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**The Rise and Fall and Resurrection  
of American Criminal Codes**

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# THE RISE AND FALL AND RESURRECTION OF AMERICAN CRIMINAL CODES

*Paul H. Robinson\**

## I. INTRODUCTION

In the 1960s and 1970s, three-quarters of the states adopted comprehensive criminal codes based in large part upon the organization, if not the specific provisions, of the American Law Institute's Model Penal Code.<sup>1</sup> Kentucky did this in 1974.<sup>2</sup> The hallmarks of these modern American codes—what made the Model Penal Code such an attractive model and so well known around the world—were three things.

### *A. Comprehensiveness*

First was the Code's comprehensiveness. The goal of the Model Penal Code drafters was to articulate all of the rules needed to adjudicate criminal liability and to set the level of seriousness (the grade) of each offense. Such comprehensiveness is attractive for several reasons: It maximizes fair notice to citizens; it reduces discretion and disparity and increases uniformity in application; and it reserves criminalization decisions to the legislature, the most democratic branch, rather than delegating them de facto to the judiciary, who must fill in any holes left by the Code.

The Model Penal Code has made the United States something of a global leader in comprehensive codification. Around the world, one sees a variety of different codification situations. The range of possibilities is illustrated in the appended graphic.<sup>3</sup>

There remain few English-speaking countries that approximate pure common law without statutes, a "1" on the continuum. Most British Commonwealth countries have had modern codification reforms. At this point, perhaps only Ireland remains without something like a modern code. And Ireland was undertaking a criminal law codification project several years ago, although it looks now as though it has failed. Ireland is probably a "2" on this codification continuum.

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<sup>1</sup> MODEL PENAL CODE (Proposed Official Draft 1962).

<sup>2</sup> Kentucky Penal Code Act, 1974 Ky. Acts 831 (codified as amended in scattered sections of KY. REV. STAT. ANN. tit. L).

<sup>3</sup> See *infra* Figure 1.

That quarter of American states that did not codify their criminal law during the 1960s and 1970s are typically a “3” on the continuum. They have many criminal statutes covering most criminal conduct, but not integrated into an organized code. And typically these states have no codified “general part,” setting out the general principles of liability and general defenses; no articulation of the general doctrines of imputation, such as complicity and voluntary intoxication; and no scheme for the consistent definition of culpability requirements and other terms used throughout the code. Only states that modeled their codes after the Model Penal Code rated a “5” on the continuum.

Many codes around the world are influenced by the German Penal Code,<sup>4</sup> which is a “4” on the continuum. That approach is comprehensive in its coverage but skeletal in its articulation. That is, it has a full “special part” and “general part” and does not allow the judicial creation of offenses, but it does not purport to be a full statement of the liability and grading rules that a judge might need to adjudicate a case. Instead, the German approach is one that leaves unarticulated a variety of concepts that the Germans think are better left to the sophistication and complexity developed over a century or more in German criminal law scholarship. Thus, for example, rather than attempting any articulation of what constitutes causation, as the Model Penal Code does,<sup>5</sup> the German approach is to leave it to judges to consult the accumulated scholarship.<sup>6</sup> This approach makes the German Penal Code and others like it more of a table of contents or an index, sending the reader to the relevant area of the scholarly literature.

That approach may work well for the Germans, where many if not most judges are also scholars, or even professors, but works less well for those countries who have no such close relationship between the judiciary and academia and no easy access to the enormous body of German academic literature. To these countries, the American approach, which aspires to true comprehensiveness in the *articulation* of all liability and grading rules, is more attractive simply because it is more practical.

Interestingly, there do remain some criminal justice systems in the world that are a “1” on the codification continuum: Islamic law is

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<sup>4</sup> STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, Teil I [BGBL. I] 3322 (Ger.).

<sup>5</sup> See MODEL PENAL CODE § 2.03.

<sup>6</sup> See Markus Dirk Dubber, *Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49, 98 (1999) (“For instance, the concept of causation, recognized by all modern penal codes as a constituent element of result offenses, goes undefined in . . . the German Penal Code, though not in the Model Penal Code.”).

traditionally uncodified.<sup>7</sup> That may be changing, slowly,<sup>8</sup> but it remains the state of affairs even in many modern Muslim societies.

What is perhaps most striking about the state of codification around the world is that countries over time move from left to right on the codification continuum. Sometimes that movement takes a long time, but once they move right, they essentially never move back to the left. That is, once a society experiences the benefits of increased comprehensiveness in codification—fair notice, reduced discretion, increased uniformity, and legislative control—they have no interest in going back.

There is one exception of sorts to this general principle, a phenomena that we see in almost all the modern American criminal codes enacted in the 1960s or 1970s. While the original codifications were a “5” on the continuum, the processes of crime politics of the past forty or fifty years have, as a practical matter, pushed these codes back from a “5” to provide considerably less of the advantages that their original codifications did.

