Criminal Law Reform in the District of Columbia

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CRIMINAL LAW REFORM IN THE DISTRICT OF COLUMBIA: AN ASSESSMENT OF NEEDS AND DIRECTIONS

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Introduction

A. Approach and Scope

The prospects for meaningful, comprehensive revision of the District of Columbia’s substantive criminal laws have improved mark-
edly in recent years. In the most promising of recent political developments, Congress established a Law Review Commission for the District of Columbia in August of 1974 with a broad mandate to give special consideration to revision of the criminal code.\(^1\) Since jurisdiction to initiate revision of the criminal laws will pass to the District of Columbia Council in January of 1977 pursuant to the Home Rule Act, Congress has substantial incentive to give final approval to a new criminal code within two years.\(^2\) Additionally, the recent development of the Proposed Federal Criminal Code should provide further stimulus to reform of the substantive criminal laws of the District of Columbia.\(^3\)

The overall purpose of this article is to report the results of research on the nature and extent of the need for comprehensive criminal code revision. The research was designed to provide information and perspective for decision-making on approaches to code revision, to aid in understanding what can be expected from code revision, and to illustrate directions such code revision might take. The information presented draws upon three sources: materials collected by one of the co-authors,\(^4\) library research of statutes and related case law, and a questionnaire administered during the summer of 1974 to attorneys and judges who have day-to-day contact with the administration of criminal justice.

Following additional introductory sections on the nature of the questionnaires and the respondents and the role of the legislature in defining and classifying criminal conduct, the analysis will continue in three parts. Part I analyzes the status of criminal code reform in the District of Columbia. It is subdivided into four sections which discuss the national movement for criminal code reform, the historical development of the District’s criminal code, the

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2. See notes 85—88 & accompanying text infra.
4. Professor Aaronson served as a member of the Criminal Code Revision Committee, Young Lawyers Section, District of Columbia Bar Association, from 1970 to 1973, serving as chairman for the last two years. He submitted a paper analyzing two bills to create a law review commission (H.R. 7412 and H.R. 7658), and testified before the Judiciary Subcommittee of the House of Representatives District of Columbia Committee. He presented a resolution of the Criminal Code Revision Committee, endorsed by the Executive Council of the Young Lawyers Section, recommending that criminal code reform be accorded priority among the tasks to be given a law review commission.
resurgence of the impetus for substantive criminal code reform in the District of Columbia, and evaluate the recently created Law Review Commission as a mechanism to achieve criminal code reform. The need for revision of the criminal code is assessed in Part II by identifying general problem areas or deficiencies in the present code. This approach gives a broad overview of the degree to which the code falls short of minimum standards. Finally, Part III presents a case study of the provisions relating to unlawful homicide. It demonstrates the need for especially detailed scrutiny of code provisions protecting vital community interests and illustrates an approach to analysis of substantive offense areas involving several code sections.

B. The Nature of the Questionnaire and the Respondents

The purposes of using a questionnaire are to obtain information to supplement library research on criminal code deficiencies, perceptions of criminal justice professionals on the relative seriousness of code deficiencies, and recommendations for code revision from persons who are involved on a day-to-day basis in the administration of criminal justice. To achieve these objectives the questionnaire was administered to several groups. With the understanding that the views expressed would not be attributed to the respondents or the offices with which they are affiliated, cooperation was generously provided in distributing the questionnaire to supervising attorneys in the United States Attorney’s Office,5 to attorneys assigned to the Juvenile and Law Enforcement Divisions of the Office of the Corporation Counsel,6 and to staff attorneys in the Public

5. The questionnaire was distributed to each of the 22 supervising Assistant United States Attorneys for the District of Columbia; six completed responses were received. In addition, six completed responses were received from other Assistant United States Attorneys, responding to the questionnaires distributed to the Section on Criminal Law and Individual Rights of the District of Columbia Bar Association. Another response was received from a former Assistant United States Attorney. See note 8 infra.

Appreciation is expressed for the cooperation of Earl Silbert, Acting United States Attorney for the District of Columbia; Henry Greene, Executive Assistant United States Attorney; and Paul Friedman, Administrative Assistant United States Attorney (currently with the Solicitor General’s Office) in distributing the questionnaires.

6. Thirty questionnaires were distributed to the Assistant Corporation Counsels for the District of Columbia; six completed responses were received.

Appreciation is expressed for the cooperation of C. Francis Murphy, Corporation Counsel for the District of Columbia; Michael Dowd, Jr., Chief, Juvenile Division; and Carl McIntyre, Chief, Law Enforcement Division.
Defender Service. To get the views of other attorneys, especially members of the private defense bar, the questionnaire was submitted to members of the Section on Criminal Law and Individual Rights of the District of Columbia Bar Association. Finally, the questionnaire was given to the associate judges of the Superior Court of the District of Columbia.

A total of 84 completed responses was received. The respondents include 19 attorneys from prosecutor's offices, 30 from the defense bar, nine judges, and 26 other attorneys holding positions primarily as government counsel, in criminal justice agencies, and in public interest law offices or research centers. Five of the judges indicated that they spent at least 50 percent of their time hearing criminal matters, and no judges spent less than 20 percent of their time. Furthermore, six of the nine judges had at least some experience with criminal litigation in the District of Columbia prior to judicial service. Of the remaining 75 respondents, 62 of whom are male and 13 female, 14 have five or more years of experience, 17 have three or more, 13 have two or more, 14 have at least one, and 17 have less than one year of experience.

The questionnaire was long and divided into five parts. The

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7. Questionnaires were distributed to 44 staff attorneys of the Public Defender Service for the District of Columbia; eight replies were received.

Appreciation is expressed for the cooperation of Norman Lefstein, Director, Public Defender Service for the District of Columbia.

8. Approximately 390 questionnaires were mailed to the residences of members of the Section on Criminal Law and Individual Rights of the District of Columbia Bar Association, with the exception of those members who had already been distributed a questionnaire at their offices; 55 completed responses were received. Twenty-two were from practicing attorneys with at least some experience in defending criminal cases in the District; 13 of these were quite experienced, having handled at least 25 felony, misdemeanor, or juvenile cases. Twenty-six of the respondents were not engaged in private practice, but held a variety of legal positions, including public interest firms, legal education, and federal government legal work (primarily with the Justice Department or J.A.G. staff of one of the armed services). In addition, seven of the respondents were Assistant United States Attorneys.

Appreciation is expressed for the cooperation of William Schaffer, Section Chairman, and Raymond Garraty, Executive Director, District of Columbia Bar, for providing a computer printout of the mailing labels for section members.

9. Forty-four questionnaires were distributed to the Judges of the Superior Court of the District of Columbia; nine completed responses were received.

Appreciation is expressed for the assistance of David Richin, then a law clerk for one of the associate judges, in distributing the questionnaires and collecting the responses at a time when many judges were attending conferences or vacationing.

10. The first part of the questionnaire is a short section on "Personal Data of Respondent." The second part is the main section listing most of the criminal code
main part contained a list of the principal code sections. In order to obtain the views of respondents with a minimum amount of time and effort, and in order to facilitate the compilation of responses, they were asked to check each code section, indicating "frequency of contact" with that particular section. In addition, the respondents were asked to indicate whether they agreed or disagreed with the statement that "this section is in need of revision" and to comment thereon. A summary of the responses to this part of the questionnaire, according to offense category, appears in the Appendix.

C. The Role of the Legislature and Law Enforcement Agencies Exercising Quasi-Legislative Functions

1. The role and its parameters

Basic to any discussion of the revision of a criminal code must be some analysis of the role of the legislature. The generally accepted premise for the legislative role in making decisions as to the definition and classification of criminal conduct is that the legislature exercises, by action or inaction, the primary as well as the ultimate provisions. Part three is composed of nine statements relating to general problems with the code. The fourth part consisted of questions relating to strategies for code reform. The final section was for general comments. The questionnaire was 27 letter-size pages long. All responses to the questionnaire are on file in the office of Professor Aaronson, Washington College of Law, American University, Washington, D.C.

11. The following statement appeared in the instructions to the questionnaire: "Frequency of Contact or Experience with Code Provision(s). Have you provided legal services in a criminal case in which the defendant was charged (or subsequently entered a guilty plea) with the listed code sections? Four choices are provided: often, occasionally, rarely, never."

12. The following directions appeared in the instructions to the questionnaire: "For each section(s) please indicate the extent of your agreement with the following statement: THIS SECTION IS IN NEED OF REVISION. Please place a checkmark in the box that most closely reflects the extent to which you agree with that statement. Five choices are provided: strongly agree, agree, disagree, strongly disagree, no opinion." The five point rating scale used is a technique commonly employed in opinion surveys. See, e.g., D. Miller, Handbook of Research Design and Social Measurement 88 (2d ed. 1970); C. Sellitz, et al., Research Methods in Social Relations 343 (1959).

The following statement in the questionnaire’s instructions related to comments: "After you have expressed an opinion (unless the 'No Opinion' box is checked), space is provided for 'Comment.' If time permits, please indicate in this space views or suggestions of what should be changed and why. If your views are based on particular case law, if possible, please indicate."
responsibility for this activity. Less well-recognized is the vital role of the police department, the prosecutors’ offices, and, to a lesser degree, the trial and appellate courts in this decision-making process.

The respective roles of these various groups in the maintenance or revision of a criminal code should be viewed in terms of the several functions of a criminal code. It is the starting point and foundation for: 1) officially announcing minimum standards of acceptable conduct by labelling certain behavior as criminal; 2) obtaining voluntary citizen compliance and cooperation, upon which the enforcement of the criminal laws depends, by informing the public with as much clarity as possible of what behavior is deemed to be criminal; 3) guiding police actions in the enforcement of the criminal laws; 4) clarifying for the prosecutor, defense counsel, and trial and appellate judges the limits of criminal and non-criminal behavior, and providing the basis for instructions given to a jury of laymen at the trial of a criminal case; and 5) promoting the educational, deterrent, and rehabilitative impact of the criminal laws while safeguarding conduct that is without fault.

Part I of this article, which traces the historical development of the District’s criminal code, demonstrates the relatively inactive role of the Congress in maintaining a modern criminal code designed to serve the above-noted functions in the District of Columbia. This discussion suggests by implication that these functions have been met through an informal, largely unwritten, low-profile process of criminalization/decriminalization decision-making by other criminal justice agencies, acting through the device of implementing legislative policy. 13

13. An alternative thesis is that the process of legislative policy-making cannot be understood merely by examining the formal legislative record as reflected in the provisions of the criminal code. Professor Kenneth Culp Davis has recently observed that the legislative branch speaks with three voices in communicating to law enforcement agencies:

The first is the statute. The second is long-term knowledge of and acquiescence in nonenforcement. . . . The third is appropriation of funds insufficient for complete enforcement, compelling police and prosecutors to create a system of enforcement priorities. The argument that the second and third voices speak louder than the statute and express the true legislative intent is based on realism and cannot be brushed aside.


One difficulty with the above statement is the meaning of “true legislative intent.” The informal processes of legislative communication to law enforcement
It is submitted that statutory decriminalization by the legislature represents the preferred remedy to the existence of an overly-broad spectrum of conduct now subject to the sanctions of the District of Columbia criminal code. It is essential that those to whom these minimum standards of acceptable conduct are addressed have clear notice that the elected representatives deem specific conduct to be unacceptable. This is necessary if the functions of the criminal code, principally in this instance the maximization of citizen compliance with the criminal laws and cooperation with law enforcement agencies, are to be fully met. Respect for the law may be seriously undermined when there are wide discrepancies between “law-on-the-books” and “law-in-action.”

The importance and legitimacy of broad discretion in the form of policy-making by other criminal justice agencies and of informal processes of communication with the legislative branch is recognized. However, it is also important to clearly distinguish between formal criminalization/decriminalization decision-making by the legislature and de facto decision-making by police and prosecutors. The important question in terms of the wide range of conduct

agencies outlined by Professor Davis merit study. A case study of a particular jurisdiction, evaluating the use of the budget as a mechanism for making more refined, short-term adjustments to the criminal code, might be highly revealing. If it were demonstrated that the dominant mode of communication was through these informal processes, the following question would still need to be resolved: to what degree does the informal communication, as compared to the formal communication through statutes, advance the functions performed by a criminal code?

To the degree that Davis’ thesis is valid, it can be argued that a non-arrest or non-prosecution policy for certain offenses does not represent a substitute for legislative judgment. It is suggested, however, that the neglect of the formal process of communication is costly in terms of community acceptance of minimum standards of conduct and maintenance of maximum community cooperation with law enforcement agencies, and respect for law and the legal processes.

14. Most police departments, however, must have non-arrest policies as to certain offenses. If all the laws in the criminal code were fully enforced, more cases would be initiated than could be prosecuted, and great disrespect for the law would be generated if many of the arrests involved conduct not deemed criminal by the community. Moreover, total enforcement is precluded by the limited resources available to law enforcement agencies. On the other hand, full enforcement of particular code sections might force the legislature to exercise its responsibility to decide what conduct or status should be punishable and how. See Davis, An Approach to Legal Control of the Police, 52 Texas L. Rev. 703, 716 (1974).

15. The Congress, however, does not formally recognize the existence of any discretion on the part of the Metropolitan Police Department in this regard.

Penalty for neglect to make arrest.

If any member of the police force shall neglect making any arrest for an offense against the laws of the United States committed in his presence, he
labelled criminal in the District of Columbia is not whether to decriminalize but who should decriminalize, the extent of decriminalization, and the process for making decriminalization decisions.

The policy-making process of law enforcement agencies is basically different from that of the legislative branch. Law enforcement decisions relating to the definition and classification of conduct as criminal are almost always made informally, usually have low visibility, and are not published. By contrast, the legislative process typically includes a formal fact-finding process, permitting all interested individuals and groups affected by criminal laws to provide information and express their views, a written statement of the policy, a statement of reasons for the policy in the form of a written committee report, and, finally, publication of the policy, often accompanied by wide publicity. The informal process greatly increases the likelihood of unjustified selective or discriminatory enforcement of the penal laws.

If the history of the role of the legislature in the District of Columbia with regard to statutory criminal law-making is a guide, it may be unrealistic to expect that branch of government to assert itself in the future. If so, this responsibility will continue to rest by default in the other criminal justice agencies responsible for enforcing the criminal laws. Consequently, it is especially important to consider ways to promote the better use of discretion, to insure both that discretion is wisely exercised and, also, that it has the appearance of being wisely exercised. An approach strongly recommended for consideration is formal rule-making by police and prosecutors, which might take the form of joint rule-making.16

shall be deemed guilty of a misdemeanor and shall be punished by imprisonment in the District jail or penitentiary not exceeding two years, or by a fine not exceeding $500.

16. When a non-arrest policy is formalized by means of a written rule, it enhances the level of predictability and consistency in the operation of law enforcement agencies. Such occurrences are rare. One example in the District of Columbia is a police department rule that motorists were no longer to be stopped for passing red lights between the hours of 3:00 and 6:00 a.m. One of the purposes of this order is to conserve resources for more serious crimes. Metropolitan Police Department, General Order No. 303.1, Traffic Enforcement, pt. 1(E)(2) (Aug. 1, 1974).

A perfect example of the failure of an attempt at formal rule-making was the plan announced by Acting United States Attorney for the District of Columbia Earl Silbert that persons arrested for possession of small amounts of marijuana would not be prosecuted. Acting Police Chief John Hughes immediately criticized Sil-
2. Alternate approaches to fulfilling the role

If the legislative branch is willing to exercise its statutory role, it is important to set out the alternatives available in making criminalization/decriminalization decisions. Three types of statutory decriminalization may be distinguished: 1) pure decriminalization, 2) reclassification, and 3) substitution of a non-criminal response for the criminal sanction. These options, with some modifications, are also available to the various criminal justice agencies in making decisions involving de facto decriminalization.

Pure decriminalization, which is often equated with statutory
decriminalization, is the removal of particular offenses or classes of offenses from statutory prohibition, without any further attempt to penalize, regulate, or provide treatment for the previously prohibited conduct. Experience with code revision in other jurisdictions suggests that many offenses decriminalized in this fashion are those which have been de facto decriminalized by the police or prosecutors. This may occur either because these criminal justice officials do not perceive the offense to be serious enough to warrant allocation of limited resources, or because arrest and prosecution in these cases is highly unpopular or morally objectionable. A lag between societal norms as expressed in statutory provisions and as expressed in law enforcement policy is likely to be particularly pronounced in a jurisdiction such as the District of Columbia where the legislature has not undertaken a periodic review of the substantive offense provisions. Consequently, pure decriminalization will not usually result in any appreciable change in the processing of cases in the criminal justice system for many types of crimes.

A second approach to decriminalization, which may be termed reclassification, involves downgrading the criminal penalty for particular categories of offenses, rather than eliminating them completely from the criminal code. The use of this approach is likely in two situations: 1) where the legislature still desires to regulate or control the conduct in question by criminal sanctions; or 2) where the legislature recognizes that the conduct involved cannot be effectively deterred by criminal sanctions, but desires to "place itself on record" as disapproving of the conduct. The reclassification approach may be a more politically expedient method of responding to public pressure condemning the punishment as unnecessarily severe where pure decriminalization may anger interests more concerned with defining the conduct as illegal, irrespective of the type of penalty.¹⁹

¹⁹. An example of this process in action can be seen in Oregon's reclassification of marijuana possession. In July of 1973, Oregon amended its marijuana statute, reducing the penalty for possession of less than one ounce from a Class A Misdemeanor, punishable by imprisonment for one year or a fine of $1,000, to a violation, punishable by a fine of less than $100. Ore. Rev. Stat. § 167.207(3) (1974).

It is interesting to note that apparently the action of the Oregon legislature merely formalized the informal law enforcement policy. Since 1969, no one had received a sentence of imprisonment for mere possession of such amounts of marijuana and the police had made few arrests. The legislature hoped that its action would promote the use of law enforcement resources for investigating more harmful drugs, as well as removing the criminal label from a sizeable minority of the state's population. Yet, by adding the $100 fine, the legislature indicated its desire to
The third type of statutory decriminalization involves the substitution of a non-criminal response for a criminal sanction. Instead of prescribing criminal definitions and penalties for certain conduct, the legislature may establish a procedure for regulating and responding to it by a mechanism intended to have a non-penal purpose. The adoption of the substitution approach often suggests a legislative judgment that the conduct formerly defined as criminal ought to be handled as a public health problem without further penetration into the criminal process.

An example in the District of Columbia of the substitution approach is the handling of public inebriates. It also illustrates the importance of the judicial branch, here the United States Court of Appeals for the District of Columbia Circuit, in providing the stimulus for the legislature to formulate an alternative to the criminal response. While the court merely held that a chronic alcoholic could not be convicted for public intoxication, Congress subsequently provided an alternative for all public inebriates, whether chronic alcoholics or not, provided they are not a danger to themselves or others. Police officers are still the primary "pick-up" agents, but instead of taking the public inebriate to the police station "drunk tank," the inebriate may be taken or sent to his home, a health facility, or to the detoxification center. It should be observed that an individual taken to a detoxification center may be detained for up to 72 hours, receiving medical attention if needed.


21. The legislative response was the Alcoholic Rehabilitation Act of 1967, authorizing alternate procedures for handling all public inebriates, whether chronic alcoholics or not. The present District intoxication statute provides that any person, who is intoxicated in public (1) may be taken or sent to his home or to a public or private health facility, or (2) if not taken or sent to his home or such facility under paragraph (1) shall be taken to a detoxification center. D.C. CODE § 24-524 (1973).

It should be noted that drinking in public is still an offense, although this provision is rarely used. See id. § 25-128.

22. Id. § 24-524. The civil-criminal distinction among legislatively prescribed responses may be unclear. While all criminal sanctions are penalties, not all civil (non-criminal) responses are non-penal, either by legislative implication or in their practical effect. Involuntary detention in the detoxification center represents a deprivation of liberty and may arguably be regarded as penal in nature. Thus,
and other services. The impact on the criminal justice system was the removal of a major source of court congestion and delay.

The consequence of a failure of the legislature to adequately perform its statutory role in criminal code revision is usually improvisation and the use of inadequately guided discretionary authority by police, prosecutors, and other criminal justice officials. Additional consequences include: 1) lack of understanding on the part of the public as to what conduct is officially prohibited; 2) lessened respect for the law and its enforcers; and 3) waste and misallocation of criminal justice resources which could be better used to combat more serious anti-social conduct.

In the analysis which follows the reader should be aware of the respective roles played by legislative and quasi-legislative bodies when considering effective alternatives for enacting or revising a set of laws designed to best serve the functions of the criminal code.

I. THE MOVEMENT FOR CRIMINAL CODE REFORM IN THE DISTRICT OF COLUMBIA

An examination of reform efforts in other jurisdictions reveals the significant progress made in other states toward modern, comprehensive revision of their criminal codes. Most states have revised their criminal codes in the last three decades or are in the process of so doing. A study of the history of the District’s development of its criminal code provides a striking contrast with reform jurisdictions which have faced code revision problems similar to those faced by the District.

This section will discuss the District’s lack of progress in reforming the criminal code, most notably in relation to its unique political status. Recent political developments will be discussed insofar as they have a bearing on what appear to be substantially improved although the purpose of the new procedure is non-criminal (to provide treatment), the effect retains the penal character inherent in involuntary detention and forced treatment. Involuntary commitment, even if short-term and for humane, non-penal objectives, may pose serious legal questions, especially the absence of due process procedural safeguards at least theoretically afforded under the former criminal sanctions.

23. The success of this form of substitution depends upon an effective service capacity and a budget appropriation designed to meet the specifications of the law. In the District of Columbia, some dissatisfaction exists among public health professionals regarding the adequacy of the delivery of public inebriates to the detoxification center and of resources for short- and long-term treatment. The institution of a treatment-oriented approach is not sufficient; a city must be willing to invest resources to handle the new patient case load at health service centers.
chances for criminal code reform. Finally, the recently created Law Review Commission will be examined in terms of its potential for achieving comprehensive criminal code reform.

A. The National Movement for Criminal Code Reform

There are movements in the field of law reform just as there are movements in the fields of art and politics; and revision of the substantive criminal law is clearly "the" law reform movement of the sixties.24

Indeed, 17 jurisdictions have enacted comprehensive revisions in their substantive criminal laws in the past decade.25 In addition, revisions have been completed and are awaiting enactment in 18 other jurisdictions.26 In fact, there are only three jurisdictions which have not revised or at least contemplated comprehensive, substantive revisions of their criminal codes.27 These statistics indicate that "movement" might even be an understatement of the scope of this phenomenon.

The trend toward reform is not based upon academic criticism of a cumbersome but functional code of criminal law, but upon a general deterioration in the effectiveness of criminal codes in all parts of the country. Wechsler has identified the general problems existing in virtually every jurisdiction which tend to impede the just administration of the criminal laws:

Viewing the country as a whole, our penal codes are fragmentary, old, disorganized and often accidental in coverage, their growth largely fortuitous in origin, their form a combination of enactment and of common law that only history explains. Basic doctrines governing the scope and measure of this form of liability have received small attention from the legislature and cannot easily be renovated by the courts. Discriminations that distinguish minor crime from major criminality, with large significance for the offender's treatment and his status in society, often reflect a multitude of fine distinctions that have no discernible relation to the ends that the law should serve.28

26. Id.
27. Id. The three jurisdictions not contemplating comprehensive revisions are Mississippi, Nevada, and Wyoming.
This very inadequacy in the substantive criminal laws precipitated the national movement towards comprehensive revision of the criminal codes. Specifically, the pre-revision criminal codes in most jurisdictions contained obsolete and unnecessarily verbose provisions, needless technical distinctions and overlapping, inadequate statements of proscribed conduct, and unnecessary variations in penalties for essentially comparable conduct. 29

While in many instances an efficient administration of inadequate laws tends to compensate for those shortcomings, 30 this stop-gap resolution of the problem serves to both perpetuate the underlying problems and create new ones. If the true failings of the substan-

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30. In discussing this compensating process, one commentator noted: The difficulties created by lack of organization and clarity are often overcome by the gradually developed expertise of the lawyer who continuously works with the criminal law. However, not even the most experienced lawyer is likely to be aware of every hidden provision or misleading title. Similarly, inadequacies in coverage are usually offset by an ingenious prosecutor, always able to find some provision somewhere that relates to at least one aspect of the defendant's conduct, or a tolerant judge, willing to strain the language of an existing provision to encompass an act that clearly should be deemed criminal even if the statute might not clearly say so. So too, gross inconsistencies in penalties for similar acts often are neutralized by judicious use of plea bargaining. All of this, of course, comes at a cost—in time, effort and dignity of the criminal law.

tive laws are not revealed, then the root problem, the inadequate criminal code, will not be corrected. Also, this solution, while necessary to the orderly maintenance of a criminal justice system pending rational reform, vests undue discretion in officials, many of whom are not elected and thus unresponsive to citizen criticism. This undue discretionary power resulting from a dysfunctional criminal code negates one of the basic tenets of American society—that the law and not individuals will rule.\textsuperscript{31}

The combination of substantive inadequacies and excessive administrative discretion has supplied the chief impetus for the national reform movement. The National Advisory Commission on Criminal Justice Standards and Goals recently undertook a review of the status of criminal codes across the country. The Commission, concerned about the problems presented by such unrevised codes and impressed by the results achieved in reform jurisdictions, felt compelled to assert substantive code reform as an imperative objective: “Any State that has not revised its substantive criminal law within the past decade should begin revision immediately.”\textsuperscript{32}

This presumption of inadequacy attaching to an unrevised code certainly seems warranted in light of the identifiable problems uniformly present in virtually every jurisdiction which has not recently revised its substantive criminal laws. To prevent the recurrence of these problems subsequent to a revision, the Commission found that “continuing law revision is required if the achievements of initial code reform are to be maintained.”\textsuperscript{33}

\textsuperscript{31} For a discussion of the role of the legislature in criminal code reform see notes 13—23 & accompanying text \textit{supra}. See also Wechsler, \textit{The Challenge of a Model Penal Code}, 65 \textit{Harv. L. Rev.} 1097, 1102 (1952).

A society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves. Whatever one would hold as to the need for discretion of this order in a proper system or the wisdom of attempting regulation of its exercise, it is quite clear that its existence cannot be accepted as a substitute for a sufficient law. Indeed, one of the major consequences of the state of the penal law today is that administration has so largely come to dominate the field without effective guidance from the law. This is to say that to a large extent we have, in this important sense, abandoned law—and this within an area where our fundamental teaching calls most strongly for its vigorous supremacy.

\textit{Id.}

\textsuperscript{32} \textit{National Advisory Commission on Criminal Justice Standards and Goals, Criminal Justice System} 175 (1973).

\textsuperscript{33} \textit{Id.} at 195.
Continuing code revision may be almost as important as the initial revision itself. Indeed, the inadequacies present in unrevised codes have resulted from the legislatures’ failure to maintain criminal codes responsive to changing societal institutions. As the penal codification movement of the nineteenth century introduced the principle of statute law to replace the common law, the code reform movement of the twentieth century should promote the concept of a more flexible code, amenable to change in response to community needs.

34. As the National Advisory Committee stated:

Much of the confusion in criminal law coverage in States that have not revised their criminal statutes recently is the product of random, uncoordinated legislation enacted over many years of legislative sessions. The confusion can be prevented or controlled only by requiring that all bills be reviewed promptly to determine whether they actually are needed. When changing conditions create new needs, new code provisions are necessary...

Much of the benefit realized through revision is likely to be lost unless revision is a continuing process, through which omissions or duplications in coverage can be remedied, defects in administration cured, and the inevitable urge to pass new statutes resisted to the utmost.

Id.

35. The following passage clearly indicates the breadth of problems created by an unrevised criminal code.

Actually even a penal code that had been totally revised in 1931 could not be expected to deal adequately with the vast changes in society that have occurred in just the last ten or fifteen years. New developments in the economic structure—the widespread use of credit; the recognition of new security interests in legislation like the Uniform Commercial Code; the use of services and rentals as major commodities on the market; and the creation of new items of value such as trading stamps and credit cards—would alone require significant changes in various provisions dealing with the misappropriation and destruction of property. Similarly, the tremendous expansion in the operations of government, accompanied by various changes in administrative functions, would require substantial alterations in the numerous provisions that affect public administration.


36. That earlier movement, however, was perhaps too rapid and insufficiently implemented, resulting in cumbersome and insufficient penal codes.

After the Revolution, there was a general desire among the states to break away from the English criminal common law, due to the harshness of the provisions from which the colonies had suffered. . . . Our criminal laws . . . have developed into a patchwork of inconsistencies, contradictions, and confusion by reason of the desire to break away from the common law and create as rapidly as possible a legal system more nearly adapted to local conditions. Molnar, Criminal Law Revision in Georgia, 15 Mercer L. Rev. 399 (1964).
B. Historical Development of the District of Columbia Criminal Code

The evolution of the District's code is chronicled in the preface to the current code. It should be noted, however, that this account, like most of the code, has not been updated since first printed in the 1929 edition. Since its original codification in 1901, there has been no general revision of the substantive criminal code.

