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Michael T. Cahill

Brooklyn Law School, michael.cahill@brooklaw.edu

Paul H. Robinson

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Can a Model Penal Code Second Save the States from Themselves?

Paul H. Robinson *
Michael T. Cahill **

I. INTRODUCTION

Other contributors to this Symposium suggest a variety of changes to the Model Penal Code that they think justify producing a Model Penal Code Second. We offer such suggestions elsewhere.¹ We want to use this space to discuss a slightly different, but related, subject: the need for, and potential effect of, a Model Penal Code Second as a spur to reforming current American criminal codes.

Probably the most important point we can contribute is to make clear that current American criminal codes are in serious trouble. About one-third of the states never adopted a modern criminal code during the codification wave of the 1960s and 70s. But even those that did adopt new codes have, over the past forty years, discovered many flaws in the drafting. Even among the well-drafted provisions, many are badly out-of-date. The sexual offenses are just at the top of a long list. Some states have amended those out-of-date provisions, and many other provisions as well. But as we will discuss, that amendment process creates its own problems—different problems, but nonetheless tragic and devastating ones.

Indeed, this is the subject we want to take up here. Though the Model Penal Code has serious flaws that merit consideration and correction, our experience has led us to conclude that the greater problem for American criminal codes is the amendment process by the state legislatures and its cumulative effect over the past forty years.

Our discussion will offer examples from two states in particular—Illinois and Kentucky—only because we have been directly involved with code reform in these two states and therefore know their codes relatively well. One of us has served as the Reporter for both reform projects; the other was Staff Director for the Illinois Criminal Code Rewrite and Reform Commission and a consultant to the Kentucky Penal Code Project. Our published study ranking American criminal codes² shows

* Colin S. Diver Distinguished Professor of Law, University of Pennsylvania Law School. Reporter, Illinois Criminal Code Rewrite and Reform Commission; Reporter, Kentucky Penal Code Revision Project.

** Assistant Professor, Brooklyn Law School. Staff Director, Illinois Criminal Code Rewrite and Reform Commission; Consultant, Kentucky Penal Code Revision Project.

¹ See Paul H. Robinson, *Reforming Federal Criminal Law and the Model Penal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225 (1997); Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for a Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. (forthcoming Spring 2004).

² See Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1 (2000).

that, in our view at least, Illinois and Kentucky are hardly at the bottom of the barrel in terms of current quality; indeed, each of these two states already has a significantly better-than-average code.³ So do not take their use as illustrations as a suggestion that they are particularly bad. Indeed, we are highly impressed with both states; as far as we know, they are engaged in the only ongoing general recodification efforts.

II. THE CODE DEGRADATION PROBLEM

The important point we wish to make is that the amendment process has increasingly degraded American criminal codes. This degradation process has several sources. One is special-interest-group lobbying. There is a continuous stream of what we might call “designer offenses,” most of which are unnecessary. For example, in Illinois, while there is a general theft offense,⁴ the Illinois General Assembly has nonetheless added by amendment a special offense for theft of delivery containers⁵ as well as other specific theft offenses.⁶ Similarly, even though there is a general property-damage offense,⁷ special offenses have been added for damaging library materials,⁸ or damaging an animal facility,⁹ or defacing delivery containers¹⁰—the delivery-containers lobby seems especially strong—or, one of our favorites, a special offense for damaging anhydrous ammonia equipment.¹¹ Kentucky, though less extreme, has similar serious problems of duplication and overlap.¹²

Another engine of code degradation is the normal news-story/political-response cycle. A high-profile series of offenses, or even one particularly serious offense,

³ See *id.* at 60 (ranking Kentucky code 11th, and Illinois code 14th, out of 52 American criminal codes).

⁴ See 720 ILL. COMP. STAT. 5/16-1 (1993).

⁵ See 720 ILL. COMP. STAT. 5/16E-3(a)(1) & (4) (1993).

⁶ See, e.g., 720 ILL. COMP. STAT. 5/16A-3(a) (1993) (retail theft); 720 ILL. COMP. STAT. 5/16B-2(a) (1993) (library theft).

