Washington Law Review

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

11-1-1972

The Draftman's View of the Revised Code

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THE DRAFTSMAN'S VIEW OF THE REVISED CODE

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Introduction

It has now been nearly two years since publication of the Revised Washington Criminal Code by the Judiciary Committee of the Legislative Council. This issue of the *Washington Law Review* constitutes the first comprehensive critical evaluation of this effort to be published in the state.

In this article, the author seeks to review the Code with the advantage of hindsight afforded by the passage of time since the completion of his activities as Reporter for the Judiciary Committee.[1] Beyond this general review of the Code, the author will offer general observations concerning the process of code revision and the philosophy of the Code. Finally, the author will consider, in the context of the students' Notes[2] appearing in this issue of the *Washington Law Review*, the effect adoption of the Code will have on criminal law in Washington.[3]

I. PROCESS AND PURPOSE

In response to growing concern that the state's criminal code[4] is swiftly becoming anachronistic, the Washington State Senate passed resolutions in 1967 and 1969 which led the Judiciary Committee of the Legislative Council to begin the process of code revision. The project itself was aided by a federal grant from the Law Enforcement As-

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1. As "Reporter" the author provided the staff work necessary to produce the drafts and commentary for the Code, in conjunction with the comments and suggestions of the Editor, Professor John M. Junker of the University of Washington School of Law.

2. See p. 149 of this volume for the student Note analyzing the Code.

3. Since the author is (and was at the time of drafting the Code) an Assistant Attorney General for the State of Washington, it should be noted that the views expressed herein are not necessarily those held by the Office of the Attorney General, nor by the Judiciary Committee of the Legislative Council.

4. WASH. REV. CODE tit. 9. This code was passed in 1909.

sistance Administration of the United States Department of Justice. The staffing for the project was provided by the Office of the Attorney General, which appointed an Assistant to serve as Reporter for the Judiciary Committee and retained the consulting services of a member of the faculty of the University of Washington School of Law.

As the project evolved, the process began with preparation of the draft sections and commentaries by the Reporter, who submitted these drafts to the Editor. After discussions between the Editor and Reporter, the sections and comments were re-drafted and submitted chapter by chapter to the Citizens' Advisory Committee, appointed by the Chairman of the legislative committee. Periodically throughout the one year of the project, the Citizens' Advisory Committee met and discussed the drafts section by section, approving, amending or rejecting. After re-drafting to reflect the Citizens' Committee's comments, the draft was submitted to the Judiciary Committee, which in turn met and discussed at length each draft section, directing the Reporter to make appropriate changes from time to time. The final draft of the Code embodies language consistent with all of these modifications adopted throughout the process of drafting and discussions. If enacted, this Code would be R.C.W. Title 9A.

Examination of the Code's scope shows that, with minor exceptions, the revision effort was directed to subjects presently found either in R.C.W. Title 9 or in case law. The pressures of time and lack of greater staffing precluded full revision of the many portions of substantive criminal law found in other titles of the Revised Code of Washington.

The principal references utilized in developing the Code were the Model Penal Code, including the extensive commentary of the American Law Institute which accompanies that product, and the relatively recent revised codes of Connecticut,[5] Illinois,[6] New York,[7] and the proposed Michigan code of 1967.[8] In addition, existing Washington statutory and case law was utilized in formulating the Code.

5. CONNECTICUT PENAL CODE (1969 P.A. 828, effective October 1, 1971), now included in CONN. GEN. STAT. ANN. (Special Pamphlet 1972).

6. ILLINOIS CRIMINAL CODE (1961), now included in ILL. ANN. STAT. ch. 38 (Smith-Hurd 1961).

7. N.Y. PENAL LAW (McKinney 1967).

8. Special Committee of the Michigan State Bar for the Revision of the Criminal Code and Committee on Criminal Jurisprudence—State Bar of Michigan, MICH. REV. CRIM. CODE (Final Draft 1967).

