

Washington Law Review

Volume 48
Number 1 *Symposium: The Revised
Washington Criminal Code*

11-1-1972

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Recommended Citation

Robert E. Schillberg, *A Prosecutor's View of the Revised Washington Criminal Code*, 48 Wash. L. Rev. 133 (1972).

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A PROSECUTOR'S VIEW OF THE REVISED WASHINGTON CRIMINAL CODE

Robert E. Schillberg*

I am reluctant to criticize this Proposed Code.¹ Volunteers, legislators, a paid staff, and a Citizens' Committee² which I chaired have committed a substantial amount of time and effort to making the Code a reality. It is a good code; its basic layout is more logical and rational than the existing criminal code,³ and, unlike the present code, its provisions can be more easily understood by both the public and professionals. This Code is timely, controversial, and extremely important.⁴ It has been sixty-three years since the legislature gave substantial consideration to criminal law reform,⁵ a period during which the criminal law evolved from an institution characterized as fair, efficient, personal, and comparatively indifferent to legal niceties, to an institution which today is basically impersonal, comparatively slow, and extremely concerned with the criminal's rights. This Code must be judged by present conditions and standards; the practices and conditions of just a few years ago do not reflect the "real world" of criminal law now. As there appears to be little support for the Code in its present form, substantial revision of the Code will probably be neces-

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1. REV. WASH. CRIM. CODE (Tent. Draft 1970) [hereinafter cited as R.W.C.C.].

2. The Citizens' Committee consisted of an ex-offender, two lay members, two defense attorneys, two judges, one police officer, and one prosecutor.

3. WASH. REV. CODE tit. 9 (1959).

4. Criminal law reform was one of the priorities in the President's Crime Commission Report and was considered a prime objective by the Attorney General's Citizens' Committee on Crime. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT, THE CHALLENGE OF CRIME IN A FREE SOCIETY 126, (1967) [hereinafter cited as PRESIDENT'S REPORT]; and ATTORNEY GENERAL'S CITIZENS' COMMITTEE, CRIME REPORT, RECOMMENDATIONS (1969).

5. The need for criminal law reform has been urged for the past twenty years. The proposals of the Model Penal Code which commenced in 1952 and culminated in the Proposed Official Draft in 1962 have been a major impetus to criminal law reform. Several states already have substantially reformed their criminal codes along the lines of the Model Penal Code. See, e.g., CONN. GEN. STAT. ANN. tit. 53a (Special Pamphlet 1972); IDAHO CODE tit. 18 (Supp. 1971); N.Y. PENAL LAW ch. 40 (McKinney 1967); ORE. LAWS tit. 16 (1971). The Washington Proposed Code generally follows these earlier derivations of the Model Penal Code, although some substantial deviations will be noted *infra*.

sary to ensure law enforcement support. Whereas I am firmly convinced this Code is a step in the right direction, it is, nevertheless, my opinion that the Proposed Code, in its present form, is incomplete and subject to needed change. Perhaps my opinions are due to my bias as a prosecutor. In any event, my reasons are set forth in the following pages.

Basically, I am dissatisfied with the Proposed Code for three reasons: (1) the Code is incomplete; (2) the Code has in many cases imposed an unrealistic burden of proof on the state which will be impractical or impossible to sustain; and (3) the Code has too narrowly defined and too leniently graded many offenses.

I. THE CODE'S INCOMPLETENESS

The Proposed Code can only be considered the start of criminal law reform in Washington.⁶ The Code does not deal with two vital contemporary issues—drugs⁷ and gambling.⁸ Nor does the Code, other than in a very minor way, confront the problems of treating and correcting criminal offenders.⁹ In addition, the Proposed Code does not include within its scope the hundreds of criminal offenses found in statutes not codified under Title Nine of Washington's Revised Code.

The need for legislative re-examination of the non-Title Nine offenses, which include numerous state, county and city offenses, is exacer-

6. By asserting that the Code is incomplete, I do not intend to be critical of most of the work that has been done on the Code. I merely wish to emphasize that the Code is only one step towards complete substantive criminal law reform in Washington.

7. WASH. REV. CODE ch. 69.50 (1971). My understanding is that the 1971 drug legislation was enacted without a substantial examination by the Washington State Legislature.

