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A Vice of Its Virtues: The Perils of Precision in Criminal Codification, as Illustrated by Retreat, General Justification, and Dangerous Utterances

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A VICE OF ITS VIRTUES: THE PERILS OF PRECISION IN CRIMINAL CODIFICATION, AS ILLUSTRATED BY RETREAT, GENERAL JUSTIFICATION, AND DANGEROUS UTTERANCES

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I. INTRODUCTION

My subject, the problem of precision in criminal codes, is hardly novel. Greater precision has been a major aim of systematic codification, which can specify what behavior is criminal in a way that is more rational, coordinated, and exact than would be possible if liability were determined by occasional statutory enactment, by common-law development, or by a combination of occasional statutes and judicial development. Under this last approach, which was typical in the United States prior to the Model Penal Code, statutes loosely set out the list of offenses and their penalties; critical elements of offenses and many defenses of justification and excuse were left to judicial interpretation.

For a jurisdiction to move from the haphazard catalogue of crimes and penalties that results from occasional statutes to a more systematic legislative treatment involves considerable gain and very little loss. But the trade-off in moving to codification of matters previously left to judicial interpretation is more even. Any careful specification of the elements of offenses and defenses risks insensitivity to relevant factors and risks rigidity. First, the drafters may simply fail to see important problems that they would have dealt with had they been aware of them. Second, the need for relatively concise language imposes constraint. Unless a formulation is to be wholly open-ended, cast in terms of reasonableness or something similar, only a limited number of factors can be taken into account. At some point, the drafters must say: "Yes, ideally this particular case should come out differently but we cannot try to cover that and all similar cases and maintain clear and relatively simple language." Third, according to

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the traditional view in common-law countries,[1] a resolution accomplished by statutory formulation can be altered only by fresh legislative action. Since legislatures cannot consistently attend to minor defects in criminal codes, change may be more difficult than if a subject were left to the evaluation of judicial interpretation. Worries of these sorts underlay some opposition to the entire codification effort. More frequently among serious students of the criminal law, who understood the sorry state of penal law in this country, these worries led to opposition to codifying particular aspects of the criminal law, such as principles of "causation" and the general justification or "necessity" defense.[2] The Reporters of the Model Penal Code and the American Law Institute, though providing important elements of flexibility in some rather open-ended formulations, chose the path of comprehensive codification.

My paper is about a few areas in which the language of the Model Code points in the direction of results that I believe are not sound; I try to illustrate with examples some of the perils of precision. Before embarking on that task, I offer some cautionary comments and a few words about why the effort seems worth doing.

The raw material for this essay is built on my overall review of the updated Comments to the Model Code[3] and on independent research and thought in areas of particular interest to me. Since I have not undertaken, with respect to the Model Code, the criminal law of any actual jurisdiction, or the scholarly literature, a wide assessment focussed on the problem of precision, my remarks here do not reflect a comprehensive appraisal.

I want to stress at the outset my belief that whatever risks inhere in careful statutory specification, they do not cast doubt on the wisdom of systematic codification. Whether a few particular subjects should be codified is reasonably arguable, but the benefits of codification overall

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1. *See generally* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

2. On causation, see 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 142-47 (1970). On the general justification defense, see FINAL REPORT OF THE NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS — PROPOSED FEDERAL CRIMINAL CODE § 601 Comment at 262 (1968).

3. My own involvement in the updating of the Commentaries commenced a decade and a half after the Code itself had been approved by the American Law Institute. Except for the most minor editorial changes, *e.g.*, from "which" to "that," from "bodily harm" to "bodily injury," my colleagues and I had neither responsibility nor authority to propose alterations in the Code itself; and we quickly decided that for provisions as to which there was already fairly full commentary (which had already profoundly affected understanding of American criminal law) we should largely maintain that commentary, adding mainly clarificatory examples and cites to more recent authority. For the sections that loom most prominently in this essay, such full commentary was present when the Code itself was approved by the Institute.

clearly outweigh any disadvantages.

It is not even plain that the risk of oversight and the drawbacks of compact language and rigidity that a code necessarily involves are more severe than analogous problems in actual common-law interpretation. Common-law judges are not all wise, and common-law interpretations are not infinitely sensitive to varieties in the human condition. Judicial interpretation has its own need for straightforward standards, and the common law has often been riddled with rigidities. In the realm of criminal law, where fair notice is so central, judges are hesitant to make shifts in standards that expand liability, even when the existing standards derive only from judicial opinions. Thus, it would be mistaken to suppose that total or selective abandonment of codification would eliminate the problems I consider.

I concentrate on the Model Code because of my familiarity with it, because it is the subject of this symposium, and because it is the product of such thorough work. Having engaged some of the greatest legal minds of the era as original Reporters and Members of the Council over a decade of intensive scrutiny up to 1962, the Model Code is no slipshod product of mediocre talent. We can be sure that problems of the sort I discuss will not be less serious in other systematic codes. No doubt, the particular illustrations will differ, but the problems are inherent in the enterprise.

If the problems are inherent and are not a reason to abandon codification generally, what then is the point of discussing them? Each of the areas I discuss presents discrete questions about drafting, and for some areas the issue whether the particular subject matter should be codified is serious. Though far from conclusive, what I say bears both on the desirability of codification and on how a codified provision should be drafted. The analysis also sheds some broader light on approaches to statutory drafting and judicial interpretation of systematic codes, and I comment briefly on these. Although the illustrations I offer are fairly remote from the central core of criminal behavior and the social problem of crime,[4] I cling to the view that it matters whether a criminal code

4. Since all criminal codes in a given culture will overlap to a very great degree in what they treat as criminal, and since the problem of crime seems little related to how exactly crimes are defined, a similar worry about practical unimportance may also be raised in respect to virtually all scholarship in substantive criminal law and to penal law revision. If, in fact, other forms of scholarship and social reform proved much more effective in reducing crime, then that might be a source of slight embarrassment to those of us who devote our energies here; but we must face the reality that the problem is so great and complex, no single line of endeavor is likely to be very successful.

