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MAKING CRIMINAL CODES FUNCTIONAL: A CODE OF CONDUCT AND A CODE OF ADJUDICATION

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I. INTRODUCTION

A traditional criminal code performs several functions. It announces the law's commands to those whose conduct it seeks to influence. It also defines the rules to be used in deciding whether a breach of the law's commands will result in criminal liability and, if so, the grade or degree of liability. In serving the first function, the code addresses all members of the public. In performing the second function, it addresses lawyers, judges, jurors, and others who play a role in the adjudication process.

In part because of these different audiences, the two functions call for different kinds of documents. To effectively communicate to the public, the code must be easy to read and understand. It must give a clear statement, in objective terms if possible, of the conduct that the law prohibits and under what conditions it is prohibited. Readability, accessibility, simplicity, and clarity characterize a code that most effectively articulates and announces the criminal law's rules of conduct.

The adjudicators, on the other hand, can tolerate greater complexity. Clarity and simplicity are always a virtue, but the judgments required of adjudicators necessarily limit how simple the adjudication

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rules can be. While the public can be told rather easily and clearly that "you may not cause bodily injury or death to another person,"[1] when a prohibited injury or death does occur, the adjudicators need rules to determine whether the injurer ought to escape liability because he or she had no culpability, was insane, believed mistakenly but reasonably that the force used was necessary for self-defense, or for any number of other reasons. If liability is appropriate, the adjudication rules must determine the appropriate degree of liability, taking account of the actor's level of culpability, the extent of the injury, and a variety of other mitigating and aggravating circumstances. Many, if not most, of these liability and grading factors require complex and sometimes subjective criteria.

The current practice of using a single code to perform both functions means that neither function is performed as well as it could be.[2] Is it possible to draft two codes—a code to articulate the rules of conduct, written for lay persons, and a code to govern the adjudication process, written for criminal justice professionals? If one were to pull out of a current criminal code only those provisions that a lay person must know in order to remain law-abiding, what would such a document contain and what would it look like? If one were to organize a code to capture the decisional process for criminal adjudication, what would such a document contain and what would it look like? This Article attempts to answer these questions. We tentatively conclude that distinct codes of conduct and of adjudication can be drafted and can allow the criminal law to perform both functions more efficiently and successfully.

The possibility of creating separate codes for separate functions is made feasible in part because each doctrine of criminal law typically serves one or the other function. For example, to communicate effectively to the members of the public the rules needed to conform their conduct to the requirements of law, a code need not clearly communicate the subtleties of the insanity defense, the detailed definitions of culpable states of mind, or the operation of the entrapment doctrine. That is, a code of conduct and a code of adjudication can be created by segregating the doctrines of criminal law into one or the other code according to the function that each doctrine performs.[3]

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[1] Appendix A, § 3 (Injury to a Person).

[2] *See generally* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 Nw. U. L. REV. 857 (1994) [hereinafter, Robinson, *Functional Analysis*]; Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990) [hereinafter, Robinson, *Rules and Principles*].

[3] *See infra* text accompanying note 107. There is no suggestion by this segregation that the code drafted for adjudicators be kept secret from the public. More on this later.

This Article outlines how a code of conduct and a code of adjudication can be drafted, and how taken together the two codes can better perform each of the two functions of present criminal codes. Part II discusses strategies for drafting an effective code of conduct, Part III for drafting a code of adjudication. Both discussions use examples from the complete models for a draft code of conduct in Appendix A and a draft code of adjudication in Appendix B. We do not offer these codes as refined, ready-to-enact models, but rather as illustrations of the drafting principles that we develop.

II. DRAFTING A CODE OF CONDUCT

How can one create a clear statement for the public of the rules of conduct, one that is easy to read, understand, and apply in daily life, even in the situations of anxiety and confusion in which the potential for criminal conduct sometimes arises? We offer five drafting principles toward that end.

A. ELIMINATE LIABILITY AND GRADING LANGUAGE

Presently, criminal codes include much more than the rules of conduct, and it is this feature that most impedes communication with the public. The long and complex rules governing the adjudication of liability and grading hide the conduct rules. Even if the conduct rules could be understood, they cannot be found. At under 2,300 words, including headings, the draft code of conduct in Appendix A is one-fifteenth the length of the Model Penal Code, although it covers essentially the same material.[4]

Consider an example; the Model Penal Code's definition of assault.[5] In essence, the Model Penal Code's section 211.1 criminalizes

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[4] The relevant provisions of the Model Penal Code—Part I (excluding Articles 6 and 7) and Part II—are approximately 35,000 words in length. *See* MODEL PENAL CODE (Official Draft 1985).

[5] MODEL PENAL CODE § 211.1 (Assault) provides:

(1) *Simple Assault.* A person is guilty of assault if he:
(a) attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another; or
(b) negligently causes bodily injury to another with a deadly weapon; or
(c) attempts by physical menace to put another in fear of imminent serious bodily injury.
Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.
(2) *Aggravated Assault.* A person is guilty of aggravated assault if he:
(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or
(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.
Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault

causing bodily injury to another. Eliminating the liability and grading language from the provision leaves a fairly readable and understandable rule:

> 3. INJURY TO A PERSON
> You may not cause bodily injury or death to another person.

Gone are all culpability requirements, as well as other language defining grades of assault. Indeed, this simple rule of conduct provides a substitute not only for the Code's definitions of simple and aggravated assault,[6] but also for the definitions of criminal homicide,[7] murder,[8] manslaughter,[9] negligent homicide,[10] and reckless endangerment.[11] Together these offense definitions take up some 490 words in the Model Penal Code, 475 more than the fifteen words of the draft code of conduct provision quoted above.

Similarly, the Model Penal Code's provisions relating to complicity, solicitation, and conspiracy require 1,600 words.[12] The rule of conduct they contain is reducible to this:

> 50. ACTING WITH ANOTHER TOWARD COMMISSION OF A CRIME (COMPLICITY, CONSPIRACY, AND SOLICITATION)
> You may not agree with, ask, assist, or encourage another to commit a crime.

Gone are all culpability requirements, doctrines of mitigation and aggravation, and special defenses, for none of these are needed to tell persons what this aspect of the law commands of them.

The code of conduct would also eliminate all excuse defenses and nonexculpatory defenses. Only justification defenses remain, and then only their objective requirements. To remain law-abiding, people do need to know the rules that allow them to use otherwise unlawful force. However, they do not also need to know, for example, the conditions that will give rise to a duress excuse or the kind of mistake

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under paragraph (b) is a felony of the third degree.

6 MODEL PENAL CODE § 211.1 (Assault).

7 *Id.* § 210.1 (Criminal Homicide).

8 *Id.* § 210.2 (Murder).

9 *Id.* § 210.3 (Manslaughter).

10 *Id.* § 210.4 (Negligent Homicide).

11 *Id.* § 211.2 (Recklessly Endangering Another Person). The substitute for reckless endangerment also requires reference to Appendix A, § 51 (Creating a Prohibited Risk).

12 MODEL PENAL CODE §§ 2.06 (Liability for Conduct of Another; Complicity); 5.02 (Criminal Solicitation); 5.03 (Criminal Conspiracy); 5.04 (Incapacity, Irresponsibility or Immunity of Party to Solicitation and Conspiracy); 5.05 (Grading of Criminal Attempt, Solicitation and Conspiracy; Mitigation in Cases of Lesser Danger; Multiple Convictions Barred).

that will mitigate their level of liability.[13]

B. CONSOLIDATE OVERLAPPING OFFENSES

The consolidation of overlapping offenses provides a second means of improving the Code's ability to communicate to the public. Just as the elimination of liability and grading language focuses the reader upon the rules of conduct, as discussed in Part II.A., consolidation of overlapping offenses similarly eliminates many unnecessary words, as well as entire provisions. Many offenses in current codes prohibit conduct identical to that prohibited by other offenses; the offenses differ only to distinguish grades of punishment. For example, an offender frequently is held liable for the same conduct under different offenses depending upon whether a prohibited harm actually results. Thus, reckless endangerment[14] and reckless homicide[15] prohibit the same conduct (or at least should prohibit the same conduct[16]), with the latter applicable where the risk created results in death and the former applicable where it does not. Where the conduct results in injury but not death, a third offense applies: assault. The specific assault offense may vary with the extent of the injury caused.[17] In other words, current codes distinguish grades of offenses both by creating subsections within an offense and by creating separate offenses. All of these distinctions can be eliminated by drafting a code of conduct that has as its purpose only a description of the law's commands. Such consolidation makes the code more accessible to the public.

Consolidation is possible for every set of offenses that differ from one another only in that one prohibits *causing* a result and another prohibits engaging in conduct that merely *risks* the same result. Model Penal Code section 220.2(1) defines the offense of causing a catastrophe; section 220.2(2) defines the separate offense of risking a catastrophe. The only difference is one of grading: recklessly causing

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13 Members of the public may well find some information in the adjudication code useful. For example, the relative seriousness of offenses as reflected in their grading may be useful in judging the justification of conduct. The point here is simply that conveying the basic rules of conduct is an important function that can be improved by keeping the statement of rules as simple and straightforward as possible. The code of adjudication ought to remain available to lay persons, as the criminal code is now, so that information such as the relative grades of offenses will remain as available as it is today. *See infra* text accompanying note 107.

14 MODEL PENAL CODE § 211.2 (Recklessly Endangering Another Person).

15 *Id.* § 210.3 (Manslaughter).

16 For discussion of the Model Penal Code's failure to provide a general definition of criminal risk that governs both offenses, see Robinson, *Functional Analysis*, *supra* note 2, at 886-87.

17 MODEL PENAL CODE § 211.1(Assault).

a catastrophe is a third degree felony, while merely risking it, with the same culpable state of mind, is only a misdemeanor.[18]

A similar proliferation of offenses in present codes occurs where multiple offenses punish the same conduct at different liability levels because of different levels of culpability. For example, the Model Penal Code distinguishes among three homicide offenses—murder, manslaughter, and negligent homicide—according to the actor's level of culpability as to causing the result—purposeful or knowing, reckless, and negligent, respectively.[19]

Theft offenses illustrate yet another proliferation of offenses. Each of several different offenses criminalizes a particular form of taking, using, or transferring another's property without consent.[20] Model Penal Code section 223.2(1) criminalizes taking or exercising control over movable property.[21] Section 223.3 prohibits obtaining property by deception.[22] Section 223.4 criminalizes obtaining property by extortion.[23] Section 223.7 covers theft of services,[24] while section 223.8 targets theft by failure to make required disposition of funds received.[25] The rule of conduct for these offenses (and for property damage offenses) is reducible to the following:

> 24. DAMAGE TO OR THEFT OF PROPERTY
>
> You may not damage, take, use, dispose of, or transfer another's property without the other's consent. Property is anything of value, including services offered for payment and access to recorded information.

Proliferation also occurs where offenses combine prohibitions already contained individually in other offenses. The offense of robbery,[26] for example, simply prohibits a combination of theft and assault. Perhaps such conduct should be graded higher than it would be if punished separately as a theft and an assault. If this is so, then the adjudication code should reflect such a policy. But creation of a

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18 *Id.* § 220.2(1)-(2) (Causing or Risking Catastrophe).

19 *Id.* §§ 210.2 (Murder); 210.3 (Manslaughter); 210.4 (Negligent Homicide).

20 *See* MODEL PENAL CODE, art. 223 (Theft and Related Offenses).

21 *Id.* § 223.1(1) (Consolidations of Thefts).

22 *Id.* § 223.3 (Theft by Deception).

23 *Id.* § 223.4 (Theft by Extortion).

24 *Id.* § 223.7 (Theft of Service).

25 *Id.* § 223.8 (Theft by Failure to Make Required Disposition of Funds Received). The grading of these offenses in Model Penal Code § 223.1(2) is not tied to the mode of theft defining each offense, which might justify that Code's use of separate offenses, but, rather, depends primarily on the value of the item stolen. *Id.* § 223.1(2) (Consolidation of Theft Offenses; Grading; Provisions Applicable to Theft Generally).

26 *Id.* § 222.1 (Robbery).

robbery offense adds nothing to the law's statement of prohibited conduct; the theft and assault prohibitions already clearly criminalize the conduct described in the robbery offense.

The same is true of burglary, which combines trespass and attempt to commit another substantive offense, such as theft.[27] Similarly, arson combines reckless endangerment and criminal mischief.[28] All of these combination offenses can be eliminated by a code of conduct without loss of coverage.

Beyond providing a shorter, clearer statement of the rules of conduct, consolidation of offenses can expose inadvertent loopholes in offense prohibitions. A set of overly specific, related provisions may criminalize remarkably similar conduct, yet overlook a few significant variations. For example, the Illinois Criminal Code contains eleven separate prostitution-related offenses, criminalizing nearly all forms of prostitution. Yet, while it criminalizes "touching or fondling of the sex organs . . . for any money . . . *or anything of value*,"[29] the Code inexplicably fails to criminalize *sexual intercourse* for "anything of value," perhaps because the complexity of so many related provisions hides the inadvertent omission. A more concisely drafted, generally descriptive code can readily sidestep such problems.

C. SIMPLIFY JUSTIFICATION DEFENSES

Current justification defenses illustrate the kinds of errors code drafters commit when they fail to distinguish between the functions of a code of conduct and a code of adjudication. Current justification defenses are frequently detailed and complex; the Model Penal Code's provision on defense of property goes on for 1,035 words.[30] The portion that governs use of force for the recapture of property unlawfully taken, for example, reads as follows:

> (1) *Use of Force Justifiable for Protection of Property.* Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:
>
> . . .

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27 *See id.* § 221.1 (Burglary) ("A person is guilty of burglary if he enters a building or occupied structure . . . with purpose to commit a crime therein, unless . . . the actor is licensed or privileged to enter.").

