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Structuring Criminal Codes to Perform Their Function

Paul H. Robinson*

Almost exactly three years ago, I stood here giving a paper for a conference on federal criminal code reform sponsored by the Center. My goal was to provide a “top ten” list of needed reforms.¹ My approach was to suggest five lessons that the federal criminal code could learn from the Model Penal Code and five lessons that both codes could learn.² It seemed useful at the time, but now it leaves me as having already said—in this very location—most of what I wanted to say about what is good and bad about the Model Penal Code. But there was one of those items, the tenth, that I could only mention in barest outline. So I’m pleased to have the opportunity today to lay out in greater detail what I could not say back then about the item at the top of my “top ten” list.

How should a criminal code be structured to best perform its functions? A criminal code of today must perform two very different functions:

(1) It must perform the *ex ante* function of announcing the rules of conduct that are to govern the conduct of all persons within the code’s jurisdiction; and

(2) it must perform the *ex post* function of establishing

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1. See Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 *Buff. Crim. L. Rev.* 225 (1997).

2. Part I. Characteristics of a “Modern Code”: Lessons From the MPC: 1. Create a Comprehensive General Part; 2. Provide an Analytic Structure; 3. Define Offenses Fully, Using Defined Terms; 4. Create a System for the Interpretation of Code Provisions; 5. Adopt a System of Offenses.

Part II. Reforming the Model Penal Code: 6. Drafting Problems: Fix the Revealed Drafting Errors of the M.P.C. (Examples: a. Failure to define the distinction among conduct, circumstance, and result elements; b. Confusion in the definition of causation requirements); 7. The Disparity Problem: Use More Offense Grading Categories; 8. The Rationality Problem: Define a Distributive Principle; 9. The Utility of Desert: Avoid Conflicts with the Community’s Perceptions of Desert; 10. A Functional Form: Segregate the Rules of Conduct and the Principles of Adjudication into Distinct Codes.

for the participants in the criminal justice process the principles by which violations of the rules of conduct are to be adjudicated.

These two functions often are in tension with one another. Each calls for a different kind of code, addressed to a different audience, with different objectives:

(1) To be effective *ex ante*, the rules of conduct must be formulated in a way that they will be understood and remembered, and which will make them capable of being applied in daily life by lay persons with a wide range of abilities and from a wide variety of backgrounds. Effectiveness in announcing the rules of conduct requires simple, clear, and preferably objective rules.

(2) In contrast, the goal of the principles of adjudication—to assess *ex post* the degree of liability and punishment, if any, due for a violation of the rules of conduct—often requires nuanced, subjective treatment, sometimes at least as nuanced, subjective, and complex as our notions of justice (or as complex judgments, the demands of whatever punishment theory is relied upon).

One might be disheartened by this conflict between the needs of a code's two functions, for it suggests a criminal code condemned to a permanent state of compromise and dysfunction. To serve one interest, the code must undermine the other. All that a drafter can do is to attempt to strike a balance between the competing dysfunctions.

But it turns out that no such compromise or balancing is necessary, because, in fact, the doctrines that serve the rules-of-conduct function are distinct from those that serve the adjudication function. Thus, both functions can be maximized by simply identifying and segregating the doctrines that serve each, then drafting the doctrines in a way that maximizes their respective functions.

TWO CODES

What does this segregation of doctrines look like? What doctrines make up the criminal law's rules of

conduct? That is, what aspects of the criminal law are essential for a citizen to know if he or she is to know what the law commands? What doctrines are not necessary to know the law's commands and serve only to tell adjudicators whether and how much liability and punishment ought to be imposed for a violation of the rules of conduct?

As you will see, answering these questions—making the rules-of-conduct/adjudication distinction—requires us to pull apart most of our current doctrines. Some aspects of offense definitions serve one function, while other aspects of offense definitions serve the other. Some aspects of defenses serve one function, while other aspects serve the other. This intertwining of the two functions only illustrates just how oblivious current law is to the distinction between rules of conduct and principles of adjudication.

I have published a full working out of this segregation of criminal law doctrines. Those who are interested can find it in Part III of my book, *Structure and Function in Criminal Law*.³ Let me sketch a few of the basic points.

