

**FINAL REPORT
TO THE
DELAWARE GENERAL ASSEMBLY'S
CRIMINAL JUSTICE IMPROVEMENT
COMMITTEE**

IMPROVED CODE TEXT

Volume 1

March 22, 2019

DELAWARE GENERAL ASSEMBLY'S CRIMINAL JUSTICE IMPROVEMENT COMMITTEE CODE IMPROVEMENT PROJECT

Working Group

Adam L. Balick, Esq.

Judge William C. Carpenter, Jr.

Robert Goff, Esq.

Ipek Kurul Medford, Esq.

Lisa Minutola, Esq.

R./Colonel Elmer Setting

Chief Justice Leo E. Strine, Jr.

Judge Ferris W. Wharton

Staff¹

Matthew G. Kussmaul, Consulting Attorney

Ilya Rudyak, Legislative Director

John S. Grimm, Esq.

Ashley Tucker, Esq.

¹ Special acknowledgement and appreciation is due to Professor Paul H. Robinson, Colin S. Diver Professor of Criminal Law at University of Pennsylvania Law School for his immense contribution to development of the Preliminary Report on which this Final Report is largely based.

Summary of Contents

Volume 1

PREFACE

HISTORY OF CRIMINAL JUSTICE IMPROVEMENT COMMITTEE’S CODE IMPROVEMENT PROJECT

WHY AN IMPROVED CRIMINAL CODE?

EXECUTIVE SUMMARY

INTRODUCTION

- 1. USE CLEAR, ACCESSIBLE LANGUAGE AND ORGANIZATION**
- 2. PROVIDE A COMPREHENSIVE STATEMENT OF RULES**
- 3. CONSOLIDATE OFFENSES**
- 4. GRADE OFFENSES RATIONALLY AND PROPORTIONALLY**
- 5. RETAIN ALL — BUT ONLY — RATIONAL, DEFENSIBLE POLICY DECISIONS EMBODIED IN CURRENT LAW**

PREPARING FOR CHANGE

CONCLUSION

THE IMPROVED CODE

PART I: THE GENERAL PART

PART II: DEFINITION OF SPECIFIC OFFENSES (SPECIAL PART)

EXHIBIT A

TABLE OF CHANGES TO THE IMPROVED CODE PRE-INTRODUCTION OF SB 209 IN RESPONSE TO CONCERNS OF THE ATTORNEY GENERAL, LAW ENFORCEMENT, VICTIMS’ ADVOCATES AND STATE AGENCIES

EXHIBIT B

TABLE OF CHANGES TO THE IMPROVED CODE POST-INTRODUCTION OF SB 209 IN RESPONSE TO CONCERNS OF THE ATTORNEY GENERAL, LAW ENFORCEMENT, VICTIMS’ ADVOCATES AND STATE AGENCIES

EXHIBIT C

CONFORMING AMENDMENTS

Volume 2

THE PROPOSED COMMENTARY

TABLE OF CONTENTS

PART I: THE GENERAL PART

PART II: DEFINITION OF SPECIFIC OFFENSES (SPECIAL PART)

SUMMARY GRADING TABLE

CONVERSION TABLE BY CURRENT PROVISION

Volume 1 Contents

	<u>Page</u>
PREFACE.....	vii
HISTORY OF CRIMINAL JUSTICE IMPROVEMENT COMMITTEE’S CODE IMPROVEMENT PROJECT.....	xii
WHY AN IMPROVED CRIMINAL CODE?	xvii
EXECUTIVE SUMMARY	xvii
1. <i>Use clear, accessible language and organization</i>	xvii
2. <i>Provide a comprehensive statement of rules</i>	xviii
3. <i>Consolidate offenses</i>	xviii
4. <i>Grade offenses rationally and proportionally</i>	xix
5. <i>Retain all (but only) reasonable policy decisions embodied in current law</i>	xix
WHY AN IMPROVED CRIMINAL CODE?	xxi
INTRODUCTION.....	xxi
1. USE CLEAR, ACCESSIBLE LANGUAGE AND ORGANIZATION.....	xxi
A. Clear Language	xxii
B. Clear Organization	xxiv
2. PROVIDE A COMPREHENSIVE STATEMENT OF RULES.....	xxvi
A. General Part Rules	xxvii
B. Special Part Offenses	xxvii
3. CONSOLIDATE OFFENSES	xxviii
4. GRADE OFFENSES RATIONALLY AND PROPORTIONALLY	xxxi
A. Consistently Recognize Appropriate Distinctions	xxxiii
B. Avoid Irrelevant or Unclear Distinctions.....	xxxiii
C. Maintain Proportionality Between Various Offenses.....	xxxiv
5. RETAIN ALL — BUT ONLY — RATIONAL, DEFENSIBLE POLICY DECISIONS EMBODIED IN CURRENT LAW	xxxv
A. Reserving the Most Serious Penalties for the Most Serious Killings	xxxvi
B. Returning to the Classic Intent Requirement for Burglary.....	xxxviii
C. Revising the Mental Illness or Psychiatric Disorder Defense	xxxviii
D. Eliminating Archaic and/or Obsolete Offenses	xl
PREPARING FOR CHANGE	xl
CONCLUSION	xlii
<u>Part I: Delaware Criminal Code</u>	1

<u>Subpart A. General provisions</u>	1
<u>Chapter 1. Preliminary provisions</u>	1
<u>Chapter 2. Basic requirements of offense liability</u>	26
<u>Chapter 3. General defenses</u>	35
<u>Subchapter I. Justification defenses</u>	35
<u>Subchapter II. Excuse defenses</u>	42
<u>Subchapter III. Nonexculpatory defenses</u>	45
<u>Chapter 4. Liability of organizations</u>	50
<u>Chapter 5. Inchoate offenses</u>	52
<u>Chapter 6. Offense grades and their implications</u>	55
<u>Subpart B. Specific Offenses</u>	61
<u>Chapter 10. Offenses against the person</u>	61
<u>Subchapter I. Homicide offenses</u>	61
<u>Subchapter II. Robbery; assault; endangerment; threat offenses</u>	64
<u>Subchapter III. Sexual offenses</u>	70
<u>Subchapter IV. Kidnapping; coercion; restraint; related offenses</u>	75
<u>Chapter 11. Property offenses</u>	80
<u>Subchapter I. Theft offenses</u>	80
<u>Subchapter II. Forgery and fraudulent practices</u>	86
<u>Subchapter III. Arson and other property damage offenses</u>	92
<u>Subchapter IV. Burglary and other criminal trespass offenses</u>	97
<u>Chapter 12. Offenses against public administration</u>	99
<u>Subchapter I. Bribery, improper influence, and official misconduct</u>	99
<u>Subchapter II. Perjury and other official falsification offenses</u>	101
<u>Subchapter III. Offenses involving obstruction of governmental operations; escape</u>	104
<u>Chapter 13. Offenses against public health, order, and decency</u>	111
<u>Subchapter I. Offenses against public order and safety</u>	111
<u>Subchapter II. Public indecency, obscenity, and cruelty to animals; offenses</u>	115
<u>Subchapter III. Invasion of privacy offenses</u>	122
<u>Subchapter IV. Offenses against children and the family</u>	125
<u>Subchapter V. Gambling offenses</u>	132
<u>Chapter 14. Crime control offenses</u>	135
<u>Subchapter I. Offenses involving firearms and other deadly weapons</u>	135
<u>Subchapter II. Drug and related offenses</u>	142

<u>Subchapter III. Offenses involving organized crime and racketeering</u>	150
<u>SYNOPSIS</u>	154
Exhibit A.....	155
Exhibit B.....	171
Conforming Amendments.....	177

PREFACE

In 2014, the Delaware General Assembly adopted epilogue in its Budget Act for fiscal year 2015 that created the Criminal Justice Improvement Committee (“CJIC”). The CJIC was charged generally with seeking opportunities for efficiencies, cost savings, and pursuing other improvements in the criminal justice system. One specific area of the CJIC’s legislative mandate reads: “The Committee shall review opportunities for efficiencies in the criminal justice system, including but not limited to the following areas:

- statutes in the criminal code, identifying disproportionate, redundant, outdated, duplicative or inefficient statutes;
- crimes that should or should not constitute potential jail time;. . .”(“the Epilogue”).

After the Epilogue was reauthorized in 2015, this Code Improvement Project was initiated under the CJIC as a comprehensive response to its mandate. As a practical matter, it is impossible to determine if a criminal statute is “disproportionate, redundant, outdated, duplicative or inefficient” until it is compared to all other criminal statutes. Additionally, since the General Assembly adopted the Delaware Criminal Code of 1973, new insights have emerged regarding what a criminal code should address, and how it should do so. Moreover, the broader legal landscape has changed greatly. This Code Improvement Project was predicated on the belief that — as was the case in 1973, and may well be the case again in another forty or fifty years — it was necessary to take a step back and conduct a comprehensive review of the Delaware Criminal Code. The two volumes of this Final Report are the fruits of that review.

Under the Epilogue’s legislative mandate, the proposed Improved Criminal Code seeks to replace the current code with a clear, concise, and comprehensive set of provisions. Specifically, the Improved Code seeks to include necessary provisions not contained in the current code; to eliminate unnecessary or inconsistent provisions of the current code; to revise existing language and structure to make the law easier to understand and apply; and to ensure that criminal offenses and legal rules are cohesive and relate to one another in a consistent and rational manner. At the same time, the Improved Code aims to preserve the substantive policy judgments reflected in the original code and its later amendments. When the process of clarifying and reconciling current provisions made it necessary to make substantive choices, we have sought to explain and justify the proposed changes with commentary designed to assist the enactors, and ultimately the users, of the Improved Code.

In developing the Improved Code, we were guided by five general drafting principles. First, we have made an effort to use clear, accessible language and organization. One of the critical functions of a criminal code is to provide notice to citizens of what conduct is prohibited. Clear and accessible writing enables provision of true notice while also ensuring that no offender escapes liability because of an incomplete or ambiguous offense definition. More straightforward code provisions also promote development of clearer jury instructions, making it easier for jurors to fulfill their critical role. Even for members of the criminal justice system, who work with the criminal code every day and must be intimately familiar with its rules, plain-language expression is essential.

Second, the Improved Code endeavors to provide a comprehensive statement of rules. A criminal code must include all necessary rules governing liability. Comprehensiveness helps avoid inappropriate results. Courts, which decide individual cases and act independently of one another, cannot be as effective as a legislature in formulating coherent general doctrines that will work together as the provisions of a comprehensive code can and must. Moreover, an uncoded rule is more likely to be applied differently in similar cases than a codified rule, as the terms of the latter are fixed, explicit, and available to all officials at each stage in the process.

Third, we have aimed to consolidate offenses. Perhaps inevitably, four decades of piecemeal modification of the Criminal Code of 1973 have led to the addition of hundreds of new offenses, many of which cover the same conduct as previous offenses or appear in various other titles of the Delaware Code rather than in the criminal code. Consolidation ensures against the confusion that results when one encounters, and must make sense of, multiple provisions that overlap or contradict, and also against the mistakes that ensue when one fails to notice, or find, provisions that may apply to a given case. Consolidation also aids the task of proper grading, because it is nearly impossible to maintain consistent, proportional grading when offense definitions are based on immaterial or incomprehensible, distinctions.

Fourth, we have striven to grade offenses rationally and proportionally. One virtue of a Code Improvement Project, relative to the usual piecemeal legislative additions and alterations to the criminal code, is the opportunity it provides for a general review of the system of grading offenses, considering how all offenses relate to one another rather than considering individual offenses in a vacuum. For a system of criminal justice to be fair, liability must be assigned according to the relative seriousness of the offense(s) committed. We have sought to recognize all, and only, suitable distinctions among the relative severity of offenses and develop a scheme to grade each offense proportionally to its gravity in light of those distinctions.

Finally, the Improved Code seeks to retain all (but only) reasonable policy decisions embodied in current law. Because substantive policy decisions about the rules of the criminal law reflect value judgments properly left to the General Assembly, the Improved Code aims to follow the substance of current law wherever possible. In some places, however, current law contains multiple contradictory rules — and therefore no clear rule — on a subject. Other rules may have been sound when enacted, but no longer reflect current realities or sensibilities and require expansion, alteration, or deletion. In those situations, where the existing legal rule seems clearly at odds with the Epilogue’s mandate of producing a rational, coherent criminal code, we have had little choice but to modify the existing rule, using supporting commentary to the Improved Code to describe and justify the proposed change.

A few words are in order regarding issues that the Improved Code does not address. The Improved Code addresses substantive criminal law rules only. It excludes numerous provisions in the current code governing procedural, sentencing, and regulatory issues, retaining only the ones necessary to elaborate or explain the criminal code’s substantive prohibitions and rules. This does not mean, however, that the Improved Code would eliminate those provisions. Rather, the Improved Code was drafted with the understanding that such provisions would be retained, in Title 11 or other titles of the Delaware Code, by means of a “conforming amendments” bill to be enacted by the General Assembly contemporaneously with the new criminal code. During the time between the preliminary and final reports of the Working Group, staff of the CJIC and Working Group, with important help from Legislative Division of Research staff and staff attorneys from the Supreme Court and other courts, have worked hard to prepare the conforming amendments bill so that it is ready for introduction with the primary bill including the Improved Code.²

Like the primary bill, the conforming amendments bill will become effective, if adopted as the Working Group proposes, 20 months after enactment at the same time as the Improved Code would become effective. During this period, there will be an opportunity to identify and correct any technical errors that may have been made. This 20-month period (rather than 12 months, which was initially considered) will also help ensure smooth integration of the Improved Code into existing structures. The Department of Justice, the Executive Director of DelJIS, and representatives of the police community wished to be sure that there was time to update key technology, develop training materials and deliver that

² We would like to thank the Code Revisors for their technical input on bill formatting issues. We would also like to acknowledge the support and hard work of the staff of the Administrative Office of the Courts.

material to key constituencies, update sentencing guidelines, and develop model jury instructions. This specific timing also takes into account advice from DelJIS as to when it would be most convenient for DelJIS to have the bill become effective.

It is our expectation that in the years ahead, subsequent reforms of Delaware's procedural and regulatory law may organize these provisions differently or transfer them to other Titles of the Delaware Code. In many instances, the Code's commentary provides recommendations that may assist these future reform efforts, by highlighting such provisions and explicitly stating that a particular current offense, procedural or sentencing rule, or civil or regulatory provision should be preserved outside the Improved Code. Yet the commentary's failure to include such a clear statement as to any particular provision — especially one that does not address an issue relating to substantive criminal law — should not be understood to indicate a recommendation that the provision in question should be eliminated. In the event that the General Assembly decides to adopt the Improved Code, we have prepared an implementing bill to make the necessary conforming amendments. It should be adopted along with the bill including the Improved Code so that there is no gap in the law.

In the Preliminary Report of the Working Group, the Working Group identified a number of important issues that warranted consideration by the CJIC, the General Assembly generally, the public, and key constituencies. These were highlighted by the inclusion of “pro-con” footnotes, which flagged the issue, and presented the basic arguments on both sides of the question.