28 *See* MODEL PENAL CODE §§ 220.1 (Arson and Related Offenses); 211.2 (Recklessly Endangering Another Person); 220.3 (Criminal Mischief). Similarly, § 251.3 (Loitering to Solicit Deviate Sexual Relations) combines loitering (§ 250.6) and solicitation (§ 5.02). *Id.* §§ 251.3 (Loitering to Solicit Deviant Sexual Relations); 5.02 (Criminal Solicitation).

29 720 ILCS 5/11-14 (1995) (emphasis added).

30 *See* MODEL PENAL CODE § 3.06.

(b) to effect an entry or re-entry upon land or to retake tangible movable property, provided that the actor believes that he or the person by whose authority he acts or a person from whom he or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession, and provided, further, that:

(i) the force is used immediately or on fresh pursuit after such dispossession; or

(ii) the actor believes that the person against whom he uses force has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or re-entry until a court order is obtained.

. . .

(3) *Limitations on Justifiable Use of Force.*

. . .

(c) *Resistance of Lawful Re-entry or Recaption.* The use of force to prevent an entry or re-entry upon land or the recaption of movable property is not justifiable under this Section, although the actor believes that such re-entry or recaption is unlawful, if:

(i) the re-entry or recaption is made by or on behalf of a person who was actually dispossessed of the property; and

(ii) it is otherwise justifiable under subsection (1)(b) of this Section.[31]

While such complexity may be tolerable in a code of adjudication, it borders on the absurd to think that a person who comes upon another who is unlawfully taking his or her property would or could follow these rules, even if he or she had a copy of the rules in hand.

The drafters' failure to understand the natural limitations of a criminal code creates two problems. First, their efforts to alter people's conduct by drafting complex code provisions are doomed to fail. For example, the drafters may be right that it would be best to have a person resist the temptation to use force to recapture property taken by a person acting under a claim of right, as Model Penal Code section 3.06(3)(c)(i) provides.[32] It may be better to have the parties settle their dispute in court than to allow a clash that could escalate into violence.[33] But can the drafters really believe that burying such a spe-

[31] *Id.*

[32] *Id.* § 3.06(3)(c)(i).

[33] *See id.* § 3.06 commentary at 73-74 (1985).

cial rule among the 1,035 words of the defense of property provision will cause people unlawfully dispossessed of property to refrain from using force? One of us regularly teaches the Model Penal Code's defensive force provisions to law students, but would be unable to apply the complex rules and exceptions of the Code that govern a recapture situation. How can one think that such statutory pronouncements can alter the conduct of the average non-law professor? Whenever criminal code drafters formulate a special rule in the expectation that it will alter people's conduct, they show their ignorance of their code's limited accessibility to the average person.

A more serious effect of the Code drafters' ignorance on this point is the unfairness it creates for individual defendants who come within the scope of one of these rules. The actor defending his or her property against an unlawful dispossession, who is unlikely to know anything about the drafters' special rule barring recapture from one acting under a "claim of right," will be denied a justification defense if he or she violates the rule. Thus, the drafters' erroneous belief that they can change conduct by manipulating complex statutory rules not only fails to change conduct, but also creates unfairness by denying a defense to a person who could not reasonably have been expected to act in a way other than he or she did. To avoid this unfairness, where a code of conduct adopts any rule that cannot be simply stated, the rule ought to correspond to the lay person's intuition of what a just rule for the situation would provide. This issue is discussed below in Section E.[34]

The draft code of conduct in Appendix A suggests a formulation that reduces the Model Penal Code's 1,035 words to the following thirty-three:

> 56. DEFENSE OF PROPERTY
>
> You may use reasonable force against a person who is unlawfully threatening property or who has just unlawfully taken property, if such force is immediately necessary to defend or take back the property.

D. USE SIMPLE, ACCESSIBLE LANGUAGE

The previous three drafting principles improve a code's communicative potential by reducing its complexity and eliminating unnecessary language. The use of simple and plain language provides a different kind of improvement. In other contexts, scholars have noted the benefits of plain language drafting and careful attention to

[34] *See infra* text accompanying notes 47-55.

the structure of a code's provisions.[35] Careful word choice, sentence structure, and overall organization all serve to improve lay comprehension. Several kinds of reformulations are particularly useful.

First, effective plain language drafting calls for short, commonly-used words.[36] Consider Model Penal Code section 240.1, prohibiting the gaining of an advantage by interfering with the exercise of political power:

> A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> (1) any pecuniary benefit as *consideration* for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter . . .[37]

While the term "consideration" may have a clear meaning for lawyers, the term does not have the same meaning for the lay person.[38] A code of conduct prohibition might read better if phrased like the following:

> 45. BRIBERY AND CRIMINAL COMPENSATION
>
> You may not offer or accept any benefit either to influence the future action of or in return for past action by a public official or servant, a party official, or a voter, UNLESS such benefit is a legal fee or salary for such action.

This prohibits the conduct criminalized by the Model Penal Code section (and much more[39]), but replaces the word "consideration" with the words "influence" and "in return for."

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35 *See* MARK ADLER, CLARITY FOR LAWYERS: THE USE OF PLAIN ENGLISH IN LEGAL WRITING (1990); MICHELE M. ASPREY, PLAIN LANGUAGE FOR LAWYERS (1991); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (3d ed. 1994); Irving Younger, *In Praise of Simplicity*, 62 A.B.A. J. 632 (1976).

36 *See* ADLER, *supra* note 35, at 62, 75-81; ASPREY, *supra* note 35, at 81-97; WYDICK, *supra* note 35, at 53-60.

37 MODEL PENAL CODE § 240.1 (Bribery in Official and Political Matters) (emphasis added).

38 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 484 (1966) defines consideration as "observation, contemplation; continuous or deliberate thought . . . ." The eighth meaning listed is "something given as recompense," but this is not the common understanding of the term. *Id.*

39 The draft section also includes the prohibitions of MODEL PENAL CODE §§ 240.6 (Compensating Public Servant for Assisting Private Interests in Relation to Matters Before Him), 240.7 (Selling Political Endorsement; Special Influence), 241.6 (Tampering with Witnesses and Informants; Retaliation Against Them), and 224.8 (Commercial Bribery and Breach of Duty to Act Disinterestedly).

The offense of prostitution yields another example. The Model Penal Code prohibition provides:

> A person is guilty of prostitution, a petty misdemeanor, if he or she:
>
> (a) is an *inmate* of a house of prostitution or otherwise engages in sexual activity as a business . . . .[40]

Just as "consideration" has a meaning for the drafters that differs from its ordinary usage, so too does "inmate." In current common usage the term refers to someone incarcerated in a prison rather than to a resident of a house of prostitution. The draft code of conduct replaces this language with the following:

> 34. PROSTITUTION
>
> You may not engage in, support, or profit from any sexual act that is offered for sale.[41]

This draft provision also covers the prohibitions contained in Model Penal Code sections 251.2(1)(b)-(6) (Prostitution and Related Offenses). In this instance, 591 Model Penal Code words are reduced to eighteen.

The use of shorter sentences similarly increases comprehension.[42] The Model Penal Code, in addition to using technical legal language, commonly relies on long, multi-clause sentences. Model Penal Code section 223.5, for example, provides:

> A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is guilty of theft if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.[43]

Shorter sentences could convey the same information as this sentence of sixty-seven words but increase the likelihood of lay comprehension. The draft code of conduct criminalizes the same conduct as follows:

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40 MODEL PENAL CODE § 251.2(1)(a) (Prostitution and Related Offenses) (emphasis added).

41 A "sexual act" is defined in Appendix A § 35.

42 *See* ASPREY, *supra* note 35, at 74-76; WYDICK, *supra* note 35, at 33-37.

43 MODEL PENAL CODE § 223.5 (Theft of Property Lost, Mislaid, or Delivered by Mistake).

27. FAILURE TO RETURN LOST OR MISTAKENLY DELIVERED PROPERTY

You may not keep lost or mistakenly delivered property, UNLESS you make a reasonable effort to find its owner and return the property.

A third clarification technique involves the capitalization of connecting words. The quote above illustrates the use of capitalization to highlight important conditions. The same is useful to highlight connecting words that might easily be missed. Some offenses criminalize conduct only if it satisfies several conditions; others may prohibit any one of a list of related actions. The significant difference between such provisions can be brought to the attention of the reader by highlighting the connecting words. For example, the draft code of conduct provision defining the justified use of force by a parent, guardian, teacher, or caretaker requires *both* of two conditions:

62. USE OF FORCE BY PARENT, GUARDIAN, TEACHER, OR CARETAKER

If you are a parent, guardian, teacher, or caretaker, you may use reasonable force against a minor or incompetent if:

(a) you are legally responsible for the minor or incompetent's care or supervision,

AND

(b) such force is necessary to safeguard the well-being of the minor or incompetent.

In contrast, the duty to act to prevent a catastrophe requires action if *either* of two conditions is met:

26. DUTY TO PREVENT CATASTROPHE

You must make reasonable efforts to prevent or reduce potentially widespread injury or damage from explosion, fire, flood, avalanche, collapse of building, release of other harmful or destructive force or substance, or any other means, if you:

(a) have an official, contractual, or other legal duty to prevent the injury or damage,

OR

(b) have contributed to creating the danger.

The capitalization of the connecting words (AND and OR) emphasizes the relation between the two conditions and is likely to reduce

misunderstanding.[44]

A different kind of reform switches present codes' use of phrases like "an actor" or "a person" in describing a prohibition to use of the second person pronoun, "you." If the goal of the code of conduct is to tell members of the public what each may not do and what each is obligated to do, what better way to emphasize the point than through the use of the second person pronoun.[45] The law's prohibitions are not directed to some abstract, nameless, hypothetical person. They are directed to YOU.

Finally, a code of conduct can be made more comprehensible by organizing it in a way that helps readers understand how it works. Notice that in the Appendix A table of contents Part II collects all offense conduct, grouped within that Part according to a few basic categories. (The federal criminal code and some state criminal codes, in contrast, intersperse offenses with other provisions, organizing all the provisions alphabetically.[46]) Part III of the draft code of conduct expands each of the basic offenses by adding general prohibitions against attempting, assisting, or risking any of the offenses in Part II. Part IV summarizes the special justifying circumstances in which a person may commit one of the offenses otherwise prohibited, again, grouping the justifications into a few basic categories. This organization not only makes it easy to see the practical connection between similarly grouped provisions, but it also allows the reader to better understand the functional differences between each of the types of provisions.

E. TRACK COMMUNITY VIEWS WHERE POSSIBLE

A final reform that can increase a code of conduct's effectiveness concerns not its form but its content. Behavioral science research suggests that people can better understand rules that mirror their own intuitive judgments about just rules for assessing liability. For example, one study of juror comprehension of legal instructions gave both true-false and open-ended questions about legal rules to jurors who had been given legal jury instructions and to jurors who had not.[47] The study hypothesized that superior performance by the instructed jurors, if any, would indicate the extent to which the instructions were understood. The study, in analyzing the true-false responses, found

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44 *See* ASPREY, *supra* note 35, at 108-09; WYDICK, *supra* note 35, at 46-47.

45 *See* WYDICK, *supra* note 35, at 69.

46 *See, e.g.*, 18 U.S.C. §§ 31 (aircraft) to 2521 (wiretapping) (1994); IDAHO CODE §§ 18-401 (abandonment) to 18-7207 (weights and measures) (1987).

47 Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REF. 401, 406, 409-10 (1990).

that for 63.6% of the questions, jury instructions had no statistically significant effect in increasing juror comprehension of the law or it actually decreased juror comprehension.[48] Other studies confirm the poor performance of jury instructions in conveying legal principles to lay persons.[49] The reasons for this include many of the reasons noted above in explaining the weakness of current criminal codes in effectively communicating the rules of conduct.

One interesting and potentially helpful finding of the jury instruction work is that, on issues on which the uninstructed jurors did relatively well, the instructed jurors tended to do better,[50] presumably because the legal instructions built upon and articulated the lay jurors' existing intuition of what a just rule would be.[51] Perhaps this occurs because the instruction only identifies or reminds the juror of the concept; the juror's prior knowledge provides the level of understanding that other instructions by themselves seem unable to provide.[52] In any case, these findings suggest that a similar increase in comprehension of a code of conduct may result from having it mirror community views.

Beyond the issue of comprehension, a code of conduct can inspire greater compliance if, in the public's view, it is known to describe conduct that the public sees as wrongful. In other words, the code's credibility as an accurate statement of what is wrongful conduct can enhance its effectiveness; its lack of credibility can undercut compliance.[53] For example, assume a code still criminalizes consensual

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48 *Id.* at 425. In another study using similar methodology, instructed jurors had at best a six percent greater success rate than uninstructed jurors in correctly assessing the defendant's liability in a controlled test case. Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM L. & CRIMINOLOGY 198, 205-06 (1984).

49 *See generally* Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 170-72 nn.46-60 (1994) (summarizing studies on effectiveness of jury instructions).

50 Kramer & Koenig, *supra* note 47, at 421, 424. One issue was voluntary manslaughter, where 89.3% of instructed jurors correctly answered the questions on the issue as compared to 67.6% of the uninstructed jurors. The second issue was whether second degree criminal sexual conduct always involves injury and penetration, where all instructed jurors correctly answered the questions on the issue, as compared to 64.4% of the uninstructed jurors. *Id.*

51 *Id.* at 430. In other words, when a juror's preconceived notions are congruent with instructions, both uninstructed and instruction-benefited comprehension levels are quite high. *Id. See also* Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, LAW & CONTEMP. PROBS. 205, 220-21 (Autumn 1989).

52 It would be useful to have a further study on the change of both comprehension and nullification rates as instructions are more or less divergent from community views. Of course, this kind of research first requires research into the community's views on the issues to which the test instructions apply. *See generally* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995) [hereinafter ROBINSON & DARLEY, JUSTICE, LIABILITY, AND BLAME].

