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A CRITIQUE OF THE PROPOSED WEST VIRGINIA CRIMINAL CODE*

ROBERT BATEY** and JAY MONTGOMERY BROWN***

I. INTRODUCTION

The proposed West Virginia Criminal Code\(^1\) will be introduced in the 1979 legislative session. The drafters, a subcommittee of the Joint Committee on Government and Finance, have requested comments, criticisms, and suggestions to be considered for incorporation in the final draft.\(^2\) This article is a response to that solicitation.\(^3\)

Those who favor codification of the substantive law of crimes frequently complain that it is hard to demonstrate the attraction of codification but easy to show its disadvantages. Codification results in loss of common-law flexibility and loss of the stability that is obtained by defining criminal behavior in terms refined by centuries of interpretation. Proponents of codification find it difficult to explain the gains which offset those losses, yet these propo-

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\(^1\) SUBCOMMITTEE ON CRIMINAL LAWS OF THE JOINT COMMITTEE ON GOVERNMENT AND FINANCE, WEST VIRGINIA LEGISLATURE, FIRST REVISED DRAFT, WEST VIRGINIA CRIMINAL CODE (1976) [hereinafter cited as WEST VIRGINIA CRIMINAL CODE].


\(^3\) Although the authors generally favor codification of common-law crimes, they have taken this opportunity to demonstrate some of the inadequacies of the proposed West Virginia Criminal Code in the hope that their comments, criticisms, and suggestions will be incorporated into the final draft.
ments are convinced that codification of the criminal law does achieve more than it sacrifices. According to them, criminal law in West Virginia resembles a huge castle. Hundreds of years ago, the castle was nothing more than a rude building composed of a few simple rooms; time, however, brought both new construction and renovation. Rooms were added as the needs and capacities of the inhabitants grew, and when additions could not be built, the occupants put old rooms to new uses. The result was a house woefully deficient in design. Lacking an overall blueprint, generations of designers failed to coordinate the functions of the various rooms and produced a structure so haphazard as to be uninhabitable.

West Virginia criminal laws grew as that castle grew—without any overall design. Proponents of criminal law codification now want to move out of the castle and into a modern home—a home whose floorplan coordinates all the rooms in a sensible, rational way.

As shown by the analogy, the principal achievement of codification is that it provides an opportunity to coordinate the mass of criminal statutes into a coherent whole and makes the relationship between various areas of the law easier to understand. The analogy also suggests two means of evaluating any proposed codification: one can either examine the general provisions (the blueprint) of the proposed code to judge whether it provides a coherent whole, or one can look to the specific provisions (the rooms) to insure that they are coordinated in a practical and efficient manner.

II. General Provisions

The general provisions of a criminal code can facilitate the coordination of the specific provisions of that code. For example, if the general provisions define the mental requirements for all criminal offenses in terms of a few basic concepts, then the confusing array of mental requirements dictated by the common law could be avoided. It is important to analyze how successfully the general provisions of the West Virginia Criminal Code fulfill the promise of coherent codification and how sensibly and rationally the specific provisions of the proposed code are coordinated.

Articles 1 through 4 and 12 contain the general provisions of the proposed code. Article 1 sets out general definitions and establishes certain procedural rules, including rules governing burdens of proof and the use of inferences. Article 2 adopts minimum requirements for criminal liability and defines accessorial liability. Article 3 recognizes various general defenses, such as self-defense,
insanity, and entrapment. Article 4 concerns the inchoate of-3.

The provisions of article 2 regarding general principles of liability demonstrate the advances which codification can make as well as the inadequacies which codification can create. In defining the minimum requirements for criminal liability, article 2 adopts many of the reforms suggested by the drafters of the Model Penal Code but omits a vital rule of statutory construction found in the model code. This omission produces a number of anomalous results when the general provisions of the proposed code are applied to its specific provisions.

One of the most important innovations proposed in the Model Penal Code was a simplification of the mental requirements for criminal liability. Where the common law of crimes employs a large number of terms to define the mens rea necessary for commission of all the various offenses, the Model Penal Code uses only four: "purposely," "knowingly," "recklessly," and "negligently."

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4 The proposed West Virginia Criminal Code also contains specific provisions regarding offenses against the person (article 5), offenses against property (article 6), offenses involving theft, forgery, or fraud (articles 7-8), and offenses against public administration, order, health, or morality (articles 9-11). In addition, articles 13 through 14 define criminal contempt and criminal nuisance, respectively.


6 Current West Virginia criminal statutes, which adopt the common-law definitions of most crimes, indicate the variety of mental requirements possible. The defendant must have acted "wilfully" to have committed one crime, W. Va. Code § 61-3A-1(1) (1977 Replacement Vol.) (shoplifting), "fraudulently" to have committed another, id. § 61-3-20 (1977 Replacement Vol.) (embezzlement), and "maliciously" to have committed a third, id. § 61-2-9 (1977 Replacement Vol.) (assault). Other criminal statutes are drafted in terms of intent, id. § 61-3-11 (1977 Replacement Vol.) (burglary), knowledge, id. § 61-3-18 (1977 Replacement Vol.) (fraudulent use of credit cards), and recklessness, id. § 17C-5-1 (1974 Replacement Vol.) (vehicular homicide). Many statutes do not specify any mental requirement. Id. §§ 61-8B-3 to -8 (1977 Replacement Vol.) (sexual assault, sexual abuse).

7 Model Penal Code § 2.02(2) (Official Draft, 1962). One acts purposely when it is his "conscious object" to engage in the conduct proscribed. Id. § 2.02(2)(a). To act knowingly, one need not desire that his actions result in criminal conduct; simple awareness that a criminal result is "practically certain" is sufficient to meet the requirement. Id. § 2.02(2)(b). Recklessness and negligence involve running a risk that one's action might constitute the prohibited behavior. In either case, running the risk must be a "gross deviation from the standard of conduct that a law-abiding person would observe"; the difference between acting recklessly and acting negligently is that the reckless actor is "conscious" that he is running a risk while the negligent actor "should be aware" of the risk but is not. Id. § 2.02(2)(c)-(d).
The drafters of the model code found that these four terms, used singly or in combination, could replace all of the others.