During the CJIC process, the Chairman asked the Working Group to come to its best judgment about the resolution of these questions, using the input it received from the extensive period of public involvement this Final Report discusses. That involvement process allowed the public and key constituencies a full year to consider and comment upon the draft of the Improved Code described in the Preliminary Report. In particular, discussions about these key issues were had with constituencies such as the police and victims' rights organizations, and feedback was also given by the Department of Justice and members of the General Assembly.

This Final Report and the Improved Code recommended by the Working Group proposes a resolution to each of the issues framed by “pro-con” footnotes that were included in the Preliminary Report. As a general matter, the Working Group resolved these issues by defaulting to the current position taken by the existing Code, unless the Working Group felt strongly that the mandate of the Epilogue required a change in the Code. In resolving the pro-con issues, the Working Group also gave heavy weight to the input it received from the public, key constituencies, the Department of Justice, and members of the General Assembly about those issues. Precisely because these are important issues, the Working Group, as on other issues, was not always unanimous as to these issues, but worked hard to come to a principled resolution, recognizing their duty to adhere to the epilogue and to come up with an Improved Code that was, as an overall product, clearer, more just, and more proportionate.

In other instances, language in the Improved Code itself makes clear its intent to retain current law as to an issue. For example, the proposed provisions governing abortion (Section 1006) and driving under the influence (Section 1025) explicitly incorporate by reference the complicated regulatory schemes currently set forth in Subchapter IX of the Medical Practice Act and Section 4177 of Title 21, respectively. Similarly, many of the proposed drug offenses (Chapter 14, Subchapter II) explicitly rely upon definitions contained in the Uniform Controlled Substances Act. Incorporating those rules and definitions by reference, but preserving their regulatory content outside Title 11, avoids cluttering the Code with technical regulatory provisions. At the same time, it is necessary to overtly incorporate the relevant offenses within the Improved Code both in order to promote the comprehensiveness of the Code and to exclude them from the scope of the rule (stated in proposed Section 601) that non-Code offenses can be graded no higher than Class A misdemeanors.

The official commentary to the Improved Code describes how each section of the Improved Code works. Where the Improved Code suggests a change in current law, the commentary notes this fact and identifies the suggested change and the reasoning behind it. The official commentary also contains some tools to assist the people of Delaware and various actors within its criminal justice system to acclimate to using the Improved Code. First, the commentary contains a Summary Grading Table, which groups all offenses covered by the Improved Code according to their grade. A just and fair penal code authorizes more serious punishment for more serious offenses. Thus, using this Summary Grading Table, the grade of each offense can be compared to the grade of each other offense in the Improved Code and, all other things being equal, more serious offenses are graded more seriously than less serious offenses. Because the Improved Code attempts to be comprehensive, it contains a large number of offenses, making it a challenge to assure proportionality among all offenses. But the Summary Grading Table demonstrates this proportionality in an accessible way.³ Second, the official commentary contains a Conversion Table. The Conversion Table lists each current law provision and identifies the Improved Code provision(s) that address its content. This table eases the comparison between current law and the Improved Code.

Note also that presently, the Improved Code (including its commentary, grading table and the conversion table) reflects some of the most recent additions to Delaware law. The current version of the Improved Code is based upon the Delaware criminal code as it existed in June 2018, but new criminal legislation may be introduced before passage of the Improved Code. As this code improvement project moves ahead, Delaware criminal law is likely to evolve even further. The bill implementing the Improved Code calls for a 20-month phase-in period that will allow for the preparation of model jury instructions, education for criminal justice constituents such as the police, and updated sentencing guidelines. During this period, there will be ample opportunity to make any minor legislative amendments to the Improved Code to take into account any additional legislation changes. Consistent with the purpose of the General Assembly in calling for the Criminal Justice Improvement Committee to address the problems that have arisen with a piecemeal approach to updating what started as a model code, the drafting group hopes that any amendments will take into account the principles underlying the Improved Code, and be modest and targeted.

As a final matter, it is important to note that proposed Chapter 6 is not intended to address all issues (or indeed, any issues) regarding the sentencing and disposition of offenders. Rather, Chapter 6 deals only with those basic issues necessary to make clear the meaning of the Improved Code's general scheme of liability — for example, that offense grades define a certain hierarchy; and that the Code contemplates certain broad factors that will operate to aggravate an offense's grade, and addresses those factors by imposing general aggravations rather than applying them to specific offenses. The Improved Code's silence as to other, more complex sentencing issues does not indicate a lack of awareness or concern about such issues, but an understanding that they were beyond the scope of the present project. That said, the Improved Code materially improves the state's ability to craft more reliable, more equitable, more consistent, and if the General Assembly later decides, more enforceable sentencing guidelines. Under current law, that is not reasonably possible because each felony and misdemeanor grade lack common sentencing ranges and the current Code's imposition of sentencing ranges is confusing, inconsistent, and so offense-specific that the guidelines cannot fulfill their intended role in making sentences for like offenses and involving like circumstances consistent and equitable. During the implementation period between enactment and the effective date of the Improved Code, the bill suggests that SENTAC update its guidelines, having the benefit of an Improved Code that provides a single

³ The Summary Grading Table lists all of the offenses in the Improved Code and provides a fair representation of the various sub-offenses contained within these offenses. This level of generality optimizes the reader's understanding the Improved Code's grading judgments. Importantly, the table does not contain all the possible variations of each offense, since such granularity would hinder, rather than facilitate this task.

sentencing range for each felony and misdemeanor grade, and that applies aggravating factors such as recidivism and vulnerable victim adjustments in a consistent way.

HISTORY OF CRIMINAL JUSTICE IMPROVEMENT COMMITTEE'S CODE IMPROVEMENT PROJECT

The current Delaware Criminal Code was developed beginning in 1967, in direct response to the American Law Institute publishing its landmark Model Penal Code in 1962. In the words of then Judge, later Justice, Joseph T. Walsh, Chairman of the Governor's Committee for Revision of the Criminal Law: [t]he criminal law of Delaware consisted at that time of a large number of unconnected criminal statutes. The offenses were not codified, and the sections defining them were phrased in widely different styles of language. Penalties were inconsistent, language was archaic and worst of all, many offenses were left to be defined by the common law without any statutory assistance. General principles of criminal liability, such as definitions of the requisite states of mind for criminal guilt and defenses to criminal prosecution, were also left to common-law development.⁴

After eight public hearings and a four-year revision process, the current code was passed and received the Governor's approval in 1972, and was enacted in 1973.

The Criminal Code of 1973 was short, clean, and comprehensive — a dramatic improvement over the law it replaced. In the years since 1973, however, numerous amendments have greatly reduced the utility and clarity of the original criminal code. The sheer volume of the code has increased from less than 95 pages as originally enacted, to over 407 pages today. Nearly all of these amendments and additions were made on an ad hoc basis and without a comprehensive review of the code as a whole. As a result, several fundamental problems plague the code, much as they plagued Delaware criminal law before 1973. Provisions overlap with or contradict other provisions. Offenses have become obsolete or out of touch with current societal norms. Penalties are disproportionate to the harm caused or in comparison with other provisions. Numerous major criminal offenses are defined in statutes outside the criminal code. Conversely, various procedural, sentencing, and regulatory provisions that properly belong elsewhere — in the Code of Criminal Procedure, or another title related to the provision's subject matter — appear within the criminal code.

In 2014, the Delaware General Assembly passed a law creating the Criminal Justice Improvement Committee ("CJIC") (FY 15 Budget Act of the 147th General Assembly (SB 255, Sect. 111 as amended by SB 266))⁵. Part of the mandate of that group was to focus on reforming the Delaware Criminal Code. To that end, the epilogue language required that the CJIC:

⁴ Frank B. Baldwin, III, DELAWARE CRIMINAL CODE WITH COMMENTARY iii (1973) (introductory material by Judge Walsh)

⁵ Section 111 provides as follows:

"Recognizing funding and policy challenges in the criminal justice system, the General Assembly hereby establishes the Criminal Justice Improvement Committee. The Committee shall suggest efficiencies, improvements and cost savings to the criminal justice system. The Chair and the Co-Chair of the Joint Finance Committee shall appoint a Committee Chair. The Committee shall also include the following membership:

- The Attorney General or designees;
- The Chief Public Defender or designee;
- The Commissioner of Correction or designee;
- The Governor's criminal justice policy advisor;
- A member of the Joint Finance Committee representing each caucus, as appointed by the Chair and Co-Chair of the Joint Finance Committee;
- Two representatives of the Judicial Branch, as appointed by the Chief Justice;
- A representative from the Delaware Association of Criminal Defense Lawyers;
- A representative from the Delaware Bar Association; and
- The Director of Substance Abuse and Mental Health or designee.

“review opportunities for efficiencies in the criminal justice system, including but not limited to the following areas:

- Statutes in the criminal code, identifying disproportionate, redundant, outdated, duplicative or inefficient statutes;
- Crimes that should or should not constitute potential jail time; . . .”

During the following year, discussions were had among members of the CJIC established by the epilogue as to how best to move the epilogue’s mandated mission forward. By mandate of the epilogue, the Chief Justice and his designee were required to serve on the CJIC. To aid the CJIC, the Chief Justice selected Superior Court Judge William C. Carpenter, Jr. as his designee, because Judge Carpenter is not only highly experienced as a criminal law judge and a former U.S. Attorney for the District of Delaware, but also the head of the General Assembly-mandated Delaware Sentencing Accountability Commission (SENTAC).⁶

In discussions with the General Assembly’s Joint Finance Committee (JFC), the Judiciary suggested that the code reform tasks in the epilogue be assigned to SENTAC, because that body was established by statute to create a coherent sentencing scheme under the existing code, was expert in the criminal law of Delaware, and contained key stakeholders such as the police, corrections officials, and prosecutors and defense attorneys. Ultimately, the General Assembly elected to continue with the mandate for code reform under the CJIC, and to continue with its existing membership.⁷

As it had in 2014, the General Assembly again directed the CJIC to “review opportunities for efficiencies in the criminal justice system, including but not limited to the following areas:

- statutes in the criminal code, identifying disproportionate, redundant, outdated, duplicative or inefficient statutes;
- crimes that should or should not constitute potential jail time; . . .”

The Committee shall review opportunities for efficiencies in the criminal justice system, including but not limited to the following areas:

- Statutes in the criminal code, identifying disproportionate, redundant, outdated, duplicative or inefficient statutes;
- Crimes that should or should not constitute potential jail time;
- Judicial access to adequate information prior to sentencing;
- Court decisions and rules related to Rule 61;
- The charging and plea bargaining process, including cases where charges may overlap;
- Bail and alternatives to incarceration including new technologies; and
- Action plans related to the identified areas outlined in the Sixth Amendment Center’s report, published in February 2013.

The Committee shall work in consultation with other governmental committee and bodies which have overlapping authority in the criminal justice areas that it will be reviewing, in order to support coordination, and avoid duplication, of efforts. Those bodies include, but are not limited to, the Delaware Sentencing Accountability Commission, Delaware Justice Reinvestment Oversight Group, and the Supreme Court’s Access to Justice Commission. In recognition that many important criminal justice issues fall within overlapping jurisdictions of various commissions, task forces, and other bodies overseeing criminal justice areas, and that this overlap creates a strain on scarce staff resources, risks inefficiency and potential inconsistency in policies, the Committee shall also recommend steps to reduce the number of bodies dealing with common criminal justices issues, so that fewer, but more effective, bodies develop and help implement criminal justices policies. The Committee shall recommend appropriate funding or policy changes by May 1, 2015.”

⁶ 11 *Del. C.* § 6580.

⁷ FY 16 Budget Act of the 148th General Assembly, HB 225, Sect. 112. The General Assembly again voted support the Code Improvement project in FY 2017 Budget Act (SB 285) and then again in the FY 2018 Budget Act (HS 1 for HB 275).

Using that authority, the Judiciary offered funding it received in the FY 2016 Budget Act of the 148th General Assembly (HS No. 1 for HB 225, Sect. 49) to support access to justice initiatives and hired Professor Paul Robinson, an internationally renowned expert in crafting modern criminal codes, to aid the legislatively established CJIC.⁸

During the CJIC's November 17, 2015 initial meeting, the committee discussed working with Professor Paul Robinson to guide an independent and comprehensive review of Delaware's criminal code to meet their goals specified in budget epilogue. A group of lawyers and judges involved in the Delaware criminal justice system was formed to assist with the project, which initially included: Judge William Carpenter, SENTAC Chair; Judge Ferris Wharton; Judge Charles Butler; Judge Paul Wallace; Lisa Minutola, Chief of Legal Services for the Office of Defense Services; Robert Goff, Office of Defense Services; Steve Wood, Deputy Attorney General; and Kathleen Jennings, who was at that time Chief State Prosecutor. During the first portion of the drafting and revision process that followed, Steve Wood and Kathleen Jennings received all the materials distributed to the Working Group. But before the Working Group deliberations began, the then-Attorney General declined the invitation for his attorneys to participate in the process and eventually would not permit them to comment on the Report. As a result of this decision by that Attorney General, no one in the Department of Justice participated in the Working Group. Nonetheless, the Working Group's initial members included three former prosecutors with decades of prosecutorial experience. Additionally, Professor Robinson is a former federal prosecutor and former member of the United States Sentencing Commission appointed by President Reagan.

On January 21, 2016, Professor Robinson appeared before the CJIC to present some preliminary work and answer questions about the Project's approach and process. The CJIC agreed that the Project should continue its work. On June 8, 2016 at the request of the CJIC Chair, Professor Robinson appeared before the full Joint Finance Committee to update members of the General Assembly about the Project's progress. In the interests of transparency, Professor Robinson and the Working Group has also invited commentary and questions from other stakeholders in the criminal justice system, to be incorporated before the Report is finalized including:

- leaders of the Delaware police unions,⁹
- police chiefs from across the state,¹⁰ and

⁸ Section 49 provides:

"Notwithstanding anything contained in 12 *Del. C. c. 11 Subchapter IV*, or any other rule or law to the contrary, 50 percent of the funds held pursuant to former Superior Court Rule 16.1 shall be deposited in the General Fund and the remained authorized to be used, on a one-time basis as determined by the Chief Justice, for operation needs in Fiscal Year 2016 related to the work of SENTAC, the Access to Justice Commission, and the Criminal Justice Council for the Judiciary."

⁹ On April 22, 2016, Professor Robinson, Mr. Kussmaul, and Chief Justice Strine met with: Thomas Brackin, President of the Delaware State Troopers Association; and Fred Calhoun, President of the Delaware State Lodge of the Fraternal Order of Police.