53 *See generally* ROBINSON & DARLEY, JUSTICE, LIABILITY, AND BLAME, *supra* note 52, at 6-7;

sexual intercourse between unmarried persons, so-called "fornication." In our present society, that provision is likely to be ignored. But more than that, the inclusion of such a provision may suggest to many people that the code drafters lack reliable judgment about what is wrongful conduct. That lack of credibility is likely to lead some to disregard the code in marginal cases because of a belief that the code is "behind-the-times," excessively detailed, or simply erroneous. Presumably all will agree that rape, murder, and mayhem are wrong. But in less obvious cases, such as criminalization of the failure to return lost or stolen property,[54] the authority with which the code speaks and its earned moral credibility may well influence the rate of compliance.[55]

III. DRAFTING A CODE OF ADJUDICATION

How can one best draft a code to clearly articulate the sometimes subtle distinctions needed in the often complex adjudication decision of not only whether, but also how much, liability ought to be imposed? We suggest five drafting principles.

A. ADOPT A CODE STRUCTURE THAT MATCHES THE ANALYTIC PROCESS

Whether the adjudicator is a prosecutor deciding whether and what to charge, a defense counsel giving advice on a proposed plea agreement, a judge writing jury instructions, or a jury deliberating on a verdict, the process of assessing liability has several logical steps. By organizing a code of adjudication around that analytic process, the code can increase the chances that the adjudicator will understand and follow that process.

The analytic process properly follows three questions:

1. Has the defendant violated the rules of conduct?
2. If so, is the violation sufficiently blameworthy that criminal liability ought to attach?
3. If so, how much liability should be imposed?

While most other codes address these questions without any logi-

Paul H. Robinson, *A Failure of Moral Conviction?*, PUB. INTEREST 40, 44-46 (Fall 1994).

54 MODEL PENAL CODE § 223.5 (Theft of Property Lost, Mislaid, or Delivered by Mistake). Another example of marginal criminalization is the offense of "refraining from reporting . . . the . . . suspected commission of any offense" in exchange for any compensation. *Id.* § 242.5 (Compounding).

55 The draft code of conduct in Appendix A generally does not reflect community views, but rather tracks the prohibitions contained in the Model Penal Code. Reforming the rules of conduct to reflect community views would require empirical research beyond that which is presently available to determine those views.

cal structure or organization, the code of adjudication in Appendix B is explicitly organized around these questions. The process begins by comparing the defendant's conduct to that prohibited by the code of conduct, the same code that has been available to the defendant and all members of the public. Did the defendant's conduct violate the code? While other codes undoubtedly ask these questions, the inquiries are buried among questions about blameworthiness and grading.

> SECTION 100. VIOLATION OF CODE OF CONDUCT
>
> A person violates the Code of Conduct, for the purposes of this Code of Adjudication, if the person violates a prohibition or duty in Part II of the Code of Conduct and does not have a justification for such violation under Part IV of that Code.

A few additional provisions may be needed to make this determination with precision, provisions that are not necessary in the code of conduct itself, such as provisions giving more detailed explanations of what constitutes causation, attempt, conspiracy, solicitation, prohibited risk creation, and consent.[56]

Once it is clear that the code of conduct was violated, the inquiry shifts to whether the violation was blameworthy. Here the relevant inquiries include whether the defendant acted with the required minimum culpable state of mind,[57] whether the defendant is accountable for the offense conduct performed by another,[58] whether the defendant ought to be excused for his culpable conduct because of insanity, immaturity, duress, or some other excusing condition,[59] and whether, despite his blameworthiness, the defendant is entitled to a nonexculpatory defense such as the statute of limitations or diplomatic immunity.[60]

If it is determined that liability is appropriate, the inquiry shifts to grading the violation. Here the adjudication code must take account of such issues as the seriousness of the offense harm or evil,[61] whether the offense harm or evil actually occurred,[62] the offender's level of

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56 Appendix B §§ 110 (Causation Defined); 111 (Requirements for Violation of Code of Conduct Section 49 (Attempting Commission of a Crime)); 112 (Requirements for Violation of Code of Conduct Section 50 (Acting with Another Toward Commission of a Crime)); 113 (Requirements for Violation of Code of Conduct Section 51 (Creating a Prohibited Risk)), 114 (Consent Defense).

57 *See id.* § 200 (Minimum Culpability Required).

58 *See id.* § 212 (Accountability for Conduct of Another).

59 *See id.* art. 22 (Excuses).

60 *See id.* art. 23 (Nonexculpatory Defenses).

61 *Id.* § 304 (Base Grade).

62 *Id.* § 304(49) (reduction in grade where harm or evil of offense has not occurred).

culpability,[63] the extent of the offender's impaired capacity to avoid the offense, if any,[64] and, if the offender is an accomplice, the extent of the assistance he or she provided.[65] The mechanism used by the draft code of adjudication to take account of this wide range of factors sets a base grade for each violation described in the draft code of conduct, depending upon the seriousness of the offense harm or evil,[66] and then adjusts that base grade up or down according to the presence of various aggravating or mitigating factors.[67] Current codes include these inquiries in specific offense definitions. The adverse effect that this has on clarity is discussed below in Part II.C.

The end result of this process of adjustments to the base grade is a grading classification like that generated by current criminal codes, but one that takes account of many more factors with greater sophistication and less complexity. Note that the draft adjudication code in Appendix B takes less than 5,300 words. Even when added to the 2,300 words of the draft conduct code, the two codes together are still approximately one-fifth the length of the comparable provisions of the Model Penal Code.[68] Although it is shorter, the draft adjudication code takes account of relevant factors that the Model Penal Code does not. The Model Penal Code does not take account of, for example, such factors as the extent of participation by an accomplice,[69] a defendant's partial disability,[70] or a defendant's selection of victim because of certain victim characteristics.[71]

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63 *Id.* § 310 (Adjustment for Greater Culpability).

64 *Id.* § 313 (Adjustment for Partial Disability).

65 *Id.* § 311 (Adjustment According to Extent of Participation in Assisting an Offense by Another).

66 *Id.* § 304 (Base Grade). Though the Model Penal Code served as a general guide for the assignment of base grades, we were obliged to refine the Code's grading judgments because the draft adjudication code uses 14 grading categories (eight grades of felony, five grades of misdemeanor, and one grade of petty misdemeanor) in place of the Model Penal Code's five categories (three grades of felony, one grade of misdemeanor, and one grade of petty misdemeanor). Modern state codes commonly use eight or more categories. *See, e.g.*, N.Y. PENAL LAW § 55.05 (McKinney 1987); TEX. PENAL CODE ANN. §§ 12.03-.04 (West 1994). The draft code of adjudication uses more categories than usual to allow smaller adjustments to grade.

67 Appendix B, art. 31 (Adjustments to Base Grade). This scheme is similar to that used in the United States Sentencing Commission Guidelines and described in Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987).

68 The length of the Model Penal Code's relevant provisions is approximately 35,000 words. *See supra* note 4.

69 Appendix B § 311 (Adjustment According to Extent of Participation in Assisting an Offense by Another).

70 *Id.* § 313 (Adjustment for Partial Disability).

71 *Id.* § 314 (Adjustment for Selection of Victim). Nor does the Model Penal Code provide a system of special verdict forms. *See id.* App. B, art. 41 (verdict forms).

B. INCLUDE ALL ARTICULABLE RULES RELEVANT TO ADJUDICATION

The most useful code of adjudication will include all rules relevant to the liability decision, and as many rules relevant to the grading decision as is feasible. Relying upon common law rules or giving the judiciary authority to create and define liability rules through case law is not an adequate substitute for codification. Comprehensiveness in a code has several important benefits.

First, comprehensiveness helps avoid inappropriate results. Judges cannot, in every case, be as effective as a legislature or a criminal code drafting commission in properly formulating doctrines that will work together as do the provisions of a comprehensive code. The failure to create or to properly formulate a defense, for example, can result in liability for an actor who deserves to be exculpated. It is unrealistic to expect that a single judge in a single case can more properly formulate a defense than a legislative drafting committee.

Second, an uncodified rule is more likely to be applied differently in similar cases than a codified rule. The criteria of the latter are fixed, explicit, and easily available to all officials at each stage in the process. For example, assume a person seriously injures another in the course of a high school football game. Can the injured party insist that the injurer be prosecuted for aggravated assault? In a jurisdiction that has no codified consent defense, as many do not,[72] the issue may be left to the discretion of the prosecutor or the judge, to be decided according to whether he or she thinks there should be a consent defense in such a situation. A sports hater, who sees high school sports as a dangerous and irresponsible activity, might come to a different conclusion than a fan of the local team.

The problem is not a hypothetical one. In addition to consent,[73] provisions that are frequently missing from current criminal codes, even recently reformed codes, include such basic rules as those governing the requirements of causation,[74] mistake or ignorance of law or fact,[75] and customary license and de minimis infractions.[76]

C. USE GENERAL PRINCIPLES WHENEVER POSSIBLE

A code of adjudication can benefit from being made shorter and

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72 *See, e.g.*, CAL. PENAL CODE (Deering 1994); GA CODE ANN. tit. 16 (1994); N.C. GEN. STAT. ch. 14 (1994).

73 *See supra* note 72.

74 *See, e.g.*, ILL. REV. STAT. ch. 38 (1993); NEV. REV. STAT. ANN. tit. 15 (1993); N.H. REV. STAT. ANN. tit. LXII (1993).

75 *See, e.g.*, R.I. GEN. LAWS tit. 11 (1993); S.C. CODE ANN. tit. 16 (1992); WYO. STAT. tit. 6 (1994).

76 *See, e.g.*, FLA. STAT. tit. XLVI (1993); N.Y. PENAL LAW (Consol. 1992); WASH. REV. CODE ANN. tit. 9-9A (West 1992).

more streamlined, just as Part I showed that a code of conduct could so benefit.[77] The greatest benefits are achieved through the use of general rules that will apply to all offenses without having to repeat the rule in each specific offense. The culpability required for criminal liability provides a good example. Current codes typically include a statement of culpability requirements in each offense definition, but the functions of culpability requirements suggest that a few general principles can be substituted.

A first principle suggests that criminal liability ought not be imposed in the absence of some minimum level of culpability as to each offense element. This function of culpability requirements can be served by a general rule like the following:

> SECTION 200. MINIMUM CULPABILITY REQUIRED
>
> (1) An actor's violation of the Code of Conduct is not criminal unless the actor is at least reckless as to each element of the violation as described in the Code of Conduct . . . .

The general rule must be tempered:

> . . . except that negligence is the minimum culpability required:
>
> (a) for a violation of the prohibition against causing the death of another person under Code of Conduct Section 3 (Injury to a Person); and
>
> (b) as to the age of the victim for a violation of Code of Conduct Section 14(b) or (c) (Criminal Sexual Contact).[78]

A jurisdiction might want additional exceptions; these are the two most common in current codes. The point is, the function of culpability requirements in setting a minimum condition of liability is more clearly and easily served when articulated as a general rule.

For some offenses, especially inchoate offenses, code drafters may wish to add a more demanding culpability requirement.[79] This too can be provided by special mention within the general provision:

> (2) In addition to the culpability requirements of Subsection (1), to be liable for a violation of:
>
> (a) Code of Conduct Section 49 (Attempting Commission of a Crime), the actor must have the purpose to engage in the conduct that would constitute the violation; and

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77 *See supra* part I.A-D.

78 Appendix B, § 200 (Minimum Culpability Required).

79 *See, e.g.*, MODEL PENAL CODE §§ 2.06(3)(a), 5.01(1)(a)-(c), 5.02(1), 5.03(1).

(b) Code of Conduct Section 50 (Acting with Another Toward Commission of a Crime (Complicity, Conspiracy and Solicitation)), the actor must have the purpose to facilitate the conduct constituting the violation.[80]

Culpability requirements perform a second function: they increase the grade of liability where the offender has committed the offense with a higher level of culpability than the required minimum. In homicide, for example, the grade of a killing varies according to the actor's culpability as to causing the death. But a general principle can also govern this function. In the draft code of adjudication, this is done through the use of a grading table.[81] The base grade for each violation assumes the actor has only the minimum culpability required for liability. If greater liability is present, the grade of the violation increases according to the following general principle of adjustment:

SECTION 310. ADJUSTMENT FOR GREATER CULPABILITY

(1) The grade of an offense increases:

(a) two grades if the actor is purposeful as to the core elements, and

(b) one grade if the actor is knowing as to the core elements.

(2) *Definitions.* For the purposes of this Section:

(a) The "core elements" are those facts that establish the violation in the Code of Conduct and its grade in Section 304 (Base Grade).

(b) "Purposely," "knowingly," "recklessly," and "negligently" are defined in Section 401 (Definitions).

If special culpability grading distinctions are needed for a particular offense, they need only be noted in the table.[82]

This approach allows differences in culpability levels to be easily taken into account in all cases. While few people would disagree with the general principle that greater culpability ought to increase liability,[83] current codes only occasionally alter liability accordingly. The homicide offenses do this, as noted above, as does arson.[84] But most offenses do not, including such important offenses as statutory rape[85]

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80 Appendix B § 200 (Minimum Culpability Required).

81 *Id.* § 304 (Base Grade).

82 Note, for example, that reckless and negligent homicide are given special treatment in the grading table. *See* Appendix B, § 304(3)(a)-(b) (Base Grade).

83 ROBINSON & DARLEY, JUSTICE, LIABILITY, AND BLAME, *supra* note 52, at 169-81.

84 *See* MODEL PENAL CODE § 220.1 (Arson and Related Offenses).

85 *Id.* § 213.3(1)(a) (Corruption of Minors and Seduction).

and theft.[86] For example, negligence as to a sexual partner being underage may be adequate for liability, but it seems clear that greater blameworthiness ought to attach when the actor knows that the partner is underage. Modern codes typically make no grading distinction between these two cases.[87]

The practice of ignoring culpability differences may reflect the overwhelming complexity of such a task given the structure of current codes. Recognizing culpability differences through the creation of separate offenses or sub-offenses—the approach of current codes—dramatically multiplies the number of offenses in a code. In contrast, with a general adjustment like the one quoted above, no such proliferation of offenses is needed.