To be a little more precise, I believe there is a significant difference between how practical importance matters for social reform and how it matters for scholarship. Reform

adequately reflects the enlightened values of a culture and draws lines of inclusion and exclusion that track thoughtful judgments about what behavior should be made criminal. Even if anomalies involve unusual circumstances, many of which could be taken care of by sensible exercises of prosecutorial discretion, there is still cause for some concern about an appropriate reach of criminal prohibitions.

II. SELF-DEFENSE: RETREAT AND THE INNOCENT AGGRESSOR

My first illustration involves the familiar issue of retreat, which has troubled me since I learned about it from Herbert Wechsler in my first year of law school. The particular aspect on which I concentrate is whether an initial nonaggressor who is subject to an assault by another should have to retreat rather than fight back if he knows he can retreat safely.[5] In favor of retreat is the argument that violence and physical harm and death are best avoided; against retreat are both the "rights" argument that a person doing no wrong should not have to surrender to a show of force, and the utilitarian argument that granting a full right to defend oneself may help deter initial aggression. The issue has particular poignancy when deadly force is involved, and indeed requirements of retreat are imposed on innocent victims of assault only in respect to their possible use of deadly force.

American jurisdictions take three basic approaches: never requiring retreat, requiring retreat except from one's home or place of business,[6] and requiring retreat except from one's home. The Model Penal Code adopts a variant of the second approach. It requires retreat except from one's dwelling or place of work, but as to one's place of work, one is required to retreat if one knows that the aggressor is a fellow worker.[7]

The practical significance of a rule of retreat for initial nonaggressors is much diminished by the sensible condition that someone is not to be penalized for failing to retreat unless he was sure retreat would have been

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should be undertaken only when a significant practical advantage of some kind is to be gained. While it counts positively in favor of a scholarly effort in law and related disciplines that it has some likely usefulness in the "real world," there is room for work that pursues interesting intellectual problems for their own sake, because understanding has intrinsic value, because confusion is often an obstacle to practical achievement, and because some of the ideas that eventually prove to be most illuminating for practical thought are developed when scholars have no immediate practical objective in mind.

5. This question arises less in the case law than retreat requirements for initial aggressors who are met with disproportionate force by initial victims.

6. The privilege not to retreat, in traditional law and in the Model Penal Code formulation, apparently covers retreat within the home or place of business, *e.g.*, to a lockable bathroom, as well as retreat to a location outside the home or place of business.

7. MODEL PENAL CODE § 3.04(2)(b)(ii)(1) (1985).

safe. Given the difficulty of showing that the victim of an initial aggression (1) was aware that the aggressor was seriously determined to proceed in a way that would engender the right of self-defense, and (2) *knew* that he could retreat safely, the cases in which someone actually loses on a claim of self-defense for failing to retreat must be pretty rare. Nonetheless, the question of retreat is an important one in principle, especially for those who suppose a serious claim of moral right can be made to stand one's ground.

It is generally assumed that a person retains a right of self-defense even if the aggressor who threatens is in some sense innocent, for example, a small child or a mentally deranged adult. Of course, in most settings the victim is not in a position to assess whether the aggressor is blameless. In any event, the victim should not have to sacrifice his or her welfare and interests because the aggressor who threatens is blameless. The Model Code explicitly provides for this result. The general account of self-defense is force to protect oneself "against the use of *unlawful force* by [another] person on the present occasion."[8] "Unlawful force" is defined as including force which constitutes 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 the force."[9]

Consider the following case:

> Alice and Velma are two adult sisters sharing an apartment. Velma, a police officer, knows that Alice has recently been released from a mental institution, after having suffered serious paranoid delusions that led her to attack two people she believed were attacking her. One night as Velma enters the apartment, Alice begins raving that the person entering is an agent of the devil who has come to hurt her. Alice demands that Velma leave. When Velma refuses, Alice approaches her with a knife, screaming, "I have to be alone. If you won't leave, I'll make you." Velma realizes that Alice is suffering a delusion, that she does not recognize Velma. Velma is standing by the door and is sure she can retreat with perfect safety by leaving the apartment. She also is aware Alice probably will not "snap out" of her delusion. Velma draws her revolver and tells Alice to stop. Alice instead moves forward with raised knife. Velma shoots and kills her. When asked why she did not retreat, Velma says "I never back off from a confrontation. Too bad for Alice."

The suggestion that Velma's homicide, viewed in and of itself, should be treated as justified[10] strikes me as appalling. Whatever one's moral

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8. *Id.* § 3.04(1) (emphasis added).

9. *Id.* § 3.11(1).

10. If, assuming a right not to retreat, Velma's force exceeded what was needed to protect her, then that force was not "necessary" as required by section 3.04. My text

rights against an ordinary aggressor in one's dwelling, the idea that these rights extend to using deadly force against a co-dweller, a family member, whom one knows to be a blameless aggressor, is far too much to swallow. Conceivably an argument could be mounted to the contrary, and rhetorical flourishes like "appalling" and "too much to swallow" do not substitute for genuine analysis; but I suspect that few people will have a view different from mine, either initially or after consideration. If I am right about that and in supposing that the result in and of itself would not have appealed to the drafters of the Model Code or the membership of the American Law Institute, why might provisions that seem to require the result nevertheless have been adopted?