The object of the criminal law revision project was to produce a code which reflected contemporary thinking with respect to penal statutes and which was consistent in its treatment of various criminal offenses. The Code seeks to introduce contemporary language into the definitions of the criminal statutes, as well as to lay the groundwork for later revision efforts of the many criminal statutes found outside of the present R.C.W. Title 9. Its adoption would mean that much of the criminal law presently found only in case law would be stated expressly in statutes. Thus, a significantly larger proportion of criminal law would be passed upon by the legislative branch of state government, a factor which has appeal to some democratic purists who feel legislation is best left to the legislature and not the courts.[9]

II. THE PROVISIONS OF THE CODE

This article does not purport to constitute in itself a comprehensive critique of the Code; rather, it seeks to emphasize those portions of the Code which deserve particular attention. In all cases, the commentary to the Code itself offers a more complete discussion of the operative effect of the Code than this article attempts.[10]

In basic organizational format, the Code progresses from the general to the specific. The first five chapters deal with various general principles, including provisions concerning basic principles of liability,[11] rules regarding defenses,[12] classification of offenses and sentencing provisions.[13] The remainder of the Code is concerned with specific offenses; typically the first section contains definitions of var-

9. A more specific statement of the general purposes of the Code is found in R.W.C.C. § 9A.04.020, which provides that the purposes of the Code are:

> To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; . . . to safeguard conduct that is without culpability from condemnation as criminal; . . . to give fair warning of the nature of the conduct declared to constitute an offense; . . . [and] to differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

10. While the Comments to the Code were not approved by either the Citizens' Advisory Committee or the Judiciary Committee, in all likelihood if the Code were adopted in anything like its present form, these Comments might attain some significance in terms of legislative history. Accordingly, the occasional lapses of precision or accuracy which may exist in those Comments are quite properly noted and critized by those who would evaluate the Code as a whole.

11. R.W.C.C. ch. 9A.08.

12. R.W.C.C. chs. 9A.12, 9A.16.

13. R.W.C.C. ch. 9A.20.

ious terms which will be used throughout the particular chapter. This use of a specific definition section in each chapter benefits the draftsman of such a Code (and, hopefully, the user) by precluding the need of repetitious language in the separate sections describing individual offenses.[14]

The portions of the Code which are the subjects of the Notes in this issue of the *Washington Law Review* are generally the most significant parts of the Code; accordingly, it is to these portions of the Code that the author now turns.

The most obvious change in present law wrought by the Code is the new classification and designation of offenses into three categories of felonies together with the existing categories of gross misdemeanors and misdemeanors.[15] In addition, the Code creates a new classification of "violation."[16] An offense classified as a "violation" neither constitutes a crime nor gives rise to the various disabilities which attach to a person convicted of a crime.[17] The drafters' comment that the category of "violation," in addition to other advantages, allows "[c]onduct . . . [to] be subjected to official penalties (short of imprisonment) without the attendant expense and stigma of a 'criminal' prosecution,"[18] has even more meaning today in the light of the 1972 decision of the United States Supreme Court that: ". . . absent a knowing and intelligent waiver, *no person may be imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[19] Thus in addition to the criminological advantages of having a category such as "violation," the *Argersinger* decision suggests that grading and classifying the most petty offenses as "violations" for which no imprisonment is authorized could substantially reduce the not inconsiderable expense of providing counsel in minor cases.

The Code does not cope with the eminently practical problem of

14. This device was pioneered in Washington's present criminal code in the larceny chapter, WASH. REV. CODE ch. 9.54 (1959), where the 1909 code's draftsman was able to consolidate many separate offenses into the shorter form of the present statute by, in effect, defining the words "steal" and "larceny" to include each of the several ways to commit larcenous offenses formerly set forth in separate sections. *See* WASH. REV. CODE § 9.54.010 (1959).

15. R.W.C.C. § 9A.20.010(1),(2).

16. R.W.C.C. § 9A.20.010(3).

17. R.W.C.C. § 9A.04.040(3).

18. R.W.C.C. § 9A.04.040, Comment at 12.

19. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (emphasis added).

police enforcement of violations. The author has no prescription. In the typical case of a police officer detaining an alleged violator, the citation or "ticket" method utilized commonly in traffic enforcement would no doubt be effective. However, as presently drafted, the Code provides no assistance to a police officer confronted with an uncooperative violator. Specifically, if the violator refuses to identify himself or give an address to which future correspondence regarding the violation can be sent, there does not appear to be any device by which the police officer could satisfactorily effect the arrest. While the absence of any provision dealing with this problem is basically an oversight of the revision process, no self-evident solution to the problem seems entirely satisfactory.