Other general principles in Appendix B similarly provide more sophisticated grading to take account of other relevant factors without a proliferation of offenses. For example, if an actor does not receive a full excuse defense but nevertheless may deserve some mitigation because of a substantial impairment of functioning, the following provision guides adjudicators:

> SECTION 313. ADJUSTMENT FOR PARTIAL DISABILITY
>
> The grade of the actor's offense decreases one grade if, at the time of the conduct constituting the offense, the actor suffers a substantial impairment of cognitive or control function, as defined in a provision in Article 22, but to a degree insufficient to merit a complete excuse.

Rather than creating a mitigation within each excuse defense, this general adjustment provides a set of parallel mitigations, piggybacking on the excuse criteria of each defense in Article 22. Other general adjustments take account of the extent of contribution by an accomplice, a choice of victim that aggravates the seriousness of the offense, and ineffective renunciation by an actor.[88]

D. USE PARALLEL LANGUAGE IN CONCEPTUALLY ANALOGOUS PROVISIONS

The previous subsection discusses the drafting advantages of using general principles when possible, rather than introducing a distinct rule for each factual context. An example is the use of a general

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86 *See id.* § 223.2 (Theft by Unlawful Taking or Disposition).

87 *See, e.g., id.* § 213.3(1)(a) (Corruption of Minors and Seduction).

88 Appendix B, §§ 311 (Adjustment According to Extent of Participation in Assisting an Offense by Another); 312 (Adjustment for Ineffective Renunciation of Attempt, Conspiracy, or Solicitation); 314 (Adjustment for Selection of Victim).

principle of adjustment for culpability level rather than the practice of modern codes of defining special culpability requirements for each offense. Such a tendency to splinter a single conceptual issue into a variety of context-specific rules creates difficulties beyond drafting. Such fracturing also invites inconsistent treatment within the different contexts. That is, conceptually parallel concepts are actually treated differently, not only in drafting, but in substance as well. In addition to hindering clarity, this disparate treatment also results in unfairness.

For example, the Model Penal Code bars an intoxication excuse for any offense if the actor was negligent in bringing about the excusing condition, that is, in becoming intoxicated.[89] In contrast, in the context of duress the actor's negligence only bars the defense for offenses of negligence; an actor must be at least reckless to lose the defense when charged with an offense of recklessness, knowledge, or purpose.[90] In yet another variation, in the context of the lesser evils defense, an actor who is negligent in bringing about the justifying circumstances will lose the defense when charged with an offense of negligence, but recklessness in bringing about the defense conditions will bar the defense only for offenses of recklessness.[91] In still other instances, the Code gives no guidance on how to handle an actor's culpability in causing the defense conditions. This is the case, for example, for a defense for conduct performed under hypnosis.[92] Yet, there is no apparent reason for these different approaches to the problem of culpability in causing the conditions of one's defense. One can only guess that the drafters' penchant for context-specific rules blinded them to the conceptual similarity of the issues.[93]

The draft adjudication code deals with the problem in the following provision:

> SECTION 240. CAUSING THE CONDITIONS OF ONE'S OWN JUSTIFICATION OR EXCUSE DEFENSE
>
> (1) When an actor causes the conditions that give rise to a justification under Part IV of the Code of Conduct or to an excuse under Article 22 of the Code of Adjudication, the actor gains the benefit of the defense despite his or her conduct in causing the defense conditions, but

89 *See* MODEL PENAL CODE § 2.08(4), (5)(b) (Intoxication).

90 *Id.* § 2.09(2) (Duress).

91 *Id.* § 3.02(2) (Justification Generally: Choice of Evils).

92 *See id.* § 2.01 (Requirement of Voluntary Act; Omission as Basis of Liability; Possession as an Act).

93 For a general discussion of the inconsistent treatment of causing the conditions of different defenses, see Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 1-27 (1985).

(2) the actor may be held liable for the violation of the Code of Conduct based upon his or her conduct in causing the defense conditions if, at the time of causing those conditions, the actor has the culpability as to bringing about the violation that is required by Section 200 (Minimum Culpability Required).

(3) As provided by Section 310 (Adjustment for Greater Culpability), the grade of liability for causing the defense conditions under Subsection (2) increases if the actor was knowing or purposeful as to causing the violation.

(4) *Defense to Liability for Causing the Conditions of One's Own Defense.* An actor may have a justification or excuse defense to liability under Subsection (2) for his or her conduct in causing the defense conditions.

A similar problem arises from the drafters' failure to see the conceptual similarity among excuses. The insanity and involuntary intoxication excuses use parallel language that makes clear that having the required disability—mental illness or involuntary intoxication—is not, in itself, enough to merit an excuse. The actor must show, in addition, that the disability caused a substantial impairment of functioning, such that the actor lacked "substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[94] Yet, in the context of other excuses, such as hypnotism and somnambulism, the Code fails to impose such a dysfunction requirement.[95] There is no dispute that hypnosis and somnambulism may create a wide variety of degrees of dysfunction, some very debilitating, some not.[96] Yet the Code's provisions give a defense without any inquiry into the degree of dysfunction present in a given case. Under the Code's defense formulation, hypnosis or somnambulism will provide a complete defense to an actor even if the condition did not cause a lack of "substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[97] The draft adjudication code collects all excuses in Article 22 and uses parallel re-

94 MODEL PENAL CODE § 4.01 (Mental Disease or Defect Excluding Responsibility); *see also id.* at § 2.08(4) (Intoxication).

95 *See id.* § 2.01(1), (2)(b)-(c) (Requirement of Voluntary Act; Omission as Basis of Liability; Possession as an Act).

96 *See* Robinson, *Functional Analysis, supra* note 2, at 896-901.

97 MODEL PENAL CODE § 4.01 (Mental Disease or Defect Excluding Responsibility). For a more detailed discussion of this problem, see Robinson, *Functional Analysis, supra* note 2, at 896-901; *see also* Robinson, *Rules and Principles, supra* note 2, at 762-63 (discussing similar problems with Model Penal Code treatment of immaturity defense).

quirements for each.[98]

E. PROVIDE JURY VERDICTS THAT MAKE CLEAR THEIR MEANING

One final proposal tries to solve the problem of ambiguous jury acquittals and their destructive effect on criminal justice. First we will explain the problem, then explain how a properly organized adjudication code can avoid the problem.

A verdict of "not guilty" under the present system may mean either: (1) that the actor's conduct in the case *did not* violate the rules of conduct, or (2) that the actor's conduct *did* violate the rules of conduct but that he or she is entitled to a culpability, excuse, or nonexculpatory defense. Thus, any acquittal might be understood either to approve or to disapprove of the actor's conduct, and that ambiguity prevents trial verdicts from educating the public about the commands of the criminal law. Indeed, the ambiguous verdicts can affirmatively confuse a rule of conduct that otherwise would have been clear.

A contemporary example of this confusion is the state court acquittals of the officers tried in the beating of Rodney King. Many people found the acquittals outrageous because they seemed to condone the use of excessive and unnecessary force.[99] But the issues at trial

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98 Cases of hypnotism and somnambulism are dealt with under the following excuse defense:

> SECTION 225. DISABILITY EXCUSE: IMPAIRED CONSCIOUSNESS
> (1) An actor's violation of the Code of Conduct is excused if, at the time of the conduct constituting the violation, the actor:
> (a) is in a state of impaired consciousness, and
> (b) by reason of such impaired consciousness, lacks substantial capacity to:
> (i) appreciate the criminality or wrongfulness of his or her conduct, or
> (ii) conform his or her conduct to the requirements of law.
> (2) *"State of Impaired Consciousness" Defined.* For the purposes of Subsection (1)(a), a "state of impaired consciousness" means a disturbance of consciousness resulting from a physiologically confirmable state or condition not specifically recognized or rejected as a basis for exculpation under any other Section included in this Article.
> (3) *Presumed Impaired Consciousness.* An actor who is unconscious, asleep, or under hypnosis is presumed to be in a state of impaired consciousness as required by Subsection (1)(a).

Appendix B, § 225.

99 "[The verdict] sends out a message that whatever you saw on that tape was reasonable conduct." Los Angeles Deputy District Attorney Terry White, *reported in* Seth Mydans, *The Police Verdict*, N.Y. TIMES, Apr. 30, 1992, at A1. Mr. White was the prosecutor in the case. *Id.* "[The verdict] tells me that police can do what they want . . . . Everyone in the world saw that man get whipped and I don't know what the jury was seeing." David Green, a 32-year-old northeast Washington construction worker, *reported in* Sue Anne Pressley, *Case Casts Long Shadow*, WASH. POST, May 1, 1992, at A1, A30. "What does it take to prove they're guilty? They're saying, 'So what if you videotape me, I still can beat you up.'" Hilda Whittington, a Chicago African-American nutritionist, *reported in* Isabel Wilkerson, *Riots in Los Angeles*, N.Y. TIMES, May 1, 1992, at A23. "[It is] an outrage that our system can't punish those—particularly police officers—who use the power and majesty of the state to beat

went beyond the propriety of the conduct; the trial also focused on the blameworthiness of the officers, including an examination of the danger the officers felt, the confusion and uncertainty of the situation from the officers' perspective, the emotion generated by the preceding high-speed chase, and the training the officers had received for dealing with such a situation. Thus, the jury acquittal may well have been based upon a finding of insufficient blameworthiness rather than an approval of the conduct.[100]

Upon hearing the verdicts, different people came to different conclusions about the jury's intent in voting to acquit. This conflict arises in part because the simple verdict of "not guilty" fails to tell the whole story in a most important respect. The jurors could have voted not guilty because, while they disapproved of the *conduct*, they did not think the *officers* were sufficiently blameworthy to merit criminal conviction. Yet, people could reasonably interpret the verdict as an approval of the officers' conduct, an outrageous outcome to most.

What is needed is a verdict system that distinguishes "no violation" acquittals from "blameless violation" acquittals. With proper organization, a code of adjudication can easily do this. Recall from the first drafting principle for an adjudication code—"Adopt a Code Structure That Matches the Analytic Process"—that the draft code of adjudication in Appendix B considers separately the questions of whether the defendant has violated a rule of conduct and whether that violation is blameworthy. A code that segregates these questions may then offer alternative verdicts of "no violation" or "blameless violation," depending upon the code provision giving rise to the acquittal.

The structure of the draft code of conduct in Appendix A has

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some man senseless." Jerry Brown, former Governor of California, *reported in* William Raspberry, *Where's the Outrage From White America?*, WASH. POST, May 1, 1992, at A27.

100 "In the words of defense attorney Michael Stone, their goal was to persuade jurors to view the incident 'not through the eye of the camera but through the eyes of the police officers' .... On the night in question ... [the officers] confronted a 250-pound man who they believed—wrongly—to be intoxicated with the drug PCP, said to endow users with 'superhuman strength.'" Leef Smith, *Jury Was Asked to See Events as Police Did; Defense Depicted Officers in Urban Jungle*, WASH. POST, Apr. 30, 1992, at A25. After hearing the evidence at trial, one juror explained the verdict this way: "At one point, King lunged at and connected with Officer Powell. The cops were simply doing what they'd been instructed to do. They were afraid he was going to run or even attack them. He had not been searched, so they didn't know if he had a weapon. He kept going for his pants, so they thought he might be reaching for a gun. . . . I have no regrets about the verdict. I'll sleep well tonight." *The Jury's View*, WASH. POST, May 1, 1992, at A33. Another juror explained: "[King] 'refused to get out of the car . . . so the police department had no alternative. He was obviously a dangerous person, massive size and threatening actions .... They're policemen. They're not angels. They're out there to do a lowdown dirty job. Would you want your husband doing it, or your son or your father?'" Smith, *supra*, at A26.

other similar benefits: it allows jury verdicts to educate the public by distinguishing "no violation" acquittals from "justified violation" acquittals. A "no violation" acquittal confirms that the conduct at issue is not prohibited by the code of conduct and can lawfully be performed by others without any special justification. A "justified violation" acquittal sends the opposite message about the conduct at issue: it *is* normally prohibited by the code of conduct and cannot lawfully be performed by others unless special justifying circumstances exist.

Assume, for example, that a bus passenger is running through the bus distracting the driver, impairing her view of the road, and endangering the vehicle and its passengers. Despite requests, the passenger refuses to sit down or to leave the bus. The driver then uses force to eject the passenger, causing him to twist his ankle. The driver has violated Section 3 of the draft code of conduct:

> 3. INJURY TO A PERSON
> You may not cause bodily injury or death to another person.

However, because the driver also satisfies the requirements of Section 64, she receives a justification defense:

> 64. USE OF FORCE BY OPERATOR OF PUBLIC TRANSPORTATION
> If you are responsible for the maintenance of safety, control, or order aboard a vehicle, vessel, train, or aircraft, you may use reasonable force if it is necessary to maintain such safety, control, or order.

An acquittal by verdict of "justified violation" under Section 64 reaffirms that causing bodily injury to another person is not permitted, *unless* special triggering conditions and force limitations are satisfied (such as the justification provision authorizing a bus driver to respond to the endangerment of her vehicle with the use of non-deadly force[101]).

Finally, the structure of the draft code of adjudication also allows the system to distinguish between excused conduct and conduct that remains blameworthy but is not punishable. For example, a blameworthy offender may escape liability because of diplomatic immunity, former prosecution, governmental immunity, incompetency, expiration of the period of limitation for commencement of the prosecution, or entrapment.[102] Because such nonexculpatory defenses are

[101] The use of deadly force has additional requirements beyond those in the quoted Section 64. *See* Appendix A § 52 (Use of Deadly Defensive Force).

[102] *See* Appendix B, art. 23 (Nonexculpatory Defenses).

collected in one article of the draft code of adjudication, an acquittal based on such a defense is distinguishable from one based on one of the excuse defenses, which are collected in a different article of the code.

This distinction between exculpatory and nonexculpatory acquittals should improve the system's credibility. A nonexculpatory acquittal rendered as a simple "not guilty" may be misperceived by some as a conclusion by the system that the offender is blameless, a conclusion that may lead some to believe the system has bad judgment on matters of blameworthiness. That poor credibility can reduce the system's power to gain compliance.[103] By making clear that such acquittals do not exculpate the offender, but rather result because the offender simply is not punishable, the system protects its credibility.

