect such other person as the third person may use in self defense. Thus he may not use deadly force if other avenues are reasonably open without danger to the third person

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93. Dwelling is defined not to include the curtilage of common law recognition. R.W.C.C. § 9A.04.130(8).
95. Id. The Code does not embody several other refinements which might be helpful in a citizen's guide to self-protection, such as withholding the privilege of standing one's ground at a spot in the home against another member of the household equally entitled to occupy that spot. These trivia appear to have been rejected. For the New Jersey elaboration, see Note, Self Defense—Duty to Retreat, 3 SETON HALL L. REV. 532 (1972).
96. R.W.C.C. § 9A.16.040(4). The exception to this rule is found in R.W.C.C. § 9A.16.040(2).
and to himself. The language "under the circumstances as the actor reasonably believes them to be" may result in a third party intervenor justifiably protecting a person who is not privileged to protect himself, as when the person being rescued is actually the aggressor or is being arrested by a person whom he knows, but whom the rescuer does not know, to be a peace officer. The available authorities are not harmonious as to the merits of this language, but the Code's view, permitting the intervenor to act on circumstances as they reasonably appear to him, is consistent with other modern codes.99

D. Protection of Property

1. Use of Non-Deadly Force

The rules governing the use of force for the protection of property are not stated in a form easily printed on a card that can be carried about on one's person. Indeed, even with a copy of the rule, the property, if movable, would be long gone before the rule could be deciphered.100

The provision requires that to be justified in using non-deadly force the actor must reasonably believe that the property is in his possession or in the possession of the person for whose protection he acts.101 The confusing terminology is the term "possession," which appears to be a legal construct, reminiscent of the earliest complications of property law. Under the Proposed Code, if I put my billfold on a restaurant table and a thief seeks to make away with it, I believe I'm entitled to use non-deadly force to stop him. I further believe this is the case if I unknowingly drop my billfold in a public street, and, on subsequent discovery of the loss, return to the place where I dropped it, only to find another picking it up. On the other hand, if my billfold is in a pocket of a coat which I have checked at a restaurant, it appears that I cannot wrestle with the hat check girl to regain it.102 The entire matter is a mish-mash of the law of custody, possession, license and

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Burden of Proof, Felony Murder and Justification

claim of right, no paraphrase of which can possibly do justice to the original language. In all of these situations, I think I'm first supposed to ask for my billfold, but even that is not crystal clear.103

2. Use of Deadly Force

Under the Proposed Code, I am convinced that I may not justifiably shoot the hat check girl to regain my billfold from the pocket of my bailed coat, nor indeed may I use deadly force against anybody to regain or keep personal property. However, the Code does provide that an actor may use deadly force when he reasonably believes that the “person against whom the force is being used is committing...a forcible offense in...the actor's dwelling or place of work; and...the use of non-deadly force...would expose the actor or another to a risk of bodily harm.”104 Whether and under what circumstances I may use deadly force to protect my dwelling or place of work depends on the term “forcible offense,” for which no definition has been found.105 The real crux of the matter, though, appears to be the extent to which the actor or another is exposed to the risk of personal injury. These limitations, in most instances, appear to preclude the use of a “spring gun” to protect an unoccupied cabin,106 but inasmuch as the Code's statement of the rule applies to an occupied cabin which the occupier can in some circumstances justifiably protect, the matter is not as clear as it might be made.107

Finally, perhaps because of the lateness of the hour or the lasting effects of seeking to master the property concepts inherent in the provision under discussion, I read subparagraph (3) of this provision to say that if I arrive home on a cold, snowy night to find a burglar in my house, and the burglar is without warm clothing, I am not privileged to throw him out into the snow.108

105. The term “forcible felony,” as defined in R.W.C.C. § 9A.04.130(10), is not controlling, for that term assumes violence to persons, and this is not necessarily a factor under R.W.C.C. § 9A.16.060(4).
107. For a clearer statement of the law, see M.P.C. § 3.06(5).
108. R.W.C.C. § 9A.16.060(3) states that a person is not justified in excluding a trespasser if the actor knows that such action will "expose the trespasser to substantial danger of serious bodily harm."
E. Law Enforcement

1. Propriety of Arrest

The Code does not detail the law of arrest. In Washington, that subject appears to be governed by the common law, save for an occasional statute governing arrest in particular situations, the most familiar of which is arrest for shoplifting.\textsuperscript{109} The lawfulness of the arrest is relevant both to the privilege of the arrester in effecting the arrest and to the legality of resistance contemplated by the person arrested. Under the Code, the arrestee may use force to resist wrongful arrest if, and only if, he does not know that the person making the arrest is a police officer.\textsuperscript{110} Insofar as justification for the use of force by an arresting person is concerned, it is required that the actor reasonably believe that the arrest is lawful, or if under a warrant, that the warrant is valid.\textsuperscript{111}

