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THE REVISED WASHINGTON CRIMINAL CODE: A DEFENSE PERSPECTIVE

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INTRODUCTION

Those who work with Washington's criminal law generally concede that it is in need of substantial overhaul. Consequently, members of the bench, law enforcement agencies, the state legislature, the public, prosecutors and defense attorneys undertook to draft a new criminal code for Washington. Input came from varied sources—from law enforcement personnel to a former inmate of the Washington prison system. The Proposed Code reflects the input of each contributor; it cannot be labelled the Code of any single group. This article attempts to analyze those sections of the Proposed Code that are important from a defense attorney's standpoint. No attempt has been made to cover all of the crucial points raised in the Proposed Code.

I. MENTAL STATES AND CAUSATION

Section 9A.08.020(2) of the Proposed Code defines four levels of culpable mental states, one of which must have been held by the actor when the unlawful act was performed in order for criminal liability to attach. This section is a much needed improvement over the current law's use of such elusive concepts as general and specific intent, malice and premeditation. The most important doctrinal change made by the section is the elimination of ordinary civil negligence as a predicate for criminal liability. This result has been advocated by several writers.[1]

A by-product of the mental states section of the Code is that prosecutors will no longer be able to rely on the presumption that one in-

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The author wishes to express his appreciation to Harvey H. Chamberlin, 3rd year law student, University of Washington, B.A., 1970, University of Washington, for his assistance in the preparation of this article.

1. *See e.g.*, G. WILLIAMS, CRIMINAL LAW § 43 (2d. ed. 1961); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 137 (2d. ed. 1960).

tends the natural and probable consequences of his acts. This presumption has been an invaluable aid to prosecutors, but at the same time has destroyed "any rational theory of intention."[2] Its effect has been "to efface the line between intention and negligence"[3] and merge "all negligence in constructive wrongful intent."[4] In practical terms it has meant that a defendant was presumed to have criminally intended a result if he would be negligently liable in tort for the result. Such a mangling of the intent concept has no place in rational criminal theory.

R.W.C.C. § 9A.08.030 is an attempt to define precisely the causal link between the actor's conduct and a particular result which must exist if the actor is to be criminally responsible for a particular offense. Determining legal causation is an inherently difficult problem. Dean Prosser tells us that there is "nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion"[5] than the notion of legal causation. In the civil law, difficulty in determining legal causation is mitigated by an overriding concern for an equitable disposition of a private dispute. But in the criminal field, equitable disposition plays a less important role.[6] The consequences of criminal guilt—imprisonment accompanied by moral condemnation, as opposed to a mere money judgment—require that causation in the criminal law be defined more precisely than in tort law.[7] Heretofore however, Washington courts, using the elusive notion of "proximate cause,"[8] have treated causation alike in both criminal law and tort law.

Generally, the Proposed Code adopts the "but-for" test as sufficient to establish the cause-in-fact necessary to impose criminal liability.[9]

2. G. WILLIAMS, *supra* note 1, at 89.
3. *Id.* at 90.
4. J. SALMOND, JURISPRUDENCE 371 (12th ed. 1966).
5. W. PROSSER, LAW OF TORTS 236 (4th ed. 1971).
6. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden of Persuasion Practices in Criminal Cases,* 77 YALE L.J. 880, 888 (1968).
7. MODEL PENAL CODE § 2.03, Comment (Tent. Draft No. 4, 1955) [hereinafter MODEL PENAL CODE will be cited as M.P.C.]
8. *See, e.g.,* Stoneman v. Wick Construction Co., 55 Wn.2d 639, 349 P.2d 215 (1960).
9. The "but for" test is located in R.W.C.C. § 9A.08.030(1)(a) which provides: "Conduct is the cause of a result when . . . it is conduct but for which the result in question would not have occurred . . . ." Section 9A.08.030(a)(b) further provides that if Title 9A or a statute defining an offense imposes additional causal requirements, they too must be met.

Once cause-in-fact has been established, criminal liability will attach under the Proposed Code only if a close relationship exists between the defendant's mental state and the particular result caused by the defendant's conduct. The Code has adopted an elaborate set of rules specifying how close this relationship must be.[10] This specificity is a marked improvement over the uncertainty inherent in the term "proximate cause."

II. AFFIRMATIVE DEFENSES

A. Burden of Proof

Section 9A.04.120(1) of the Proposed Code codifies the presumption of innocence and reasonable doubt standard.[11] While both these principles are universally declared to be fundamental to our criminal law, Professor Fletcher has accurately noted that the state need not prove some issues pertaining to the defendant's guilt beyond a reasonable doubt.[12] The most notable example in Washington is the insanity defense which presently requires the defendant to prove his insanity by a preponderance of the evidence.[13]

This doctrinal inconsistency is, for the most part, corrected by the Proposed Code. R.W.C.C. § 9A.04.120(2) requires the state to disprove beyond a reasonable doubt nearly all affirmative defenses raised by supporting evidence.[14]

In addition to bringing more consistency into our criminal law, the Proposed Code's concept of affirmative defenses is fairer from the standpoint of the parties' resources. The indigent defense bar has not developed or used the investigative agencies or tools necessary to compete equally with the state's well-trained police force, equipped with the latest electronic and laboratory equipment. Most private criminal lawyers have no investigative resources readily available un-

10. R.W.C.C. § 9A.08.030; M.P.C. § 2.03, Comment (Tent. Draft No. 4, 1955).
11. The reasonable doubt standard has been given constitutional stature by the United States Supreme Court in *In re* Winship, 397 U.S. 358 (1970).
12. Fletcher, *supra* note 6, at 883.
13. State v. Tyler, 77 Wn.2d 726, 466 P.2d 120 (1970); State v. Bower, 73 Wn.2d 634, 440 P.2d 167 (1968); State v. Clark, 34 Wash. 485, 76 P. 98, 101 Am. St. Rep. 1006 (1904).
14. For further discussion of this point, see Professor Cosway's article, *The Revised Washington Criminal Code's Vital Structure: The Burden of Proof, Felony Murder, and Justification Provisions,* at pp. 67-69 of this volume.

less an affluent client is willing to hire the services of a private detective.