### *B. Orderliness*

A second hallmark of modern criminal law codifications is the orderliness and uniformity of their drafting structure. The offenses are segregated into different chapters according to the interest at stake and, within each chapter, are organized in order of seriousness. Most importantly, there is a minimum of overlap between the offenses. All conduct that deserves criminalization is included, ideally, under only one provision. And the drafting style of provisions is clear and consistent throughout the document, with a large number of defined terms, and a single term having the same meaning throughout the code.

### *C. Principled*

A final hallmark of modern American codes based on the Model Penal Code is their principled nature. The Model Penal Code drafters really did think through the principles that ought to underlie the criminal law rules. While they may have ended up some distance from principled perfection, they did at least try to reason out what the proper rule should be rather than

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<sup>7</sup> See generally Paul H. Robinson, Adnan Zulfiqar, Margaret Kammerud, Michael Orchowski, Elizabeth A. Gerlach, Adam L. Pollock, Thomas M. O'Brien, John C. Lin, Tom Stenson, Negar Katirai, J. John Lee & Marc Aaron Melzer, *Codifying Shari'a: International Norms, Legality and the Freedom to Invent New Forms*, 2 J. COMP. L. 1 (2007).

<sup>8</sup> See UNIV. OF PA. CRIMINAL LAW RESEARCH GRP., FINAL REPORT OF THE MALDIVIAN PENAL LAW AND SENTENCING CODIFICATION PROJECT (2006), available at <http://ssrn.com/abstract=1522222>.

simply codifying what had been done in the past or responding to the political pressures of the moment.

## II. THE VIRTUES OF MODERN AMERICAN CODIFICATION

Why should codes with these three characteristics—comprehensive, orderly, and principled—be so attractive? Comprehensiveness, as noted previously,<sup>9</sup> is important because it provides fair notice, reduces discretion and disparity, increases uniformity, and ensures that criminalization authority resides in the most democratic branch, the legislature. To leave issues unresolved in the code is a *de facto* delegation of criminalization authority to the courts. It is obviously important for courts to have some discretion in the adjudication of individual cases, but not regarding the rules that govern liability and punishment. We must trust courts and juries to determine the facts in an individual case and to apply those facts to the governing law, but we must also insist that every defendant be judged by exactly the same law, without regard to their good or bad luck in the judge that they draw.

Orderly structure, and in particular the avoidance of unnecessarily overlapping offenses, is important for a similar reason but involves different players. The ideal code designates a specific offense and grade for any given occurrence of a criminal harm or evil. When a criminal code has many overlapping offenses, it creates discretion and power in prosecutors to decide for themselves which of the different offenses will be charged and punished, or whether they should all be. Again, this undermines the proper allocation of the criminalization authority of the legislature and invites unjustified disparity in similar cases depending upon a defendant's good or bad luck in the prosecutor that they draw. It also invites over-punishment where overlapping offenses punish the same harm or evil.

Certainly an offender could engage in conduct that causes a variety of criminal harms and evils. One criminal episode could include murder, arson, and rape, and each of these should be punished as a separate offense. But each of these three criminal harms ought to be punished as a single offense, not each as related, multiple offenses at the discretion of the prosecutor.

Finally, the principled nature of a code is also important—and not just for philosophical reasons. We value rationality and internal consistency for their own sake. They are part of our notion of justice. But there are also important practical reasons for having a criminal code that is principled, and

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<sup>9</sup> See *supra* Part I.A.

seen to be principled.

Within the last several decades, social science has demonstrated the practical, crime-control value of building criminal law's "moral credibility" with the community it governs.<sup>10</sup> If criminal law is seen as just, it will gain deference and compliance rather than inspire resistance and subversion. Perhaps more importantly, criminal law that has earned a reputation with the community as a reliable moral authority gains the power to move people to internalize the law's norms. And that can be a more powerful—and a less expensive—mechanism of gaining compliance than any threat of criminal sanction. But irrationalities and internal inconsistencies in a criminal code can quickly undermine the criminal law's moral credibility, and thereby undermine its power to gain compliance and deference through social influence. There is practical, crime-control value, then, in a criminal code that is internally consistent in its liability and grading rules and that is seen as reliably doing justice and avoiding injustice.

### III. THE FALL OF AMERICAN CRIMINAL CODES

#### *A. Degradation of Existing Codes*

These important advantages of modern codification should be good news for all of those states that adopted modern codes, right? It certainly was good news in the 1960s and 1970s when those new codes were enacted. The problem is that since that time, there has been a continuing and accelerating flood of criminal law legislation that has tended to degrade those codes and to undermine the virtues of their original codification.<sup>11</sup>

One might have thought that, after a new code was enacted, there might be a quick spurt of legislation to fix the gaps or ambiguities exposed by early practice, then a drop in legislation as all of the flaws were discovered and fixed. In fact, just the reverse has occurred. There was a mere trickle of criminal law legislation after enactment, but it typically has grown each year since. And the new legislation is not tweaking one offense or another to make it clear or to keep it current with the advances of human activity. More often than not, existing statutes are ignored, and entirely new offenses are being created that overlap and often conflict with existing offenses. In many states, forty years of accumulated criminal law legislation,

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<sup>10</sup> See generally Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211 (2012).