One obvious alternative would be to make criminal the failure of an alleged violator to cooperate with the arresting officer by identifying himself. The difficulty here would be cases in which the alleged violator does not refuse to cooperate but merely lacks identification documents or a permanent address. The criminalization of such shortcomings seems highly suspect. Moreover, it is debatable whether it is good social policy to have a provision in the Code which could, in effect, lead to "escalation" of relatively minor offenses into criminal offenses with jail terms. Another alternative would be to authorize the police officer to transport an alleged violator who does not satisfactorily account for himself to the stationhouse for photographing and/or fingerprinting so that there is some record of the violator in the event of later violations or offenses. This alternative is deficient in that it seems an empty and punitive gesture, and, insofar as the reason for utilizing this alternative is the alleged violator's lack of documents or an address, such detention is suspect on civil liberties grounds. In any event, some solution to the problem of arresting the violator needs to be formulated and incorporated into the section of the Code concerning violations.

The new classification of felonies into three degrees,[20] has the twin advantages of precluding the necessity for stating the precise penalty in each separate offense and allowing for more consistent grading of all offenses. Greater consistency is possible since the drafters are able to denominate the penalty for any particular offense by means of a simple comparison with the relative severity of the grading for comparable offenses. Moreover, the fact that the actual authorized sentences

20. R.W.C.C. § 9A.20.010(1).

are set forth in one section[21] allows for greater legislative flexibility in making judgments about the disposition which should be made for all convicted persons. While maximum sentences under the Code are rather similar to existing law, the legislature could alter the entire penalty structure of the Proposed Code by simply amending that one section, rather than having to amend virtually every statute containing a specific offense as would be necessary under the existing code.

Another major innovation in the Code is its explicit statutory treatment of the issues of responsibility and mental states. The Code would introduce the four mental states of the Model Penal Code into Washington criminal law and would eliminate the difficult and imprecise treatment of the mental state question presently found in the common law of the state.[22] While this treatment of mental states is new to Washington law, other states with revised criminal codes have enacted similar provisions, and a fair amount of case law has been published in those jurisdictions concerning these concepts. The basic advantage of such a treatment is greater precision in describing the mental element than that afforded by the common law's amorphous distinctions between general and specific intent.

While the Note concerning mental states appears to suggest that the Code's provisions impose what may be a significantly greater burden of proof on the prosecution, the fact that no evidence has been presented demonstrating that states which have enacted similar provisions are suffering from any impairment of the prosecutorial function suggests that the increased burdens of proof may not have any impact on criminal prosecution.

Apart from the Code's obvious and direct effect of raising the minimum level of a culpable mental state from ordinary negligence to criminal negligence,[23] the Code also utilizes a "criminal negligence" standard within its definition of "reasonable belief."[24] As the Note concerning mental states observes, use of the "reasonable belief" notion in defining several defenses to criminal liability will allow the defendant successfully to invoke any of those defenses even though he

21. R.W.C.C. § 9A.20.020.
22. R.W.C.C. § 9A.08.020 defines four mental states which are used throughout the Code to describe the required mental element which must be proven with respect to each offense. The four mental states are intent, knowledge, recklessness, and criminal negligence.
23. R.W.C.C. § 9A.08.020, Comment at 33-34.
24. R.W.C.C. § 9A.04.130(22).

acted with ordinary negligence. This result is certainly not inconsistent with the treatment of negligence throughout the Code. If one believes that the arguments in favor of making *criminal* negligence (rather than ordinary negligence) the lowest culpable mental state for offenses are persuasive, then surely consistent treatment of this mental element requires making the same mental state the operative factor with respect to defenses.