The proposed West Virginia Criminal Code follows this aspect of the Model Penal Code with only a few variations: "purposely" becomes "intentionally" and "negligently" becomes "with criminal negligence" under the proposed code. Accepting this recommendation of the drafters of the Model Penal Code simplifies the treatment of mens rea in the proposed code. The definition of murder, for example, avoids that opaque concept "malice aforethought" and uses instead intention and recklessness. A mur-

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8 West Virginia Criminal Code, supra note 1, § 61-2-2 provides that [in this criminal code, unless a different meaning plainly is required, the following definitions apply:

(1) "Intentionally." A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

(2) "Knowingly." A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

(3) "Recklessly." A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

(4) "Criminal negligence." A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

9 "Though murder is frequently defined as the unlawful killing of another 'living human being' with 'malice aforethought,' in modern times the latter phrase does not even approximate its literal meaning. Hence it is preferable not to rely upon that misleading expression for an understanding of murder . . . ." W. LaFave & A. Scott, Handbook on Criminal Law § 67, at 523 (1972).

10 West Virginia Criminal Code, supra note 1, § 61-5-2(a) provides that [a] person is guilty of murder when:

(1) With intent to cause the death of another person, he causes
der statute explicitly relying on the concept of malice aforethought can be construed only on the basis of prior cases interpreting that term—that is, only on the basis of prior murder cases. When a murder statute uses the general terms “intentionally” and “recklessly,” however, a court construing those terms can rely not only on prior murder cases but also on all prior cases interpreting these terms as used in the definitions of other crimes. In this way, the use of general provisions in criminal-law codification allows each provision defining a specific crime to draw strength from all of the other specific provisions.

By using concepts developed in the drafting of the Model Penal Code, the proposed West Virginia Criminal Code makes important advances over the current criminal statutes. Unfortunately, fidelity to the Model Penal Code is imperfect: although the proposed West Virginia Criminal Code adopts a simplified set of mental requirements, it omits an important provision of the Model Penal Code concerning the interpretation of criminal statutes which specify no mental requirement. This omission produces problems of statutory construction throughout the proposed code.

The section of the Model Penal Code defining the four mens rea levels establishes various rules for construing statutory provisions which contain no indication of the level of culpability required. Unless a contrary intent plainly appears, some mental requirement must be read into any criminal provision;¹¹ in other words, there is a presumption against liability without fault which can be overcome only by a clear expression of legislative intent. The Model Penal Code also includes a weaker presumption against

the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if:

(i) He acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

¹¹ Model Penal Code §§ 2.02(1), .05 (Official Draft, 1962).
criminal liability based on negligence. A statutory provision which is silent with respect to mens rea must be read to require that the defendant committed the prohibited conduct "purposely, knowingly, or recklessly." The legislature must use the language of negligence in order to make purely negligent behavior criminal.

The proposed West Virginia Criminal Code errs by not adopting these two rules of construction. Although provisions creating a presumption against liability without fault do appear in the proposed code," there is no mention of a presumption against liability based solely on negligence. Consequently, under the proposed code a criminal provision which is silent with respect to the mental state required for commission of the crime may be interpreted to require only negligence in the commission of the prohibited acts.

The sexual misconduct provision of the proposed code is an instance of its failure to specify a mental requirement. The definitional subsection reads: "A person is guilty of sexual misconduct when he engages in sexual intercourse with another person without the latter's consent." Under the rules of construction adopted in the Model Penal Code, a court construing this provision must require the prosecution to prove not only that the defendant engaged in sexual intercourse without consent, but also that he did so inten-

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" Id. § 2.02(3).
" West Virginia Criminal Code, supra note 1, §§ 61-2-3(2), -5. Section 61-2-3(2) establishes the following minimum requirements for criminal liability:

A person is not guilty of a criminal offense unless:

\[
\text{He has engaged in . . . conduct intentionally, knowingly, recklessly or with criminal negligence, as the law may require, with respect to each element of the offense, except that this requirement does not apply to any offense which imposes absolute liability, as defined in section five of this article.}
\]

Section 61-2-5 defines liability without fault as follows:

(a) If an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of "strict liability."

(b) A person may be guilty of an offense involving strict liability only when:

1. The offense is a violation and no particular culpable mental state is specifically designated within or necessarily required by the definition of the offense; or

2. The offense is defined by a statute other than this criminal code and the statute clearly indicates a legislative purpose to impose absolute liability for the conduct described.

" Id. § 61-5-38(a).
tionally, knowingly, or recklessly. Under the proposed West Virginia Criminal Code, a court would be free to construe the statute to require only a showing that the defendant negligently engaged in sexual intercourse without consent. A defendant who should have been aware that there was no consent, but who was not, could be branded a criminal and thrown into jail for as long as a year,\(^\text{15}\) even though in the circumstances, as he perceived them, there was not even the risk of wrongdoing. Such a penalty for a negligent act\(^\text{16}\)

\(^{15}\) Id. §§ 61-5-38(b), -12-9(b)(1).

\(^{16}\) Many other examples could be offered. The proposed code fails to specify the mens rea requirement for each of the following offenses: one form of terroristic threatening, id. § 61-5-16(a)(1); sexual assault in the first, second, and third degrees, id. §§ 61-5-32(a), -33(a), -34(a); sexual abuse in the first, second, and third degrees, id. §§ 61-5-35(a), -36(a), -37(a); one form of criminal mischief in the third degree, id. § 61-6-11(a)(2); one form of theft of services, id. § 61-7-5 (a)(3); unlawful compensation for past official behavior, id. § 61-9-14(a); misuse of confidential information, id. § 61-9-19(a); unlawful surveillance in the first degree, id. § 61-10-21(a); possession of weapons while intoxicated, id. § 61-10-34(a); improperly furnishing firearms to a minor, id. § 61-10-42(a); prostitution, id. § 61-11-23(a); and unlawfully dealing with a child, id. § 61-11-41(a)(3).