The justification of a private person who assists another in making an unlawful arrest is expressly detailed by the Proposed Code.\textsuperscript{112} He is justified in using whatever force could accompany a lawful arrest, provided that (a) in the case of assistance to peace officers, he does not know the arrest is unlawful; and (b) in the case of assistance to citizens, he reasonably believes the arrest is lawful.\textsuperscript{113}

2. Deadly Force to Effect Arrest

The Proposed Code follows the Model Penal Code\textsuperscript{114} and other recent statutes\textsuperscript{115} in substantially constricting the circumstances in which the use of deadly force may be used to accomplish an arrest. In general, deadly force may not be used to facilitate an arrest made by a private citizen.\textsuperscript{116} Such force may be used by the police and those

\textsuperscript{110} R.W.C.C. § 9A.16.040(2).
\textsuperscript{112} R.W.C.C. § 9A.16.070(4).
\textsuperscript{113} Id.
\textsuperscript{114} M.P.C. § 3.07.
\textsuperscript{115} See Note, The Law Enforcement Officer's Use of Deadly Force: Two Approaches, 8 AM. CRIM. L.Q. 27 (1969).
\textsuperscript{116} There are two apparent exceptions: (1) A private citizen may use deadly force to assist one he reasonably believes is a peace officer under the same circumstances in which the peace officer would be justified in using deadly force (R.W.C.C. § 9A.16.070(2)(b)), and (2) a private citizen may use deadly force in apprehending one
under their direction only if the arresting person (1) reasonably believes the arrest to be for a felony, and reasonably believes either (2) that the felony involved the use or threatened use of deadly force or (3) that there is a substantial risk that if deadly force is not used, the person to be arrested will cause death or serious bodily harm. This will evolve into a rubric that deadly force may not be used in property offenses, because such offenses rarely create such risks or involve the use of deadly force. Since the harm contemplated from delay in capture is harm to third persons and not to the felon himself, the Code does not justify the use of deadly force in order to prevent a felon's self-destruction.\footnote{R.W.C.C. § 9A.16.070(5).}

In considering the use of deadly force in effecting an arrest, one crucial issue is whether the arresting person may use deadly force where otherwise prohibited if his intention is only to frighten or to injure slightly. The most forthright answer is that regardless of his intentions, he may not use deadly force.\footnote{R.W.C.C. § 9A.04.130(6).} Since deadly force is defined as "force which creates a substantial risk of causing death or serious bodily injury,"\footnote{R.W.C.C. § 9A.16.040(3)(c)(ii).} the arresting person who, for example, shoots a gun to frighten or disable the arrestee might create such a risk and therefore would not be justified in shooting the gun unless otherwise expressly provided for by law.

Of course, a policeman may use deadly force in an arrest situation to protect himself, without a duty to retreat, quite apart from whatever justification exists incident to the arrest.\footnote{R.W.C.C. § 9A.16.070(2)(a)(i).}

3. \textit{Non-Deadly Force to Effect Arrest}

Before any force is used, the arresting person must make known his purpose to arrest, unless the circumstances otherwise make this purpose obvious.\footnote{R.W.C.C. § 9A.16.070(3)(c).} Though the statute does not require an officer to identify himself as such, as a practical matter a plain-clothesman is required to identify himself as an officer, for otherwise the person ar-
rested may be justified in using force against a wrongful arrest.\textsuperscript{122} Obviously one making a proper citizen's arrest need only disclose his purpose to arrest. Thereafter, whatever force short of deadly force is reasonably believed to be necessary may be exerted to accomplish the lawful arrest.

4. \textit{Prevention of Escape}

The primary purpose of the draftsmen in this section of the Code is to emphasize the value of human life; thus deadly force may not be used to prevent the escape of a prisoner except in those cases in which it would have been appropriate at the time of the arrest. A guard or other officer present at the scene of a prison escape must, however, act on information known to him. He may, thus, use deadly force unless he \textit{knows} that the escapee's ground for imprisonment was something other than a forcible felony.\textsuperscript{123} This formulation creates a statutory presumption detrimental to the escapee.