Two important legislative choices were made. The first, to treat innocent aggression like blameworthy aggression for purposes of self-defense, is unexceptionable in the vast majority of cases. The second choice, not to require retreat from a dwelling even when the aggressor is a co-dwelling family member, is more debatable, and in my view is wrong; but it is at least a reasonable position. What makes the result in Velma's case so unsettling is the combination of an "aggressor" who is a co-dwelling family member *and* who is known by the original victim to be innocent.

I see three possible explanations for treating Velma as justified. One is that such cases are too improbable to worry about, or at least to take account of with statutory language. The second is that because the whole idea of required retreat from the home is so impossible to administer anyway, there is no point in making someone liable in theory if he or she happens to have all the knowledge and possibilities I have ascribed to Velma. The third explanation is understandable inadvertence; no one focussed on the consequence of the determination about retreat from the home and the definition of unlawful force for this unusual conjunction of circumstances.

Let us see whether the Model Code really requires the interpretation I have assumed. Alice's attempt to stab Velma was undoubtedly "unlawful force"; the definition of unlawful force leaves no room for doubt about that. Alice was also plainly the original aggressor. If Velma could not safely stop Alice with nondeadly force, her use of deadly force was appropriate unless she had a duty to retreat.[11] Given the explicit dwelling exception to the retreat rule, Velma had no general duty to retreat. The specific provision that one must retreat from a place of work when the aggressor is a co-

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assumes what may be arguable, that as the subject of imminent attack with a knife, even an experienced police officer might fire a gun in a way that not only wounded but caused death.

11. MODEL PENAL CODE § 3.04(2)(b)(ii)(1).

worker[12] effectively forecloses any similar conclusion that co-dwellers or family members must retreat from each other. Indeed, a similar provision covering co-dwellers had been initially proposed by the drafters, but was rejected by a vote of the Institute membership.[13] Especially because the possibility of requiring retreat of co-dwellers was consciously rejected, the language of Article 3 itself seems to leave no option to the conclusion that Velma engaged in justified self-defense.

We also need to consider the general principles of construction provided by the Code. Among the general purposes of the Model Code are "to forbid . . . conduct that unjustifiably . . . inflicts . . . substantial harm to individual . . . interests . . ."[14] and to "give fair warning of the nature of the conduct declared to constitute an offense . . . ."[15] The Code's provisions are to be "construed according to the fair import of their terms but when the langauge is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved."[16]

If one attended to the purposes behind the Code and the self-defense provision, there would be a substantial argument that Velma's homicide was not justified. Although prior notice might be thought to count for less in respect to surprise circumstances presenting possible justifications than for most other matters, Velma would have a significant counterargument that fair warning of liability had not been given. But does this situation even call for construction according to general purposes; or, rather, is the language here not "susceptible of differing constructions"?[17]

Construing the Code's principles of construction takes us toward deep waters about legal interpretation that I shall skirt. No doubt, the interpretation of language depends on cultural context; words of English that mean one thing to us could mean something else to someone of a different century or culture. No doubt also, legal interpretation depends in part on legal culture, legal words have meaning in particular legal contexts. But in contrast to the view sometimes now expressed that all legal language is essentially indeterminate, I think a good bit in the Model Code's self-defense provisions is pretty determinate.

The Model Code's own guide to interpretation establishes a hierarchy;

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12. *Id.*

13. *See* MODEL PENAL CODE § 3.04(2)(b)(iii)(1) (Tent. Draft No. 8, at 13 (1958)); ALI PROCEEDINGS 270 (1958).

14. MODEL PENAL CODE § 1.02(1)(a).

15. *Id.* § 1.02(1)(d).

16. *Id.* § 1.02(3).

17. *Id.*

one looks first to the "fair import" of terms, and only when the language is "susceptible of differing constructions" does one turn to purposes. This hierarchy probably should not be conceived as completely rigid. One may need some idea of purposes to understand the fair import of terms, and the fair import of terms may not require an absolutely ridiculous interpretation that might seem suggested by literal statutory language.

But even if purpose influences to some degree the fair import of terms, an instruction to go to the terms first, and only when these leave doubt to look at general purposes, must be understood as a different instruction than an instruction simply to interpret all the statutory language in terms of general purposes. Some more weight is to be given to what the words seem to say, if they point strongly in one direction.

We can understand why the Institute chose such an instruction; it wanted judges to follow the systematic scheme of the Code, not to range far and wide in light of rather vague and general purposes.

My judgment is that the fair import of the terms is clear in Velma's case. Each relevant strand of the interpretive endeavor is straightforward as far as application of the language to this example is concerned. Alice's knife attack was unlawful deadly force whatever her state of mind; Velma had a privilege not to retreat regardless of the fact that Alice was a co-dweller and family member. Further, the answer to each strand of the interpretative endeavor is not only consistent with the Code's purposes, it actually represents a conscious choice by the drafters against possible alternatives. The only problem arises when the strands come together in an unusual case. Even then, the result is not ridiculous; it is defensible on grounds of administrability and simplicity of norms,[18] if no other.