8. WASH. REV. CODE ch. 9.47 (1959). Revision of Art. 2, § 24 of the Washington State Constitution, which provides that the legislature shall not authorize any lottery, must be completed before comprehensive gambling legislation can be effective. *See Seattle Times v. Tielsch*, 80 Wn.2d 502, 495 P.2d 1366 (1972).

An amendment to Art. 2, § 24 was adopted at the 1971 Regular Session to be submitted to the voters at the next state general election. As amended, the section would read in relevant part:

Lotteries shall be prohibited except as specifically authorized upon the affirmative vote of sixty percent of the members of each house of the legislature or, notwithstanding any other provision of this Constitution, by referendum or initiative approved by a sixty percent affirmative vote of the electors voting thereon.

9. The present code provisions dealing with suspending and deferring sentences are not models of clarity; however, Washington has been a leader in its deferred sentencing approach. WASH. REV. CODE §§ 9.95.240 (1959) and 9.92.060 (1971).

In contrast to Washington's approach, Idaho simultaneously reformed its penal laws and corrections provisions. *See IDAHO CODE tit. 20 (Supp. 1971)*.

bated by the fact that the general provisions of the Proposed Code will apply to these non-Title Nine offenses.¹⁰ The immense confusion which would be created by applying the Code's provisions to the non-Title Nine offenses which were not drafted pursuant to the Code's provisions is immediately apparent. The problem is illustrated in the burden of proof area where the Code requires that the state disprove beyond a reasonable doubt any defense which this "title or another statute" does not expressly require the defendant to prove by a preponderance of the evidence.¹¹ Since no non-Title Nine offenses were drafted to conform to this requirement of the Code, all non-Title Nine offenses will have to be re-examined to determine where the burden of proof now rests.

To prevent unintended results prior to legislative review of the non-Title Nine offenses, the Code provisions making the Code applicable to non-Title Nine offenses should be eliminated.¹² The important job of re-examining these non-Title Nine offenses remains unfinished. In re-examining these offenses, every effort should be made not to impose criminal sanctions on conduct which is not traditionally considered criminal.¹³

In completing the Proposed Code, a few excellent provisions significantly different from existing law should be expanded. First, the Code contains an alternative fine provision which would allow the

10. R.W.C.C. § 9A.04.050(2) provides that the Code provisions dealing with the principles of liability, responsibility, justification, classifying offenses, sentencing, and anticipatory offenses shall apply to every Washington offense defined by statute, unless otherwise specifically stated. R.W.C.C. § 9A.08.050 provides that the mental states prescribed by the Code (intent, knowledge, recklessness, and criminal negligence) shall apply to every Washington crime defined by statute unless there is a clear legislative intent to impose strict liability. Finally, R.W.C.C. § 9A.04.120 requires the state to disprove beyond a reasonable doubt any defense which "this title or another statute" does not expressly require the defendant to prove by a preponderance of the evidence.

Perhaps re-examination of these non-Title Nine offenses, many of which are misdemeanors, will be prompted by the Supreme Court's recent decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), holding that no person can constitutionally be imprisoned for *any* offense, including misdemeanors, unless represented by counsel.

11. R.W.C.C. § 9A.04.120.

12. The Code's provision with respect to defenses to non-Title Nine offenses is extremely unreasonable. Unless the non-Title Nine offense "expressly" requires the defendant prove the defense by a preponderance of the evidence, the state must disprove the defense beyond a reasonable doubt. Even the Model Penal Code and the Idaho Code do not go so far. Each provides that the defendant must bear the burden of proof if the statute "plainly" indicates that the defendant should bear the burden. M.P.C. § 1.12(2)(b); IDAHO CODE § 18-112(2) (Supp. 1971).

13. For a similar recommendation, see PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, THE COURTS 97-107 (1967).

court to fine the defendant twice the amount of his gain in lieu of the statutory fine in any case in which the defendant acquired property or money by committing a crime.¹⁴ This provision should be expanded to allow the court to impose a fine equal to the higher of twice the defendant's gain or twice the *victim's loss*.¹⁵ The alternative fine provision as modified would more accurately reflect the actual financial impact of the defendant's criminal conduct and thereby would maximize deterrence of "white collar" crimes perpetrated by solvent individuals or corporations which are not effectively deterred under present punitive provisions. Second, the Proposed Code, unlike the present law, has realistically conferred criminal responsibility on corporations and their agents.¹⁶ This provision should be expanded to criminalize knowingly receiving benefits of corporate criminal behavior.¹⁷ This additional provision would be most useful against organized crime.