The final point within the area of responsibility and mental states which this article will treat is that of so-called "diminished responsibility." Observing the absence of an explicit section concerning diminished responsibility or capacity from the Code,[25] the Note in point raises the question of why such a defense is not present in the Code. It may well be that given the case law origin in Washington of this defense[26] it would have been wise to include such a defense within the Code. On the other hand, section 9A.08.020(1) requires as a condition precedent to a finding of guilt that the accused acted while having one of the mental states described in this section. This provision surely must mean that if, for instance, a defendant alleged that he lacked the capacity to form the intent required for a particular offense, even though he could have held some lower mental state, such an allegation would be highly relevant, and evidence bearing on the point would need to be considered to determine if the accused in fact had held the requisite higher mental state. Thus, even without an express statement of the defense, a proper reading of section 9A.08.020(1) would appear to lead to the same result as if the defense had been explicitly written in the Code.

As discussed in the Note in point, the Code treats at some length defenses based on justification.[27] It does so in a manner consistent with the Model Penal Code in distinguishing among the several different types of justification defenses, such as self-defense, defense of others, and defense of property. The justification chapter deals with a difficult area of the law which has traditionally been handled not by legislative enactment but by developing case law. It was the purpose

25. MODEL PENAL CODE § 4.02(1) (Tent. Draft No. 4, 1955) explicitly includes a defense of diminished capacity:

> Evidence that the defendant suffered from a mental disease or defect shall be admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

26. *See* State v. Carter, 5 Wn. App. 802, 490 P.2d 1346 (1971).
27. R.W.C.C. ch. 9A.16.

of the drafters to collect the rules of justification in a way which would make resort to the legal principles involved less onerous than at present.

The entire question of under what circumstances one is justified in using force against another is charged with the controversies of our time, and the basic policy choices contained within the Code are surely a reflection of the disagreement which exists with respect to the matter.

One section which promises to be controversial is that concerning a citizen's right to use deadly force to effect the arrest of a person whom he believes has committed a dangerous forcible felony and is trying to escape.[28] This provision is a reflection of a political value judgment that such serious offenses ought to trigger a private right to use deadly force analogous to that which would exist merely to prevent such an offense.[29] The Note on justification expresses concern that the section on entrapment[30] has been drafted so restrictively that it will be a defense almost any time a law enforcement officer is involved in encouraging another to commit a crime. The words "then otherwise intended" seem to present the conceptual problem. However, New York[31] has the same language, and the New York courts have not interpreted the language so restrictively. Moreover, such language probably is a useful protection against over-zealous police enforcement.

This article offers one *caveat* to those who debate the operative effect of chapter 9A.16 or some suggested amendment thereto. One usual area of confusion about "Model Penal Code"-type justification provisions is that separating the different interests which one can justifiably use force to protect sometimes leads to a misunderstanding about what rule of justification applies in a particular situation. Many common situations in which force may justifiably be used involve protection of more than one interest, and if the reader of the Code considers the question of how much force is proper in the context of only one protected interest, then it is possible to conclude that the Code prohibits a particular use of force when in fact it does not.

Beyond the foregoing comments, this author would observe that the

28. R.W.C.C. § 9A.16.070(3)(c).
29. The words "from custody" should be dropped from the title of R.W.C.C. § 9A.16.070(3) in order that subsection (c) logically fit within it.
30. R.W.C.C. § 9A.16.100.
31. N.Y. PENAL LAW § 35.40 (McKinney 1967).

Note in point is thorough in "spotting" the portions of the justification chapter where policy decisions have been made which may be somewhat different than under present law.

Turning to the subject of inchoate offenses,[32] the real purpose of the inchoate offense section is to give more precision to the definitions of the material elements of a class of offenses which traditionally have been poorly and incompletely defined. There are three major areas of change which this author will discuss: criminal attempt, criminal conspiracy, and criminal solicitation.