Furthermore, a number of offenses in the proposed code specify mental requirements in an ambiguous fashion. An example is the custodial interference provision which provides that

[a] person is guilty of custodial interference when, knowing that he has no legal right to do so, he takes, entices or keeps from lawful custody any incompetent or other person entrusted by authority of law to the custody of another person or to an institution.

Id. § 61-5-28(a). Although it is clear that the prosecution must prove that the defendant knew he had no legal right to “take, entice, or keep” the individual whose custody is interfered with, the level of culpability which the prosecution must prove with regard to that taking, enticement, or keeping is far from clear. If simple negligence constitutes sufficient culpability, then the custodial interference statute would punish a negligent taking by one who knows he has no legal right to take.

Other proposed provisions which, like the custodial interference statute, can be read to penalize negligence include receiving stolen property, id. § 61-7-10(a); possession of a forgery device, id. § 61-8-8(a); misapplication of entrusted property, id. § 61-8-29(a); some forms of falsely reporting an incident, id. §§ 61-9-6(2), -6(3), -6(5); one form of tampering with public records, id. § 61-9-8(a)(3); receiving or granting unlawful compensation for assisting private interests in public matters, id. § 61-9-13(a); unlawful gift to public servants, id. § 61-9-15(a); soliciting unlawful compensation, id. § 61-9-16(a); escape in the first, second, and third degrees, id. §§ 61-9-20(5), -21(a), -22(a), -23(a); perjury in the first and second degree and false swearing, id. §§ 61-9-37(a), -38(a), -39(a); tampering with physical evidence, id. § 61-9-55(a); possession of an eavesdropping device, id. § 61-10-20(a); tampering with private communications, id. § 61-10-23(a); possession of gambling records in the first and second degree and possession of a gambling device, id. §§ 61-11-15(a), -16(a), -18(a); permitting a minor to disseminate pornography, id. § 61-11-33(a); bigamy, id. §§ 61-11-36(a), -36(b); and incest, id. § 61-11-37(a).
is possible because the proposed code fails to include a presumption against criminal liability for negligence. Having chosen to follow the example of the model code in simplifying the types of mens rea requirements, the drafters of the proposed code failed—either by design or through neglect—to follow that example completely; the result, with regard to minimum levels of culpability, is a disaster.

Article 2 of the proposed code has some pluses to offset its minuses, but article 1 displays the proposed West Virginia Criminal Code at its worst. Article 1 contains carelessly drafted provisions dealing with burdens of proof and the use of inferences against the defendant which raise a welter of constitutional questions. By forcing the courts to construe some criminal statutes to the very brink of constitutionality, these provisions will complicate many cases. The result of codification in this respect will be confusion, not clarity and rationality.

The difficulties with regard to burdens of proof in the proposed code stem from a misreading of the model code, the basis for much of the language in the proposed code. The Model Penal Code divides the burden-of-proof problem into two subsidiary questions: (1) who has the burden of first producing evidence with regard to a particular issue? (2) who has the burden of persuading the finder of fact with regard to that issue? If the issue concerns any of the basic elements of the offense—the prohibited conduct, the required mental state, or a jurisdictional prerequisite to prosecution—the Model Penal Code places on the prosecution both the burden of initially producing evidence and the burden of ultimately persuading the jury. If the issue relates to any matter of mitigation, the model code allocates the burden of production sometimes to the prosecution and sometimes to the defendant. This allocation is accomplished through use of the terms "defense" and "affirmative defense." If the model code denominates any set of excusing or justifying circumstances an "affirmative defense," then the defendant bears the burden of initially introducing evidence tending to establish those circumstances. If the term "defense" is used without any attribution, the prosecution has the burden of first producing evidence which negates the defense.

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18 Id. §§ 1.12, .13(9).
19 Id. For example, § 2.04 of the Model Penal Code defines ignorance or mistake
Thus clarifying the burden-of-production question, the Model Penal Code in addition establishes that the prosecution must disprove all defenses, affirmative or otherwise, beyond a reasonable doubt—unless some specific provision clearly places on the defendant the burden of ultimately persuading the jury.20

In the provisions defining specific offenses, the proposed West Virginia Criminal Code resembles the Model Penal Code. Where the model code establishes a defense or an affirmative defense, the proposed code will most likely establish a defense or an affirmative defense.21 This would not be remarkable if the proposed code defined "defense" and "affirmative defense" as the Model Penal Code does. Provisions in the Model Penal Code and the proposed West Virginia Criminal Code which are identical in language, however, are not identical in meaning—a fact which the drafters of the proposed code seem not to have noted. Where the Model Penal Code uses the "defense"-"affirmative defense" distinction to allocate the burden of production, the proposed West Virginia Criminal Code uses the distinction to allocate the burden of persuasion: although the prosecution must establish beyond a reasonable

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20 Id. §§ 1.12, 1.13(9). In this fashion, the drafters of the Model Penal Code signify the consequences of the terms "defense" and "affirmative defense." If "defense" is used, the prosecution must be the first to raise the issue and must prove beyond a reasonable doubt that the defense does not apply to the facts at hand. If "affirmative defense" is used and the provision is silent as to burden of persuasion, then the defendant must bring the issue into the case; but, once he has done so, the prosecution must disprove the affirmative defense beyond a reasonable doubt. The defendant has the burden of ultimately convincing the jury only when the term "affirmative defense" is used in conjunction with explicit language shifting the burden of persuasion to the defendant.

21 Having thus defined "defense" and "affirmative defense," the drafters of the Model Penal Code use the terms frequently throughout the specific provisions of the model code. Article 223, "Theft and Related Offenses," provides an example. In the course of defining eight offenses, the article recognizes three affirmative defenses applicable to all eight offenses, as well as two other specially relevant affirmative defenses. MODEL PENAL CODE §§ 223.0-.9 (Official Draft, 1962).