II. THE STATE'S BURDEN OF PROOF UNDER THE CODE

The Proposed Code has imposed an unrealistic burden of proof on the state in three ways. First, the requirement that the state prove beyond a reasonable doubt what a particular defendant at a particular time purposely desired (intent), subjectively knew (knowledge), was consciously aware of (recklessness), or negligently failed to perceive¹⁸ with respect to every material element¹⁹ of a particular crime is unrealistic, especially in light of recent Supreme Court extensions of the

14. R.W.C.C. § 9A.20.030.

15. The suggested provision was utilized in the proposed federal code, and was recommended by the Prosecuting Attorneys' Association. See NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT, PROPOSED NEW FEDERAL CRIMINAL CODE § 3301(2) (1971); and Minutes of the Washington State Prosecuting Attorneys' Association Conference, held at Pasco, Washington, Feb. 25-26, 1972.

I would also recommend that the statute provide that all fines collected be used strictly for law enforcement, or alternatively, be used as a fund to compensate victims.

16. R.W.C.C. § 9A.08.070.

17. Such a provision should at least extend to those owning or controlling a substantial portion of the corporation.

18. R.W.C.C. § 9A.08.020.

19. R.W.C.C. § 9A.08.020. A "material element" of an offense is defined as any element of the crime connected "with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct . . ." R.W.C.C. § 9A.04.130(14).

rights of the criminal defendant.²⁰ Prior to *Miranda*,²¹ the state could often prove the defendant's subjective state of mind through some form of statement by the defendant, albeit with some inherent discrimination in favor of the more intelligent, experienced, and counseled defendant. But since *Miranda*, such statements are rarely available and can seldom be relied upon. Instead, the prosecutor attempting to prove the defendant's state of mind must rely on the stock presumptions that a person intends the normal and natural consequences of his acts and that a reasonable person in the defendant's situation would have intended or known of the particular element of the crime. However, even these stand-bys may be ineffective methods of proof under the Proposed Code's sections 9A.08.030(2) and (3), for the law requires the prosecutor to prove beyond a reasonable doubt the particular defendant's subjective state of mind at a particular time concerning every material element of the crime. If the Code's mens rea requirements are literally applied, the state does not sustain its burden of proof by merely offering rebuttal evidence of what a normal person in the defendant's situation would have intended or known, where the defendant testifies that he did not have the requisite knowledge or intent. Although we can reasonably assume that a jury will disregard obviously false testimony of the defendant, the jury will, nevertheless, make every effort to follow instructions, and if they have any reasonable doubt as to the particular defendant's state of mind, the defendant will be acquitted. This system of proof may result in substantial injustices.

The Proposed Code's mens rea provisions can be remedied by simply modifying the mental states section to provide that the state has sustained its burden if it proves beyond a reasonable doubt that a reasonable person acting as the defendant, in the defendant's situation, would have done so either intentionally, knowingly or recklessly, as the case may be. The defendant must then bear the burden of proving that, unlike the reasonable man, he did not act intentionally, knowingly or recklessly. This modified system of proof would allow the jury to draw upon their normal experience and would require the defendant—the only party to the action who knows exactly what his

20. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1; *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

21. *Miranda v. Arizona*, 384 U.S. 436 (1966).

state of mind was—to prove that he should not be measured by the normal experience of a reasonable man.²²

The second way in which the Proposed Code has imposed an unrealistic burden of proof on the state is the requirement that the prosecution disprove beyond a reasonable doubt any affirmative defense raised by the defendant unless the statute defining the offense expressly requires that the defendant prove the defense by a preponderance of the evidence.²³ The problem is that most affirmative defenses within the Code have failed to expressly require that the defendant bear the burden of proof; this is a significant departure from existing law.²⁴ A few examples illustrate the problems created by placing this burden on the state.