The traditional rationale in favor of placing the burden of persuasion of affirmative defenses upon the defendant (usually by a preponderance of the evidence) is threefold. First, the nonexistence of some defenses is difficult to prove. Second, the facts establishing a defense are best known to the defendant. And third, since the facts constituting the defense occur infrequently, *e.g.*, most defendants are not criminally insane, the defendant should bear the burden of persuasion as to those facts. The first part of the rationale is correct—it is difficult to prove the nonexistence of a valid defense. But that argument reflects a misunderstanding of the presumption of innocence and the reasonable doubt standard. These two "bedrock" principles of our criminal law are products of a belief, ancient in origin, that the state bears a heavy burden of justification for depriving a person of his liberty or life. This concern for the individual's dignity has been manifested in various rubrics. It prompted Hale to proclaim that it is better to acquit five guilty men than to convict one who is innocent.[15] The point is simply this: it is supposed to be difficult for the state to prove a defendant's guilt.

The second argument is rooted in the private law concept that if the facts supporting a defense are within the defendant's peculiar knowledge, it is more equitable to require the defendant, not the plaintiff, to prove the facts. The rule's applicability to the criminal law is questionable. The purpose of civil litigation is to arrive at a fair and efficient settlement of a dispute. "In a civil suit . . . we view it as no more serious in general for there to be" an error in the defendant's favor than in the plaintiff's.[16] But in the criminal context, the social disutility of convicting an innocent man is not equivalent to that of acquitting one who is guilty. The problem then in criminal trials is not one of reaching a fair settlement, but of justifying the use of the state's coercive powers to condemn and punish.

The third argument rests upon the same misplaced rationale as the second, with an added defect. To argue that since the facts supporting a particular defense occur infrequently, the accused therefore should

15. 2 M. HALE, PLEAS OF THE CROWN 289 (1694). *See also* G. WILLIAMS, PROOF OF GUILT 186-90 (3d ed. 1963).
16. *In re* Winship, 397 U.S. 358, 364 (1970) (dissenting opinion).

bear the burden of persuasion as to those facts, proves too much. It is similarly infrequent that a defendant secures an acquittal. Using the logic above, it would thus seem equally reasonable to require the accused to prove his innocence once the decision to prosecute has been made. This is not the place to discuss the merits of presumptive innocence over presumptive guilt.[17] Let it suffice to say that the presumption of innocence is deeply rooted in our system of criminal jurisprudence and few advocate its repeal.

B. Criminal Insanity

The proposed insanity test[18] is a much needed improvement over the current M'Naghten Rule. While some commentators[19] argue that M'Naghten, if construed properly, is as flexible as any of the current proposals, the Washington Supreme Court has interpreted the rule so restrictively that it is little better than the primitive "Wild Beast" test.[20]

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17. The classic exposition on the presumption of innocence is found in J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 551 (1898).

18. The proposed insanity test is located in R.W.C.C. § 9A.12.010 and provides:
(1) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either:
(a) to know or appreciate the nature and consequence of such conduct; or
(b) to know or appreciate the criminality of such conduct; or
(c) to conform his conduct to the requirements of law.
(2) Mental disease or defect excluding responsibility is an affirmative defense.
For a detailed analysis of the proposed test, see the Note on "Principles of Liability and Responsibility" at p. 156 of this volume.

19. *See* Mueller, *M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity,* 50 GEO. L.J. 105 (1961); Livermore and Meehl, *The Virtues of M'Naghten,* 51 MINN. L. REV. 789 (1967).

20. For a discussion of the "Wild Beast" test and the Washington Supreme Court's construction of the M'Naghten Rule, *see* Professor Morris' excellent article, *Criminal Insanity,* 43 WASH. L. REV. 583 (1968).

Commenting upon the Washington court's interpretation of M'Naghten, Judge Bazelon has said "that a test of responsibility which allows Don White (State v. White, 60 Wn. 2d 551, 374 P.2d 942 (1962), *cert. denied,* 375 U.S. 883 (1963)) to be sentenced to death is no test at all." Bazelon, *The Concept of Responsibility,* 53 GEO. L.J. 5, 13 (1964).

Professor Morris provides a useful commentary on the *White* case:

> At the age of twenty-two, Don White beat an old woman to death in a laundry room. He raped her, took her ring and watch (which were of little value), then spent more than an hour in the room, folding laundry, placing some of it under the head of the dying woman, and chatting with the unsuspecting people who came into the laundry. Later that day he killed a longshoreman, whom, like the old woman, he had never seen before. He stabbed him with a knife, then wandered a little distance away to drink wine and watch the police come and go. At trial, expert witnesses on both sides testified to the accused's serious mental disorder. Consider his background. He had never lived with his mother, who was only thirteen at his birth. When he was four months old, a redcap at a railway depot hailed the woman who

Opposition to the proposed criminal insanity rule stems from a fear that it will result in more acquittals. But Mr. Justice Blackmun (then circuit judge) has suggested "that the exact wording of the [insanity] charge and the actual name of the [insanity] test are comparatively unimportant and may well be little more than an indulgence in semantics."[21]

Why should prosecutors in this state more than casually concern themselves with the proposed insanity test? Why should they care whether a defendant is labelled "guilty" or "criminally insane"? They should care only that, by whatever means, society is protected from the unsafe defendant. Under either the current or Proposed Code, a person convicted of a crime may or may not serve time in a state institution.[22] Similarly, under the Proposed Code, a person acquitted by reason of criminal insanity may or may not serve time in a mental institution.[23] The prosecutor's concern should not extend to whether the defendant is incarcerated in a penal or mental institution.