Consider, for example, a person who steals an automobile belonging to another. The conduct is a violation of the code of conduct:

> 24. DAMAGE TO OR THEFT OF PROPERTY
>
> You may not damage, take, use, dispose of, or transfer another's property without the other's consent. . . .

Assume, however, that the actor is the member of the staff of a foreign embassy. Pursuant to the Diplomatic Relations Act of 1978, the person is not subject to prosecution.[104]

> SECTION 232. DIPLOMATIC IMMUNITY
>
> An actor may not be prosecuted for a violation of the Code of Conduct if he or she has been granted immunity from prosecution pursuant to the procedures of the Diplomatic Relations Act of 1978.

By making clear that the actor's acquittal arises from a defense in Section 232 rather than from a failure to violate Section 24, the special verdict form[105] reaffirms rather than undercuts the prohibition against theft. It also protects the system's credibility by explaining the reason for the acquittal of what will seem to the lay person to be condemnable conduct.

These kinds of distinctions among acquittal verdicts are possible because of the general organization of the draft codes:

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103 *See supra* text accompanying note 55.

104 Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254a-ee (1988).

105 Appendix B, § 413 (Verdict Form: Not Punishable).

A DRAFT CODE OF CONDUCT
- Part I. . . .
- Part II. Specific Crimes: Prohibited and Required Conduct
- Part III. General Prohibitions
- Part IV. Justified Violations of the Criminal Law

A DRAFT CODE OF ADJUDICATION
- Part I. Violation of Code of Conduct
- Part II. Liability Assessment
  - Article 20. Minimum Requirements for Liability
  - . . .
  - Article 22. Excuses
  - Article 23. Nonexculpatory Defenses
  - . . .
- Part III. Grading
- . . .

By mirroring this organization, verdicts effectively convey their intended meaning. A verdict system like the following would permit such communication:

SECTION 410. VERDICT FORM: NO VIOLATION OF PROHIBITIONS OR DUTIES

If the trier of fact finds no violation of the prohibitions or duties described in Parts II and III of the Code of Conduct, then the verdict shall be "No Violation."

SECTION 411. VERDICT FORM: JUSTIFIED VIOLATION OF PROHIBITION OR DUTY

If the trier of fact finds that the actor's conduct constitutes a violation of a prohibition or duty under Parts II or III of the Code of Conduct, but finds that the violation is justified under Part IV of the Code of Conduct, then the verdict shall be "Justified Violation."

SECTION 412. VERDICT FORM: BLAMELESS VIOLATION

If the trier of fact finds that the actor's conduct constitutes an unjustified violation of the Code of Conduct, but:

(1) the minimum requirements for liability contained in Code of Adjudication Article 20 have not been satisfied, or

(2) the actor's conduct is excused under Code of Adjudication Article 22, then the verdict shall be "Not Guilty by Reason of Blameless Violation."

SECTION 413. VERDICT FORM: NOT PUNISHABLE

If the trier of fact finds that the actor is not subject to prosecution, triable, or punishable because of a provision in Code of Adjudication Article 23, then the verdict shall be "Not Punishable."

SECTION 414. VERDICT FORM: GUILTY

If the trier of fact finds that the actor violated the Code of Conduct without justification, satisfies the minimum requirements of liability under Code of Adjudication Article 20, and has no defense under Code of Adjudication Articles 22 or 23, then the verdict shall be "Guilty." The verdict shall indicate the grade of the offense as provided by Part III of the Code of Adjudication.

Absent such a verdict system, trial verdicts can undercut and confuse the public's understanding of the rules of conduct instead of clarifying and reinforcing those rules, as trial verdicts ought to and can do.

IV. CONCLUSION

The drafting principles suggested in this Article are executed in the draft code of conduct and draft code of adjudication contained in the appendices. We do not suggest that these drafts are codes ready for enactment. They are, rather, vehicles by which we illustrate the principles offered in the text. We have sought to take the majority view on most policy issues in drafting these codes, not because we always agree with that view, but because we have sought to focus the discussion on the drafting method rather than the drafts' contents.[106]

At least one writer has suggested that there might be value in giving the members of the public rules to guide their conduct that are different from the rules given adjudicators to assess liability, and that the latter decision rules ought not be publicly available.[107] The draft codes that we offer here could well be used to construct such a system of "acoustical separation." Some readers may think that such is part of our motivation, so we feel obliged to address the issue.

There are arguments in favor of "acoustical separation" but on balance we do not find them persuasive. A short-term value may result from the law's ability to announce a rule—perhaps denying a defense to help deter crime, for example—but not to enforce the rule and thereby avoid the unfairness to the defendant and the cost of imprisonment. The long-term prospects of such deception are not

106 *See also supra* note 55.

107 *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 634-46, 667-68 (1984).

good. In an open society with an active free press, acoustical separation cannot be maintained. And once the deception is revealed it can only contribute to a cynicism and distrust for the criminal justice system that will make it harder for the system to perform its functions.

A case in point is the once common practice of publicly imposing long prison terms and then systematically releasing offenders long before the end of the terms imposed. The practice provided high deterrent effect at minimum cost. But once the practice was discovered by the general public, the perceived bite of every imposed sentence was reduced accordingly, requiring even higher sentences to maintain the same deterrent effect. Of course, eventually the higher sentences, also unfulfilled, only increased the public's discount rate for judging the severity of the sentences imposed, creating a cycle of exaggeration that often ended in sentences of many hundreds of years being imposed, with little general deterrent effect because of a belief by the public that the offender might still be released in a short time.

Many jurisdictions have shifted to a system of "real time" sentencing in which offenders must serve most of the sentence imposed. For instance, the federal system requires an offender to serve eighty-five percent of the sentence.[108] The earlier deception, however, has caused many citizens to remain skeptical of the sentences. At the same time, many people who have gotten used to high sentences insist that the new "real time" sentences are too low to provide the bite needed to deter. The earlier deception may have created the worst of both worlds, longer sentences with less deterrence. Presumably, with time, the system's credibility will return and people's expectations will adjust.

Our view is that the code of adjudication ought to be available to anyone who has an interest. Greater public knowledge of its contents is likely to improve the criminal law's credibility (and provide better prepared jurors). The emphasis, however, should be on broad publication of the code of conduct, for this is the document that should be guiding people's daily lives. In the reasonably short and readable form in which it appears in Appendix A, it can be widely reproduced, read, and understood. It could be the basis for high school classes on the obligations of citizens and for adult education and reeducation through newspapers, magazines, and television. The resulting greater public awareness and understanding can mean greater compliance with the law's commands. And the better notice provided can make more fair the punishment imposed for a violation of those commands.

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[108] Sentencing Reform Act of 1984, 18 U.S.C. § 3624(b) (1987).

APPENDIX A: A DRAFT CODE OF CONDUCT

PART I. SCOPE AND DEFINITIONS

1. SCOPE OF CODE

All crimes are defined in this Code. Other prohibitions, defined by other statutes of this state, are not crimes.

2. DEFINITIONS

The following terms are defined in the following sections:
"Consent" in Section 5.
"Deadly force" in Section 53.
"Family member" in Section 23.
"Intimate parts" in Section 16.
"Property" in Section 24.
"Public place" in Section 18.
"Sexual act" in Section 35.
"Sexual contact" in Section 15.
"Unlawful force" in Section 54.

PART II. SPECIFIC CRIMES: PROHIBITED AND REQUIRED CONDUCT

OFFENSES AGAINST PERSONS

3. INJURY TO A PERSON

You may not cause bodily injury or death to another person.

4. CONSENT DEFENSE TO MINOR INJURY

You may engage in conduct that causes or risks minor bodily injury IF the victim requests or voluntarily consents to such conduct, as in participation in a sporting event, for example.

5. CONSENT DEFINED

"Consent," as used in this Code, means voluntary agreement by a person who understands the nature and consequences of what he or she is agreeing to. Silence is not consent, unless such silence is understood to be consent by prior agreement among the persons involved.

6. ASSISTING ANOTHER'S SUICIDE

You may not assist another's suicide, UNLESS the other:
(a) has a terminal illness,
AND
(b) voluntarily requests the assistance.

7. CRIMINAL HARASSMENT

You may not repeatedly follow or contact another in a way that causes the other emotional harm or the fear of physical harm.

8. VIOLATION OF PRIVACY

You may not violate another's legitimate expectation of privacy without the other's consent.

9. CRIMINAL THREAT OF COMMITTING A CRIME

You may not gain an advantage from another by threatening to commit a crime.

10. CRIMINAL THREAT OF EXPOSURE

You may not gain an advantage from another by threatening to:

(a) accuse anyone of a crime,

OR

(b) accuse anyone of serious misconduct,

OR

(c) expose a secret,

UNLESS you are trying to avoid a danger, right a wrong, or receive restitution for the crime or misconduct.

11. CRIMINAL THREAT OF OFFICIAL ACTION

You may not gain an advantage from another by threatening to improperly cause or prevent official action.

12. CRIMINAL RESTRAINT

You may not remove, restrain, or confine another without the other's consent.

13. WELFARE OF CHILD

You may not endanger the physical or emotional well-being of a child.

14. CRIMINAL SEXUAL CONTACT

You may not have sexual contact with another person:

(a) without that person's consent,

OR

(b) who is under the age of eleven (11),

OR

(c) who is under the age of sixteen (16) if you are four or more years older than that person,

OR

(d) who is in your custodial care,

OR

(e) who is receiving mental health treatment from you.

15. SEXUAL CONTACT DEFINED

"Sexual contact," as used in this Code, includes any of the following three types of contact:

(a) contact with another's intimate parts, using a body part, directly or through clothing,

AND

(b) contact with another, using an intimate part,

AND

(c) any form of sexual intercourse, using a body part or object.

16. INTIMATE PARTS DEFINED

"Intimate parts," as used in this Code, are the buttock, anus, groin, scrotum, penis, vagina, pubic mound, or female breast.

17. INDECENT EXPOSURE

You may not expose your intimate parts in a public place, EXCEPT that if you are a female you may expose your breast as needed to breast-feed a child.

18. PUBLIC PLACE DEFINED

"Public place," as used in this Code, is any area, facility, vehicle, vessel, train, or aircraft to which persons generally have unrestricted access or to which access is restricted to customers and employees.

19. ABORTION

You may not terminate a pregnancy after 26 weeks, UNLESS one of the three following conditions applies:

(a) the failure to terminate would result in substantial and unjustified danger to the life or health of the mother,

OR

(b) the fetus would be born with a serious physical or mental defect,

OR

(c) the pregnancy is the result of rape or incest.

OFFENSES AGAINST THE FAMILY

20. BIGAMY

You may not marry another person if either of you is already married to someone else who is alive.

21. INTERFERENCE WITH CUSTODY

You may not interfere with another's legal custody of a child.

22. DUTY TO PROVIDE SUPPORT

You must provide financial support to any present or former spouse or family member or dependent when the support is required by law or by a judgment of a court.

23. INCEST

You may not marry or have sexual intercourse or sexual contact with a family member. A family member is a parent by blood or adoption, step-parent, child, step-child, brother, sister, uncle, aunt, nephew, niece, grandparent, or grandchild.

OFFENSES AGAINST PROPERTY

24. DAMAGE TO OR THEFT OF PROPERTY

You may not damage, take, use, dispose of, or transfer another's property without the other's consent. Property is anything of value, including services offered for payment and access to recorded information.

25. CRIMINAL TRESPASS

You may not enter or remain in another's building without consent or enter or remain upon another's land if "no trespassing" signs are posted or if you are told that such entrance is forbidden.

26. DUTY TO PREVENT CATASTROPHE

You must make reasonable efforts to prevent or reduce potentially widespread injury or damage from explosion, fire, flood, avalanche, collapse of building, release of other harmful or destructive force or substance, or any other means, if you:

(a) have an official, contractual, or other legal duty to prevent the injury or damage,

OR

(b) have contributed to creating the danger.

27. FAILURE TO RETURN LOST OR MISTAKENLY DELIVERED PROPERTY

You may not keep lost or mistakenly delivered property, UNLESS you make a reasonable effort to find its owner and return the property.

28. FORGERY, BAD CHECKS, AND FRAUDULENT PRACTICES

You may not injure another person by providing misleading or false information or documents.

OFFENSES AGAINST PUBLIC ORDER OR DECENCY

29. DESTRUCTION OR DAMAGE OF CERTAIN OBJECTS

You may not damage, destroy, or deface any public monument or structure, or any object or place commonly worshipped.

30. DISORDERLY CONDUCT

You may not provoke unlawful behavior or a disruption of order in a public place or in a gathering of persons by excessively loud, offensive, or threatening behavior.

31. INDECENT BEHAVIOR

You may not commit a lewd and indecent act in a public place that would cause offense or alarm.

32. CREATING A PUBLIC ALARM OR PANIC

You may not cause false alarm or panic among a gathering of persons or among persons in a public place.

33. OBSTRUCTING A PUBLIC PASSAGE

You may not obstruct a public passage.

34. PROSTITUTION

You may not engage in, support, or profit from any sexual act that is offered for sale.

35. SEXUAL ACT DEFINED

"Sexual act," as used in this Code, includes any of the following acts:

(a) vaginal, anal, or oral intercourse or penetration,

OR

(b) direct genital stimulation.

36. OBSCENITY

You may not produce, possess, or exchange written or recorded material that contains a visual record of any of the following:

(a) an actual sexual act involving a person under the age of sixteen (16),

OR

(b) actual sexual contact between a person of any age and an animal,

OR

(c) actual mutilation, torture, rape, or death of a human being that is performed for such recording.

37. CRIMINAL POSSESSION

You may not possess:

(a) a weapon without proper authority or license, if such is required by law,

OR

(b) a controlled substance or drug paraphernalia without proper authority or prescription,

OR

(c) stolen property.