¹⁰ On July 21, 2016, Professor Robinson and Mr. Kussmaul met with the following representatives from the Delaware Police Chiefs Council: Jeff Horvath, Executive Director of the Council; Wayne Kline, Chief of Enforcement for the Delaware Department of Natural Resources and Environmental Control; Paul Bernat, Chief of the Dover Police Department; R.L. Hughes, Chief of the Georgetown Police Department; John Horsman, Chief of the Delaware Capitol Police; and Peggy Bell, Executive Director of the Delaware Criminal Justice Information System. On August 15, 2016, Professor Robinson, Mr. Kussmaul, Chief Justice Strine, and Judges Carpenter and Wharton met with: Colonel Nathaniel McQueen, Jr., Chief of the Delaware State Police; Colonel Elmer M. Setting, Chief of the New Castle County Police Department; and Fred Calhoun, President of the Delaware State Lodge of the Fraternal Order of Police.

- victims' rights advocates.¹¹

Throughout 2017, input on the Code was actively sought from both stakeholders in the Delaware criminal justice system and the general public. On January 10, 2017, a presentation was made to the Council of Police Chiefs discussing the Improved Code. On March 8, 2017, the Working Group met again with Victims' Advocates to discuss the draft of the code. In response to their comments, the code text was amended in several significant ways.

The Working Group completed its initial work on March 21, 2017, and provided a Preliminary Report containing the Improved Code Text to the CJIC and the public for discussion. The Committee then posted the Preliminary Report on the CJIC website at <https://legis.delaware.gov/Committee/JointFinance/CJIC-Report> for all to review. The purpose of the Preliminary Report was to surface issues for public discussion and to solicit comments to ensure the process was as transparent as possible. At this point, the Working Group added key members to help conduct the public hearings and to turn the Preliminary Report into a Final Report. These new members—Adam Balick, Esq., Ipek Medford, Esq., and Elmer Setting—had substantial prosecutorial and law enforcement experience. With the existing members of the Working Group, they actively engaged in listening to the public and key constituencies and incorporating their input into the Preliminary Report.

Public hearings were held to solicit additional comments and feedback from the community. The first public hearing took place in Newark on April 3, 2017 at the University of Delaware, the second on April 10, 2017 at Delaware State University, and the third on April 13, 2017 at the University of Delaware's Virden Retreat Center in Lewes. Written comments were also accepted online from those who could not attend the hearings or wanted to supplement their remarks at the hearings. A number of the concerns of victim's rights groups and others led to amendments to the Code text.

In May 2017, the Delaware Department of Justice ("DDOJ") provided Preliminary Comments to the proposed Improved Code and Commentary. The Working Group carefully reviewed these comments and made a number of significant changes to the code text in response to the DDOJ's comments.

Several members of the drafting group met again during summer of 2017 with police chiefs, Union heads, and their attorneys for the police to discuss the Improved Code. The Improved Code was amended in accordance with their concerns.

On November 17, 2017, a follow-up meeting with victims' advocates was held. The changes previously made to the Code text in response to the victims' advocates' concerns were reviewed, and additional comments were received for review by the Working Group. More amendments to the Code were made in response to the advocates' concerns. Also on November 17, 2017, the DDOJ provided a final version of its Comments on the Preliminary report. Once again, the Working Group reviewed and deliberated about these comments and made changes whenever it was possible to do so and be consistent with the Epilogue mandate.

On December 20, 2017, the Working Group reported to the CJIC the status of the Improved Code and requested that all constituencies and the public review it and make further comments. An updated version of the Improved Code was posted on the CJIC website on January 25, 2018.

In December 2017 and January 2018, the Working Group reviewed the DDOJ's final comments on the Final Report and made additional changes to the text in response to those comments.

On February 9, 2018, members of the Working Group met with police union representatives to discuss the Improved Code. The Improved Code was amended in accordance with their concerns.

¹¹ By way of example, on August 30, 2016, Professor Robinson, Mr. Kussmaul, Mr. Rudyak, and Judge Wharton met with representatives from various victims' rights advocacy organizations.

On February 13, 2018, members of the Working Group met with the Delaware Police Chiefs Council at their regular meeting in Dover to discuss the Improved Code. The Improved Code was amended in accordance with their concerns

On March 6, 2018, the Republican caucuses were briefed on the Improved Code.

SB 209 (the Improved Code Bill) and SB 210 (the Conforming Amendments Bill) were released in May 2018. The only differences between SB 209 and the Final Report that was delivered to the AG on March 16, 2018 were formatting changes made at the request of Legislative Counsel – no substantive changes were made. On June 5, 2018, the DDOJ released its comments on SB 209 and SB 210.

After more than two years of work, three public hearings, and countless meetings with various criminal justice constituents – creating an inclusive super-process – a difficult decision was made to put these bills on hold to allow additional time for review by those who had not previously engaged in the process. In the interest of being fully transparent, deliberative, and inclusive, Senate Bill 209 and its companion legislation Senate Bill 210 were not worked for the remainder of the 149th General Assembly.

After the bills were temporarily withdrawn in June 2018, more comments on the bills were solicited from state agencies, victims' groups and child advocates. Furthermore, the Working Group carefully reviewed the DDOJ's June 5, 2018 comments on SB 209 and 210 and amended the Improved Code in accordance with those concerns. The Working Group held discussions to address issues in the criminal code that were understood to be of particular concern to the incoming Attorney General, Kathleen Jennings. These issues included the Improved Code's treatment of offenses against children and the grading scheme for rape. As a result of these discussions, additional changes were made to the bills.

In addition, immediately upon Attorney General Jennings' election, members of the Working Group reached out to her and her advisors to discuss the Improved Code and any new feedback the AG's office might have. Multiple meetings were held between Working Group members and the AG's representatives in early 2019. These meetings were constructive, and the Working Group thanks Attorney General Jennings and her staff for their input. During those meetings, there was useful discussion with the Department of Justice, but the Department of Justice representatives did not provide specific comments on the Improved Code. In these discussions, representatives of the Working Group shared the proposed amendments the Working Group had developed to address prior input from the Department of Justice and from other constituents.

To sum up, the CJIC and the Working Group believed that it was essential for the Working Group to consider closely the input it received on its Preliminary and Final Reports and draft Improved Code from the public, key constituencies, and members of the CJIC and General Assembly in finalizing its recommendations. In particular, the Working Group held extensive meetings to address comments about the grading of sex offenses, in reaction to comments made by the Department of Justice, understanding that these concerns were important to the new Attorney General and to other constituents. Likewise, the Working Group was expanded to include the Chief Judge of the Family Court, Michael K. Newell and the Counsel to the Chief Judge, Eleanor B. Torres, so that the Working Group could better consider input received from Child Protection Accountability Commission, the Delaware Commission against Domestic Violence, and others. Over a lengthy series of meetings, informed by feedback and discussion provided by the entire Family Court, the Working Group developed amendments to be responsive to important suggestions it received.

The Working Group was grateful to receive valuable feedback from all these sources, including the police, victims' organizations, and Department of Justice, and gave this feedback important weight. As a result of this input, the Improved Code was amended in several important respects, but in a manner that adhered to the important principles set forth in the epilogue that guided the Code's preparation. A summary of the material changes from the Preliminary Report to the Final Report is attached as Exhibit A, and a summary of material changes from the date the Improved Code bill was introduced in Spring of 2018 until the present is attached as Exhibit B.

WHY AN IMPROVED CRIMINAL CODE?

EXECUTIVE SUMMARY

In the forty years since the General Assembly adopted the Criminal Code of 1973, thousands of individual changes to the law have led to numerous inconsistencies, redundancies, ambiguities, and contradictions in the code. As was the case in 1973, the time is ripe to take a step back and conduct a more comprehensive review of the Delaware Criminal Code.

The Improved Code seeks to replace the current code with a clear, concise, and comprehensive set of provisions. Specifically, the Improved Code seeks to include necessary provisions not contained in the current code; to eliminate unnecessary or inconsistent provisions of the current code; to revise existing language and structure to make the code easier to understand and apply; and to ensure that the offenses and rules contained in the code are cohesive and relate to one another in a consistent and rational manner.

In developing the Improved Code, we were guided by five general drafting principles, set forth below. The first three principles relate to the form of the Code; the final two principles relate to its content.

1. Use clear, accessible language and organization

One of the critical functions of a criminal code is to provide notice to citizens of what conduct is prohibited. Clear and accessible writing enables provision of true notice while also ensuring that no offender escapes liability because of an incomplete or ambiguous offense definition. More straightforward code provisions also promote development of clearer jury instructions, making it easier for jurors to fulfill their critical role. Even for members of the criminal justice system, who work with the code every day and must be intimately familiar with its rules, plain-language expression is essential. Current Delaware law, however, is often less clear than it could, and should, be.

- Various current provisions, such as “use, possession, manufacture, distribution and sale of unlawful telecommunication and access devices,” use undefined terms whose meaning is not obvious, and frequently employ legal terms of art without explaining their meaning. In such cases, users of the criminal code (including judges, lawyers, law enforcement officials, and jury members) must guess at the General Assembly’s intended meaning.
- Current Delaware law contains numerous offenses that unnecessarily reiterate, or even undermine, General Part provisions. For example, many offenses are defined to prohibit certain conduct and “attempting” such conduct. This approach to defining offenses short-circuits the general rules for attempts set forth in the General Part, under which attempts are distinguished from completed crimes for grading purposes.
- Current law fails to properly categorize general defenses into justifications, excuses, and non-exculpatory defenses, or to consistently define who bears the burden of proving those different kinds of defenses, or by what standard. As a result, the burden is on the defendant to prove some excuse defenses by the preponderance of the evidence, such as the Mental illness or serious mental disorder defense, while setting only an evidentiary burden as to others, such as Involuntary intoxication. Yet all excuses — and especially Mental illness or serious mental disorder and Involuntary intoxication — are inherently similar, in that they prevent liability for an admitted violation of the law by a blameworthy defendant.

2. *Provide a comprehensive statement of rules*

A criminal code must include all necessary rules governing liability. Comprehensiveness helps avoid inappropriate results. Courts, which decide individual cases and act independently of one another, cannot be as effective as a legislature in formulating coherent general doctrines that will work together as the provisions of a comprehensive code can and must. Moreover, an uncodified rule is more likely to be applied differently in similar cases than a codified rule, as the terms of the latter are fixed, explicit, and available to all officials at each stage in the process. The following are a few examples of significant provisions current law omits:

- Current Title 11 lacks general provisions explaining the practical effects of categorizing a defense as a justification, excuse, or non-exculpatory defense. As a result, it is unclear whether bystanders would be permitted to assist in conduct that is excused, or whether an aggressor would be permitted to resist justified force used in self-defense — both undesirable outcomes.
- Current Title 11 does not include a comprehensive offense for resisting or obstructing law enforcement officers, fire fighters, and emergency personnel. Instead, it contains a few specific offenses that deal with some, but by no means all, of the situations in which interference with first responders merits punishment. As a result, many blameworthy offenders are arbitrarily saved from prosecution. Current law also does not contain a comprehensive offense for obstructing administration of law, instead taking a similarly piecemeal approach.
- Current law fails to criminalize causing or risking catastrophe, a very serious offense contained in the overwhelming majority of U.S. criminal codes. This omission leaves terrorist-like attacks to be prosecuted using offenses with unsuitably low grades, such as criminal mischief or reckless endangerment.
- Current law fails to define an offense for reckless injuring that is separate from assault. Instead, all reckless, knowing, or intentional injuries are graded the same. As a result, intentionally and knowingly causing injury, which are materially more blameworthy acts, are not punished more seriously than recklessly causing injury.

3. *Consolidate offenses*

The Criminal Code Improvement Project provides a valuable opportunity to consolidate multiple offenses that overlap, contradict, or narrowly focus on particular instances of a general category of improper conduct. Consolidation also aids the task of proper grading, because it is nearly impossible to maintain consistent, proportional grading when offense definitions are based on immaterial or incomprehensible distinctions. The following are a few examples of the numerous problems that suggest enormous potential to consolidate offenses more effectively:

- The sheer verbiage of current law is one indication of its failure to consolidate similar offenses. To take just one example, the current criminal code uses 16,229 words to define its fraud offenses, while the Improved Code requires only 2,732 words to do so. Overall, the Improved Code's Special Part uses only 30 percent — roughly 1/3 — of the words in the current code's Special Part, plus other, non-criminal code statutory felonies.
- Current Delaware law defines numerous serious crimes outside the criminal code. Over one hundred misdemeanors and nearly one hundred felonies are scattered throughout the Delaware Code, and more than fifty offenses appearing outside Title 11 — many of which overlap, or simply restate, prohibitions in current Title 11 — are graded as Class E felonies or higher.

- Current law frequently includes numerous narrow offenses in addition to, or instead of, a single, more general offense. In the area of theft, for example, in addition to the current general offense, there are separate offenses for stealing from a cemetery, shoplifting retail goods, or stealing a motor vehicle, prescription pad, rented property, livestock, computer services, or firearms, to name just a few. Even more exaggerated examples of needless multiplicity of offenses exist for such offense categories as property damage, assault, and perjury. In many cases, these multiple offenses will impose varying sentencing grades without any apparent basis for the variation.

4. *Grade offenses rationally and proportionally*

One virtue of a Code Improvement Project, relative to the usual piecemeal legislative additions and alterations to the criminal code, is the opportunity it provides for a general review of the system of grading offenses, considering how all offenses relate to one another rather than considering individual offenses in a vacuum. The necessarily ad hoc process that has generated current law makes consistent grading difficult, if not impossible. An overall review reveals a great variety of grading problems and inconsistencies, of which the following are merely a few examples:

- The current sexual assault provisions fail to take the offender’s age into account, but the rape provisions do take it into account, in many different ways. But there is no clear reason why it would only matter for one provision, but not the other.
- Current law treats many forms of fraud as a single-grade misdemeanor, regardless of the amount of money involved in the fraud. Other forms of fraud provide a felony grade for offenses involving an amount above a certain threshold (usually \$1,500), while any amount below that threshold is a misdemeanor. As a result, for example, defrauding secured creditors in the amount of \$10 million is treated the same as defrauding them for \$100.
- Some unexplained grading anomalies reflect current law’s lack of clarity and failure to consolidate similar offenses. For example, current law defines the offense of bribery as a Class E felony, but also defines a separate offense covering “unlawful gratuities” and grades that offense as a Class A misdemeanor. But, giving an unlawful gratuity is simply a specific form of bribery.
- Current law grades sexual harassment much less harshly than non-sexual harassment, despite the fact that the former can involve threatening to rape another person.
- Current law grades thefts involving more than \$100,000 the same as manslaughter and aggravated kidnapping, while grading petty thefts (for example, stealing a sandwich) the same as assault and sexual assault.
- Current law uses a single felony grade for damaging property; as a result, destroying a famous work of art valued at \$10 million would be subject to the same punishment as stealing \$1,500 or selling drug paraphernalia.