Possible interpretative techniques to reach the conclusion that Velma's homicide was not justifiable would be (1) to create an "implied" exception to the privilege of no retreat or the definition of unlawful force, or (2) to admit candidly that the applicable "terms" of the Code do not yield the proper result and to conclude that this is an occasion when the "terms" should give way to overall objectives. Neither of these maneuvers strikes me as construction according to the fair import of the terms, and either presents a significant fair warning problem given the terms as they are.[19]

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18. By any absolute standard, the language of this and the other major justification sections of the Model Penal Code is not particularly simple. Section 3.06, in particular, has a degree of complexity that makes it very difficult to understand. In general, one may say that the drafters of the Code chose to deal with a multiplicity of factors rather than adopt more simple, less sensitive language. But this does not detract from the point that clarity and simplicity were recognized as objectives and sometimes guided choices not to increase complexity further.

19. As a police officer, Velma actually may have had some familiarity with the

If I am right that the provisions of the Model Code require that Velma's killing of Alice be treated as justified, this may be an occasion on which Code language locks the law in a rigidity that might be avoided by common-law decision-making. A judge faced even with holdings that in ordinary circumstances people need not retreat from dwellings and may use deadly force against innocent aggressors could fairly distinguish Velma's situation by saying that whatever general language was used in opinions, no one conceived the right not to retreat as applicable to these unusual facts.

What could drafters of penal codes do who are apprised of this problem of retreat and agree with me that regarding Velma as justified is an unappealing result? I shall save for a final section comment on general principles of construction. If one focuses on the justification provisions and accepts all the considered judgments made by the drafters of the Code and the Institute, how might the drafters meet possible circumstances similar to Velma's? The duty of retreat might be formulated to apply to all cases of aggressors who are known to the person considering deadly force to have characteristics that would yield an excuse from criminal liability.[20] Or the definition of unlawful force might be altered to say that excused force does not count as unlawful for purposes of considering retreat. Or, weasel words of some kind might be used: unlawful force would include excused force, "except in cases where the result would be unjust."

Are any of these measures worth undertaking? Certainly the case of known safe retreat and known innocence of an aggressor is far too extraordinary to warrant amendment of existing provisions, and quite possibly the minor added complexity of the language needed to deal with Velma is not worth drafting even for those starting from scratch. If that is so, we might conclude if a case like Velma's should ever arise, that letting her off is an acceptable slight cost of having a comprehensive code with appropriate simplicity of language.

III. The General Justification Defense and "Useful" Breaches of Rights

My second illustration concerns the general justification defense and circumstances in which an act achieves a short-term overall gain, in some

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language of the Code.

20. One might instead cast the principle in terms of knowledge that the aggressor had a legal excuse. I believe it is a difficult question whether for this purpose what should matter is the original victim's knowledge of characteristics (the usual approach) or his knowledge of the legal relevance of these characteristics, but I shall not pursue that question here.

sense, but would be widely supposed to be morally inappropriate.

The Model Penal Code privileges an otherwise criminal act when "the harm or evil sought to be avoided by [the actor's] conduct is greater than that sought to be prevented by the law defining the offense charged."[21] Consider the following hypotheticals:

> (1) When passengers in a lifeboat are informed by the only naval officer aboard that the lifeboat will flood within the next few minutes unless two of ten occupants are put out, and when quick death in the surrounding icy water is a near certainty, three friends throw over two people they hate. (2) Faced with three patients who will die within a few days if they do not receive transplants of various organs and with no availability of the needed organs through ordinary channels, a doctor kills a man who has suffered an accident and needs to have his legs amputated, and transplants the victim's healthy heart, liver and kidneys into the other three patients.

Assuming that despite its ambiguous origins, the general justification defense is a true justification, as it is designated in the Model Code, and not merely an excuse based on the pressure of trying circumstances, I take these two cases as ones in which the behavior should not be justified. I believe this conclusion is warranted whether one takes a "rights" view or a long-term utilitarian perspective. The problem with the lifeboat case is that even if two lives must be lost, people should not have a real justification unless they adopt a principle of selection that is reasonable in the circumstances. Perhaps one would need to fill out the facts a bit more to say what was possible under the circumstances, but so long as the officer could exercise authority or the group could make some sort of determination by chance, a few self-chosen persons throwing their personal enemies out is definitely an unacceptable principle of selection.

In regard to the second example, our society assumes that doctors will not actively kill patients who would otherwise survive in order to save other patients through organ transplants. The setting is not an unusual sort of emergency at which the general justification defense is directed. The doctor's act violated accepted canons of medical practice; authorizing such acts would cause widespread insecurity among those who are in hospitals for treatment. What I have said here may not be sufficient to capture exactly why the doctor's course of action strikes almost everyone as clearly unwarranted, but I shall go forward on the assumption that the criminal law should not justify it.

I turn now to the Model Code formulation, first offering an initial clarification I regard as noncontroversial and some general remarks before

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21. MODEL PENAL CODE § 3.02(1)(a).

proceeding to interpretive application to the two examples.[22]

One conceivable reading of the general justification formulation would be to compare the quality of the harm sought to be avoided and the quality of the harm done. In each example the two harms are death. Since the quality of the harm avoided is equal to the quality of the harm done, no justification would be forthcoming. However, the Code formulation is designed, as the Comment makes patently clear,[23] to take into account the magnitude of the harm in numbers; ten deaths are worse than two.

The Model Code provision is essentially designed as a supplement to legislative judgment, allowing a more particularistic evaluation for circumstances that a legislature cannot foresee or cannot comfortably address. The formulation allows the judge or jury, the Code does not specify which, to make a particularized judgment about the harm and benefit of an act that otherwise violates the criminal law. Though relatively open-ended, the formulation does set the terms in which the evaluation is to be made. These terms are decidedly consequentialist, and they are focused on the immediate transaction.