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doubt22 the nonexistence of any defense raised by the defendant,23 the defendant who raises an affirmative defense "has the burden of establishing such defense to the satisfaction of the court or jury, as the case may be."24 Thus, use of the terms "defense" and "affirmative defense" in the proposed code produces consequences radically different from those resulting when the same terms are used in the Model Penal Code. If the proposed West Virginia Criminal Code speaks of a "defense," the burden of production is on the defendant,25 but the prosecutor has the burden of persuasion with regard to that defense.26 If the proposed code employs the term "affirmative defense," then both the burden of production and the burden of persuasion are on the defendant.27

The drafters' failure to see the consequences of so defining "defense" and "affirmative defense" in the proposed code results in giving the defendant the burden of proving, to the satisfaction of the jury, a number of excusing or justifying facts which ordinarily the prosecution has the burden of disproving beyond a reasonable doubt. The theft provisions of the proposed code,28 for example, recognize claim of right as an affirmative defense.29 Because the defense is affirmative, the defendant must establish his claim of right to the satisfaction of the jury. Under the present West Virginia criminal statutes,30 a claim of right contradicts an essential element of the offense, intent to deprive the owner of the benefits of ownership;31 accordingly, West Virginia prosecutors must

22 Id. § 61-1-4(a).
23 Under the proposed code, the defendant bears the burden of first introducing evidence with regard to any defense, whether affirmative or not. Id. §§ 61-1-4(a), -4(b).
24 Id. § 61-1-4(c).
25 Id. § 61-1-4(b).
26 These are the same consequences which result from use of the term "affirmative defense" in the Model Penal Code. See note 20 supra.
27 Under the Model Penal Code, these consequences flow only from use of the term "affirmative defense" coupled with clear language shifting the burden of persuasion to the defendant. See note 20 supra.
28 West Virginia Criminal Code, supra note 1, §§ 61-7-2 to -13.
29 Id. The language of the claim-of-right section closely parallels the Model Penal Code, Model Penal Code § 223.1(3) (Official Draft, 1962), but the model code does not shift the burden of persuasion to the defendant as the proposed code does.
currently disprove claim of right beyond a reasonable doubt.\textsuperscript{22}

The burglary provisions\textsuperscript{33} provide another example of the penchant in the proposed code for shifting the burden of persuasion to the defendant. These provisions establish that it is an affirmative defense to any burglary or criminal trespass prosecution that the dwelling or building entered was an abandoned structure.\textsuperscript{34} Since the defense is labeled an affirmative one, the defendant must persuade the jury that the structure was abandoned. At present the prosecutor must disprove abandonment beyond a reasonable doubt.\textsuperscript{35}

The theft and burglary provisions are but two examples\textsuperscript{36} of the results of the definitions of defense and affirmative defense in the proposed code. These results—shifting the ultimate burden of persuasion to the defendant on a host of issues—can be condemned not only as unwise but also, probably, as unconstitutional.

In the last decade the United States Supreme Court has set constitutional guidelines regarding the burden of persuasion in criminal cases. In 1970 the Court held that the prosecution must


\textsuperscript{23} \textit{West Virginia Criminal Code, supra note 1, §§ 61-6-14 to -24.}

\textsuperscript{24} \textit{Id. §§ 61-6-19(b), -23(1). The wording of these affirmative defenses matches closely the provisions of the Model Penal Code regarding abandonment, \textit{Model Penal Code} §§ 221.1(1), .2(3) (Official Draft, 1962), but the Model Penal Code does not shift the burden of persuasion to the defendant.}


\textsuperscript{26} A few other provisions of the proposed criminal code shift the burden of persuasion to the defendant with regard to essential elements of the offense. \textit{West Virginia Criminal Code, supra note 1, § 61-5-42 (rape: mistake as to consent because of victim's youth); id. § 61-7-9(b) (credit card abuse: intention to meet all obligations arising out of use of card); id. § 61-8-25(b) (falsifying business records: mere execution of the orders of a superior without intent to defraud).}

Several other provisions recognize affirmative defenses not directly related to essential elements of the offense. \textit{Id.} § 61-5-23(b) (criminal coercion); \textit{id.} § 61-7-7(b) (theft by extortion); \textit{id.} § 61-7-8(b) (unauthorized use of vehicles); \textit{id.} § 61-8-28 (commercial bribery and receiving a commercial bribe); \textit{id.} § 61-9-33 (hindering prosecution or apprehension); \textit{id.} § 61-10-32(c) (second-degree unlawful possession of a deadly weapon); \textit{id.} § 61-10-33(c) (carrying a dangerous weapon); \textit{id.} § 61-10-44(a) (unlawful possession of prohibited weapon or ordnance). Three of these eight affirmative defenses also appear in the Model Penal Code, \textit{Model Penal Code} §§ 212.6(1), 223.4, .9 (Official Draft, 1962) (criminal coercion, theft by extortion, unauthorized use of vehicles), but none of the three Model Penal Code provisions shifts the burden of persuasion to the defendant, \textit{id.}
prove its case beyond a reasonable doubt because any less stringent standard would deny the defendant due process of law. In 1975 the Supreme Court specifically required proof beyond a reasonable doubt of every element of the offense charged. Although this rule leaves the legislature free to redefine the elements of any particular offense and to shift to the defendant some burdens of persuasion (by converting former elements of an offense into affirmative defenses which the defendant must prove), the Supreme Court has recognized that there are limits on the power to redistribute burdens of persuasion. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime"; to transform an offense with five elements into an offense with one element and four affirmative defenses is tantamount to creating a presumption of guilt. Indeed, it is possible that a legislature may not convert even one former element of an offense into an affirmative defense, with respect to

\[\text{27 In re Winship, 397 U.S. 358 (1970). Winship, a juvenile, had been adjudicated a delinquent by a preponderance of the evidence. In reversing this adjudication, the Court first held that the beyond-a-reasonable-doubt standard was required in criminal trials and then reasoned that due process required application of the same standard in juvenile proceedings involving allegations of criminal behavior.}\]