The history as recorded evidences a pattern of congressional disregard for the state of the substantive laws in the District of Columbia. Although the Congress has the plenary power to "exercise exclusive legislation in all Cases whatsoever" in regard to the District of Columbia, that power has rarely been exercised to qualitatively reform the criminal laws.

When the District of Columbia was ceded by Maryland and Virginia to the federal government, the common law of those jurisdictions followed the cession of the land. Congress at that time made no attempt to clarify the laws in force in the District other than:

[t]hat the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of government; and that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted as aforesaid.

Thus, from their creation the District's laws were a confusing amalgam of federal law and the laws of two states, applicable to the territory which they respectively ceded to the federal government. This state law, moreover, was little more than the inherited English common law in force as of the time of the Declaration of Independence. The District's substantive laws were thus comprised of: 1) the maxims and principles of equity; 2) the British common law as of 1776; 3) the British statutes in effect in 1776; 4) laws of Maryland in effect in 1800, including those passed by the Maryland colonial

39. See Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130.
41. Since, however, the territory ceded to the federal government by Virginia was retroceded to Virginia in 1846, whatever laws were in effect in that territory had little if any effect on the development of the District's law. See Act of July 9, 1846, ch. 35, Preamble, 9 Stat. 35.
government; 5) laws of Virginia likewise in effect in 1800; and 6) those federal laws not inapplicable to the District.42

From that time until 1900 a number of attempts, congressionally authorized and otherwise, were made to organize these laws. There was no official codification of the laws until 1901, however, although the problem had increased through the continuing enactment of laws to govern the District, many of which were "buried in appropriation acts."43

The congressional codification of 1901 did little to clarify the state of the laws in the District. While the Congress enacted the overall code with some 1,642 sections stating positive law in force in the District, a confusing mass of laws unaffected by the codification were continued in force in the District. These included:

The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States . . . .44

Therefore, the codification served merely to delineate certain laws without eliminating or organizing the vast bulk of laws applicable to the District but unaffected by the codified provisions.

The 1901 code had slightly over 100 provisions relating to substantive criminal offenses, six provisions concerning general matters such as attempts, and about two dozen sections on various criminal procedure matters.45 The chapter covering the criminal offenses was divided into eight subchapters: offenses against the person, property, public peace, public justice, public policy, morality, miscellaneous, and general provisions.46

Since 1901, there has been no general revision or even a reconsideration of the substantive criminal provisions. While a variety of specific offenses have been added or deleted, often without thought as to the effect of such amendments on other provisions of the code,47

43. Id.
45. Id. §§ 798—939.
46. Id. §§ 798—910.
47. When, for example, the housebreaking section was entirely amended to establish two degrees of burglary, the felony-murder clause of the murder provision was not amended to reflect that change. Compare D.C. Code § 22-1801 (1973), with id. § 22-2401.
the only comprehensive change enacted has been rearrangement of
the provisions.\textsuperscript{48} Even that Act resulted in a change from a societal
interest arrangement to an alphabetical one, a move ill-considered
in light of the uniform rejection of the alphabetical format in con-
temporary criminal codes.\textsuperscript{49}

The District's criminal code has never been fully resurrected from
the mass of conflicting laws resulting from the combination of sev-
eral jurisdictions. In fact, the jurisdictional conflict still continues
as Congress and the District Council both have authority within
their respective spheres to legislate criminal offenses.\textsuperscript{50} For the first
time since its creation, however, the District may be able to avoid
this cumbersome problem in January of 1977, when jurisdiction to
initiate criminal laws for the District of Columbia will reside solely
in the Council.\textsuperscript{51}

\section*{C. The Recent Impetus for Substantive Criminal Code Reform}

With the steadily rising crime rate of the 1960's came the in-
creased awareness that the system of administering criminal justice
in this country was not achieving its primary purpose—the deter-
rence of actual and potential criminals and the rehabilitation of
individual offenders. To study the causes of this phenomenon, the
federal government established a number of commissions and com-
mittees. Among these were two concerning the District of Columbia.

The President's Commission on Crime in the District of Columbia
reported on many substantive and procedural failings in the crimi-
nal justice system, as well as reporting on the need for broader
community programs. Pursuant to one of the recommendations, the
Commission on Revision of the Criminal Laws of the District of
Columbia was established. For a number of reasons, however, that
Commission failed in its task.

Yet, the interest in substantive criminal code reform, fueled by
political developments favorable to the District, has continued.
This section will trace the evolution of this recent drive for substan-
tive code reform in the District which has culminated in a new Law
Review Commission with a mandate to give special consideration to
revision of the criminal law.

\textsuperscript{48} In 1941, the Committee on the Revision of the Laws of the House of Repre-
sentatives rearranged the District's code into what is basically its present form.
Authority for that action was granted by the Act of May 29, 1928, ch. 910, § 3, 45

\textsuperscript{49} See notes 159--61 & accompanying text \textit{infra}.

\textsuperscript{50} See note 89 & accompanying text \textit{infra}.

\textsuperscript{51} See notes 86--87 & accompanying text \textit{infra}.
1. The President's Commission on Crime in the District of Columbia

In 1965 President Johnson established a Commission to examine in depth a number of institutions relating to the administration of criminal justice in the District. One of its many functions was to evaluate and report on the "adequacy and effectiveness of the criminal laws." The results of that study were included as a major section in the report of that Commission.

The findings of the Commission presented numerous examples of inadequacies in the substantive criminal law. Overall, the Commission found the District's criminal code needed "modernization, clarification, a more rational penalty structure, and thoughtful consideration of many difficult substantive and procedural problems." As a result of that study, the Commission recommended:

1. The criminal law of the District of Columbia should be reviewed and reformed. The review should include a reexamination of all substantive and procedural provisions of the law to provide a clear definition of criminal behavior, to achieve fair and consistent policies in dealing with offenders, and to introduce new concepts of treatment into the code.

2. Congress should create and support a commission to undertake revision of the District of Columbia criminal laws.

2. The Commission on Revision of the Criminal Laws of the District of Columbia

The creation and subsequent abolition of this law revision commission was a reflection of the Congress' general lack of concern over the state of the criminal laws in the District of Columbia, as well as the conflict in philosophy and approaches of the House and Senate District Committees. In December of 1967 the Congress passed "An Act Relating to Crime and Criminal Procedure in the District of Columbia." Title 10 of that Act established a Commission to

53. Id.
55. The more striking examples discussed by the Commission were the need for precise definitions of criminal behavior, elimination of confusing and inconsistent Code provisions, and the institution of a systematic and effective penalty structure. Id.
56. Id. at 627.
57. Id. at 635.
make a full and complete review and study of the statutory and case law applicable in the District of Columbia for the purpose of formulating and recommending to the Congress a revised code of criminal law and procedure for the District of Columbia. The Commission [was also to] include in its recommendations proposals for the repeal of unnecessary or undesirable statutes and such changes in the penalty structure as the Commission may feel will better serve the ends of justice.\(^5\)

The legislative history of the Act suggests that, for the House of Representatives at least, the Commission was secondary to the passage of accompanying "law and order" offenses.\(^6\) In fact, the Commission was created pursuant to a Senate amendment to the House's strong anti-crime proposals for the District,\(^6\) and the House concurred simply to enact its proposed anti-crime measures.\(^6\)

The Act provided for an eleven-member commission,\(^6\) which was to submit an interim report within two years and a final report within three years.\(^6\) The Commission held an initial meeting in the spring of 1968; however, no attempts were made to recruit a staff until early in 1970, largely because of lack of appropriated funds.\(^6\)

In hearings before the Senate District Committee in the spring of 1970, the Commission's chairman, Wiley Branton, argued for the necessity of funds for the project to accomplish its task, noting:

There is considerable case law that needs to be enacted into legislation, to prevent the confusion and to eliminate some of the archaic

\(^{59}\) Id. § 1003.

\(^{60}\) The House Report stated that the Commission was passed by the House solely because of the overriding "interest of getting some effective House passed anti-crime proposals . . . into the statute books . . . ." H. R. Rep. No. 907, 91st Cong., 2d Sess. 130 (1970).

\(^{61}\) See 113 Cong. Rec. 36079 (1967).

\(^{62}\) See id. at 36405—09.


laws which are on the books. There are many criminal statutes on the books which are no longer applicable. 66

Mayor Washington also urged funding for the Commission in a letter to Senator Tydings. 67 At least one Senator on the Committee indicated his support for funding the Commission. 68

Congressman Dowdy, a Commission member, introduced legislation to abolish the Commission and delegate the work of revision to the District Committees of both Houses. 69 The rationale for this action was that the "Commission to date has not initiated any study or review of the D.C. Criminal Code," had not met in two-and-one-half years, had not secured any funds for its operations, and had failed to submit its required interim report. 70 Thus, it was felt that "the Congress itself, through its own Committees, can more effectively carry on the review, study, and revision of the District's criminal laws." 71 In fact, the Commission had met, had secured some funds to initiate its study, and had attempted to acquire all of its authorized funds from the House District Committee. 72

One explanation for the failure of the Commission is that while it enjoyed the support of the more liberal Senate District Committee, the conservative House District Committee lacked confidence in its membership and procedures. The basis of the House District Committee's objection lay in its inability to supervise the activity of the Commission. Consequently, it exerted pressure to prevent adequate funding and ultimately sought its dissolution. 73

The Commission was abolished by legislation which included, according to Senator Ervin, some of the most repressive anti-crime legislation ever enacted. 74 In light of this predilection on the part of

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66. Id. at 2137.
67. Id. at 2092—93.
68. Senator Mathias stated, "I personally hope that you can proceed with the job and get your staff in place and get on obviously with what needs to be done." Id. at 2137.
71. Id. at 131.
74. Senator Ervin declared:
[This bill is just as full of unconstitutional and unjust and unwise provisions as a mangy hound dog is of fleas. . . . It is literally a garbage pail of
the Congress at the time, it may be inferred that the Commission was never appropriately funded and eventually abolished partly because of congressional concern, especially on the part of some House District Committee members, that its recommendations would be too liberal.\textsuperscript{75}

3. Subsequent political developments—Improved prospects for criminal code revision

Since the demise of the former revision commission, several significant political events have occurred which have greatly enhanced the prospects for substantive criminal code reform in the District of Columbia. First, there was a radical shift in the leadership of the House of Representatives Committee on the District of Columbia, with Congressman Charles Diggs replacing Congressman John McMillan as chairman.\textsuperscript{76} Second, the Home Rule bill for the District of Columbia was passed.\textsuperscript{77} The transfer of legislative powers over the criminal code was delayed until January of 1977,\textsuperscript{78} thus creating a strong incentive for Congress to revise the criminal code before the transfer occurs. Last, Congress passed a bill in August of 1974 which

\begin{footnotesize}
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  \item some of the most repressive, near-sighted, intolerant, unfair, and vindictive legislation that the Senate has ever been presented.
  \item During the Hearings it was suggested that the District was being used by the Congress as an anti-crime image-builder at the expense of the rights of the local citizens.
  \item Once again a majority of the members of the House District Committee have shown themselves willing to authorize serious invasions of liberty on the voteless residents of the District of Columbia which they would never tolerate, much less support, against their own constituents.
  \item \textit{See also} 116 CONG. REC. 8096 (1970), where Representative Broyhill stated, “[W]e should view the District of Columbia as a laboratory for reforms, as an opportunity to test new techniques to reduce crime.” \textit{Id.}
  \item \textit{Id.} § 602(a)(9).
\end{itemize}
\end{footnotesize}
created a Law Review Commission,\textsuperscript{79} charged with giving special consideration to the revision of the substantive criminal code for the District.\textsuperscript{80}

The change in the leadership of the House District of Columbia Committee opened the way for home rule in the District of Columbia. While Representative John McMillan of South Carolina was chairman of this Committee from 1948 to 1972, he consistently opposed legislation granting home rule to the District.\textsuperscript{81} Consequently, virtually all such bills were retained in committee. However, during the 1972 campaign, Congressman McMillan faced a primary runoff. To secure the support of the third-place finisher in the primary, he pledged to vote for home rule.\textsuperscript{82} Nonetheless, on September 12, 1972, McMillan lost the runoff, and the chairmanship of the House District Committee passed to Representative Charles Diggs.\textsuperscript{83} Chairman Diggs, a member of the Congressional Black Caucus and a strong supporter of home rule for the District,\textsuperscript{84} used his new position to successfully initiate the home rule legislation.

The District of Columbia Self-Government and Government Reorganization Act provided the District of Columbia Council with legislative authority over "all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution of the United States."\textsuperscript{85}

Among the limitations placed upon that power, however, was that the Council could not legislate with "respect to any provision of any law codified in title 22 . . . during the twenty-four full calendar months immediately following the date on which the members of

\textsuperscript{80} See text accompanying notes 97 & 98 infra. The unprecedented effort on the Proposed Federal Criminal Code should provide additional momentum for revision of the District's criminal laws. See note 3 supra.
\textsuperscript{81} See 30 Cong. Q. Weekly Rep. 2337 (1972). In 1971, McMillan's position on the Committee was threatened at a Democratic caucus when party liberals attempted to replace him as chairman. The attempt failed, however, by a vote of 126 to 96. Id.
\textsuperscript{82} See 28 Cong. Q. Almanac 653 (1972). The sincerity of that pledge was doubtful, however, for McMillan attempted to postpone a Committee meeting relating to proposed Home Rule legislation until after the runoff. That move failed, but the Committee was unable to muster a quorum for the meeting. Id.
\textsuperscript{83} See id. at 654. For a general discussion of these events see 30 Cong. Q. Weekly Rep. 2337, 2479 (1972).
\textsuperscript{84} See 28 Cong. Q. Almanac 653—54 (1972).
the Council . . . take office." The purpose of this limitation was to provide time for Congress to revise the criminal code prior to the transfer of authority to the Council. During the interim, it was understood, the mechanism for the revision would be a law review commission to be created by the Congress, which would have as one of its responsibilities reviewing and recommending reforms of the code's criminal provisions.

Even after jurisdiction is transferred to the Council, changes in title 22 will be subject to a congressional veto by either House within 30 legislative days. Other laws enacted by the Council require the adoption of a concurrent resolution by both Houses within the same period in order to void the proposal.

It should be emphasized that Congress has, historically, been concerned with the maintenance of public order in the nation's capital, and has never viewed the issue of law enforcement in the District of Columbia as one readily delegated to local officials. Yet, Congress has not only passed the home rule legislation, but has also established a new Law Review Commission.

Contrary to opinions expressed at the time of the abolishment of the earlier Commission, Congress itself was unable to accomplish code reform for the District through its own committee process. The need for a law review commission whose powers include recommendations on substantive criminal law revision once again has been given congressional recognition.

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86. This was a compromise reached in the conference committee called to reconcile the House amendments to the bill (S. 1435). The amendment limited the District Council's jurisdiction over the criminal laws and the organization and jurisdiction of the District court system. The conference committee agreed to "transfer authority to the Council to make changes in Titles 22, 23 and 24 of the District of Columbia Code, effective January 2, 1977." H.R. Rep. No. 703, 93d Cong., 1st Sess. 75 (1973).

87. The House Report stated:

It is the intention of the Conferees that their respective legislation committees will seek to revise the District of Columbia Criminal Code prior to the effective date of the transfer of authority referred to.

Id. at 76.


90. In fact, the Congress first became interested in establishing a separate seat of government in 1783 when local law enforcement officials stood aside as disgruntled soldiers rioted around the Congress in Philadelphia, forcing the Congressmen to flee. See The Constitution of the United States of America—Analysis and Interpretation, S. Doc. No. 82, 92d Cong., 2d Sess. 352 (1973).

91. See note 79 supra.

92. See note 71 & accompanying text supra.
D. The Law Review Commission as a Vehicle for Criminal Code Reform

As of August 21, 1974, a Law Review Commission for the District of Columbia was established. The establishment of this Commission implements a recommendation made in 1972 by the Commission on the Organization of the Government of the District of Columbia. This recommendation, in turn, relied heavily upon the function and operation of the New York Law Revision Commission, established in 1934, which has served as the prototype for similar commissions created since that date.

The District's Commission was created with a broad mandate to:

(1) examine the common law and statutes relating to the District of Columbia, the ordinances, regulations, resolutions, and acts of the District of Columbia Council, and all relevant judicial decisions for the purpose of discovering defects and anachronisms in the law relat-


Recommendation No. VIII-3— The Commission recommends that the District Government initiate legislation that would authorize the establishment of a Law Revision Commission for the District of Columbia, in the form of a permanent body . . . , to be composed of fifteen members appointed as follows: (1) two each appointed by the Mayor-Commissioner, Chairman of the District of Columbia Council, District of Columbia Corporation Counsel, and the United States Attorney for the District of Columbia; (2) one each by the Speaker of the House of Representatives, majority leader of the Senate, the respective minority leaders of the House of Representatives and Senate, and the Chief Judges of the District of Columbia Court of Appeals and District of Columbia Superior Court; and (3) the Chairman by the President of the United States, subject to Senate confirmation.

Id. (emphasis added).
See also id., vol. 2, at 763-66 (discussion of the reasons for this recommendation).


For a more detailed reference to law revision or law reform agencies, see MacDon-
ing to the District of Columbia and recommending needed reforms;
(2) receive and consider proposed changes in the law recommended by the American Law Institute, the Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies;
(3) receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms relating to the District of Columbia; and
(4) recommend from time to time, to the Congress, and where appropriate to the Commissioner of the District of Columbia and to the District of Columbia Council, such changes in the law relating to the District of Columbia as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law relating to the District of Columbia, both civil and criminal, into harmony with modern conditions.96

Moreover, the Commission is charged with formulating uniform rules of practice and preparing a manual for administrative procedure in the District.97 In short, the Law Review Commission has been created to study all laws in the District of Columbia, both substantive and procedural, and to recommend needed reforms.

In providing such broad responsibilities, patterned after the New York Law Revision Commission,98 it was expected that the new Law Review Commission would "supply a much-needed service now

97. Id. § 3(b).
98. The New York Law Revision Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

2. To receive and consider proposed changes in the law recommended by the American law institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.

3. To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

5. To report its proceedings annually to the legislature . . . and, if it deems advisable, to accompany its report with proposed bills to carry out any of its recommendations.

N.Y. LEGIS. LAW § 72 (McKinney 1952).
lacking in the legislative and administrative machinery of the District Government." It was observed:

Experience demonstrates that an active Corporation Counsel's office, burdened with the day-to-day workload of litigation and accumulated administrative responsibilities, has little time or adequate facilities to undertake studies into legislative shortcomings, or to exercise initiative in formulating recommendations for specific legislative improvement.  

An important question in the establishment of the Law Review Commission was what priority, if any, should be given to substantive criminal code revision among the many possible subject areas in need of revision. Specifically, should substantive criminal code revision take precedence over revision of the civil laws? In the two initial bills proposing a law review commission introduced in the House of Representatives in May of 1973, civil and criminal code revision were mentioned without any designation of priorities. However, in the hearings on these bills before the Judiciary Subcommittee of the House District Committee held on July 11, 1973, the Committee was urged to require that criminal code revision receive priority in order to finally implement the 1966 recommendation of the President's Commission on Crime in the District of Columbia.  

100. Id. at 765. It was also stated that

[the work of law-revision commissions serves to supplement and assist, as well as ultimately to strengthen, the resources available to the chief law-enforcement officials. There need be no conflict between the two; in fact, there has been no occasion for incongruity but rather an opportunity for meaningful cooperation between them. The District Corporation Counsel is included among those that would be given a voice in the selection of members of the Commission proposed for the District of Columbia.  

Id.

102. See notes 54—57 & accompanying text supra. See also Statement of David E. Aaronson, Chairman, Criminal Code Revision Committee, Young Lawyers Section, District of Columbia Bar Ass'n, before the Judiciary Subcomm. of the House Comm. on the District of Columbia, on H.R. 7412 and H.R. 7658 establishing a Law Revision Commission for the District of Columbia, July 11, 1973 (unpublished): IT IS RECOMMENDED that Section 2 [of H.R. 7412] be amended to include the following language in order to implement the recommendation of the President's Commission on Crime in the District of Columbia (1966):

"In the review of both civil and criminal common law, statutes, and judicial decisions, in receiving and considering proposed changes, and in making recommendations for changes in the law, revision of the substantive criminal law shall be accorded priority."
In the subsequent combined bill, dated February 14, 1974, criminal code revision was accorded priority over civil code revision:

In carrying out its duties under this Act, the Commission shall give *priority* to the examination of the common law and statutes relating to the criminal law in the District of Columbia, and all relevant judicial decisions, for the purpose of discovering defects and anachronisms in the law relating to the criminal law in the District of Columbia and recommending needed reforms, and *this task shall be completed before the Commission begins the examination of the civil law in the District of Columbia.*

Subsequently, the House District Committee substituted "special consideration" for "priority" and deleted the language requiring that criminal code revision be completed before the commencement of the examination of the civil law. This change apparently was a compromise between the position of Congressman Diggs and that of Congressman Nelson, who expressed concern about the effect of the stricter provision on the appointments, staffing, and broad base of the Commission.

The foregoing was a unanimously adopted resolution of the Criminal Code Revision Committee. On July 26, 1973, the Executive Council of the Young Lawyers Section formally considered the Committee's resolution, and voted to endorse it. Letter from Lawrence S. Schwartz, Chairman, Executive Council, Young Lawyers Section, District of Columbia Bar Ass'n, to Congressman Fauntroy, Chairman of Judiciary Subcomm. of House District Comm., Aug. 14, 1973.

104. Id. § 3(a) (emphasis added).
105. Section 3(a), as amended, reads:

In carrying out its duties under this Act, the Commission shall give special consideration to the examination of the common law and statutes relating to the criminal law in the District of Columbia, and all relevant judicial decisions, for the purpose of discovering defects and anachronisms in the law relating to the criminal law in the District of Columbia and recommending needed reforms.

106. Congressman Nelson’s position was that

[a]s originally provided in H.R. 12832, the Commission could not undertake the consideration of other matters until its examination of the criminal law was “completed.” I agree with and quote favorably from a letter written by Frank J. Whalen, Jr. . . . :

This priority provision seems to me to preclude establishment of the Commission on a broad base commensurate with the all-encompassing purposes described elsewhere in the legislation. Although the Commission should obviously devote a fair share of its attention to the criminal law, the effect of the priority provision would cause the Commission, for at least the first two years of its existence, and probably longer, to deal exclusively with criminal
The accompanying House Report is explicit, however, in stating that criminal code revision is to take precedence over civil code revision.\textsuperscript{107} After observing that the District Council will receive jurisdiction over the criminal code 24 months after it takes office in January of 1975, the Report states:

Due to the longstanding need for criminal code revision, it is the intention of the Committee that the Law Revision [sic] give special consideration to the examination and recommendation for revision of the criminal law. The Committee intends that while the Commission need not deal exclusively with the criminal law, \textit{it should have substantially completed its work on criminal code revision before turning its attention to the civil law. The Commission should therefore to the extent possible complete the long-needed recommendations for criminal code revision before turning its attention to other areas of the law.}\textsuperscript{108}

After a brief hearing on the House-passed bill,\textsuperscript{109} the Senate District Committee unanimously approved the bill on August 7, 1974, using language identical to that in the House Report with respect to the intended meaning and effect of the phrase "give special consideration to the examination" of the substantive criminal laws of the District of Columbia.\textsuperscript{110}

Two additional questions considered in the creation of the Law Review Commission and their resolution are particularly worthy of mention.\textsuperscript{111} First, should the Law Review Commission be established as a permanent structure, or should it be given an initial trial period subject to extension by Congress? Despite the fact that Con-

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\textsuperscript{107} Id. at 2.

\textsuperscript{108} Id. at 2—3 (emphasis added).


\textsuperscript{110} Id. at 4.

\textsuperscript{111} A related issue concerned the residency of the proposed Commission members. The compromise language in the Act read as follows:

At least eight persons appointed to the Commission shall be bona fide residents of the District of Columbia who have maintained an actual place of abode in the District of Columbia for at least the ninety days immediately prior to their appointments as such members. The remaining persons appointed as members of the Commission shall be residents of the National Capital Region . . . .

gress can effectively destroy any such commission simply by withholding appropriations, and notwithstanding the fact that it was recommended by the Commission on the Organization of the Government of the District of Columbia to be a permanent body, the bill as enacted provides for a four-year life unless extended by Congress. The Chairman of the Commission on Organization noted that such retained control would effectuate the passage of the Law Review Commission through both Houses of Congress.

The second question concerns whether the funding of the new Commission should come from moneys in the Treasury "credited to the District of Columbia" or from general Treasury funds. The bill reported out of the House District of Columbia Committee authorized money to be appropriated from general Treasury funds. However, the passage of the bill in the House was prefaced by a heated discussion about the propriety of committing federal funds for what was seen to be an essentially local project. Consequently, Congressman Nelson proposed a floor amendment, inserting after the word "treasury" the phrase "credited to the District of Columbia." Following approval of this amendment, the Law Review

112. See note 94 supra.

It was not our desire to limit the life of the Commission, unless the Congress in its judgment considered that it was failing to perform its duties as contemplated in such legislation. There is a similar provision in this bill, and I believe it is a provision which enhances its passage in the House and the Senate.

Id.

116. The following interchange between District Delegate Fauntroy and Representative Gross of Iowa shows the split of opinion on the question of federal funding:

Mr. Fauntroy. . . . I think it would be unfair to ask the citizens of the District of Columbia to assume the cost.

Mr. Gross. What is unfair about it? They have just been granted home rule. What is unfair about the District of Columbia financing the revision of their municipal code? What is unfair about it?

. . . .

Mr. Fauntroy. This is a Federal responsibility.

Mr. Gross. If this bill is approved, every municipality should be able to come here and get funds. If any municipality in any congressional district wants to revise its municipal codes, right here is the place to get the money. The line forms on the left.

117. Id. at 2,088. As amended, section 6 of the Act provides:
Commission passed the House of Representatives by a vote of 220 to 119.\textsuperscript{118} The Commission then passed in the Senate without debate.\textsuperscript{118}

The District of Columbia government has estimated that it will cost $223,000 per year for the operation of the Commission—based on salaries for 15 Commissioners, a staff of five professionals, clerical support, and normal operating, contractual, and travel expenses. Thus, the four-year cost of the Commission is estimated at $892,000.\textsuperscript{120}

While the new Law Review Commission certainly has a greater chance of success than its more specialized predecessor,\textsuperscript{121} it will nevertheless have many obstacles to overcome. The Commission is superior to its predecessor, being wisely modeled after the very successful New York Law Revision Commission.\textsuperscript{122} While the political climate has changed, continuing resistance to the Commission could still arise when appropriations are being considered. If Congress can reach agreement on appropriating funds, the Commission’s work will likely produce a long overdue reform of both the civil and criminal laws in the District. It is hoped that the two-year delay in the transfer of jurisdiction over the criminal code to the District Council will provide a sufficient impetus for the Commission to actually give the criminal laws the “special consideration” which they unquestionably require.

II. NEEDS AND DIRECTIONS FOR CRIMINAL CODE REFORM:
GENERAL PROBLEM AREAS AND CODE DEFICIENCIES

What are the principal deficiencies of the substantive criminal laws of the District of Columbia? This question is addressed in this section by identifying and illustrating problems in the District of Columbia criminal code which are counterproductive to the public

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For the purpose of carrying out this Act, including the amendment made by this Act, there are authorized to be appropriated, out of moneys in the Treasury credited to the District of Columbia and not otherwise appropriated, such amounts as may be necessary to carry out the purpose of this Act.


119. 120 Cong. Rec. 14,647 (daily ed. Aug. 8, 1974).


121. See notes 65–75 & accompanying text supra.

122. See note 95 supra.
ends which it should serve. The problem areas selected represent aspects of the basic minimum standards of an effective criminal code. It is submitted that the extent of their presence is an indicator of the success or failure of the criminal code and suggestive of priorities for criminal code reform. The general problem areas are: 1) absence of fair notice as to what constitutes criminal conduct; 2) code provisions inconsistent with contemporary values; 3) absence of a rational system of gradation and penalties; 4) overlapping and confusing code provisions; 5) sexual discrimination; and 6) absence of provisions in areas deserving protection of a criminal code.

The discussion is organized according to the above general problem areas. No attempt is made to exhaustively categorize applicable code sections. The approach is to describe the problem area, to analyze general problems into components or sub-types where possible, and to clarify the nature and seriousness of the problem by selecting representative or particularly interesting illustrations from among the code sections. Frequently, one or two offenses are then discussed in greater detail, both in relation to the particular problem and to appropriate remedies and directions for reform.

