First Assignment

Welcome Criminal Law students!

I look forward to meeting you in a few weeks. Please complete the below assignment for Class 1.

NOTE: I have merged all the readings and assignments for the first class into a single PDF document titled “First Class Assignment” on the UB webpage. After orientation, you will be able to register for our course TWEN page where you can access all the course documents.

1. Read the syllabus
2. Complete the first assignment listed on the syllabus
   a. Complete the assigned textbook readings (first week’s reading assignments—Class 1 and Class 2—are posted on TWEN).
   b. Read the handout titled “Analysis Questions and Problem.” Answer the questions and complete the problem.
   c. Complete the quiz
   d. Read the handout titled “The American Model Penal Code_A Brief Overview.”
3. Follow the Casebook Plus Instructions and sign up for the online course.
4. Sign up for our Criminal Law TWEN page. You may not have access to TWEN until orientation when you receive your WESTLAW account information (TWEN is accessible through your WESTLAW account).

If you have not bought your textbook, please note that I have scanned the first and second reading assignments and posted them to TWEN.
Analysis Questions & Problem

Introduction:

1. Analysis Questions for Cases
   a. In re Winshop discusses the “beyond a reasonable doubt standard.” How is it defined, and how have courts erred in defining it (hint: see Notes)?
   b. How would you vote as a juror in Owens? Does it differ from how you would rule as a judge on the Court of Special Appeals of Maryland, like Judge Moylan?

2. Problem
   a. Do you believe in the presumption of innocence? Why or why not?
   b. Read Note 4 after the In re Winshop case discussed on pp. 11-12 of your text. Which of the “reasonable doubt” instructions do you find most helpful as a defense attorney? As a prosecutor? Be prepared to discuss your answers in class.
Hello Criminal Law students!


Note that we are using the “casebook plus” edition of the text with online materials that we will be discussing in class.

To redeem the course code and connect your quizzes to your professor, follow these steps:

1. Go to eproducts.westacademic.com
2. Sign in or create an account.
3. Click to open Cases and Materials on Criminal Law from your bookshelf.
4. Click the Enroll in a Course button and enter this course code:

   **CRSE-R9I6-B5RL-6LQD-CE3G**

5. If you don't see a picture of Cases and Materials on Criminal Law on your bookshelf when you log on to eproducts.westacademic.com, perform either of the following:
   - Click the Redeem Code button on the My Bookshelf page and enter the code that came with the casebook. Next, redeem your code.
   - If you did not purchase a new book with a code, you can go to store.westacademic.com and purchase either the eBook/Learning Library or the Learning Library option for your casebook.

**Need Help?**

For help you can contact us at 1-877-888-1330 (option 4) or support@westacademic.com.

**About the Course Code**

By registering the course code, you connect your quiz results to the course your professor created. Your professor will have the option to view your progress and scores on the quizzes tied to your book. If you have questions about the information we provide to faculty, you can refer to the eProducts user agreement.
Class Participation & Daily Quizzes

Methods of Evaluation – The final grade will be based on the following: Participation (including quizzes) (10%); Midterm (30%); Final (60%). This class is subject to UB’s mandatory 1L curve.

Your participation grade will, in part, be based on daily “take home” quizzes. Prior to each class you must take an online quiz on the reading for that day. The quizzes are available through your Casebook Plus materials (Casebook Plus instructions are posted on TWEN).

Quizzes are open note and open book but you may not collaborate with other students. Quizzes may include questions from previous readings or lectures.

Quizzes will be evaluated as part of your participation grade with your top 10 scores counting toward your participation grade (but see caveat below). If you are not able to complete a quiz prior to class, you must make alternate arrangements with me in advance to receive credit. If you complete all of the quizzes in accordance with these instructions you will receive full credit for your quizzes regardless of your individual quiz scores.

I have prepared handouts for each class titled “Analysis Questions and Problem” that are designed to help you prepare for the quizzes. Please complete the analysis questions and problem prior to each class and be prepared to discuss, though I will not collect your answers.