5. *Retain all (but only) reasonable policy decisions embodied in current law*

Because substantive policy decisions about the rules of the criminal law reflect value judgments properly left to the General Assembly, and because there is a value to consistency with past precedent and practices, the Improved Code seeks to follow the substance of current law when it is possible to do so without increasing injustice, lack of clarity, or inefficiency. In some places, however, current law contains multiple contradictory rules — and therefore no clear rule — on a subject. Some rules may have been sound when enacted, but no longer reflect current realities or sensibilities and require expansion,

alteration, or deletion. For instance, Title 11 contains a number of outdated offenses that do not belong in a modern criminal code, such as the offenses of larceny of livestock, smoking on trolleys, and advertising marriage in another state. Maintenance of dead-letter statutes of this kind only tends to invite abuse and to undermine the authority of the criminal law as a reflection of the governed community's sensibilities.

WHY AN IMPROVED CRIMINAL CODE?

INTRODUCTION

It has been more than forty years since the General Assembly adopted the Criminal Code of 1973. In that time, the code has been expanded and amended in numerous ways. Those later alterations, however, have each sought to address the specific matter at hand, with little attention to the general effects of the change on the criminal code's overall structure, its terminology, or its application. Meanwhile, four decades have passed without an overarching review of the criminal code as a whole to determine what modifications should, or must, be made to reflect changing times, developing insights, and changes in the broader legal landscape. As a result, the current criminal code has numerous inconsistencies, redundancies, ambiguities, and contradictions. As was the case in 1973 — and may well be the case again in another forty or fifty years — the time is ripe to take a step back and conduct a more comprehensive review of the criminal code.

The Improved Code attempts to eliminate these problems and replace the current code with a clear, concise, and comprehensive set of provisions. Specifically, the Improved Code seeks to include necessary provisions not contained in the current code; to eliminate unnecessary or inconsistent provisions of the current code; to revise existing language and structure to make the code easier to understand and apply; and to ensure that the offenses and rules contained in the code are cohesive and relate to one another in a consistent and rational manner. At the same time, the Improved Code aims to track the substantive policy judgments reflected in the original code and its later amendments. When the process of clarifying and reconciling current provisions made such substantive choices necessary, we have sought to explain and justify the proposed changes with commentary designed to assist the enactors, and ultimately the users, of the Improved Code.

In developing the Improved Code, we were guided by five general drafting principles, set forth below. The first three principles relate to the form of the Code. Experience shows that proper form can aid, and poor form can hinder, a code's ability to achieve its substantive functions. The final two principles concern the Code's content.

1. USE CLEAR, ACCESSIBLE LANGUAGE AND ORGANIZATION

One of the critical functions of a criminal code is to provide notice to citizens of what conduct is prohibited. Indeed, the fundamental principle of legality — the requirement of a clear prior written prohibition as a prerequisite to criminal liability — underlies numerous constitutional and other core criminal-law rules, such as the constitutional prohibition against ex post facto laws and the constitutional invalidation of vague offenses. Providing notice also has obvious practical value, for citizens can hardly be expected to obey the law's commands if they are unaware of them, or cannot understand them. Accordingly, clear and accessible writing enables provision of true notice and ensures that no judgment is imposed that was not clearly intended and expressed by the General Assembly, and that no offender who violates the rules will escape liability because of an incomplete or ambiguous declaration of the law's commands.

The virtues of plain-language drafting extend beyond the direct imposition of liability. The criminal code serves functions beyond notifying the general public in advance of the law's commands of them. The code is also the ultimate basis of guidance for lay juries, who must decide after the fact whether a criminal offense has been committed in a particular situation. More straightforward code provisions promote development of clearer jury instructions, making it easier for jurors to fulfill their

role. Even (perhaps especially) for members of the criminal justice system, who work with the code every day, plain-language expression is essential. Law enforcement officers, for example, are charged with implementing the code's rules fully and fairly. Yet these officers are not lawyers. No less than the general populace, their ability to perform their legal role is enhanced by clarity in the criminal law's written expression.

Further explanation of this goal follows, along with a representative, but by no means exhaustive, collection of examples of current Delaware law's shortcomings in this area.¹²

A. Clear Language

Several drafting methods promote the goal of clarity. First, effective communication calls for short, commonly used words, and avoidance of legal terms of art where possible. When such legal terms are used, they should be defined, and it should be apparent that the terms' use is to be guided by the definition and not left to unguided speculation. One difficulty with current law is that numerous important terms, many of which have no commonly understood meaning or are complex legal terms, are left undefined. In such cases, users of the criminal code (including judges, lawyers, law enforcement officials, and jury members) must guess at the General Assembly's intended meaning. To avoid this problem, the Improved Code includes a definitions section at the beginning of the Title that contains all of the defined terms used in the Title, and includes a provision at the end of each Section that identifies all of the defined terms used in that Section with a citation to the place where the term is defined (whether in the Improved Code or another Title).

Current law also sometimes impedes clear understanding by using undefined terms where similar defined terms exist. For example, current 11 Del. C. § 231 clearly defines the culpability levels of intent, knowledge, recklessness, and negligence. Nevertheless, numerous current Delaware provisions employ other culpability requirements, such as “having reason to believe,”¹³ “reasonable ground to believe,”¹⁴ “would lead a reasonable person to believe,”¹⁵ “having reason to know,”¹⁶ “should know,”¹⁷ “reasonably should know,”¹⁸ “should have known,”¹⁹ “wil[l]fully,”²⁰ “fraudulently,”²¹ “purposely,”²² or a combination of the foregoing and others.²³ The Improved Code rejects the use of such outmoded, and statutorily

¹² For example, numerous other provisions use unclear language. *See, e.g.*, 11 Del. C. §§ 463, 616, 840, 850, 933, 1102, 1106, 1112A, 1112B, 1326, 1327, 1403, 1404, 4214.

¹³ *See* 11 Del. C. § 850(a)(3)a.

¹⁴ *See* 11 Del. C. §§ 802(b)(3), 811(c), 1002(2).

¹⁵ *See* 11 Del. C. §§ 1114(d)(2), 1114A(d).

¹⁶ *See* 11 Del. C. §§ 1339(a)(2), 1458(a)(1).

¹⁷ *See* 11 Del. C. §§ 204(a)(5), 424(2), 464(d).

¹⁸ *See* 11 Del. C. §§ 1303(a)(1); 16 Del. C. § 4774(e).

¹⁹ *See* 11 Del. C. § 1326(d).

²⁰ *See* 7 Del. C. § 724(a); 11 Del. C. §§ 840(b); 850(d)(3)b., 1325; 12 Del. C. § 210; 14 Del. C. § 9302; 21 Del. C. § 6705.

²¹ *See* 6 Del. C. § 4903A(b); 11 Del. C. § 841(b); 16 Del. C. § 4798(r); 21 Del. C. § 2751.

²² *See* 11 Del. C. § 471(a).

²³ *See* 3 Del. C. §§ 1041 (“wilfully or maliciously”), 1045 (“wilfully, negligently or maliciously”); 7 Del. C. § 6013 (“wilfully or negligently”); 11 Del. C. §§ 903A (knowingly, wilfully, and with the intent to defraud”), 941(c) (“wilful and malicious”), 1448A (“wilfully and intentionally”); 16 Del. C. § 2209(b) (“wilful and wanton”); 21 Del. C. § 6701 (“wilfully or maliciously”).

undefined,²⁴ culpability terms in defining offenses. Rather, the Improved Code exclusively uses the culpability levels of intent, knowledge, recklessness, and negligence, which are the nearly universal norm for modern criminal codes.

As an example of the type of legalese the Improved Code seeks to avoid, current law defines the offense of “use, possession, manufacture, distribution and sale of unlawful telecommunication and access devices” as follows:

(a) *Prohibited acts*--A person is guilty of a violation of this section if the person knowingly:

(1) Manufactures, assembles, distributes, possesses with intent to distribute, transfers, sells, promotes, offers or advertises for sale, use or distribution any unlawful telecommunication device or modifies, alters, programs or reprograms a telecommunication device:

a. For the unauthorized acquisition or theft of any telecommunication service or to receive, disrupt, transmit, decrypt, acquire or facilitate the receipt, disruption, transmission, decryption or acquisition of any telecommunication service without the express consent or express authorization of the telecommunication service provider; or

b. To conceal, or to assist another to conceal from any telecommunication service provider or from any lawful authority, the existence or place of origin or destination, or the originating and receiving telephone numbers, of any telecommunication under circumstances evincing an intent to use the same in the commission of any offense.

(2) Manufacturers, assembles, distributes, possesses with intent to distribute, transfers, sells, offers, promotes or advertises for sale, use or distribution any unlawful access device;

(3) Prepares, distributes, possesses with intent to distribute, sells, gives, transfers, offers, promotes or advertises for sale, use or distribution:

a. Plans or instructions for the manufacture or assembly of an unlawful telecommunication or access or device under circumstances evincing an intent to use or employ the unlawful telecommunication access device, or to allow the unlawful telecommunication or access device to be used, for a purpose prohibited by this section, or knowing or having reason to believe that the unlawful telecommunication or access device is intended to be so used, or that the plan or instruction is intended to be used for the manufacture of assembly of the unlawful telecommunication or access device; or

b. Material, including hardware, cables, tools, data, computer software or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture of an unlawful telecommunication or access device.²⁵

²⁴ “Wanton” conduct is only defined in case law. *See Eustic v. Rupert*, 460 A.2d 507, 509 (Del. 1983). “Fraudulently” is only defined in pattern jury instructions. *See, e.g.*, Delaware Criminal Pattern Jury Instructions 11.841(b) (current through 77 Del. Laws, June 30, 2010). Otherwise, there are no pattern jury instructions defining culpability levels other than intent, knowledge, recklessness, and criminal negligence — despite the fact that ordinary negligence is occasionally used in the current criminal code as a culpability level. *See* 11 Del. C. §§ 231(d), 628A(2), 629, 630(a)(2), 938(a), 1107, 1114(a), 1448(e)(2).

²⁵ 11 Del. C. § 850.

On one hand, this offense uses many broad, yet undefined terms — such as “transmit,” “disrupt,” “facilitate,” “prepares,” and “promotes” — inhibiting this offense’s ability to communicate its prohibitions clearly to the public, to members of the criminal justice system, or perhaps even to experienced attorneys and judges. On the other hand, this offense also relies upon numerous verbose, offense-specific definitions — such as “manufacture or assembly of any unlawful access device,” “telecommunication service provider,” and “unlawful telecommunication device” — that, rather than increasing clarity, further obscure the criminal prohibition the offense intends to communicate. The Improved Code defines a corresponding, but briefer and clearer, generalized offense to punish one who “obtains without consent services that the person knows are available only for compensation.”²⁶

Similarly, the current destruction of computer equipment provision imposes liability on one who “without authorization, intentionally or recklessly tampers with, takes, transfers, conceals, alters, damages or destroys any equipment used in a computer system or intentionally or recklessly causes any of the foregoing to occur.”²⁷ The current provision was designed to serve as a comprehensive catchall offense, but its vague and overlapping terms, and its confusing statement of required culpability and conduct, serve only to make its scope less clear. In fact, when the destruction of computer equipment provision’s language is analyzed and considered in light of other current code provisions, it becomes clear that the provision is redundant. The Improved Code does not include a specific offense for “destruction of computer equipment,” in recognition that other general offenses (such as criminal damage or attempted criminal damage) already cover such conduct.²⁸

In some cases, the current code’s language, though it may not represent the clearest or simplest method of expressing a rule, has been “defined” and clarified over time by judicial decisions. For this reason and for the mere sake of stability, we have sought to maintain the language of current law whenever that language would give a reader adequate notice of the provision’s intended meaning. Where modification of existing language is considered necessary, we have prepared commentary to explain the relation between the proposed language and existing statutory language, as explicated by current precedent.

B. Clear Organization

A criminal code, and each of its provisions, must be effectively organized so that each component’s meaning and function are plain and all provisions are easily found. For example, it invites confusion when issues for which there are rules of general application are addressed a second time in specific offense provisions. Current Delaware law contains numerous offenses that unnecessarily reiterate, or even undermine, General Part provisions. For example, many offenses are defined to prohibit certain conduct and “attempting” such conduct.²⁹ This approach to defining offenses short-circuits the general rules for attempts set forth in current law, under which attempts are distinguished from completed crimes (though not for grading purposes).³⁰ Similarly, several current offenses are defined to include

²⁶ Section 1106(a)(1).

²⁷ 11 Del. C. § 936.

²⁸ *See, e.g.*, Section 1144 (criminal damage).

²⁹ *See, e.g.*, 11 Del. C. §§ 617(b)(1), 763(2), 778A(3), 906(3), 1105(a), 1112A(a)(1), 1112B(a)(1), 1257(a)(1), 1257(b), 1304(a), 1458(a), 1471, 3532; 16 Del. C. §§ 4744(e)(1), 4757(a), 4758(a), 4760A(a); 18 Del. C. § 4354(a); 21 Del. C. § 4112; 24 Del. C. § 1790(a); 31 Del. C. § 1003.

³⁰ *See* 11 Del. C. § 531.

anyone who aids, solicits, or conspires with another in planning or committing the offense,³¹ even though general rules covering accomplice liability, solicitations, and conspiracies are defined in the General Part or elsewhere in current law.³² The Improved Code ensures consistency by avoiding offense definitions that revisit, or revise, rules already included in its General Part.

Finally, a criminal code's various rules should be classified sensibly, to ensure that meaningfully different rules are distinguished and similar rules are treated alike. For example, the Improved Code's organization separates justifications, excuses, and non-exculpatory defenses.³³ Recognizing such distinctions is important because a defense's function as a justification, an excuse, or a non-exculpatory defense has significant legal implications.³⁴ Current Delaware law, however, is not organized to accurately distinguish between these three defense types.³⁵

The failure to properly establish such distinctions has resulted in inconsistent rules, such as the rules involving the burdens of proof for general defenses. For example, some excuse defenses are classified as "affirmative defenses"³⁶ while others are classified simply as "defenses."³⁷ The defendant bears the burden of proving affirmative defenses by a preponderance of the evidence,³⁸ but bears only an evidentiary burden as to simple defenses.³⁹ Current law requires that the defendant prove the mental illness or psychiatric disorder defense by a preponderance of the evidence, but not the involuntary

³¹ See, e.g., 11 Del. C. §§ 617(b)(1), 913(a)(2), 1212(3), 1244(a)(6), 1249(b), 1471(f), 1503(d); 16 Del. C. §§ 2209(a), 4757(c).

³² See 11 Del. C. §§ 271–73 (complicity), 501–03 (solicitation), 511–13 (conspiracy).

³³ Justification defenses, such as self-defense and use of force in defense of property, immunize conduct that avoids a harm or evil that is objectively worse than the offense itself. Excuse defenses, such as insanity and immaturity, operate to exculpate persons who cannot properly be held responsible for objectively harmful conduct. Finally, non-exculpatory defenses, such as entrapment and the statute-of-limitations defense, provide exemptions for liability because — even though the actor's conduct is objectively harmful and the actor is responsible for it — some alternative societal interest is deemed to be more important than the assessment of criminal liability.