Where the defendant raises the affirmative defense of insanity, the state must prove beyond a reasonable doubt that the defendant is sane—that the defendant did not lack substantial capacity to appreciate the natural consequences or criminality of his conduct or to *conform his conduct to the law*.²⁵ In the case of a hardened criminal, this unrealistic burden is analogous to attempting to prove beyond a reasonable doubt that a particular person could quit smoking when the only evidence available is the person's thirty-year habit of smoking and a few half-hearted attempts to stop. Although the Proposed Code's insanity provisions are generally an improvement over present law,²⁶ requiring the defendant to prove insanity by a preponderance of the evidence as does present law would not be unfair.²⁷

22. For a discussion on how a "purposeful" or "intentional" mental state can be disguised in committing "white collar crimes," see UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, *THE NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME* 14 (1970).

23. R.W.C.C. § 9A.04.120.

24. For example, the defendant must prove the defenses of duress and insanity by a preponderance of the evidence under existing law; under the Proposed Code the state would have to disprove these defenses beyond a reasonable doubt once they have been raised. Compare *State v. Rasey*, 54 Wn.2d 422, 427, 341 P.2d 149, 152 (1959); *State v. Putzell*, 40 Wn.2d 174, 180, 242 P.2d 180, 184 (1952); *State v. Clark*, 34 Wash. 485, 496-98, 76 P. 98, 101-02 (1904); with R.W.C.C. §§ 9A.12.010, 9A.16.090.

25. R.W.C.C. § 9A.12.010. The insanity defense provides that a person is not criminally responsible if, as a result of a mental disease or defect, he lacked substantial capacity to know or appreciate the natural consequences or criminality of his conduct or he lacked capacity to conform his conduct to the requirements of the law.

26. Compare R.W.C.C. § 9A.12.010 with *State v. Collins*, 50 Wn.2d 740, 750, 314 P.2d 660, 666 (1957).

27. See *State v. Putzell*, 40 Wn.2d 174, 242 P.2d 180 (1952); *State v. Clark*, 34 Wash. 485, 76 P. 98 (1904).

Placing the burden of proof of insanity on the state is especially perplexing when one considers that not only is there no consensus in the psychiatric profession as to what

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Entrapment, another affirmative defense under the Code, exculpates a defendant if a public law enforcement official induced or encouraged commission of the crime when the defendant "did not *then* otherwise intend to commit an offense of that nature."²⁸ If this defense is raised by the defendant, the state must prove beyond a reasonable doubt that the defendant intended to commit the crime at the particular moment it was committed despite the encouragement of the police. This burden of proof is unwise for two reasons. First, the defendant, not the state, is in the best position to prove what he would have done had he not been encouraged. The Model Penal Code adheres to this rationale and requires the defendant to prove by a preponderance of the evidence that he did not intend to commit the particular crime until he was induced.²⁹ Second, it is irrational to expect the state to prove beyond a reasonable doubt that the defendant *at that particular moment* otherwise intended to commit the crime. A well known drug pusher who alleges that a policeman induced him to sell the drugs could not be convicted unless the state produces testimony or other evidence that the *moment before* the pusher met the policeman he contemplated selling the drugs. The requirement of identifying the time of the actor's intent should be eliminated.

Finally, the Code exculpates a defendant who mistakenly believed a fact which negates the mental state required for commission of the offense.³⁰ If this defense is raised by the defendant, the state has the nearly impossible task of proving beyond a reasonable doubt that the particular defendant did not believe a fact which never existed. The theory behind this defense is good, but it can be rationally applied only if the defendant bears the burden of proving he was acting under a mistaken belief.

Insanity, entrapment, and mistake of fact are just three illustrations which demonstrate the Code's irrational requirement that the state

criminal insanity is, but also there is no consensus that insanity even exists as an abstract concept. Therefore, it seems absurd to require the state to prove the non-existence of insanity beyond a reasonable doubt. A better approach to the insanity defense in the criminal context would be to treat insanity, when proved by the defendant, as a mitigating circumstance in setting the punishment, rather than as an absolute defense to criminal liability.

28. R.W.C.C. § 9A.16.100.

29. M.P.C. § 2.13. However, the Model Penal Code requires the defendant to prove merely that the official conduct created a "substantial risk" that the offense would be committed by one not otherwise ready to commit it. *Compare* R.W.C.C. § 9A.16.100.