If one compares the "harm or evil . . . avoided by the actor's conduct"[24] against the harm or evil "sought to be prevented by the . . . offense,"[25] that strongly suggests that one looks at the consequences or likely consequences of acts rather than the intrinsic quality of acts. Understood at a fairly simplistic level, the formulation seems to render inapt assertions of absolute rights or duties, and even assertions that the intrinsic quality of acts is somehow to be weighed against the balance of likely consequences. Further, if one focuses on the actor's conduct and the harm "the offense" seeks to prevent, it is not clear where to fit administrative considerations, notably the argument that if the justification is recognized in this case, it will encourage undesirable behavior by others in the future.[26]

If community, or legislative, morality includes strong nonconsequen-

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22. Many of the points sketched below are developed in greater depth in K. GREENAWALT, CONFLICTS OF LAW AND MORALITY 285-310 (1987); Greenawalt, *Natural Law and Political Choice: The General Justification Defense; Criteria for Political Action; And the Duty to Obey the Law*, 36 CATH. U.L. REV. 1, 2-26 (1986).

23. MODEL PENAL CODE § 3.02 comment at 14-15. The formulation also permits action to avoid a highly likely harm, *e.g.*, speeding on the way to a hospital to forestall a serious nonfatal consequence, although the traffic law that is broken is partly designed to reduce the risk of a more serious consequence, death. What is critical in that instance is that the risk of death from a single instance of speeding is very slight.

24. *Id.* § 3.02(1)(a).

25. *Id.*

26. Allowing the justification defense for prison escapes presents this sort of problem.

tialist elements and if legislative judgment takes into account administrative considerations, where does this leave the judge or jury when applying the general justification standard? The original commentary to the provision suggested that a judge or jury might reject application of the defense on the ground that an absolute moral prohibition had been violated,[27] but this passage was in considerable tension with other passages indicating that lives were to count equally and that a net saving of lives was justified.

It might be claimed on one of two grounds that the overall consequentialist flavor of the provision is mistaken. I shall not here address the ground that consequentialism is intrinsically mistaken as an approach to moral problems. The other ground is that legislative and community morality are not consistently consequentialist and that the general justification defense should either itself reflect dominant morality or should permit the agencies applying it to employ dominant standards. Guessing about community and legislative morality is tricky, but, at least as far as academic and popular philosophy in the United States is concerned, there has been some movement away from unalloyed consequentialism in the three decades since the Model Code was drafted.

The worry that a consequential standard for legal justification may not reflect dominant morality is largely tempered by the fact that in almost every case such a standard does not actually prefer the person whose act is "justified" by consequential considerations over someone who follows widely accepted nonconsequentialist norms. In virtually all circumstances, the latter person will not have committed a criminal offense. Thus, in cases where it is genuinely debatable whether someone should achieve a net positive balance of consequences or conform with a nonconsequentialist norm, treating a considered choice in either direction as warranted may be appropriate.

Nevertheless, if one views a standard like the Model Code's as properly reflecting part of the morality of much of a culture, the risk exists that terms appropriate at one stage of time will become inappropriate as values change.

The possible difficulties with the Code formulation are sharpest if one focusses on cases in which there is near universal agreement that a net balance of favorable consequences on the particular occasion does not justify behavior; my lifeboat and organ transplant cases both fall into this category. If we view these circumstances as presenting issues of application or interpretation, we can be pretty sure that no judge or jury would find the

27. *See* MODEL PENAL CODE § 3.02 comment at 9 (Tent. Draft No. 8, 1958).

acts justified whatever the exact language of the provision, and that result seems to me appropriate.

The language of the general justification standard is much less precise than the langauge of the self-defense provision. The drafters were obviously searching for a capsule formulation that would allow consideration of a wide multiplicity of variables. The language is mainly directed at the balance of consequences in the particular circumstance, but it should not be construed as foreclosing other possibly relevant factors, including standards of fairness in selecting the persons on whom the harm will fall, long run effects of recognizing the defense, and the weight of strongly held nonconsequentialist standards.[28] These factors could be thought of as related to the harm or evil sought to be prevented by the offense, or as somehow reducing the harm or evil the actor has avoided. Or, a court might say that the provision is broadly meant to allow consideration of some factors that do not quite fit within the specific formulation of the balance.

Lest it be thought that my interpretive suggestions here are at odds with my views about the appropriate latitude of interpretation for the right not to retreat, my answer is that the language of this provision was evidently meant to do a different job. It was not meant to settle definitely what can or cannot be taken into account, as the self-defense language was meant to do.[29]

The reader may wonder why I have raised an apparent difficulty about interpreting the general justification section only to conclude that the difficulty can be surmounted. That may not be very productive. But I see some significant lessons that may be drawn from this march up the hill and back down again.

The difficulties I have discussed may underlie an argument that no legislative formulation, or a less detailed formulation, or a more detailed formulation would be preferable to the Code's general justification defense. If the language of the Code's standard proves in some troublesome cases to be more of an obstacle than an aid to a proper result, and the problem is not easily susceptible of cure because the multiplicity of relevant factors is so hard to capture in language, one might reasonably conclude that *this* defense is best left to the common law. Or, if a statutory

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28. That the long-run effects of recognizing the defense may be taken into account is suggested explicitly in the updated commentary. MODEL PENAL CODE § 3.02 comment at 12 n.5.