38. CRUELTY TO ANIMALS

You may not cause unnecessary suffering, injury, or death to any animal, UNLESS the conduct is specifically authorized by law.

39. ABUSE OF CORPSE

You may not mutilate, destroy, or mistreat a human corpse, UNLESS the conduct is specifically authorized by law.

OFFENSES AGAINST GOVERNMENT ADMINISTRATION

40. OBSTRUCTION OF LAW

You may not obstruct or resist an arrest, obstruct the apprehension or prosecution of a suspected criminal, or obstruct the performance of a public duty.

41. AVOIDING LAWFUL DETENTION

You may not escape from lawful detention, or fail to return to lawful detention from authorized release.

42. FAILURE TO APPEAR

You may not fail to appear in court when required to do so.

43. ABUSE OF NON-PUBLIC INFORMATION BY PUBLIC OFFICIAL

If you are a public official, you may not speculate or wager upon, gain an economic benefit from, or cause another to gain an economic benefit from, information not available to the public gained in your capacity as a public official.

44. PROVIDING FALSE INFORMATION

You may not lie under oath or give false information to a law enforcement officer, firefighter, or other public servant performing his or her public duty.

45. BRIBERY AND CRIMINAL COMPENSATION

You may not offer or accept any benefit either to influence the future action of or in return for past action by a public official or servant, a party official, or a voter, UNLESS such benefit is a legal fee or salary for such action.

46. GOVERNMENTAL OPPRESSION

If you are a public official, you may not violate another's personal, property, or other civil rights.

47. TAMPERING WITH RECORDS

You may not tamper with a public document.

48. IMPERSONATING A PUBLIC OFFICIAL

You may not impersonate a public official.

PART III. GENERAL PROHIBITIONS

49. ATTEMPTING COMMISSION OF A CRIME

You may not attempt to commit a crime.

50. ACTING WITH ANOTHER TOWARD COMMISSION OF A CRIME (COMPLICITY, CONSPIRACY, AND SOLICITATION)

You may not agree with, ask, assist, or encourage another to commit a crime.

51. CREATING A PROHIBITED RISK

You may not act in a way that creates a substantial and unjustified risk of causing a result made criminal by this Code, EXCEPT that conduct creating a risk that would otherwise be a crime is not a crime if it is:

(a) commonly engaged in,
AND
(b) generally thought by the community at large to be lawful.

PART IV. JUSTIFIED VIOLATIONS OF THE CRIMINAL LAW

USE OF DEADLY DEFENSIVE FORCE

52. USE OF DEADLY DEFENSIVE FORCE

You may use deadly force against another who is threatening you if and only if it is necessary to defend against the other's use or threatened use of unlawful force likely to cause serious bodily injury or death.

53. DEADLY FORCE DEFINED

"Deadly force," as used in this Code, is force that creates a substantial risk of causing the death of another person. The firing of a firearm is deadly force.

54. UNLAWFUL FORCE DEFINED

"Unlawful force," as used in this Code, is force that would be criminal and unjustified under this Code.

USE OF NON-DEADLY FORCE BY THE GENERAL PUBLIC

55. USE OF FORCE IN SELF-DEFENSE OR DEFENSE OF ANOTHER

You may use reasonable force against another if it is immediately necessary to defend against the other's use or threatened use of unlawful force.

56. DEFENSE OF PROPERTY

You may use reasonable force against a person who is unlawfully threatening property or who has just unlawfully taken property, if such force is immediately necessary to defend or take back the property.

57. USE OF FORCE TO PREVENT COMMISSION OF A CRIME

You may use reasonable force, including confinement, against another, if it is necessary to prevent the other from acting in a way that is

defined as criminal and unjustified by this Code.

58. USE OF FORCE TO ASSIST LAW ENFORCEMENT

You may use reasonable force against another if it is necessary to assist a law enforcement officer in making an arrest or preventing an escape.

59. USE OF FORCE TO PREVENT SUICIDE

You may use reasonable force against another if it is necessary to prevent the other's suicide.

60. USE OF FORCE TO PASS A WRONGFUL OBSTRUCTOR

You may use reasonable force against another if it is necessary to pass the person who is unlawfully obstructing a public passage.

USE OF FORCE BY SPECIALLY AUTHORIZED PERSONS

61. USE OF FORCE BY LAW ENFORCEMENT OFFICER

If you are a law enforcement officer, you may use reasonable force against another to make an arrest or prevent an escape. You may use deadly force if and only if:

(a) the force used creates no risk of serious bodily injury to innocent persons,

AND

(b) it is likely that the other person will cause serious bodily injury if such force is not used.

62. USE OF FORCE BY PARENT, GUARDIAN, TEACHER, OR CARETAKER

If you are a parent, guardian, teacher, or caretaker, you may use reasonable force against a minor or incompetent if:

(a) you are legally responsible for the minor or incompetent's care or supervision,

AND

(b) such force is necessary to safeguard the well-being of the minor or incompetent.

63. USE OF FORCE BY PENAL OFFICER

If you are an official of a jail, prison, or other correctional institution, you may use reasonable force against an inmate if it is immediately necessary to maintain control or order within that institution.

64. USE OF FORCE BY OPERATOR OF PUBLIC TRANSPORTATION

If you are responsible for the maintenance of safety, control, or order aboard a vehicle, vessel, train, or aircraft, you may use reasonable force if it is necessary to maintain such safety, control, or order.

65. USE OF FORCE BY MEDICAL PERSONNEL

If you are a doctor, a person acting under a doctor's supervision, or a paramedic, you may use reasonable force if:

(a) such force is necessary to avoid serious bodily injury or death,
AND
(b) no authorized person is available to consent,
AND
(c) it is likely that the patient would consent if he or she were able to.

GENERAL JUSTIFICATIONS

66. PUBLIC DUTY

You may act in a way that would otherwise be a crime if your conduct is necessary to perform a public duty, and reasonable in light of the importance of that duty. This Section does not apply if the situation is addressed by a previous section of this Part of the Code.

67. LESSER EVILS

You may act in a way that would otherwise be a crime if your conduct is necessary to avoid a more serious harm or evil than that caused by your conduct. This Section does not apply if the situation is addressed by a previous section of this Part of the Code.

APPENDIX B: A DRAFT CODE OF ADJUDICATION

Part I. Violation of Code of Conduct
- Article 10. Violation of Code of Conduct
  - Section 100. Violation of Code of Conduct
- Article 11. Provisions Relating to Adjudication of a Violation of the Code of Conduct
  - Section 110. Causation Defined
  - Section 111. Requirements for Violation of Code of Conduct Section 49 (Attempting Commission of a Crime)
  - Section 112. Requirements for Violation of Code of Conduct Section 50 (Acting with Another Toward Commission of a Crime (Complicity, Conspiracy, and Solicitation))
  - Section 113. Requirements for Violation of Code of Conduct Section 51 (Creating a Prohibited Risk)
  - Section 114. Consent Defense

Part II. Liability Assessment
- Article 20. Minimum Requirements for Liability
  - Section 200. Minimum Culpability Required
  - Section 201. De Minimis Violation
- Article 21. Doctrines of Imputation
  - Section 210. Divergence Between Result Intended or Risked and Actual Result
  - Section 211. Inculpatory Mistake
  - Section 212. Accountability for Conduct of Another
  - Section 213. Voluntary Intoxication
- Article 22. Excuses
  - Section 220. Disability Excuse: Involuntary Conduct
  - Section 221. Disability Excuse: Insanity
  - Section 222. Disability Excuse: Involuntary Intoxication
  - Section 223. Disability Excuse: Immaturity
  - Section 224. Disability Excuse: Duress
  - Section 225. Disability Excuse: Impaired Consciousness
  - Section 226. Mistake Excuse: Mistake of Law
  - Section 227. Mistake Excuse: Mistake as to Justification
  - Section 228. Rebuttable Presumptions
- Article 23. Nonexculpatory Defenses
  - Section 230. Timing of Assertion of Nonexculpatory Defense
  - Section 231. Waiver of Nonexculpatory Defense

PART I. VIOLATION OF CODE OF CONDUCT

ARTICLE 10. VIOLATION OF CODE OF CONDUCT

SECTION 100. VIOLATION OF CODE OF CONDUCT

A person violates the Code of Conduct, for the purposes of this Code of Adjudication, if the person violates a prohibition or duty in Part II of the Code of Conduct and does not have a justification for such violation under Part IV of that Code.

ARTICLE 11. PROVISIONS RELATING TO ADJUDICATION OF A VIOLATION OF THE CODE OF CONDUCT

SECTION 110. CAUSATION DEFINED

An actor is causally accountable for a result if:

(1) his or her conduct is an antecedent but for which the result in question would not have occurred; and

(2) the result is not:

(a) too remote or accidental in its manner of occurrence, or

(b) too dependent upon another's volitional act, to have a just bearing on the actor's liability or on the gravity of his or her violation.

SECTION 111. REQUIREMENTS FOR VIOLATION OF CODE OF CONDUCT SECTION 49 (ATTEMPTING COMMISSION OF A CRIME)

(1) An actor violates Code of Conduct Section 49 (Attempting Commission of a Crime) if he or she engages in conduct that constitutes a substantial step toward the commission of a violation which is strongly corroborative of the actor's culpability.

(2) The following are examples of what constitutes a substantial step:

(a) lying in wait, searching for, or following the contemplated victim of the violation;

(b) enticing or seeking to entice the contemplated victim of the violation to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the violation;

(d) unlawful entry of a structure, vehicle, or enclosure in which it is contemplated that the violation will be committed;

(e) possession of materials to be employed in the commission of the violation, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection, or fabrication of materials to be employed in the commission of the violation, at or near the place contemplated for its commission, where such possession, collec-

tion, or fabrication serves no lawful purpose under the circumstances; and

(g) soliciting an innocent agent to engage in conduct constituting a violation.

(3) *Liability for Attempt in Absence of Causation.* Where an actor would be liable for a violation of the Code of Conduct but does not cause or is not causally accountable for the prohibited result under Code of Adjudication Section 110 (Causation Defined), he or she is liable for an attempt in violation of Code of Conduct Section 49 (Attempting Commission of a Crime).

(4) *Complete and Voluntary Renunciation as a Defense to Attempt.* An actor may not be held liable for attempting a crime, in violation of Code of Conduct Section 49 (Attempting Commission of a Crime), if the actor completely and voluntarily renounces the attempt before completion of the criminal conduct. An actor's renunciation is not "complete and voluntary" if it is motivated in whole or in part by the actor's:

(a) decision to postpone the conduct until a more advantageous time,

(b) decision to transfer the criminal effort to another but similar objective or victim, or

(c) perception of circumstances that increase the probability of detection or apprehension.

SECTION 112. REQUIREMENTS FOR VIOLATION OF CODE OF CONDUCT SECTION 50 (ACTING WITH ANOTHER TOWARD COMMISSION OF A CRIME (COMPLICITY, CONSPIRACY, AND SOLICITATION))

(1) *Unconvictable Perpetrator No Defense to Complicity.* An actor may be held to have assisted in a violation, in violation of Code of Conduct Section 50 (Conspiracy), even if the person claimed to have committed the violation has not been prosecuted or convicted, has been convicted of a different violation or degree of violation, has an immunity to prosecution or conviction, or has been acquitted.

(2) *Termination as a Defense to Complicity.* An actor does not violate the prohibition against assisting a violation, contained in Code of Conduct Section 50 (Conspiracy) if the actor terminates his or her complicity prior to the completion of the criminal conduct, and:

(a) wholly deprives his or her complicity of its effectiveness in assisting the criminal conduct,

(b) gives timely warning to law enforcement authorities, or

(c) otherwise makes proper effort to prevent the commission of the violation.

(3) *Sufficiency of Unilateral Act for Conspiracy.* An actor may be held to have agreed with another to commit a violation, in violation of

Code of Conduct Section 50 (Conspiracy), even if the person with whom the actor agrees is not in reality agreeing to commission of the offense.

(4) *Overt Act Requirement for Conspiracy.* An actor does not violate the prohibition against agreeing with another to commit a violation, contained in Code of Conduct Section 50 (Conspiracy), unless one of them performs an overt act in pursuance of the conspiracy. This requirement does not apply if the object of the conspiracy has a base grade in Section 304 (Base Grade) of a first or second degree felony.

(5) *Complete and Voluntary Renunciation as a Defense to Conspiracy and Solicitation.* An actor may not be liable for agreeing with or soliciting another to commit a violation, in violation of Code of Conduct Section 50 (Conspiracy and Solicitation), if the actor prevents the crime under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose. A "complete and voluntary" renunciation has the meaning given in Section 111(4) (Requirements for Violation of Code of Conduct Section 49 (Attempting Commission of a Crime)).

SECTION 113. REQUIREMENTS FOR VIOLATION OF CODE OF CONDUCT SECTION 51 (CREATING A PROHIBITED RISK)

An actor violates Code of Conduct Section 51 (Creating a Prohibited Risk) if, given the nature, degree, and circumstances of the risk, its creation is a gross deviation from the standard of conduct of a law-abiding person.

SECTION 114. CONSENT DEFENSE

An actor does not violate the Code of Conduct if the victim consents and such consent:

(1) negates an element of the violation, or

(2) precludes occurrence of the harm sought to be prevented by the Code of Conduct provision defining the violation.

PART II. LIABILITY ASSESSMENT

ARTICLE 20. MINIMUM REQUIREMENTS FOR LIABILITY

SECTION 200. MINIMUM CULPABILITY REQUIRED

(1) An actor's violation of the Code of Conduct is not criminal unless the actor is at least reckless as to each element of the violation as described in the Code of Conduct, except that negligence is the minimum culpability required:

(a) for a violation of the prohibition against causing the death of another person under Code of Conduct Section 3 (Injury to a Person); and

(b) as to the age of the victim for a violation of Code of Con-

duct Section 14(b) or (c) (Criminal Sexual Contact).