30. R.W.C.C. § 9A.08.040.

disprove beyond a reasonable doubt an affirmative defense raised by the defendant. Numerous other examples exist throughout the Code.³¹ This problem can be remedied either by categorically requiring that the defendant prove all affirmative defenses by a preponderance of the evidence unless otherwise provided,³² or by expressly providing in each of the above affirmative defenses that the defendant bear the burden of proof. If this recommendation is rejected, thereby requiring the state to bear the burden of disproving these affirmative defenses, at least some provision should be added requiring the defendant to file written notice of the defense within a reasonable time before the trial date.

The third and final way in which the Code imposes an unjustifiable burden of proof on the state is found in the sex offense section.³³ The Code provides that a person cannot be convicted of rape, sexual misconduct, or sexual contact (except sexual contact in the third degree) unless there is evidence corroborating the victim's testimony.³⁴ Since such corroborating evidence is often unavailable, the maximum crime some rape defendants will be subject to is sexual contact in the third degree, a misdemeanor.³⁵ The corroboration requirement should be eliminated; the defendant is adequately protected from false accusation by the natural skepticism of the jury and the judge's ability to set aside a verdict for insufficient evidence.³⁶ A second unrealistic burden for the state in sexual offense prosecutions is the requirement that the state prove beyond a reasonable doubt that the defendant is older than a particular age.³⁷ The defendant will seldom offer information as to

31. Additional affirmative defenses which the state must disprove beyond a reasonable doubt under the Proposed Code include intoxication, justification, duress, and the "extreme emotional disturbance" defense to murder. R.W.C.C. §§ 9A.08.080, 9A.16.020, 9A.16.090, 9A.32.020(2)(a). The defendant is in a much better position to establish these defenses and should bear the burden of proof in order to avoid substantial injustice.

32. N.Y. PENAL LAW § 25.00(2) (McKinney 1967), requires the defendant to establish affirmative defenses by a preponderance of the evidence.

33. R.W.C.C. ch. 9A.44. Included in the sex offense section of the Code are the offenses of sexual misconduct, rape, and sexual contact. For a detailed discussion of this section of the Code see the Note entitled "Sexual Offenses" at p. 223 of this volume.

34. R.W.C.C. § 9A.44.010.

35. R.W.C.C. § 9A.44.090. As a misdemeanor, the maximum penalty for sexual contact in the third degree is ninety days in jail and a \$500 fine. R.W.C.C. § 9A.20.020(3).

36. The Washington State Prosecuting Attorneys' Association recommends that the corroboration requirement be eliminated. Minutes of the Washington State Prosecuting Attorneys' Association Conference, held at Pasco, Washington, Feb. 25-26, 1972.

See also, *People v. Linzy*, 11 Crim. L. Rptr. 2380 (N.Y. Ct. App., July 7, 1972).

37. For example, the defendant is guilty of second degree rape if the victim is less

his age, and locating relatives or establishing other means of establishing the defendant's age could be a major problem. This could easily be remedied by inserting a statutory presumption that the defendant is twenty years old. If the defendant is truly younger than presumed, he can easily prove his correct age.

III. DEFINITION AND GRADING OF OFFENSES UNDER THE CODE

Any person actively engaged in law enforcement will naturally form opinions on what conduct should be punished. Prosecutors are certainly no exception. The Prosecuting Attorneys' Association and I are of the opinion that a number of offenses under the Proposed Code have been too narrowly defined and too leniently graded. Although these opinions are subjective and reflect our own moral biases, they are nevertheless supported by years of experience in dealing with criminals and their victims. I (and as indicated, the Prosecuting Attorneys' Association) recommend that the following sections of the Proposed Code be amended as indicated:

Definitions (§ 9A.04.130). The definitions adopted by the Code are generally very good. However, the term "serious bodily injury," which is defined as any injury (1) creating a substantial risk of death or (2) causing *permanent* disfigurement or *protracted* loss of a body function,³⁸ should be amended by eliminating the words "permanent" and "protracted." If these two words are used to define "serious bodily injury," substantial debate involving medical testimony may ensue in crimes such as assault³⁹ on whether the defendant's serious injuries are permanent or protracted. Such debate would take a great deal of time and would be largely irrelevant in assessing the defendant's culpability.

Principles of Liability (ch. 9A.08). The complicity section⁴⁰ should be amended in three ways. First, a person acting with the culpability otherwise required by the offense should always be liable for causing

than fourteen and the defendant is eighteen or older. R.W.C.C. § 9A.44.050. The defendant is guilty of third degree rape if the victim is less than sixteen and the actor is twenty or older, or if the victim is under sixteen and the same sex as the actor and the actor is nineteen or older. R.W.C.C. § 9A.44.060.