A. Absence of Fair Notice as to What Constitutes Criminal Conduct

The due process clauses of the fifth and fourteenth amendments to the Constitution embody the values expressed in one of the fundamental principles of the American system of criminal justice: fair notice as to the nature and scope of conduct declared to be criminal. The absence of this notice in penal statutes has been somewhat deterred by the "void for vagueness" doctrine developed by the Supreme Court, imposing minimum standards for the degree of notice required of the legislature in drafting statutes. The values underlying this doctrine have been clearly articulated by the Court in a recent case:

Vague laws offend several important values. First, because we as-

sume that man is free to steer between lawful and unlawful conduct, we insist the laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . . Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."124

This expression of the doctrine's premises is reflected in two fundamental notions inherent in the development of Anglo-American criminal law: 1) that an individual is responsible to society for the consequences of his volitional acts; and 2) that all persons should receive equal treatment under the law. These twin objectives can only be achieved by maximizing precise drafting of statutes in order to give the citizen a clear choice between licit and illicit conduct, and to minimize the potential for inequitable application of the criminal laws which arises from an undue grant of discretion to various officials charged with administering criminal justice.

It is submitted that an important test of the adequacy of a criminal code is its ability to perform this essential notice function. It is also submitted that criminal statutes should be scrutinized in the code revision process to insure not merely that the minimum due process standards of fair notice are satisfied but that every effort has been made to provide as clear notice as possible.

The District of Columbia's criminal code contains four major problems tending to diminish this notice function.125 The first is the absence of any definition of offense elements in most code sections. This problem is compounded where elements of offenses embody confusing common law concepts and distinctions. The second problem arises from offense elements which are defined in vague, confusing terms. The third problem is a result of the absence of general


125. See Questionnaire on the Reform of the District of Columbia Substantive Criminal Code, Response No. 50, Comment to Q. III A 1 ("'Fair notice' is a fiction."); id., Response No. 58, Comment to Q. III A 1 ("The D.C. Code is one of the poorest I've ever seen."); id., Response No. 83, Comment to Q. III A 1 ("This is not a problem of 'fair notice' but rather a problem of solidifying and simplifying the criminal sections of the code.") [hereinafter cited as Questionnaire].
definitions, especially those governing the mental states which distinguish criminal from non-criminal conduct. The fourth failing of the notice function is seen in the inadequate organization and indexing of criminal offenses.

1. The absence of definitions of offense elements

While a number of provisions in the District's code fail to define the elements of the offense, this omission obviously raises greater problems in certain offense areas than in others. For example, a lack of definition of the requisite elements for the offense of adultery is not very serious since the offense's scope has changed little, if at all, since first "codified" in the Ten Commandments. On the other hand, the scope of the offense of manslaughter has undergone considerable refinement since its common law origin in England. Indeed, it is probably safe to say that few citizens other than practicing criminal attorneys, judges, and some law students could even define the exact conduct encompassed by that offense in the District. Yet, the code simply provides for punishment upon conviction of manslaughter, without even attempting to outline its reach in the statute.

There are a number of provisions suffering from this infirmity—a number sufficiently great to seriously impair the overall notice function of the code. Thus, mayhem, affray, assault, attempt, libel, and escape are among those substantive offenses which are declared criminal without statutory definition. To charge all citizens with knowledge of the law assumes that the scope of the criminal law is generally known or ascertainable by one of ordinary intelligence. When there is no readily available source for this information, this assumption becomes especially unreasonable, particularly if applied to other than malum in se offenses.

127. See generally notes 481—528 & accompanying text infra.
128. See Questionnaire, supra note 125, Response No. 57, Comment to Q. II 2 b ("There presently is some confusion among judges as to whether there are two manslaughters (voluntary & involuntary)—this confusion should be settled—at common law there was one which could be committed two ways.").
129. D.C. Code § 22-506 (1973) (mayhem); id. § 22-1101 (affray); id. §§ 22-501—05 (assault); id. § 22-103 (attempt); id. §§ 22-2301—03 (libel); id. § 22-2601 (prison breach).
130. It may be argued that malum in se offenses do not require the degree of notice of malum prohibitum offenses because they are generally known and proscribed by standards of community morality. However, the scope of the conduct legally proscribed may differ from that generally morally proscribed. Also, since
A criminal proscription summarily declared without limiting or explanatory language to describe the full reach of the offense fails to be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . ."\(^{131}\)

2. Offense elements defined in vague, confusing terms

A second defect in the District of Columbia's criminal code impairing its notice function is evident where the legislature has set out offense elements but the definitions are either insufficiently explicit in clarifying the offense's scope or do not fully reflect the body of case law defining the offense's total reach. In either case, the attempt at clarification has contributed little to the full explication of the conduct proscribed or has actually furthered confusion surrounding the offense.

An illustration of an archaic definition of an offense element is provided by the rape statute. That section reads in part, "Whoever has carnal knowledge of a female forcibly and against her will . . . ."\(^{132}\) While the actus reus of the offense clearly requires that the act be by force and without the consent of the female, it is deficient in totally outlining the conduct which may be sanctioned under the statute. The essential element of the offense, carnal knowledge, is a vague term of biblical origin which, when included in a penal statute, may represent the antithesis of precise drafting. Not only does the term fail to give clear notice that sexual intercourse is required, but it does not indicate that the definition of intercourse for rape entails the mere penetration of the female's \textit{labia majora} without requiring that the male achieve emission.\(^{133}\) Thus, the use of the term "carnal knowledge" does little, if any-

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\(^{131}\) Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (Oklahoma statute prohibiting state contractors from paying their employees less than the "current rate of per diem wages in the locality where the work is performed" held void for vagueness).

\(^{132}\) D.C. Code § 22-2801 (1973). See also Questionnaire, supra note 125, Response No. 60, Comment to Q. II 3 a ("Forcible rape should be separated from carnal knowledge . . . should be explicit in requiring sexual intercourse."); Appendix infra.

thing, to describe the essential element of the actus reus.

Additionally, the term "forcibly and against her will" does not fully describe the conduct within the scope of the statute. In fact, that limiting phrase is affirmatively misleading in light of the judicial interpretation it has received. Thus, the force element has often been diminished by emphasis placed upon the element of lack of consent.\textsuperscript{134} Rape may be committed without force if the mere threat of use of serious force is present.\textsuperscript{135} Likewise, the statute may include sexual intercourse without force if the female is incapable of granting consent in cases where she has been drugged or is incompetent by reason of mental infirmity.\textsuperscript{136} The "notice" thus given by the section is inconsistent with its scope in that force is not always a requisite element.

\textsuperscript{134} In cases where consent has been induced by threats of force, the courts have held that the apparent consent will be no defense to the rape charge even though no force was actually used. See, e.g., McGuinn v. United States, 89 U.S. App. D.C. 197, 199, 191 F.2d 477, 479 (1951):

The court properly instructed the jury "there must be an absence of consent unless the consent is induced by putting the woman in fear of grave bodily harm or death or by the exercise of actual physical force against her person."

\textit{Id.}


There are cases, especially older ones from other jurisdictions, which seem to require resistance to the victim's ultimate physical powers in order to sustain conviction for this crime. But the law is no longer in this last-ditch stage. Whatever it may have been in other times, it is generally settled now that consent is not shown when the evidence discloses resistance is overcome by threats which put the woman in fear of death or grave bodily harm, or by these combined with some degree of physical force.

\textit{Id.} (footnote omitted).


A girl cannot simply say, "I was scared," and thus transform an apparent consent into a legal non-consent which makes the man's act a capital offense. She must have a reasonable apprehension, as I understand the law, of something real; her fear must be not fanciful but substantial.

\textit{Id.} (footnotes omitted).


\textsuperscript{136} \textit{See, e.g.}, Sanselo v. United States, 44 App. D.C. 508, 510 (1916):

Even in the case of a woman, where the element of force is an essential ingredient of the crime, it is no defense that she did not protest or resist, if, in fact, by reason of drunkenness, stupefaction, or idiocy, she was incapable of yielding consent.

\textit{Id.} (footnote omitted).
The statute also fails to give notice as to certain other elements. While the actor is simply described by the neuter term "Whoever," the qualifying phrase "has carnal knowledge of a female," when taken together with the fact that carnal knowledge is limited to sexual intercourse, indicates that the offense may only be committed directly by a male. Although the statute does not exclude married couples from its coverage, nor has any case explicitly so held, the statute does describe the common law offense which included this exception. Finally, one of the most controversial issues of the offense, the requisite evidentiary element of corroboration of the victim's testimony, is omitted from the statute entirely.

Read in light of the interpretative case law, the rape statute fails in three ways to fulfill its notice function. Several significant elements of the offense are entirely absent from the provision's definition. The central element of the offense, sexual intercourse, is defined in a term too vague to add any clarity to the generic term "rape." And, the gravest failure of the provision is found in the element of force which misleads citizens into believing that the rape must be forcible, while, in fact, it need not be if it is against the victim's will.

137. A female may, however, commit the crime of rape of another female when acting as an accessory to a male perpetrator. See, e.g., State v. Pikel, 116 Wash. 600, 200 P. 316 (1921).
139. Corroboration is required in the District of Columbia as to both the corpus delicti of the offense and the identity of the assailant. See, e.g., Allison v. United States, 133 U.S. App. D.C. 159, 409 F.2d 445 (1969); In re W.E.P., 318 A.2d 186 (D.C. Ct. App. 1974). But see United States v. Arnold (D.C. Super. Ct., Crim. No. 45274-73, Jan. 14, 1974), wherein Newman, J., held that corroboration was no longer required in the District of Columbia; this decision, however, was not binding on other Superior Court judges unless approved by the District of Columbia Court of Appeals. See also Questionnaire, supra note 125, Response No. 56, Comment to Q. II 3 a ("Corroboration requirement is outrageous—only assault so requiring—vestige of day where crime less relevant—serious impediment to needed prosecution."); id., Response No. 48, Comment to Q. II 3 a ("Recent decision in U.S. v. Wiley [160 U.S. App. D.C. 281, 492 F.2d 547 (1973) (independent corroboration of carnal knowledge insufficient for conviction)] . . . is an outrage. Corroboration requirement should be dropped."); Appendix infra.
140. The drafters of the Proposed Federal Criminal Code had little difficulty in including these elements in their proposed rape sections.

Rape.
(1) Offense. A male who has sexual intercourse with a female not his wife is guilty of rape if:
   (a) he compels her to submit by force, or by threat of imminent death,
Another illustration of an inadequate definition of offense elements can be found in the false pretenses statute.\(^{141}\) While the lengthy provisions delineate several means by which the offense can be committed, the essential offense does not completely define the requisite elements. In general, false pretenses requires: 1) a false pretense or representation of a past or existing material fact; 2) the actor's knowledge of the falsity; 3) a specific intent to defraud; 4) reliance by the victim upon the actor's false pretense or representation; and 5) defrauding or obtaining of value.\(^ {142}\) Yet the generic section of the statute only provides, "Whoever, by any false pretense, with intent to defraud, obtains from any person any service or anything of value . . . ."\(^{143}\)

This definition omits two essential elements: the defendant's knowledge of the falsity and the victim's reliance thereon. A further infirmity in that statute's definition is that it fails to note the requirement that the pretense or representation be in regard to a past serious bodily injury, or kidnapping, to be inflicted on any human being;

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge intoxicants or other means with intent to prevent resistance; or

(c) the victim is less than ten years old.

(2) Grading. Rape is Class A felony if in the course of the offense the actor inflicts serious bodily injury upon the victim, or if his conduct violates subsection (1)(c), or if the victim is not a voluntary companion of the actor and has not previously permitted him sexual liberties. Otherwise rape is a Class B felony.

PROPOSED FEDERAL CRIMINAL CODE, supra note 3, § 1641.

Gross Sexual Imposition.

A male who has sexual intercourse with a female not his wife is guilty of a Class C felony if:

(a) he knows that she suffers from a mental disease or defect which renders her incapable of understanding the nature of her conduct;

(b) he knows that she is unaware that a sexual act is being committed upon her, or knows that she submits because she mistakenly supposes that he is her husband; or

(c) he compels her to submit by any threat that would render a female of reasonable firmness incapable of resisting.


142. Id. § 1642.

or existing thing, rather than merely a false promise.\textsuperscript{144} In failing to
describe all but a few of the offense’s elements, the legislature af-
firmatively misleads the public into believing that the scope of the
offense is broader than the actual offense. The conclusion is war-
ranted that the failure to provide initial adequate drafting and the
failure to continuously review the code to insure that it reflects the
present state of the law offends the values underlying the due pro-
cess clause. Law enforcement officials and private citizens should
not be required to read through the case law in the hopes of finding
a clear statement of the basic elements of criminal offenses. As the
Supreme Court stated, “No one may be required at peril of life,
liberty, or property to speculate as to the meaning of penal statutes.
All are entitled to be informed as to what the state commands or
forbids.”\textsuperscript{145}

3. Absence of definitions of general criminal law principles

The legislature has never attempted to codify general principles
of criminal law.\textsuperscript{146} At present, the criminal code contains only two
general definitions: one governing “writing” and “paper,”\textsuperscript{147} the
other, “anything of value.”\textsuperscript{148} These would seem inadequate even
without considering the fact that neither definition has been revised
since first codified in 1901, while the subject area to which they refer
has evolved radically.\textsuperscript{149} Jurisdictions recently revising their codes
have included detailed general definitions.\textsuperscript{150}

At a minimum, the District’s code should include a comprehen-
sive definition of mens rea. The present code uses almost every
imaginable formulation in its various provisions, such as “will-

\textsuperscript{144} The misrepresentation must relate to a material fact existing at the time
the statement is made. See Chaplin v. United States, 81 U.S. App. D.C. 80, 157
F.2d 697 (1946). See also Questionnaire, supra note 125, Response No. 59, Com-
ment to Q. II 10 g (“False pretenses in addition should be made out where the
provision is of future action just the same as larceny by trick. The distinction is
meaningless.”); Appendix infra.

\textsuperscript{145} Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (statute penalizing one
for being a “gangster” unconstitutionally vague).

\textsuperscript{146} However, the General Index of the D.C. Code lists some 50 specific definitions
provided in title 22, ranging from “wild animals,” D.C. Code § 22-1628 (1973),

\textsuperscript{147} Id. § 22-101.

\textsuperscript{148} Id. § 22-102.

\textsuperscript{149} See text accompanying note 35 supra.

\textsuperscript{150} See, e.g., Conn. Gen. Stat. § 53a-3 (1972); Ky. Rev. Stat. Ann. § 433A.1-
090 (Baldwin 1974); N.Y. Penal Law § 10.00 (McKinney 1967).
fully,” “maliciously,” “deliberately,” “knowingly,” “unlawfully,” and “intentionally.” There is no need for a proliferation of confusing terms describing required mental states.

The drafters of the Proposed Federal Criminal Code have expressly included a definitional scheme for such mens rea elements:

(1) Kinds of Culpability. A person engages in conduct:
   (a) “intentionally” if, when he engages in the conduct, it is his purpose to do so;
   (b) “knowingly” if, when he engages in the conduct, he knows or has a firm belief unaccompanied by substantial doubt that he is doing so, whether or not it is his purpose to do so;
   (c) “recklessly” if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 502, awareness of the risk is not required where its absence is due to voluntary intoxication;
   (d) “negligently” if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct; and
   (e) “willfully” if he engages in the conduct intentionally, knowingly, or recklessly.

(2) Where Culpability Not Specified. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully. Except as otherwise expressly provided or unless the context otherwise requires, if a statute provides that conduct is an infraction without including a requirement of culpability, no culpability is required.151

Naturally, the codification of general principles should not be limited to the various mens rea elements. For example, the Proposed Federal Criminal Code also includes definitions of mens rea

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151. Proposed Federal Criminal Code, supra note 3, §§ 302(1), (2). In addition, the drafters indicated that doubt as to whether the mens rea should be applied to each element of the offense should be resolved in favor of the defendant, excepting express statutory language to the contrary:

   Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is “intentionally,” the culpability required as to an attendant circumstance is “knowingly.”

Id. § 302(3)(a).
defenses—ignorance or mistake of fact or law—and causal relationship between conduct and result.\textsuperscript{152}

There is some controversy as to whether affirmative defenses should be codified or left to judicial development.\textsuperscript{153} Accepting, arguendo, the latter position, it should be noted that

the use of language of defenses in criminal statutes is an indispensable draftsman's tool. The criminal process as a whole is put in a more accurate light if certain elements are identified as matters of defense.\textsuperscript{154}

For example, in regard to theft offenses, after setting forth the definition of the offense, revisers could include references to specific defenses such as claim of right or intra-spousal property.\textsuperscript{155}

Requiring such provisions serves a number of important functions in the administration of criminal justice. First and foremost, general definitions provide clear notice to citizens as to what conduct on their part will be considered unacceptable under the code as well as qualifying that conduct by describing its necessary concomitant

\textsuperscript{152} Id. §§ 303–06.

\textsuperscript{153} See generally Cosway, The Revised Washington Criminal Code's Vital Structure: The Burden of Proof, Felony Murder, and Justification Provisions, 48 Wash. L. Rev. 57 (1972); Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880 (1968); Hall, Science and Morality of Criminal Law, 9 Ariz. L. Rev. 360 (1968). See also Questionnaire, supra note 125, Response No. 53, Comment to Q. III A 9 (“It is an area where I think it would be a shame to stifle common law development, though some codification—if not made the exclusive source of law—might be helpful.”); id., Response No. 64, Comment to Q. III A 9 (“On the one hand, there are all varieties of justification in terms of lesser evil which should be provided for (& more broadly than at common law). On the other hand, it would be a mistake to try to anticipate in definition every sort of such justification that may arise.”).


\textsuperscript{155} The drafters of the Proposed Federal Criminal Code included the following defenses to the theft provisions:

It is a defense to a prosecution under sections 1732 to 1738 that:

(a) the actor honestly believed that he had a claim to the property or services involved which he was entitled to assert in the manner which forms the basis for the charge against him; or

(b) the victim is the actor's spouse, but only when the property involved constitutes household or personal effects or other property normally accessible to both spouses and the parties involved are living together. The term "spouse," as used in this section, includes persons living together as man and wife.

\textit{Proposed Federal Criminal Code, supra note 3, § 1739(1).}
mental state. Secondly, officials charged with the administration of the criminal laws are given clear standards by the legislature to apply to their roles in the system. Thirdly, comprehensive definitions will promote equitable administration of justice by maximizing uniform interpretation of the criminal code.

4. Inadequacies in the organization and indexing of criminal offenses

Three organizational inadequacies in the present code contribute to a diminution of the code's notice function. They are: 1) an inadequate general index for the code; 2) the alphabetical arrangement of offenses in title 22; and 3) the proliferation of criminal offenses in virtually every title of the code.

A major problem is the general index of the code. It is evident that it is both outdated and inadequate in performing its task. Code provisions long eliminated and no longer found in the code are still carried in the index. Likewise, the index is only useful if one already knows the precise term used for the information one is seeking. Cross references are few and far between, and the wisdom of the choice of many of the index categories is certainly questionable.

The criminal code in the District is basically arranged alphabetically by offense name, although even that scheme has deteriorated as sections have been gradually amended, eliminated, or added over the years since the 1901 codification. Yet, the alphabetical system has been largely rejected by the many jurisdictions which have recently revised their codes.

156. See Questionnaire, supra note 125, Response No. 2, Comment to Q. III A 1 ("The Code index is terrible."); id., Response No. 77, Comment to Q. V ("I believe the biggest problem to the practicing lawyer is the lack of a good index to the code.").

157. For example, the Index refers to a provision penalizing advertisement of abortifacient drugs or instruments deleted from the code in 1967 by the Act of Dec. 27, 1967, Pub. L. No. 90-226, § 606, 81 Stat. 738.

158. The General Index to the Code has a general heading of "Criminal Offenses," followed by about seven pages of offenses. Yet, while "Vehicles, larceny from" is listed, there is no general "Larceny" section. Instead, one must know in advance that the District retains "Grand" and "Petit Larceny" and look under those headings for the code section.

159. When originally codified in 1901, the code was arranged by social problem area, the arrangement currently used by revisors of criminal codes. See text accompanying notes 48 & 49 supra.

160. See, e.g., CONN. GEN. STAT. tit. 53a (1972); KY. REV. STAT. ANN. chs. 433D–34G (Baldwin 1974).
In fact, the inadequacies of the alphabetical arrangement of offenses in a criminal code were identified as early as 1915 by at least one legal scholar in this country.

Unless one knows in advance the denomination chosen for each offense, the alphabetic arrangement adds nothing to the facility of reference; it looks cheap and mechanical, and generally goes hand in hand with inferior care and skill in definition. 161

The alternative suggested therein, and the one most widely adopted by contemporary drafters, is an offense classification scheme reflecting the various interests protected by the offenses. Such a system seems superior both for the legal practitioner and the citizen in terms of providing ready access to relevant sections and notice of the various provisions relating to similar interests and conduct.

While Part IV of the District of Columbia Code purports to encompass criminal law and procedure in the included three titles, literally scores of criminal provisions are scattered throughout the rest of the code. 162 In addition, other criminal offenses which the Congress has authorized the District government to enact are found in two completely separate publications: Police Regulations of the District of Columbia 163 and Highways and Traffic Regulations. 164

While the bifurcation of legislative jurisdiction over the District of Columbia may excuse the second problem, the former seems to be unnecessary and could be easily remedied. The vast majority of the penal provisions found in various parts of the code are misdemeanor sanctions for violations of regulatory provisions. Those cases are normally addressed to a limited group of citizens subject to the regulations. An example of this can be seen in the requirement that no persons practice as certified public accountants without having been so certified. 165 While criminal sanctions attach to a violation of that section, the fact that the sanctions are found in title 2 of the code instead of title 22 does not seem to present a serious notice problem.

161. Freund, Classification and Definition of Crimes, 5 J. CRIM. L. 807, 809 (1915).
162. See D.C. Code, General Index, at 3297—304 (1973) (criminal offenses). See also Questionnaire, supra note 125, Response No. 70, Comment to Q. III A 1 ("... regulatory offenses only belong in a Code if serious, otherwise should be petty offenses with special procedures & no possibility of imprisonment.").
164. Cf. id. § 40-601 (authority over highways and traffic regulation delegated to District of Columbia Council).
165. Id. §§ 2-911—31.
Yet, provisions concerning a broader group of citizens should not be left under a regulatory heading but should be consolidated within the general criminal offense area of the code. To require citizens to find the definition and sanctions for public drinking under the title of the code concerning Alcoholic Beverage Control, or concerning negligent vehicular homicide in the title governing regulation of traffic, or even the entire scheme of sanctions involving drugs in completely different chapters of the title on Food and Drugs, seems unreasonable. Should the numerous citizens who either drink alcoholic beverages, drive cars, or come in contact with various drugs in the District desire to be informed as to the requirements of the criminal law, they are forced to discover these criminal provisions amid myriad non-criminal regulatory statutes.

Criminal offenses which are addressed to the general public's be-

166. See id. §§ 25-127—28.
167. See id. §§ 40-606—08.
169. See, e.g., District of Columbia v. Blackwell, 102 WASH. L. RPTR. 1681 (D.C. Super. Ct., Crim. No. 44293-74, July 26, 1974): The defendant is charged with “running a yellow light,” a violation of . . . the Highways and Traffic Regulations . . . . The Court had never heard of the regulation and since it requires a substantial change in the driving habits of motorists in the District of Columbia, the Court took the matter under advisement to determine if the regulation had been properly promulgated. An examination of the records reveals that it was.

Id.
The issue of notice raised by this case was commented upon in a Washington Post editorial.

Most people who drive in the District are probably not aware of the D.C. regulation 74-4 . . . . But many drivers may be finding out about that little legal change the hard way in the months ahead, because regulation 74-4 outlaws a common habit of the local road: running a yellow light.

One driver, ticketed for violating this rule, took his case to court recently and pleaded innocent on grounds that he had not heard of the new law. Superior Court Judge Tim Murphy had not heard of it either, so he checked and there it was, properly passed by the City Council . . . and signed by Mayor Washington . . . . (For the record, this newspaper reported the council’s action on March 6 in two sentences in the fourth paragraph of a story headlined, “Council Votes Regulation of Repair Shops.”)

The aim is to reduce traffic jams by discouraging motorists from rushing to beat a red light . . . . But the effect of this attempt at reform depends on public education, and so far it seems that the word has not gotten around. In an informal survey at several local intersections the other day, we saw 22 vehicles approach a corner as the light turned yellow—and 17 of those vehicles went right on through.

behavior should be consolidated. Criminal sanctions regulating a particular class of persons who know, or by reason of their particular status should know, the nature, scope and penalties of code provisions governing their conduct do not present as serious a notice problem. Perhaps such regulatory sanctions can be maintained in code sections including the entire regulatory scheme, assuming, however, that an adequate general index to the code can be devised to ensure that notice is given that non-compliance with certain regulations will subject one to criminal sanctions.  

The other problem, publication of criminal offenses enacted under the authority of the District of Columbia government in sources other than the code, is more difficult. Yet, the advent of home rule for the District of Columbia may eventually eliminate this problem when the legislative power to criminalize conduct is consolidated in one legislative body. Code revision should be undertaken with an eye toward the advisability of incorporating, at least by reference, this additional body of regulatory offenses into the code of District law.

Code revision in the District of Columbia should certainly include consideration of alternative methods of improving the code’s effectiveness as a working document. Without coherency of organization and ready access aids, the benefits of substantive revision cannot be fully realized.

B. Code Provisions Inconsistent with Contemporary Values

This section deals chiefly with the failure of the District’s criminal code to proscribe only that behavior which is in fact unacceptable to a substantial majority of the community. The specific problems which will be examined are: 1) code provisions for which there is no longer a particularized need; 2) code provisions proscribing behavior which is no longer clearly unacceptable to the community; and 3) code provisions which have been or are likely to be held unconstitutional.

1. Archaic provisions

One of the major problems which an antiquated code presents is the plethora of special provisions enacted by the legislature to curb

170. See notes 156–58 & accompanying text supra.

a particularized social harm. This "patchwork" method of ad hoc resolution of narrow or short term social problems is the antithesis of the contemporary approach to codifying the criminal law. Instead of specialized statutes, often drafted and enacted without consideration of consistency with other code provisions, contemporary code revision involves the use of more comprehensive provisions, broadly defining certain proscribed conduct in a given offense area and relying upon a clear definitional framework to guide specific application.

The District of Columbia's criminal code contains a number of provisions which are no longer applicable to contemporary society or which are included within more comprehensive provisions. An example of the former type is the section concerning duelling. While the control of duelling may have been a concern in the District even as late as the turn of the century when the provisions were codified, clearly such conduct no longer presents a significant social problem. Even if it were to be argued that duelling may return to popularity, it is clear that the normal assault and homicide provisions would adequately treat the problem.


Successive legislatures in each State reacted to new economic and social problems, not by a thorough recodification but by individual statutes to meet specific cases.

Id.
The Commission's remedy for this problem was to recommend continuing code revision.

Much of the confusion in criminal law coverage in States that have not revised their criminal statutes recently is the product of random, uncoordinated legislation enacted over many years of legislative sessions. The confusion can be prevented or controlled only by requiring that all bills be reviewed promptly to determine whether they actually are needed. When changing conditions create new needs, new code provisions are necessary.

Id. at 195.


174. See notes 255—64 infra.

175. See D.C. Code §§ 22-1102—04 (1973). See also Questionnaire, supra note 125, Response No. 52, Comment to Q. II 13 f ("I'm not sure society could not possibly continue to exist without this statute."); id., Response No. 62, Comment to Q. II 13 f ("It's a good law to have just in case!"); id., Response No. 65, Comment to Q. II 13 f ("Repeal—silly to have a special section."); Appendix infra.

Additionally, there are a number of provisions regulating conduct involving horses which were promulgated at a time when they were the principal means of transportation.\textsuperscript{177} As many contemporary codes contain special provisions regarding motor vehicles,\textsuperscript{178} chiefly because their proliferation makes them a special social problem, older codes dealt extensively with the use of horses and horse drawn carriages. In view of the substantial decrease in the number of horses in the District of Columbia, it would seem that these special statutes are mere surplusage and should be eliminated. Any problems concerning the District's minute horse population can probably be dealt with by more comprehensive provisions concerning cruelty to animals and traffic control.\textsuperscript{179}

Other provisions, such as theft of certain scarce commodities during wartime,\textsuperscript{180} were enacted for short-term problems and should not be retained in the absence of a continuing need for their specific coverage. Such provisions often do not add to the coverage of more general provisions, but provide additional sanctions during times when the problem is acute.\textsuperscript{181} Such added protection could be more easily obtained by amending the general sentencing provisions to include the specific circumstances as an aggravating factor in the offense.\textsuperscript{182} This solution would accomplish the legislative purpose of providing an added deterrent without unnecessarily cluttering the criminal code with specialized statutes of limited duration.