The Proposed Code changes the burden of proof requirement in the insanity defense. Presently, the accused bears both the burden of persuasion by a preponderance of the evidence and the burden of production. Under the Proposed Code, once some evidence of his insanity is introduced, the state bears the burden of disproving the accused's criminal insanity beyond a reasonable doubt. One state court has held that the burden of proof placed on the state under the Code is constitutionally required by the reasonable doubt standard.[24] The Code's pro-

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became his adoptive mother to ask if she wanted a baby. Despite his superior intelligence—his IQ was about 130—he was expelled from every school he attended. Nine times he was in state institutions, with a growing record of violence and delinquency. In 1951, a child psychiatrist said he was suffering from "a very malignant mental illness," that "institutionalization is absolutely necessary," and that "he will almost certainly wind up in prison or in a state mental hospital." It is apparent that, whatever the cause, the defendant was terribly sick, that his sickness was of long duration, and that it had been brought to the attention of the authorities time and time again. Yet, Don White could not qualify under Washington's "minimized insanity defense."

Morris. *Criminal Insanity,* WASH. L. REV. 583, 615-16 n. 159 (1968).

21. Dusky v. United States, 295 F.2d 743, 759 (8th cir. 1961), *cert. denied,* 368 U.S. 998 (1962).

22. *See* WASH. REV. CODE §§ 9.92.060 and 9.95.200 (Supp. 1971). These sections of Title 9 are not repealed by the Proposed Code. R.W.C.C. § 9A.92.010, Comment at 371-2.

23. WASH. REV. CODE §§ 10.76.030-.040 (1959) provide for the commitment of a defendant labelled "insane" if the jury believes it necessary for the protection of society.

24. People *ex rel.* Juhan v. District Court for the County of Jefferson, 165 Colo. 253, 439 P.2d 741 (1968). In light of *In re* Winship, 397 U.S. 358 (1970), it may be that the due process clause of the fourteenth amendment now compels this result.

cedure is also the rule in the federal system, and during this writer's tenure as a federal prosecutor it did not seem to create an undue burden for the prosecution. This was probably due to two factors. First, presuming the sanity of the accused and requiring him to raise the issue of insanity modifies the reasonable doubt standard by encouraging the jury to inquire whether the accused has, because of his insanity, *created* a reasonable doubt as to his guilt.

Proving beyond a reasonable doubt that a defendant is sane is logically equivalent to the defendant's creating a reasonable doubt that he is insane. The difference is one of focus which in practice produces a change in the burden of persuasion. Requiring proof beyond a reasonable doubt compels the state to overcome the presumption of innocence and persuade the jury of the defendant's guilt. Creating a reasonable doubt, on the other hand, requires in practice that the defendant overcome the presumption of sanity[25] and persuade the jury of his insanity.

Second, in order to be acquitted, the defendant must have created a *reasonable* doubt, not just any doubt, in the minds of the jury. If the state were required to erase all doubts and suspicions about an accused's guilt, most defendants would be acquitted. Since it is a *reasonable* doubt the accused must create concerning his insanity, the accused must necessarily introduce substantial evidence supporting his claim.

Some writers have urged that the insanity defense be abolished.[26] Their arguments are not unpersuasive. Many psychiatrists contend that legal insanity rules have little relevance to the needs of a defendant.[27] They argue that it seems inappropriate for lawyers and ju-

25. The significance of the difference I have outlined is highlighted when we consider that the presumption of innocence is more easily overcome than the presumption of sanity. Because most defendants are convicted and not acquitted, Professor McCormick says the presumption of innocence is not a presumption at all, but rather an assumption that disappears upon proof of unlawful conduct. C. MCCORMICK, EVIDENCE § 342 (2d ed. 1972). However, most defendants are sane. Therefore, the presumption of sanity operates as a true presumption which does not "disappear," but which must be overcome.

26. *See, e.g.*, Goldstein and Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L.J. 853 (1963). This may not be possible in Washington. *See* State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910) where the Washington Supreme Court held that the right to a trial by jury under Washington's constitution requires an insanity defense.

27. *See e.g.*, Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 60-61 (1961), M.P.C. § 4.01, Comment (Tent. Draft No. 4, 1955); M. GUTTERMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 406 (1952); G. ZILBOORG, MIND, MEDICINE AND MAN 274 (1943); MCCARTHY & MAEDER, INSANITY AND THE LAW 136 (1928).

ries to decide at what point along a scale of graded mental impairments an accused should be treated in a mental institution rather than "rehabilitated" in a penal institution. Such writers contend that triers of fact should determine if the accused performed the acts which are defined as unlawful, and if so, then determine the appropriate disposition. If the trier of fact determines that the defendant is in need of psychiatric treatment, then an appropriate disposition might be commitment to a mental institution. Resistance to this viewpoint seems to be based on the notion that some people should be punished for their misdeeds while the insane should be afforded psychiatric treatment. Punishment is by now a discredited concept in criminal law. The only justification for imprisoning an individual is that he is dangerous to others or that he repeatedly takes their property. No person should be so isolated without the state's making a great effort to modify the offending behavior. This should hold true whether the person is labeled sane or insane. Needless to say, this view was not shared by the advisory committee.

C. *The Rule of Diminished Capacity*

The rule of diminished capacity permits the defendant to introduce evidence of mental impairment, however caused, which is relevant in determining whether the accused committed the unlawful act with the mental state required by the offense with which he is charged. Subsequent to the drafting of the Proposed Code, the Washington Court of Appeals ruled that Washington now ranks among those jurisdictions approving the rule of diminished capacity.[28] The Washington Supreme Court had earlier indicated that Washington was headed in that direction.[29]

Those drafting the Proposed Code did not choose to include a section expressly dealing with diminished capacity. The rule is recognized, either by case law or statute, in at least seventeen other jurisdictions,[30] and its adoption is recommended by the American Law Institute.[31]

28. State v. Carter, 5 Wn. App. 802, 490 P.2d 1346 (1971).
29. State v. White, 60 Wn.2d 551, 588, 374 P.2d 942, 964 (1962) *cert. denied*, 375 U.S. 883 (1963).
30. Brief of John M. Junker and Harvey H. Chamberlin as Amicus Curiae at 12-13, State v. Carter, 5 Wn. App. 802, 490 P.2d 1346 (1971).
31. M.P.C. § 4.02.