38. R.W.C.C. § 9A.04.130(23).

39. R.W.C.C. § 9A.36.010.

40. R.W.C.C. § 9A.08.060.

another to commit the crime.⁴¹ The Code, for no logical reason, limits liability under this section to cases where the actor causes an irresponsible or innocent person to commit the offense.⁴² Second, a person who recklessly or with criminal negligence solicits, commands, encourages, or requests another to commit a crime should be an accomplice in the crime. As the Code presently reads, a person is an accomplice only if he "intends to promote or facilitate the crime."⁴³ This is too narrow.⁴⁴ And finally, the Code should be amended so that victims are not automatically excluded as accomplices. To exclude all victims as accomplices may create problems in vice areas involving drugs, gambling, alcoholism and sex offenses.

Anticipatory Offenses (ch. 9A.28). The affirmative defense of renunciation⁴⁵ and the multiple conviction provision⁴⁶ may be acceptable if modified to expressly require the defendant to prove renunciation by a preponderance of the evidence,⁴⁷ and to allow convictions for both the substantive and inchoate crimes, limiting the maximum punishment to that specified for the substantive offense. The Prosecuting Attorneys' Association recommends that both provisions be eliminated.⁴⁸

Homicide (ch. 9A.32). Three changes are needed in this section. First, a provision should be added assuring that persons convicted of first degree murder will not be released prematurely. Such a provision is especially important in view of the abrogation of the death penalty.⁴⁹ I favor the recommendation of the Attorney General's Citizens' Committee that prevents a prisoner convicted of first degree murder from being released unless three conditions are met: (1) the prisoner

41. The present law includes such persons as principals in the crime. WASH. REV. CODE § 9.01.030 (1959).

42. R.W.C.C. § 9A.08.060.

43. *Id.*

44. For example, a person who solicits an individual who is under the influence of alcohol to race an automobile probably does not intend that the driver kill another, but logically this person should be a principal to the crime if the driver does kill another.

45. R.W.C.C. § 9A.28.040.

46. The multiple conviction provision prohibits a defendant from being convicted (1) of both the substantive offense and an inchoate offense, or (2) of more than one inchoate offense for the same conduct. R.W.C.C. § 9A.28.050.

47. This is another example of an affirmative defense which the prosecutor cannot reasonably be expected to prove beyond a reasonable doubt. See notes 23-32 and accompanying text, *supra*.

48. Minutes to the Washington State Prosecuting Attorneys' Association Conference, held at Pasco, Washington, Feb. 25-26, 1972.

49. *Furman v. Georgia*, 92 S. Ct. 2726 (1972).

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has served a minimum of fifteen years' imprisonment, (2) the warden and parole board have granted approval, and (3) a hearing in the local community has been conducted which results in a recommendation of release.⁵⁰ Such a provision would give citizens assurance that a person convicted of first degree murder would not be released without the local community's approval.

Second, first degree manslaughter,⁵¹ which has an expressed penalty of not *more* than twenty years, should be classified as a regular first degree felony carrying a penalty of not *less* than twenty years. This change would eliminate the uncertainty inherent in the existing penalty and would be more consistent with the severity of the offense.

Third, a simple homicide provision carrying a gross misdemeanor penalty should be added to the Code.⁵² Under the Proposed Code and existing law, a person is criminally responsible for killing another only if he has been grossly negligent. One of the most difficult jobs for a prosecutor is trying to explain to the victim's family that the present vehicular homicide law does not apply to a person who has been negligent or violated a statutory duty. There is no compelling reason why simple negligent homicide should not be criminally punished.

Assault (ch. 9A.36). Two changes are recommended in this section. First, placing another in fear of physical injury, which currently is not proscribed under the assault provision of the Code, should be a third degree assault. The actor who places another in fear of physical injury is just as culpable as the actor causing the injury. Second, menacing,⁵³ which is defined as intentionally placing another in fear of death or serious bodily injury, should be classified as a second degree felony. The drafters have seriously underrated the severity of menacing by classifying it as a misdemeanor.