5. \textit{Prevention of Crime}

In many instances, one may be justified in using force to prevent the perpetration of a crime under the principles of justification already discussed, namely the use of force in self-protection, protection of others, or protection of one's property. Even where threatened criminal conduct does not fall under these categories, one is justified in using non-deadly force to prevent any criminal conduct.\textsuperscript{124} Consistent with earlier provisions regarding deadly force, the common law rule that deadly force may be exerted to prevent any \textit{felony} is abandoned\textsuperscript{125} in favor of the more humane rule that deadly force may be used only to prevent death or serious bodily harm. As LaFave and Scott graphically put it: "It is a felony to file a false income tax return; but one is not justified in shooting the filer on his way to the mailbox, even though the filing cannot otherwise be prevented."\textsuperscript{126}

\begin{footnotes}
\item[123.] R.W.C.C. § 9A.16.070(3)(b).
\item[124.] R.W.C.C. § 9A.16.070(5).
\item[125.] W. LaFave & A. Scott, \textit{Criminal Law} 406 (1972).
\item[126.] \textit{Id.}
\end{footnotes}
6. *Slaughter of the Innocents*

The draftsmen of the Proposed Code have elected not to follow the lead of the Model Penal Code in detailing the effect of presence of third persons on the arresting person's privilege to use force, particularly deadly force.\(^{127}\) Stated briefly, the Model Penal Code provides that conduct of the arresting person which is otherwise justified but which negligently creates risks to third persons is not justifiable. The draftsmen feel that the Model Penal Code provision is unnecessary, and that indeed it is wrong. Respectfully, one may suggest reconsideration of this detail. It may be that other provisions in the Code which criminalize reckless and negligent conduct are sufficient to cover the matter, but it is by no means certain that the provisions on justification, particularly regarding arrest, solve the problem by justifying force only against the particularly defined object.

**F. Duress**

In analyzing the duress provision, one must keep in mind that the fundamental predicate of criminal doctrine is the voluntary act.\(^{128}\) Certain kinds of force are sufficient to transform the accused into a mere tool. If A, for example, takes B's hand and forces it to sign the name of C to a check by forcibly moving it through the required motions, B has not committed forgery, as he did not voluntarily do the act, and there is no issue of an affirmative defense. This is so because the state must prove as one of the elements of the crime that there was a voluntary act.

However, the duress concept is founded on the assumption that the actor voluntarily performed the act even though he did not want or desire to accomplish the end result. He acted to prevent harm to himself or another greater or equal to that which would result from the crime's commission. Earlier, the argument was advanced that the concept of duress is not one of justification.\(^{129}\) However, the similarity between duress and justification explains why the Code subsumes duress within justification. The basic underpinning of the justification principle is that one must balance the harm of committing an inter-

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129. See note 68 and accompanying text, *supra*.
dicted act against another harm which may result if the act is not done.\textsuperscript{130} This is exactly the kind of value judgment which the defense of duress presents to the actor.\textsuperscript{131}

The duress concept under the Code will be free of present arbitrary limitations on the use of the defense. For example, there is no express limitation in the Code that an actor only respond to threats of serious harm to himself or a relative. Under the Code, the actor may respond to a threat directed toward anyone. Further, no particular crimes are excluded from the ambit of duress—even homicide is excused by duress. Finally, there is no particularization of the nature of the threats which must be made so long as the threats are such that no reasonable person in the position of the actor would have been able to resist.

Only a reviewer versed in the ideology of Women's Lib could adequately handle the third paragraph of this provision, which specifies that a wife is afforded no defense when acting on the command of her husband.\textsuperscript{132} The issue may be a fighting cause, a constitutional issue, or an anachronism, depending on one's emotional reaction. Probably retention of the rule is justified on the same basis that Georgia's new code has an express provision for Benefit of Clergy—since the statute being replaced addressed itself to the matter, repeal might otherwise be interpreted as reinstitution of the older and less desirable common law rule.\textsuperscript{133}

\textbf{G. Entrapment}

The entrapment defense inevitably involves two inquiries: (1) did the enforcement official or someone acting with him actually engage in conduct with the design to influence another to act, and (2) did the official actually influence the other's conduct. The other possibility, of course, is that the official did nothing, or at most provided the opportunity for the defendant to do what he would have done anyway.