\[\text{28 Mullaney v. Wilbur, 421 U.S. 684 (1975). A Maine jury had found Wilbur guilty of murder pursuant to instructions that the prosecution had the burden of proving an intentional killing beyond a reasonable doubt but that the defendant had the burden of showing by a preponderance of the evidence that his intentional killing was the result of sudden provocation and was, therefore, not murder but manslaughter. The opinion of the Court concluded that since malice aforethought (in this case, lack of sudden provocation) was an element of the offense of murder, under In re Winship that element must be proved by the prosecution beyond a reasonable doubt. See note 37 supra.}\]

\[\text{29 For example, despite its holdings in In re Winship and Mullaney v. Wilbur, see notes 37-38 supra, the United States Supreme Court has upheld a murder conviction based upon New York statutes which define murder as intentionally causing the death of another but give the defendant an opportunity to show by a preponderance of the evidence that he acted under extreme emotional disturbance, which showing reduces the crime from murder to manslaughter. Patterson v. New York, 97 S. Ct. 2319 (1977). The Patterson majority distinguished Mullaney v. Wilbur by noting that New York, unlike Maine, defines murder without reference to malice aforethought; therefore, lack of extreme emotional disturbance is not an element of the offense of murder in New York and need not be proved by the prosecution beyond a reasonable doubt. For a discussion of the restrictions on legislative circumvention of In re Winship and Mullaney v. Wilbur, see text accompanying notes 40-41 infra.}\]

which the defendant has the burden of persuasion, unless some quid pro quo is offered the defendant—such as a broadening of the affirmative defense so that it excuses conduct not excused under the former definition of the crime.\(^4\)

The constitutional requirements to which a legislature must adhere when it shifts burdens of persuasion to the criminal defendant are not clear. Every time the legislature makes such a shift, however, criminal defendants will be able to mount at least colorable claims that the shift violates their constitutional right. Even if most of these claims are ultimately found to be without merit, their consideration will inevitably consume valuable court time. And, just as inevitably, some of these claims will have merit and result in the voiding of the criminal statutes involved.

Those provisions of article 1 of the proposed code dealing with burdens of production and persuasion thus fail to keep the promise of codification: they will not help to clarify the criminal law. Those provisions, however, are not the only defective ones in that article. Others, especially those dealing with the use of inferences against the criminal defendant, are drafted so carelessly that they verge on unconstitutionality.

Article 1 of the proposed West Virginia Criminal Code recognizes that inferences may be used against the defendant and provides general rules for the use of any of the inferences established by specific provisions: (1) if there is evidence of the facts giving rise to the inference, the court must submit the issue to the jury, unless "the evidence as a whole clearly negatives the inferred facts";\(^2\) and (2) if the issue is submitted to the jury, the court must inform the jurors that "while the inferred fact must . . . be proved beyond a reasonable doubt, . . . the jury may regard the facts giving rise to the inference as sufficient evidence of the inferred fact."\(^3\) Applying either of these rules could violate a defendant's constitutional rights. Although both rules are taken almost word for word from

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\(^4\) Support for this requirement of a quid pro quo can be found in the opinion of the court in *Patterson v. New York*. See note 39 supra. The *Patterson* Court emphasized that New York's extreme emotional disturbance affirmative defense is a "substantially expanded version of the older heat of passion concept," 97 S. Ct. at 2325, thus casting doubt on the notion that a statute which converted heat-of-passion into an affirmative defense without broadening its scope would pass constitutional muster.

\(^2\) *West Virginia Criminal Code*, supra note 1, § 61-1-4(e)(1).

\(^3\) Id. § 61-1-4(e)(2).
the Model Penal Code,\(^5\) developments since the publication of the model code in 1962 have rendered its provisions regarding inferences, and all similar statutes, constitutionally suspect.

The defect in the first rule is its restriction of a court's power to disregard an inference when the connection between the proved fact and the inferred fact is tenuous; unless that connection is "clearly negative[d]," the issue must be submitted to the jury. Although this provision met the constitutional requirements of 1962,\(^1\) in the years since the adoption of the Model Penal Code the Supreme Court has steadily raised the standard by which it judges the constitutional validity of criminal inferences.\(^2\) Today, due process would require that the proved fact establish the inferred fact beyond a reasonable doubt.\(^3\) By requiring submission to the jury even when the proved fact leaves a reasonable doubt as to the existence of the inferred fact, the proposed code could force trial judges to commit constitutional error.

For example, in defining the crime of receiving stolen property, the proposed code identifies knowledge or belief that the received property has been stolen as an element of the offense.\(^4\) Knowledge or belief can be inferred under certain conditions: if the defendant is a dealer found in possession of property stolen from different people on different occasions, or if as dealer he has received stolen property more than once in the previous year, or if as a dealer in property of the sort received he has paid a price substantially below the normal value of the property.\(^5\) Proof of either of the first two conditions could well leave a reasonable doubt as to the defendant's knowledge or belief that the received property was stolen,\(^5\) but despite this possibility, under the pro-

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\(^1\) In Tot v. United States, 319 U.S. 463 (1943), the United States Supreme Court held that due process required only a rational connection between the proved fact and the inferred fact.


\(^4\) West Virginia Criminal Code, supra note 1, § 61-7-10(a).

\(^5\) Id. § 61-7-10(b).