Four states have expressly rejected the rule.[32] Their reasons for doing so do not contest the logic of diminished capacity but instead reflect policy considerations.[33] The reporter of the Model Penal Code replies to such objections as follows:[34]

> We see no justification for a limitation of this kind. If states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible . . . to the same extent as any other relevant evidence.

Professors LaFave and Scott comment that "The logic of the [diminished capacity rule] would seem to be unassailable."[35] Since most crimes require proof of the existence of a particular mental state, it follows that if the accused did not entertain the requisite mental state, he cannot be convicted of the crime charged. Accordingly, the accused should be permitted to prove that he lacked the necessary state of mind.[36]

The rule of diminished capacity is analogous to the present rule of voluntary intoxication, which permits the jury to "take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act."[37] It

32. Fox v. State, 73 Nev. 241, 316 P.2d 924 (1957); Foster v. State, 37 Ariz. 281, 294 P. 268 (1930); State v. Van Vlack, 57 Idaho 316, 65 P.2d 736 (1937); State v. Ganet, 391 S.W.2d 235 (Mo., 1965).

33. As one student states:

> Courts which have not approved the rule of diminished capacity do so on four grounds. First, they may reject the proposition that mental impairment exists in varying degrees. Instead, such courts view mental impairment as an 'all or nothing' proposition: the defendant is either legally insane or legally sane . . . . Second, even assuming that mental impairment exists in varying degrees, these courts contend that they involve distinctions too subtle for juries to apply . . . . Third, critics have argued that the rule would lead to compromise verdicts; that juries divided upon the issue of insanity would compromise by convicting for a lesser offense than the one charged . . . . Finally, concern has been expressed that the rule would result in inadequate protection for the public. Instead of being committed indefinitely under a verdict of insanity, some defendants, it [is] feared, will serve shorter prison sentences for lesser offenses and be released when they still constitute a serious threat to society.

Diminished Responsibility and Diminished Capacity: Analyzed and Distinguished 43-45 (unpublished seminar paper on file in the University of Washington Law Library, 1972) (footnotes omitted).

34. M.P.C. § 4.02, Comment (Tent. Draft No. 4, 1955).

35. W. LaFave & A. Scott, Criminal Law § 42 at 331 (1972).

36. People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492, 503 (1959); People v. Wells, 33 Cal.2d 330, 202 P.2d 53, 63 (1949); *cert. denied,* 338 U.S. 836 (1949); S. Brakel & R. Rock, The Mentally Disabled and the Law 394 (rev. ed. 1971).

37. R. Perkins, Criminal Law 900 (2d ed. 1969).

would be anomalous to permit a defendant whose mental faculties were diminished due to intoxication to offer evidence of his intoxicated condition and to deny the same priviledge to a defendant whose diminished mental capacity stems from another source. Given two minds, equally prostrated, it makes no sense, legally or otherwise, to distinguish the defendant with a chronic mental deficiency from one with a similarly acute deficiency induced by alcohol. In either case, the focus of the inquiry should be whether mental incapacitation prevented the accused from entertaining a particular mental state. The source of that incapacity should be immaterial.

The rule of diminished capacity may be constitutionally compelled. The United States Supreme Court in *In re Winship* stated:[38]

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

If the accused is not permitted to introduce evidence of mental impairment tending to negative the existence of an essential element of the crime charged, the prosecution is not proving "beyond a reasonable doubt . . . every fact necessary to" establish guilt.[39] The prosecution in such instances is being aided by a conclusive presumption that mental impairment, not amounting to legal insanity, does not preclude the defendant from acting with the specific mental state required of the offense charged.

Furthermore, to deny an accused the opportunity to present evidence of mental impairment negating an element of the offense deprives him of his constitutional right to a jury trial on every material issue.[40] The United States Supreme Court has said:[41]

> [W]hen a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or *otherwise,* as to be capable of deliberate

38. 397 U.S. 358, 364 (1970).
39. *Id.*
40. People v. Mosher, 1 Cal. 3d 379, 82 Cal. Rptr. 379, 461 P.2d 659 (1969).
41. Hopt v. United States, 104 U.S. 631, 634 (1891) (emphasis added).

> premeditation, *necessarily becomes a material subject of consideration by the jury.*

In addition to the persuasive argument that the rule of diminished capacity is compelled by the United States Constitution,[42] there are also grounds for asserting that it is required by the Washington State Constitution.[43]

Since diminished capacity is not of statutory origin but is a judicially created rule compelled by logic, it should stand without statutory authority. However, if sections 9A.04.120(1) and 9A.08.020(1) of the Proposed Code are to be given substance, diminished capacity must be implicit in the Proposed Code. R.W.C.C. § 9A.04.120(1) requires the state to prove each element of an offense beyond a reasonable doubt. As indicated earlier,[44] this burden is not met if an accused is not permitted to demonstrate that he lacked the requisite mental state during commission of the unlawful act. Section 9A.08.020(1) states that, except in cases of absolute liability, criminal liability will not attach unless the state proves the existence of a culpable mental state. Unless an accused is "allowed to show that in fact, subjectively, he did not possess the mental state . . . in issue,"[45] it cannot be said that the requirement of section 9A.08.020(1) has been met.