RULES OF CONDUCT

Focusing first on announcing the rules of conduct, what doctrines are necessary to describe to citizens the conduct that the criminal law forbids, the conduct it requires, and the conduct that it permits because of special circumstances that otherwise would be forbidden?

Looking first at offense definitions, the definition of forbidden conduct generally is found in the objective conduct and circumstance elements of a code's offense definitions. The culpability requirements of offense definitions typically serve the adjudication function—telling us whether performance of the forbidden conduct on this occasion ought to be punished and, if so, to what

3. Paul H. Robinson, *Structure and Function in Criminal Law* (1997) [hereinafter Robinson, *Structure and Function*]. In an earlier form, see Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 Nw. U. L. Rev. 857 (1994).

degree. (An important exception to this is the special kind of intention requirement contained in inchoate offenses.)

In serving the adjudication function, the culpability requirements are supplemented by the excuse defenses, such as insanity, immaturity, involuntary intoxication, and mistake as to a justification. The objective result elements of offense definitions also serve the adjudication function, by establishing the grade of an offense, with greater punishment imposed where a forbidden result actually comes about than where it does not. (Not everyone agrees that this should be the rule, of course, but it is clearly the majority rule in the United States.)

To illustrate these distinctions, the rules of conduct forbid engaging in conduct that risks injuring another, that is, conduct under certain circumstances (those that would create a risk to another person). If a person engages in such conduct despite the prohibition, the principles of adjudication may hold the person liable if the conduct is performed with a culpable state of mind. And culpable conduct may be punished even more severely if the harm it risked actually occurs.

The rules of conduct specify not only what conduct is prohibited but also what is required. This aspect of the rules of conduct is found in the objective requirements of the law's duties to act. The principles for adjudicating violations of these duties are contained, again, in the culpability requirements for these duties and supplemented by the excuse defenses. They also include the special capacity requirement attached to omission liability.

To illustrate, the rule of conduct requires parents to care for children. If parents fail in this duty, the principles of adjudication examine whether their failure was purposeful, knowing, reckless, or negligent, whether the parents were capable of performing their duty, and whether their failure nonetheless might be excused.

Finally, the rules of conduct, to be complete, must tell citizens when they are permitted to engage in conduct that otherwise is prohibited. This aspect of the rules of conduct

is found in the objective requirements of justification defenses. For example, the rules of conduct generally prohibit engaging in conduct that risks harm to another, yet the rules allow such conduct if it is necessary to defend against an unjustified attack.

To summarize, the rules of conduct sought to be announced *ex ante* to the community are contained, for the most part, in the conduct and circumstance elements of offense definitions, the law's positive duties to act, and the (objective aspects of) justification defenses.

The principles of adjudication—telling participants in the criminal justice process how to judge a violation of the rules of conduct—are similarly dispersed throughout a criminal code's provisions. They are found in the objective result elements of offense definitions, most of the culpability requirements of offense definitions and duty provisions, and the excuse defenses.

The table at page six summarizes the discussion.⁴

MIXING RULES OF CONDUCT WITH PRINCIPLES OF ADJUDICATION

This intertwining of rules of conduct and principles of adjudication within a single doctrine creates at least four distinct kinds of problems.

First, the overlay of principles of adjudication essentially hides the rules of conduct. Those rules need to be made readily available to the general public in a form that is easy to understand and apply, not buried under a mountain of complex adjudication provisions. If one pulled the rules of conduct from under the adjudication provisions, the total of all the rules would run only eight to ten pages,⁵ rather than the hundreds of pages of most criminal codes.

Consider the complexities of a code's homicide and assault provisions, which typically go on for many pages.