<sup>11</sup> See Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635–44 (2005).

accelerating in rate each year, have left the original code unrecognizable—lost under a mountain of often unnecessary, often contradictory, often overlapping, and often unprincipled additions to the original, comprehensive code. Further, many of the new offenses are added to statutory titles outside of the criminal code.

Perhaps these new overlapping offenses are a good idea—belt and suspenders, perhaps? For a variety of reasons, I think not. First, the growing mountain of offenses, inside and outside of the criminal code, make it increasingly unlikely that citizens really can sort out what the criminal law commands of them. Second, as I noted previously, overlapping offenses create unhealthy discretion in prosecutors to decide what grade of an offense or how many offenses they will charge—discretion that can produce seriously disparate results in similar cases simply because of the different views of different prosecutors, or because of the inconsistencies or prejudices of a single prosecutor.<sup>12</sup> Perhaps even more problematic is the enormous potential for injustice that arises from such duplication. Subjecting offenders to punishment for multiple, overlapping offenses can produce liability and punishment far beyond what the offender's conduct justifies.

Another problem comes from the conflicts between statutes and the resulting ambiguities. What is a court to do when statutory terms are defined differently in different places? Or if the same conduct is graded differently in different statutes? And one may wonder: Why should we be empowering courts to get back into the criminalization business—to make legislative decisions forced upon them by such statutory conflicts and ambiguities? How can a code be principled if different provisions provide different definitions of the same criminal harm, or provide different offense grades for the same conduct? In other words, the proliferation problem undermines not only the criminal law's orderliness, but also its principled nature and its reservation of the criminalization power to the legislature.

These problems often occur because new legislation is not written to *integrate* into the code, but rather to *layer* on top of it without regard to what went before. And, of course, layering produces a vicious cycle. The messier that the code gets, the less able or inclined legislators are to integrate new legislation into the existing code. The more new legislation that is *layered on* rather than *integrated in*, the more future legislation will *layer* rather than *integrate* until dozens, if not hundreds, of overlapping layers have been created. If you imagine the original Kentucky Penal Code of 1974 as being the trim hull of a fast boat, the addition of hundreds of

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<sup>12</sup> See *supra* Part II.

independent and overlapping patches can, over forty years, completely obscure the original design, turning it into an irregular blob.

Another form of serious degradation has been the grading inconsistencies created in the flood of new offenses that are layered on, rather than integrated in, the codes. It is not uncommon for legislators drafting a bill to do so in isolation, without consulting the existing grades of related offenses already contained in the criminal code. The result is a collection of gross grading irrationalities that grow worse every year. We have documented and illustrated this phenomena in several jurisdictions.<sup>13</sup> It is, unfortunately, simply the way of modern American criminal law legislation.

A final form of degradation is found in statutes such as three-strikes legislation—or, in Kentucky, persistent felony offender legislation—that dramatically aggravate punishment for an offense based upon a defendant's prior criminal record.<sup>14</sup> We know from empirical studies that people do see some aggravation of blameworthiness and deserved punishment for repeat offenders.<sup>15</sup> After being warned and punished for the first, the second offense is seen as a form of “nose thumbing,” as Andrew von Hirsch calls it, that adds to the offender's blameworthiness.<sup>16</sup>

But the studies also make clear that people see this repeat conduct as a form of offense aggravation like other aggravations, perhaps increasing the offense punishment by 10%, 20%, or even 30%. But many repeat offender statutes make the offender's prior criminal history more important than the offense itself, often doubling or more the punishment imposed.<sup>17</sup> These dramatic increases seriously conflict with ordinary people's intuitions of justice and can only serve to bring the system into disrepute—to undermine the system's “moral credibility” with the community it governs.

In a similar vein is the enormous growth of mandatory minimum sentences. I understand the initial, understandable motivation for mandatory minimums. There was a period in our history in which judges were given vast discretion in sentencing, and many judges took that opportunity to regularly produce gross failures of justice. But there is now a well-developed solution to that problem—sentencing guidelines, in which judges continue to have the flexibility to take into account the unique circumstances of each individual case, but also have the guidance and

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<sup>13</sup> See Robinson & Cahill, *supra* note 11, at 641–44.

<sup>14</sup> See KY. REV. STAT. ANN. § 532.080 (West 2006 & Supp. 2014).

<sup>15</sup> See generally PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME* (1996).

<sup>16</sup> See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1437 (2001).