⁷ See 720 ILL. COMP. STAT. 5/21-1 (1993).

⁸ See 720 ILL. COMP. STAT. 5/16B-2.1 (1993); see also 720 ILL. COMP. STAT. 5/21-4 (1993) (damaging government-supported property).

⁹ See 720 ILL. COMP. STAT. 215/4 (1993).

¹⁰ See 720 ILL. COMP. STAT. 5/16E-3(a)(3) (1993).

¹¹ See 2001 ILL. LEGIS. SERV. 92-16 § 88 (West). Note that the code also already has a general endangerment offense, see 720 ILL. COMP. STAT. 5/12-5 (1993), so this distinct offense cannot be justified based on its involving the creation of a risk of injury or death.

¹² Compare, e.g., KY. REV. STAT. ANN. § 514.040 (Michie 1999 & Supp.) (defining general offense of theft by deception), with KY. REV. STAT. ANN. § 434.095 (Michie 1999) (obtaining real estate loan by substituting or making false instrument), KY. REV. STAT. ANN. § 434.655 (Michie 1999) (fraudulent use of credit or debit card after reporting it as lost, stolen, or not received), KY. REV. STAT. ANN. § 434.660 (Michie 1999) (furnishing goods or services to user of false credit card with intent to defraud), KY. REV. STAT. ANN. § 434.670 (Michie 1999) (failure to furnish goods, services, etc., represented in writing as furnished), and KY. REV. STAT. ANN. § 516.130 (Michie 1999) (using slugs in coin machine with intent to defraud).

upsets the community. The legislators, understandably, feel that they need to demonstrate their appreciation of the community concern and to do something in response to it. If there is a series of drive-by shootings, or a particularly scary home invasion case, or some carjackings, a common response is to create special offenses for each of these particular kinds of conduct, even though they are already fully criminalized and, where possible, prosecuted. Another response is to enact special grading provisions to ratchet up the grading for this particular form of the general offense (of homicide, aggravated assault, or robbery), even though the offense may already be graded seriously and even though the new aggravation may create obvious disproportionalities when compared with other existing offenses. The legislation serves to publicly express the recognition and concern that is felt to be needed.¹³

The problem with both sorts of legislation—designer offenses and crimes *du jour*—is that they not only are generally unnecessary, but also cause positive damage to the effective operation of the code. The new offenses tend to be drafted as if the existing general offense(s) did not exist. The style and format are commonly inconsistent with that of the code. Many of these offenses, even serious offenses, are defined outside the criminal code. They use undefined terms or, alternatively, they use newly-defined terms or new definitions that conflict with pre-existing language or definitions. Their presence and form also create special problems because the normal rules of statutory interpretation direct that one avoid an interpretation that makes statutory language superfluous. Yet here the entire offense is superfluous. By enacting these offenses, the legislature undermines the clarity and predictability of the previously existing general offense.

A further systemic problem comes from the natural human tendency to exaggerate the seriousness of an offense that affects one personally. In the designer offenses it is common to provide grading that is disproportionately high given the true relative seriousness of the new offense. Similarly, the crime *du jour* exaggerates grading, reflecting the strong feelings of the moment. But after the news storm passes, we are left with a grading that is disproportionate. Worse, this new exaggerated grading sets a new high-water mark against which the next crime *du jour*