29. Nevertheless, it is at least arguable whether as open-ended an interpretation as I have suggested is actually desirable. One might worry that such interpretation allows a judge or jury to reject the defense too easily and that long-term administrative considerations are not well suited for jury evaluation.

formulation were to be used, it might invite the judge or jury to consider anything that bears on whether the behavior that contravenes a section of the criminal code is nevertheless justified.[30]

If, on the other hand, drafters concluded both that this subject should be part of a comprehensive code and that some concrete positive guidance is desirable in a legislative formulation, judgments I am presently inclined to accept, then perhaps the Model Code formulation could be amplified to speak more directly to the concerns I have raised. A provision might include, for example, caveats that an act is not justified unless it "justly respects the interests of everyone involved" and its recognition as being justified "would not tend to undermine the administration of justice." The first phrase would direct reference to principles for selecting victims and would permit reference to possible nonconsequential rights; the second phrase would require consideration of the longer term effects of recognizing the defense. Although a standard including such language might raise dangers of the defense being too sharply circumscribed, such language would yield more straightforwardly the correct results for the lifeboat and transplant examples than the existing formulation and on balance is probably desirable. Despite the infrequency of litigated cases, the general justification defense is an important enough departure from ordinary standards of criminal liability to warrant this much added complexity in the language if the defense is to be part of an overall revision of the penal code.

IV. SOLICITATION, "CAUSATION" AND RECKLESS ENDANGERMENT

My last topic is somewhat more complex. It concerns the treatment of dangerous utterances by the Model Penal Code.

I want here to treat two basic situations. In one, a person utters words that are designed to get someone else to commit a crime but the words do not express or indicate a desire to have the crime committed. In the other, a person has no desire that a crime be committed, but his words create a substantial risk that the crime will happen.

A person is guilty of criminal solicitation under the Code if he "commands, encourages, or requests" another to engage in conduct that is criminal.[31] One who successfully solicits is an accomplice of the person who

30. Were this approach followed, drafters could retain the parts of the Model Code provision that preclude the defense when other provisions deal with the specific situation or when a legislative purpose to exclude the justification plainly appears. *See* MODEL PENAL CODE § 3.02(1)(b) & (c).

31. MODEL PENAL CODE § 5.02(1).

commits the crime.[32] Suppose that one person discloses certain facts to another, hoping and expecting that disclosure will lead to a crime but concealing his wish that a crime be committed.

> Susan, who has never let her next-door neighbor, Max, realize that she knows he occupies a high position in the Mafia, "lets drop" one day in conversation that Donald, who works for Max, is a police informer. Susan actually hopes Max will have Donald, whom Susan believes has taken advantage of her daughter, killed; and Max does so.

Is Susan liable for the murder?

One theory of liability is that Susan has successfully solicited Max and, therefore, is liable as an accomplice; but the language of the solicitation section poses some problem. Susan certainly has not commanded or requested the murder. While it is arguable, as the present commentary indicates,[33] that she has encouraged the murder, the ordinary sense of "encourage" is to express support for a course of action;[34] and Susan has not done that.

Viewed in light of my stipulated facts, there is no good policy reason to treat Susan differently from the person who does express support for the murder; but one could reasonably make the judgment that, since intent rarely will be clear when support is not expressed, simple factual disclosures that are relatively removed from the ultimate harm should not be punishable. Given the language of the solicitation section[35] and the underlying general purposes,[36] I think a court could reasonably decide either to include or not to include Susan's disclosure within the term "encourages."

A second theory of Susan's liability is that Max has a generalized disposition to kill informers and that identifying Donald as an informer constitutes a form of aid, making Susan liable for aiding Max.[37] However, it may stretch the notion of "assistance" to reach a situation in which one person (1) assumes that a second person has not yet decided to commit a particular crime, and (2) provides information that generates a motive for the second person to commit the crime but that does not really help the

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32. *Id.* § 2.06(3)(a)(i).

33. *Id.* § 5.02 comment at 372.

34. An earlier draft of the Model Code provision on accomplice liability made one liable for intentionally provoking a crime. *See* MODEL PENAL CODE § 2.04(3)(a)(i) (Tent. Draft No. 1, 1953).

35. MODEL PENAL CODE § 2.06(3)(a)(i).

36. *Id.* § 1.02(1).

37. *See* MODEL PENAL CODE § 2.06(3)(a)(ii).

second person commit the crime.[38]

The third theory of liability focuses on the Model Code's "causation" provision,[39] which lies at the center of the remainder of my remarks in this section. Strictly, the Model Code uses the language of "cause" to refer to "but for" cause; the language that is directed to what might loosely be called issues of "proximate cause" does not use causal terminology. The terminological choice rested, first, on a sense that the language of causation was more confusing than clarifying about the elements important for a judgment about responsibility, and, second, on a view that some traditional aspects of proximate cause doctrine might be misguided.[40]

One traditional aspect that the Code does not endorse is the idea that the subsequent intentional act of a responsible person breaks the causal chain.[41] On the traditional view, Max's conscious decision to have Donald killed would relieve Susan of direct liability for Donald's death. The Model Code provides that if one has a purpose to cause a result that is an element of an offense, the element can be established if "the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability . . . ."[42]

This language certainly minimizes the possible intrinsic relevance of the subsequent intentional act of another person. Though it would not defy logic to say that such subsequent intentional acts inevitably make a result too remote or accidental, my example shows how implausible that view would be. The result here is exactly what Susan planned; the result is certainly not "accidental" from her perspective, and considering it "remote" strains ordinary language. I think it is fair to say that this is just the kind of case as to which the Model Code is designed to yield or permit a result that is different from common-law principles of proximate cause. Further, the attempt section is drafted in a way that makes Susan directly liable for an attempt if her disclosure to Max does not in fact result in

38. The more one can think of the listener as having a generalized aim to commit a certain kind of crime, the easier it is to think of identifying subjects on whom or with whom the crime might be committed as involving a kind of assistance. If Max was looking for purchasers of heroin and Susan told him that Donald wanted to buy heroin, it would not be unnatural to say that Susan had aided Max. *But see* People v. Gordon, 32 N.Y.2d 62, 295 N.E.2d 777, 343 N.Y.S.2d 103 (1973).