4. Robinson, *Structure and Function*, *supra* note 3, at 139.

5. See, e.g., *id.* app. at 211 (the eight-page code of conduct).

Rule Articulation Function	Liability Function	Grading Function
Violation Doctrines	Culpability Doctrines	
<i>Primary Violations:</i>	Base culpability requirements: primarily present circumstance culpability	Result elements of offence definitions
Conduct and circumstance elements of offence definitions		Causation requirements
Legal duty requirements for omission liability; possession of contraband prohibited in possession offences	Offence modification defences relating to criminalization mental elements, such as possession of contraband, where the defendant is not liable for the offence.	Aggravation culpability requirements: typically limited to future result culpability and future conduct intention
Offence modification defences relating to conduct or circumstance offence elements, such as consent	Doctrines imputing culpability requirements, such as doctrines of voluntary intoxication and substituted mental elements	Doctrines imputing aggravated culpability, such as felony murder
<i>Secondary Violations:</i>	De minimis defence, setting minimum harm or evil requirements	Miscellaneous offence mitigations and aggravations
Conduct toward a violation, such as attempt	Excuse Doctrines	
Assisting another in a violation	Voluntariness requirement, in commission offences	
Criminalization mental elements	Physical capacity requirement, in omission offences	
Justification Doctrines	Requirement of knowledge of possession for a sufficient time to terminate the same, in possession	
Justification defences	Excuse defences	
Traditionally thought of as:		
□ = actus reus	□ = mens rea	■ = defences

Ninety-five percent of those provisions are principles of adjudication—defining minimum requirements for liability, as well as making grading distinctions of aggravation and mitigation. The rule of conduct is simple: Do not engage in conduct that risks injury to another.

Presumably most people know of this legal prohibition without having to rely upon the criminal code, but not every prohibition and legal duty is so well known. Does the criminal law prohibit lying to a traffic cop? Does it require a person to return a lost wallet? Does it permit a person to shoot a trespasser in one's garage? Frankly, I think we have given up on expecting a criminal code to educate the public. But this need not be so. A properly constructed code could teach the criminal law's commands. Especially in a system like ours, which generally rejects an excuse for even a reasonable mistake of law, such public education is a goal we have a moral obligation to pursue.

A second problem with mixing rules of conduct and principles of adjudication is the conflicting drafting approaches the two need: The rules of conduct do best when they are simple. In order for the principles of adjudication to do their job, they often must be complex. The failure to appreciate this conflict between the two can lead to improper drafting of one or the other.

Consider, for example, the complex rules of the self-defense in Model Penal Code section 3.04. It is nothing but silly to think that a citizen really could know, let alone remember and apply, such rules. I have studied them for twenty years and, if I were attacked tonight, I doubt I could apply them, no matter how careful I tried to be.

A code of conduct might be able to establish a few basic ground rules, such as: One can defend only against an unjustified attack. One can use only that force necessary for defense. One can use deadly force only to prevent serious bodily injury or worse. More detailed rules might be of value as non-binding guidelines for adjudicators, which might help increase uniformity in the disposition of similar cases, but to provide pages of detailed rules, as many American codes do, is only to insure that even the

most law-abiding citizen will get no guidance from the code.

A third problem with failing to distinguish between rules of conduct and principles of adjudication is the errors in substantive formulation that it induces. Let me illustrate with the formulation of justification defenses. The most common American formulation is the subjective formulation: A person is justified if he "believes" his conduct meets the statute's objective criteria for justification.

But giving a justification defense when a person "believes" he is justified subsumes the objective rule of conduct within the principle-of-adjudication excuse for a mistaken justification. The objective justification requirements define how and when we want people to act in the future; the mistaken-"belief"-in-justification defense excuses a person who has violated the rule of conduct because the person lacks culpability. By formulating justification defenses subjectively, as "belief," the code fails to provide a clear rule of conduct. The code tells what kinds of mistakes will be excused, but how are people to know the rule of conduct?

Beyond this failure of the code to announce clearly the rule of conduct, such subjective formulation also distorts the substantive rules themselves. For example, we want to allow people to resist the attacker who only mistakenly believes he is justified, but we do not want to allow people to resist the attacker who is actually, objectively justified. How can we make this needed distinction in setting out the rule of conduct if the code defines "justified" in subjective terms? That terminology makes it difficult, if not a practical impossibility, to state accurately the rule of conduct. To allow defense against an "unjustified" attack, what one would think was the most natural definition, gives too narrow a defense, for the actor who only mistakenly "believes" he satisfies the rules of conduct is "justified" under the Model Penal Code, and therefore lawfully could not be resisted.