A basic reason for new provisions regarding criminal attempt and criminal conspiracy was the conviction that existing statutory treatment is vague and ambiguous. Concerning attempt, the emphasis of the present "tending and failing"[33] language seems wrong; it focuses on the completion of the crime and thereby tends to blur the socially desirable theory that an attempt statute should proscribe conduct which is unambiguously more than mere preparation or planning and which is substantially along the path toward completion of a criminal offense. Moreover, as a technical matter, elimination of the "but failing" element allows this offense to be a lesser included offense within the completed offense; this is a result which, while consistent with Washington case law,[34] is a strained reading of the existing statute.

The conspiracy provision was designed to reduce the ambiguity of the present statutes and thus reduce the risk that this offense could be used to criminalize conduct which is really nothing more than agreement, or less still, idle talk. Generally, the drafting reflects the concern that the doctrine of conspiracy can be abused by application to essentially innocent behavior or to conduct that otherwise might even be found to be constitutionally protected speech.

Apart from evident changes in the context of existing inchoate offenses (which are discussed in the relevant Note), the inclusion of the substantive offense of criminal solicitation is new to Washington law.[35] While a solicitation which leads to a completed crime clearly makes the solicitor guilty as a principal under the present law,[36] there is not presently any criminal liability other than that in attempt and con-

32. R.W.C.C. ch. 9A.28.
33. WASH. REV. CODE § 9.01.070 (1959).
34. *See* R.W.C.C. § 9A.28.010, Comment at 104.
35. R.W.C.C. § 9A.28.020.
36. *See* WASH. REV. CODE § 9.01.030 (1959).

spiracy for one who gives a thing of value to another with intent that a specific offense be committed by that other person. Contrary to the Note's characterization of this offense as an "attempt to conspire" and as an offense principally oriented toward the intent of the defendant, it would seem that the real interest behind the proposed criminal solicitation offense is to deter a specific course of conduct, namely the offering or giving of things of value to others with the intent of having them "return the favor" by committing a specific crime. To say the least, it seems anomalous under present law that such behavior is criminal if the person solicited is successful, but not criminal if the crime solicited fails of completion. Surely solicitation is as dangerous to society in the one case as the other.

In the proposed homicide chapter,[37] the most controversial change concerns the death penalty for murder[38] which is substantially altered from existing law. Quite apart from the provision of the proposed section, it is clear that the decision of the U.S. Supreme Court in *Furman v. Georgia*[39] will need to be studied with care before any provision concerning capital punishment can be enacted.

Other than the change in the penalty for murder, the most evident change in the Code renders murder a single degree crime, and thereby abolishes the present second degree murder category. Presently, the only difference between first degree and second degree murder is that premeditation is necessary in the former. But analysis of the case law suggests that the term "premeditation" has no real and tangible meaning: "while it is necessary for an appreciable period of time to elapse for premeditation to exist, the premeditation required to support a conviction for first degree murder may involve no more than a moment of time."[40] In short, it is the view of this author that functionally the second degree murder category is very often handled by juries as a mercy or mitigation tool. This is even more likely when one considers that capital punishment does not attach to the second degree murder offense.

The Note in point is concerned that the proposed murder provision is redundant in that it provides for both "reckless" and "intentional" murder.[41] The author of the Note reasons that since the Code pro-

37. R.W.C.C. ch. 9A.32.
38. R.W.C.C. § 9A.32.025.
39. 92 S. Ct. 2726 (1972).
40. *See* R.W.C.C. § 9A.32.020, Comment at 117.
41. R.W.C.C. § 9A.32.020(1)(a), (b).

vides for reckless murder and since intentional conduct also suffices to establish recklessness as a mental state,[42] an intentional murder provision is unnecessary. Contrary to the suggestion in that Note, this author does not believe that all intentional murders come within the reckless murder provision. The reckless murder provision requires, in addition to a reckless mental state, "extreme indifference to human life" and "grave risk of harm."[43] The cases falling under the reckless murder provision involve conduct in which it would be very difficult to prove "intent," but in which the mental state is qualitatively different from simple "recklessness," as for example, where a man fires a shotgun indiscriminately into a crowd. Each subsection serves a useful purpose in describing a heinous type of homicide traditionally treated in the most serious manner.