39. MODEL PENAL CODE § 2.03.

40. *See id.* comment at 255-56.

41. There may be some doubt how solidly entrenched the "traditional view" is in actual criminal law cases, since the relevant issues arise only rarely.

42. MODEL PENAL CODE § 2.03(2)(b).

Donald's death.[43]

So long as one concentrates on communications whose purpose is to get crimes committed, the evident consequences of the causation section seem acceptable; but when one turns to liability for recklessness and negligence, these consequences in respect to communicative acts become more troubling.

Under the Code's provision, liability for reckless or negligent behavior is governed by essentially the same principles as control acts with a purpose to accomplish criminal objectives. If a result is within the risk of which the actor was aware or (for negligence) should have been aware, he can be liable for recklessly or negligently causing the result if "the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability . . . ."[44] Again, the subsequent voluntary act of a responsible person would not "break the causal chain" if such an act was foreseen, or (for negligence) was reasonably foreseeable, by the actor.

The apparent import of this provision is that one can be liable for reckless or negligence utterances. If a speaker honestly states facts, asserts values or expresses feelings, and there is a considerable risk that someone will be influenced by the words to act intentionally to cause a result for which liability can attach for recklessness or negligence, then the speaker could be liable. There is a certain logic to all this, of course. If one can be liable for recklessly or negligently causing results, why should not someone else's intentional predictable action, as well as a series of natural events, be a ground for liability, and why should not communications be treated like "ordinary" physical acts? Still, there is something more than a little disturbing in the notion that one could actually be guilty of negligent homicide, a fairly serious crime, for uttering words that expressed some true proposition when one, in fact, was not even conscious such words generated a risk that a listener would commit a crime.[45] Although I shall not pursue the constitutional analysis here,[46] it is highly questionable

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43. *Id.* § 5.01(1)(b). Susan has done something, *i.e.*, speak to Max, with the purpose that it will cause the criminal result without further conduct on her part.

44. MODEL PENAL CODE § 2.03(3)(b).

45. It is worth emphasizing that the concern expressed in this paragraph does not reach all general liability for reckless and negligent utterances. If one were reckless about the truth of what was asserted, *e.g.*, "fire," and people had to react without a considered judgment, the argument for liability according to ordinary principles would be strong.

46. *See generally* Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 768-71. I am presently working on a book to be published by Oxford University Press, tentatively titled Speech, Crime, and the Uses of Language, that deals with these matters in a somewhat more comprehensive way.

whether a conviction that was based on a jury determination that an otherwise constitutionally protected communication was reckless or negligent in this way could withstand a challenge under the first amendment.

The Model Code's creation of a misdemeanor of reckless endangerment makes it at least logically possible that a person might be punished for similar reckless communications that are not acted upon, so long as a jury finds that he has recklessly engaged in conduct (making the communication) that "may place another person in danger of death or serious bodily injury."[47]

Even if the Code is to be interpreted as I have so far indicated, we should not imagine that punishment for reckless or negligent communication presents a major practical problem. Prosecutions on this theory rarely, if ever, will be brought. And, importantly, the Code's own standards of recklessness and negligence provide significant protection; recklessness requires a disregard of a "substantial and unjustifiable" risk that amounts to "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation";[48] negligence requires a disregard of a "substantial and unjustifiable risk" that amounts to "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."[49] Although these standards would be put to juries in a jury trial, a judge could refuse to send the case to a jury if he or she decided that the jury could not reasonably find the needed unjustifiable risk and gross deviation.

When all is said and done, however, even the chance of prosecution here is somewhat serious. An ambitious and imaginative prosecutor might decide to employ this theory of liability to go after a speaker at a rally that ended in some violent deaths or a television producer of a story depicting appalling homicides that were then imitated, or risked imitation, by a few viewers.

The interpretation I have thus far supposed may be too simple and therefore unfair to the richness of the Model Code. Of course, a court might rely directly on the Free Speech or Free Press Clause of the first amendment to refuse applications of the Code's standards to protected communications; but a court could stop short of a definitive judgment of unconstitutionality by construing the Code's standards in light of constitutional values.

One possibility is instruction to the jury that the value of speech must

47. MODEL PENAL CODE § 211.2.
48. *Id.* § 2.02(2)(c).
49. *Id.* § 2.02(2)(d).

be given weight when the jury decides if a risk is "unjustifiable" and if disregard of the risk involves a gross deviation.[50] After all, the justifiability of a risk turns not only on danger but on social benefit as well. The value of speech should not be disregarded. There can be no doubt that the standards of recklessness and negligence call upon jury and judge to estimate the likely benefits of a particular communication — what the speaker aimed to accomplish and reasonably might have accomplished by what he said on that occasion. The doubt concerns the value of speech in a more general sense. Although Herbert Wechsler has assured me that that idea also is an aspect of the test for recklessness and negligence, I remain dubious that language about the justifiability of risk, or language about gross deviation from common standards, calls up such general valuation of a complex social practice. Even if it does, I am highly skeptical that a jury is equipped to make such a valuation. If the jury deems that a particular communication was malicious, or well intended but obviously worthless, exactly what value is it to assign to the communication because of the more general value of speech? One of the basic rationales for constitutional protection of speech is that officials and citizens will undervalue speech on particular occasions. Instructing a jury to pay attention to the value of speech in assessing the justifiability of a particular risk is not adequate to meet this worry.