These archaic provisions do not present a problem of variance with contemporary morality or of discretionary enforcement; they are simply no longer needed.\textsuperscript{183} These provisions are probably the

\textsuperscript{177}See, e.g., D.C. Code § 22-814 (1973) (docking tails of horses). See generally id. §§ 22-801—14; this chapter, dealing with cruelty to animals, is basically designed to prevent overwork of animals, not malicious cruelty.

\textsuperscript{178}See, e.g., id. § 22-2204; Model Penal Code § 223.9 (Proposed Official Draft 1962).


\textsuperscript{180}D.C. Code § 22-2204a (1973) (only applicable when "any restrictions on the sale or use of any of the articles . . . are in effect pursuant to any law of the United States").

\textsuperscript{181}The conduct proscribed in section 22-2204a is also covered by section § 22-2202 (petit larceny). However, the former section provides a sentence of up to three years, while the latter is limited to a fine of $200 and a sentence of up to one year.


\textsuperscript{183}The enforcement of such a statute after long disuse may, however, raise an aspect of equal protection of the laws known as the doctrine of desuetude. See A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 143—56 (1962); Bonfield, The Abrogation of Penal Statutes by Nonenforcement,
easiest to recognize because of their contrast with modern conditions. They are also the easiest problems to remedy; they may be simply eliminated from the code without any loss of control over truly harmful behavior.

2. Provisions inconsistent with contemporary morality

The criminal code can maintain its legitimacy only through regulating conduct in a manner consistent with the predominant, fundamental views of the community. In retaining provisions criminalizing conduct acceptable by a majority or even a substantial minority, the legislature places an intolerable strain on law enforcement officials. When the "criminal" conduct is engaged in by a considerable number of the community's members, it is impossible to apply the sanctions uniformly. The resulting patterns of selective enforcement greatly diminish the deterrent value of the code and respect for law enforcement in general.184

The National Advisory Commission on Criminal Justice Standards and Goals has recently recommended that, particularly in regard to offenses of this nature, "the criminal code should reflect a more rational attitude toward current social practices and a more realistic appraisal of the capabilities of the criminal justice system."185 The Commission therefore recommended

that States reevaluate their laws on gambling, marijuana use and possession for use, pornography, prostitution, and sexual acts between consenting adults in private. Such reevaluation should determine if current laws best serve the purpose of the State and the needs of the public.186

After considering the general ineffectiveness of incarceration as a

49 IOWA L. REV. 389 (1964); Rodgers & Rodgers, Desuetude as a Defense, 52 IOWA L. REV. 1 (1966). Whether this doctrine has been accepted by the Supreme Court is in doubt. Compare Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924) (law passed to meet emergency may become invalid when situation changes even if valid when enacted), with District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953) (1873 law compelling restaurant service of non-whites upheld despite its long disuse).


185. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 132 (1973).

186. Id.
deterrent to these offenses, the Commission further recommended that, as a minimum, each State remove incarceration as a penalty for these offenses, except in the case of persistent and repeated offenses by an individual, when incarceration for a limited period may be warranted. 187

The District of Columbia has numerous provisions in its criminal code concerning this sort of conduct—the so-called “victimless crime.” 188 Criminal sanctions in the code probably will not deter fornication, 189 consensual sodomy, 190 adultery, 191 prostitution, 192 pornography, 193 gambling, 194 or use of marijuana. 195 Such acts, when

187. Id.
188. See Questionnaire, supra note 125, Response No. 64, Comment to Q. III A 4 (“I don’t know what ‘contemporary values’ are. I do know that criminal law has no business dealing with private morals: sex . . . , drugs, suicide, etc.”).
190. Id. § 22-3502.
191. Id. § 22-301.

A general conclusion which can be drawn from these data and those presented in the appendix is that the sample favored legalization and regulation of prostitution, considered the spread of venereal disease as a major concern, and rejected the notion that prostitution enforcement should be limited only to certain types of offenders, e.g., only streetwalkers or only procurers. In addition, the officers sampled rejected items which suggested that prostitution simply be ignored or that enforcement be maintained as it is currently.

Id.
194. Id. §§ 22-1501—15. See Legalized Numbers in Washington, supra note 192, at 28:

Based upon the tables presented and others too numerous to include, we may conclude that the majority of the sample approve of a legalized lottery (87%); that over 80 percent agree that gambling should be licensed and taxed by the District; that police resources should be redeployed toward more serious offenses; and that virtually all agreed that “Gambling will always be around regardless of the law . . . .”

Id.
195. D.C. Code §§ 33-401—25 (1973). The national problem regarding enforcement of the marijuana laws is increasing. Over 400,000 persons were arrested on marijuana charges in 1973, an increase of some 100,000 over the preceding year. See Wash. Post, July 22, 1974, § A, at 2, col. 3. As a result, many state legislatures have been considering alternatives to the present means of enforcement, including diminishment of penalties for possession or use of marijuana. See, e.g., Ore. Rev. Stat. § 167.207(3) (1974) (limiting penalty for possession of an ounce or less of marijuana to $100 fine). See also note 19 supra.
committed by consenting adults in private, do not present a threat to social order and serve to divert law enforcement resources from more harmful conduct. However, it has been noted that there are at least four legitimate purposes of the criminal law which are served by some of the sections which had their genesis in the regulation of morality: (1) prevention of direct physical injury to others (e.g., forcible sodomy, cruelty to children, indecent act on a minor child); (2) prevention of even non-forcible sexual contact with children who are too young to understand and cope with such conduct (e.g., indecent act on a minor child where force is not involved, statutory rape); (3) prevention of public nuisance (e.g., indecent exposure, fornication in public); (4) as a means to combat other evils (e.g., the involvement of prostitution in muggings, con games, drug traffic, etc.).

Nevertheless, in many prosecutions for these so-called "victimless crimes," the "victim" whose sensibilities have allegedly been outraged by this conduct is an undercover policeman.

196. See Rittenour v. District of Columbia, 163 A.2d 558 (D.C. Mun. App. 1960), wherein the court, despite clear legislative intent to the contrary, construed D.C. CODE § 22-1112(a) (1951) (lewd, indecent, or obscene acts) as not applicable to acts between consenting adults in private.


198. In regard to solicitation for sodomy cases, one Assistant United States Attorney in the District of Columbia who has handled numerous such cases has confidentially provided the following description of a typical case:

Usually the "victim" of the solicitation is a young police officer selected for his probable appeal to homosexuals; the "victim" lingers in parks, gay bars, or lavatories until he has whetted the appetite of the "criminal." This having been accomplished the officer offers no resistance until the proposition is made. The investigation of homosexual solicitation and sodomy may well turn on the fact that the police do not like homosexuals, not the fact that the conduct is illegal or that it affronts the public.

Indeed, if one has been to the area of Rock Creek Park (the 2600 block of Pennsylvania Avenue, N.W.) from which most homosexual sodomy cases emanate, one knows it is hardly public. The gay community and the Metropolitan Police are the only ones likely to endure the treacherous terrain in search of fleeting, anonymous liaisons.

The law should be written to avoid this sort of invitation to selective enforcement growing out of an individual, if not institutional bias against homosexuals.

Some have suggested that punishing non-commercial homosexual solicitation affronts free speech and equal protection.

the activities are such that only a rare case will be brought by the complaint of a private citizen. Thus, not only do the sanctions fail to operate as effective deterrents, but the enforcement of these provisions requires the expenditure of an extraordinary amount of effort by law enforcement officials.199

Without considering the relative merits of pure decriminalization of such conduct, it may be said that a number of factors militate against the retention of such offenses. Ineffective and, at best, selective enforcement, failure of sanctions as a deterrent, and, most often, lack of a complaining witness, all indicate the need to reexamine these offenses as they are now defined and sanctioned.

3. Unconstitutional provisions

While none of the provisions presently in the District's criminal code have been specifically ruled unconstitutional by the Supreme Court, some of the provisions still carried in the 1973 edition of the code are probably unconstitutional under recent Court decisions.

The abortion statute,200 as currently worded, represents an unconstitutional infringement of the police power on a woman's right of privacy under the Roe v. Wade and Doe v. Bolton decisions.201 While the Supreme Court was clear as to the scope of the police power in this regard,202 those decisions have raised a considerable amount of controversy, including the proposed constitutional amendments which would act to reverse the mandate of the Court.203

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199. See Annual Report of the Metropolitan Police Department, Washington, D.C. 5 (1973) (an average of 143 police personnel were assigned to vice investigation on any given day).
202. As the Court pointed out in Roe v. Wade, 410 U.S. 113 (1973), the state has a legitimate interest both in preserving and protecting the health of the pregnant woman and in protecting potential human life. Id. at 148—51. However, the Court concluded that although the right of personal privacy is broad enough to cover the abortion decision, the state's legitimate interest in potential life becomes controlling only at the point of viability. Thus, if the state is interested in protecting fetal life after viability, it may regulate and even proscribe abortion during that period, except when necessary to preserve the life or health of the mother. Id. at 162—65.
203. See generally Byrn, Abortion Amendments: Policy in the Light of
Pending resolution of this political issue, the District could either eliminate its abortion statute or revise it to conform with the Court's decisions. Thus, a statute could be drafted proscribing abortions at any time by one other than a licensed physician, or by anyone during the third trimester of pregnancy. Revision in this area should, however, proceed cautiously and any proposed revision should carefully consider the prevailing views of the community on the abortion question.

The homicide section provides for a death penalty with procedures similar to those found unconstitutional by the Supreme Court. Without debating the merits of the death penalty, it should be noted that unless radically revised, the present provisions cannot be constitutionally enforced. This section should be revised only if the community views the death penalty as a necessary and effective deterrent, assuming a death penalty can be drafted so as not to offend the Constitution.

In addition, the code provisions relating to disorderly conduct and vagrancy should be carefully examined in regard to similar


207. D.C. Code §§ 22-1107, -1112, -1121 (1973). Cf. District of Columbia v. Walters, 319 A.2d 332 (D.C. Ct. App. 1974) (third clause of section 1112—“any other lewd, obscene, or indecent act”—held unconstitutionally vague). See also Questionnaire, supra note 125, Response No. 5, Comment to Q. II 13 g (“Repeal—too vague.”); id., Response No. 31, Comment to Q. II 13 g (“The acts constituting the offense should be specified to avoid misuse of the statute for harassment.”); id., Response No. 48, Comment to Q. II 13 g (“Probably unconstitutionally vague & unfair . . . .”); Appendix infra.

208. D.C. Code §§ 22-3302—06 (1973). See also Questionnaire, supra note 125, Response No. 2, Comment to Q. II 13 m (“Everyone has the right to do nothing for at least short periods of time.”); id., Response No. 43, Comment to Q. II 13 m (“This statute is just about without redeeming features. There are grave burden of proof problems, it is overbroad—and how can one require a person to have a lawful occupation in our economy.”); id., Response No. 52, Comment to Q. II 13 m (“Should be totally repealed; overbroad, unconstitutional & unnecessary offense.”); Appendix infra.
statutes held unconstitutional by the Supreme Court. The retention of unenforceable provisions in the criminal code detracts from the code's total deterrent value by undermining its credibility. A criminal code, even one newly revised, should be continually reappraised in relation to developments in the law. The code should reflect the proscription only of that conduct which the legislature may constitutionally regulate; the dead weight of unconstitutional provisions will only be a detriment to the efficient functioning of the criminal code.

C. Absence of a Rational System of Gradation and Penalties

There is little evidence in the present criminal code of any systematic attempt to provide a consistent plan for the gradation of offenses and penalties. The legislature, through the formulation of relative degrees of crimes within a given offense area, ought to provide broad guidelines for the judiciary to follow in the sentencing process. Thus, the gradation of offenses represents the evaluation of the legislature as to the degree of social harm which is created by various forms of socially unacceptable conduct.

The District's criminal code suffers from two types of problems in this regard. First, the criminal code does not provide a classification scheme for sentencing purposes; each statute contains its own statement of authorized punishment. Among the criminal statutes there are over 23 different authorized periods of incarceration, ranging from 30 days to life in prison, and at least 17 separate fines,


210. See notes 34–35 & accompanying text supra.

211. Other provisions of the District's criminal code could also be found unconstitutional on various grounds. As to the District's sodomy provision, D.C. Code § 22–3502 (1973), for example, one of the respondents to the Questionnaire replied: Unconstitutionally vague—should be limited to forcible, nonconsensual or public acts—bestiality should be separate provision or indictment language is probably unconstitutional & should be abolished.

Questionnaire, supra note 125, Response No. 60, Comment to Q. II 3 d.

Several respondents also questioned the constitutionality of D.C. Code § 22–3601 (1973) (possession of implements of crime). See, e.g., Questionnaire, supra note 125, Response No. 2, Comment to Q. II 1 d (“Every implement has an illegal use.”); id., Response No. 61, Comment to Q. II 1 d (“I think 'satisfactory account' language shifts burden of proof and violates 5th amendment.”); id., Response No. 63, Comment to Q. II 1 d (“Overbroad—burden of proof should be on defendant only if implements have no non-criminal use.”). See also Appendix infra.
ranging from one dollar to $10,000. Second, the code prescribes identical penalties for acts which are qualitatively different. It is essential that a criminal code differentiate on reasonable grounds between serious and minor offenses. Penalty provisions should reveal a hierarchical scheme of wrongs, ranging from the most serious down to the near trivial, with meaningful gradations.

The District of Columbia classifies crimes by the common law rule of what punishment may be applied upon conviction, distinguishing between offenses punishable by incarceration exceeding one year and those that are not. This broad classification system, while perhaps useful at common law when the choice of available sanctions was more limited, is unsatisfactory for a modern penal code.

The lack of a comprehensive system of gradation has been largely corrected in most revised codes. The American Law Institute's system of gradation, designed to give a reasonable amount of legislative guidance to the courts in fixing penalties, has been generally followed in the revision of criminal codes. For example, the Proposed Federal Criminal Code provides the following scheme:

Classification of Offenses.
(1) Felonies. Felonies are classified for the purpose of sentence into the following three categories:
   (a) Class A felonies;
   (b) Class B felonies; and
   (c) Class C felonies.
(2) Misdemeanors. Misdemeanors are classified for the purpose of sentence into the following two categories:
   (a) Class A misdemeanors; and
   (b) Class B misdemeanors.
(3) Infractions. Infractions are not further classified.

Two methods for the maximization of consistency in the application of specific sanctions according to offense categories are mandatory minimum penalties and express aggravating and mitigating factors. However, the use of the former method in the District has

212. There is, however, no clear statement to that effect in the code. But see D.C. Code § 23-301 (1973) (necessity for indictment in lieu of information determined by length of potential sentence for offense); id. § 23-581(a)(1)(B) (arrest without warrant authorized if officer has probable cause to believe person committed a felony). Compare id. § 22-2201 (grand larceny: one to ten years), with id. § 22-2202 (petit larceny: up to $200 fine and/or up to one year).
214. PROPOSED FEDERAL CRIMINAL CODE, supra note 3, § 3002.
LAW REFORM raised some serious problems. Mandatory minimum punishments are provided for some offenses, but appear to exhibit no pattern of rationality. For example, a mandatory two-year penalty is provided for the crime of bigamy,\textsuperscript{215} while no mandatory minimum punishment is imposed for forcible rape.\textsuperscript{216} The concept of mandatory minimum punishments incorporated into the criminal code should be reviewed.\textsuperscript{217} Analysis of aggravating and mitigating factors has been included in the Proposed Federal Criminal Code, wherein the courts are directed to consider a number of factorsmitigating for or against probation before imposing sentences of imprisonment.\textsuperscript{218} This method, 

\textsuperscript{216} Id. § 22-2801.
\textsuperscript{217} The President’s Commission on Crime in the District of Columbia recommended such review:

Some members of this Commission believe that all mandatory minimum sentences are inappropriate because they operate to limit judicial discretion and hinder the rehabilitative efforts of correctional officials. Other members believe that in some limited instances mandatory minimum sentences have a significant deterrent effect on specific kinds of crime. The Commission recognizes, however, that the mandatory penalty provisions which now exist are largely obviated by the District’s indeterminate sentencing laws. Despite the mandatory minimums provided by statute, suspended sentences may be given, probation is available, and the actual time served may be as little as 1 day. At the very least, the Commission believes that this apparent conflict between the mandatory minimum provisions and the indeterminate sentence law requires review.

\textbf{REPORT OF THE PRESIDENT’S COMM’N ON CRIME IN THE DISTRICT OF COLUMBIA 630—31 (1966) (footnote omitted).}

\textsuperscript{218} The mitigating factors to be considered are:

(a) the defendant’s criminal conduct neither caused nor threatened serious harm to another person or his property;
(b) the defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property;
(c) the defendant acted under strong provocation;
(d) there were substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant’s conduct;
(e) the victim of the defendant’s conduct induced or facilitated its commission;
(f) the defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;
(g) the defendant has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense;
(h) the defendant’s conduct was the result of circumstances unlikely to recur;
as opposed to that of legislatively mandated minimum sentences, seems far superior in promoting equitable application of sanctions, while still considering the specific circumstances of each case.

In addition to these general problems stemming from the absence of comprehensive grading and a detailed penalty structure, the District’s criminal code also evidences certain more specific, but equally serious, inequities. Among numerous possible examples, such inequities are readily identifiable in the areas of attempt, rape, robbery, and theft.

While there is a general misdemeanor provision governing attempts, there are many offenses, apparently selected at random, for the attempt of which the legislature has provided specific and much harsher penalties. No effort has been made to formulate a general system by which a penalty for an attempt is related to the degree of social harm posed by the completion of that offense.

One such example of the disparity in penalties for attempts has been presented to the Criminal Code Revision Committee of the Bar Association of the District of Columbia.

In the case of arson an attempt to maliciously burn the property of another is punished the same as for the completed offense—with a prison term of from one to ten years. Since [that section] covers both attempts and the completed offense, the punishment provided in [the general attempt provision] has no application. The succeeding section, however, covers only the completed offense of maliciously burning one’s own property, with intent to defraud or injure another.

(i) the character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;
(j) the defendant is particularly likely to respond affirmatively to probationary treatment;
(k) the imprisonment of the defendant would entail undue hardship to himself or his dependents;
(l) the defendant is elderly or in poor health;
(m) the defendant did not abuse a public position of responsibility or trust; and
(n) the defendant cooperated with law enforcement authorities by bringing other offenders to justice, or otherwise. Nothing herein shall be deemed to require explicit reference to these factors in a presentence report or by the court at sentencing.

PROPOSED FEDERAL CRIMINAL CODE, supra note 3, § 3101(3).

219. Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by this title, shall be punished by fine not exceeding one thousand dollars or by imprisonment for not more than one year, or both.

So, a person violating [that section] "shall be imprisoned for not more than fifteen years" but a person frustrated in his attempt to violate [the same section] faces a maximum of only one year in prison and a thousand dollar fine. Since the same danger to society is posed by a completed violation of this section and a frustrated attempt to violate it, this result is hard to justify.\(^\text{223}\)

The rape statute does not differentiate either in terms of general gradation or penalties between forcible and statutory rape:

> Whoever has carnal knowledge of a female forcibly and against her will or whoever carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for any term of years or for life.\(^\text{221}\)

This equal grading is most inequitable for several reasons: 1) the relatively high age of the victim for statutory rape; 2) that mistake of fact as to age is not a defense;\(^\text{222}\) and 3) the possible imposition of life imprisonment for consensual sexual relations between teenage persons.\(^\text{223}\)

The Proposed Federal Criminal Code has reduced the age for statutory rape to ten years,\(^\text{224}\) and has created a separate offense for consensual sex involving persons under sixteen.

(1) Offense. A male who has sexual intercourse with a female not his wife or any person who engages in deviate sexual intercourse with another or causes another to engage in deviate sexual intercourse is guilty of an offense if the other person is less than sixteen years old and the actor is at least five years older than the other person.

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221. Id. § 22-2801.

222. D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA 167 (2d ed. 1972). Note, however, that the only case cited as authority for this instruction, Fuller v. United States, 243 F. Supp. 203 (D.D.C. 1965), is not at all supportive. Nor is there any discoverable authority as to whether or not the District courts have followed this common law rule.

223. See Questionnaire, supra note 125, Response No. 30, Comment to Q. II 3 b ("Some means should be found for flexibility as to defendant's age—it seems ludicrous to charge this offense [statutory rape] to an individual close to complaining witness' age . . . ."); id., Response No. 48, Comment to Q. II 3 b ("Protection needed for both underage boys and underage girls. Reasonable mistake as to age should be a defense if it is not now, & age difference (à la Model Penal Code) should be enacted."). See also Appendix infra.

224. PROPOSED FEDERAL CRIMINAL CODE, supra note 3, § 1641.
The offense is a Class C felony, except when the actor is less than twenty-one years old, in which case it is a Class A misdemeanor. Thus, the drafters exempted "sexual experimentation among inter-generational peers" entirely, and eliminated the label "rape" for consensual sex involving teenage females. In addition, mistake of fact as to age would be a defense.

Another example of identical penalties for acts which are qualitatively different is presented in the robbery section. Robbery has traditionally been viewed as a larceny in the aggravated form, arising from the force or violence used or threatened to be used upon the victim. It thus calls for a heavier penalty than simple larceny. The District's code, however, blurs this distinction by adding to the traditional concept the alternative of a stealthy seizure. Thus, no force or violence need be used upon the person nor must the victim be put in fear. If a secret taking from the person, or from his immediate actual possession, which is usually interpreted to include the immediate vicinity of the person, occurs, the crime in the District of Columbia is not mere larceny, but robbery. If it is thought that stealthy taking from a person should be punished more heavily than simple larceny, it should be stated as a separate form of aggravated larceny, carrying a lesser penalty than robbery.

The theft offenses in the code present a number of problems resulting from inadequate gradation. These problems include an archaic value-of-property distinction and what appears to be an arbitrary distinction based upon whether the property was privately owned or was government property. The majority of the offenses involving wrongful acquisition of property differentiate between felony and misdemeanor sanctions solely on the basis of the value of the property involved. The line of demarcation has only been increased twice since codified in 1901. In 1937 the value was increased from $35 to $50. In 1953 it was increased to the present level of

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225. Id. § 1645.
226. Id. § 1648(1)(b). Note, however, that mistake of fact as to age is not available as a defense to statutory rape, i.e., involving a female child of less than ten years of age. Id. § 1648(1)(a).
229. See, e.g., id. § 22-1207 (punishment for embezzlement); id. § 22-1301 (false pretenses); id. §§ 22-2201—02 (larceny).
$100.\textsuperscript{231} The District's criminal code should be amended by upgrading the value distinction to compensate for economic inflation and by including a graduated penalty structure correlating the value and nature of the property involved with a scale of sanctions.\textsuperscript{232} The American Law Institute has proposed a tripartite gradation scheme for theft, establishing felony, misdemeanor, and petty misdemeanor categories.\textsuperscript{233} This proposal was based upon the judgment that the attitudes which justify discrimination by amount probably recognized three groups of transactions: those involving really petty values, another group at the other end of the scale relating to very substantial amounts, and a third group in between.\textsuperscript{234}

New York, in adopting this scheme, set the categories at less than $250, more than $250 to $1500, and more than $1500.\textsuperscript{235}

A second problem in the theft area of the District's code involves a substantive distinction between government and private property. The present code contains a number of separate provisions regarding the theft of property belonging to the District of Columbia government.\textsuperscript{236} These sections penalize wrongful appropriation of such property much more severely than wrongful appropriation of private property.

Thus, embezzlement of District property carries sanctions of up to 20 years imprisonment and a fine of up to twice the value of the property embezzled.\textsuperscript{237} In contrast, the major statute governing embezzlement of private property has maximum sanctions of only ten-years imprisonment and a fine of up to $10,000.\textsuperscript{238}

There is also a catchall provision covering embezzlement, stealing, or purloining government property, with attendant sanctions of


\textsuperscript{232} See Questionnaire, supra note 125, Response No. 31, Comment to Q. II 10 b ("The $100 value requirement should be increased considering the inflation since the statute was enacted."); id., Response No. 36, Comment to Q. II 10 a ("Redraft to define [grand larceny as] theft of property of value of $1,000 or more."); id., Response No. 49, Comment to Q. II 10 b ("Penalty way too high, $101.00 ought not to make the difference between 1 and 10 years.").


\textsuperscript{234} Id. § 223.1(2), Comment (Tent. Draft No. 2, 1954).

\textsuperscript{235} N.Y. Penal Law §§ 155.25—.40 (McKinney 1967).

\textsuperscript{236} See D.C. Code § 22-1201 (1973) (embezzlement of property of District of Columbia); id. § 22-2206 (stealing property of District of Columbia); id. § 22-2207 (receiving property stolen from District of Columbia).

\textsuperscript{237} Id. § 22-1201.

\textsuperscript{238} Id. § 22-1207.
up to five years imprisonment and a $5,000 fine. Yet, if the property in question were less than $100 in value, the maximum sanction for petit larceny would be less than one-year imprisonment and/or less than a $200 fine, a rather wide distinction to be based upon mere ownership of the property.

More severe penalties can be understood for the provision concerning embezzlement of the District's property, since that section requires that the actor be a government official. However, that limitation does not apply to the other sections concerning government property. Perhaps because of this, the District's courts have required proof of scienter regarding government ownership. The theory for that construction is that the more severe penalties will only deter theft of government property if the actors are aware that the property belongs to the government. Assuming the validity of this ownership distinction as a factor in gradation, statutes governing District property should be consolidated to provide clear notice that stricter sanctions will apply. Also, the requisite scienter developed by the courts should be codified.

The absence of legislative initiative in the area of gradation and penalties is particularly counterproductive of the ends served by a modern penal code. A sentencing judge will often be forced to decide in each instance the relative gravity of the offense, having received little guidance from the legislature. Providing similar penalties for essentially dissimilar acts is detrimental to the administration of justice.


Overlapping and confusing code provisions abound in the District of Columbia Criminal Code, primarily as a consequence of the ad hoc development of the code and the failure to undertake an effort to rationally organize offense areas. The existence of these provi-

239. Id. § 22-2206.
240. Id. § 22-2202 (petit larceny).
241. Id. § 22-1201.
243. This theory was cogently stated in Mitchell:
Since § 22-2206 would be a greater deterrent only if the potential wrongdoers were aware that the property they were intending to steal belonged to the District of Columbia, the statute would have its intended effect only if construed to require scienter.
Id. at 299, 394 F.2d at 774.
sions creates uncertainty in the attempt to apply closely related provisions to particular fact situations. It gives rise to unnecessary issues in litigation and encourages the use of technical defenses in an effort to find loopholes in the statutes. It encourages prosecutors to use "shotgun" indictments (charging of offenses in the alternative) in an effort to make certain that the particular facts of the case, as subsequently developed at trial are covered—a practice which often makes it more difficult for the defendant to prepare a defense.

This section focuses upon one illustration of the need to rationalize an offense area: the area of theft of property. The general interests of citizens to enjoy their acquired rights in property free from wrongful appropriation have been met not by a comprehensive classification scheme, but by a wide array of highly technical, overlapping categories of acquisitive conduct, determined more by historical accident than social need, or even logic. The District of Columbia must thus preserve the integrity of its modern economy through the use of legal concepts designed to maintain a feudal economic system which have been haphazardly updated to fill technical gaps in their coverage.

There are three major chapters in the District's criminal code relating to theft: embezzlement, false pretenses, and larceny.244 Each of these chapters has from eight to eleven separate provisions. In addition there are numerous scattered provisions enacted to meet special problems, such as stealing books or manuscripts,245 offenses regarding property of public utilities,246 and the issuance of warehouse receipts for goods not received.247

The theft offenses in the District represent varieties of the common law offenses of larceny, embezzlement, and false pretenses, with the addition of numerous specialized statutes. The distinctions marking the boundaries of these offenses are among the most esoteric of the criminal law doctrines. Completely unintelligible and meaningless to one not schooled in the law, they are also quickly forgotten by many practitioners. The differences among these offenses can be made intelligible only by the use of a historical approach which provides a fascinating illustration of the development of the law from feudal times. No attempt is made here to trace

244. D.C. Code §§ 22-1201—10 (1973) (embezzlement); id. §§ 22-1301—08 (false pretenses); id. §§ 22-2201—08 (larceny).
245. Id. § 22-3106.
246. Id. §§ 22-3115—18.
247. Id. §§ 22-3701—06.
the entire historical development of the law of theft.248 A few comments may be helpful, however, in explaining the multiplicity of existing provisions.

Larceny was the first theft offense. The concept of larceny underwent some expansion at early common law with the aid of legal fictions such as the doctrine of breaking bulk and substituting fraud for force. These led to the judicial development of the new crime of larceny by trick in order to accommodate expanding needs of commerce. It also underwent periods of very narrow interpretation in order to avoid the harsh penalty of death for larceny. This is reflected in the type of property that was subject to larceny, consisting of only tangible, personal property. Real property and intangibles such as services were excluded.

The requirement of a taking by "trespass" was developed to include fine distinctions between "possession" or "custody" in determining whether there was a trespassory taking and carrying away of the personal property of another with intent to permanently deprive the owner of possession. Special treatment of certain problems involving, for example, distinctions between lost, mislaid, and misdelivered property also has developed.