¹³ For example, the current Illinois code contains two offenses that provide very serious penalties for discharging a firearm in the direction of another. See 720 ILL. COMP. STAT. 5/24-1.2 (1993); 720 ILL. COMP. STAT. 5/24-1.2-5 (1993) (imposing grades ranging from Class 1 felony to Class X felony with minimum imprisonment term of 12 years, depending on potential victim's occupation and type of firearm involved); cf. 720 ILL. COMP. STAT. 5/24-3.2(b) (1993) (defining Class X felony for discharging a firearm loaded with armor-piercing bullet or similar ammunition, where bullet "strikes any other person"). The grading for these offenses, which do not require any resulting injury or death, is unduly severe when compared to the grading for other offenses criminalizing endangerment or actual infliction of injury or death. For example, recklessly killing another person is only a Class 3 felony, see 720 ILL. COMP. STAT. 5/9-3 (1993); even second-degree murder is only a Class 1 felony, see 720 ILL. COMP. STAT. 5/9-2 (1993). Knowingly causing a catastrophe—which, in this context, requires "serious physical injury to 5 or more persons"—is a Class X felony, see 720 ILL. COMP. STAT. 5/20.5-5 (1993), making it less serious than some firearm discharge offenses where no injury occurs. "Reckless conduct," which is similar to the discharge offenses in criminalizing risk-creation as opposed to actual infliction of injury, is a mere Class A misdemeanor. See 720 ILL. COMP. STAT. 5/12-5 (1993).

is judged and must surpass if great concern is to be demonstrated. In Illinois, for example, Class 1 felonies have been surpassed with a new class—Class X felonies. But that class too has now become old news. A variety of offenses now have grading that goes beyond the standard Class X.¹⁴

The point is that the typical motivations for *ad hoc* amendments tend naturally to distort grading judgments. Indeed, the entire process of amendment by piecemeal legislation generally encourages changes without regard for their impact on the overall consistency or rationality of the code. What is needed for rational grading is to step back, to decide how many grading categories one wants, then to sort all offenses into those offense grades, taking seriously the obligation to grade each in relation to the relative seriousness of all the other offenses. All offenses can't be worse than the worst. Breaking into a house while armed with a gun is bad, especially if the offender threatens or harms an occupant, but it is not as bad as intentionally stabbing someone to death.¹⁵ Yet it is only through general recodification that a general reexamination of grading, and a reimposition of proportionate penalties, can realistically be accomplished.

The *ad hoc* amendment process has produced a deluge of legislation. The Illinois Criminal Code was enacted in 1961. It is now twelve times longer than the original code!¹⁶ Given that the original code was full and complete, one might reasonably wonder, “What *is* all that extra stuff, without which the original code worked fine?” We think the best analogy may be barnacles collecting on the hull of a ship. The cumulative effect is a distortion of the original hull shape such that it can no longer perform its function. At this point, one might justifiably say that the barnacles have dwarfed the ship.

More frightening is the fact that the rate of amendment is accelerating.¹⁷ In Illinois, for example, the 1980s saw twice the number of amendments as either the 60s

¹⁴ See, e.g., 720 ILL. COMP. STAT. 5/24-1.2 & 5/24-1.2-5 (1993), discussed *supra* note 13 (grading aggravated forms of offenses as Class X felonies with enhanced minimum sentence).

¹⁵ Compare 720 ILL. COMP. STAT. 5/12-11(a), (c) (1993) (defining offense of “home invasion” as Class X felony; requiring that additional 15, 20, or 25 years must be added to offender’s term if offender uses force while armed, fires a gun, or fires a gun and causes “great bodily harm,” respectively) and 730 ILL. COMP. STAT. 5/5-8-1(a)(3)(1993) (providing sentence of 6 to 30 years’ imprisonment for Class X felonies), with 720 ILL. COMP. STAT. 5/9-1 (defining first-degree murder) and 730 ILL. COMP. STAT. 5/5-8-1(a)(1)(A) (1993) (providing standard sentence of 20 to 60 years’ imprisonment for first-degree murder).

¹⁶ Based on the downloaded files we have used for the Illinois project, the current Illinois Criminal Code contains 136,181 words, whereas the original 1961 Code had 23,970 words. Yet this comparison greatly understates the expansion of Illinois criminal offenses, for it includes only the words that have been added to the Code itself. Our files also indicate that, *considering only felonies*, there are 153,347 words worth of offenses outside the Criminal Code—meaning that Illinois now has more statutory criminal law outside its Criminal Code than in the Code itself! Governor George Ryan’s executive order initiating the Illinois reform project stated that the Illinois Criminal Code “has swelled from 72 pages when passed to 1,200 pages today,” which would make the current code more than 16.5 times the size of the original. George H. Ryan, *Executive Order to Rewrite and Reform the Illinois Criminal Code (Exec. Order No. 9)* (May 4, 2000).