Another possible approach is for judges to interpret the Code standards as simply inapplicable to classes of cases in which the concerns about free speech are particularly great. A court might say, for example, with respect to a risk that an informed member of the audience will commit a crime, and absent any legislative specification of dangerous communications, that public speech cannot be considered to involve an unjustifiable risk.[51]

My own present view is that general principles of liability are probably never an appropriate basis for punishing as reckless or as negligent communications that risk a harmful act by an informed listener,[52] but one

50. It would probably follow that in certain cases the value of speech would be sufficient to justify the judge taking the case from the jury.

51. For jurisdictions that have adopted a reckless endangerment provision, without abandoning traditional principles of proximate cause, it would be reasonable to hold that one cannot be punished for reckless endangerment if what one risks would not make one liable for another crime if the result that was risked actually occurred. Thus, if an intentional supervening act would relieve one of liability for homicide, one would not be guilty of reckless endangerment if one's communications risked an intentional act of homicide.

52. That is, communications that present this risk should not be punished unless the legislature has focussed more carefully on the dangers of particular sorts of

might disagree with that. What is clear is that the merit of the traditional principle of supervening cause takes on quite a different coloration when one considers reckless and negligent communications rather than noncommunicative actions.

As with my previous examples, we have statutory formulations, adopted with particular problems at the forefront of people's minds, that seem somewhat inapt for a minor problem that may not have been carefully considered by many of those who approved the formulation.[53] Like the language of the general justification section, the language here is not an insuperable obstacle to a sound result, if I am right about what is a sound result. The language is only an impediment. But the existence of the impediment gives some force to arguments that what is properly relevant to legal "causation" is so complicated that the subject does not lend itself to any statutory formulation, or lends itself only to the most general kind of formulation.[54]

V. General Lessons

What general lessons, if any, can be drawn from the problems these examples illustrate? As I said at the outset, one should not exaggerate the difficulties. They are of relatively minor importance and certainly do not amount to a serious argument against having a systematic comprehensive code. But I think the difficulties have some relevance for the perspectives of legislative drafters and judges.

Assuming that drafters and legislators want to minimize, so far as possible, outcomes that are required by statutory language but that all would regard as wrong, or that are highly controversial and have not even been considered, how is this aim to be accomplished? It is important to have drafts reviewed closely by many people; the drafting job should not be done too quickly. In the absence of good reason to do otherwise, sticking to familiar language whose interpretation is settled is advisable. Such a familiar standard[55] is probably less likely to yield surprises than a novel formulation. When there is a strong need for a novel formulation, one has to

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communications.

53. Herbert Wechsler's assurances to me that the formula of "unjustifiable risk" deals adequately with the value of speech suggests that he, at least, had a considered judgment on this problem.

54. One might think, on the other hand, that the level of the formulation is fine, and that all that is needed is an explicit reference to intervening acts or an explicit exclusion for certain effects of communicative acts, or both.

55. Of course, a term may be "familiar" but interpreted so variously that its use is confusing. One might have said that about the term "reckless" in criminal law prior to the Model Penal Code.

be especially careful about unforeseen implications.

When some especially complex matters are critical for nonstandard cases, problems of the sort I have raised are a reason, though not necessarily a conclusive one, for employing a very open-ended statutory standard or leaving these matters entirely to judicial development.

Worry about inappropriate results underlies a possible argument for adopting language that leans toward inclusiveness in what it makes criminal; but that argument has troubling implications. The argument is based on the relative appropriateness of allowing judges to expand or contract language that establishes criminal liability. Courts taking language that seems to impose criminal liability and interpreting it not to impose liability is regarded as more acceptable than courts taking language that seems not to impose liability and interpreting it to impose liability. One of the difficulties in interpreting the Code's self-defense language to deny Velma a privilege to stand her ground is that the relevant language so clearly does not make her action criminal. Judicial restriction of apparent liability seems much more tolerable than judicial expansion of apparent liability. But if a legislature broadly chooses formulations that appear to extend liability, expecting prosecutorial discretion and judicial interpretation to take care of excesses, the troubling problem arises. Having a criminal code that appears to subject too much behavior to criminal penalties is itself not desirable.

In addition to whatever action it takes on specific provisions, a legislature may adopt principles of construction. As I have indicated, the Model Penal Code establishes a hierarchy in which one turns to purposes only if reference to the fair import of terms is not conclusive. Overall, this approach may impose the best degree of constraint on judges, but an approach that would be somewhat more responsive to the difficulties I have discussed would be to direct construction according to the fair import of terms *and* general and special purposes. This approach would introduce somewhat greater latitude for flexibility of response to unusual circumstances, while still giving significant emphasis to the statutory language. Since an important general purpose is "fair warning," this direction would still give defendants substantial protection against liability they could not reasonably have expected from the statutory language.

Finally, one way to avoid making the language too complex in an attempt to deal with extraordinary cases is to rely on authoritative commentary for particular sections. Commentary can fill out intended meaning and can suggest strategies of interpretation for a section.

If there is any general lesson for the judiciary in what I have discussed, it is that interpretation should take into account both the immense

difficulties for drafters of foreseeing and covering unusual situations and the nature of particular provisions. When situations are really extraordinary, judges should feel less constrained than is ordinarily appropriate by the evident import of the words chosen for the statute. They should feel less constrained when the provision is at a high level of generality than when those who drafted the provision have made a serious attempt to specify all the relevant factors.