³⁴ For example, a person enjoying a self-defense justification may be assisted by others, and may not legally be interfered with. On the other hand, an aggressor is entitled to resist a person who enjoys an excuse because he mistakenly believes himself to be acting in self-defense; such a person, even if excused, is not justified. Moreover, because justifications recognize conduct that is socially acceptable, and often desirable, it is sensible to require the prosecution to prove that conduct was not justified. Excuses and non-exculpatory defenses, in contrast, operate to prevent liability for harmful conduct that would ordinarily constitute an offense. Accordingly, and because the state-of-mind or other evidence relevant to an excuse or non-exculpatory defense is frequently within the control of the defendant, it is sensible to shift the burden of proof to the defendant for those defenses, as the Improved Code does.

³⁵ By defining several justifications to protect one who "believes" himself to be justified, Title 11 improperly treats mistake as to a justification as though it were a justification. See 11 Del. C. §§ 462(b)(2), 464(a)–(c), 465(a), 466, 467, 468(2) & (4)–(7), 470(a). The Improved Code categorizes this defense as an excuse, because it relates to the actor's mental state rather than to whether the act itself is objectively justified.

Current Delaware law also does not recognize excuses or non-exculpatory defenses as distinct classes of defenses. As a result, current law treats the statute-of-limitations defense as an element of the offense that must be proven accordingly, while organizing all general defenses together in the same chapter as justification defenses. See 11 Del. C. § 232 (limitations period as an element); see generally Chapter 4 (defenses to criminal liability) of Part I of Title 11.

³⁶ See 11 Del. C. §§ 401(mental illness or psychiatric disorder), 431 (duress).

³⁷ See 11 Del. C. §§ 423 (involuntary intoxication), 441 (ignorance or mistake of fact).

³⁸ 11 Del. C. § 304.

³⁹ 11 Del. C. § 303; see also *Hamilton v. State*, 343 A.2d 594, 596 (Del. 1975) ("[T]he importance of [§ 303(c)] is that it requires only that the defense raise a reasonable doubt in the minds of the jury, not that the jury be persuaded that the defense is more probably true than not.").

intoxication defense—two defenses that are inherently similar. The evidentiary rules for these defenses differ for no obvious reason.⁴⁰ Because excuse defenses are all the same in terms of their underlying principles and their central issue (the defendant’s blameworthiness for an admitted violation), they should be treated similarly in terms of the burden of proof, as is done in the Improved Code.⁴¹

Similarly, current law fails to articulate whether the State or the defendant bears the burden of proving or disproving several non-exculpatory defenses, and by what standard.⁴² This omission is plainly inconsistent with the rule shifting the burden of proof to the defendant for the mental illness excuse. If such a burden-shifting rule is appropriate for an excuse defense — under which the defendant would be considered blameless in committing the offense — it should also apply to non-exculpatory defenses, which involve no claim of blamelessness. The Improved Code employs such a rule.⁴³

2. PROVIDE A COMPREHENSIVE STATEMENT OF RULES

It is critical not only that a criminal code say things clearly, but that it say everything that needs to be said. A criminal code must be comprehensive as well as comprehensible. Failure to provide all necessary provisions will inevitably lead to either or both of two results: (1) failures of justice, as the code’s omissions and “loopholes” lead to liability where none is deserved or allow an offender to avoid deserved punishment; or (2) a de facto delegation of authority to the courts (or usurpation of authority by the courts), as judicial interpretations try to fill in the gaps left by the legislature. The costs of the first result are obvious. Yet the alternative of judicial intervention, however necessary to achieve sensible or just results in individual cases, may ultimately impose costs as well. The interests of advance notice (discussed above), democracy, and legal consistency and coherence suggest that the legislature, rather than the courts, must bear the primary responsibility for creating criminal law rules.

Insisting on comprehensiveness leads to several important benefits. First, comprehensiveness helps avoid inappropriate results. Courts, which decide individual cases and act independently of one another, cannot be as effective as a legislature in formulating coherent general doctrines that will work together as the provisions of a comprehensive code can and must. Second, an uncoded rule is more likely to be applied differently in similar cases than a codified rule, as the terms of the latter are fixed, explicit, and available to all officials at each stage in the process.

Further explanation of this goal follows, along with a representative, but by no means exhaustive, collection of examples of current Delaware law’s shortcomings in this area.⁴⁴

⁴⁰ Current Delaware law does not make it clear who bears the burden of persuasion for statutory defenses, or by what standard they must be proven or disproven. Section 108(c) avoids ambiguity by explicitly placing the burden of persuasion on the State and the defendant as appropriate.

⁴¹ Rather than defining excuse defenses as affirmative defenses or simple defenses, proposed Section 321(d) places the burden of persuasion on the defendant to prove any excuse defense by a preponderance of the evidence. More generally, the term "affirmative defense" has been dropped from the Improved Code’s language in favor of general formulas and more explicit language defining the burden of persuasion.

⁴² See 11 Del. C. §§ 205 (defining statute of limitations as an element of the offense, and not as a defense at all), 207–10.

⁴³ Improved Code Section 341(c) provides that, as with excuses, the defendant must prove a non-exculpatory defense by a preponderance of the evidence.

⁴⁴ For example, in the General Part, the Improved Code introduces several other currently omitted provisions that govern important common issues and make clear the relationships between various parts of the Code. See, e.g., Sections 106 (preserving civil remedies), 103(123) (defining “property”), 201 (making clear bases of liability), 202 (categorizing and defining offense elements), 207 (mental illness or disorder negating required culpability), 103(32), (132) &(135) (defining different kinds of mistakes), 301(a) (clarifying that justification,

A. General Part Rules

Current Title 11 contains no provisions explaining the practical effects of justification, excuse, and non-exculpatory defenses. The central distinction between the three groups of general defenses is that justified conduct—conduct technically satisfying an offense’s objective elements, but is subject to a justification defense—is socially desirable conduct that citizens are encouraged to take when necessary. Therefore, it is also desirable that other people assist a person’s justified conduct, and it is not desirable for the person against whom justified conduct is used to be allowed to resist it. For example, a person who is attacked is justified in using self-defense; other people are allowed to assist in defending the victim; and the attacker is not justified in resisting the victim’s proper use of force. On the other hand, excuse defenses prevent liability for socially undesirable acts, but in situations where the defendant is nevertheless not blameworthy. In that case, it is not desirable for other people to assist (for example) a person who commits theft under duress, and the victim of such a theft must be allowed to resist it. The same is true for conduct subject to a non-exculpatory defense, which is both socially undesirable *and* blameworthy. But, without a clear categorization of general defenses into justifications, excuses, and non-exculpatory defenses—and without provisions explaining the less-than-intuitive consequences of those categorizations—inconsistent and improper liability can result for people who assist and resist conduct subject to those defenses. Because consistency and predictability is an essential trait of a comprehensive criminal code, the Improved Code both carefully organizes general defenses and provides thorough provisions explaining their effects.⁴⁵

B. Special Part Offenses

The current code sometimes fails to criminalize conduct that merits criminal liability. For example, Title 11 does not provide a comprehensive offense for resisting or obstructing law enforcement officers, fire fighters, and emergency personnel. Instead, Title 11 contains a few overly specific offenses that prohibit resisting arrest by using force or violence,⁴⁶ disarming a law enforcement officer,⁴⁷ or obstructing a firefighter from extinguishing a fire.⁴⁸ As a result, a person who interferes with the discharge of a law enforcement officer’s duties unrelated to an arrest—or a firefighter’s duties unrelated to extinguishing a fire (for example, rescuing someone trapped inside a burning building)—may entirely escape liability under current law. Additionally, interference with the duties of emergency medical

excuse, and non-exculpatory defenses bar liability), 322 (specifying an excuse defense for involuntary acts and omissions), 326-28 (codifying mistake of law excuse defenses currently established only in case law), 342 (defining statute of limitations as a non-exculpatory defense, rather than as an element of an offense), 505 (defense to certain inchoate offenses for defendants who are victims or whose conduct is inevitably incident to the offense), 508 (general inchoate offense for possessing instruments of crime).

The proposed Special Part also includes several offenses not recognized in current law. *See, e.g.*, Sections 1023 (recklessly causing injury), 1108 (unauthorized distribution of protected works), 1123 (fraudulent treatment of public records), 1145 (causing or risking catastrophe), 1242 (resisting or obstructing a law enforcement officer or other specified person), 1243 (obstructing administration of law or other government function), 1345 (unlawful dissemination of personal pornography).

⁴⁵ See Improved Code Sections 301, 321, and 341.

⁴⁶ 11 Del. C. § 1257.

⁴⁷ 11 Del. C. § 1458.

⁴⁸ 11 Del. C. § 1243.

personnel is not addressed at all in current law, despite its close relationship with law enforcement and fire fighters and the disastrous results of obstructing their efforts. The Improved Code fills these unjustified gaps in liability by imposing liability for obstruction or interference with any duties of first responders.⁴⁹

Similarly, Title 11 does not provide a comprehensive offense for obstructing administration of law and other government functions, instead taking a piecemeal approach across multiple titles that leaves unnecessary gaps in liability.⁵⁰ The Improved Code joins the overwhelming majority of jurisdictions with modern criminal codes by creating a comprehensive offense that addresses any obstruction or interference with the administration of law.⁵¹

In other cases, the current code's failure to define suitable offenses means prosecution is only possible for less serious offenses, resulting in punishment that falls short of the relative gravity of the offense. For example, Title 11 fails to criminalize causing or risking a catastrophe, standard offenses adopted by many jurisdictions from the Model Penal Code.⁵² Although these offenses overlap with assault, endangerment, and property damage offenses, their magnitude signals a different kind of harm—one to social stability and infrastructure that is more immediate in the wake of the September 11 attacks and the War on Terror than perhaps it was in 1973 when the current code was enacted. Knowingly causing a catastrophe would normally be graded the equivalent of a current Class A felony; recklessly causing a catastrophe would be a Class B felony; and recklessly creating a substantial risk of a catastrophe would be a Class E felony. Under current law, however the act of causing a catastrophe would count only as criminal mischief (at most, a Class G felony),⁵³ while risking catastrophe would not be an offense at all unless it involved a risk of physical injury.⁵⁴

Similarly, and unlike most jurisdictions, current Delaware law does not provide an offense for reckless injuring that is separate from assault. The basic form of assault in Title 11 is defined as “intentionally or recklessly” causing either physical injury or serious physical injury.⁵⁵ By implication, that definition also includes knowingly causing injury. As a result, a person who injures another person by accident, though recklessly, commits the same offense as both the person who is aware that his conduct is likely to result in injury, and the person who subjectively desires to cause injury. But, intentionally or knowingly causing injury is materially more blameworthy than doing so recklessly, and ought to be punished more severely. The Improved Code avoids this problem by defining assault as an offense separate from, and graded more harshly than, reckless injuring.⁵⁶

3. CONSOLIDATE OFFENSES

A third goal is consolidation of all criminal offenses. Perhaps inevitably, four decades of piecemeal modification of the 1973 Code have led to the addition of hundreds of new offenses, many of which cover the same conduct as previous offenses (but, in some cases, provide for conflicting levels of punishment) or appear in various other Titles of the Delaware Code rather than in the criminal code.

⁴⁹ See Improved Code Section 1242.

⁵⁰ See 6 Del. C. § 5132 (hindering inspections by the Department of Agriculture); 11 Del. C. §§ 1248 (obstructing the control and suppression of rabies), 1267 (misconduct by a juror), 1273 (unlawful grand jury disclosure); 16 Del. C. § 4759 (obstructing inspection of a pharmacy under the Uniform Controlled Substances Act).

⁵¹ See Improved Code Section 1243.

⁵² See Model Penal Code Section 220.2.

⁵³ See 11 Del. C. § 811(b).

⁵⁴ See 11 Del. C. §§ 603–04 (defining reckless endangering).

⁵⁵ See 11 Del. C. §§ 611(1), 612(a)(1).

⁵⁶ See Improved Code Sections 1022-23.

It is not only redundant, but potentially counterproductive or self-contradictory, to add extra offenses whose prohibitions are identical to an existing offense; or to add prohibitions against narrow, specific forms of conduct in addition to (or in lieu of) a more general prohibition against all such relevant conduct; or to scatter serious crimes throughout the State’s statutory code instead of ensuring that all relevant offenses appear within the criminal code, where their significance and relation to one another is clear. Consolidation ensures against the confusion that results when one encounters, and must make sense of, multiple provisions that overlap⁵⁷ or contradict, and also against the mistakes that ensue when one fails to notice, or find, provisions that may apply to a given case. Consolidation ensures the briefest, clearest statement of the criminal law’s rules, while also exposing and eliminating inadvertent omissions, duplications, and inconsistencies in the statutory scheme. The consolidation goal has two aspects. First, all criminal offenses must be defined within the criminal code itself, and not elsewhere. Second, superfluous specific offenses must be eliminated in favor of a reduced number of offenses that are defined as broadly as is feasible.

As to the first element, a statutory scheme in which a significant number of important offenses are defined outside of the criminal code will have at least three shortcomings. First, and most obviously, the likelihood of notice to the public diminishes as the dispersion of criminal provisions in the state’s laws increases. It is simply much easier for the layperson to educate herself about the state’s criminal law if that law can be found in one place. A second, and subtler, “notice” problem will affect the legislature itself. If crimes are spread throughout the state statutory code, the legislature will be less likely to view the criminal law as a consistent, unified scheme. A new offense may be placed outside the code, making it less likely that the legislature will consider how that offense fits within the existing matrix of criminal offenses. Additionally, the criminal code itself may be amended without consideration of the amendment’s impact on offenses outside the code. Third, the existence of criminal offenses outside the code will generate problems of statutory construction. For example, it may not be clear whether the legislature expected the criminal code’s “default” culpability provision to apply to offenses in other Titles. In short, the possibility of criminal offenses appearing outside the criminal code undermines the entire project of setting aside a separate criminal code within the overall state code scheme.

Current Delaware law defines numerous serious crimes outside the criminal code. Over one hundred misdemeanors and nearly one hundred felonies are scattered throughout the Delaware Code, and more than fifty offenses appearing outside Title 11 — many of which overlap, or simply restate, prohibitions in current Title 11 — are graded as Class E felonies or higher. For example, Chapter 10 of Title 31 (Welfare) defines several offenses “instituted to regulate abuses in the payment of funds under the State’s public assistance programs.”⁵⁸ These offenses — graded as high as Class C felonies — overlap substantially with several Title 11 offenses, such as (among others) theft by deception, bribery, solicitation, and tampering with public records.⁵⁹ Similarly, Chapter 67 of Title 21 (Motor Vehicles) defines several vehicle theft, fraud, unauthorized use, and criminal damage offenses that are principally aimed at “chop shops” in the business of receiving stolen vehicles. Most of these offenses are graded as Class E felonies — even though all of the relevant conduct (vehicle theft, receiving stolen vehicles,

⁵⁷ According to interpretive canons, such overlapping provisions must be read so that none renders any other superfluous — a task which frequently requires courts to distort the meaning of one provision in order to accommodate another.