The major controversy rages about whether emphasis should be placed exclusively on policing the police, \textit{i.e.}, on examining whether

\begin{itemize}
\item \textsuperscript{130} R.W.C.C. § 9A.16.020(1).
\item \textsuperscript{131} W. LaFave & A. Scott, \textit{Criminal Law} 374-75 (1972).
\item \textsuperscript{132} R.W.C.C. § 9A.16.090(3): "It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this section."
\item \textsuperscript{133} Quarles, \textit{An Introduction to Georgia's New Criminal Code}, 5 Ga. St. Bar J. 185 (1968).
\end{itemize}
the officer's conduct, viewed objectively, was such as to influence, more likely than not, a reasonable man in the defendant's position. The other option is to inquire whether the officer's conduct did in fact induce the defendant to act, thereby incriminating an "otherwise innocent man." This latter test is usually couched in terms of whether or not the defendant had a predisposition toward departing from the straight and narrow path.\textsuperscript{134} The two tests have developed a substantial amount of supportive and explanatory literature.\textsuperscript{135} The choice of either orientation will resolve other issues such as the allocation of burden of proof, the nature of evidence properly admissible, and the identification of the appropriate trier of the issue.\textsuperscript{136} In addition, entrapment is classified as an affirmative defense,\textsuperscript{137} the consequence of which is discussed \textit{supra}.\textsuperscript{138}

The major problem presented by the predisposition test is that it makes the defendant's past criminal record relevant to the determination of guilt. The result to be anticipated under the Code's version of the entrapment defense is uncertain, for the test used is not precisely either of the two above mentioned options. Instead, the test is whether the defendant "did not then otherwise intend to commit an offense of that nature."\textsuperscript{139} The most likely prediction is that under this test, evidence of the defendant's previous life of crime or virtue is relevant. The jury must infer from some objective fact that the defendant did not then intend to commit a crime like the one he committed. Inasmuch as the burden of persuasion is on the state, the prosecutor will be hard pressed to prove what the defendant would have done had the officer not appeared and acted as he did, a hypothetical situation if ever one existed. The state will have to turn to the objective manifestations of intent and past conduct.\textsuperscript{140} In short, the predisposition test appears to

\textsuperscript{134} \textit{Cf.} M.P.C. § 2.13 and the earlier formulation of the rule in M.P.C. § 2.10 (Tent. Draft No. 9, 1959).
\textsuperscript{136} Though the suggestion has been made that the court, not the jury, should hear and determine the entrapment issue, the absence of a provision in the Proposed Washington Code to this effect warrants a prediction that the jury and not the court will hear the issue. \textit{Cf.} M.P.C. § 2.13(2).
\textsuperscript{137} R.W.C.C. §§ 9A.16.100, 9A.04.120.
\textsuperscript{138} \textit{See} note 27 and accompanying text, \textit{supra}.
\textsuperscript{139} R.W.C.C. § 9A.16.100.
expose to view the defendant's past criminal record, even though that test was abjured by the draftsmen of the Code.

Unless evidence of this kind is admissible, the formulation of the rule and the allocation of the burden of proof would seem to present an insurmountable obstacle to the state. In the typical case where entrapment is an issue, e.g., narcotics traffic, sex offenses, and the like, the defendant may certainly raise the issue without much trouble. Merely identifying the "victim" as a police officer would probably introduce the required "some evidence" necessary to allow the defendant to raise an affirmative defense. Whether "some evidence" as to the intent of the defendant also is required is an issue about which no safe prediction is possible.

APPENDIX

The Proposed Code provides that an affirmative defense exists when "it arises under a section of this title which so provides; or ... it relates to an offense defined by a statute other than this title and such statute so provides." R.W.C.C.§ 9A.04.120(3). Thus only those defenses particularly and expressly identified as affirmative are such. The following list is a complete compilation of the sections of the Code which establish affirmative defenses.

The affirmative defenses are:
(1) Mistake of fact, R.W.C.C. § 9A.08.040.
(2) Intoxication, R.W.C.C. § 9A.08.080.
(8) To the crime of murder there are two affirmative defenses: (1) extreme emotional disturbance; (2) assistance in suicide. The first is couched in somewhat unorthodox terms, and the second might cover euthanasia. However, both are mitigating and not exculpating defenses. Hence, the provision ought not produce anxiety. R.W.C.C. § 9A.32.020(2).
(9) To the crime of kidnapping in the second degree, it is an affirm-
ative defense “that (i) the abduction does not include the use of or in-
tent to use or threat to use deadly force, and (ii) the actor is a relative
of the person abducted, and (iii) the actor’s sole intent is to assume
custody of [the] . . . person [who was abducted] . . . .” R.W.C.C. §
9A.40.020(2).

(10) It is an affirmative defense to kidnapping in the first degree
“that the actor voluntarily released the victim, alive and free from se-
rious bodily injury, in a safe place prior to trial,” R.W.C.C. §
9A.40.010.