\(^5\) The prosecution's proof may show only that the defendant, a dealer, purchased property from a thief who was disposing of the gains from more than one theft. This would establish the first condition giving rise to the inference. Or, the prosecutor may prove only that the defendant, a dealer, has twice purchased stolen...
posed code the issue of knowledge or belief must be submitted to the jury (unless the evidence as a whole clearly negates the inference). A trial judge must choose, then, either to ignore the criminal code by not submitting the issue to the jury or to violate the Constitution by allowing the jury to decide the question.\textsuperscript{51}

The defect in the second rule is its requirement that the judge inform the jury of the existence of the inference, thus arguably decreasing the prosecutor's burden of persuasion. Even though the rule also requires a reminder that the prosecution must prove its case beyond a reasonable doubt, informing the jury of the legally recognized relationship between the proved fact and the inferred fact could easily sway a juror who would otherwise have had a reasonable doubt. Therefore, instructing the jury about the inference unconstitutionally reduces the prosecutor's burden of persuasion,\textsuperscript{52} notwithstanding any accompanying curative instruction.\textsuperscript{53}

Although the validity of this constitutional argument is dis-

\textsuperscript{51} Other provisions of the proposed West Virginia Criminal Code could present the state trial judges with similar dilemmas. West Virginia Criminal Code, supra note 1, § 61-7-6(c)(2) (theft by failure to make required disposition of property received: dealing with property as one's own inferred from failure to account after demand); id. § 61-7-11(b) (obscuring the identity of a machine: knowledge of defacement inferred from possession for sale in the course of business); id. § 61-7-12(a)(2) (theft offenses: knowledge that check would be dishonored inferred from insufficient funds both at time of check's issuance and at time of check's presentation); id. § 61-11-19(a) (gambling offenses: knowledge of character of device or records inferred from possession); id. § 61-11-29 (promoting prostitution in the third degree: knowledge of profit from prostitution inferred from receipt of support from prostitution); id. § 61-11-34 (pornography offenses: knowledge of character of material inferred from possession).

A peculiar problem arises under the proposed murder provision. That provision abandons the felony-murder doctrine and substitutes for it an inference of recklessness under circumstances manifesting extreme indifference to human life. Id. § 61-5-2(b). In other words, rather than producing a conclusive presumption of malice aforethought, proof of commission of a felony generates only the inference of malice, an inference which the defendant may rebut. Surprisingly this inference may be vulnerable to the constitutional attack outlined above, even though there is widespread agreement that the conclusive presumption of the traditional felony-murder doctrine, which has far harsher effects on the defendant, is constitutional. Cf. United States v. Antelope, 97 S. Ct. 1395 (1977).

\textsuperscript{52} See In re Winship, 397 U.S. 358 (1970).

\textsuperscript{53} This argument is approved in State v. Evans, 28 Md. App. 640, 349 A.2d 300, (1975) (Moylan, J.), aff'd, 278 Md. 197, 362 A.2d 629 (1976). But see cases cited note 54 infra.
puted, recent opinions suggest that the West Virginia Supreme Court of Appeals might look upon the argument with favor. Since 1975 the supreme court of appeals has three times struck down inferences used against criminal defendants, each time citing the diminishing of the prosecutor's burden of persuasion as one of its reasons. Only one of these cases involved jury instructions. In spite of the apparent existence of a general instruction on the prosecution's burden of proving every element of the offense beyond a reasonable doubt, the court threw out an instruction which informed the jury of the inference in question. Thus, the West Virginia Supreme Court of Appeals appears likely to hold that a prosecutor may use an inference to get an issue to the jury, but he may not also have the jury instructed about the legal status of that inference because such an instruction inevitably lessens his burden of persuasion.

Although the defect in the first rule casts doubt on the constitutionality of some of the inferences created by the proposed

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55 The court in State v. Pendry, 227 S.E.2d 210 (W. Va. 1976), held that the state is not entitled by way of a presumption or inference to avoid the proof of an element beyond a reasonable doubt. (Although there may be a technical distinction between an inference and a presumption, the terms are often used interchangeably in West Virginia. Id. at 224.)


58 State v. Pendry, 227 S.E.2d at 223. The court specifically disapproved of any instruction which "would entitle the jury to accept proof of the use of the deadly weapon as being proof beyond a reasonable doubt of the [element] of intent . . . . An inference cannot relieve the State of proving [the] elements [of an offense] beyond a reasonable doubt." Id. Two other grounds for disapproving the instruction on the deadly weapon inference were offered: the instruction phrased the inference incorrectly and also appeared to place the ultimate burden of persuasion on the defendant. Id. The opinion of the court did not consider the general validity of inferring intent to kill from the deliberate use of a deadly weapon. See text accompanying notes 44-51 supra.
code, the defect in the second rule calls all such inferences into question. By requiring trial courts to instruct juries that these various inferences have legal force, the proposed code again forces the courts into a Hobson's choice between ignoring the code provisions and violating the Constitution.

In their present form the general provisions of the proposed code fail to achieve the primary goal of codification—rationalizing the criminal law. Although the mens rea provisions of article 2 represent progress toward that goal, other provisions in the same article negate the advance. More disappointing is the inadequacy of provisions in article 1 regarding defenses, affirmative defenses, and the use of inferences; through misapplication of the Model Penal Code and misreading of recent constitutional law, the drafters of those provisions have produced more confusion, not less. Tested by examination of its general provisions, the present version of the proposed West Virginia Criminal Code is found wanting and does not merit adoption.

III. Specific Provisions

The preceding discussion has been devoted to analysis of the general provisions of the proposed code because these provisions are frequently overlooked in the rush to examine the provisions establishing specific crimes. Not surprisingly, the latter examination yields as negative a result as does the analysis of the general provisions.

The articles of the proposed code which define specific offenses are deficient both individually and as a whole: many of the specific provisions are so imprecise in their language as to raise problems of vagueness and overbreadth; furthermore, too many offenses are created. These two features combine to make the proposed code a bonanza for law-enforcement officials and a setback for the civil liberties of the citizenry.

Many specific provisions of the proposed code define crimes

\[\text{footnotes}\]

\[\text{footnotes}\]
too broadly apparently in order to insure that certain acts which should be criminal are not legalized by language which is too specific. The offense of possessing a weapon while intoxicated, for example, incorporates the general definition of intoxication: “a disturbance of mental or physical capacities resulting from the introduction of substances into the body.” Although it is desirable to avoid specifying only certain drugs as intoxicants, thereby excluding newly formulated chemical compounds which are equally as dangerous, it is not wise to make the definition so broad as to include all “substances” which “disturb” mental or physical “capacities.” The legislature has already confronted the problem of defining illegal drugs and has made a comprehensive statement in the Controlled Substances Act without including persons under the influence of aspirin, one beer, insulin, or a blood thinning drug, as does this proposed section.