Although implicit in the Proposed Code, express reference to diminished capacity would have the advantage of assuring its use and providing courts with some measure of the contours of the rule. For this reason, I propose that the following statute be added to the Revised Washington Criminal Code. The language of the proposed statute is based on the opinion of the court of appeals in *State v. Carter*.[46]

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42. *See* notes 38-41 *supra*, and accompanying text.

43. In State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910), the Washington Supreme Court declared a statute eliminating the insanity defense violative of the right to a jury trial protected by the state constitution (WASH. CONST. art. 1, § 21). The court declared that where intent is made an element of the crime charged, the legislature cannot preclude a defendant from presenting evidence that he was mentally incapable of acting with criminal intent. "To take from the accused the opportunity to offer evidence tending to prove this fact [mental incapacity], is, in our opinion, as much a violation of his constitutional right of trial by jury as to take from him the right to offer evidence before the jury tending to show that he did not physically commit the act . . . ." (60 Wash. at 119, 110 P. at 1024).

44. *See* note 38 *supra*, and accompanying text.

45. People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492, 503 (1959).

46. 5 Wn. App. 802, 490 P.2d 1346 (1971).

9A.12.020. Diminished Capacity.
(1) Competent evidence of mental impairment is admissible whenever it tends logically and by reasonable inference to prove or disprove that the defendant acted with a mental state which is an element of the offense.
(2) Diminished capacity is an affirmative defense.

D. Entrapment

Section 9A.16.100 of the Proposed Code takes a sound theoretical step forward in making entrapment an affirmative defense. Several valid arguments may be advanced against permitting the state to induce the commission of a crime. When police officers engage in such practices, they generate disrespect for law enforcement. The officer's image as a protector turns into that of an inciter. Law enforcement officers thereby create an atmosphere conducive to corruption. They themselves become part of a criminal web and acquire the power of "crimemakers."[47] One would think that law enforcement officers could better spend their time investigating the many crimes that do not need state aid for their commission.[48]

But while the defense is a solid step forward jurisprudentially, it is of doubtful practical value for the defense counsel. For the defense to be successfully asserted, counsel must produce some evidence that the defendant had no predisposition to commit the crime charged. This is next to impossible to do. Most persons entrapped or "induced" into committing crime did entertain some idea of committing the offense charged. But whether they would have committed the offense "but for" the inducement is another question. The focus of the entrapment defense is not whether the accused committed the crime, for that is assumed; rather it is whether the police have been sufficiently culpable to justify freeing the accused. "It is the attempt to deter wrongful conduct on the part of the government that provides the justification for . . . the defense of entrapment . . . ."[49] Thus, the entrapment defense in effect asks the jury to weigh the wrongfulness of the police. The re-

47. M.P.C. § 2.10, Comment (Tent. Draft No. 9, 1959).
48. "When officers are engaged in persuading citizens to criminal acts, they are absent from their proper task of apprehending those offenders who act without encouragement." M.P.C. § 2.10, Comment at 14 (Tent. Draft No. 9, 1959).
49. M.P.C. § 2.10, Comment (Tent. Draft No. 9, 1959). *See* Saunders v. People, 38 Mich. 218, 222 (1878) and United States v. Whitter, 28 F. Cas. 591 (No. 16, 688) (C.C.E.D. Mo. 1878) (concurring opinion) for two early cases grounding entrapment on public policy considerations.

porter to the Model Penal Code concludes that "[J]uries are apt to give great latitude to the police, at least in relation to an otherwise guilty defendant."[50]

The state can attempt to negative entrapment by presenting evidence of the defendant's criminal record and general reputation.[51] With evidence of the accused's "bad" character before the jury, "[t]here is the danger that the jury will reject the defense of entrapment, whatever its merits . . . ."[52]

The rationale for entrapment should be based on an analysis of legal causation. If it cannot be said that a person would have acted in a particular way without the inducement of another, then the inducement should be considered a contributing cause of the act. Where the inducement does nothing more than encourage a person to commit an act which he would have committed anyway, the inducement cannot fairly be said to have caused the act. But when the person succumbs to ordinary human weakness and is induced to perform an act which he would not ordinarily perform, that inducement is a cause of the act and the actor is an agent of the inciter. Ordinarily, the inciter would be liable for the criminal behavior of his agent.[53] However, when the inciter is not criminally liable, *e.g.*, because he is a police officer, his agent should not be criminally liable. This analysis explains why some informants are shielded from prosecution for what would otherwise be criminal behavior. This analysis should also be applied when a police officer causes another to commit a crime. Since the officer is protected from prosecution, his agent, the defendant, should also be protected. Similarly, since the officer is not considered "guilty" of criminal behavior, his agent should not be stigmatized as guilty.

The object of this discourse is to move the focus of an entrapment inquiry away from "weighing" the guilt of the inciter and his agent toward an independent, objective inquiry into the inciter's behavior. If entrapment is thought of as a causation problem as it should be, then

50. M.P.C. § 2.10, Comment (Tent. Draft No. 9, 1959).

51. *Id.* For an idea of the scope of the evidence some courts have permitted to be introduced, *see* Sullivan v. United States, 219 F.2d 760 (D.C. Cir. 1955) (evidence of past criminal conduct); Washington v. United States, 275 F.2d 687 (5th Cir. 1960) (reputation); Trice v. United States, 211 F.2d 513 (9th Cir. 1954) (reasonable suspicion of police officers); Carlton v. United States. 198 F.2d 795 (9th Cir. 1952) (hearsay evidence of predisposition).

52. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 48, at 373 (1972); *accord,* Sherman v. United States, 356 U.S. 369, 382 (1957) (Frankfurter, J., concurring).

53. *See e.g.,* R. PERKINS, *supra* note 37, at 658, 663; W. LAFAVE & A. SCOTT, *supra* note 52, § 63 at 497-8.

the inquiry will focus on the acts of the inciter which allegedly caused the criminal behavior. If the inciter's inducement would create a "substantial risk"[54] that a person indisposed to criminal behavior would commit the induced act, then the inducement should be considered the legal cause of the act. And, as indicated above, if the inciter is deemed innocent, his agent also would be considered innocent. Since the inquiry is properly an objective one focusing on the inciter's behavior and its causal effect upon the average person, the character of the agent is irrelevant. The test should be simply whether the inducement exploited ordinary human weakness.