<sup>17</sup> See *id.* at 1435 & n.25.

incentive to try to match their judgments with those of other sentencing judges.<sup>18</sup>

With the development of sentencing guidelines, mandatory minimum sentences are now archaic and destructive. They essentially guarantee a stream of injustices, as some offenders in some cases really will have the kind of important mitigations that demand a sentence in the lower end of the range forbidden by the mandatory minimum. This guarantee of a string of mandatory minimum injustices can only serve in the long run to undermine the criminal justice system's reputation for being just, for being a reliable assessment of the punishment that each offender genuinely deserves. And, as noted previously, that loss of moral credibility can have serious consequences in the system's loss of crime control effectiveness.<sup>19</sup>

### *B. Causes of Degradation*

What drives this degradation of existing criminal law? The underlying causes of degradation are found primarily in the inherent nature of the legislative process.<sup>20</sup> Many amendments and new offenses are enacted for purely political purposes: Politicians propose a bill to show concern regarding an issue about which their constituents are concerned. We cannot be too critical here. They are simply trying to be responsive to their community—normally something we see as a good thing, a basic feature of democracy in action. They may be responding to an especially grim case in the headlines or a case where an offender seemed to have received too little punishment.

But in many of these cases, the problem has little to do with a flaw in an existing criminal law rule. Not every problem can be fixed with a criminal code amendment. People will continue to commit outrageous crimes, judges will continue to make what are seen as sentencing errors, and so on. Yet, legislators often feel a need to do *something* to show that they are sensitive to their constituents' concerns. And there are a few "somethings" that they can do. Changing or adding to the criminal law is one of those few things. But when crime legislation is simply a vehicle for expressing concern, drafters have little reason to take account of existing law. They aren't really fixing a code problem, but rather are using their bill as a vehicle to send an empathetic message of concern to their constituents. We should not be surprised by overlaps and inconsistencies because there is

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<sup>18</sup> See U.S. SENTENCING GUIDELINES MANUAL (2014); see also *United States v. Booker*, 543 U.S. 220, 264–65 (2005).

<sup>19</sup> See *supra* Part II.

<sup>20</sup> See Robinson & Cahill, *supra* note 11, at 644–45.

little motivation to *integrate*: Overlaying is always easier and faster and often sends a clearer and more dramatic message.

Unfortunately, criminal law bills, even if useless and unnecessary, commonly pass because legislators share a common reluctance to appear “soft on crime.” When a new and unnecessary offense, say “library theft,” is proposed, the issue becomes a referendum on whether legislators care about public libraries, not on whether the proposed legislation will actually do anything new to combat the problem of such theft, or on whether it will instead have pernicious ramifications for the application of the criminal code’s general theft provision. A legislator is likely to vote in favor of the library-theft bill because there is a clear constituency—library users and taxpayers—who would seem to share a concern about library theft, and no constituency to complain about the new provision’s less obvious and more diffuse drawbacks in creating inconsistencies, ambiguities, and overlaps.<sup>21</sup>

The larger point is that criminal law legislation provides an important vehicle by which legislators can signal to their constituents that they are concerned, and are doing something, about the crime concerns that their constituents may have at that moment. With that, it matters little whether the criminal law legislation simply duplicates, perhaps in inconsistent terms, offenses already on the books.

Another sort of systemic problem might be called *punishment inflation*. In order to emphasize how seriously the legislators take the new offense created, the heat of the moment naturally pushes the grade of the offense higher than it might otherwise be. A year or two later, when that heat has died down, the grade may seem “out of whack” with other offenses. But the exaggerated grade lives on.

Worse, the dynamic creates a vicious cycle. Having exaggerated the grade of yesterday’s “crime *du jour*,” the legislator, in order to adequately express outrage over today’s crime *du jour*, must exceed the new, exaggerated baseline established by yesterday’s offense. The ultimate effect is to create an upward spiral of grading and a hodgepodge of inconsistent offense grades. There is no fixing this problem ad hoc. Internal grading consistency throughout a code requires examining all of its offense and sub-offense grades at one time, comparing each against the grade of every other offense.

In talking about the problem of degradation of existing criminal codes, I do not mean to single out Kentucky. We see this unhealthy dynamic in every state that we have investigated.<sup>22</sup> I do not know the details of the

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<sup>21</sup> *See id.*

<sup>22</sup> *See* Paul H. Robinson, Thomas Gaeta, Matthew Majarian, Megan Schultz & Douglas M. Weck,

criminal law legislation dynamics in Kentucky, but there seems little reason to think that it is uniquely saved from the normal destructiveness of the process. It may be better off than many other states,<sup>23</sup> but there nonetheless are reasons to be concerned. A Kentucky law professor recently estimated that there are now 440 provisions in the criminal code and 1800 criminal offenses outside of the code.<sup>24</sup> These are dramatic increases over what existed when the Kentucky Penal Code was enacted in 1974. In comparison to Kentucky, however, many other states are much worse.<sup>25</sup>

What is to be done about the current mess in which we find ourselves? Let me suggest some short-term solutions, but also some long-term strategies.

#### IV. THE RESURRECTION OF AMERICAN CRIMINAL CODES

##### A. Short-Term Solutions

The short-term goal must be to reduce the mountain of overlapping provisions to a single, integrated code, as existed with the original 1974 codification. This can only be done through a major overhaul, which will take into account all of the existing accumulated statutes. It cannot be done piecemeal or ad hoc. Let me suggest some basic principles in doing this work.

First, there ought to be a strong preference for including all nontrivial offenses in the criminal code itself, not scattered in titles outside of the code.