The crime riot in the first degree, for another example, is defined as “participat[ing] with five or more persons in tumultuous and violent conduct and thereby intentionally or recklessly creat[ing] a grave risk of causing public alarm.” An additional requirement for first-degree rioting is that “a person other than one of the participants suffer bodily injury or substantial property

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62 West Virginia Criminal Code § 61-10-34.
63 Id. § 61-10-27(15).
64 Id. § 61-2-1(2).
66 The proposed code does provide one means of avoiding this type of conviction in its provision relating to de minimis infractions. West Virginia Criminal Code, supra note 1, § 61-2-11. This section provides that the court should dismiss the prosecution if the defendant’s conduct “[d]id not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction” or if defendant’s conduct “[p]resents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense.” Id. § 61-2-11(a)(2)-(3).
67 Courts will have difficulty in determining what can and “cannot reasonably be regarded as envisaged by the Legislature” because the proposed code itself lacks any statement of purpose for each section or group of sections and because the legislative history of acts passed by the West Virginia Legislature is not recorded. Consequently, courts must rely on the written opinions of the supreme court of appeals and the less accessible opinions of the circuit courts to obtain a full description of the elements of the offense and defenses. The ironic result is that in this instance proposed codification will only perpetuate the problems associated with the common law of crimes.
68 Id. § 61-10-2(a)(1).
In defining this felony for which one may serve from one to five years in prison, the use of vague terms like "tumultuous and violent conduct" and "public alarm" is unacceptable. Although the statute is well suited for dealing with an organized band of terrorists, it is not appropriate for, but would encompass, five fraternity brothers at a football game who become rowdy and in the process accidentally break someone's three-hundred-dollar watch or split someone's lip. The provision would also penalize those who might panic during a natural disaster and cause someone else to be harmed or to lose some of his property.

Although similar instances of overbreadth appear throughout the proposed code, they are most plentiful in article 10, "Offenses Against Public Order." In addition to the overbreadth in its treatment of first-degree riot, article 10 provides imprecise definitions for second-degree riot, inciting to riot, and unlawful assembly; in fact vagueness becomes almost a motif in the provisions dealing with disorderly conduct, harassment, harassing communications, obstructing a highway, and disrupting meetings.

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68 Id. § 61-10-2(a)(2).
69 Id. §§ 61-10-2(b), -12-9(a)(4).
70 The drafters of this section would have been well advised to follow the Model Penal Code in its definition of the felony riot, which definition requires that the accused have had either a "purpose to commit or facilitate the commission of a felony or misdemeanor," or a "purpose to prevent or coerce official action," or "knowledge [that a participant] plan[ned] to use a firearm or other deadly weapon." MODEL PENAL CODE § 250.1(1) (Official Draft, 1962). The omission of these additional mental requirements in the proposed West Virginia Criminal Code does not aid in the prosecution of the intentional rioter. Such an omission does, however, permit the felony prosecution of countless persons who, without criminal purpose or knowledge, may have been in the wrong place at the wrong time.
71 See, e.g., WEST VIRGINIA CRIMINAL CODE, supra note 1, §§ 61-5-39, -40 (indecent exposure and public indecency: penalizing actions which "affront or alarm" without further definition), § 61-9-6(a)(5) (falsely reporting an incident: penalizing conduct "likely to cause public inconvenience or alarm" without further definition).
72 Id. §§ 61-10-3(a), -4(a), -5(a) ("tumultuous and violent conduct," "grave risk of causing public alarm").
73 Id. § 61-10-6(a) ("violent, tumultuous or threatening behavior," "unreasonable noise," "offensively coarse utterance, gesture or display," "hazardous or physically offensive condition [created] by any act that serves no legitimate purpose").
74 Id. § 61-10-7(a) ("offensively coarse utterance, gesture or display," "acts which alarm or seriously annoy . . . which serve no legitimate purpose").
75 Id. § 61-10-8(a) ("offensively coarse language likely to cause annoyance or alarm," "no purpose of legitimate communication").
76 Id. § 61-10-14(a) ("renders any highway . . . impassable without unreasonable inconvenience or hazard").
Provisions like these not only allow the innocent to be convicted, but also permit the law-abiding to be harassed. Dissidents of every sort—social, political, and economic—object to the "public order"; vaguely defined offenses against that order provide a fertile field for abuse of the dissidents' civil rights.

Potential for abuse springs from other sources as well. Because the sanctions imposed are usually minor, there will be few appeals from convictions, even from improper ones. Furthermore, these broadly defined offenses can be used for abusive purposes even if no conviction is sought, because the police will be able to remove a person from the site of his dissent—for example, a picket line—with at least the appearance of legitimacy. Because the abuse has been cloaked in legitimacy, the person arrested has a difficult time making his case if he chooses to bring a civil action against the offending officer. Consequently, these offenses against public order promise to become personal vendetta laws for prosecutors and police officers much as the current peace bond statute is.

Adoption of these overbroad provisions is surely impolitic and misguided since courts may subsequently be forced to strike them down for being unconstitutionally vague. Striking down the provisions would eliminate the problem of convicting innocent persons and the problem of abuse, but it would also prevent the conviction of those whose actions the state may legitimately prohibit—the intentional rioter or disruptor of meetings. These persons, whose actions are clearly criminal, would nonetheless have standing to attack the constitutionality of a vague statute. Society pays too high a price for a statute under which innocent persons may be convicted and which may later be set aside, preventing the conviction of those who should suffer penal sanctions. This is particularly true when a more carefully drawn and specifically worded statute could have been used from the outset to avoid these problems.