¹⁷ A recent study identifies and analyzes all of the changes to the Illinois Criminal Code since 1961,

or 70s,¹⁸ and the rate in the 90s was still higher.¹⁹ At some point the code is headed for collapse under its own weight.

III. HOW A MODEL PENAL CODE SECOND CAN HELP THE STATES SAVE THEMSELVES

But the reader may ask: If legislative degradation of the states' own codes is the problem, then shouldn't we be calling for direct legislative reform, rather than pressing for a Model Penal Code Second? The answer is that our experience in Illinois and Kentucky, and other states, persuades us that the dynamics of local criminal law politics make it very difficult, if not impossible, to achieve general criminal law recodification without the kind of outside help provided by the Model Penal Code in the 1960s and 70s.

Let us explain why this is. (Don't take this as a prediction of how we think the Illinois and Kentucky code reforms will end, but rather as just a reflection of the serious political difficulties that are involved.) Here's the problem: Each of the players in the criminal justice process who has some political clout to either support or block a recodification effort, although that party may see the benefits of recodification if they are explained, will tend to start out with serious fears and reservations that are hard to surmount.

Consider the perspective of prosecutors and police. If you have the burden of proof with the jury, a clear and concise code with fewer ambiguities can make things easier. You may have a lot fewer offenses, but those offenses are very clear and general. And for police, in particular, there is great value in the plain-language code drafting about which we have learned a good deal in the past forty years. It is no longer unreasonable to think that one could draft a criminal code that a line police officer could read and understand in its entirety. That wish is laughable with regard to most current criminal codes today, but we think that, with a new model, it could easily be a reality.

Given the obvious advantages, why would prosecutors and police oppose a recodification project? First, if there were such a project, they would want to be intimately involved, but the kinds of people who are in a position to participate in a recodification effort—those who can make the policy decisions needed to represent prosecutors' interests—are people with heavy ongoing responsibilities, and they don't

pointing out that the number of new amendments has increased over time. See Stephen Haedicke, *Punishing Democracy: A Political History of the Amendments to the Illinois Criminal Code of 1961, with Recommendations for Change*, at text following n.716 (unpublished manuscript on file with authors) ("As should be obvious simply from the frequency of amendments during the 1980s and especially the 1990s, this dynamic [of modifying and expanding the code] is accelerating.").

¹⁸ Compare *id.* at nn.311–60 and accompanying text (identifying and describing each of more than fifty new offenses added during 1980s), with *id.* at nn.126–47, 193–207 and accompanying text (identifying and describing offenses added in 1960s and 1970s).

¹⁹ See *id.* at nn.456–534 and accompanying text (identifying and describing each of more than seventy new offenses added during 1990s).

have the time for such code reform work. Even if they could be persuaded to make the time, the first thing they focus on is what they see as the transition costs. They imagine the disruption that would come with all-new code sections to remember and new code provisions to master. They think, "Our office is already working at 110% just to keep up; how could we ever absorb such an added strain?" Pointing out that the sky did not fall with the past recodification does not tend to dissuade them from their fear.

But even if you get by all of the transition-cost issues, they are thinking to themselves of all those political battles that they fought so hard and, for prosecutors, typically won. Why endanger all that with a new code? And, somewhat more sinisterly, they understand that there can sometimes be a useful tactical advantage for them in having the sort of discretion and power that comes with complex and overlapping provisions.

From the perspective of the defense bar, eliminating the overlapping-offenses morass is an attractive feature of recodification. Having a more coherent grading system is also attractive, especially in making grading more rational for the more serious offenses. A natural effect of a more rational grading scheme is to reduce the number of offenses in the upper grades; as we have noted, not all serious offenses can be the worst.