⁵⁸ 31 Del. C. § 1001.

⁵⁹ Compare 31 Del. C. § 1003 et seq. (public assistance fraud), with, e.g., 11 Del. C. §§ 843–44 (theft by false pretense or promise); 1201–03 (bribery and receiving a bribe); 501–03 (solicitation); 873 (tampering with public records).

criminal mischief, unauthorized use of a vehicle) is covered *and graded differently* by provisions in Title 11.⁶⁰

Within the criminal code itself, consolidation is no less important. Formulation of an offense in one provision, rather than many, reduces uncertainty as to the nature and scope of the banned conduct. A general prohibition avoids confusion and grading inconsistency. At the same time, it reduces the need for the legislature to enact additional prohibitions in the future, because a more general provision is more easily adapted to changing circumstances.

Current Delaware offenses often fail to realize this goal of consolidation within a single, general offense. This failure occurs in two ways. In some cases, Title 11 criminalizes specific forms of conduct in lieu of a broader prohibition against such conduct generally. For example, Title 11 contains a number of offenses prohibiting possession of instruments tailored for the commission of individual crimes, but none of them apply to more than a single target offense. Without a comprehensive general offense for possession of instruments of crime, the General Assembly must pass a new law for every situation that arises, leading to inconsistent punishment when some situations are inevitably missed.⁶¹ Similarly, current Delaware law contains no general offense prohibiting the failure to make an entry in public records when such a duty is imposed by law, but instead contains various offenses prohibiting the failure to make required records in specific contexts.⁶²

In other cases, Title 11 includes narrow, specific offenses in addition to a broader prohibition against such conduct generally. For example, although one provision in current Title 11 covers theft generally, a number of other provisions in Title 11 prohibit the same underlying conduct — theft by taking (or its attempt or conspiracy) — in the context of specific circumstances or forms of property.⁶³ The same situation exists for assault offenses⁶⁴ and property damage offenses.⁶⁵ Similarly, in addition to its general perjury offense,⁶⁶ current Delaware law contains numerous offenses criminalizing false statements made under oath or affirmation about particular matters, in particular documents, and in particular proceedings.⁶⁷

⁶⁰ Compare, e.g., 21 Del. C. §§ 6701–10 (vehicle code provisions), with 11 Del. C. §§ 841(b) (defining offense of theft by taking); 851 (defining offense of receiving stolen property).

⁶¹ See, e.g., 11 Del. C. §§ 812(b) (possession of graffiti implements), 828 (possession of burglar’s tools or instruments facilitating theft), 860 (possession of shoplifter’s tools or instruments facilitating theft), 862 (possession of forgery devices).

⁶² See, e.g., 16 Del. C. § 4740(g) (knowing failure to keep records of sales of pseudoephedrine or ephedrine); 21 Del. C. § 4603 (knowing failure to submit a record of possession of a vehicle master key).

⁶³ Compare 11 Del. C. § 841 (general theft offense), with, e.g., 813 (theft of property from a cemetery), 840 (shoplifting), 841A (theft of a motor vehicle), 841B (organized retail crime), 841C (theft of a prescription form or pad), 849 (theft of rented property), 859 (larceny of livestock), 933 (theft of computer services), 1451 (theft of a firearm).

⁶⁴ Compare 11 Del. C. §§ 611–13 (general assault offenses) with, e.g., 605–06 (abuse of a pregnant female), 607 (strangulation), 614 (abuse of a sports official), 628–29 (vehicular assault), 1254 (assault in a detention facility), 1339 (adulteration).

⁶⁵ Compare 11 Del. C. § 811 (general property damage offense), with, e.g., 3 Del. C. §§ 1041 (wilfully or maliciously starting fires), 1045 (cutting down trees in state forests); 11 Del. C. §§ 805 (cross or religious symbol burning), 812 (graffiti), 936 (destruction of computer equipment); 21 Del. C. §§ 6701 (injuring vehicle or obstructing its operation), 6703 (tampering with vehicle).

⁶⁶ See 11 Del. C. §§ 1221–23.

⁶⁷ These overlapping perjury offenses create unnecessary and undesirable confusion. For example, some offenses do not explicitly impose 11 Del. C. §§ 1222–23’s requirement that a false statement be material, but then confusingly proclaim that those who commit them are liable for “perjury.” See, e.g., 21 Del. C. § 2620(b) (false statements related to drivers’ licensing).

One useful way to get a rudimentary sense of current law’s failure to consolidate offenses is to assess its sheer verbiage. The Improved Code manages to criminalize the same substantive conduct as current law while using far fewer offense definitions to do so. For example, the Improved Code subchapter on fraud offenses (Subchapter II of Chapter 11) uses only 16.8 percent of the words making up the corresponding offenses in current law (2,732 versus 16,229 words). Similarly, the subchapter covering robbery and assault offenses (Subchapter II of Chapter 10) uses only 24 percent of the words in corresponding current law offenses (2,538 versus 10,545). Overall, the Special Part of the Improved Code uses only 30 percent — or roughly one-third — of the words in the current offenses (33,235 versus 110,637). If anything, however, this figure understates the discrepancy, as many misdemeanors outside Title 11 have not been considered, and the provisions outside Title 11 frequently use one section to impose criminal liability for any violation of an entire set of regulations.

The above examples of current Delaware law’s shortcomings in this area are representative, but by no means exhaustive.⁶⁸

4. GRADE OFFENSES RATIONALLY AND PROPORTIONALLY

For a system of criminal justice to be fair, liability must be assigned according to the relative seriousness of the offense(s) committed. It is critical that a criminal code’s system of grading offenses

⁶⁸ Including the examples discussed in the text, there are at least 22 offenses outside Title 11 that are graded as Class A, Class B, or Class C felonies. *See* 16 Del. C. §§ 1136(a) (causing death by abuse, mistreatment, or neglect of a patient at a nursing or similar facility), 4744 (prohibited practices under the Safe Internet Pharmacy Act), 4752–53 (drug dealing—aggravated possession), 4757 (miscellaneous drug crimes), 4760A (operating or attempting to operate clandestine laboratories), 7113 (violation of any one of a group of regulations relating to explosive materials, resulting in injury or death); 31 Del. C. §§ 1007 (welfare fraud in amount of \$10,000 or more), 3913 (causing death by abuse, neglect, or mistreatment of an impaired adult).

In addition to the examples discussed in the text, the Improved Code also introduces several other offenses generally criminalizing conduct that current Delaware law criminalizes only in particular contexts. Compare proposed Section 1108 (unauthorized distribution of protected works) with, e.g., 11 Del. C. §§ 858 (unlawful operation of a recording device), 920 (transfer of recorded sounds). Compare proposed Section 1122 (fraudulent tampering with records) with, e.g., 11 Del. C. §§ 840A(a) (fraudulent creation or alteration of retail sales receipts), 871 (falsifying business records), 876 (tampering with public records in the first degree), 877 (offering a false instrument for filing), 878 (issuing a false certificate), 909 (securing execution of documents by deception); 31 Del. C. § 1004 (tampering with documents to be filed with public assistance program).

Overlapping offenses are also a recurring problem in current law. Compare 11 Del. C. § 853 (unauthorized use of a vehicle) with 21 Del. C. § 6702 (driving vehicle without consent of owner). Compare 11 Del. C. § 843–44 (theft by false pretense or false promise) with, e.g., 6 Del. C. § 4903A (automobile repair fraud); 11 Del. C. §§ 840(a)(2) (charging retail goods to a fictitious person), 908 (unlawfully concealing a will), 913 (insurance fraud), 913A (health care fraud), 916 (home improvement fraud), 917 (new home construction fraud); 12 Del. C. § 210 (alteration, theft, or destruction of a will); 31 Del. C. § 1003 (welfare fraud). Compare 11 Del. C. § 845 (theft of services) with 11 Del. C. §§ 850 (use, possession, manufacture, distribution and sale of unlawful telecommunication and access devices), 933 (theft of computer services). Compare 11 Del. C. § 861 (forgery) with, e.g., 21 Del. C. §§ 2316 (forgery or fraudulent alteration of vehicle identification documents), 2751 and 2760 (forgery or fraudulent alteration of driver’s licenses or identification cards). Compare 11 Del. C. §§ 821–23 (criminal trespass) with, e.g., 7 Del. C. § 714 (trespass while hunting); 11 Del. C. § 820 (trespass with intent to peer or peep into another’s window). Compare 11 Del. C. §§ 1201 (bribing a public servant), 1203 (receiving a bribe as a public servant), 1209(4) (defining “public servant” to include jurors) with 11 Del. C. §§ 1264 (bribing a juror), 1265 (bribe receiving by a juror).

recognize all, and only, suitable distinctions among the relative severity of offenses and develop a scheme to grade each offense proportionally to its gravity in light of those distinctions.

In most cases, determinations of “seriousness” reflect value judgments as to which reasonable people might differ, and as to which the legislature (as the most direct political voice of the people) should have the ultimate authority. Accordingly, we have sought to defer to the grading determinations exemplified in existing Delaware law where possible. In some cases, however, broad examination of current grading determinations reveals logical inconsistencies that, it is presumed, the General Assembly would have sought to avoid had it been aware of them. Such inconsistencies may develop for several reasons. As new offenses are added to a criminal code, the General Assembly may neglect to consider how the grade of each new offense relates to the grades for other, preexisting offenses. As noted earlier, the sheer increase in the number of offenses, especially offenses outside the criminal code itself, makes it difficult to maintain consistency — assuming one even manages to locate and consider all relevant offenses. In any event, the shared experience of various jurisdictions is that over time, proportionality in the grading of offenses diminishes.

One of the virtues of a broad Code Improvement effort is the opportunity it provides to review the grading system as a whole, considering how all offenses relate to one another rather than considering individual offenses in a vacuum. Following such a review, we have altered the grades of certain offenses where doing so seems necessary to maintain any legitimate sense of proportionality. In addition, a “change” in grading in the Improved Code has sometimes been necessitated by the consolidation of offenses. Because current law often contains multiple offenses that overlap and prohibit the same conduct (as discussed in Section 3 above), but might impose different grades for that conduct, it is simply impossible to follow “current law” on the matter, and it becomes necessary to choose a single, consistent grade for the prohibited conduct.

The task of grading offenses has three goals: each offense’s grading scheme must recognize all relevant distinctions between degrees of the offense; that scheme must avoid introduction of irrelevant distinctions; and the overall grading scheme must maintain proportionality across offenses. We discuss each of these three goals in turn.

Further explanation of this goal follows, along with a representative, but by no means exhaustive, collection of examples of current Delaware law’s shortcomings in this area.⁶⁹

⁶⁹ To list just a few more examples, current law grades conspiracy and solicitation to commit Class B and unclassified misdemeanors more seriously than the target offense, but grades conspiracy and solicitation to commit Class A, B, C, and D felonies much less seriously than the target offense. *See* 11 Del. C. §§ 501–03 (solicitation), 511–13 (conspiracy). *Cf.* Improved Code Section 507 (grading all conspiracies and solicitations one grade lower than the target offense).

Current law grades various specific offenses for possessing instruments tailored for commission of other specific offenses as anything from an unclassified misdemeanor to a Class E felony. *See* 11 Del. C. §§ 850 (a)(1)a. & (b)(1) (possession of unlawful telecommunication devices for theft of telecommunication services, unclassified misdemeanor), 812(b) (possession of graffiti instruments, Class B misdemeanor), 1401 (possession of tickets for illegal lotteries, Class A misdemeanor), 862 (possession of forgery devices, Class G felony), 828 (possession of burglar’s tools, Class F felony); 21 Del. C. § 4604 (illegal possession of motor vehicle master keys, Class E felony). *Cf.* Improved Code Section 508 (establishing a single offense for possessing instruments of crime, graded the same in all cases).

A. Consistently Recognize Appropriate Distinctions

The Improved Code seeks to ensure that the grading for each offense recognizes all relevant distinctions in the relative seriousness of various forms of an offense. In most cases, current law reflects such distinctions, and the proposed offenses' grading distinctions will tend to track existing distinctions. In a few cases, however, current law's grading for offenses seems too crude, failing to recognize legitimate distinctions of degree.

For example, the four degrees of rape in current law draw many useful distinctions between circumstances for grading purposes, including the relative ages of the victim and offender.⁷⁰ However, although the three degrees of unlawful sexual contact take the victim's age into account, the defendant's relative age is not considered.⁷¹ Under this scheme, a person who sexually assaults a 12-year-old child is treated the same regardless of whether the offender is another 12-year-old, or an adult; but an adult rapist in the same situation would be treated more harshly than a child rapist — a sensible distinction.⁷² The Improved Code refines the grading of sexual assault by adjusting the grade of the offense based on the same factors as rape.⁷³

Likewise, current law grades many forms of fraud as a single class of misdemeanor, regardless of the amount involved in the fraud.⁷⁴ Other forms of fraud are graded as either a Class G felony or Class A misdemeanor, depending upon the amount involved.⁷⁵ Fraud is fundamentally a form of theft by deception, so it makes sense to grade frauds and thefts similarly. But, neither of these schemes reflects the more nuanced value-based grading for current theft offenses, which utilizes four different grades.⁷⁶ The Improved Code —in addition to raising the number of value-based grades for theft from four to eight — grades all frauds and other property-based offenses using the same scheme.⁷⁷

B. Avoid Irrelevant or Unclear Distinctions

Another goal of the Improved Code is to avoid the inconsistency that results when seemingly similar offenses are graded differently. This goal represents the other side of the offense-degree coin from the goal discussed immediately above: in addition to recognizing all relevant distinctions, the Code must refuse to recognize “distinctions” that do not or should not exist.

⁷⁰ See 11 Del. C. §§ 770–73.

⁷¹ Compare *id.* with 11 Del. C. §§ 767–69.

⁷² Compare 11 Del. C. §§ 771(a)(1) (providing a higher grade of rape where the victim is less than 14 years of age, and the offender is at least 19 years of age), 773(a)(5) (providing an even higher grade of rape where victim is less than 12 years of age, and the offender is at least 18 years of age) with 11 Del. C. § 769(a)(3) (providing a higher grade of unlawful sexual assault where the victim is less than 13 years of age, regardless of the offender's age). Note also that the relevant age of the victim — less than 12 or less than 13 years of age — varies between the two sets of offenses, but it is not clear that these different distinctions are meaningful, or that the General Assembly was aware of the apparent discrepancy.

⁷³ See Improved Code Section 1041(d) (grading sexual assault at three grades lower than it would be for rape under the same circumstances).

⁷⁴ See 11 Del. C. §§ 853(4) (defrauding creditors secured on an automobile), 891 (defrauding secured creditors), 892 (fraud in insolvency), 893 (interference with levied-upon property), 906 (deceptive business practices), 910 (debt adjusting).

⁷⁵ See 11 Del. C. §§ 900 (issuing a bad check), 903 (unlawful use of payment card).

⁷⁶ See 11 Del. C. § 841(c).