Second, offenses ought to be defined as much as possible to identify distinct, non-overlapping harms. Identify the basic harm or evil, and capture it in one offense. If a criminal episode embodies several distinct harms or evils, they can all be accounted for by convicting the offender for a series of non-overlapping offenses.

Third, the legislature ought to provide as much grading distinction within an offense as possible. It ought to identify those forms of the offense

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*The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 718–28 (2010).

<sup>23</sup> See Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 60–61 (2000) (ranking criminal codes using a qualitative scoring system and finding Kentucky's Penal Code ranks eleventh).

<sup>24</sup> E-mail from William A. Hilyerd, Assoc. Professor of Legal Bibliography, Louis D. Brandeis Sch. of Law, to Paul H. Robinson, Colin S. Diver Professor of Law, Univ. of Pa. Law Sch., & Luke M. Milligan, Assoc. Professor of Law, Louis D. Brandeis Sch. of Law (Aug. 28, 2014) (on file with author). Forms of criminal activity that did not exist in 1974 require a trivial number of new offenses. Traditional theft, for example, punishes taking “a thing of value,” even if that thing now includes intangible computer data.

<sup>25</sup> See Robinson & Cahill, *supra* note 11, at 635–37.

that merit more punishment and those that merit less. This is a value judgment that ought to be made by the legislature, not left to the judiciary or prosecutors to decide ad hoc, which is what happens when the legislature enacts statutes containing a wide range of offenses without identifying the factors that distinguish more serious violations from less serious violations. In other words, including sufficient offense grades is important both to preserve the criminalization authority to the legislature and to ensure uniformity in application of these grading judgments to different defendants.

Fourth, the drafters ought to avoid “combination offenses” as much as possible. Such offenses are particularly common in new legislation: taking two individual offenses and combining them to create a brand-new third offense, such as “carjacking.”<sup>26</sup> Is anyone really worried that carjacking was not a serious offense before the new carjacking statutes were enacted? Theft, assault, and kidnapping statutes all exist in every jurisdiction in the country. If the legislature wants to provide that some forms of these offenses are more serious, it need only add a grade aggravator to that effect in the existing offense; there is no need to create a special, new combination offense.

One of the problems with combination offenses is that they reduce grading nuance. Let me use robbery, a long-existing combination offense, to illustrate the problem. Robbery is the combination of theft and assault or threat.<sup>27</sup> As the graphic illustrates,<sup>28</sup> a jurisdiction might have four grades of each of these two offenses. (In fact, a jurisdiction is likely to have many more grades than this.) When the two offenses are combined into robbery, however, a similar four-category grading scheme for robbery reduces the grading nuance by three-quarters. Of the sixteen possible combinations of grades provided by the four grades of theft and the four grades of assault, the four robbery grades must ignore twelve of the sixteen combinations. (In fact, many if not most jurisdictions have fewer grades of robbery than four.<sup>29</sup>) When grading robbery, which grading distinctions for theft and for assault are to be ignored? And what justification can be used for ignoring them? If the drafters have already determined that they are important enough to alter the grade of the theft offense or the assault offense, why not also the robbery offense?

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<sup>26</sup> See, e.g., 18 U.S.C. § 2119 (2012) (federal anti-carjacking statute); CAL. PENAL CODE § 215 (West 2014) (state anti-carjacking statute).

<sup>27</sup> See MODEL PENAL CODE § 222.1 (Proposed Official Draft 1962).

<sup>28</sup> See *infra* Figure 2.

<sup>29</sup> See, e.g., KY. REV. STAT. ANN. §§ 515.020–.030 (West 2006) (defining robbery in the first- and second-degrees).

For these reasons and others, the Model Penal Code drafters thought seriously about dropping such combination offenses as robbery and burglary, but finally decided to keep them simply because they had such a long history, and states would expect to see them in the Code.<sup>30</sup> That may be an adequate justification for keeping these two combination offenses, but the damage to grading nuance strongly suggests that the modern popularity of inventing new combination offenses ought to be abandoned.

Fifth, there ought to be a strong preference for updating an existing offense rather than creating a new offense. Thus, the general theft offense ought to be relied upon to punish all forms of unlawful taking of the property of another, be it library thefts or the theft of intangible data. To the extent that some special definitions are required to ensure the adequate coverage of the offense, then they can and should be added. But there is little to be gained, and much to be lost, by creating new offenses of library theft or data theft. We ought to avoid creating a host of special theft offenses scattered throughout the criminal code, or even outside the code, and ought to aim instead for consolidating offenses of a similar or related nature.

Sixth, as noted previously, the code ought to provide definitions of terms whenever it would be useful.<sup>31</sup> Most importantly, the same term ought to have the same definition throughout the code. If some different meaning is needed in a special context, then a different term ought to be used to carry that different meaning.