Sex Offenses (ch. 9A.44). My only recommendation is that the qualified affirmative defense of mistake of age⁵⁴ be eliminated. The

50. ATTORNEY GENERAL'S CITIZENS' COMMITTEE, CRIME REPORT, RECOMMENDATIONS (1969).

51. R.W.C.C. § 9A.32.030(2).

52. The maximum penalty for a gross misdemeanor is one year imprisonment and a \$1,000 fine. R.W.C.C. § 9A.20.020(2). The Washington State Prosecuting Attorneys' Association concurs in this recommendation. Minutes of the Washington State Prosecuting Attorneys' Association Conference, held at Pasco, Washington, Feb. 25-26, 1972.

53. R.W.C.C. § 9A.36.040.

54. The defendant can assert mistake of age as an affirmative defense in cases where the victim is less than eighteen but older than fourteen. R.W.C.C. § 9A.44.020(2).

Proposed Code has already lowered the age of consent from the present law; reasonable brackets of age differentials are also provided.⁵⁵ If young people are to be protected by these statutes, the mistake of age defense should be stricken.

Arson (ch. 9A.48). There are two recommended changes for this section. First, a person should be guilty of first degree arson⁵⁶ if he "reasonably anticipated" that another person was in the building before causing the fire or explosion. The Code presently requires that the prosecutor prove that the defendant was criminally negligent in not knowing of another's presence. This is too narrow.⁵⁷ Second, the criminal mischief provisions⁵⁸ of the Code have been underrated and should be raised one degree.⁵⁹

Burglary (ch. 9A.52). Four major changes are recommended in this section. First the definition of "building"⁶⁰ should be expanded to include fenced-in property. Second, the definition of "unlawfully remains"⁶¹ should expressly include a case where the defendant lawfully enters the premises but remains past closing hours. Third, first degree burglary should be expanded to cover the burglar who assaults another during the burglary even though no deadly weapon is involved.⁶² Finally, the Prosecuting Attorneys' Association recommends that the third degree burglary provisions be merged into the second degree provisions. The Prosecuting Attorneys' Association believes these four

55. See Note entitled "Sexual Offenses" at p. 229 of this volume.

56. R.W.C.C. § 9A.48.010.

57. Criminal negligence under the Code requires that the defendant be grossly negligent. R.W.C.C. § 9A.08.020. A standard of "reasonable anticipation" would punish the defendant who manifested ordinary negligence. Since the law seeks to prevent all potentially dangerous burnings, the broader standard is recommended.

58. R.W.C.C. § 9A.48.060.

59. In addition, these provisions should be rewritten to require the defendant to prove by a preponderance of the evidence that he reasonably believed he had the right to damage the property of another. In its present form, the Code requires the state to disprove any such reasonable belief beyond a reasonable doubt.

The Washington State Prosecuting Attorneys' Association concurs in this recommendation. Minutes to Washington State Prosecuting Attorneys' Association Conference, held at Pasco, Washington, Feb. 25-26, 1972.

60. "Building" is defined in R.W.C.C. § 9A.52.005(1). For a discussion of the significance of this term as it relates to burglary, see the Note entitled "Burglary" at p. 242 of this volume.

61. "Unlawfully remains" is defined in R.W.C.C. § 9A.52.005(4). For a discussion of the significance of this term as it relates to burglary, see Note entitled "Burglary" at p. 241 of this volume.

62. The rationale for increasing the penalties for persons who are armed is to deter violence. The same rationale applies to increasing the penalty for persons causing the violence.

changes to be necessary if burglary is to be properly and rationally graded under the new Code. My personal belief is that the third degree burglary provision should be kept separate, but that the presumption of intent applicable to first and second degree burglary should extend to third degree burglary.

Theft and Robbery (ch. 9A.56). Three changes are suggested for the crime of theft. First, the definition of "permanently deprive"⁶³ should be amended to require that "a *significant* portion" of the property's economic value must be taken from the owner instead of "the *major* portion." This change would obviate the necessity of proving that over fifty percent of the property's value has been lost. Second, Washington's present "joy ride" statute⁶⁴ should be retained and its counterpart in the Code—unauthorized use of a vehicle⁶⁵—should be eliminated. The existing statute imposes a ten year penalty, while the Proposed Code imposes a maximum penalty of only one year's imprisonment and a \$1,000 fine in cases in which the vehicle is not substantially damaged.⁶⁶ Finally, the amounts taken in a series of related thefts should be accumulated in determining if the offense is to be first, second, or third degree theft.⁶⁷ An embezzler who accumulates property by a number of related thefts is certainly as culpable as the embezzler who acquires a like sum in just one effort.