⁷⁷ See Improved Code Sections 1101 (theft), 1124 (issuing a bad check), 1125 (unlawful use of a payment card), 1126 (deceptive business practices), 1127 (defrauding secured creditors), 1128 (fraud in insolvency), 1144 (criminal damage), 1382(c) (unfair wagering) and their corresponding commentaries.

For example, current law defines the offense of bribery as a Class E felony, but also defines a separate offense to cover “unlawful gratuities” and grades that offense as a Class A misdemeanor.⁷⁸ Although current law defines an unlawful gratuity slightly differently than a bribe, it appears to be nothing more than a particular form of bribe, and there is no clear reason to suppose that it merits a different punishment from that for other forms of bribery. This offense is an example of a situation where, as discussed above, current law is internally inconsistent, or at least ambiguous, thereby complicating any effort to track to its stated policy judgments. The Improved Code creates only one bribery offense and ordinarily grades it as the equivalent to a Class E felony.⁷⁹

Similarly, current law grades harassment as a Class A misdemeanor, while grading sexual harassment as an “unclassified misdemeanor” (subject to a maximum sentence of 30 days’ imprisonment).⁸⁰ But, some of the conduct that constitutes sexual harassment — “threaten[ing] to engage in conduct likely to result in the commission of a sexual offense” — seems much more serious than an unclassified misdemeanor, being more similar to non-sexual harassment. The Improved Code grades harassment and the quoted portion of sexual harassment the same.⁸¹

C. Maintain Proportionality Between Various Offenses

The two goals discussed above relate to decisions about grading specific offenses or degrees of offenses. A third objective in grading criminal offenses is to ensure that grading remains rational when the grades of different offenses are compared with one another. In other words, a criminal code must maintain proportionality of grading across offenses and make certain that the relative level of liability for different offenses parallels the relative harm or wrong they reflect.

Although the Improved Code has deferred, where possible, to the apparent legislative determinations regarding the relative harm of each offense that current grading levels reflect, in a few instances a comparison of different offenses reveals grading discrepancies contrary to any sense of proportionality. For example, consider current law’s grading of the theft offenses. The current scheme properly provides different grades depending on the amount stolen. A theft in valued from \$1,500 to \$50,000 is a Class G felony. However, a theft valued from \$50,000.01 to \$100,000 jumps up three grades to a Class D felony, and a theft valued higher than \$100,000 jumps up another two grades to a Class B felony.⁸² As a result, taking \$100,000.01 in property is subject to the same punishment as manslaughter, assault by amputation, second degree rape, and kidnapping without releasing the victim alive and unharmed.⁸³ At the same time, theft of any amount less than \$1,500 is a Class A misdemeanor. As a result, stealing a sandwich is subject to the same punishment as unlawful sexual contact, simple assault, and highly sophisticated frauds like defrauding secured creditors and fraud in insolvency.⁸⁴ The

⁷⁸ See 11 Del. C. §§ 1201–02, 1205–06.

⁷⁹ See Improved Code Section 1202 and corresponding commentary.

⁸⁰ See 11 Del. C. §§ 763, 1311.

⁸¹ See Improved Code Sections 1045(b)(2)(A) and 1303(c)(1).

⁸² See 11 Del. C. § 841(c). In addition to the problems described in this paragraph, note also that a single dollar difference in value generates a four-fold increase in maximum punishment at each threshold. Creating irrational distinctions between different thefts leads to disproportional punishment. See Section 4.B above.

⁸³ See 11 Del. C. §§ 613(a)(2) (assault by amputation), 632 (manslaughter), 772 (rape in the second degree), 783A (kidnapping in the first degree).

⁸⁴ See 11 Del. C. §§ 611 (assault in the third degree), 767 (unlawful sexual contact in the third degree), 891 (defrauding secured creditors), 892 (fraud in insolvency).

Improved Code makes theft grading more proportional compared to other offenses by creating additional grade thresholds and lowering the highest available grade of theft to the equivalent of a Class C felony.⁸⁵

Similarly, the current code's general offense for property damage, criminal mischief, has only one felony grade: a Class G felony for \$5,000 or more in resulting damage.⁸⁶ As a result, intentionally destroying the Statue of Liberty (were it located in Delaware) would be subject to the same punishment as issuing a bad check in the amount of \$1,500, failure to await law enforcement's arrival following a motor vehicle accident, and selling drug paraphernalia.⁸⁷ The Improved Code makes grading property damage offenses more proportional compared to other offenses by utilizing the same nuanced grading scheme it proposes to use for theft.⁸⁸

Other examples of disproportionate grading are plentiful. For example, current law assigns higher grades to criminally negligent homicide and manslaughter than intentionally causing another person to commit suicide, despite the fact that the latter offense has essentially the same conduct and culpability requirements as first-degree murder.⁸⁹ The Improved Code allows a defendant who causes another's suicide to be convicted of any homicide offense for which the defendant meets the proper culpability requirements.⁹⁰ Likewise, current law contains an offense for wearing body armor during commission of a felony that is graded the same as negligent homicide of a child by abuse or neglect, aggravated assault with a deadly weapon, and creating child pornography.⁹¹ The body armor offense also creates liability in addition to the underlying felony that will, in most cases, be more severe than the underlying felony itself. The Improved Code avoids both of these problems by converting the body armor-wearing provision into a general grade adjustment that increases the grade of the underlying felony, but does not result in conviction for a second, disproportionately graded offense.⁹²

5. RETAIN ALL — BUT ONLY — RATIONAL, DEFENSIBLE POLICY DECISIONS EMBODIED IN CURRENT LAW

Substantive policy decisions about the rules of the criminal law — such as what conduct should be criminalized and what adjudicative rules should govern the imposition of criminal liability⁹³ — reflect value judgments that are properly made by the General Assembly rather than a group of drafters. For this reason, the Improved Code seeks to follow the substance of current law wherever possible.

In some places, however, current law contains multiple contradictory rules — and therefore no clear rule — on a subject. Other rules may have been sound when enacted, but no longer reflect current

⁸⁵ See Improved Code Section 1101 and corresponding commentary.

⁸⁶ See 11 Del. C. § 811(b)(1).

⁸⁷ See 11 Del. C. § 900 (issuing a bad check); 16 Del. C. § 4774(c) (manufacture and sale of drug paraphernalia); 21 Del. C. § 4202(b) (failure to await law enforcement following a motor vehicle accident).

⁸⁸ See Improved Code Section 1144(b) and corresponding commentary.

⁸⁹ Compare 11 Del. C. § 645 (grading promoting suicide as a Class F felony) with 11 Del. C. §§ 631 (grading criminally negligent homicide as a Class D felony), 632 (grading manslaughter as a Class B felony), (636 (first degree murder).

⁹⁰ See Improved Code Section 1005(c). Note, however, that due to the problems presented by proving causation in these cases, the proposed provision also requires that the defendant cause suicide “by force, threat, or coercion.”

⁹¹ Compare 11 Del. C. §§ 1449 (wearing body armor during commission of felony; class B felony) with 11 Del. C. §§ 613(a)(1) (assault with a deadly weapon or dangerous instrument), 633 (murder by abuse or neglect in the second degree), 1108 (sexual exploitation of a child).

⁹² See Improved Code Section 604(e).

⁹³ A third substantive category, offense grading, is discussed in Section 4 above.

realities or sensibilities and require expansion, alteration, or deletion. In those situations where the existing legal rule seems clearly at odds with the goal of producing a rational, coherent criminal code, we have been forced to modify the existing rule, using supporting commentary to the Improved Code to describe and justify the proposed change.

Further explanation of this goal follows, along with a representative, but by no means exhaustive, collection of examples of current Delaware law's shortcomings in this area.⁹⁴

A. Reserving the Most Serious Penalties for the Most Serious Killings

Current Delaware law provides several alternative definitions for murder in the first degree.⁹⁵ The main, classic definition of first-degree murder is intentionally causing the death of another person.

⁹⁴ Included here are other examples of current policies that are difficult to reconcile with the existing statutory scheme. First, current Delaware law improperly uses ordinary, tort negligence as a basis of criminal liability. Criminal negligence and recklessness differ from tort negligence and recklessness by requiring that the risk the person takes, or the person's failure to be aware of such a risk, be "a *gross deviation* from the standard of conduct that a reasonable person would observe in the situation." See 11 Del. C. § 231(a) & (e) (emphasis added). Fundamentally, this heightened "gross deviation" standard is what justifies holding a person criminally liable for the accidental effects of that person's conduct. But, in a few cases, Delaware currently makes tort negligence (which contains no heightened standard) the basis of criminal liability, including some serious felonies. See 11 Del. C. §§ 231(d) (defining "negligence" as a culpability requirement separate from criminal negligence), 628A(2) (second degree vehicular assault), 629 (first degree vehicular assault, Class F felony), 630(a)(2) (second degree vehicular homicide, Class D felony), 632(2) (manslaughter, Class B felony); 7 Del. C. § 6074(a) (negligent ocean dumping). Note that current law embraces tort negligence, but not tort recklessness, though there is no obvious reason why one should be incorporated, but not the other. The Improved Code eliminates tort negligence as a culpable state of mind that can support criminal liability. See Improved Code Section 205(b) and corresponding commentary.

Second, the current scheme of inchoate offenses contains an ambiguity that makes it possible to improperly elevate their culpability requirements relative to completed offenses. The current formulation of attempt requires the defendant to "*intentionally* engage in conduct," and conspiracy and solicitation each establish a general culpability requirement of intent. See 11 Del. C. §§ 501–03, 511–13, 531. But, none of these provisions are explicit about what the defendant's culpability must be as to the result or circumstance elements of the completed offense. Reading the explicit "intent" requirements to apply to other elements of the target offense may cause improper results or confusion. For example, 11 Del. C. § 607(a)(1) requires that the defendant "knowingly . . . impede[] the breathing" of a strangulation victim. The strangler need only know that the victim's breathing will be impeded as a result of his conduct. But, under the current inchoate offenses, the culpability requirement might be raised, and the person might need to intend that result before being subjected to inchoate liability. To avoid this problem, proposed Chapter 5 requires that for each inchoate offense, the person need act intentionally only with respect to the conduct that would bring about the underlying offense, but act with the culpability required by the underlying offense for all other elements. See Improved Code Sections 501-03 and their corresponding commentaries.

⁹⁵ 11 Del. C. § 636(a) reads:

A person is guilty of murder in the first degree when:

- (1) The person intentionally causes the death of another person;
- (2) While engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person.
- (3) The person intentionally causes another person to commit suicide by force or duress;
- (4) The person recklessly causes the death of a law-enforcement officer, corrections employee, fire fighter, paramedic, emergency medical technician, fire marshal or fire police officer while such officer is in the lawful performance of duties;
- (5) The person causes the death of another person by the use of or detonation of any bomb or similar destructive device;

This offense combines the most egregious harm—killing another human being—with the most culpable state of mind—subjective desire to kill. For that reason, first-degree murder is universally considered the most serious offense, and why it has been the only offense in Delaware eligible for capital punishment. However, the remaining alternative definitions of first-degree murder do not require the defendant to intentionally cause death. Instead, they require mere recklessness.⁹⁶ These definitions elevate killings that would otherwise be manslaughter to capital murder. This violates the general principle reflected throughout the current code that more culpable states of mind make an offender more blameworthy, and therefore deserving of greater punishment. Put simply, no matter how harmful a defendant’s conduct may be, recklessness is not blameworthy enough to merit capital punishment.

The current death penalty sentencing procedures for first-degree murder add another layer of inconsistency and disproportionality to this situation. Before a defendant can be sentenced to death, Delaware requires that a jury independently find the existence of an aggravating factor, enumerated in the procedures, unanimously and beyond a reasonable doubt.⁹⁷ But, if the offense is committed in one of the alternative, reckless ways, the required aggravating factor is automatically established, bypassing the jury’s usual finding.⁹⁸ This double counting produces an irrational result, making it more difficult to execute a person who deserves the death penalty for intentional killing, than a person who does not.

On the other hand, the kinds of reckless killings currently eligible for the death penalty are objectively more serious than ordinary manslaughter. The Improved Code recognizes this distinction, but avoids the proportionality and consistency problems described above, in two ways. First, it retains the killing of police officers and emergency personnel in the line of duty as eligible for the death penalty, by elevating the culpability level for such killings to “knowing.” This higher level of culpability, combined with the especially condemnable nature of the conduct, warrants the grading of this conduct as the most serious offense in the Improved Code, alongside intentional murder. Second, the Improved Code still preserves all the alternative definitions of first-degree murder requiring recklessness, but treats them as forms of second-degree murder instead of first-degree murder.⁹⁹ Thus, the death penalty is reserved for the only conduct truly blameworthy enough to deserve it—intentionally killing another human being, or knowingly killing police officers and emergency personnel in the line of duty.¹⁰⁰

Before closing, we note that members of the Working Group have, as one would think, diverse views about whether the death penalty is an appropriate punishment and some members of the group believe it should not be an available punishment. As things now stand, Delaware has no constitutionally viable procedures of implementing the death penalty. The Working Group realizes the General Assembly will face proposals to address that situation. All members of the Working Group understand that the decision of whether the death penalty should persist is one for the General Assembly. The Improved Code, the Working Group believes, is not the vehicle for the General Assembly to deal with the current status of the procedural provisions dealing with the death penalty. For that reason, the Working Group

(6) The person causes the death of another person in order to avoid or prevent the lawful arrest of any person, or in the course of and in furtherance of the commission or attempted commission of escape in the second degree or escape after conviction.

⁹⁶ 11 Del. C. § 636(2) and (4) have explicit culpability requirements of recklessness. Subsections (5) and (6) do not contain explicit culpability requirements; but, under § 251(b), recklessness is read in as the lowest level of culpability that need be proven. Subsection (3)—intentionally causing another person to commit suicide by force or duress—is not considered here because the Improved Code maintains this provision (and its eligibility for the death penalty) through a new offense for causing suicide. *See* Section 1005(c).

⁹⁷ *See* 11 Del. C. § 4209(c)(3)b.1.

⁹⁸ *See* 11 Del. C. § 4209(e)(2).

⁹⁹ *See* Improved Code Section 1002(a)(2)b.—(a)(3).

¹⁰⁰ *See* Improved Code Section 1001.

has not proposed altering those provisions and has left them in place with whatever effect they currently have.

B. Returning to the Classic Intent Requirement for Burglary

Burglary is a compound crime composed of two different offenses: a trespass, and any other offense committed during the trespass (usually theft). Before burglary was recognized as an offense, the State could convict a defendant of both offenses based on the two separate harms involved. Burglary exists as a separate offense for only one reason: to recognize an additional harm that occurs when a defendant's trespass is motivated by the desire to commit a further offense. As a result, a defendant need not actually succeed in committing the offense motivating the trespass to commit burglary: trespassing because of a preexisting intent is sufficient.¹⁰¹

In 2008, the General Assembly dramatically redefined the intent requirement for burglary, amending the offense definition so that “[t]he ‘intent to commit a crime therein’ may be formed . . . concurrent with the unlawful entry or . . . after the entry while the person remains unlawfully.”¹⁰² As discussed above, however, forming intent before the trespass is the only harm that burglary uniquely addresses, thereby justifying its existence. Now, any offense committed during a trespass automatically generates liability for burglary, despite the State's ability to charge and convict the defendant of both that offense and the trespass. In that case, the defendant is subject to liability for multiple offenses for causing the same harm.