Finally, after defining offenses and determining the grades for each offense and sub-offense, the drafters ought to undertake a general study of the internal coherence of the grades that they have assigned.<sup>32</sup> Here is the procedure I recommend. After deciding how many offense-grading categories to recognize, identify for each category at least two specific offense examples to serve as “milestones”—a set of markers against which every other offense or sub-offense in the code can be compared and tested. For each offense with a separate grade, the drafters should ask whether the conduct described in that offense matches the seriousness of the milestone

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<sup>30</sup> See MODEL PENAL CODE §§ 221.1 cmt. 2, 222.1 cmt. 1 (Official Draft and Revised Comments 1980) (discussing rationale for retaining burglary and robbery, respectively, as combination offenses).

<sup>31</sup> See *supra* Part I.B.

<sup>32</sup> For examples of how these studies could be conducted, see generally Robinson, Gaeta, Majarian, Schultz & Weck, *supra* note 22; Paul H. Robinson, Rebecca Levenson, Nicholas Feltham, Andrew Sperl, Kristen-Elise Brooks, Agatha Koprowski, Jessica Peake, Benjamin Probbler & Brian Trainor, *Report on Offense Grading in New Jersey* (Univ. of Pa. Law Sch., Public Law Research Paper No. 11-03, 2011), available at <http://ssrn.com/abstract=1737825>; Paul H. Robinson, *Report on Offense Grading in Pennsylvania* (Univ. of Pa. Law Sch., Public Law Research Paper No. 10-01, 2009), available at <http://ssrn.com/abstract=1527149>.

offense, or whether perhaps it better matches the seriousness of the next-higher milestone offense or the next-lower milestone offense. At the end of the process, the drafters can produce a list of all offenses and sub-offenses in each grading category, and they can then perform a quality control check by working through all of the offenses in that category to confirm that they all do indeed reflect a comparable level of seriousness.

This grading exercise was performed in relation to the Kentucky Penal Code Revision Project in 2003. The *Final Report of the Kentucky Penal Code Revision Project* contains a table for each offense grade, including a list of all of the sub-offenses from the draft code with that grading classification.<sup>33</sup> The process of producing these summary grading tables was one that revealed many grading inconsistencies that had previously gone unnoticed during the drafting process.

### *B. The Political Feasibility of Recodification*

I have made the case here for a general recodification of existing criminal statutes. Such a project is clearly feasible from a drafting point of view. It is essentially what was done by the Kentucky Penal Code Revision Project in 2003, although the work now will require incorporating the many new and overlapping provisions that have accumulated in the decade since.

One may wonder, however, whether such a project is politically feasible. The Kentucky Attorney General's Office opposed the Revision Project.<sup>34</sup> And that is not an irrational position for prosecutors, at least those with a short-term perspective. They benefit from the current disorder of the Kentucky Penal Code, especially the variety of overlapping offenses that have arisen from the hundreds of criminal law amendments layered over the original. So perhaps I should speak most directly to prosecutors' needs and concerns, and explain why these kinds of reforms ought to be attractive to them. Yes, the current mess does give them many overlapping offenses and, consequently, much flexibility and discretion in how and what to charge in any given situation. They have the ability to take an offense and treat it as something relatively minor or to transform it into a whole string of serious offenses. The appeal to prosecutors is understandable.

But prosecutors should be aware that there is also a cost to it, albeit a hidden cost. Not only does it create a messy system aesthetically, but it also has several unattractive practical consequences. It gives the system a

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<sup>33</sup> KY. CRIMINAL JUSTICE COUNCIL, 1 FINAL REPORT OF THE KENTUCKY PENAL CODE REVISION PROJECT 135-52 (2003).

<sup>34</sup> See 2 *id.* at 333.

reputation as being more unpredictable, more discretionary, and therefore less uniform and more disparate in its treatment of defendants. But why should prosecutors care about the system's reputation for reliability and consistency in doing justice and avoiding injustice? Let me suggest why they should care.

As I hinted at earlier, social scientists have shown us—with studies that have arisen only since the original Kentucky Penal Code—that the greatest power of the criminal justice system may lie not in its threat of official sanction, but rather in the social influence of its moral authority.<sup>35</sup> A criminal justice system that has more credibility with the community it governs is more likely to prompt acquiescence in support rather than resistance and subversion. This reputational effect can influence players throughout the system. Do witnesses report crimes? Do they cooperate with investigators? Do jurors follow their instructions? The system's reputation even influences the professional players within it. Do police, prosecutors, and judges follow the spirit and text of legislative rules, or do they feel free to make up their own rules? A system that has earned a reputation for great moral credibility will gain deference. A system that has not will inspire resistance and subversion.

Perhaps even more important than this is the influence that the system's reputation has in gaining compliance from citizens. A system that has earned a reputation as a reliable moral authority is more likely to gain deference from people in those important cases in which the moral status of the law's prohibition is ambiguous. Is downloading music without a license really condemnable? Is insider trading? Is coercing consent to intercourse on a date really condemnable? Criminal law that has earned a reputation as a moral authority will not only gain compliance in these gray area cases, but, most importantly, is more likely to induce all citizens to internalize the norms that the criminal law announces. In contrast, a criminal law seen as regularly doing injustice loses its moral credibility with the community and loses its power to gain deference and compliance, as well as the power to induce the internalization of its norms.