The separate offense of embezzlement was created by statute when courts ruled that persons who were entrusted with goods by the owner and subsequently misappropriated them had not committed a "trespassory" taking. The early embezzlement statutes were very restricted in coverage. New statutes were enacted to deal with numerous actors and types of activities. Other shortcomings in the law of larceny were revealed where the defrauder persuaded the victim to part with both possession and title of his or her property, requiring the implementation of the additional offense of obtaining property by false pretenses. Other statutes were added to cover areas related to theft. Thus, the offense of unauthorized use of a motor vehicle was developed primarily for the case of teenagers taking cars for joy-riding and abandoning them, because the "intent to permanently deprive the owner" of possession of the property was lacking.

Activities relating to theft, such as receiving stolen property and theft by such means as extortion, also received separate attention. Finally, as special problems developed in applying common law offense categories to new forms of carrying on commerce, other special provisions were added. These included "fraud by operation of coin-controlled mechanism by use of slugs,"249 "making, drawing or uttering check, draft, or order with intent to defraud,"250 and "issue of receipt containing false statement" by a warehouseman.251

Commenting on the existence of this proliferation of theft sections in the District's code, the President's Commission on Crime in the District of Columbia observed:

This surfeit of theft offenses makes it difficult in many cases to determine just what statutory offense has been committed. In a given case a prosecutor might proceed against a defendant on two theories, such as larceny and embezzlement, the difference turning on the nebulous distinction between "custody" and "possession." If a jury convicts on one, the defendant may appeal on the ground that the facts proved the other offense, and the appeal may be successful.252

The common law distinctions embodied in the offenses of larceny, embezzlement, false pretenses and the specialized "spin-off" offenses added by statute presently serve no useful purpose in the criminal law. The differences among the various kinds of theft have become less important than the common central element: an involuntary loss of property to another without some socially prescribed justification.

The alternative to the approach of the District of Columbia Code is some form of consolidation of theft offenses. Most revised codes have utilized consolidation, frequently based on the Model Penal Code approach.253 Consolidation itself has been achieved by a variety of code revision approaches.

A major revision is the more rational definition of property subject to theft adopted by the Model Penal Code. The definition of "anything of value" in the District's code254 might be expanded to include "anything that is part of one person's wealth and of which

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250. Id. § 22-1410.
251. Id. § 22-3702.
another person can deprive him." This definition is more related to the underlying rationale of the offense area since any property right of any worth to someone other than the actor and which is capable of being wrongfully acquired by the actor is properly subject to the sanctions of the theft law.

The concept of ownership of property has also been revised in many codes. "Property of another" has commonly been redefined to include property in which anyone other than the actor has an interest upon which the actor is not entitled to infringe. It thus becomes irrelevant, except perhaps for the defenses of mistake of fact or claim of right, whether the actor also had an interest, even a superior one, in the property. Consolidation will eliminate the outmoded distinctions as to whether the actor had possession, custody, control, or title to the property in favor of the more rational determination as to whether the actor's conduct wrongfully deprived another person of a right or interest in the property.

Other than a wrongful transfer of rights in real property, realty disputes should be left to the civil law for determination of conflicting claims. Theft of services should be limited to those which the actor knows are available only for compensation. This would eliminate from criminal sanctions situations in which the one providing services had no expectations of receiving consideration for the service, irrespective of the service's value.

Lost, mislaid, or misdelivered property should be subject to the theft provision's coverage only if the actor intended to deprive the owner thereof and had made no efforts to restore the property to the

257. The drafters of the Proposed Federal Criminal Code noted this distinction: Thus, a trustee who manages (or attempts) to sell the land of another for his own benefit could be prosecuted for theft. But the bully who excludes the owner from his land or the landlord who unlawfully evicts the tenant from his leasehold cannot be prosecuted for exercising unauthorized control over the property of another. This is because of the exclusion in the definition of "property," namely that immovable property cannot be the subject of theft unless the underlying conduct involves a transfer or an attempt to transfer an interest in it. Other forms of unauthorized conduct in relation to immovable real property must therefore be dealt with under trespass laws and other traditional real property remedies.
NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, 2 WORKING PAPERS 917 (1970).
rightful owner.\[259\] This revision eliminates the technical common law distinctions between these categories of conduct and establishes an affirmative duty to attempt restoration of the property if the actor eventually intends to convert the property to his or her own use.

Similarly, the actus reus elements of a trespassory taking and carrying away should be redefined in light of the rationale for the offense instead of historical categories involving confusing and subtle distinctions concerning the manner or time sequence of the acquisition. Theft, then, should include "any form of control over property which exceeds the permissible range of control attributable to any legal interest he [the actor] may have in the property or to authority given by someone entitled to give it."\[260\] The circumstances and specific manner of unauthorized control are relevant only to the issue of gradation\[261\] and not guilt of the substantive offense.

The requisite mens rea for theft has also been redefined to coincide more closely with the offense’s rationale. Thus, the acquisition of property must be intentional and with a specific intent to permanently deprive another of an interest therein.\[262\] This precludes to a great extent problems arising from having to prove the ambiguous and often technically-construed intents to defraud or steal. Yet, this broad definition should not be expanded further by allowing the specific intent to be inferred from the proof of the general intent. The free alienation of property rights would be greatly hindered if one always had to consider whether clever bargaining could imply theft in the minds of a jury. While the circumstances under which the actor used or disposed of the property may properly give rise to inferences as to the specific intent, the knowing or intentional acquisition should not be sufficient alone.

Since these broad definitions may be just as likely to deny defendants specific notice, revised codes have further delineated specific categories of sanctioned conduct. Also, conduct involving theft of services, unauthorized use of vehicles, extortion, deception, and receiving stolen property should be given separate treatment to clarify the scope of the main theft provisions.\[263\] These additional specifica-

\[259\] See id. § 206.5, Comment.


\[263\] The Model Penal Code, in discussing the desirability of specific delineation, states:
tions of sanctioned conduct are necessary for specific notice, especially where the theft offenses enter areas of conduct which were not subject to criminal sanctions or were not cognizable as theft-related offenses at common law.

The consolidation or limited consolidation of the theft and theft-related offenses seems necessary for a more efficient and equitable administration of criminal justice. The law of theft in the District of Columbia is similar to the description of the state of the law of theft at the end of the nineteenth century:

[A]n enormous, lumbering, ramshackle machine . . . [with] a variety of attachments of whimsical aspect and mysterious purpose added at various times by maladroit journeymen.

Not only does such a system provide "an open invitation to the technical defense," but the creation of legal fictions to avoid technical distinctions has virtually eliminated the notice function which the code should provide. Such consolidation would seem to be the preferred method of assuring adequate coverage of conduct culpable in light of contemporary social problems.

E. Sexual Discrimination in the Criminal Code

One major disadvantage of an unrevised criminal code is that it often reflects values which have been largely rejected by the community. Nothing is more illustrative of this point than the retention of sexual discrimination in the substantive criminal laws of the
District of Columbia. Indeed, it is most unfortunate that certain notions relating to criminal liability based upon the sex of the actor or the victim still permeate the criminal code when they have begun to disappear from the prevailing community value structure.

Without becoming embroiled in the as yet unresolved controversy surrounding the advisability of ratifying the proposed Equal Rights Amendment, suffice it to say that sexual differences which may or may not be a valid factor in certain regulatory classifications have little importance in determining ultimate criminal liability. In fact, while many regulatory classifications based upon sex often are at least tangentially related to physical differences, in the area of criminal offenses they more often relate to differences in social roles—roles which are inappropriate as determinants since they are more likely to be continually evolving.

If one accepts the assumption "that the law must deal with the individual attributes of the particular person, not with a vast over-classification based upon the irrelevant factor of sex," it is clear that there is no place for such discrimination in an area of the law founded upon the idea of individual responsibility. Yet, substantive discrimination survives in both the statutory and case law of the District of Columbia.

This problem has gained even more significance in light of recent developments in recognizing the equal rights of women under the law. The Supreme Court has recently held that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." Unless the legislative distinc-

269. While regulations of working hours for women may be justified upon such physical differences as stamina (although this point has been disputed), with the possible exception of rape, there are no general differences between the sexes which can justify legislative or judicial discrimination for substantive criminal offenses. Such distinctions can only be predicated upon ad hoc determinations of relative social roles. "Unless the difference is one that is characteristic of all women and no men, or all men and no women, it is not the sex factor but the individual factor which should be determinitive." Emerson, The E.R.A.: The Legal Basis, 57 Women Lawyers' J. 12 (1971).
270. Id.
271. Frontiero v. Richardson, 411 U.S. 677, 688 (1973). Therein, a female Air Force employee was denied certain dependency allowances normally available to a male employee under similar circumstances; the Court held the ruling to be based on sex and violative of the due process clause of the fifth amendment.
tion is based upon a characteristic exclusive to one sex, it is clear that the Constitution requires that one's individual, rather than sexual, attributes should control, particularly when the possibility of criminal sanctions is present as a consequence of the distinction.\textsuperscript{272}

In the first instance, as a matter of drafting, it is suggested that the legislature should strive towards avoiding even the appearance of sexual discrimination through the use of sexually neutral language in the drafting of penal statutes.\textsuperscript{273} Such a development would demonstrate a social policy determination favoring sexual equality under the criminal law.

Probably the most blatant example of a sexual distinction based upon a legislative determination of social roles (a determination of questionable validity today) is that of the adultery provision.

Whoever commits adultery in the District shall . . . be punished . . . and when the act is committed between a married woman and a man who is unmarried both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man only shall be deemed guilty of adultery.\textsuperscript{274}

It is patent that the premise upon which this distinction is based involved a legislative determination of the relative sexual aggressiveness of the two sexes.\textsuperscript{275} Assuming, arguendo, that this distinc-

\textsuperscript{272} It is difficult to distinguish between racial and sexual discrimination in this regard:

The similarities between race and sex discrimination are indeed striking. Both classifications create large, natural classes, membership in which is beyond the individual’s control; both are highly visible characteristics on which the legislators have found it easy to draw gross, stereotypical distinctions.


\textsuperscript{273} The criminal code necessarily embodies a formal moral statement by the community. If it reflects, however subtly, discriminatory attitudes, the code will impede the general elimination of such discrimination in the community. Cf. M. Berger, \textit{Equality by Statute} 205—27 (rev. ed. 1967).

\textsuperscript{274} D.C. Code § 22-301 (1973).

\textsuperscript{275} Numerous commentaries have attacked such a double standard. [T]he extra-legal sanctions of social disfavor, ostracism and lessened attractiveness on the marriage market imposed upon the female transgressor are the clear results of society’s double standard of sexual behavior, which allows males great sexual freedom and imposes severe restrictions where females are concerned. Laws that provide special penalties for male offenders in this area
tion is still valid as to a majority of the population, there exists a sufficiently significant minority to which it does not apply so that its retention as a basis of criminal liability is clearly discriminatory.

Another problem is evident in the rape provision. Putting to one side the difficult question as to whether there is a need for including men as victims of forcible rape, the clause defining "statutory" rape is discriminatory. The rationale presented for equating consensual intercourse involving a female under 16 years of age with the forcible rape of a woman is that the female child is deemed unable to consent to the act. Yet, in limiting the protection of the statutory rape section to females, it is evident that the law presumes a male under 16 years of age to be capable of consent.

The District of Columbia Court of Appeals recently rejected a constitutional challenge to this section by two juveniles under the age of 16. The court held that convicting the juvenile male but not the female was not a denial of due process since there was a valid interest in protecting the female only, due to the possibility of pregnancy. The court noted that the statute on its face referred to the actor as "whoever," and thus was not patently discriminatory, even though a female would be incapable of committing the proscribed act.

The District of Columbia Court of Appeals has also recently upheld the solicitation statute against a similar challenge. That section proscribes solicitation for the purpose of prostitution or "any immoral or lewd purpose." The court dismissed the claim of defendants that solicitation for sodomy was unconstitutional in effectively lend their support to those social sanctions and ultimately to the perpetuation of the hypocritical double moral standard upon which they are based.


276. See D.C. Code § 22-2801 (1973). See also Questionnaire, supra note 125, Response No. 32, Comment to Q. II 3 b (statutory rape "section is discriminatory, undefined & completely unconstitutional in its present form"); id., Response No. 40, Comment to Q. II 3 b ("Violates equal protection—should be repealed and rewritten. Should not apply when male is less than 3 years older than the female—defense of seduction by the female should be recognized.").


279. Id. at 289-90.

280. Id. at 289-90.


that sodomy as defined could only be committed if at least one male were a party to the act by finding that the sodomy statute included cunnilingus within its scope. The defendant introduced testimony that no women had been arrested for the offense of solicitation for sodomy between September 22, 1962 and July 20, 1973, indicating the statute's unconstitutionality as applied. However, the court held that discretionary enforcement was not tantamount to discrimination.

A related evidentiary problem which evinces discrimination towards women is the general requirement of corroborative evidence in all sexual offenses. While this requirement exists in only a small minority of other jurisdictions, the highest court in the District of Columbia has yet to question even the efficacy of the rule. While the rule recognizes a realistic assumption that the possibility of fabrication is high in the sexual offense area, it is not clear that the results of the rule's application are anything more than a general deterrent to the reporting and prosecuting of sexual offenses.

Another instance of an anachronistic distinction based upon the sex of the party and victim of an offense is found in manslaughter. The common law provocation-heat-of-passion definition of manslaughter has been retained in the District. One of the circumstances to be considered by the jury as constituting adequate provocation to reduce an intentional homicide from murder to manslaughter is based upon a moral standard relating to extramarital sex. The United States Court of Appeals for the District of Columbia has held that "[a] wife's adulterous conduct has long been recognized as the classic provocation for homicide." While this rule is not as abusive as the "unwritten law" defense found in some jurisdictions which would completely excuse a husband from criminal liability in

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283. 321 A.2d at 343.
284. Id. at 343—44.
285. See note 139 supra.
286. Thirty-five jurisdictions have no requirement, eight have limited requirements, five have adopted the full requirement by statute, and only the District of Columbia and Nebraska have required full corroboration by judicial decision. Note, The Rape Corroboration Requirement: Repeal Not Reform, 81 YALE L.J. 1365, 1367—68 (1972).
287. See id. at 1370—72.
288. See text accompanying notes 483—91 infra.
the same situation, it preserves the double moral standard which, if not obsolete, is certainly on the decline.

It is evident that sexual discrimination based upon factors other than exclusive physical differences survives in the District's criminal laws. Since "[e]ven in our own day [criminal] law is still looked upon as the codification of the morality to which a community adheres," it is imperative that the revisers of the District's criminal code do their utmost to eliminate unnecessarily sexist classifications which act to continue discrimination against women based upon stereotyped social roles.

F. Absence of Provisions in Areas Deserving Protection of a Criminal Code

One of the advantages of comprehensive code revision and a periodic reevaluation of the code's function is the identification of conduct threatening to the public welfare which is not covered in the code. The criminal code's definition of conduct unacceptable to fundamental community values must be reexamined in light of changing social, technological, and even political conditions.

Probably the major weakness of the District of Columbia Code in this regard is the virtual absence of provisions governing consumer fraud. With the exception of a minor provision concerning false advertising and a number of specialized provisions concerning the sale of kosher meat and the like, consumers are not protected from

290. See Kanowitz, Sex-Based Discrimination in American Law II: Law and the Married Woman, 12 St. Louis U.L.J. 3, 61—63 (1967).
292. See Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499 (1971).

The requirement that all statutes be written asexually is attractive because it eliminates the difficulties of evaluating sophisticated medical, sociological, and actuarial theories of aggregate differences between the sexes. It is also attractive because it represents the highest degree of societal commitment to the ideal of legal sexual equality.

Id. at 1511 (footnotes omitted).
293. See notes 34 & 35 supra.
294. See Questionnaire, supra note 125, Response No. 50, Comment to Q. III A 5 ("...the statutory provisions dealing with corruption & fraud are inadequate to protect."); id., Response No. 56, Comment to Q. III A 5 ("We are in dire need of consumer fraud ... legislation."). See also Appendix infra.
296. See, e.g., id. §§ 22-3404—06 (Kosher meat); id. §§ 22-3409—12 (mislabeling potatoes).
a wide variety of fraudulent conduct. While special statutes have been enacted proscribing check fraud and embezzlement of mortgaged chattels, no similar protections have been extended to the consumer.

In other situations where contemporary social problems have been included in the code's coverage, the legislature has almost always enacted special statutes rather than redefining the scope of applicable statutes. Thus, the common law definition of arson, limiting the actus reus to burning, has been retained, and a special statute relating to use of explosives has been enacted. Revised codes have followed the more preferable route of comprehensive redefinition of general statutes to govern these special problems. Similarly, because of the difficulty involved in placing theft from vending machines within the common law categories of theft, the legislature enacted separate provisions covering vending machines instead of redefining the theft provisions.

The theft area's patchwork coverage is inadequate in three major categories of property rights: services, intangibles, and realty.

299. Id. § 22-1209.
300. Id. § 22-401 ("Whoever shall maliciously burn or attempt to burn"). See also id. § 22-403 (malicious burning of movable property). This section creates problems, for although the actus reus is described in the terms "by fire or otherwise," the subject property to be protected is unclear. Further, while the provision heading speaks of "movable property," the language of the section deals with property "whether real or personal."
301. Id. § 22-3105 (placing explosives with intent to destroy or injure property).
302. See, e.g., Model Penal Code § 220.1(1) (Proposed Official Draft 1962) ("starts a fire or causes an explosion"); id. § 220.2(1) ("causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material ... or by any other means of causing potentially widespread injury or damage ... ").
303. D.C. Code § 22-1407 (1973) (fraud by operation of coin-controlled mechanism by use of slugs), id. § 22-1408 (manufacture, sale, offer for sale, possession of slugs or device to operate coin-controlled mechanism); id. § 22-3427 (breaking and entering vending machines and similar devices, and penalties therefore).
304. The National Commission on Reform of the Federal Criminal Laws prefaced its comments to the proposed theft provisions by noting this problem existing in the present federal theft law:

It is practically impossible to develop an overview of the kinds of conduct reached by Federal law, for the purpose of measuring the extent to which it
With the exception of certain limited circumstances, the District's code does not recognize services as being subject to the protection of the theft provision. The use of artificial devices to operate vending machines and the use of certain insignia to gain aid or assistance by one not entitled to use them are examples of these special circumstances.

The only substantial reform in this regard was the 1970 amendment to the false pretenses statute which inserted the phrase, "any service or," before "anything of value," expanding the provision's scope beyond the previous coverage which was limited to innkeeping services. Yet, to prosecute for theft of services under this section, the government must prove all five elements of common law false pretenses: false representation, knowledge of the falsity, reliance, obtaining something of value, and specific intent to defraud.

A recent case demonstrates the inadequacy of the code in relation to theft of services. The defendant was tried for unauthorized use of a motor vehicle after failing to return a rented automobile to the rental agency. The question before the court was "whether a use in excess of the express consent given in the contract is to be equated with use 'without the consent of the owner' " in the unauthorized use statute. The district court, noting that no case law exists on this question in the District of Columbia, found insufficient evidence for conviction. The court held that in the absence of evidence that the agency had informed the defendant of his breach of the rental agreement and his concommitant liability under the criminal laws, he could not be convicted. The case indicates a deficiency is in accord with modern economic circumstances or for the purpose of assuring consistency of sanction for comparable conduct.


305. See note 249 supra.
308. See note 142 supra.
310. Id. at 321. The unauthorized use statute is D.C. Code § 22-2204 (1973).
311. The trial court indicated its preference for civil over criminal remedies in its holding:

It does not appear from the evidence that the rental agency ever served notice on the defendant that it considered the contract breached and that if he failed to return the car within a certain period of time he would be charged with a violation of the criminal laws. Nor does it appear that the agency tried to replevy the car. To hold that one using a rented car in excess of authority
in the coverage of the laws relating to theft of services as well as the reluctance of the courts to extend the coverage of the criminal code to services without more affirmative assistance from the legislature.

The coverage of intangible property by the criminal code in the District of Columbia is likewise inadequate. The phrase "anything of value" is used in the major offense provisions to describe the property subject to protection. Yet, the common law requirement of intrinsic as opposed to intangible value has been amended only to include documents representative of value:

The words "anything of value," wherever they occur in this title, shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money and commercial paper and other writings which represent value. Even with this statutory extension, the courts have had some difficulty in applying the common law theft crimes to intangible property of this sort.

The existing definition, while purporting to establish "value" in some intangibles, has either received too little attention by the courts or is not sufficiently definitive. The wording of this provision also does not protect such valuable intangibles as trade secrets, ideas, and information.

The District of Columbia, while extending the coverage of its theft statutes to crops and fixtures, does not recognize real property as given is subject to prosecution under the criminal laws, in the absence of adequate notice and attempts to recover possession of the car by civil process, would be tantamount to making a person criminally liable for a simple breach of contract. It is true that this case represents an aggravated breach of contract, but the breach still appears to go no further than to the amount of time the defendant was authorized to use the car.

278 F. Supp. at 321.

312. See, e.g., D.C. Code § 22-1202 (1973) (embezzlement); id. § 22-1301 (false pretenses); id. § 22-2201 (larceny).

313. Id. § 22-102.

314. Despite the clear language of sections 102 and 1203 (embezzlement of note not delivered), the courts have had difficulty with promissory notes. See Reeves v. United States, 56 App. D.C. 376, 15 F.2d 734 (1926) (defense that note could not be subject of embezzlement rejected). See also Partridge v. United States, 39 App. D.C. 571, 580 (1913), where the defense to conviction of false pretenses—a promissory note is "not a thing of value"—was rejected, but the court held that even if that count were defective, it would be harmless error.

315. See D.C. Code § 22-2201 (1973) (grand larceny includes "things savoring of the realty").
being subject to theft. This notion is a hold-over from the common law doctrine that realty and its appurtenances were impossible to carry off.

With the advent of an economic system of greater complexity, however, it becomes apparent that one can indeed steal the land of another by a wrongful transfer of interest therein. Many revised codes expressly include the transfer of an interest in real property within the scope of the theft section.\textsuperscript{316} Other disputes over rights to realty, however, are left to the disposition of the civil law.\textsuperscript{317}

Another example of inadequate coverage can be found in the District code's coverage of child abuse.\textsuperscript{318} As was indicated to the D.C. Criminal Code Revision Committee:

\begin{quote}
Cruelty to children (22 D.C. Code § 901) is a very serious offense in the District of Columbia. Some of the archaic language in the statute should be modified, and the punishment should be increased. Because such violence on the part of a parent (or often the common-law spouse of the parent) is often the result of a profound and perva-
\end{quote}

\textsuperscript{316} The Model Penal Code's section states:
A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto.

\textbf{MODEL PENAL CODE § 223.2(2) (Proposed Official Draft 1962).}

\textit{See also} \textbf{CONN. GEN. STAT. § 53a-118(1) (1972); N.Y. PENAL LAW § 155.00(1) (McKinney 1967).}

\textsuperscript{317} \textit{See Model Penal Code § 206.10, Comment 1 (Tent. Draft No. 2, 1954).}

\textsuperscript{318} Any person who shall torture, cruelly beat, abuse, or otherwise wilfully maltreat any child under the age of eighteen years; or any person, having the custody and possession of a child under the age of fourteen years, who shall expose, or aid and abet in exposing such child in any highway, street, field, house, outhouse, or other place, with intent to abandon it; or any person, having in his custody or control a child under the age of fourteen years, who shall in any way dispose of it with a view to its being employed as an acrobat, or a gymnast, or a contortionist, or a circus rider, or a rope-walker, or any exhibition of like dangerous character, or as a beggar, or mendicant, or pauper, or street singer, or street musician; or any person who shall take, receive, hire, employ, use, exhibit, or have in custody any child of the age last named for any of the purposes last enumerated, shall be deemed guilty of a misdemeanor, and, when convicted thereof, shall be subject to punishment by a fine of not more than two hundred and fifty dollars, or by imprisonment for a term not exceeding two years, or both.

\textbf{D.C. Code § 22-901 (1973).}

\textit{See also} Questionnaire, supra note 125, Response No. 32, Comment to Q. II 13 c ("Statute is vague, ambiguous, not definitive, and unconstitutional."); Appendix \textit{infra}. 
sive frustration, visits to a social services office could be required
where the parents would consult with professionals on how to cope
with their feelings toward children. Another possibility is prosecu-
tion, with strict penalties, coupled with removal of the child from the
home through neglect proceedings. Because the battered child is
often too young to testify or to make a good witness, the main witness
is usually one spouse who files a complaint against the other spouse;
often the complaining spouse decides by the time of the trial that he
does not wish to testify. To protect the child we should consider
providing for the use of depositions and the abrogation of the
husband-wife privilege in this type of case.319

The Model Penal Code contains a far more comprehensive section,320
although the penalty may be considered too mild.321

It is submitted that these and similar deficiencies in the coverage
of the criminal code can best be identified and corrected through
comprehensive code revision.

G. Summary

The extent of the need for comprehensive criminal code revision
is analyzed by identifying code deficiencies. The significance of
these deficiencies may be seen by grouping them in broad problem
areas, reflecting minimum standards of a modern criminal code.
The fundamental standard of fair notice of what constitutes crimi-
nal behavior is lacking in such basics as the total absence of, or
inadequate definitions of, offense elements for most crimes, the ab-
sence of any general definition and consistent application of mens
rea terms, an inadequate code index, and poor organization and
placement of code sections. Another basic problem is the existence
of numerous provisions that are inconsistent with contemporary val-
ues, encouraging selective and discriminatory law enforcement,
misallocation of scarce criminal justice resources, and lessening re-
spect for the criminal law.

319. P. Friedman, Crimes Against Morals and Social Welfare 5 (1972) (unpub-
lished memorandum presented to the D.C. Criminal Code Revision Comm., Young
Lawyer's Section, D.C. Bar Ass'n).

320. A parent, guardian, or other person supervising the welfare of a child under
18 commits a misdemeanor if he knowingly endangers the child's welfare by
violating a duty of care, protection or support.


321. See Questionnaire, supra note 125, Response No. 42, Comment to Q. II 13
C ("The penalties for willful abuse should be raised commensurate with those for
[assault with a deadly weapon, D.C. Code § 22-502 (1973)] . . . .").
Moreover, the District's criminal code lacks a system for grading and penalizing criminal behavior in a manner consistent with the degree of social harm. Unlike other modern criminal codes, no general classification scheme exists for distinguishing among types of felonies and misdemeanors. Also, similar penalties are frequently authorized for qualitatively different acts, providing inadequate guidance to judges in exercising sentencing responsibilities, law enforcement officials, and the public. Another general problem is the existence of numerous overlapping and confusing code provisions, especially in the theft offense area. Not surprising in a criminal code based on nineteenth century values is the existence of unjustified sexual discrimination. Finally, the criminal code fails to provide adequate protection in some areas, such as consumer fraud and child abuse, deserving of attention in a modern criminal code.

III. A Case Study of the Unlawful Homicide Provisions

A. Introduction

The minimum standards for a modern penal code analyzed in the preceding sections will be applied in a closer scrutiny of one offense area. Unlawful homicide was chosen for a case study of the need for code revision since it is a complex offense area involving a serious social problem in the District of Columbia. This part of the article also suggests the type of questions that a law review commission might raise in analyzing an offense area and presents some recommendations for its consideration.

The offense area approach to code revision will be more likely to produce a criminal code coextensive with the social problems with which it should deal. In this discussion, only a cursory description of the nature and extent of the problem of homicide in the District of Columbia is presented. A law review commission should receive more detailed and complete information on the types and patterns of homicide, characteristics of offenders and victims, and the response of police, prosecutors, courts, and correctional institutions to the problem. In addition to aiding in the development of a more rational system of gradation and penalty structure, this information provides a basis for recommendations of complementary measures, in order for the legislature to more adequately respond to the social problem.

Supplementary proposals that a law review commission might consider relating to the social problem of homicide include the fol-
lowing: 1) stricter regulations of handguns;\textsuperscript{322} 2) a preventative program for vehicular homicide involving drunk drivers;\textsuperscript{323} and 3) a police family crisis intervention program.\textsuperscript{324}

After an introduction to the problem of homicide in the District of Columbia, problems of general definition of the elements of homicide are analyzed. Next, the existing statutory scheme and its evolution are set forth. This is followed by a discussion of murder and manslaughter with suggested reforms.

B. The Social Problem Area

Unfortunately, there is little accurate data available concerning

\textsuperscript{322} Robert M. Boyd, Chief of the Metropolitan Police Department's homicide unit, reported that 60 percent of the 295 homicides occurring in the District during 1974 were carried out with handguns. \textit{See 2 More Slain; 295 Killings A City Record}, Wash. Post, Jan. 1, 1975, § B, at 1, col. 8.