But defense counsel have some of the same fears and reservations as prosecutors. They don't have time for code reform. The disruptive transition is scary. It is probably true that they have won fewer political victories that need to be protected, but they are afraid nonetheless that, in the current climate, recodification might give them something worse than even what they have.

The judges, especially the appellate judges, initially react by thinking that recodification would throw away a career's worth of work. They have spent entire careers trying to make sense of every phrase of current statutes; now someone plans to toss that work in the trash by adopting new language! The trial judges seem most scared by what they see as the transition problems. They are the folks on the front line who must make the trials work. They have some investment in the code they know and the code they know works, however imperfectly. They may well have spent years producing pattern jury instructions.

Yet there are sound responses to the judges' concerns. As for the appellate judges, recodification hardly amounts to tossing out their life's work. Any smart code drafter will use his or her case opinions as the signs of where problems lie with current law formulations, and will commonly adopt the judicial solution to those problems. A good recodification does not abandon or ignore judicial wisdom and experience, but rather enshrines them. For trial judges, as with advocates on both sides, although the short-term transition problems are real, the long-term payoff can be much greater: having a criminal code that is complete, clear, and understandable, where their daily routine is no longer filled with sorting through an ever-increasing mountain of conflicting provisions.

Finally, consider the view of the legislators. They know firsthand the perversity of the barnacle-encrusting process. In private conversation they are likely to say, "Oh

yes, I voted for a lot of bad criminal law bills, but I had no choice.” On the other hand, they too are concerned about protecting past victories, and they think about the political capital they have spent getting the law to where it is now. Reopening the entire package can be scary. On other hand, they know their messy *ad hoc* amendment process has the effect of transferring to judges and prosecutors the authority to decide what conduct is criminal because they must sort out the ever-accumulating conflicting provisions.

What can a Model Penal Code Second do to help? It can overcome the current local stalemate. Each group is presently ambivalent, at best, about recodification. In addition, the local players are highly suspicious of one another. If one group supports general recodification, other opposing groups take that as a sign that they should oppose recodification. A Model Penal Code Second can break the stalemate. If a well-respected institutional player, especially the author of the model upon which an existing state code is based, publicly acknowledges the model’s flaws (which are probably shared by the state code) by undertaking recodification, the public acknowledgment reassures the local groups that there is a real need for recodification, and that it is not just a bit of political jockeying initiated by their opponents to gain advantage.

Further, if a group like the American Law Institute (A.L.I.)—respected, independent, and balanced—produces a code, that code gives the local groups a benchmark against which they can test their local recodification proposals. The comparison can assure them that the local proposal, to the extent that it parallels the new model code, has no hidden political tricks that they lack the criminal law expertise to discover. It becomes a manageable task to scrutinize the local proposal’s deviations from the new model code for political tricks. Again, a Model Penal Code Second can serve as a catalyst, providing an assurance that can break the state deadlock.

Still further, recodification is a big project and, because it is labor intensive, can be an expensive project if a state wants to do it fully and well. Most states are going to want more than an *ad hoc* group without staff to take on such a large and important project. The Illinois approach was to create a new commission; the Kentucky approach has been to use an existing reform body and add staff with criminal code reform expertise. Either approach can be expensive, and state budgets are tight. (Note that, though there is widespread dissatisfaction with the state of American criminal codes because of the ballooning of inconsistent amendments—the National Conference of State Legislatures sponsored a program on the subject—only Kentucky and Illinois are actually doing something about the problem. In each instance, a special set of circumstances in the state gave reason for access to the needed resources for the project.) But the A.L.I. has the resources, talent, and expertise. With the A.L.I.’s new model code in hand, a state would not be starting from scratch and, importantly, numerous states could benefit from a single centralized undertaking. As happened in the 1960s, a credible model code makes the task feasible.

IV. REDUCING FUTURE DEGRADATION

Additionally, a Model Penal Code Second could provide a valuable service by devising and promoting reforms that would avoid, or at least reduce, the future degradation process. If the pressures degrading current codes are not addressed, they will simply rise again to start degrading the new code. Barnacles will begin attaching to the new hull the day after launch.