(2) In addition to the culpability requirements of Subsection (1), to be liable for a violation of:

(a) Code of Conduct Section 49 (Attempting Commission of a Crime), the actor must have the purpose to engage in the conduct that would constitute the violation; and

(b) Code of Conduct Section 50 (Acting with Another Toward Commission of a Crime (Complicity, Conspiracy, and Solicitation)), the actor must have the purpose to facilitate the conduct constituting the violation.

(3) *Definitions.* "Purposely," "recklessly," and "negligently" are defined in Section 401 (Definitions).

SECTION 201. DE MINIMIS VIOLATION

An actor's violation of the Code of Conduct is not criminal if the actor's conduct is too trivial to warrant the condemnation of a criminal conviction.

ARTICLE 21. DOCTRINES OF IMPUTATION

SECTION 210. DIVERGENCE BETWEEN RESULT INTENDED OR RISKED AND ACTUAL RESULT

When causing a result is an element of an offense, and the actual result differs from the result intended or risked by the actor, the required culpability as to causing the result is established if the difference is only that:

(1) a different person or property is injured, or

(2) the injury intended or risked would have been more serious than the actual injury.

SECTION 211. INCULPATORY MISTAKE

Where an actor's ignorance or mistake negates the minimum culpability required by Section 200 (Minimum Culpability Required), the actor nonetheless is liable for the offense if he or she would be liable for a different offense had the situation been as he or she supposed.

SECTION 212. ACCOUNTABILITY FOR CONDUCT OF ANOTHER

(1) *Legal Accountability.* An actor is legally accountable for the conduct of another constituting an offense if, acting with the minimum culpability required for liability by Section 200 (Minimum Culpability Required):

(a) he or she causes an innocent or irresponsible person to engage in the conduct; or

(b) with knowledge that the other person is engaging in, or will engage in, the conduct constituting the offense, he or she:

(i) aids, advises, or encourages the person,

(ii) solicits the other person to engage in the conduct, or

(iii) has a legal duty to prevent the conduct and fails to make a reasonable effort to do so.

(2) *Exceptions to Accountability for Conduct of Another.* An actor is not accountable for another's conduct under Subsection (1) if his or her conduct is inevitably incident to the commission of the violation, as a victim or otherwise, and is not prohibited by the Code of Conduct.

SECTION 213. VOLUNTARY INTOXICATION

(1) Where an actor does not have the minimum culpability required for liability by Section 200 (Minimum Culpability Required) because the actor was voluntarily intoxicated, such lack of culpability is immaterial if he or she is unaware of a risk of which he or she would have been aware if sober.

(2) *Definitions.* For the purposes of this Section and Section 222 (Disability Excuse: Involuntary Intoxication):

(a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(b) "voluntarily intoxicated" means the actor's intoxication was self-induced and not pathological;

(c) "self-induced intoxication" means intoxication caused by substances, the tendency of which to cause intoxication the actor knows or reasonably ought to know, that the actor knowingly introduces into his or her body, unless he or she introduces them pursuant to medical advice; and

(d) "pathological intoxication" means intoxication, grossly excessive in degree given the amount of the intoxicant, to which the actor does not know, and cannot reasonably be expected to know, he or she is susceptible.

ARTICLE 22. EXCUSES

SECTION 220. DISABILITY EXCUSE: INVOLUNTARY CONDUCT

(1) An actor's violation of the Code of Conduct is excused if the actor's conduct constituting the violation is involuntary.

(2) *"Involuntary Conduct" Defined.* For the purposes of this Section, conduct is "involuntary" if it is:

(a) not the product of the effort or determination of the actor, or

(b) a reflex or convulsion.

(3) *Habitual Conduct Not Necessarily Involuntary.* The fact that con-

duct is habitual does not in itself make the conduct involuntary.

SECTION 221. DISABILITY EXCUSE: INSANITY

(1) An actor's violation of the Code of Conduct is excused if, at the time of the conduct constituting the violation, the actor:

(a) has a mental disease or defect, and

(b) by reason of such mental disease or defect, lacks substantial capacity to:

(i) appreciate the criminality or wrongfulness of his or her conduct, or

(ii) conform his or her conduct to the requirements of law.

(2) *"Mental Disease or Defect" Defined.* For the purposes of this Section and Section 235 (Incompetency), "mental disease or defect" is a physiologically confirmable abnormality of the mind, but does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

SECTION 222. DISABILITY EXCUSE: INVOLUNTARY INTOXICATION

(1) An actor's violation of the Code of Conduct is excused if, at the time of the conduct constituting the violation, the actor:

(a) is involuntarily intoxicated, and

(b) by reason of such involuntary intoxication, lacks substantial capacity to:

(i) appreciate the criminality or wrongfulness of his or her conduct, or

(ii) conform his or her conduct to the requirements of law.

(2) *"Involuntary Intoxication" and "Self-Induced Intoxication" Defined.* "Involuntary intoxication" means the actor's intoxication was not self-induced. "Self-induced intoxication" is defined in Section 213(2)(c) (Voluntary Intoxication).

SECTION 223. DISABILITY EXCUSE: IMMATURITY

(1) An actor's violation of the Code of Conduct is excused if, at the time of the conduct constituting the violation, the actor:

(a) is immature, and

(b) by reason of such immaturity, lacks substantial capacity to appreciate the criminality or wrongfulness of his or her conduct.

(2) *"Immaturity" Defined.* For the purposes of this Section, "immaturity" means a level of maturity typical of an individual less than sixteen years of age.

(3) *Presumed Excuse for Actors Under Eleven.* An actor of eleven years of age or less at the time of the conduct constituting the viola-

tion is presumed to satisfy the requirements of Subsection (1).

(4) *Presumed Immaturity of Actors Under Sixteen.* An actor more than eleven years of age but less than sixteen years of age at the time of the conduct constituting the violation is presumed to be immature as required by Subsection (1)(a).

SECTION 224. DISABILITY EXCUSE: DURESS

An actor's violation of the Code of Conduct is excused if, at the time of the conduct constituting the violation, the actor:

(1) was coerced to engage in the conduct by the use or threatened use of unlawful force against his or her person or the person of another, and

(2) a person of reasonable firmness in the actor's situation could not reasonably have been expected to have resisted such coercion.

SECTION 225. DISABILITY EXCUSE: IMPAIRED CONSCIOUSNESS

(1) An actor's violation of the Code of Conduct is excused if, at the time of the conduct constituting the violation, the actor:

(a) is in a state of impaired consciousness, and

(b) by reason of such impaired consciousness, lacks substantial capacity to:

(i) appreciate the criminality or wrongfulness of his or her conduct, or

(ii) conform his or her conduct to the requirements of law.

(2) *"State of Impaired Consciousness" Defined.* For the purposes of Subsection (1)(a), a "state of impaired consciousness" means a disturbance of consciousness resulting from a physiologically confirmable state or condition not specifically recognized or rejected as a basis for exculpation under any other Section in this Article.

(3) *Presumed Impaired Consciousness.* An actor who is unconscious, asleep, or under hypnosis is presumed to be in a state of impaired consciousness as required by Subsection (1)(a).

SECTION 226. MISTAKE EXCUSE: MISTAKE OF LAW

An actor's violation of the Code of Conduct is excused if, at the time of the conduct constituting the violation, the actor reasonably believes that the conduct does not constitute a violation because the actor:

(1) reasonably relies upon an official statement of law contained in a statute, judgment, or an administrative order or grant of permission, subsequently determined to be invalid or erroneous, or

(2) the actor diligently pursues all means available to ascertain the meaning and application of the Code of Conduct provision to his or her potential conduct and in good faith concludes that his or her

conduct would not be a violation, in circumstances in which a reasonable person would also so conclude.

(3) *"Reasonable Belief" Defined.* For the purposes of this Section, a "reasonable belief" is a non-negligent belief. "Negligently" is defined in Section 401(4) (Definitions).

SECTION 227. MISTAKE EXCUSE: MISTAKE AS TO JUSTIFICATION

(1) An actor's violation of the Code of Conduct is excused if, at the time of the conduct constituting the violation, the actor reasonably believes that the conduct constituting the violation is justified under Part IV of the Code of Conduct.

(2) *"Reasonable Belief" Defined.* "Reasonable belief" is defined in Section 226(3) (Mistake Excuse: Mistake of Law).

SECTION 228. REBUTTABLE PRESUMPTIONS

The presumptions afforded an actor in Section 223(3) and (4) (Disability Excuse: Immaturity) and Section 225(3) (Disability Excuse: Impaired Consciousness) may be rebutted by the prosecution by proof by a preponderance of the evidence that the actor is mature or not in a state of impaired consciousness, respectively.

ARTICLE 23. NONEXCULPATORY DEFENSES

SECTION 230. TIMING OF ASSERTION OF NONEXCULPATORY DEFENSE

Any defense contained in this Article must be raised by the defendant before trial. A failure to assert such a nonexculpatory defense before trial shall be deemed a waiver of that defense, but shall not preclude the defendant from raising any other appropriate defense.

SECTION 231. WAIVER OF NONEXCULPATORY DEFENSE

Where an actor would otherwise satisfy the requirements of a nonexculpatory defense in this Article, the actor may elect to waive the nonexculpatory defense in order to allow the trier of fact to reach a verdict other than "Not Punishable" as provided in Section 413 (Verdict Form: Not Punishable).

SECTION 232. DIPLOMATIC IMMUNITY

An actor may not be prosecuted for a violation of the Code of Conduct if he or she has been granted immunity from prosecution pursuant to the procedures of the Diplomatic Relations Act of 1978.

SECTION 233. PROSECUTION BARRED BY FORMER PROSECUTION

(1) An actor may not be prosecuted for a violation of the Code of Conduct if:

(a) he or she was previously prosecuted for a violation of the same provision of the Code of Conduct;

(b) the present violation is based on the same facts; and

(c) the previous prosecution:

(i) resulted in a conviction,

(ii) resulted in an acquittal,

(iii) was terminated after jeopardy attached, or

(iv) was terminated by a final order or judgment for the defendant, if the order or judgment necessarily required a determination inconsistent with a factual or legal proposition required for conviction of the violation.

(2) *Attachment of Jeopardy.* The point in time at which "jeopardy attached," as referred to in Subsection (1)(c)(iii), is defined by the applicable Rules of Criminal Procedure.

SECTION 234. GOVERNMENTAL IMMUNITY

An actor may not be tried for a violation of the Code of Conduct if he or she has judicial, legislative, or executive immunity from liability for such violation.

SECTION 235. INCOMPETENCY

(1) An actor may not be tried for a violation of the Code of Conduct if, as a result of a mental disease or defect, the actor lacks the capacity necessary to:

(a) understand the nature of the proceedings against him or her, or

(b) adequately assist counsel in the preparation of a defense.

(2) *"Mental Disease or Defect" Defined.* "Mental disease or defect" is defined in Section 221(2) (Disability Excuse: Insanity).

SECTION 236. PERIOD OF LIMITATION FOR COMMENCEMENT OF PROSECUTION

(1) An actor may not be tried for a violation of the Code of Conduct if:

(a) the violation is a misdemeanor or a petty misdemeanor and the court determines that the conduct constituting the violation occurred more than three years prior to the date of commencement of the prosecution, or

(b) the violation is a felony and the court determines that the conduct occurred more than seven years prior to the date of commencement of the prosecution, unless the conduct constitutes a violation of Code of Conduct Section 3 (Injury to a Person) that results in the death of another person.

(2) *Commencement of Prosecution.* For the purposes of this Section, "commencement of the prosecution" can be achieved by any of the following:

(a) return of an indictment,

(b) filing of an information, or

(c) issuance of a warrant or other process, provided that such warrant or process is executed without unreasonable delay.

SECTION 237. ENTRAPMENT

An actor may not be punished for a violation of the Code of Conduct if:

(1) the conduct constituting the violation is induced by a law enforcement officer,

(2) the actor was not predisposed to commit the violation, and

(3) the officer's conduct created a substantial risk that a reasonable person not predisposed to commit the violation would have been induced to do so.

ARTICLE 24. CAUSING THE CONDITIONS OF ONE'S OWN DEFENSE

SECTION 240. CAUSING THE CONDITIONS OF ONE'S OWN JUSTIFICATION OR EXCUSE DEFENSE

(1) When an actor causes the conditions that give rise to a justification under Part IV of the Code of Conduct or to an excuse under Article 22 of the Code of Adjudication, the actor gains the benefit of the defense despite his or her conduct in causing the defense conditions, but

(2) the actor may be held liable for the violation of the Code of Conduct based upon his or her conduct in causing the defense conditions if, at the time of causing those conditions, the actor has the culpability as to bringing about the violation that is required by Section 200 (Minimum Culpability Required).

(3) As provided by Section 310 (Adjustment for Greater Culpability), the grade of liability for causing the defense conditions under Subsection (2) increases if the actor was knowing or purposeful as to causing the violation.

(4) *Defense to Liability for Causing the Conditions of One's Own Defense.* An actor may have a justification or excuse defense to liability under Subsection (2) for his or her conduct in causing the defense conditions.

SECTION 241. CAUSING THE CONDITIONS OF ONE'S OWN NONEXCULPATORY DEFENSE

When an actor establishes a nonexculpatory defense under Article 23 and the actor caused the conditions of that defense, such defense is not available to the actor. This Section is not intended to supersede any international treaties.

PART III. GRADING

ARTICLE 30. BASE GRADE OF OFFENSE

SECTION 300. GRADE OF OFFENSE

The grade of an actor's offense shall be the base grade provided in Section 304 (Base Grade), as adjusted by the provisions of Article 31.