Comparing the number of serious crimes committed by handguns in Washington and New York City, the President's Commission on Crime in the District of Columbia stated:

\textit{We are convinced by the experience in New York City that a strictly enforced licensing law can have a significant impact on the amount of handgun crime . . . . While the District of Columbia had a handgun murder rate of 9.1 per 100,000 population in fiscal 1966, New York City had a rate of 1.7; the handgun assault rate was 79.8 in the District and 20.0 in New York City; and the handgun robbery rate was 141.7 in the District and 45.4 in New York City.}


\textsuperscript{323} For the incidence of alcohol use accompanying homicides in the District, see text accompanying note 332 infra. The Vehicle Research Safety Office of the District of Columbia Motor Vehicle Department presently has plans to institute a rehabilitation program for persons who lose their licenses on charges of driving under the influence of intoxicants. At this time, however, there is no preventative program to deal with the problem of "drinking drivers" before they come into contact with the criminal justice system.

Both Fairfax and Arlington Counties in Virginia have recently instituted such programs. The results should be evaluated for possible adaptation to the problem in the District.

\textsuperscript{324} Specially trained police units, combined with increased cooperation between police departments and social service agencies, have been developed to decrease the number of homicides resulting from family altercations in such cities as New York and Louisville, Kentucky. For a general discussion of such programs see Parnas, \textit{Police Discretion and Diversion of Incidents of Intra-family Violence}, 36 \textit{Law & Contemp. Prob.} 539 (1971).

The Regional Office of the Law Enforcement Assistance Administration has announced plans to hold a conference with District police officials within the next three or four months to discuss possible implementation of such a program.
the true breadth of the homicide problem in the District of Columbia. Dr. James L. Luke, Chief Medical Examiner for the District of Columbia, has described the general scope of the problem:

Homicide is by far the leading cause of death in the nation's capital between the ages of 15 and 44 years. We are killing each other here at the rate of nearly 40/100,000 population, more than double New York City's rate. Extrapolated to the entire United States, at this rate the annual toll would be 80,000 lives, which places the situation here in proper perspective. 325

There is also a problem (less serious in the District than elsewhere) of obtaining accurate information to distinguish between criminal and non-criminal homicides in determining cause of death. Dr. Luke has stated:

[T]he specific cause of death is incorrect in approximately 50% of the total cases investigated by any functional medical-legal agency when pre- and post-autopsy causes of death are compared . . . . [T]he circumstances or manner of death (i.e. homicide, suicide, accident, natural causes, etc.) is incorrect in some 20—30% of cases investigated when pre- and post-autopsy circumstances of death are compared . . . 326

In the same speech, he commented:

Most of us in the specialty are of the opinion that only 50% of homicides are even recognized, much less completely and expertly interpreted. Data recently accumulated in Oklahoma and extrapolated to the country as a whole, for example, lead to the conservative conclusion that there are an estimated 4,500 homicides that are medically certified as having occurred via other modalities every year . . . 327

The official police crime reports show that there were 106 and 100 actual criminal homicides reported in fiscal years 1962 and 1963 respectively. 328 In fiscal years 1972 and 1973 there were 375 and 356 actual criminal homicides reported, 329 an increase of over 300 per-

326. Id.
327. Id.
cent. Thus, based upon data which can only be regarded as conserva-
tive estimates, the social harm from homicides has presented an
increasingly serious problem for residents of the District of Colum-
bia. While the loss to the families of homicide victims and the loss
to the community cannot be expressed adequately in economic
terms, studies have shown that homicides have a greater relative
economic impact on the community than the loss from any other
criminal offense.

A profile of the characteristics of homicide offenses in the District
of Columbia was made in 1966, based on an intensive analysis of
some 172 unlawful homicides:

Murders are most likely to occur from 6:00 p.m. to 3:00 a.m. on
weekends. Murder is not a markedly seasonal crime, nor is it primar-
ily a street crime: the majority take place indoors at the residence of
the victim or offender. Almost 80 percent of murder victims and
offenders are acquainted or related. Approximately half of all victims
and offenders are between 30 and 50 years old. Negroes account for
the overwhelming majority of offenders and victims. For the most

330. The statistics are published annually in a pamphlet entitled ANNUAL REP.
of the Metropolitan Police Dept, Washington, D.C. Reliance on these figures
presents two problems, however. First, whether a homicide is reported as a criminal
homicide depends upon whether the police define it as such at the time the report
for the offense js written. See generally Federal Bureau of Investigation, Uniform
Crime Reporting Handbook (1974). Second, a study has shown that police statisti-
cs do not have a high rate of correlation with an independent survey of crime
incidence. President's Comm'n on Law Enforcement and Administration of Just-

cice, Field Surveys No. 1, Report on a Pilot Study in the District of Columbia
on Victimization and Attitudes Toward Law Enforcement 118 (1967). However,
the police statistics do provide at the very least a conservative illustration of the
great increase in criminal homicides over the last decade.

331. As the President's Commission on Law Enforcement has indicated:

Willful homicide results in an economic loss both to the community, which
loses a productive worker, and to the victim's family or dependents who lose
a source of support. This loss is essentially the same as the loss in other kinds
of death and is normally measured by the earning capacity of the victim at
the time of death. Other expenses, such as medical bills before death may
also be involved. In 1965 there were an estimated 9,850 victims of murder and
non-negligent manslaughter. The present value of their total future earning
potential at the time of death, computed on the basis of the average national
wage for persons of the victim's age, amounts to about $750 million (dis-
counted at 5 percent). This estimate represents total earnings rather than
savings.

President's Comm'n on Law Enforcement and Administration of Justice, Task
Force Report: Crime and Its Impact—An Assessment 45 (1967) (footnotes omit-
ted).
part murder has been and remains an intra-racial crime: Negroes kill Negroes; whites kill whites. Alcohol plays a significant part in the prelude to murder; almost half the victims and offenders had been drinking prior to the crime. A gun is the weapon most often employed by offenders.\(^{332}\)

This profile suggests that major attention needs to be focused on the problem of homicide among non-strangers. It also suggests the need for additional information on the role of guns, as the weapon of choice, and the relationship between alcohol and unlawful homicide in order to understand more fully the social problem. The law can operate to prevent homicides only by preventing the behavior which causes them.

C. The Definition of Criminal Homicide: Some Difficult Issues

Following a familiar pattern in the District's criminal code, "homicide" is not defined in the existing statutory scheme. If homicide is defined simply as the death of one human being caused by another,\(^{333}\) then criminal homicide is homicide committed without legal justification or excuse.\(^{334}\) The elements of criminal homicide

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333. Professor Perkins defines homicide in these terms:

Homicide is the killing of a human being by another human being.

The older authorities gave this definition: Homicide is the killing of a human being by a human being. The difference between the two is that suicide is excluded by the first but included in the second. The problems of self-destruction are so different from those involved in the killing of another that it is desirable to use "suicide" and "homicide" as mutually exclusive terms, and the modern trend is in this direction.


In order to assure the exclusivity of suicide and homicide, a revised criminal code for the District of Columbia should clearly except suicide from the homicide sections. See notes 367—75 & accompanying text *infra*.

334. Professor Perkins defines criminal homicide as "homicide without lawful justification or excuse." R. Perkins, *supra* note 138, at 34. The rationale underlying this qualification is based upon the complexity of behavior which may result in homicide:

Though the principal end to be served by the law of homicide is the preservation of life, it is obvious that this does not mean the prevention of all homicides. In the first place, while it is generally desirable to preserve life, not all homicides are undesirable. In the second place, the law can operate to prevent homicides only by preventing the behavior which causes them and even if a homicide viewed alone is undesirable, the behavior which causes it may not be, because it serves ends which justify the creation of such risk of
Thus are: 1) the death, 2) of a human being, 3) caused by, 4) another human being, 5) without legal justification or excuse. This section will discuss certain general problems involved in defining criminal homicide.

1. "Death"—When is a person legally dead?

Without a resolution of the problem of defining death, the criminal code provides inadequate guidance to the medical profession and others as to what minimum standards are to be applied. Moreover, in the absence of a clear standard, criminal homicide prosecutions of certain types of cases are extremely difficult.\footnote{335}

With medical technology capable of prolonging the vital functions of a human being long after the brain has entirely ceased to function and with the advent of organ transplantation, the issue of defining death takes on added importance. When is a person actually dead for the purposes of the law of homicide?

To illustrate the problem, consider two situations. First, suppose an elderly patient is in a coma for five months with virtually no chance of regaining consciousness. The resident doctor of a hospital makes a decision to discontinue the use of a machine maintaining circulatory or respiratory functions to which the patient is attached, knowing that life cannot otherwise be sustained. Has a criminal homicide been committed? Second, suppose as a result of an automobile accident the victim's brain is no longer functioning, but the victim's beating heart is removed for transplant into another human being. Is the victim's death caused by injuries inflicted in the automobile accident or by removal of the viable heart?

Obviously it is legally impossible to commit homicide after death occurs. Regardless of intent, a person does not commit homicide by firing a bullet into a corpse.\footnote{336} The requisite element of death raises...
difficult issues in the law of homicide because of the absence of any legal definition of death, not to mention a satisfactory definition of death, in many jurisdictions. The authors have been unable to find any homicide case in the District of Columbia which has defined death for the purposes of criminal homicide prosecutions. In the absence of a legal definition of death, most cases where the issue is raised seem to be resolved either by a lay or a medical definition.

A few attempts to provide an appropriate legislative standard have been made. One such attempt is the Maryland provision which provides alternative definitions of death:

(a) A person will be considered medically and legally dead if, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and, because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and, in this event, death will have occurred at the time these functions ceased. (b) A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice and because of a known disease or condition, there is the absence
of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of spontaneous brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before artificial means of supporting respiratory and circulatory function are terminated and before any vital organ is removed for purposes of transplantation.339

Most jurisdictions, as an alternative to attempting to draft a precise legal definition of death, have not specified criteria for determining when death occurs. Rather, they have incorporated the contemporary medical definition as was done in the Uniform Anatomical Gifts Act.340 It is argued that to insist upon a legal definition of death may preclude the incorporation of subsequent medical advances.

Having raised this difficult issue and discussed some alternate responses, the authors make no attempt herein to recommend an appropriate definition of death. The Law Review Commission should consider such fundamental problems of definition in the course of revising the District's criminal code and make their recommendations to the legislature.341

2. "Human being"—When does human life begin?

When will human life be deemed to have begun insofar as the homicide law is concerned? The search for a legally precise definition of the human person has been hampered by discord in philosophical, theological, and scientific circles.342

339. ANN. CODE Md. art. 43, § 54F (Supp. 1974).
340. See, e.g., D.C. Code § 2-277(b) (1973) ("The time of death shall be determined by a physician who attends the donor at his death, or, if none, the physician who certifies the death."). This solution by the National Commissioners for the Uniform Anatomical Gifts Act was substantially adopted by 47 states and the District of Columbia as of October 15, 1971. 9 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1972-1973, at 106 (1972).
341. Consideration of the problem would require a thorough investigation of the medical as well as legal problems involved in formulating any such definition. Such a study could be modeled on several similar investigations into the question already conducted. See, e.g., Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, A Definition of Irreversible Coma, 205 J.A.M.A. 337 (1968); Task Force on Death and Dying, Institute of Society, Ethics and the Life Sciences, Refinements in Criteria for the Determination of Death: An Appraisal, 221 J.A.M.A. 48 (1972).
342. As the Supreme Court has stated:
Early common law held that the killing of a fetus was homicide only after a certain point in the stage of pregnancy, defined as “quickening,” or when the fetus showed signs of movement, usually early in the second trimester of pregnancy.

As the common law developed, however, a fetus had to be born alive in order to be the subject of homicide. Under the “born alive” test, questions of precisely when an infant died during the process of childbirth were soon presented. These cases generally arose outside of the setting of a modern hospital. Is it necessary for an infant to be entirely separated from its mother? Is it required that there be an entirely independent life, with the umbilical cord cut and tied, and with its own breathing and heart action? Under the common law, jurisdictions have not been uniform in deciding the exact point in the birth process when an infant is “born alive.”

California was recently faced with an interpretation of its

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.


344. The Supreme Court has recently defined quickening as “the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy.” Roe v. Wade, 410 U.S. 113, 132 (1973) (footnote omitted).

345. See W. LAFAVE & A. SCOTT, supra note 336, at 530—31; Means, supra note 343, at 420.

346. This lack of uniformity was noted in a California case:

[Under the older common law . . . a child did not become a human being and could not be the subject of a homicide until it was completely born alive, was entirely separated from its mother and had an entirely independent life, with the cord cut and with its own breathing and heart action. . . . [T]hese rules have largely been retained in the modern common law and in common law states in this country. While there have been some modifications of the rules these jurisdictions still require a rather complete separation from the mother and a rather complete demonstration that there was an entirely independent existence in the child before considering the infant as a human being, although in some of the more modern cases it has been held that the cutting of the cord was not necessary to this end.


In affirming a conviction of manslaughter, the Chavez court did not follow the strict common law standard:
homicide laws. The Keeler case involved a deliberate assault upon an unborn child with the intent to kill it. The lower court held that such conduct could be murder, noting that “[w]e are satisfied that a fetus which has reached the stage of viability is a human being for the purposes of California’s homicide statutes.”

In rejecting the live birth test that court held that “[p]roof beyond a reasonable doubt of capacity to live outside the womb provides a test more in keeping with the realities of continuous human development.”

The California Supreme Court reversed, holding that in declaring murder to be the unlawful and malicious killing of a “human being” the legislature of 1850 intended the term to have the settled common law meaning of a person who had been born alive, and did not intend the act of feticide—as distinguished from abortion—to be an offense under the laws of California.

In reaction to this decision the California legislature immediately enacted a feticide statute, despite the notation of the California Supreme Court indicating that such statutes were basically a nineteenth century phenomenon and had recently been abrogated in several jurisdictions.

Other jurisdictions have also seen legislative reactions to this position taken by the courts. The actions have ranged from legislative definition of the subject of homicide to include fetuses, separate

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There is no sound reason why an infant should not be considered a human being when born or removed from the body of the mother, when it has reached that stage of development where it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed.

Id.


349. Id. at 868 n.2 (emphasis added).

350. 2 Cal. 3d at 628, 470 P.2d at 622, 87 Cal. Rptr. at 486.


352. 2 Cal. 3d at 633 n.16, 470 P.2d at 625 n.16, 87 Cal. Rptr. at 489 n.16.

353. See, e.g., ARK. STAT. ANN. § 41-2223 (1964).
feticide laws,354 and stringent birth reporting laws.355

While the issue of when human life begins has never been decided in the District of Columbia, it has been held that the local murder statutes define the crime as it was at common law356 with certain statutory additions which are irrelevant to this discussion.357 It can thus be presumed that the District's definition of a human being will be that of the common law. While it is apparent that there is no constitutional bar to extending the common law definition of human being to include the unborn but viable fetus,358 such a step should be undertaken, if at all, only after careful study. The authors believe there is merit in providing a definition which includes a child in the process of being born, a slight extension of the common law. A fetus should "at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed."359 In addition, the authors submit that consideration should be given to the adoption of a separate feticide statute to cover conduct not currently within the scope of the District's criminal code.

3. "Omissions to act resulting in death"—What should be the scope of the duty to preserve the life of another?

The common law rule, reflected in the District's case law, is that there is no general legal duty to provide aid to preserve the life of another, no matter how great the danger or how easily the actor

354. The Supreme Court in Keeler undertook a detailed discussion of the various feticide statutes. See 2 Cal. 3d at 627—33, 470 P.2d at 621—26, 87 Cal. Rptr. at 485—90.
357. See, e.g., D.C. CODE § 22-2401 (1973) (felony-murder rule); id. § 22-2402 (death caused by obstructing railroad—first degree murder).
358. See Roe v. Wade, 410 U.S. 113 (1973). In discussing the interest of a state in protecting the unborn, the Court recognized an important state interest in this regard:
Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.
Id. at 150.
could have prevented the death, unless there is a specific legal duty to do so. In *Jones v. United States*, Judge Wright identified the sources of specific legal duties:

There are at least four situations in which failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

Excluding these four limited circumstances, the law imposes no affirmative duty to save human life if within one's power. Nowhere in the criminal law is the potential gap between law and morality greater than in the area of omissions to act. An example provided by the nineteenth century criminal law scholar, Sir James Fitzjames Stephen, expresses the current state of the law:

A number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are no doubt, shameful cowards, but they can hardly be said to have killed the child.

A more modern example which further illustrates the gap between

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360. A malicious omission to perform an act which one has a duty to perform is murder if death is the result. See, e.g., Commonwealth v. Hall, 322 Mass. 523, 78 N.E.2d 644 (1948) (second degree murder conviction of mother for death of illegitimate child who died when deprived of food and liquid affirmed); Biddle v. Commonwealth, 206 Va. 14, 141 S.E.2d 710 (1965) (murder conviction for wilfully and maliciously withholding food from baby reversed for failure to prove case beyond a reasonable doubt).

An omission to perform an act which one has a duty to perform which under the circumstances amounts to reckless conduct is manslaughter if death is caused thereby. See, e.g., Jones v. United States, 113 U.S. App. D.C. 352, 308 F.2d 307 (1962) (manslaughter conviction reversed due to failure to instruct jury that it must first find that defendant had a legal duty to provide food to infant).


362. *Id.* at 355, 308 F.2d at 310. It may be questioned whether the third source of legal duty exists independently of the fourth source. Merely quitting a job in breach of contract would seem to be an inadequate basis for criminal liability in the absence of reliance upon the contract and the lack of opportunity to obtain a suitable replacement.

363. 3 J. Stephen, A History of the Criminal Law of England 10 (1883). If one of the on-lookers in the above hypothetical were the parent of the child, the second source of legal duty enumerated in *Jones* would be satisfied. A legal duty would similarly be found if one of the persons had contractually assumed a duty to care for the child, such as a baby sitter.
specific legal and moral obligations is that of 28-year old Catherine Genovese. She was repeatedly stabbed over a half-hour period in front of her apartment house in New York City, in the plain view of at least 37 respectable, middle-class residents who witnessed her death from their apartments but did nothing to help her.\textsuperscript{364}

The concepts of individual insularity and independence which underlie the Anglo-American doctrine of extremely limited responsibility for non-feasance are in need of reevaluation in light of the exigencies of contemporary society. Problems presented by advanced technology and denser population demand a more cooperative attitude among citizens, the encouragement of which may be a proper end of the criminal law.\textsuperscript{365} It should be noted, however, that any steps taken in this direction should be carefully made and accompanied by some process which would adequately educate the citizenry as to what circumstances would create an affirmative duty to act and what sanctions would be imposed upon failure to do so.

4. "Another"—The treatment of conduct related to suicide

At earlier common law, suicide was considered a form of homicide and was punishable by forfeiture of the decedent's estate.\textsuperscript{366} No cases have been discovered in the District of Columbia concerning

\textsuperscript{364} 37 Who Saw Murder Didn't Call Police, N.Y. Times, Mar. 27, 1964, § 1, at 1, col. 4. In an editorial entitled "What Kind of People Are We," the New York Times commented:

[A] simple telephone call in the privacy of their own homes was all that was needed. How incredible it is that such motivations as "I didn't want to get involved" deterred them from this act of simple humanity. . . . Who can explain such shocking indifference on the part of a cross section of our fellow New Yorkers?

N.Y. Times, Mar. 28, 1964, § 1, at 18, col. 2.

365. In many European countries statutes punish by fine or imprisonment persons who knowingly fail to aid a person in danger of death or serious bodily harm, if such aid could be given without danger to that person or others. For a compendium of such legislation see Feldbrugge, \textit{Good and Bad Samaritans}, 14 Am. J. Comp. L. 630, 655–57 (1966).

366. See Rudolph v. United States \textit{ex rel.} Stuart, 36 App. D.C. 379 (1911) (civil suit for policeman's pension after he committed suicide). In denying the heirs' claim for the pension, the court stated:

Suicide was a common-law crime, punishable by the forfeiture of the estate of the decedent. To support relators' contention [that suicide should not be considered a crime], therefore, would be equivalent to holding that, if the decedent had been killed while in the perpetration of a crime, or executed for a crime, during the term of his employment on the police force, relators would be entitled to the pension. Such a construction is impossible.

\textit{Id.} at 386.
criminal prosecution for suicide or its attempt. While it is not clear whether suicide is a substantive offense in the District, the present code language could be read to exclude suicide from the scope of the murder provisions by the presence of the word "another."

Other than perhaps clarifying that suicide should be excluded from the substantive law of homicide in the District, is there a need for some form of statutory language on the subject of suicide and related conduct? Some of that conduct is currently clearly within the purview of the homicide statutes. Someone causing, aiding, or soliciting the suicide of another would be the subject of the appropriate homicide provision. Thus, maliciously aiding another's suicide with deliberation and premeditation would be first degree murder; without premeditation and deliberation, second degree murder; and without malice, but in the absence of justification or excuse, manslaughter.

The concept of suicide and related conduct as a substantive criminal offense raises many abstract questions in regard to the sanctity of life versus an inherent right of self-destruction. It has been

367. Indeed, "whether attempted suicide is a crime is in doubt in some jurisdictions, including the District of Columbia." Application of the President & Directors of Georgetown Col., Inc., 118 U.S. App. D.C. 80, 89, 331 F.2d 1000, 1009 (1964) (footnote omitted) (proceeding by hospital for writ authorizing blood transfusion for patient who refused on religious grounds).


369. Many jurisdictions hold such conduct to be murder, but of varying degrees. See, e.g., McMahan v. State, 168 Ala. 70, 53 So. 89 (1910) (a defendant could be guilty of either first or second degree murder depending on the circumstances); Burnett v. People, 204 Ill. 208, 68 N.E. 505 (1903) (a hypothesis that there was an agreement between two parties to commit suicide, and that the agreement was in part the inducing cause of deceased's taking poison, was insufficient evidence for conviction); Commonwealth v. Hicks, 118 Ky. 637, 82 S.W. 265 (1904) (an accessory could be guilty of murder, first or second degree, as would be the principal, if there were sufficient evidence of his actions); People v. Roberts, 211 Mich. 187, 178 N.W. 690 (1920) (after plea of guilty in murder case court may determine degree of murder without calling a jury); State v. Jones, 86 S.C. 17, 67 S.E. 160 (1910) (affirming a conviction of first degree murder).

370. See, e.g., Larremore, Suicide and the Law, 17 HARV. L. REV. 331 (1904)
argued that criminalization of suicide is an indirect means of criminalizing related conduct such as attempted suicide. While there may be some merit in the argument that criminalizing attempted suicide guarantees the state's jurisdiction over the would-be suicide for rehabilitative purposes, it can serve to create a reverse deterrence, i.e., the actor must succeed in the attempt or be faced with possible criminal sanctions. Attempted suicide has also been held to be an "unlawful act" sufficient to invoke the misdemeanor-manslaughter rule when a rescuer was accidentally killed.

Although several states recognize attempted suicide as a crime, the authors concur with the draftsmen of the Model Penal Code, who concluded: "[W]e think it clear that this is not an area in which the penal law can be effective and that its intrusion on such tragedies is an abuse." Some conduct in regard to suicide, however, would seem to warrant criminal sanctions, and the American Law Institute included separate provisions dealing with soliciting or aiding another to commit suicide. The District would be well advised to clarify the position of such conduct in the criminal code upon revision.

5. Other general terms in the definition of criminal homicide

Two other terms relevant to any discussion of the definition of criminal homicide involve "causation" and "without legal justification or excuse." A general definition of causation, as appears in many of the modern criminal codes, would seem to be sufficient to cover criminal homicide as well. A full discussion of affirmative defenses included within the concept "without legal justification or excuse" is beyond the scope of this article. Hence, these terms receive only brief mention here.

373. See Note, Criminal Law—Attempted Suicide, 40 N.C.L. Rev. 323, 326 (1962).
375. See Model Penal Code § 210.5(2) (Proposed Official Draft 1962). In this section soliciting or aiding another to commit suicide is a separate offense. It is a second degree felony if suicide or attempted suicide results; otherwise it is a misdemeanor.
377. See note 153 & accompanying text supra.
a. causation

As a necessary, but not sufficient, basis for the requirement of causation, the actor's conduct must be proven to have been the cause in fact of the death.\(^{378}\) With rare exceptions,\(^{379}\) this principle is easily applied.

Although the victim's death may not have occurred "but for" the actions of the accused, there may have transpired such intervening events contributing to the victim's death that the accused will not be held criminally responsible. The general rule, then, is that "for homicide, the death must be the natural and probable consequence of the unlawful act, and not the result of an independent intervening cause in which the accused does not participate, and which he cannot foresee."\(^{380}\)

This principle does present difficulties in application to the facts of each case, and the rules which have evolved under it are diverse.\(^{381}\) Thus it has been held in the District of Columbia that failure of the victim to seek medical treatment,\(^{382}\) and even affirmative action on the part of the victim to counteract the benefits of medical treatment,\(^{383}\) will not relieve the accused of criminal liability for the homicide.

Also, cases from other jurisdictions have been cited by our courts to the effect that even the suicide of the victim may not absolve the one who first dealt a serious, but not mortal, wound.\(^{384}\) There is some

\(^{378}\) See generally 40 Am. Jur. 2d Homicide §§ 13—16 (1968); Williams, Causation in Homicide, 1957 Crim. L. Rev. 429, 430—33.

The importance of factual cause for legal purposes is that nothing that is not a factual cause can be legal cause. A legal cause is, therefore, a species of factual cause.

\(^{379}\) Id. at 431.

\(^{379}\) Certain instances, for example, independent and simultaneous injuries which jointly cause death, present problems in the determination of factual cause, but these may be resolved by the jury as any other question of fact.

\(^{380}\) 40 Am. Jur. 2d Homicide § 17 (1968). See also W. LaFave & A. Scott, supra note 336, at 248.

\(^{381}\) A perfect example of an arbitrary, technical rule of causation is the so-called "year and a day rule." Probably for lack of scientific proof reliable as to any great length of time, the common law refused to prosecute if death occurred more than a year and one day from the time of the injury. See generally R. Perkins, supra note 138, at 28—29.

\(^{382}\) Hopkins v. United States, 4 App. D.C. 430, 438—41 (1894).


\(^{384}\) Id. at 551, citing People v. Lewis, 124 Cal. 551, 559, 57 P. 470, 473 (1899) (serious but not mortal wound); Stephenson v. State, 205 Ind. 141, 183, 179 N.E. 633, 649 (1932) (mortal wound).
authority, though, for the proposition that clear negligence on the part of those attending to the victim's wounds may be considered in some circumstances as relieving the actor's responsibility for the death; 385 one of the circumstances seems to be that the original wound was not mortal in itself. 386

b. without legal justification or excuse

The absence of legal justification or excuse is the dividing line between criminal and non-criminal homicide. 387 While the two categories of "legal justification" and "legal excuse" were markedly different at common law, 388 they have blended into a single concept, recognizing that certain homicides, based on the realities of the human condition, should not be labelled criminal. Basically, a homicide is "justified" if commanded or authorized by law. 389 The typical examples are execution of a convicted felon by order of the court, 390 the killing of an enemy in time of war, 391 or the killing of a person engaged in a forcible felony. 392

385. See Hopkins v. United States, 4 App. D.C. 430 (1894), where the court stated:

But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines the party dies, if it can clearly appear, that this medicine, and not the wound, was the cause of his death, it seems it is not homicide, but then that must appear clearly and certainly to be so.

Id. at 440, citing 1 M. Hale, Pleas of the Crown 428 (1678).

386. In Hopkins, the court implied that the defendant's burden of proving this intervening cause is significant:

[The defendant] will be held guilty of the murder unless he can make it clearly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death.

4 App. D.C. at 441.

387. See note 334 supra. While it is a tautology to explain criminal homicide simply as homicide committed without legal justification or excuse, it is a descriptive term signifying a conclusory statement of law.

388. At early common law, excusable homicide was punishable by forfeiture of chattels, while justifiable homicide was a complete exoneriation from blame. One early commentator, Sir Edward Coke, even maintained that excusable homicide was punishable by death, but this view has since been repudiated. See Law of Crimes, supra note 338, § 7.01, at 470.


392. See, e.g., Laney v. United States, 54 App. D.C. 56, 294 F. 412 (1923) (homi-
Excusable homicide recognizes exculpation in certain circumstances which do not involve the exercise of a legal duty or right, but are considered sufficiently mitigating to bar criminal liability. Such situations are represented by accidents, wherein the actor was not criminally negligent, deaths caused by persons not considered legally responsible for their actions, and certain of the self-defense cases which lie somewhere between justifiable homicide and voluntary manslaughter.

D. Existing Statutory Provisions and Their Evolution

1. The common law

At common law there were but two categories of criminal homicide, murder and manslaughter. The United States Court of Appeals for the District of Columbia discussed the definitions of and distinctions between these categories of criminal homicide and their evolution in the case of Marcus v. United States. Murder was defined as "[w]hen a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." Manslaughter was defined as "[t]he unlawful killing of another which is justifiable if necessary in defense of domicile, self, or others under actor's protection.