Let us assume for the sake of argument that prosecutors are not persuaded by this research and these arguments. Let me suggest to legislators that they ought to press ahead nonetheless, even in the face of prosecutorial opposition. Not only would they have on their side all of the arguments described above about the practical, crime-control value of a

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<sup>35</sup> See generally PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT (2013); Paul H. Robinson, Geoffrey P. Goodwin & Michael D. Reising, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

system with a reputation for consistency and uniformity in doing justice and avoiding injustice, but they also would have a good political reason to press for these reforms.

Just as the enactment of a comprehensive criminal code shifted criminalization authority away from the judiciary and vested it in the more democratic legislative branch, so too does the process of systematic degradation of a comprehensive criminal code shift criminalization power—shifting it away from the legislature and to the prosecutor. That is not only bad because of its long-term effect of undermining the moral authority of the criminal justice system by producing inconsistent and unpredictable results, but also is bad because it takes those criminalization decisions away from where they belong—from the people of Kentucky through their elected representatives in the legislature. A criminal code that gives prosecutors so many different options on how to treat any given criminal offense is a criminal code by which the legislature forsakes its important role in reflecting the community's shared views about justice.

The only way that a criminal justice system can be predictable and consistent in its criminal liability and punishment is to have a criminal code that on its face controls basic liability and punishment decisions. Every defendant ought to be treated the same, no matter who they have as a prosecutor. Every victim's chance at true justice ought to be the same, no matter who prosecutes their case. That requires a comprehensive and tightly-defined system of offenses, based upon a coherent grading structure, applicable the same in all cases, and only the General Assembly can provide that.

Even if all of this is true, is it realistic to think that legislators—even knowing that it is the right thing to do—can rise above their political fears to oppose what prosecutors want? Even if the alternative is to essentially give up their legislative power to the prosecutors, is it realistic that legislators would oppose prosecutors on criminal law matters? After all, the reality is that every legislator's primary concern, if they are to continue to do their good works, must be to get reelected. They can do no good works if they lose the next election. Is not the political risk that comes from opposing prosecutors just too high to expect them to take it? Being accused of being "soft on crime" can be a powerful election cudgel for their opponent.

But here is where structural changes to the system can make a difference. Let me then talk about long-term strategies to effective criminal law reform.

### C. Long-Term Strategies

Stepping back for a moment from the political feasibility question, let us assume for the sake of argument that a new criminal code was, in fact, enacted following the drafting principles I have previously detailed.<sup>36</sup> This would be a good thing. But for how long would it last? Why would the same processes and influences that caused the degradation of the 1974 Kentucky Penal Code over the past four decades not still be at work, ready to begin degrading the new code as soon as it was enacted? If the degradation problem is to be solved long-term, it requires some strategies that will undermine the degradation process. Is that possible?

I believe that it is possible, but let me be frank in conceding that it has not yet been done. We are at a point where most states are very much in need of recodification and of a long-term strategy for avoiding future degradation, but no state has yet done it. Perhaps Kentucky can provide the model.

Let me suggest a variety of mechanisms that might help. All of them are designed toward the same goal: to provide what might be called “amendment discipline” in future criminal law legislation.

First, future amendments should revise the *existing* criminal code provisions; they should *integrate* into them rather than *overlaying* them. Of course, this requires some continuing body with influence over legislative proposals that can build and retain expertise on the structure and drafting style of the criminal code. This could be a body outside of the legislature, such as the Criminal Justice Council, or some other, newly-created body. But it would have to be given somehow (or perhaps just take) the role of critiquing criminal law reform proposals in light of the existing code provisions. This critique could be very much helped by requiring all proposed legislation concerning criminal law to be accompanied by an “impact statement” (or something of that nature) that would describe all of the existing law on the subject and explain why that existing law is inadequate or flawed and why the proposed legislation would fix the problem.

Another aspect of “amendment discipline” is to ensure that only *essential* changes are made to existing law—that the proposed revision is truly necessary to solve a real problem and can do so. Of course, when criminal law legislation is used simply as a vehicle to send a message of concern to constituents, it will be difficult (if not impossible) for proponents of legislation to make the case that the legislation is essential. The point is

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<sup>36</sup> See *supra* Part IV.A.

that amending the criminal code ought to be the last resort—not the first. If the problem can be solved with a memorandum to judges or prosecutors urging them to interpret or apply existing law differently, then that ought to be preferred.

This suggests another structural change in the process that might be useful. As mentioned before, we need to be sympathetic to the situation in which legislators find themselves.<sup>37</sup> They will always want to find some way to communicate their empathetic concern to their constituents. To avoid having that message vehicle be unnecessary criminal code amendments, perhaps the process should create an alternative vehicle. A good candidate could be to provide an official commentary to the new penal code, which would have a standing similar to legislative history in the interpretation of the code's provisions.<sup>38</sup> Thus, an official commentary would be promulgated to accompany the recodification and, most importantly, would be a living document to be kept up-to-date by legislative revision as needed. Thus, when a case in the news has constituents worked up, it may be enough of a signal of concern from legislators to pass legislation to modify the official commentary.