III. SUBSTANTIVE OFFENSES

A. Conspiracy

Civil libertarians harbor a skepticism about the crime of conspiracy. Historically, conspiracy has been a prime tool of political suppression.[55] The history of the labor movement is replete with examples of this suppression.[56] And more recently we have witnessed the use of the criminal conspiracy charge in such a way as to pose a threat to First Amendment freedoms.[57]

History shows that every conspiracy statute can be an instrument of abuse. Judge Learned Hand called conspiracy "that darling of the modern prosecutor's nursery."[58] Past abuse has produced a just concern about the dangers of unfairness to conspiracy defendants.[59]

54. The requirement of a "substantial risk" is taken from M.P.C. § 2.13(1)(b).

55. *See generally* P. WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921); Arens, *Conspiracy Revisited,* 3 BUFFALO L. REV. 242 (1954).

56. *See* Cousens, *Agreement as an Element in Conspiracy,* 23 VA. L. REV. 898 (1937).

57. *See* J. MITFORD, THE TRIAL OF DR. SPOCK (1969); Nathanson, *Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis to Dr. Spock,* 65 NW. U.L. REV. 153 (1970).

58. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925). This is due to the elusive nature of conspiracy as a legal concept, and to special rules of evidence given application in the conspiracy context. Professor Sayre has termed conspiracy "A doctrine so vague in its outlines and uncertain in its fundamental nature [that it] lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought." Sayre, *Criminal Conspiracy,* 35 HARV. L. REV. 393 (1922). And remarking that the history of conspiracy "exemplifies the tendency of a principle to expand itself to the limit of its logic," Mr. Justice Jackson labelled the crime an "elastic, sprawling and pervasive offense . . . so vague that it almost defies definition. [It is] chameleon-like, [taking] on a special coloration from each of the many independent offenses on which it may be overlaid." Krulewitch v. United States, 336 U.S. 440, 445-47 (1949) (Jackson, J., concurring).

59. *See* Goldstein, *The Krulewitch Warning: Guilt by Association,* 54 GEO. L. REV.

The Proposed Code provides a limited affirmative defense to conspiracy based on the actor's renunciation of criminal intent. In order to invoke the defense, the actor must have "thwarted the success of the conspiracy."[60] This seems little more than a reward offered for the prevention of crime. While in most cases, the crime of conspiracy will have been completed before the renunciation, permitting an actor to undo what he has already done manifests both equity and good tactics. Tactically, it is good policy to encourage conspirators to turn back at any point before their inchoate crime results in concrete harm. Equitably, one instinctively feels that a person should be able to undo what he has done when no social harm has yet occurred.

Unfortunately, problems of proof prevent the proposed renunciation defense from being of much practical value to defendants. Unless the actor thwarts the success of the conspiracy with the aid of third parties, *e.g.*, the police, he is not likely to be successful in urging the defense. Without the testimony of third parties, an accused would have only his word upon which to plead renunciation.

To require a successful thwarting of the target crime seems unduly strict. It would better fulfill the tactical and equitable goals of the defense to require renunciation plus some overt attempt to discourage or thwart the prohibited acts. The accused would still have difficulty proving the defense, but there is little utility in prosecuting a person who took reasonable and substantial steps to prevent the crime. Such a defense would also permit the accused to escape punishment in cases where he "tips" the police but they fail to stop the conspiracy. Whether one receives a prison sentence should not depend on the success or failure of the law enforcement agencies. Giving them sufficient time to prevent execution of the conspiracy should be enough.

The Proposed Code does not expressly make "withdrawal"[61] an

133 (1965); Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1 (1957).

60. R.W.C.C. § 9A.28.040(3). One could argue that a conspirator can assert the defense of renunciation under the Code if he merely has "abandoned his effort to commit" the substantive crime, because section (1) of R.W.C.C. § 9A.28.040 appears to apply to conspiracy, attempt, and solicitation. However, since the comments state that this section follows the Model Penal Code and since the Model Penal Code limits renunciation by abandonment to attempt, it appears that R.W.C.C. § 9A.28.040(1) should, and in practice will, apply only to attempt. *Compare* M.P.C. §§ 5.01-5.03 *with* R.W.C.C. § 9A.28.040.

61. Withdrawal "refers to voluntary action by a conspirator legally effective to terminate his relationship to the conspiracy." Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 957 (1959).

affirmative defense to conspiracy. Withdrawal is normally treated as a defense which permits an accused to avoid conviction if he withdraws from the conspiracy before an overt act is committed by communicating his decision to his conspirators.[62] Analytically, however, withdrawal is not a defense at all. If conspiracy requires proof of an overt act and no overt act was committed while the accused was a conspirator, then he simply did not commit conspiracy. Since the Proposed Code contains an "unequivocal step" requirement,[63] it would seem that the defense of withdrawal is implicit in the statute defining the offense.

As a former prosecutor who has successfully used the conspiracy tool, it seems to this writer that only one justification for the offense exists: cases where the target crime or the means thereto involve destructive or lethal force, and the police arrest the plotters before the fire is set, the trigger pulled, or the bomb thrown. Where the safety of persons is in jeopardy, it would be reasonable to permit the use of the conspiracy charge; waiting for an attempt or a charge of possession of destructive devices might involve intolerable risks. However, once the act has occurred, violent or otherwise, the government should be required to charge the substantive offense, prosecuting aiders and abettors by means other than the conspiracy exception to the hearsay rule.[64]

B. Failure to Disperse

R.W.C.C. § 9A.84.020 defines the crime of failure to disperse. The offense consists of two elements. First there must be acts by "the ac-

62. *Id.* at 958.
63. R.W.C.C. § 9A.28.030(1)(a).
64. The general rule is that hearsay is not admissible in a criminal prosecution. But the co-conspirator exception provides that:

> any act or declaration by one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator provided that a foundation for its reception is laid by independent proof of the conspiracy.