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77 Id. § 61-10-15(a) ("any utterance, gesture or display designed to outrage the sensibilities of the group").
78 Pierson v. Ray, 386 U.S. 547 (1967) (Good-faith belief that statute being enforced is constitutional provides complete defense to action under 42 U.S.C. § 1983.).
81 For a particularly egregious example, see Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617 (1970), where the defendant, who had kneed a pregnant woman and fractured the skull of her subsequently stillborn child, was held not guilty of killing a "human being."
Although imprecision in drafting is a major defect of the specific provisions, it is not so important as the problem of overdrafting. The proposed West Virginia Criminal Code creates too many crimes and thus makes life a little too easy for West Virginia prosecutors. The proposed code, once again in an apparent effort to provide flexibility, sets out so many different crimes and different degrees for each crime that a single act or course of conduct by a defendant may subject him to excessive prosecution and punishment.

For example, a prankster who is arrested after the “cherry bomb” he placed in the toilet facilities of a fast-food restaurant exploded, could be charged with: reckless endangerment in the first degree (a class D felony); criminal mischief in the first degree (a class D felony), in the second degree (a class A misdemeanor), or in the third degree (a class B misdemeanor); use of a noxious substance (a class A misdemeanor); criminal possession of a noxious substance (a class B misdemeanor); unlawful possession of dangerous ordnance in the first degree (a class C felony), in the second degree (a class D felony), or in the third degree (a class A misdemeanor); arson in the first degree (a class B felony), in the second degree (a class C felony), or in the third degree (a class D felony); disorderly conduct (a violation); and harassment (a violation).

As a result of his prank the defendant may find himself charged with a class B felony (first degree arson, punishable by a maximum of twenty years in prison), a class C felony (unlawful...
possession of dangerous ordnance, punishable by a maximum of ten years in prison),

\[9^8\] two class D felonies (reckless endangerment and criminal mischief, each punishable by a maximum of five years in prison),

\[9^9\] a class A misdemeanor (use of a noxious substance, punishable by a maximum of one year in jail),

\[9^{10}\] a class B misdemeanor (criminal possession of a noxious substance, punishable by a maximum of 90 days in jail),

\[9^{11}\] and two violations (disorderly conduct and harassment, each punishable by fines).

Additionally, the terms could be set to run consecutively. \[9^{12}\]

One of the ramifications of the prosecutor's access to such a "laundry list" of charges is that he has good reason to "overcharge" for each criminal act. In the above hypothetical, where the prankster is charged with, among other counts, a class B felony (arson in the first degree), there is a strong incentive for him to enter into a plea-bargaining agreement in order to plead guilty to a class A misdemeanor or even a class D felony, if necessary. Confronting a defendant with a long list of "good" charges will undoubtedly cause plea bargaining to look attractive, and other considerations will enhance the desirability of plea bargaining even further. Although a defendant may not be convicted of two or more offenses if the one is a lesser offense included within another, under the proposed code he may be tried on all applicable charges, whether included or not. \[9^{13}\] Thus, the prosecutor may present a multitude of offenses to the jury.

Two results occur, both of which illustrate the value to the prosecutor of "overcharging." First, if the prosecutor just tries to prove the most serious charge against the defendant and carries the other charges as security, his chances of proving that one serious offense are increased because he need concentrate on proving only one offense whereas the defendant must try to raise a reasonable doubt about all of the charges. Second, there are psychological advantages in presenting a jury with a long list of possible offenses. Jurors may determine that if the defendant is charged with all of these offenses, he must be guilty of something; or a jury divided

\[9^8\] Id.

\[9^9\] Id.

\[9^{10}\] Id. § 61-12-9(b).

\[9^{11}\] Id. § 61-12-24(a).

\[9^{12}\] Id. § 61-12-14(a).

\[9^{13}\] Id. § 61-3-17.
over the primary issue of guilt or innocence may resolve the problem by convicting the defendant of one of the lesser charges.

These benefits are increased by the greater number of offenses and degrees of offenses provided for in the proposed code and by the problem of imprecise description. Because of the number of charges which can be brought against a defendant and because of the advantages provided to the prosecution by a multiplicity of charges, more and more cases will be resolved through plea bargaining. Although the merits of plea bargaining are beyond the scope of this article, it is contended here that when plea bargaining increases because of the danger that convictions will be based on insufficient evidence or on jury compromise, then any proposal which increases that danger should come under serious scrutiny before it is adopted.

IV. CONCLUSION

The specific provisions of the proposed code, like the general

105 The proposed West Virginia Criminal Code creates 206 separate offenses, 156 of the first degree, 37 of the second degree, and 13 of the third degree.
106 See text accompanying notes 62-77 supra.
107 The only feature of the proposed code which might make plea bargaining less attractive is the potential for leniency inherent in the sentencing provisions. Using the stated purposes of the criminal code—"[t]o insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interest of public protection," WEST VIRGINIA CRIMINAL CODE, supra note 1, § 61-1-6(5)—and combining this with the evidence unearthed by the pre-sentence report required in every felony case, id. § 61-12-5, a defense attorney can argue that his client's situation in life requires a penalty less severe than incarceration. Even if the crime of which the defendant has been convicted imposes a prison term, the court, in consideration of these factors, can order the lesser penalty of probation. Id. §§ 61-12-16, -17. If the facts of the case indicate that the deterrent value of the criminal law will not be significantly diminished, then the defendant should not be incarcerated if imprisonment will not enhance his chances for rehabilitation and if he poses no significant threat when allowed to remain in the mainstream of society. This balancing of interests means that incarceration should be ordered only when it is necessary. Such a mandate is similar to the requirement of using the least restrictive alternative which the West Virginia Legislature has imposed upon proceedings for commitment of the mentally ill. W. VA. CODE § 27-5-4(d) (1976 Replacement Vol.). It must be noted, however, that these statutory provisions will mean little if they remain only perfunctory admonitions written in a code book and are seldom given serious consideration by sentencing judges.
108 Compare ABA STANDARDS, PLEAS OF GUILTY § 1.8 (Approved Draft, 1968) with NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS § 3.1 (1973).
provisions, display its overall weaknesses. While codification may be necessary for a complete renovation of West Virginia’s “castle” of criminal law, if that renovation compromises the constitutional rights of individuals by way of misstated burdens of proof, overcriminalization, and statutes which invite official abuse, then perhaps the renovation comes at too high a cost and different plans should be studied before the reconstruction begins.