If librarians are anxious to have some special public confirmation that taking library books is theft, a line could be added to the official commentary to the theft offense confirming that taking public library books is theft. That legislative action may be all that is needed to keep the librarians happy. It may well be that the added sentence is, as a practical matter, unnecessary, but its real value is in providing an outlet for the expression of legislative concern without creating a troublesome new, overlapping theft offense.

Another aspect of structural reform addresses the problem of irrational grading. I suggested previously that the recodification project include a process of comparing all offenses and sub-offenses to “milestone” examples of each grading category.<sup>39</sup> I would recommend that proponents of new offenses or new grades be obliged to undertake that same task. Perhaps as part of the required “impact statement,” a bill's sponsors would be required to compare their new offense or new offense grading provision to the milestone examples for the offense grade that they are proposing, and to

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<sup>37</sup> See *supra* Part III.B.

<sup>38</sup> Cf. *Delphi Auto. Sys., LLC v. Capital Cmty. Econ./Indus. Dev. Corp.*, 434 S.W.3d 481, 485 (Ky. 2014) (“Where a statute is ambiguous, we resort to legislative history, canons of statutory construction and, in the case of uniform statutes such as the Uniform Commercial Code, interpretations by other courts. In this case, we also have the benefit of Official Comments to the UCC provisions, Comments which the legislature has indicated ‘represent the express legislative intent of the General Assembly and shall be used as a guide for interpretation.’” (citations omitted)).

<sup>39</sup> See *supra* Part IV.A.

compare it to the other sub-offenses with that same grade in the current code.

Such “impact reports” could spark a healthy debate about whether the proposed criminal law revision is, in fact, appropriate and necessary. And where some body with criminal law expertise exists outside of the legislature—be it the Criminal Justice Council, or some other official or unofficial body—the resulting public debate could provide just the political cover that legislators need to vote against an unnecessary new offense or an inappropriate grading increase. Of course, this can only work if the independent body has earned credibility with the public—has shown itself to be as opposed to inappropriate failures of justice as it is opposed to injustice. But once it has earned that credibility, the thoughtful legislator can do the right thing and vote against the unnecessary or inappropriate criminal law legislation without fear of being labeled “soft on crime” at the next election.

There are many crime problems that will create concern among voters, but the truth is that many if not most of them cannot be solved with amendments to the criminal code. Changing police procedures, increasing police funding, promoting job training and education, developing better drug and alcohol programs, and a host of other reforms may be the real solution to the problem. But these are often outside of the reach of legislators. Amending the criminal code is a lever of power within easy reach, and if we are to avoid degradation of the criminal code in the future, we must develop a system in which legislators can realistically be expected to resist the easy response of pulling that particular lever of power.

I have suggested several structural changes here. Frankly, however, it is only the legislators themselves who are in a position to know what kind of changes are feasible, and who can actually succeed in bringing about “amendment discipline” in the future.

## V. CONCLUSION

Just as most states codified their criminal laws in the 1960s and 1970s, the next several decades will see those same states struggling with what to do with their increasingly dysfunctional and chaotic criminal codes. Some of those codes have grown to six, seven, or eight times the size of their original codification, yet with very little actual additional criminalization. That mountain of overlapping legal provisions does little but produce inconsistency and uncertainty, and the problem grows worse every year as the avalanche of criminal law legislation not only continues in most states, but accelerates.

FIGURE 1. THE RANGE OF APPROACHES

Codification Continuum

1	2	3	4	5
Pure Common Law	Scattered Statutes	Law Primarily Statutory, But Not Integrated Into Full Code	Full Special Part and General Part, But Skeletal	Self-Contained, Comprehensive Full Code

FIGURE 2. THE PROBLEM OF COMBINATION OFFENSES

	Offense of Theft	Offense of Threat or Assault
Sample Element 1	Amount is greater than or equal to \$5,000	Act causes serious bodily injury
Sample Element 2	Amount is greater than or equal to \$500, but less than \$5,000	Act causes bodily injury
Sample Element 3	Amount is greater than or equal to \$50, but less than \$500	Act of physical menacing causes fear of serious bodily injury
Sample Element 4	Amount is less than \$50	Threat of act causes fear of serious bodily injury

**Combination Offense of Robbery**

Hypothetical Grade 1	<i>Usually, robbery has three or four grades. The drafters select certain combinations of the theft and threat or assault factors to create the robbery grades.</i>
Hypothetical Grade 2	
Hypothetical Grade 3	
Hypothetical Grade 4	

**Theft and Assault as Independent Offenses**


*Using the distinctions identified as significant, the code would recognize sixteen varieties of "robbery" (i.e., four theft categories x four threat or assault categories), depending on the combination of theft and threat or assault factors. The combination offense must ignore twelve of the sixteen combinations.*