The Prosecuting Attorneys' Association has two recommendations for first degree robbery:⁶⁸ the defense that the actor's firearm was unloaded should be eliminated, and the actor should be guilty of first degree robbery if he causes physical injury. The second recommendation is most reasonable; however, I personally favor the retention of the firearm defense because the defendant bears the burden of proof and the existence of this defense discourages the use of loaded firearms.

63. R.W.C.C. § 9A.56.005(3).

64. WASH. REV. CODE § 9.54.020 (1959). This statute prohibits the taking of the vehicle of another without permission.

65. R.W.C.C. § 9A.56.070.

66. R.W.C.C. §§ 9A.56.070(2) and 9A.20.020(2). If the vehicle is substantially damaged by the actor's recklessness or negligence, the offense is elevated to a third degree felony and the maximum punishment is five years' imprisonment and a \$5,000 fine. R.W.C.C. §§ 9A.56.070(2) and 9A.20.020(1)(c).

67. R.W.C.C. §§ 9A.56.020-.040 grade theft as follows: If the amount taken exceeds \$1,500 or is taken from the person of another, the offense is first degree theft; if the amount taken exceeds \$250 or a public record or credit card is taken the offense is second degree theft; if the amount taken is not more than \$250, the offense is third degree theft.

68. R.W.C.C. § 9A.56.170.

Fraud (ch. 9A.60). Three changes are suggested for this section. First, forgery in the first degree should include the conduct proscribed in second degree forgery.⁶⁹ There is simply no logical reason to punish the forgery of stamps or securities more severely than the forging of wills or public records. Second, third degree forgery,⁷⁰ which proscribes the alteration of any writing not specified in the two higher degrees, should be changed to second degree forgery and graded as a third degree felony rather than a gross misdemeanor. Finally, the offense of deception,⁷¹ which punishes as a gross misdemeanor the act of deceitfully causing another to sign a written instrument, should be graded in degrees on the basis of the amount of property subject to the fraud. Such a grading system would resemble the theft provisions and would be extremely useful in frauds involving complicated credit transactions.⁷²

CONCLUSION

My criticism of the Proposed Code is not intended to discourage passage or to retard criminal law reform in Washington. On the contrary, it is hoped that this criticism will stimulate thought, lead to improvements of the Code, and eventually facilitate the adoption of a new criminal code.

The profound advantages of the Proposed Code cannot be overlooked. Above all, the Code provides a rational means of classifying offenses which can be readily understood and will be far easier to teach. This logical classification of offenses will also be advantageous in the long run because it will enable accumulation of meaningful and

69. R.W.C.C. § 9A.60.010 defines as first degree forgery the forging of stamps, securities, stocks and bonds. Second degree forgery includes forging of wills, deeds, contracts and other commercial investments. R.W.C.C. § 9A.60.020.

70. R.W.C.C. § 9A.60.030. Under the Proposed Code, third degree forgery is a gross misdemeanor.

71. R.W.C.C. § 9A.60.040.

72. Other significant changes that should be made in the Proposed Code include the following: the penalties for bribery (R.W.C.C. § 9A.68.010), perjury (ch. 9A.72), and riot (§ 9A.84.010) should be increased; the hindering prosecution provisions (R.W.C.C. §§ 9A.76.050-.065) should be modified so as to not require proof of the commission of the underlying crime; the escape provisions of the Code (R.W.C.C. §§ 9A.76.090-.110) should be modified to carry penalties equal to the charge from which the defendant escaped; and bail jumping (R.W.C.C. §§ 9A.76.140-.150) should carry the same penalties as escape.

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useful records.⁷³ Computer storage of these records will foster effective, high volume justice at a reasonable cost. Also, it will greatly facilitate evaluation of the effectiveness of various criminal sanctions.

Yet despite the advantages of the Proposed Code, substantial work is required before the Code should be adopted. It is my sincere hope that the Proposed Code receives the consideration it deserves from the legal profession, the law enforcement establishment, and the public so that meaningful and extensive criminal law reform will become a reality.

73. Substantial problems of coding and space availability are already being encountered in collecting this kind of information due to lack of rational classification and organization of crimes.