The problem can be solved—the Model Penal Code tries to solve part of it in what is probably its most

convoluted and unworkable provision, in section 3.11(1)'s incomprehensible definition of "unlawful force"⁶—but why create such a problem in the first place? Define justifications objectively, as their rule-of-conduct function would suggest. That allows a simple rule of conduct: One can resist only "unjustified" aggression.

Further, the Model Penal Code does not even attempt to fix the other part of the problem it has created. Its subjective approach improperly allows lawful resistance to the unknowingly justified aggressor. Because the unknowingly justified actor does not "believe" he is justified, his conduct is necessarily "unjustified" (and "unlawful" under 3.11(1)) and therefore can lawfully be resisted. But clearly we do not want the terrorist to have a right to stop the thief whose theft of a backpack containing the terrorist's bomb would save the beach goers threatened by it.⁷

Structure and Function gives a series of examples of substantive law errors induced by failing to distinguish rules of conduct and principles of adjudication.

A final problem with mixing the two kinds of doctrines in a single code is that it makes impossible an effective verdict system. Every acquittal under the current mixed system presents a dangerously ambiguous message. Consider, for example, the Rodney King case in which a video tape showed police officers using what seemed clearly to be excessive force in arresting an African-American motorist. Their acquittal of all charges in state court might

6. Section 3.11(1) defines "unlawful force" as:

[F]orce, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or would constitute such an offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use force. Assent constitutes consent, within the meaning of this Section, whether or not it is otherwise legally effective, except assent to the infliction of death or serious bodily harm.

Model Penal code § 3.11(1) (Proposed Official Draft 1962).

7. See, e.g., Paul H. Robinson, *The Bomb Thief and the Theory of Justification*, 8 *Crim. L.F.* 387-409 (1997).

be interpreted to mean that what the officers did was not a violation of the rules of conduct. It might be taken as announcing a rule that other officers in the same situation in the future would similarly be justified in using the force these officers used. If people gave the verdicts that interpretation, the acquittals could be disturbing. For many African-Americans in Los Angeles, such a message was something to be angry about and to riot over.

On the other hand, one could interpret the acquittal differently, as providing an excuse, upon the officer's mistaken belief in justification, for conduct that was admittedly a violation of the rules of conduct. In other words, the acquittal might have been intended to convey the message that what was done was wrong, and that other officers in a similar situation in the future ought not use the force that was used here, but that these officers were not going to be held criminally liable for their error because of the special circumstances of their violation—presumably their claims relating to lack of adequate training, ambiguity in existing police department policies, a mistaken belief that the arrestee was more dangerous than he really was, and the confusion and heat of the preceding car chase.

Notice that these two possible interpretations of the acquittals say exactly opposite things about the rule of conduct for future cases. Instead of educating and reinforcing people's understanding of the criminal law's commands, verdicts under the present mixed system create ambiguity and confusion, even undermining previously unambiguous rules of conduct.

A system that distinguishes rules of conduct from principles of adjudication is equipped to provide unambiguous verdicts. A system that distinguishes between rule-of-conduct doctrines and principles-of-adjudication doctrines, like the mistaken justification excuse in the Rodney King case, can help rather than hurt people's understanding of the rules. Here is how it would work: If no rule of conduct is violated, a "No Violation" verdict would be returned. If a rule of conduct is violated,

but the actor is to be excused, an “Excused Violation” verdict would be used, which reinforces the rule against the conduct, rather than undercutting it. But such a system is not possible without an analogous alteration of the underlying code.

To summarize, a system of two codes—a code of conduct and a code of adjudication—could better announce the rules of conduct, could allow each code to be drafted in a way most effective for its purpose, could avoid the substantive errors that combined codes tend to make, and would support a verdict system that distinguishes “no violations” from “excused violations,” an important distinction to make because the two verdicts say opposite things about whether the conduct in this case violates the rules of conduct and would be permitted by others in the same situation in the future.

I do not advocate keeping the code of adjudication from the open view of the public. Such attempts at “acoustic separation” have in the past come back to haunt the criminal justice system by undermining its credibility when a hidden practice is ultimately discovered, as it always will be in our free society. I do advocate special efforts to educate citizens about what the criminal law commands of them, a task that becomes feasible with a short and clear statement of the law’s commands in a separate code of conduct.