Levie, *Hearsay and Conspiracy,* 52 MICH. L. REV. 1159, 1161 (1954); *See also* J. WIGMORE, EVIDENCE § 1079 (3d ed. 1940).

The hearsay exception has two requirements: (1) the act or declaration must be in furtherance of the conspiracy; and (2) the existence of the conspiracy must have been independently established. Courts, however, have been sympathetic to the problems of the prosecution in presenting the evidence of conspiracy. The result has been to apply the first requirement broadly and largely ignore the second, so that virtually all the evidence relating to the conspiracy is heard by the jury. W. LAFAVE & A. SCOTT, *supra* note 52, § 61 at 457.

tor's group which create a substantial risk of harm or injury to person or property . . . ."[65] Second, the actor must intentionally refuse to obey an order to disperse issued by a law enforcement officer.

This statute is faulty in two respects. First, there are no standards governing how a peace officer should respond to a group which creates a substantial risk of serious disorder. Under the Proposed Code, all that is necessary is for the officer to say, "Go home!" If the order is not obeyed, then each member of the group can be prosecuted for failure to disperse. The statute contains no requirement that the order be reasonably necessary to prevent or control a potentially disruptive situation. Without this requirement, an officer can disperse a group when a more limited order, *e.g.*, to move across the street, would be sufficient to defuse the situation.[66] The public is entitled to have order maintained. It is also entitled to reasonable standards governing how order is to be maintained. A statute similar to that found in the Proposed Revised Seattle Criminal Code[67] will be suggested below.

The second fault in section 9A.84.020 lies in its failure to exempt from the dispersal order newsmen covering the event. Members of the press should not be allowed to hamper law enforcement efforts. However, when they create no physical obstruction to law enforcement, newsmen perform a valuable service in reporting demonstrations. Unjustified complaints of police brutality will be minimized if the press is present. Peace officers are much less likely to overreact to an irritating and potentially disruptive situation if they know that their efforts are being watched by the media. Events have demonstrated the need for special protection for newsmen. During the widespread demonstrations held in Seattle, Washington in May, 1970, there were complaints of policemen smashing cameras and exposing film.

Enactment of the following statute would correct the two faults discussed above:

65. R.W.C.C. § 9A.84.020, Comment at 339.

66. As indicated in the text, the offense of failure to disperse consists of two elements: (1) a substantial risk of harm; and (2) a refusal to obey an order. A crucial question arises from this. If a "substantial risk" exists and the peace officer orders the group to "go home," must the group go home, or can they themselves defuse the situation through some other course of conduct? If some other course of conduct is followed by the group, the second element of the offense, refusal to obey an order, is met. However, the first element, the "substantial risk" has seemingly disappeared. The issue is whether there is a concurrence of the two elements at the moment the order is disobeyed or whether the group retains power to abate the first element. The Code does not provide a clear answer, although the latter resolution would be preferable.

67. PROP. REV. SEATTLE CRIM. CODE § 12A.16.040 (Tent. Draft 1971).

9A.84.020. Failure to Disperse.

(1) As used in section (2) of this section 9A.84.020 "public safety order" is an order issued by a peace officer (or other public servant engaged in enforcing or executing the law) designed and reasonably necessary to prevent or control a serious disorder, and protect persons or property and the exercise of lawful rights. No such order shall apply to a news reporter or other person observing or recording the events on behalf of the public press or other media, unless he is physically obstructing lawful efforts by such officer to disperse the group.

(2) A person is guilty of failing to disperse if:

(a) he congregates with a group of four or more other persons and there are acts of conduct within that group which create a substantial risk of causing injury to any person or substantial harm to property; and

(b) he intentionally refuses or fails to obey a public safety order to move, disperse, or refrain from specified activities in the immediate vicinity.

(3) Failure to disperse is a misdemeanor.

C. *Public Intoxication*

Alcoholism is not an appropriate problem for the criminal law.[68] Alcoholics are neither cured nor deterred by criminal punishment. The appropriate disposition for alcoholics is referral to a social welfare agency. In 1972, the Washington legislature made a similar determination and enacted the Uniform Alcoholism and Intoxication Treatment Act.[69] Since the legislature addressed itself to this problem and made an appropriate determination, that determination should be final. Section 9A.84.050 of the Proposed Code describes the crime of public intoxication. That crime should be omitted from the Code.

D. *Bigamy*

Professor Glanville Williams contends that bigamy is an offense "based largely on word-fetichism . . . ."[70] It was not a crime under the common law of England, originating instead as an ecclesiastical

68. *See* Morris, *Overcriminalization and Washington's Revised Criminal Code*, at p. 11 of this volume.

69. Ch. 122 [1972] Wash. Laws 2nd Ex. Sess.

70. Williams, *Language and the Law*, 61 LAW Q. REV. 71, 76 (1945).

offense.[71] In 1603 bigamy became a capital offense by the statute of James I. Professor Williams suggests that it was "not without significance that this act immediately precedes on the statute book James I's notorious Witchcraft Act."[72] Bigamy was made a crime against the King because it was regarded as akin to blasphemy. As Professor Kenny states, it was an offense "involving an outrage upon public decency by the profanation of a solemn ceremony."[73] Originally, a capital felony, the Proposed Code has relegated this blasphemy to a third degree felony punishable by five years' imprisonment and/or a fine of up to $5,000.