This result is inconsistent with two basic principles of the current code that are also legislative mandates for this Code Improvement Project under the Epilogue: comprehensiveness and proportionality. The comprehensive definition of offenses allows each harm or injury caused by a defendant to be punished as a separate offense — but only *one* offense. Punishing one harm or injury with multiple offenses always results in disproportionate punishment. The Improved Code returns to a consistent application of these principles in burglary prosecutions by undoing the recent, novel reinterpretation of its intent requirement.¹⁰³ Beyond burglary, the Improved Code helps reinforce the principle of “one harm, one offense” by explicitly placing that limitation upon conviction for multiple offenses.¹⁰⁴

C. Revising the Mental Illness or Psychiatric Disorder Defense

Since the 1973 Code was adopted, the General Assembly has adopted provisions that limit the scope of the mental illness or psychiatric disorder (“insanity”) defense, largely due to a perception that the insanity defense has been subject to abuse. But, various studies strongly suggest this assumption is empirically unsound.¹⁰⁵ Meanwhile, additional policy concerns call these limitations into question.

¹⁰¹ See 11 Del. C. § 824 (“A person is guilty of burglary . . . when the person knowingly enters or remains unlawfully in a building with intent to commit a crime therein.”)

¹⁰² See 2008 Delaware Laws Ch. 267 (H.B. 208) (amending 11 Del. C. § 829 (definitions relating to criminal trespass, burglary and home invasion)).

¹⁰³ See Improved Code Section 1161 and corresponding commentary.

¹⁰⁴ See Improved Code Section 209(a)(!)a.—b..

¹⁰⁵ It has been well documented that the lay public has an exaggerated sense of how often the insanity plea is used as well as how often verdicts of “not guilty by reason of insanity” (“NGRI”) are granted. For example, people generally believe, wrongly, that the insanity defense is a common issue in criminal trials. One study found that people thought that thirty-eight percent of all defendants charged with a crime pleaded NGRI. See Valerie P.

For example, current law provides for a “guilty but mentally ill” verdict (“GBMI”) as a supposed compromise between a verdict of not guilty by reason of insanity (“NGRI”) and a conviction.¹⁰⁶ Although this verdict was meant to reduce NGRI acquittals, the number of NGRI verdicts in some states where such data has been collected actually increased after the GBMI verdict was enacted.¹⁰⁷ The GBMI verdict is troublesome because it has no legal significance,¹⁰⁸ yet distracts the jury into considering the technical clinical issue of whether an offender needs psychiatric treatment, although the determination of guilt should be the jury’s sole responsibility. Nevertheless, the GBMI is an established feature in current Delaware law. Moreover, supporters of GBMI maintain that this verdict option is beneficial to the defendant. The Improved Code provides a compromise between these differing approaches on the GBMI

Hans, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 CRIMINOLOGY 393, 406 (1986); See also Eric Silver et al., *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 LAW & HUM. BEHAV. 63, 67-68 (1994). In reality, an insanity plea is exceedingly rare, raised in only a fraction of a percent of felony cases. See, e.g., Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 334 (1991). (Note that this is less than one percent of all felony cases, although the lay subjects estimated insanity pleas for 38% of all persons charged with any crime). See also Richard A. Pasewark & Hugh McGinley, *Insanity Plea: National Survey of Frequency and Success*, 13 J. PSYCHIATRY & L. 101 (1985) (reporting median rate of one plea per 873 reported crimes). Also contrary to popular belief, more than half of the few cases where an insanity plea is introduced involve nonviolent offenses. See HENRY J. STEADMAN ET AL., *BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM* 111 (1993); See also Callahan et al., *supra*, at 336.

In addition, it has been reported that even in the rare cases in which the insanity defense is sought, it is usually not granted, yet the public perceives that it is commonly granted. See, e.g., Callahan et al., *supra*, at 334 (reporting average acquittal rate of 26% on NGRI pleas); Pasewark & McGinley, *supra*, at 106 (reporting success rate of 15% of pleas); Hans, *supra*, at 406 (reporting study indicating that public believes over 36% of all NGRI claims, constituting perceived 14% of all criminal cases, result in NGRI verdict); Mary Frain, *Professor Says Insanity Defense Seldom Works*, TELEGRAM & GAZETTE (Worcester, MA), Jan. 19, 1996, at B1 (quoting chair of psychiatry at the University of Massachusetts Medical Center as saying that general public believes the insanity defense is used in 20 to 50 percent of all criminal cases).

Claims that the defense is abused and employed to manipulate juries are also belied by the fact that most NGRI pleas are not contested, and the vast majority of NGRI verdicts — 93%, in one study — are reached through negotiated pleas or rendered by judges in bench trials, rather than by juries. See Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 425 (2000) (“Nearly 90% of all insanity defense cases are ‘walkthroughs’ — stipulated on the papers.”); Callahan et al., *supra*, at 334. Another refutation of the abuse concern is the fact that most NGRI acquittees have significant histories of treatment for mental illness. See, e.g., Michael R. Hawkins & Richard A. Pasewark, *Characteristics of Persons Utilizing the Insanity Plea*, 53 PSYCHOL. REP. 191, 194 (1983); Steadman et al., *supra*, at 56.

These massive misconceptions regarding the practical significance of the insanity defense fuel the general sense that the insanity defense is being abused and that something must be done to limit the abuse. See Michael L. Perlin, *“The Borderline Which Separated You From Me”: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1375 & nn.5-6 (1997) (citing polls suggesting that “ninety percent [of Americans] believe that the insanity plea is overused”).

¹⁰⁶ See 11 Del. C. § 401(b), 408–09.

¹⁰⁷ See Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 506–07 (1985).

¹⁰⁸ GBMI is not a “middle position” in terms of its consequences. It has the same effect as a guilty verdict, See 11 Del. C. § 408(c), even in terms of the defendant’s receiving a psychological evaluation, which is required for all convicts. See 11 Del. C. § 408(b); cf. 11 Del. C. § 6523 (requiring the Department of Corrections to make psychological “studies and investigations” of inmates “for the purpose of rehabilitation.”).

verdict. It retains it as an alternative verdict, but specifies that this option will only be made available to the trier of fact if requested by the defendant.¹⁰⁹

D. Eliminating Archaic and/or Obsolete Offenses

Title 11 contains a number of outdated offenses that do not belong in a modern criminal code. The Improved Code attempts to identify and eliminate these offenses. For example, the proposed Chapter covering theft offenses removes the current offense of larceny of livestock, transfer of recorded sounds, and operation of a recording device in a movie theater.¹¹⁰ All evidence indicates that these offenses are currently unenforced, despite the fact that there is no special difficulty in identifying people who commit them. Such non-enforcement can only reflect a conscious decision that imposition of criminal liability for these offenses is improper, or at least a waste of State resources. Maintenance of dead-letter statutes of this kind only tends to invite abuse and to undermine the authority of the criminal law as a comprehensive and accurate reflection of the governed community's sense of what behavior is sufficiently improper to merit imposition of punishment.¹¹¹

PREPARING FOR CHANGE

Change is scary and there is a natural human tendency to cling to what is known, even if what is known is less than ideal. However unwieldy and difficult to understand the current Delaware Code is, it is the current code and there is an understandable fear on the part of some that change will be difficult.

But, the reality is that every year new prosecutors, defense lawyers, police officers, correctional officers, and others have to learn the provisions of a cumbersome code. Judicial decisions continue to be written trying to make sense of a code that has not had a comprehensive examination since its enactment. And the reality is that the current code is so disjointed that even experienced practitioners cannot pretend that it is clear and do not pretend to claim that it is. In fact, when one member of the Working Group was a leader of one of Delaware's top police forces, he referred to it as "Frankencode." Conversely, in tandem with its drafting principles, the Improved Code draws on the language of the Model Penal Code in many areas where the current code could be improved upon in accordance with the epilogue's mandate. The Model Penal Code is a leading authority that all criminal law practitioners refer to regularly, and its language provided the foundation for the current code and has been the subject of numerous judicial decisions and helpful commentary. By hewing to the Model Penal Code's approach when appropriate, the Improved Code further facilitates ease of use by Delaware prosecutors, defense attorneys, police, correctional officials, judges and the public.

¹⁰⁹ See Improved Code Section 323 and corresponding commentary.

¹¹⁰ See 11 Del. C. § 859.

¹¹¹ For other specific offenses eliminated by the Improved Code, see, for example, 11 Del. C. §§ 614 (abuse of a sports official), 627 (prohibited acts as to substances releasing vapors or fumes), 823 (portion of criminal trespass in the first degree relating to "a building used to shelter, house, milk, raise, feed, breed, study or exhibit animals."), 918 (ticket scalping), 1004 (advertising marriage in another state), 1327 (maintaining a dangerous animal), 1365 (obscene literature harmful to minors), and 1366 (outdoor motion picture theaters). Where the conduct prohibited by these offenses is genuinely harmful and blameworthy, it should fall within the more general prohibitions of another proposed provision. For example, maintaining a dangerous animal is only an offense where the animal actually causes injury or death to a person or other animal. Any of those cases could be prosecuted as a form of homicide, reckless injuring, or property damage, and one can imagine other proper offenses that could be charged due to maintaining a dangerous animal, such as reckless endangerment.

It also bears emphasizing that the benefits of the criminal code reforms described above can only be realized if the entire code is reformed all at once. A piecemeal approach to code reform may seem like an attractive alternative to some, but it would in reality be worse than making no changes at all to current law. Making piecemeal changes to the existing code is exactly how we came to have the sprawling, confusing, and inconsistent code that we have now. Our criminal code is supposed to be cohesive and consistent—the foundational document of our criminal justice system. But when just one piece of the code is “fixed,” it creates inconsistencies and imbalance with the parts of the code that remain untouched. Here are some examples:

- The Improved Code’s goal of proportional grading. The current code uses grade aggravators for circumstances like recidivism and vulnerable/elderly victims, but applies them inconsistently to only certain offenses. If the code is genuinely to be proportionate, these factors must be given equal weight and applied uniformly. The only way to do this is through a comprehensive, whole code review of grades and aggravators—which was done to produce the Improved Code.
- The Improved Code’s goal of simplicity. The drafters of the Improved Code strove to make the language and structure of the criminal laws much easier for readers to understand. Simplifying only pieces of the existing law leaves the rest of the law hard to understand. Portions of the code would be modern, and other portions would be left antiquated. But even worse, the conflicting approaches to structure and language coexisting in that code would create new ambiguities, courting litigation to resolve the new issues and encouraging further patchwork legislation. That would make the code in greater need of reform than if nothing at all had been changed. The result would actually undermine the legislative mandate to improve the code. The only way to fulfill the General Assembly’s mandate to produce a high-quality, clear, proportionate, non-redundant, and fair code is to reform the whole code at one time.
- Approaching mandatory minimum sentences. The Improved Code does not eliminate mandatory minimum sentences. However, it does create a consistent, principled scheme for applying minimum sentences—unlike the contradictory ad hoc approach in the current code. Continuing to “reform” mandatory minimums ad hoc would just perpetuate the problem we have now. The only way to create a better approach to mandatory minimums is the approach of the Improved Code—to look at all mandatory minimums together, find their common features, and establish consistent rules. This addresses minimums in a cohesive, rational manner focusing on the very worst crimes—crimes of violence, sexual offenses, and weapons offenses.
- Future sentencing guidelines. Wholesale criminal code reform creates the necessary, but welcome, opportunity for new sentencing guidelines. The comprehensive grading table discussed above will make it possible to create consistent and credible: (1) sentencing ranges for each felony grade, and (2) approaches to aggravators like recidivism and vulnerable victims. This credibility means that the guidelines can be given real “teeth” without the concern that unjust sentences will result. The current code’s wildly inconsistent approach to mandatory minimums creates many different sentencing ranges within a single felony grade. At least ten Class B felonies in current law have sentencing ranges outside of the 2 to 25 year range provided for Class B felonies generally. For example, the sentence for possession of a deadly weapon by a person prohibited due to a prior violent felony conviction is 4 to 25 years; and the sentence for home invasion is 6 to 25 years. These same problems plague other felony classes as well. With a principled, rational approach to mandatory minimums, the sentencing ranges of felonies in the

Improved Code can likewise be principled and rational. Many felonies in current law can have their grades increased if aggravating factors, such as repeat offending or vulnerable/elderly victims, are present. But the determinations of what aggravators to apply to which felonies have been done ad hoc, resulting in widespread inconsistency and disproportionate punishment. For instance, some provisions in current law provide an upward adjustment for a third offense (for example, 11 Del. C. § 841B(c)), while others are for the second or subsequent offenses (for example, 11 Del. C. § 1455). These offense-specific provisions are unnecessarily inflexible, because they only apply to offenders who repeat the same offense. In contrast, the Improved Code provides increases the grade of an offense for repeated commission of felonies—but they can be different felonies. The Improved Code takes a unified approach to these important aggravators, making every felony eligible for increased punishment if the right circumstances are present. This makes the sentencing ranges for felonies, and their attending sentencing guidelines, much more defensible.

To manage the change process, the draft proposes that the effective date of any code be 20 months after enactment. During that time, a law enforcement officer's guide to the new Code should be produced, and intensive training for prosecutors, defense attorneys, judges, and other criminal justice constituents should and will be conducted. Precisely because the Improved Code is more rational, shorter, and clearer, it will in fact be easier for those who must use it to understand and apply it.

As important, work should be done during that time to make sure that model jury instructions and updated sentencing guidelines are ready for use that track the new Code. The clarity of the Improved Code is such that crafting reliable jury instructions, and keeping them current will be much easier.

Change is no doubt difficult, but necessary. Fear of change cannot justify adhering to a code that is impossible for any human being to understand, is fraught with inconsistencies and ambiguities, and is overly long and unduly complex. Rather, commitment to a just system of criminal justice and to helping those who labor in the trenches to make the rule of law come to life requires sensible reform, the enactment of a clear, rational, and easier-to-understand criminal code, and making sure that an educational plan is in place to help key players deal with the positive change that will be coming their way.

CONCLUSION

The creation of the Delaware Criminal Code Improvement Project represents a rare and profound opportunity to eradicate the numerous inconsistencies and contradictions that currently plague Delaware criminal law. In nearly all cases, the needed corrections are significant, but should not be at all controversial, for it is usually possible to clean up the form and structure of the law without altering its fundamental goals or rules. The Improved Code both simplifies and rationalizes the statutory criminal law of Delaware. It is rooted in the values and policy judgments of the present, but its language, organization, and comprehensive scope promise to better serve those interests in the future.