394. See, e.g., Sinclair v. United States, 49 App. D.C. 351, 265 F. 991 (1920) (death excusable as accident if vehicle malfunction occurred without fault on the part of the actor).

395. Certain persons lack the capacity to commit criminal homicide in the eyes of the law. Such incapacity normally excuses their conduct. See R. Perkins, supra note 138, at 33 (infants and raving maniacs excused for homicides they commit).

396. While one is justified in the killing of another if necessary to prevent imminent death or bodily injury, an unnecessary killing under a reasonable apprehension of imminent death or bodily injury may be excused. See id. at 33—34. If the killing is unnecessary and the actor's apprehension is unreasonable, the homicide would probably be voluntary manslaughter, not murder, since there would be no malice on the part of the actor.

397. See Fisher v. United States, 328 U.S. 463, 472—73 (1946) (first degree murder conviction affirmed despite lower court's refusal to allow jury to consider defendant's alleged mental deficiency).

398. Marcus v. United States, 66 App. D.C. 298, 86 F.2d 854 (1936) (first degree murder conviction affirmed where jury could have found that homicide in course of robbery was purposeful).

399. Id. at 304, 86 F.2d at 860 (at common law murder was not divided into degrees and its punishment was death by execution).
without malice either express or implied."^400

These definitions were adopted as part of the common law of Maryland and subsequently of the District of Columbia when the territory comprising the District was ceded to the federal government.^401 A later act of Congress expressly adopted the common law definitions of crimes as part of the substantive criminal law of the District of Columbia.^402

"Accordingly, under the common law of this District, an unlawful homicide with malice expressed or implied was murder whether with or without premeditation, deliberation, or an express purpose to kill."^403 An unlawful, that is inexcusable or unjustifiable, homicide without malice would thus have been manslaughter.

2. The 1901 codification

The first comprehensive codification of a code of laws for the District of Columbia was enacted by Congress in 1901.^404 The Code established two degrees of murder, punishment therefore, and punishment but no codified definition for manslaughter.^405 The entire statutory scheme for unlawful homicide consisted of the following brief provisions:

. . . Murder in First Degree.—Whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate any offense punishable by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree.

. . . Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree.

. . . Murder in Second Degree.—Whoever with malice aforethought, except as provided in the last two sections, kills another is guilty of murder in the second degree.

. . . Punishment.—The punishment of murder in the first degree shall be death by hanging. The punishment of murder in the second

^400. Id.
^401. Id.
^403. 66 App. D.C. at 304, 86 F.2d at 860.
^405. Id. §§ 798—802.
degree shall be imprisonment for life, or for not less than twenty years.

... MANSLAUGHTER.—Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.408

Thus, of these five code sections, two sections dealt with murder in the first degree, and one of these sections dealt exclusively with endangering the passage of railroad or street railroad. As can be seen from the above provisions, no clarification was provided for “malice aforethought” in second degree murder or for the definition of “manslaughter.”

The motives for this modification of the common law have been attributed to various notions of effectively deterring homicide and differences in culpability. The redefinition of murder into varying degrees by statute allows for the treatment of criminal behavior on a more individual basis, and is designed to provide grades of punishment to cover “the wide range of atrocity with which the crime of murder might be committed.”407 The distinction likewise recognizes a substantial difference in culpability of one who deliberately takes another’s life, as distinguished from one who impulsively accomplishes the same result.408

3. Subsequent amendments

Since the 1901 codification of the homicide laws in the District of Columbia, there have been a few substantive amendments made by Congress. In 1925, the mode of execution for first degree murder was changed from hanging to electrocution.409 That same section was

406. Id.
408. As the Court of Appeals for the District of Columbia Circuit noted:
Statutes like ours, which distinguish deliberate and premeditated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than from impulsive murder.
Accordingly, convictions of both first and second degree murder for the same slaying have been held to be inconsistent as “contrary to the intent of the nineteenth century legal reforms which displaced undifferentiated common law murder.”
subsequently amended in 1962 to provide for electrocution unless the jury unanimously recommends life imprisonment; if the jury is unable to reach a unanimous recommendation, the judge is given the power to provide for execution or life imprisonment in first degree murder convictions.\textsuperscript{410}

An Act of Congress in 1940 amended the first degree murder provision because of a lack of clarity of the status of the felony-murder rule.\textsuperscript{411} That provision used "purposely" in a manner that could be read in conjunction with the phrase "in perpetrating or in attempting to perpetrate any offense punishable by imprisonment in the penitentiary." It was suggested in two cases that the felony-murder rule was part of the second degree murder statute which incorporated common law murder.\textsuperscript{412} Congress thus made it clear that the word "purposely" was solely a limitation on deliberate and premeditated homicides, and not on the above quoted phrase, thereby insuring that the felony-murder rule was part of the first degree murder statute.

Congress limited the application of the felony-murder rule to specifically enumerated felonies.\textsuperscript{413} Thus, a killing, even without intent,
during the perpetration of arson, rape, mayhem, robbery, kidnapping, or armed housebreaking was made first degree murder and the felons involved liable to the death penalty.

Congress also provided coverage for negligent homicide if committed through the operation of a motor vehicle. The amendment provided misdemeanor sanctions for homicides committed "by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly." The crime of negligent homicide was expressly included within every charge of manslaughter by operation of a vehicle, and was to be considered by the jury if they returned an acquittal on the manslaughter charge.

Thus, the District of Columbia's criminal code includes purposeful and felony-murder as first degree murder, a special provision concerning railroads, killing with malice aforethought as second degree murder, common law manslaughter, and negligent homicide if done with a vehicle.

E. Murder

This section will consider the existing law of first and second degree murder in three sections according to the following problem areas: first, the mens rea of second degree murder—the meaning of "malice aforethought"; second, the meaning of the phrase "premeditation and deliberation" in the first degree murder statute and whether the distinction between first and second degree murder should be continued; and, third, the felony-murder rule in the first degree murder statute—whether it should be modified and, if so, in what manner.

1. The mens rea of second degree murder—Malice aforethought

As indicated above, second degree murder in the District of Columbia retains the common law meaning of the commission of a criminal homicide with "malice aforethought." This qualifying phrase, however, has become a generic term and, in the law of
homicide, has virtually ceased to even approach its literal meaning. The requisite "aforethought" has been construed to merely exclude post facto intent from murder. Moreover, "malice" no longer necessarily implies any sort of "ill-will, spite, hatred, or hostility." Consequently, malice aforethought identifies but no longer describes the dividing line between murder and manslaughter.

The term "malice aforethought" encompasses both express and implied malice. Thus, it is often stated that malice may be presumed from the circumstances of the commission of the criminal homicide. In Carter v. United States, the United States Court of Appeals for the District of Columbia attempted to provide a more operationally meaningful definition of malice aforethought by quoting from Perkins' statement that "[m]alice aforethought is an un-

418. See W. LAFAVE & A. SCOTT, supra note 336, at 528.
419. See R. PERKINS, supra note 138, at 34—35.
Undoubtedly the word "aforethought" was added to "malice" in the ancient cases to indicate a design thought out well in advance of the fatal act. But as case after case came before the courts for determination involving killings under a great variety of circumstances, there came to be less and less emphasis upon the notion of a well-laid plan. And at the present day the only requirement in this regard is that it must not be an afterthought.


421. See United States v. Hamilton, 182 F. Supp. 548 (D.D.C. 1960). Here, the defendant was found guilty of manslaughter where the victim of defendant's assault himself removed nasal drain tubes while undergoing hospital treatment, and died from asphyxiation. The government had sought a conviction on a charge of second degree murder, but the court refused to accept this position, noting that the difference between murder in the second degree and manslaughter is found in the presence or absence of malice aforethought. . . . The Court is of the opinion that there was no malice in this case in the legal sense. Moreover, any reasonable doubt as to the nature and degree of homicide should inure to the defendant's benefit.

Id. at 551.

422. As Professor Perkins commented:
While not always used with the same import, "express malice" is generally employed to indicate that type of malice aforethought represented by an intent to kill, whereas any state of mind sufficient for murder while lacking that specific intent is denominated "implied malice."

R. PERKINS, supra note 138, at 49 (footnotes omitted).

423. See generally LAW OF CRIMES, supra note 338, at § 10.06; W. LAFAVE & A. SCOTT, supra note 336, at 528—30; R. PERKINS, supra note 138, at 48—49.

justifiable, inexcusable and unmitigated man-endangering state of mind." The court has stressed that "intent to do an injurious act, even one highly dangerous to human life, is equivalent to malice only in the absence of justification, extenuation or excuse for that state of mind. Intent may be, and often is, an ingredient of malice, but never its exact counterpart." Modern criminal codes have tended to eliminate the phrase malice aforethought in the statutory definition of murder and to replace it with terms more descriptive of the underlying states of mind that will be given legal recognition as constituting malice aforethought. This approach is recommended for the District of Columbia. Such a revision would provide clearer notice to citizens as to what conduct is encompassed in the offense of murder and by what standards it will be determined. Perhaps of greater significance, it would provide a clearer basis for instructing juries called upon to perform the difficult task of determining which, if any, of the grades of unlawful homicide fits the facts of a particular case. Additionally, more descriptive statutory language would aid in minimizing problems which generate appeals under the present law, such as variations between the offense as charged and as proved, as well as problems in instructions to the jury.

In the absence of mitigation, excuse, or justification, it is clear that the intent or purpose to kill another human being is one of the underlying states of mind that will fall within second degree murder and is the equivalent of express malice. In the District of Columbia, assaulting another person with the intent to inflict serious bodily injury where the victim somehow dies as a result is also sufficient to support a second degree murder verdict. This is in accordance with the common law proposition that the intent to commit serious bodily injury supplies the element of malice necessary for murder. Thus, in United States v. Hinkle, the court stated that "malice" is

425. Id. at 263, 437 F.2d at 696 (footnotes omitted) (emphasis added).
426. Id.
430. The offense can only be second degree murder, however, because first degree murder requires a specific intent to kill. See Collazo v. United States, 90 U.S. App. D.C. 241, 196 F.2d 573, cert. denied, 343 U.S. 968 (1952).
a "state of mind showing a heart that is without regard for the life and safety of others."^{431}

In addition to intent to kill and the intent to inflict serious bodily injury, there is a third mental state that will qualify for malice aforethought. A person may intentionally do an act that creates an extremely high risk of death, and may even be aware of this risk, without subjectively intending death or serious bodily injury to result. Examples where the jury, perhaps, could have found such a mental state to exist may be seen in two District of Columbia cases. In *Lee v. United States*,^{432} the defendant drove an automobile carrying a load of "bootleg" whiskey. When defendant discovered he was being followed by a government car, he accelerated his car from twenty-two miles per hour to seventy to eighty miles per hour through a busy intersection at dusk where he struck another car and killed a child who was riding therein. In *United States v. Grady*,^{433} evidence was introduced that the defendant killed his three-year-old daughter while punishing her for eating baby powder by holding her at the shoulders and apparently banging her head against the floor. On previous occasions, the evidence showed that he had beaten his daughter with his fists, slammed her into the wall, and pushed her head down a toilet.

However, there is an absence of clarity in both the District's case law as well as that of other common law jurisdictions regarding what has been referred to as depraved-heart murder or extremely reckless behavior manifesting a disregard for the life and safety of others. The difficult problem is how to articulate a standard for the jury to apply that distinguishes this form of malice aforethought from reckless or criminally negligent conduct that constitutes involuntary manslaughter.

In a concurring opinion in *United States v. Dixon*, Judge Leventhal observed:

> There is a basis for a verdict of murder at common law, and also as to second degree murder under our Code, when a defendant's act is so reckless as to indicate a disregard of human life. Thus, there is...

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431. 159 U.S. App. D.C. 334, 336, 487 F.2d 1205, 1207 (1973) (emphasis added) (jury instruction that "malice is a state of mind showing a heart regardless of social duty" was harmless error since mortal wound inflicted by a knife).

432. 72 U.S. App. D.C. 147, 112 F.2d 46 (1940) (second degree murder conviction affirmed where actor's conduct sufficient for jury to have found malice).

433. 157 U.S. App. D.C. 6, 481 F.2d 1106 (1973) (second degree murder conviction reversed for jury should have been instructed upon the requisite elements of recklessness for murder and manslaughter).
an objective element in "malice" and second degree murder.

Yet it was settled at common law, and, I think, is true under our statute that reckless conduct resulting in death may constitute manslaughter. The difference between that recklessness which displays depravity and such extreme and wanton disregard for human life as to constitute "malice" and that recklessness that amounts only to manslaughter lies in the quality of awareness of the risk. 434

We are left, then, with a continuum of culpable behavior unintentionally resulting in death, for which there is no legal justification or excuse, beginning with extreme recklessness constituting malice aforethought, then recklessness, and concluding with criminal negligence. Although the case law in the District is less than clear, it seems that the degree of the actor's culpability, ranging from murder, reckless manslaughter, and negligent manslaughter to accidental—and thus excusable—homicide, depends upon the jury's application to the facts of the case of the following factors: 1) the degree of risk to human life which the actor's conduct presented; 435 2) the

This mental state would seem to be included in the D.C. Bar Association's jury instructions:
Implied malice is such as may be inferred from the circumstances of the killing, as, for example where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act, or when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.
D.C. BAR Ass'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA 104 (2d ed. 1972) (emphasis added).

435. Judge Leventhal's concurring opinion in Dixon [see text accompanying note 434 supra] seemed to disregard the degree of risk and placed primary emphasis in distinguishing between murder and manslaughter upon the "quality of awareness of the risk." Cf. Wechsler & Michael, supra note 334, at 721. For a description of a continuum of relative degrees of risk, see W. LaFave & A. Scott, supra note 336, at 541—42:
Conduct which creates an unreasonable risk of injury to other persons or to their property is generally termed "ordinary negligence," a type of fault which will generally serve as the basis for tort liability and occasionally for criminal liability. Conduct which creates not only an unreasonable risk but also a "high degree" of risk (something more than mere "unreasonable" risk) may be termed "gross negligence," and if in addition the one who creates such a risk realizes that he does so, his conduct may be called "recklessness." . . . For murder the degree of risk of death or serious bodily injury must be more than a mere unreasonable risk, more even than a high degree of risk. Perhaps the required danger may be designated a "very high degree" of risk to distinguish it from those lesser degrees of risk which will suffice for other crimes. Such a designation of conduct at all events is more accurately de-
of intent to cause serious bodily injury under the mental state of extreme recklessness. Consequently, intent to kill and extreme recklessness accurately describe the underlying mental states that qualify for malice aforethought.

2. First or second degree murder

When codified in 1901, the legislature divided the common law offense of murder into two degrees, the more serious of the two carrying the possibility of a death sentence. This section discusses the meaning of and justification for the general standard distinguishing first and second degree murder.

The District's code provides that "[w]hoever, being of sound memory and discretion, kills another purposely . . . of deliberate and premeditated malice . . . is guilty of murder in the first degree." There is a required specific intent to kill, the premeditation representing the formation of that intent, and the deliberation element reflecting the conscious contemplation of the previously formed decision.

Of the many efforts to explain the meaning of premeditation and deliberation, and, therefore, the difference between first and second degree murder, the most frequently cited and, perhaps, clearest expression is Judge Leventhal's discussion in Austin v. United States.

In homespun terminology, intentional murder is in the first degree if committed in cold blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion. These are the archetypes, that clarify by contrast. The real facts may be hard to classify and may lie between the poles. A sudden passion, like lust, rage, or jealousy, may spawn an impulsive intent yet persist long enough and in such a way as to permit that intent to become the

440. See note 122 supra.
441. See text accompanying notes 404—06 supra.
442. Id.
446. See id.
subject of a further reflection and weighing of consequences and hence to take on the character of a murder executed without compunction and "in cold blood." The term "in cold blood" does not necessarily mean the assassin lying in wait, or the kind of murder brilliantly depicted by Truman Capote in *In Cold Blood*. . . . Thus the common understanding might find both passion and cold blood in the husband who surprises his wife in adultery, leaves the house to buy a gun at a sporting goods store, and returns for a deadly sequel. The analysis of the jury would be illuminated, however, if it is first advised that a typical case of first degree is the murder in cold blood; that murder committed on impulse or in sudden passion is murder in the second degree; and then instructed that a homicide conceived in passion constitutes murder in the first degree only if the jury is convinced beyond a reasonable doubt that there was an appreciable time after the design was conceived and that in this interval there was a further thought, and a turning over in the mind—and not a mere persistence of the initial impulse of passion.

The formation of the specific intent to kill need only precede the actual killing by an "appreciable" interval of time. In many cases, the jury is forced to decide, as a question of fact, whether the killing was deliberate or impulsive. Additionally, these two elements may be inferred by the jury from conduct prior to the killing, such as threats or disputes between the parties, or from the actor’s use of a deadly weapon to commit the offense.

Many revised criminal codes have eliminated the degrees of murder, thereby repealing what was actually a fairly brief experiment in criminal reform. The reasons for the merger of degrees into a single offense revolve around two basic issues: 1) the problems attendant upon distinguishing between the two degrees; and 2) the decreasing use of the death penalty in first degree murder cases.

Justice Benjamin Cardozo in a now famous address before the

448. Id. at 188, 382 F.2d at 137 (emphasis added).
449. See Bullock v. United States, 74 App. D.C. 220, 122 F.2d 213 (1941) (jury instruction that no time interval was necessary to finding deliberate and premeditated malice).
452. See, e.g., ILL. ANN. STAT. tit. 38, § 9-1 (Smith-Hurd 1972); KY. REV. STAT. ANN. § 434A.1-020 (Baldwin 1974).
453. See notes 406—08 & accompanying text supra.
454. This problem has become even more prevalent with the development of allowable inferences concerning mens rea. See cases cited in notes 450—51 supra.
455. See text accompanying notes 458—60 infra. See also text accompanying notes 205—06 supra.
degree to which the actor was aware of the risk potential of his conduct;\textsuperscript{436} and 3) the degree to which the actor's conduct deviated from an objective standard of conduct.\textsuperscript{437}

scriptive than that flowery expression found in the old cases and occasionally incorporated into some modern statutes—i.e., conduct "evincing a depraved heart, devoid of social duty, and fatally bent on mischief."

\textit{Id.}

436. There was some debate at common law as to whether awareness of risk should be required for murder. Holmes thought that the actor's awareness of the danger was immaterial if he was aware of circumstances that would lead a man of common experience to conclude that the danger was very great; that the common law employed an external standard even in the case of murder. Whether the common law judges carried the law of murder so far along the line of externality must be doubted. Stephen believed, as we have said, that the actor must have knowledge of the danger and not merely of the circumstances. \ldots The cleavage between the two positions is, however, wider in theory than it is in practice. Inferences as to a particular man's knowledge must usually proceed from propositions about the knowledge that men like the actor would generally have, if they should act as he did under like circumstances. \ldots Nevertheless some cleavage remains.

Wechsler & Michael, \textit{supra} note 334, at 709—11.


A determination of "wanton disregard of human life" implies the defendant's awareness of a serious danger to life. The defendant would be entitled to an express instruction that the jury must find he had awareness of such danger. But the judge should also then charge that this awareness may be found even though defendant had not actually formulated an intent to kill, that it may be inferred from the very fact that the conduct was extremely dangerous to life and from a presumption that one is aware of the probable consequences of his conduct.

The requirement of "awareness" of risk imports a subjective element even to this wanton recklessness aspect of murder, but of course not a subjective intention to kill.

\textit{Id.} at 406—07 n.8, 419 F.2d at 293—94 n.8.

437. LaFave and Scott state:

[T]he risk must not only be very high, as the defendant ought to realize in the light of what he knows; \textit{it must also under the circumstances be unjustifiable for him to take the risk.} The motives for the defendant's risky conduct thus become relevant; or, to express the thought in another way, the social utility of his conduct is a factor to be considered. If he speeds through crowded streets, thereby endangering other motorists and pedestrians, in order to rush a passenger to the hospital for an emergency operation, he may not be guilty of murder if he unintentionally kills, though the same conduct done solely for the purpose of experiencing the thrill of fast driving may be enough for murder.

W. LaFave & A. Scott, \textit{supra} note 336, at 542 (emphasis added).

See also R. Perkins, \textit{supra} note 138, at 37:
Applying the above formulation (absent justification, excuse, or mitigating circumstances), a person's conduct evidences extreme recklessness constituting malice aforethought when such person consciously disregards a very high or extreme degree of risk to human life or safety which will result from the conduct. This risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its conscious disregard manifests an extreme indifference to the value of human life. On the other hand, a person's conduct evidences recklessness constituting involuntary manslaughter when such person consciously disregards a high degree of risk to human life or safety which will result from the conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its conscious disregard evidences a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation. As discussed below, involuntary manslaughter may also be committed in the District of Columbia where the actor is not consciously aware of the risk created but, under the circumstances, should have been aware of such risk.

This standard for malice aforethought is sufficiently broad to include the mental state of intent to cause serious bodily injury. If a person intends to cause serious bodily injury, such person is doing an act in conscious disregard of a very high or extreme degree of risk to human life or safety. For this reason both the Model Penal Code and the Proposed Federal Criminal Code subsume the mental state

In other words, the intent to do an act in wanton and wilful disregard of the obvious likelihood of causing death or great bodily injury is a malicious intent. The word "wanton" is the key word here. . . . [A] motorist who attempts to pass another car on a "blind curve" may be acting with such criminal negligence that if he causes the death of another in a resulting traffic accident he will be guilty of manslaughter. And such a motorist may be creating fully as great a human hazard as one who shoots into a house or train just for "kicks" who is guilty of murder if loss of life results. The difference is that in the act of the shooter there is an element of viciousness—an extreme indifference to the value of human life—that is not found in the act of the motorist.


439. See notes 513—21 & accompanying text infra.
New York Academy of Medicine in 1928 expressed his concern that
the standard of premeditation and deliberation was inadequate to
distinguish between first and second degree murder.

I think the distinction is much too vague to be continued in our law.
There can be no intent unless there is a choice, yet by the hypothesis,
the hoice without more is enough to justify the inference that the
intent was deliberate and premeditated . . . . What we have is merely
a privilege offered to the jury to find the lesser degree when the
suddenness of the intent, the vehemence of the passion, seems to call
irresistibly for the exercise of mercy. I have no objection to giving
them this dispensing power, but it should be given to them directly
and not in a mystifying cloud of words.458

Justice Cardozo believed that the distinction was especially inade-
quate for determining whether the death penalty should be im-
posed.457

Moreover, it is apparent that the District of Columbia's death
penalty provision is unconstitutional.458 The legislature has not to
date taken any steps to remedy the situation; therefore, the Dis-
trict's murder statutes no longer have any punitive distinctions be-
tween first and second degree murder.459 Unless this situation is
remedied—and it is possible that even the most carefully drawn
death penalty statute may not survive an eighth amendment attack
in the courts460—the District of Columbia should consolidate murder
into a single offense as it was at common law.

This step would eliminate the troublesome technical distinctions
now determining the degrees of murder, thus allowing for more effi-
cient prosecution and defense of murder charges. While one alterna-

456. B. Cardozo, Law and Literature and Other Essays 99—100 (1931).
457. The present distinction is so
obscure that no jury hearing it for the first time can fairly be expected to
assimilate and understand it. I am not at all sure that I understand it myself
after trying to apply it for many years and after diligent study of what has
been written in the books. Upon the basis of this fine distinction with its
obscure and mystifying psychology, scores of men have gone to their death.
Id. at 100—01.
458. See notes 205—06 & accompanying text supra.
459. Both first and second degree murder are punishable by sentences of twenty
460. See Furman v. Georgia, 408 U.S. 238 (1972). In the short per curiam opinion
the Court indicated that imposition of the death penalty constituted cruel and
unusual punishment in light of the facts presented. However, the sharp division
on the Court, expressed in the five concurring and four dissenting opinions, left
open the question of whether the death penalty was unconstitutional in all cases.
tive is to redefine the degrees of murder into clearer categories,\textsuperscript{461} the better approach seems to be consolidation.

Consolidation eases the burden on both parties to the action, as well as diminishing the possibility of inequitable application of the harsher sanctions attached to first degree murder.\textsuperscript{462} Sentencing guidelines may be codified in order that the trial judge may consider certain specified factors which indicate both aggravation and mitigation of the offense.\textsuperscript{463}

\begin{itemize}
  \item \textsuperscript{461} See, e.g., Wis. Stat. Ann. §§ 940.01—.03 (West 1958). The Wisconsin statute sets out the murder offense in clearly defined terms. First-degree murder is a homicide accompanied by an intent to take a human life. Second-degree murder is defined as a homicide caused by reckless conduct evincing a depraved mind, and third-degree murder is felony-murder.
  \item \textsuperscript{462} Such a potential abuse of discretion has been cited as a controlling reason for banning the death penalty as violative of due process. See Furman v. Georgia, 408 U.S. 238, 253 (1972) (Douglas, J., concurring).
  \item \textsuperscript{463} The drafters of the Model Penal Code incorporated an extensive list of aggravating and mitigating factors to be considered by the court in sentencing:
    \begin{enumerate}
      \item \textsuperscript{3} Aggravating Circumstances
        \begin{enumerate}
          \item The murder was committed by a convict under sentence of imprisonment.
          \item The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
          \item At the time the murder was committed the defendant also committed another murder.
          \item The defendant knowingly created a great risk of death to many persons.
          \item The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
          \item The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
          \item The murder was committed for pecuniary gain.
          \item The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.
        \end{enumerate}
      \item Mitigating Circumstances
        \begin{enumerate}
          \item The defendant has no significant history of prior criminal activity.
          \item The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
          \item The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
          \item The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
          \item The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
          \item The defendant acted under duress or under the domination of another person.
        \end{enumerate}
    \end{enumerate}
\end{itemize}
Thus, in lieu of a reenactment of the death penalty, and since such a reenactment, should it occur, would in all likelihood apply only in very limited circumstances, murder should be consolidated into a single offense which can be committed in two basic ways: intentionally or knowingly, and by conduct evidencing extreme recklessness. The sentencing considerations would provide sufficient insurance that the totality of the circumstances resulting in murder would be considered by the sentencing judge and would not influence the jury's decision on guilt or innocence.

3. The felony-murder rule

While there is some doubt as to the scope of the felony-murder rule at common law, it is clear that murder could be committed even by accident in the course of commission of what are now violent felonies. In the District of Columbia, first degree murder is committed if a person has died as a result of the commission, or attempted commission, by the accused of arson, rape, mayhem, robbery, kidnapping, or armed housebreaking. There is no need for the government to prove a specific intent to kill, premeditation or deliberation, or even malice.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.


464. To avoid having a reenacted death penalty provision declared invalid on constitutional grounds, the legislature should carefully restrict the amount of discretion vested in either the judge or the jury. Thus, it is likely that the legislature would be forced to draft mandatory death penalties for certain crimes. Yet, that solution, which would not account for the individual vagaries of each offense, may still be violative of the cruel and unusual punishment clause.


466. See W. LAFAVE & A. SCOTT, supra note 336, at 545—47.


469. See Burton v. United States, 80 U.S. App. D.C. 208, 151 F.2d 17 (1945) (court properly instructed jury on robbery, even though not charged in the indictment, since robbery takes the place of premeditation in first degree felony-murder).

470. See Wheeler v. United States, 82 U.S. App. D.C. 363, 165 F.2d 225 (1947) (appellant guilty of felony-murder even where it was shown that co-defendant actually committed the murder while appellant was in another part of the building).
Any accessory before the fact to the felony may be charged as a principal, even if not present at the time of the killing. The death of a co-felon may be sufficient to charge felony-murder. The phrase "perpetrating or attempting to perpetrate" has been interpreted to include a killing which occurs during a "continuous pursuit immediately organized," which may be even further expanded by crimes such as robbery which are not consummated until the asportation is entirely completed.

The impact of this rule was very limited at common law because the majority of the felonies at that time were punishable by death, even if no one died during their commission. The modern extension of the felony concept to embrace many sorts of conduct, including non-violent conduct, has led jurisdictions to limit the felonies subject to the rule as was done in the District.

Yet, it is not entirely clear that the substantive felony-murder rule still serves a valid function. Since its purpose is to deter the commission of violent felonies, particularly when committed while armed, it would seem that specialized sentencing statutes would serve the same purpose without creating legal fictions of transferred malice or, even worse, strict liability for the results of one's conduct, regardless of intent. Situations which would not be included within murder, such as conduct evidencing extreme recklessness, could probably be effectively handled by existing sentencing statutes. For example, section 22-3202 provides additional penalties for committing a crime while armed which, at the court's discretion, may be up to life imprisonment. Since the present death penalty provision is unconstitutional, there is no advantage in maintaining the felony-murder rule.