(11) In the crime of unlawful imprisonment in the second degree, it
is an affirmative defense “that (i) the restraint does not include the use
of or intent to use or the threat to use force, and (ii) the actor is a rela-
tive of the person restrained, and (iii) the actor’s sole intent is to as-

(12) The crime of custodial interference provides a defense if the
actor is a relative of the person whose custody is assumed and the ac-
tor’s sole intent is to assume responsibility for the control of the
person. The statutory language is somewhat different from that used
elsewhere, for the provision reads: “This issue shall be treated as an
affirmative defense for purposes of determining the burden of proof.”
R.W.C.C. § 9A.40.050(2)(b). The purpose and effect of this formul-
tion appears to be to make certain that liability or culpability is not
affected; only the penalty is modified by the circumstances detailed.
One potential source of ambiguity, however, is the reference to
“burden of proof.” It is unclear whether “burden of proof” includes
both the burden of going forward and the burden of persuasion.
Burden of proof may be given a narrow construction by including
only the burden of persuasion, but the author’s impression is that
“proof” and “burden of proof” connote both burdens. Clarity might
result if the provision is reworded as follows:

Custodial interference is a misdemeanor if (i) the actor is a relative
of the person and (ii) the actor’s sole intent is to assume responsibility
for control of the person. To the extent that these factors have effect
under subsection (2)(a) of this section, they are an affirmative defense.

(13) The sex offense provisions provide that mistakes regarding the
presence of consent and the age of the victim are affirmative defenses
under narrowly defined circumstances. R.W.C.C. § 9A.44.020. See
also R.W.C.C. § 9A.44.090 (sexual contact).
No doubt rather fundamental moral issues are raised with respect to the affirmative defenses in the sex offense chapter. The author has only prejudice to contribute to such an issue. Let it be noted that the underpinning of the Code’s treatment of mistake and consent is partially a result of a determination that some kinds of extramarital hanky-panky are not morally blameworthy. If one still dared to challenge this assumption, and thereby assert that indeed some kinds of sexual conduct are immoral, mistake as to the collateral arrangements for the conduct would not be a significant factor. The time appears unripe for such an argument, and it is thus more politic to turn to a less heated subject.

(14) Arson appears to have the most elaborate system of affirmative defenses of any crime. Analysis of those provisions is best left to an analysis of the substantive provisions regarding the crime; suffice it to note that each degree of arson has an affirmative defense, at least some of which appear to have the effect of reducing the offense without eliminating criminal responsibility entirely. See R.W.C.C. § 9A.48.010-.030.

(15) The criminal trespass statute contains three affirmative defenses which constitute a complete defense to that provision. R.W.C.C. § 9A.52.065.

(16) The historic claim of right defense to theft is recognized as an affirmative defense. R.W.C.C. § 9A.56.015.

(17) Where extortion in the second degree consists of a threat of the use of criminal process, reasonable belief in the validity of the charge with the sole purpose of compelling the person threatened to make good the wrong is an affirmative defense. R.W.C.C. § 9A.56.110.

(18) Receiving, retaining, or disposing of stolen goods with intent to return the stolen goods to the rightful owner is an affirmative defense to the crime of receiving stolen goods. R.W.C.C. § 9A.56.120(2).

(19) A report to the police or other appropriate government agency is an affirmative defense to the crime of obscuring the identity of a machine. R.W.C.C. § 9A.56.155(3).

(20) Bigamy provides for the affirmative defenses of reasonable belief that a person’s prior spouse is dead, that the actor is legally eligible to remarry, or that a court order exists which the actor did not know to be invalid. R.W.C.C. § 9A.64.010.

(21) The affirmative defenses to bribery are extortion and/or coer-
cion on the part of an officer. R.W.C.C. § 9A.68.010(3). These defenses may be unnecessary, as the Code's general defenses of extortion and coercion probably cover this crime, although no particular harm results from repetition.

(22) Mistake of law is an affirmative defense to the crime of granting unlawful compensation. R.W.C.C. § 9A.68.030(2). This is a departure from the more typical attitude that mistake of law is no excuse. R.W.C.C. § 9A.08.040(2).

(23) It is an affirmative defense to the offense of compounding that the benefit conferred did not exceed what the payor or recipient reasonably believed to be indemnity or restitution. R.W.C.C. § 9A.76.080. In the explanation of this provision, the drafter's comment suggests that the defense is available only to the recipient of the benefit, but the statutory language is otherwise. The requirement that the belief be reasonable, as distinguished from honest, is not consistent with emerging civil law doctrines of consideration in adjustments of disputes. Restatement (Second) of Contracts § 76(b) (1965).