SECTION 301. GRADE LEVELS

This Code recognizes:

(1) Eight grades of felonies:

First degree felony	F1 (most serious offense)
Second degree felony	F2
Third degree felony	F3
Fourth degree felony	F4
Fifth degree felony	F5
Sixth degree felony	F6
Seventh degree felony	F7
Eighth degree felony	F8

(2) Five grades of misdemeanors:

First degree misdemeanor	M1
Second degree misdemeanor	M2
Third degree misdemeanor	M3
Fourth degree misdemeanor	M4
Fifth degree misdemeanor	M5

(3) One grade of petty misdemeanor:

Petty misdemeanor	PM (least serious offense)

SECTION 302. GRADE OF OFFENSE WHEN DIVERGENCE BETWEEN RESULT INTENDED OR RISKED AND ACTUAL RESULT

Where an actor satisfies the requirements of Section 210 (Divergence Between Result Intended or Risked and Actual Result) and the grade of the offense for the result intended or risked by the actor's conduct is lower than the grade of the offense actually committed, the grade of the actor's offense is the grade of the offense for the result intended or risked.

SECTION 303. GRADE OF OFFENSE IF INCULPATORY MISTAKE

Where an actor satisfies the requirements of Section 211 (Inculpatory Mistake) and the grade of the offense under his or her mistaken belief is lower than the grade of the offense actually committed, the grade of the actor's offense is the grade of the offense under his or her mistaken belief.

SECTION 304. BASE GRADE

An offense has the base grade indicated below. Unless otherwise provided, the grade given assumes a reckless violation.

CODE OF CONDUCT SECTION VIOLATED:	ADDITIONAL GRADING CATEGORIES:	BASE GRADE:
3. Injury to a Person	(a) Death (negligently)	F4
	(b) Death (recklessly)	F3
	(c) Serious or permanent bodily injury	F5
	(d) Bodily injury	M1
6. Assisting Another's Suicide	Neither (a) nor (b)	F3
	(a) Terminal illness (but assistance not voluntarily requested)	F5
	(b) Assistance voluntarily requested (but no terminal illness)	F5
7. Criminal Harassment		M3
8. Violation of Privacy		M4
9. Criminal Threat of Committing a Crime	(a) Threatens a felony	F6
	(b) Threatens a misdemeanor	M2
10. Criminal Threat of Exposure		M2
11. Criminal Threat of Official Action		M2
12. Criminal Restraint		F5
13. Welfare of Child		M1
14. Criminal Sexual Contact	(a) Sexual intercourse with a person under eleven years of age	F3
	(b) Sexual contact with a person under eleven years of age	F5
	(c) Sexual intercourse without consent	F5
	(d) Sexual contact without consent	M1
	(e) Sexual intercourse with a person under sixteen years of age if the actor is four or more years older than the victim	F7
	(f) Sexual contact with a person under sixteen years of age if the actor is four or more years older than the victim	M2
	(g) Sexual intercourse with a person in the actor's custodial or mental health care	F7
	(h) Sexual contact with a person in the actor's custodial or mental health care	M2
17. Indecent Exposure		M4
19. Abortion		F6
20. Bigamy		M5
21. Interference with Custody		M2
22. Duty to Provide Support		M4
23. Incest		F7

CODE OF CONDUCT SECTION VIOLATED:	ADDITIONAL GRADING CATEGORIES:	BASE GRADE:
24. Damage to or Theft of Property	(a) Value of property damaged or stolen exceeds $100,000	F3
	(b) Value of property greater than $10,000 and less than or equal to $100,000	F6
	(c) Value of property greater than $1,000 and less than or equal to $10,000	F8
	(d) Value of property greater than $500 and less than or equal to $1,000	M3
	(e) Value of property greater than $100 and less than or equal to $500	M5
	(f) Value of property less than or equal to $100	PM
25. Criminal Trespass	(a) Dwelling or occupied structure	M1
	(b) Land	PM
26. Duty to Prevent Catastrophe		M3
27. Failure to Return Lost or Mistakenly Delivered Property		M5
28. Forgery, Bad Checks, and Fraudulent Practices		M2
29. Destruction or Damage of Certain Objects	(a) Irreparable damage, destruction, or defacement	M4
	(b) Other	M5
30. Disorderly Conduct		PM
31. Indecent Behavior		PM
32. Creating a Public Alarm or Panic		M3
33. Obstructing a Public Passage		PM
34. Prostitution		M4
36. Obscenity		M4
37. Criminal Possession	(a) Weapon	M2
	(b) Controlled substance	—*
	(c) Drug paraphernalia	M5
	(d) Stolen property Base grade of offense according to scale used in Section 24 (Damage to or Theft of Property)	
38. Cruelty to Animals		M4
39. Abuse of Corpse		M4
40. Obstruction of Law		M3
41. Avoiding Lawful Detention		M3
42. Failure to Appear		M5
43. Abuse of Non-Public Information by Public Official		M2

CODE OF CONDUCT SECTION VIOLATED:	ADDITIONAL GRADING CATEGORIES:	BASE GRADE:
44. Providing False Information	(a) If under oath	F8
	(b) If not under oath	M1
45. Bribery and Criminal Compensation		F6
46. Governmental Oppression		F8
47. Tampering with Records		M3
48. Impersonating a Public Official		M4
49. Attempting Commission of a Crime	Two grades less than the grade for the completed offense	
50. Acting with Another Toward Commission of a Crime (Complicity, Conspiracy, and Solicitation)	Grade adjusted as provided in Section 311 (Adjustment According to Extent of Participation in Assisting an Offense by Another)	
51. Creating a Prohibited Risk	One grade less than the grade for the offense if the harm risked had resulted	

* We follow the Model Penal Code's lead in not taking a position on the precise substances that are to be controlled or on the appropriate grading for various drug-related crimes.

ARTICLE 31. ADJUSTMENTS TO BASE GRADE

SECTION 310. ADJUSTMENT FOR GREATER CULPABILITY

(1) The grade of an offense increases:

(a) two grades if the actor is purposeful as to the core elements, and

(b) one grade if the actor is knowing as to the core elements.

(2) *Definitions.* For the purposes of this Section:

(a) The "core elements" are those facts that establish the violation in the Code of Conduct and its grade in Section 304 (Base Grade).

(b) "Purposely," "knowingly," "recklessly," and "negligently" are defined in Section 401 (Definitions).

SECTION 311. ADJUSTMENT ACCORDING TO EXTENT OF PARTICIPATION IN ASSISTING AN OFFENSE BY ANOTHER

Where the actor assists another to commit an offense, in violation of Code of Conduct Section 50 (Acting with Another Toward Commission of a Crime (Complicity)), the grade of the actor's offense:

(1) increases two grades if the actor is an organizer,

(2) increases one grade if the actor is a manager,

(3) is unaffected if the actor is a participant,

(4) decreases one grade if the actor is a supporter.

(5) *Definitions.* For the purposes of this Section:

(a) The actor is an "organizer" if he or she directed, supervised, or managed one or more persons who satisfy manager criteria;

(b) The actor is a "manager" if he or she shared management responsibilities on an equal basis with one or more actors in any one of the following:

(i) the selection of the criminal objective,

(ii) the identification of resources necessary to achieve the criminal objective, or

(iii) the planning, financing, or scheduling of the activities necessary to achieve the criminal objective;

(c) The actor is a "participant" if he or she was involved in any way in the design or implementation of the conduct constituting the offense; and

(d) The actor is a "supporter" if he or she was a minor participant in a criminal scheme and was to be compensated by a fixed amount rather than a percentage of the profits of the criminal objective.

SECTION 312. ADJUSTMENT FOR INEFFECTIVE RENUNCIATION OF ATTEMPT, CONSPIRACY, OR SOLICITATION

(1) The grade of the actor's offense decreases one grade if the actor completely and voluntarily renounces his or her attempt, conspiracy, or solicitation but is unable to prevent commission of the offense.

(2) *"Complete and Voluntary" Defined.* A "complete and voluntary" renunciation has the meaning given in Section 111(4) (Requirements for Violation of Code of Conduct Section 49).

SECTION 313. ADJUSTMENT FOR PARTIAL DISABILITY

The grade of the actor's offense decreases one grade if, at the time of the conduct constituting the offense, the actor suffers a substantial impairment of cognitive or control function, as defined in a provision in Article 22, but to a degree insufficient to merit a complete excuse.

SECTION 314. ADJUSTMENT FOR SELECTION OF VICTIM

(1) The grade of the actor's offense increases one grade if the actor selects the victim of the offense because the victim is:

(a) younger than sixteen years of age;

(b) older than sixty-five years of age;

(c) suffering from a physical or mental disability; or

(d) of a particular race, religion, ancestry, gender, sexual orientation, or national origin, and by choosing the victim the

actor hopes to intimidate or humiliate the other members of the group of which the victim is a member.

(2) The grade increase provided by this Section does not apply if the characteristic defined in Subsection (1) is an element of the violation.

PART IV. GENERAL PROVISIONS

ARTICLE 40. MISCELLANEOUS

SECTION 400. PRINCIPLES OF CONSTRUCTION

(1) Each term in the Code of Conduct and the Code of Adjudication shall be interpreted according to a definition provided for the term or, if none is provided, shall be given its common and plain meaning.

(2) Any remaining ambiguities shall be resolved to best further the Code's goal of imposing liability according to the degree of an actor's blameworthiness, including the degree of the actor's culpability and the extent of any harm that results from the actor's conduct.

SECTION 401. DEFINITIONS

For the purposes of this Code of Adjudication:

(1) A person acts "purposely" with respect to an element of a violation when:

(a) if the element involves the nature of his or her conduct or a result thereof, it is his or her conscious object to engage in conduct of that nature or to cause such a result, and

(b) if the element involves the attendant circumstances of the conduct, he or she is aware of the existence of such circumstances or he or she believes or hopes that they exist.

(2) A person acts "knowingly" with respect to an element of a violation when:

(a) if the element involves the nature of his or her conduct or the attendant circumstances, he or she is aware that his or her conduct is of that nature or that such circumstances exist, and

(b) if the element involves a result of his or her conduct, he or she is aware that it is practically certain that his or her conduct will cause such a result.

(3) A person acts "recklessly" with respect to an element of a violation when he or she consciously disregards a risk that the element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the purpose of the actor's conduct and the circumstances known to him or her, the actor's failure to perceive it involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(4) A person acts "negligently" with respect to an element of a violation when he or she should be aware of a risk that the element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the purpose of the actor's conduct and the circumstances known to him or her, the actor's failure to perceive it involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(5) *"Element of an Offense" Defined.* An "element of an offense" means such:

(a) conduct,

(b) attendant circumstances, or

(c) a result of conduct, as is contained in the definition of a violation.

(6) *"Conduct" Defined.* "Conduct" means a physical act or omission.

(7) *"Circumstance" Defined.* "Circumstance" means a characteristic of the conduct or a condition or environment under which the conduct occurs.

(8) *"Result" Defined.* "Result" means a circumstance changed by the conduct of the actor.

(9) *Other Definitions.* The following terms are defined in the following sections:

(a) In the Code of Conduct:

"Consent" in Section 5,
"Deadly force" in Section 53,
"Family member" in Section 23,
"Intimate parts" in Section 16,
"Property" in Section 24,
"Public place" in Section 18,
"Sexual act" in Section 35,
"Sexual contact" in Section 15, and
"Unlawful force" in Section 54.

(b) In this Code of Adjudication:

"Causation" in Section 110,
"Complete and voluntary" renunciation in Section 111(4),
"Immaturity" in Section 223(2),
"Included offense" in Section 402(2),
"Intoxication" in Section 213(2)(a),
"Involuntary conduct" in Section 220(2),
"Involuntary intoxication" in Section 222(2),
"Manager" in Section 311(5)(b),
"Mental disease or defect" in Section 221(2),
"Organizer" in Section 311(5)(a),

"Participant" in Section 311(5)(c),
"Pathological intoxication" in Section 213(2)(d),
"Reasonable belief" in Section 226(3),
"Self-induced intoxication" in Section 213(2)(c),
"State of impaired consciousness" in Section 225(2),
"Substantial step" in Section 111(2),
"Supporter" in Section 311(5)(d), and
"Voluntarily intoxicated" in Section 213(2)(b).

SECTION 402. LIMITATIONS ON CONVICTIONS FOR MULTIPLE OFFENSES

(1) When the same conduct of an actor satisfies the elements of more than one offense, the actor may be held liable for each offense, unless:

(a) one offense is included in another as defined in Subsection (2) of this Section, or

(b) inconsistent findings of fact are required to satisfy the elements of the offenses.

(2) *"Included Offense" Defined.* For the purposes of this Section, an offense is "included" in another if it consists of attempting, conspiring, or soliciting the other.

ARTICLE 41. VERDICT FORMS

SECTION 410. VERDICT FORM: NO VIOLATION OF PROHIBITIONS OR DUTIES

If the trier of fact finds no violation of the prohibitions or duties described in Parts II and III of the Code of Conduct, then the verdict shall be "No Violation."

SECTION 411. VERDICT FORM: JUSTIFIED VIOLATION OF PROHIBITION OR DUTY

If the trier of fact finds that the actor's conduct constitutes a violation of a prohibition or duty under Parts II or III of the Code of Conduct, but finds that the violation is justified under Part IV of the Code of Conduct, then the verdict shall be "Justified Violation."

SECTION 412. VERDICT FORM: BLAMELESS VIOLATION

If the trier of fact finds that the actor's conduct constitutes an unjustified violation of the Code of Conduct, but:

(1) the minimum requirements for liability contained in Code of Adjudication Article 20 have not been satisfied, or

(2) the actor's conduct is excused under Code of Adjudication Article 22, then the verdict shall be "Not Guilty by Reason of Blameless Violation."

SECTION 413. VERDICT FORM: NOT PUNISHABLE

If the trier of fact finds that the actor is not subject to prosecu-

tion, triable, or punishable because of a provision in Code of Adjudication Article 23, then the verdict shall be "Not Punishable."

SECTION 414. VERDICT FORM: GUILTY

If the trier of fact finds that the actor violated the Code of Conduct without justification, satisfies the minimum requirements of liability under Code of Adjudication Article 20, and has no defense under Code of Adjudication Articles 22 or 23, then the verdict shall be "Guilty." The verdict shall indicate the grade of the offense as provided by Part III of the Code of Adjudication.