What confuses any discussion of bigamy is the fact that it usually involves conduct which society cannot view with approval. Generally bigamy involves desertion of the legal spouse, adultery, and a deception upon the minister and Keeper of the King's records. Where deception of the second spouse exists, something akin to rape is involved. All of these factors are, however, logically irrelevant to the offense. Desertion is not currently a crime, nor is it made so by the Proposed Code. Adultery, for good reason, is not made a crime under the Proposed Code.[74] Nor is any type of sexual relation procured through fraud and deceit made criminal by the Proposed Code.[75] Falsifying the King's records is already made punishable by R.W.C.C. §§ 9A.72.010-.030. Since for the most part we do not treat as criminal the real social mischiefs involved in bigamy, why do we persist in criminalizing "the profanation of a solemn ceremony"? Just for a moment, consider what this means. If X deserts his wife to live notoriously with his mistress and father her children, he commits no crime either in deserting his wife or in committing adultery (under the Proposed Code). But if X and his mistress desire to give their offspring a name, through a marriage deemed legally void and a ceremony of words empty to all but themselves, both are guilty of a felony punishable by five years' imprisonment and/or a $5,000 fine.

Appeasing the wrath of the Deity may have inspired the Act of

71. 2F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 543 (2d ed. 1968).
72. Williams, *supra* note 70, at 61.
73. C. KENNY, OUTLINE OF CRIMINAL LAW 223 (19th ed. 1966).
74. *See* R.W.C.C. § 9A.64.020, Appendix.
75. The two most common examples of rape by fraud are where intercourse is procured under the pretense of medical treatment (*See* State v. Ely, 114 Wash. 185, 194 P. 988 (1921)) and where the defendant impersonated the woman's husband. *See generally,* R. PERKINS, *supra* note 37, at 164-66; M.P.C. § 207.4, Comments (14), (15) (Tent. Draft No. 4, 1955).

1603, but it can hardly justify continuing the offense today. It is irreconcilable with the secular law of divorce. If a bigamous marriage is sinful, but a second (or third, or fourth) marriage following a secular divorce is not, it must be because the state is possessed with divine authority to dissolve marriages. In other words, our divorce law is part of the law of God.[76]

Modern criminal jurisprudence holds that behavior should not be proscribed absent harmful social consequences. What are the harmful social consequences of bigamy? The only social mischiefs necessarily involved in bigamy are the deceit committed against the officer celebrating the void marriage and the falsification of the King's records. While not wishing to minimize the affront to the feelings of the officer, it hardly seems justifiable to protect these feelings with five years' imprisonment and/or a $5,000 fine. Most persons would agree that this deceit, taken by itself, would be more than adequately redressed by a small fine. Imprisonment is widely out of proportion to the social harm involved. As indicated earlier, the King's records are protected elsewhere in the Proposed Code.

Two other social mischiefs that are sometimes involved in bigamous marriages deserve mention. Sometimes the first spouse suffers an affront. This is to be regretted. However, since most personal affronts experienced in life do not entail criminal sanction, why should we single out this one as a reason to confer punishment? The Proposed

76. It is this absurdity that gives meaning to Mr. Justice Maule's satirical address to the poor wretch convicted of bigamy.

> CLERK OF ASSIZE. What have you to say why judgement should not be passed upon you according to law?
>
> PRISONER. Well, my lord, my wife took up with a hawker, and ran away five years ago; and I have never seen her since, and I married this woman last winter.
>
> MR. JUSTICE MAULE. I will tell you what you ought to have done; and, if you say you did not know, I must tell you that the law conclusively presumes that you did. You ought to have instructed your attorney to bring an action against the hawker for criminal conversation with your wife. That would have cost you about a hundred pounds. When you had recovered substantial damages against the hawker, you should have instructed your proctor to sue in the Ecclesiastical Courts for a divorce a mensa et thoro. That would have cost you two hundred or three hundred pounds more. When you had obtained a divorce a mensa et thoro, you would have had to appear by counsel before the House of Lords for a divorce a vinculo matrimonii. The bill might have been opposed in all its stages in both Houses of Parliament, and altogether you would have had to spend about a thousand or twelve hundred pounds. You will probably tell me that you never had a thousand farthings of your own in the world; but, prisoner, that makes no difference. Sitting here as a British judge, it is my duty to tell you that this is not a country in which there is one law for the rich, and another for the poor.

F. HEARD, ODDITIES IN THE LAW 48-49 (1881).

Code offers absolutely no redress to the wife who suffers an affront because her husband is living notoriously with his mistress. Where a bigamous marriage is the product of a fraud practiced upon an innocent person, a penal sanction may be justified. But as noted earlier, although fraud alone is not made criminal by the Proposed Code, when this wrongful conduct is combined with other social harms amounting to little more than nuisances, the Code transforms it into a felony.

Bigamy under the Proposed Code makes no sense unless predicated upon the idea that the marriage ceremony is a magic set of words to be protected from "profanation" at almost any cost. Of course, one must not discount the tremendous social importance served by the marriage ceremony. Through the force of tradition, it helps to preserve the institution of monogamy. It may be that criminal sanctions are justified if necessary to maintain this institution. But we should first inquire whether criminal sanctions are really needed for the institution's protection. It is suggested that the sanction of nullity and a reasonable fine coupled with the attendant exposure are sufficient deterrents to most bigamous marriages.

CONCLUSION

One final word needs to be said about the Proposed Code. The Code is not an easy document to read and understand. It is precisely and technically drawn. It is a document that reflects the thought and industry of scholars. Juries will no doubt require careful instruction on the meaning and application of the Code's provisions, and drafting new jury instructions will not be an easy task. The greatest labor will come in confining the instructions to a manageable length. But a thoughtful use of the English language can translate the technical wording of the Code into terms both easily understood by juries and conveyed with a maximum of word economy. If jury instructions *could* be easily drawn, it would mean the law was riddled with vagueness, a result to be avoided.

The Proposed Code is a marked improvement over the current criminal code. It represents a well thought out view of the criminal law. Its passage is recommended.