472. See D.C. Code § 22-2401 (1973) ("kills another"). "Another" would necessarily include a co-felon.
473. For an excellent discussion of whether the scope of the felony-murder rule should exclude situations such as the killing of a co-felon by a police officer or a bystander see Morris, The Felon's Responsibility for the Lethal Acts of Others, 105 U. Pa. L. Rev. 50 (1956).
An appropriate compromise, however, might be to have a statutory presumption that death resulting from the commission of certain violent felonies is the result of conduct evidencing extreme recklessness. Such a presumption, while rebuttable, should comprise a prima facie case, sufficient to put the evidence before the jury. The jury would, however, have the power to consider rebuttal testimony and perhaps to reduce to a lesser included offense, such as the substantive felony and the additional charge of committing a violent felony while armed.

Most revised codes have kept the felony-murder rule in some form,\textsuperscript{479} but Kentucky has totally rejected it.\textsuperscript{480} The trend, however, is to severely limit the scope and application of the rule. The District of Columbia would be well advised to consider the suggested presumption as a means of qualifying the application of the rule without sacrificing its deterrent effect.

\textbf{F. Manslaughter}

For organizational purposes, the common law distinction which held all criminal homicides other than murder as being manslaughter\textsuperscript{481} will be followed in this section. The discussion will therefore include the common law of manslaughter, as represented by the District's case law in the area, as well as its vehicular homicide statute.

The major problem which this area presents is a function of its indefinite nature. Manslaughter became a "catch-all" for all homicides which were neither murder nor justifiable or excusable.\textsuperscript{482} Consequently, the exact parameters of the offense were constantly in

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., ILL. ANN. STAT. tit. 38, § 9-1(a)(3) (Smith-Hurd 1972); N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1974); OHIO REV. CODE ANN. § 2903.01(B) (Page Current Material 1974); REV. CODE WASH. ANN. § 9.48.030(3) (1961); WIS. STAT. ANN. § 45.940.03 (West 1958).
\item This distinction is followed in the District of Columbia. Since no statutory definition for manslaughter has been enacted, the common law definition is in force. See United States v. Pender, 309 A.2d 492 (D.C. Ct. App. 1973), citing Simon v. United States, 137 U.S. App. D.C. 308, 310, 424 F.2d 796, 798 (1970).
\item According to Professor Perkins:

All homicides which were neither with malice aforethought nor under circumstances of justification or excuse were dealt with as manslaughter. Hence this was definitely a "catch-all" group, and confusion can be avoided best by thinking of the development of this crime in terms of this process of elimination.

R. Perkins, supra note 138, at 51 (footnote omitted).
\end{enumerate}
\end{footnotesize}
flux and various categories of conduct have been subsumed under the name of manslaughter. The classical resolution of this problem was to place manslaughter into two basic classes: voluntary and involuntary. For that reason, further discussion of manslaughter will proceed upon a single qualifying distinction: whether the unlawful death was caused intentionally or unintentionally.

1. Intentional killing—Voluntary manslaughter

There are basically two situations involving intentional killings which the law regards as lacking the requisite intent for murder, yet still regards as criminal. These are: 1) where the actor's emotions have been reasonably and sufficiently aroused; and 2) where the actor has used an inordinate amount of force under the unreasonable belief that he was privileged to kill another.

The first situation is the so-called “heat of passion” theory of voluntary manslaughter. Under this theory, even though the actor intended to kill his victim, the law deems him to have been acting under the passion generated by the circumstances—circumstances which have caused him to be unable to reasonably assess his actions. Such passion has been considered in the District of Columbia to include rage, resentment, anger, terror, and fear.

Yet it is not enough that the actor was in a heat of passion; that passion must have been caused by legally adequate provocation. The standard applied to the circumstances to determine whether there was adequate provocation is objective. That is, the circumstances must “produce hot blood in the mind of a reasonable man or a man of ordinary self-control.”

This standard excludes considerations of whether the actor’s intoxication at the time could have influenced his emotional reaction. Likewise, “mere words standing alone, no matter how insult-

483. See generally LAW OF CRIMES, supra note 338, at § 10.11; W. LaFAVE & A. Scott, supra note 336, at 572—82; R. PERKINS, supra note 138, at 53—69.

484. See Bishop v. United States, 71 App. D.C. 132, 136—37, 107 F.2d 297, 302—03 (1939) (even if provocation is sufficient, “passion and hot blood” must actually be caused thereby).

485. See Kinard v. United States, 68 App. D.C. 250, 254, 96 F.2d 522, 526 (1938) (passion includes emotions such as rage as well as fear).

486. See Bishop v. United States, 71 App. D.C. 132, 107 F.2d 297 (1939) (while appellant may have been in a heat of passion, his voluntary intoxication will not change the standard for provocation).


ing, offensive or abusive, are not adequate provocation," and a minor assault upon the actor by the victim is not sufficient to reduce the intentional homicide from murder to manslaughter. However, the adulterous conduct of a wife has been recognized "as the classic provocation" for mitigating what might otherwise be murder.

Other jurisdictions, in revising their penal codes, have changed the wording and substance of this offense. Thus, instead of the "heat of passion for which there is legally adequate provocation" formula, many jurisdictions have followed the lead of the American Law Institute in enacting a different formula. The modern version is basically a determination of whether the actor was under "the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse."

Thus, "extreme mental or emotional disturbance" is substituted for "heat of passion," a change which is more descriptive of the existing law but not a substantive revision. "Adequate provocation" is replaced by "reasonable explanation or excuse." This innovation qualifies the rigid objectivity of the present standard and moves toward a more realistic subjective standard. To enforce the subjectivity of this standard, the American Law Institute included immediately thereafter in the proposed statute the following test:

The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

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493. See Model Penal Code § 210.3(1)(b) (Proposed Official Draft 1962). This section states that a criminal homicide will be considered manslaughter when:

[A] homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

Id.
494. Id.
495. Id. Tentative Draft No. 9 of the Code contained the following comment:

We . . . introduce a larger element of subjectivity in the appraisal, though it is only the actor's "situation" and "the circumstances as he believes them to be," not his scheme of moral values, that are thus to be considered. The
This formulation, if adopted, would be more representative of actual culpability than the present objective standard. Thus, words alone could conceivably arouse ordinary persons to an emotional state wherein their reason can no longer control their conduct. Similarly, such a standard can account for the actors’ diminished capacity to appreciate the circumstances in which they find themselves. An intoxicated person’s reactions to a given stimulus, therefore, may be entirely reasonable under the circumstances as perceived by the actor. While the law does not excuse such an individual from criminal responsibility for his or her actions, it should permit consideration of diminished cognitive capacity as a circumstance militating against punishment as a murderer.

ultimate test, however, is objective; there must be “reasonable” explanation or excuse for the actor's disturbance. This is, we think, to state in fair and realistic terms the criteria by which men do and should appraise the mitigating import of mental or emotional distress when it is a factor in so grave a crime as homicide.

The formulation seeks to qualify the rigorous objectivity of the prevailing law insofar as it judges the sufficiency of the provocation by its effect on the reasonable man. . . .

Though it is difficult to state a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause, we think that such a statement is essential. For surely if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. They are material because they bear upon the inference as to the actor’s character that it is fair to draw upon the basis of his act.


496. With regard to adultery, it has been stated:

A wife's adulterous conduct has long been recognized as the classic provocation for homicide. Whether that provocation was “such as might naturally induce a reasonable man in the passion of the moment to lose self control and commit the act on impulse and without reflection,” thereby justifying a verdict of manslaughter, is ordinarily for the jury, particularly where, as here, the husband is reminded of the conduct immediately before the fatal act. United States v. Comer, 137 U.S. App. D.C. 214, 220, 421 F.2d 1149, 1155 (1970) (footnotes omitted) (emphasis added).

497. The defense of capacity diminished by intoxication—to the extent that the accused is unable to form a specified intent—has been recognized in the District as effective to reduce the offense from first degree murder to second degree murder. See Bishop v. United States, 71 App. D.C. 132, 135—36, 107 F.2d 297, 301—02 (1939). However, this defense has been held insufficient to negative the malice aforethought which distinguishes second degree murder from manslaughter. Id. at 136, 107 F.2d at 302.

Additionally, in United States v. Brawner, 153 U.S. App. D.C. 1, 471 F.2d 964
The second situation which has been recognized as distinguishing an intentional homicide from murder is the unreasonable exercise of what would otherwise be privileged conduct, i.e., the "imperfect defense" manslaughter. Thus, if the actor actually and reasonably believes it is necessary to kill another in self-defense in order to save the actor from death or grave bodily injury, the homicide is non-criminal.\textsuperscript{48}

Yet, if the belief is unreasonable or the force employed unreasonably excessive, the actor is deemed to have committed manslaughter and not murder, even though the killing was intentional.\textsuperscript{49} Thus, (1972), the Court of Appeals prospectively modified the rule of Fisher v. United States, 328 U.S. 463 (1946). The Fisher Court had refused to require a requested instruction that, on the question of premeditation and deliberation necessary for first degree murder, the jury "should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case." \textit{Id.} at 471 n.6. Taking heed of the Supreme Court's statement that it would not interfere with such rules fashioned by District of Columbia courts \textit{[id. at 476]}, the court held in Brawner that henceforth evidence of abnormal mental condition would be considered on the question of specific intent in first degree murder charges. 153 U.S. App. D.C. at 32—34, 471 F.2d at 1000—02.

\textsuperscript{48} See \textsc{R. Perkins}, \textit{supra} note 138, at 33—34.


[A] possible verdict of manslaughter might have arisen on the failure of appellant's claim of self-defense. . . . An unprovoked assault by another, such as appellant described, is sufficient cause for one to take up his own defense, especially when he finds himself lying on his back before his attacker. At the same time, as the trial judge instructed, the level of the defensive response must be related to the apparent necessities of the occasion, including the degree of force used by the attacker. Here . . . a fistic assault by a smaller man was met with a blazing pistol in the hand of one larger. Such a response may well be deemed disproportionate, but a jury is free to take into consideration not only the magnitude of the attack but also the predicament the accused believes himself to be in. Appellant's jury may have recognized an obstacle to finding self-defense simply from the amount of force appellant used to repel the deceased's attack. \textit{And if the jury rejected self-defense just because appellant imprudently misjudged the response necessary in the situation, his offense might well have been manslaughter, arising from the unreasonable nature of the judgment he made.} \textit{Id.} \text{(footnotes omitted)} (emphasis added).

The \textit{Wharton} opinion was unclear as to whether the force employed, or the belief that it was necessary, was unreasonable. Yet, the use of excessive force in self-defense, \textit{if in the heat of passion}, will not defeat a defense of self-defense if the defendant reasonably believed that the force was necessary. \textsc{See} Inge \textit{v. United States}, 123 U.S. App. D.C. 6, 356 F.2d 345 (1966). That case has been cited for the proposition that "one who is attacked may repel the attack with whatever force he
one is not excused for unreasonable conduct or judgment, but the circumstances in which the actor was involved are considered sufficient to treat the conduct as being qualitatively different from murder. This category of manslaughter has been judicially recognized in the District of Columbia and enacted in a few of the revised codes.

It is suggested that the American Law Institute's "extreme mental or emotional disturbance" formulation and its concomitant qualified objective standard, as well as the "imperfect defense" form of intentional manslaughter, be codified in the District of Columbia. Both of these categories should also be incorporated by reference into the murder statute so that an accused is assured of an appropriate instruction for the jury, and to clarify the fact that all intentional killings are not murder.

2. Unintentional killing—Involuntary manslaughter

The law recognizes that certain situations resulting in death, although unintended by the actor, are nonetheless deserving of criminal sanction. This spectrum of human conduct covers a wide variety of circumstances wherein the actor inadvertently causes another's death. As was noted in the discussion on murder, certain forms of unintended killing are classified as murder, either under a theory of extreme indifference to the risk posed to human life (such as extreme recklessness or intent to injure), or the stricter imposition of liability under the felony-murder rule.

Manslaughter by unintentional killing is the complement to those murder definitions, covering conduct deemed culpable but not as serious as that governed by the murder provisions. It should be noted that this conduct represents a broad category of proscribed behavior and the ascertainment of its full scope under the District of Columbia's homicide laws is made all the more difficult by the absence of legislative guidance. Involuntary manslaughter includes two basic types: 1) unintentional killing in the commission of an reasonably believes is necessary under the circumstances . . . ." Harris v. United States, 124 U.S. App. D.C. 308, 309, 364 F.2d 701, 702 (1966). It would thus appear that a separate category of intentional manslaughter is evolving from imperfect self-defense situations.

500. See cases cited in note 499 supra.

501. See, e.g., ILL. ANN. STAT. tit. 38, § 9-2(b) (Smith-Hurd 1972); PA. CONSOL. STAT. ANN. tit. 18, § 2503(b) (Purdon 1973).

502. See, e.g., N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1967) (incorporation of manslaughter definition as affirmative defense to murder prosecution).
unlawful act, i.e., the misdemeanor-manslaughter rule; and 2) unintentional killing by reckless or negligent conduct.503

The misdemeanor-manslaughter rule has been criticized as sharply, if not as often, as the felony-murder rule.504 Remarkably, it was never employed in the District of Columbia until 1973. In United States v. Owens,505 Superior Court Chief Judge Greene stated:

Generally, the courts have distinguished between two types of manslaughter, voluntary (unlawful killing in the sudden heat of passion caused by provocation) and involuntary (reckless killing in the course of conduct involving extreme danger of death or serious bodily injury). . . . Actually, it would appear that the category of involuntary manslaughter encompasses a third possible factual situation, that is, a killing in the commission of an unlawful act not amounting to a felony.506

Although the only precedent to be found for use of the misdemeanor-manslaughter rule was references to the theory in footnotes of two District of Columbia Circuit opinions,507 the Owens

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503. At common law, involuntary manslaughter is an unintentional homicide, committed without excuse and under circumstances not manifesting or implying malice. A traditional classification of types of common law involuntary manslaughter is the three-fold one of malfeasance, non-feasance, and misfeasance. Malfeasance is an unintentional homicide in the doing of a criminal act which is not a felony, and does not naturally tend to cause death or great bodily harm (i.e., the misdemeanor-manslaughter theory). Nonfeasance is the unintentional killing of another by omission to perform a legal duty owed to that person under circumstances showing inexcusable recklessness or criminal negligence. Since omissions to act may also constitute murder where the failure to act was intentional or otherwise malicious, the topic of omissions was discussed under the general problem of defining the scope of the duty to provide aid to preserve the life of another. The following discussion relating to involuntary manslaughter is equally applicable to omission to act where the duty to act is established. Finally, misfeasance is the unintentional killing of another by recklessness or gross negligence in the doing of a lawful act. See Law of Crimes, supra note 338, § 10.12, at 711—14.

504. The misdemeanor-manslaughter rule may result in an unreasonably extreme extension of liability . . . In fact, it would be wise, by statute, to abolish the misdemeanor-manslaughter rule, as has been done by the 1957 English Homicide Act, and as is recommended in the Model Penal Code. R. Perkins, supra note 138, at 78—79 (footnotes omitted).

505. 101 Daily Wash. L. Rptr. 993 (D.C. Super. Ct., Crim. No. 9969-73, April 19, 1973) (motion for judgment of acquittal denied since jury could find that victim died as a result of defendant's commission of a misdemeanor—a fistic assault).

506. Id. at 993, 996 (citation omitted).

507. See Simon v. United States, 137 U.S. App. D.C. 308, 310 n.5, 424 F.2d 796,
opinion was based upon a federal statute, considered to be representative of the common law. However, if the one case cited as interpreting the section of the United States Code concerning misdemeanor-manslaughter is consulted,508 the Fourth Circuit would appear to limit the application of the section to conduct within the scope of criminal recklessness and negligence.509

The court in Owens, however, rejected the "recklessness" theory because that theory proceeds upon the assumption that the conduct of the defendant was such that he could reasonably have anticipated the consequence of death, or as Judge Leventhal puts it in his concurring opinion in Dixon..., there must have been an "awareness of the risk."510


508. See United States v. Pardee, 368 F.2d 368 (4th Cir. 1966).


Judge Chesnut thus points to two separate divisions of the unlawful act, i.e. (1) an act "in its nature dangerous to life" and (2) an act constituting negligence. The first is self-explanatory and the second he expounds as follows: "In my view the law is reasonably clear that a charge of manslaughter by negligence is not made out by proof of ordinary simple negligence. . . . In other words, the amount or degree or character of the negligence to be proven in a criminal case is gross negligence. . . ."

368 F.2d at 374.

In reversing Pardee's homicide conviction because of inadequate instruction to the jury, the court further observed:

Although requested to instruct the jury that the unlawful act must have one or more of these characteristics—inherent danger to life or gross negligence—the Court declined to charge in this respect. Doubtlessly it was of the opinion, and not illogically, that under the facts of the case the wrong-way driving provided the knowingly and "needlessly doing [of an act] in its nature dangerous to life" or a wanton or reckless disregard for human life; therefore potential danger or recklessness was not made an issue by the evidence. Nevertheless, we think resolution of this question should have been left to the jury. For this determination the jury would be told to measure the conduct of the defendant against all of the existing circumstances and determine therefrom whether what he did was in its nature dangerous to life or grossly negligent.

Id. at 375.

Thus, the application of the misdemeanor-manslaughter rule is limited to conduct within the scope of criminal recklessness and negligence, unless there is a misdemeanor which is "in its nature dangerous to life" but does not support a conviction under a criminal recklessness or negligence theory.

Judge Leventhal, however, while noting the misdemeanor-manslaughter theory of Owens, chose in a subsequent case to apply the recklessness theory of manslaughter, clarifying the "awareness" element.

[T]he jury should convict the defendant only of manslaughter if they found him guilty of reckless conduct creating an extreme danger of death or serious bodily injury by virtue of a gross deviation from the standard of care that a reasonable person would observe, even though the defendant was not aware of the risk. 511

It is thus less than clear that the misdemeanor-manslaughter rule adds protection from culpable conduct which would otherwise go unsanctioned. The revised criminal codes of other jurisdictions have relied more upon the reckless or grossly negligent conduct standard of involuntary manslaughter than the straining of general principles of criminal responsibility in maintaining a broad misdemeanor-manslaughter rule. 512 The District of Columbia, having done without the rule until 1973, would be better advised to discard it, upon revising the criminal code, in favor of a more comprehensive definition of involuntary manslaughter based upon the standards of recklessness and criminal negligence.

Putting aside the questionable theory of the misdemeanor-manslaughter rule, the other theories of involuntary killings amounting to criminal homicide involve points along a continuum of culpable behavior, beginning with extreme recklessness or "depraved heart" murder discussed earlier in defining malice aforethought. 513 Four distinct points along this continuum may be identified: 1) extreme recklessness—malice aforethought for murder; 2) recklessness—involuntary manslaughter; 3) criminal negligence—involuntary manslaughter; and 4) negligence or carelessness in the operation of any vehicle causing death—the misdemeanor of negligent homicide under a provision in the motor vehicles section of the District's code. 514 As discussed earlier, the determination of exactly which one of the culpable types of behavior, if any, is valid

512. See, e.g., CONN. GEN. STAT. §§ 53a-55, -56, -58 (1972); KY. REV. STAT. ANN. §§ 434A.1-030 to -050 (Baldwin 1974); N.Y. PENAL LAW §§ 125.10—.20 (McKinney 1967).
513. See note 435 & accompanying text supra.
514. Cf. note 503 supra.
present under the facts of a particular case is based upon the application of the following factors: 1) the degree of risk to human life which the actor's conduct presented; 2) the degree to which the actor was aware of the risk potential of his conduct; and 3) the degree to which the actor's conduct deviated from an objective standard of conduct.\footnote{515} The difference between criminally reckless and criminally negligent behavior depends on whether the actor is conscious or aware of the risk to human life presented by his conduct.\footnote{516} A person who is aware of the risk and nevertheless intentionally proceeds on that course of action is more culpable than a person whose conduct en-
dangers human life to the same degree, but, through ignorance or stupidity, is unaware of the dangerousness of his conduct. While the latter behavior is not to be excused, the criminal law, based on a model in which fault or mens rea properly plays a decisive role, should provide for a reduced gradation and penalty range.

Some commentators have argued that there should be no criminal liability and some common law authority exists for this position. The general common law position, however, appears to be that criminal liability for involuntary manslaughter depends upon the degree of negligence and not the element of awareness. That the District of Columbia position is reflective of this general common law tradition was recently affirmed in United States v. Grady.

It is submitted that the criminal law properly should punish conduct that, although lacking in awareness, presents a substantial and unjustifiable risk to life and involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation. The Reporter for the American Law Institute observed:

Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control.

It is emphasized, however, that conduct which passes the borders of negligence and gross negligence and enters into the domain of reckless conduct merits more serious criminal sanctions—a distinction which is presently lacking in the District's criminal code.

Assuming that criminal negligence should be punishable as a lesser offense than criminal recklessness, should special provision be made for killing by automobiles? The District's statute, originally

517. See generally Hall, Negligent Behavior Should be Excluded from Penal Liability, 63 COLUM. L. REV. 632 (1963); Comment, Is Criminal Negligence a Defensible Basis for Penal Liability?, 16 BUFF. L. REV. 749 (1967).
519. See R. Perkins, supra note 138, at 73, citing State v. Hardie, 47 Iowa 646 (1878) (manslaughter conviction affirmed although killing resulted from a prank involving a firearm thought to be entirely harmless).
enacted in 1901, on its face provides for a confusing variety of mental states that will qualify for its special status. Section 40-606 (broadly labeled "negligent homicide") provides:

Any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000 or both.\(^2\)  

Although there have been few decisions interpreting this statute, United States v. Henderson\(^2\) and Sanderson v. United States\(^2\) clearly indicate that the standard of civil liability for ordinary or simple negligence is sufficient for conviction under this statute.

A number of states have enacted similar statutes creating a new crime of homicide by automobile, generally punishable less severely than involuntary manslaughter.\(^2\) One of the main justifications for such statutes has been the acknowledged reluctance of juries to convict the driver of the very serious crime of involuntary manslaughter for such a killing, apparently identifying with the defendant in such cases.\(^2\) These statutes vary in the mens rea required for the commission of the offense from recklessness to criminal negligence, and, as in the District of Columbia, ordinary negligence.\(^2\)

Although it may be argued that incorporating the civil standard of negligence into the criminal law of homicide is justified by the necessity of reducing the number of highway fatalities and the misdemeanor status of the offense of vehicular homicide, it is submitted that a statute imposing criminal penalties for mere carelessness or ordinary negligence is ill-advised. The better approach is to follow the Model Penal Code, the Proposed Federal Criminal Code, and other modern criminal codes in providing for the lesser offense of criminal homicide, requiring gross negligence.\(^2\) If reduced punish-
ment is to be provided for vehicular homicide, this can be provided for by statute, or, perhaps, could better be left to the discretion of the sentencing judge.

Since the manslaughter statute provides a penalty without any definitions, the meaning of recklessness and other culpable behavior, determined by case law, needs to be codified in any effort to clearly set forth the scope and gradations of criminal homicide. In addition, there is presently no difference in gradation or penalty range for recklessness and criminal negligence. It is recommended that the vehicular homicide offense be combined with the concept of criminal negligence, possibly providing for a reduced penalty owing to the special circumstances of vehicular homicide. It is contended that a sharp line needs to be drawn between the standards for criminal and civil negligence in defining criminal homicide. Finally, the misdemeanor-manslaughter rule should be integrated into the theories of reckless and grossly negligent manslaughter.

G. Summary

Unlawful homicide was chosen for a detailed case study of the need for comprehensive code revision because it is a complex offense area involving a serious social problem. Homicide is said to be the leading cause of death among citizens of the District of Columbia between the ages of 15 and 44. A substantial proportion of homicides are committed by acquaintances of the victim—often resulting from an assault, aggravated by intoxication, in which a handgun is used. Following a familiar pattern in the District’s criminal code, unlawful homicide is not defined by statute. A search for an acceptable definition of “homicide” requires consideration of difficult moral and philosophical issues. These include such issues as when death occurs, when human life begins, and the scope of legal duty to preserve the life of another.

Clear definitions of the various mental states of unlawful homicide are needed in order to provide fair notice, improved instructions to juries, and more rational distinctions for grading the degrees of homicide. The desirability of retaining two degrees of murder needs to be reconsidered. The felony-murder rule is in need of revision.

The common law test for reducing second degree murder to voluntary manslaughter warrants improvement. The “imperfect defense” theory of voluntary manslaughter should be codified. The misdemeanor-manslaughter rule should be abolished as a distinct and separate category apart from recklessness and gross negligence.
Finally, the statute on negligent homicide, appearing in a separate title of the code and intended for vehicular homicide cases, is inadequate. Preferably, it should be revised and integrated into a new section on unintentional homicide which clearly distinguishes between criminal recklessness and criminal negligence.

This case study of the criminal homicide provisions illustrates the types of questions that should be raised in undertaking code revision and indicates suggested reforms. It also suggests the need to consider various complementary responses to accompany criminal code revision in order to adequately respond to the problems identified.

CONCLUSION

The need for comprehensive revision of the District of Columbia’s criminal laws is manifested throughout the code. The criminal code has numerous and varied problems and represents a serious departure from the minimum standards of a modern, effective penal code. While the authors have indicated a number of specific directions which such revision might follow, these should not be viewed as sufficient alone to respond to the general problems present in the code.

The essential conclusion is that criminal code reform is long overdue. It is imperative that the new Law Review Commission receive the funding necessary to accomplish this task. Its recommendations should be presented to the legislature in the form of comprehensive draft revisions. This will enable the legislature to enact for the first time a code of criminal laws for the District that is clearly and precisely drafted to respond to those social problems that warrant criminal sanctions.
APPENDIX

RESULTS OF QUESTIONNAIRE ON THE REFORM OF THE DISTRICT OF COLUMBIA CRIMINAL CODE

The Questionnaire asked for responses to two questions with respect to each particular code section: 1) is this section in need of revision; and 2) what was the frequency of contact with this particular code section. The responses to the first question (need of revision) are charted into six major categories, ranging from "Strongly Agree" to "No Opinion" and "No Answer". Each of these major categories is then broken down according to the respondent’s frequency of contact with a particular code section, to those who “never” had such contact, and those who did not respond to this question. In compiling the results of the Questionnaire, a “no answer” column was added for both need of revision and frequency of contact responses to account for missing answers. For a general discussion of the nature of the Questionnaire, the respondents, and the administration of the Questionnaire, see notes 5—12 & accompanying text supra.

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6. Blackmail and extortion, §§ 22-2326-07

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7. Property destruction

a. Arson, §§ 22-301-04

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b. Vandalism, §§ 22-301, 22-3104

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8. Intrusion upon property

a. Burglary, § 22-1401

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b. Tampering with jade box, § 22-1414

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c. Election practices, §§ 11-11-14

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d. False impersonating a public officer, §§ 22-1309-06

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e. Petty theft, §§ 22-1301-02

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9. Robbery, §§ 22-1301-02

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10. Theft offenses

a. Grand larceny, § 22-2201

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b. Petty larceny, § 22-2202

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c. Larceny after trust, § 22-2203

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d. Theft of and from vehicles, §§ 22-2204-05a

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e. Receiving stolen goods, § 22-2205

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f. Embezzlement, §§ 22-2201-10

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g. False pretenses, §§ 22-1301-03

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11. Fencing, §§ 22-1401-02

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12. Fraud

a. Check fraud, §§ 22-1410

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b. Confidence games, §§ 22-1701-10

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c. Fraudulent advertising, §§ 22-1411-13

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d. Slugs in vending machines, §§ 22-1407-08

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13. Offenses against public decency or morality

a. Bigamy, §§ 22-301-02

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b. Cruelty to animals, §§ 22-301-14

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c. Cruelty to or neglect of children, §§ 22-301-02

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d. Drug violations: Narcotics

1. Definitions, §§ 22-301

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2. Unlawful acts, §§ 22-302

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3. Exemptions, §§ 22-303-04

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4. Regulation, §§ 22-305-07

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5. Penalties, §§ 22-307

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f. Dwellings, §§ 22-1102-04

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g. Disorderly conduct, §§ 22-1121, 22-1722

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h. Gambling, §§ 22-1301-15

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i. Obituary, §§ 22-1107, 22-1119, 22-2201

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j. Prostitution, §§ 22-2201-22

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k. Public drinking, §§ 22-322

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l. Unlawful assembly, §§ 22-3107

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m. Vagrancy, §§ 22-3001-06

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14. Offenses against governmental function or administration

a. Bribery, §§ 22-1201-04

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b. Tampering with jury box, §§ 22-1414

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c. Election practices, §§ 11-11-14

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d. Falsely impersonating a public officer, §§ 22-1300-06

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e. Petty theft, §§ 22-1301

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f. Obstructing justice, §§ 22-2203

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15. Regulatory offenses, e.g., game and fish laws, §§ 22-1020-22, harbor regulations, §§ 22-1700-03a

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16. Penalties

§§ 22-307-08

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