But there are things a Model Penal Code Second could do to counteract this trend. First, a model code could include one or more provisions that might help control the kind and form of amendments. A sort of "dictionary provision," which collected at least cross-references to all defined terms, could signal which terms are already defined and prevent duplication or contradiction.²⁰ Provisions explicitly stating the code's intended operational structure²¹ could make clear that criminal code provisions are not self-contained and ought not be drafted as if they were; each provision is only one part of a larger criminal liability machine and must be drafted in a form that serves its function. A provision that requires all serious felonies to be in the criminal code can at least slow down dispersal, especially if it limits the punishment consequences that accompany any offense outside of the code.²²

A model code might also suggest more systemic reforms, beyond simple code provisions. While this goes beyond the pure code formulation that one sees in the existing Model Penal Code, it is within the range of policy advice that the A.L.I. has given in other contexts. For example, *ad hoc* code amendment would not be so detrimental if the legislature had some continuing reservoir of criminal code expertise in whatever committee has jurisdiction over the code, to insure that amendments are drafted in a manner consistent with the code's style, format, content, and structure. There is a surprising level of ignorance about the most basic features of a modern criminal code. It would be helpful to have somebody available to educate new (and old) legislators who submit troublesome amendments.

Probably more effective would be the creation of a standing criminal law revision commission, which a number of countries have.²³ Ideally, it might also be required that any criminal code amendment bill be accompanied by a statement of the need for it and its likely effect. The point here is that an outside commission that publicly comments on proposed criminal law bills could publicly disapprove of a bill that was

²⁰ See, e.g., proposed ILL. CRIM. CODE § 108 (collecting all defined terms used in Code); proposed KY. CRIM. CODE § 500.107 (collecting all defined terms used in Code).

²¹ See, e.g., proposed ILL. CRIM. CODE § 201 (explicitly describing relation between Code's offenses, defenses, and imputation rules); proposed KY. CRIM. CODE § 501.201 (explicitly describing relation between Code's offenses, defenses, and imputation rules).

²² See, e.g., proposed ILL. CRIM. CODE § 902 (imposing liability limitations for uncodified offenses); proposed KY. CRIM. CODE § 509.902 (imposing liability limitations for uncodified offenses).

²³ Consider the standing Law Commission for England and Wales, which regularly reviews all existing laws, including criminal laws, and recommends appropriate reforms, *available at* <http://www.lawcom.gov.uk> (last visited September 9, 2003); *see also* Australian Law Reform Commission, *available at* <http://www.alrc.gov.au> (last visited September 9, 2003).

unnecessary and complicating, thereby giving political cover to those legislators who wish to vote against it for being so. It is also likely that the potential for such public disapproval by a credible independent commission might deter much unneeded or problematic legislation in the first place; the political capital to be gained would be less than the capital to be lost by public embarrassment.

Finally, let us note an odd little idea that has surprised us in the interest it has generated among some legislators with whom we have raised it: giving the code's official commentary a continuing role in law; specifically, having the commentary continually available as a document that may be updated as the legislature sees fit. It would remain only commentary, useful only in helping judges interpret a statutory provision that is not clear on its face. But its amendment would provide a vehicle by which a legislator could show the needed concern and action over a crime issue without actually damaging the code's effectiveness. If there were pressure regarding theft of delivery containers, instead of enacting a new offense with new terms and a unique grading provision, the legislature could amend the code commentary to theft to make clear the very important point that, yes, delivery containers are indeed property subject to the theft offense. That some legislators would find such an arrangement useful merely demonstrates the extent of the bind in which they now commonly find themselves when faced with bad criminal bills.

V. CONCLUSION

To summarize, a Model Penal Code Second would be important not only for its correction and updating of the Model Code's provisions, which have been shown over the past forty years to be flawed, but also, and perhaps more so, for its ability to stimulate state criminal code reform that will help states crawl out from under the decades of *ad hoc* amendments that are increasingly making the codes dysfunctional.