Among the most significant of the changes wrought by the Code is the treatment of sexual offenses.[44] The Note in point discusses the mechanics of the changes proposed, but this author would emphasize the purpose and direction of the proposed changes. This chapter attempts to formulate rules defining criminal sexual behavior which are in accord with current values in an area of social activity which has undergone tremendous change since enactment of the 1909 code provisions of R.C.W. chapter 9.79. More specifically, the proposed provisions are designed to accomplish several objectives:[45]

> limiting the scope of the criminal legislation on this subject to sexual conduct which threatens some legitimate social interest, rather than some purely moral or religious value; . . . modernizing this chapter to take account of changing social mores regaring sexual conduct; . . . stating the prohibitions in clear and precise language so as to eliminate the ambiguities currently found in . . . [present law]; and . . . structuring the statutory prohibitions in such a way as to give more precision and flexibility in dealing with different types of sexual misconduct.

It is this author's view (and the view embodied in the relevant provisions of the Code) that no useful social purpose is served by criminal prohibitions of conduct engaged in by large numbers of the citizenry.

42. R.W.C.C. § 9A.08.020(4).
43. R.W.C.C. § 9A.32.020(1)(b).
44. R.W.C.C. ch. 9A.44.
45. R.W.C.C. § 9A.44.020, Comment at 171-72.

In a real sense, this chapter is the most notable example of the effort of the entire Code "to safeguard conduct that is without culpability from condemnation as criminal."[46]

The final section of the Code to be considered by this article is the disorderly conduct chapter.[47] The author would be less than frank were he to argue this chapter is free of difficulties. Apart from the evident conflict between the misdemeanor treatment of public intoxication and the terms of the recently enacted Uniform Alcoholism and Intoxication Treatment Act,[48] the loitering section [49] almost certainly cannot withstand the decisions of the U.S. Supreme Court in *Papachristou v. City of Jacksonville*[50] and *Oyen v. Washington,* in which a unanimous Washington Supreme Court decision was reversed in a per curiam opinion.[51] In short, at least the public intoxication and loitering sections of the Proposed Code need re-examination in the light of more recent developments in the law.

CONCLUSION

As with any proposed code the size and scope of the Revised Washington Criminal Code, there are no doubt both policy and legal problems in isolated sections of the Code. However, the problems with the existing sixty-three year old criminal code appear extremely great, while the problems of the Proposed Code are readily soluble through the legislative process of evaluation both before and after enactment.[52] This author remains convinced that passage of this Proposed Code,

46. R.W.C.C. § 9A.04.020(1)(b).
47. R.W.C.C. ch. 9A.84.
48. Uniform Alcoholism and Intoxication Treatment Act, Ch. 122 [1972] Wash. Laws 2nd Ex. Sess.; in particular, see sections 1 and 19 of the Act which "decriminalize" intoxication.
49. R.W.C.C. § 9A.84.060.
50. 405 U.S. 156 (1972). In this case, the Court struck down as void for vagueness a loitering ordinance which, in some portions, resembles parts of both R.W.C.C. § 9A.84.060 and present WASH. REV. CODE § 9.87.010 (1959). See Morris, *Overcriminalization and Washington's Revised Criminal Code,* at pp. 18-22 of this volume.
51. 41 U.S.L.W. 3002 (U.S. June 29, 1972); this decision vacated the Washington Supreme Court's judgment upholding the constitutionality of WASH. REV. CODE § 9.87.010(13) (1965) concerning school loitering, a provision remarkably similar to proposed R.W.C.C. § 9A.84.060(1)(e). The U.S. Supreme Court remanded the case for reconsideration. See the Note on the loitering provisions at p. 259 of this volume.
52. It should be noted that R.W.C.C. § 9A.04.010 was originally designed to allow for an effective date some two years after enactment to insure that a complete review of the statute could occur prior to its taking effect while guaranteeing that at least one reg-

with appropriate amendments, would be of great value to this state. The enactment of such a revised Code would provide a useful tool for those governmental agencies charged with protecting the public from criminal behavior.

ular session of the legislature would fall before that effective date. Presumably, the same desire on the part of the 1973 Legislature could be implemented by establishing an effective date of July 1, 1975.