I reserve the right to adjust your participation grade up or down one-half letter grade depending on your quizzes and participation in class discussions.
1. What distinguishes criminal law from civil law?
   A. Criminal laws are valid and binding upon all those who fall within their terms, whereas civil law is only valid and binding on the parties to an agreement.
   B. Criminal law encompasses injuries to society which society is interested in preventing.
   C. Criminal laws are enforced by public officials and civil laws are enforced through private lawsuits.
   D. Only criminal laws carry the stigma of a conviction; that is, a formal and solemn pronouncement of the moral condemnation of the community.

2. The following is NOT true about Proof Beyond a Reasonable Doubt
   A. "Beyond a reasonable doubt" means that a juror's mind must be in a "subjective state of near certitude."
   B. Reasonable doubt is a powerful tool in litigation for defense attorneys.
   C. Reasonable doubt is quantifiable.
   D. The reasonable doubt standard used in criminal cases is a much greater standard of proof than the preponderance of the evidence standard used in civil cases.

3. Suppose the legislature in your state enacted a law prohibiting left-handed writing, punishable by one year imprisonment. Would Professor Henry M. Hart Jr. say this is a "crime"?
   A. Yes, because a crime is anything that society deems a crime, thus assigning to it society's judgment of community condemnation.
   B. No, because a crime has to be something that is inherently bad.
   C. Yes, because left-handed writing is evil and is a tool of those who practice the dark arts.

4. True or False: According to Owens v. State, a conviction upon circumstantial evidence alone cannot be sustained.
   A. True
   B. False

5. At the conclusion of its opinion in Owens v. State, the Court of Special Appeals stated that drawing an inference of guilt in this case involved "more than a flip of a coin between guilt and innocence," and that a finding of guilt was "rational and therefore within the proper purview of the factfinder." How can this be enough to meet the proof-beyond-a-reasonable-doubt standard?
   A. Because proof beyond a reasonable doubt does not apply in cases where there is only circumstantial evidence.
   B. Because the totality of the circumstances (all the evidence in the case) completely foreclosed the possibility that the defendant was innocent.
   C. Because the judge was only reviewing the case for prosecutorial misconduct.
   D. Because an appellate court is not the factfinder in a criminal case (that's the jury's role). Instead, the appellant court must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.
INTRODUCTION: SETTING THE STAGE

A. NATURE, SOURCES, AND LIMITS OF THE CRIMINAL LAW

HENRY M. HART, JR.—THE AIMS OF THE CRIMINAL LAW

*** What do we mean by “crime” and “criminal”? Or, put more accurately, what should we understand to be “the method of the criminal law,” the use of which is in question? This latter way of formulating the preliminary inquiry is more accurate, because it pictures the criminal law as a process, a way of doing something, which is what it is. ***

What then are the characteristics of this method?

1. The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do. Mostly, the commands of the criminal law are “must-nots,” or prohibitions, which can be satisfied by inaction. “Do not murder, rape, or rob.” But some of them are “musts,” or affirmative requirements, which can be satisfied only by taking a specifically, or relatively specifically, described kind of action. “Support your wife and children,” and “File your income tax return.”

2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words. They speak to members of the community, in other words, in the community’s behalf, with all the power and prestige of the community behind them.

3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce.

Thus far, it will be noticed, nothing has been said about the criminal law which is not true also of a large part of the noncriminal, or civil, law. The law of torts, the law of contracts, and almost every other branch of private law that can be mentioned operate, too, with general directions prohibiting or requiring described types of conduct, and the community’s tribunals enforce these commands. What, then, is distinctive about the method of the criminal law?
Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing? The difficulty is that society is interested also in the due fulfillment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation. The civil law is framed and interpreted and enforced with a constant eye to these social interests. Does the distinction lie in the fact that proceedings to enforce the criminal law are instituted by public officials rather than private complainants? The difficulty is that public officers may also bring many kinds of "civil" enforcement actions—for an injunction, for the recovery of a "civil" penalty, or even for the detention of the defendant by public authority. Is the distinction, then, in the peculiar character of what is done to people who are adjudged to be criminals? The difficulty is that, with the possible exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are visited upon unsuccessful defendants in civil proceedings.

If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is called a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name. So vacant a concept is a betrayal of intellectual bankruptcy. ** A conviction for crime is a distinctive and serious matter—a something, and not a nothing. What is that something?

4. What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection: 18

The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.

If this is what a "criminal" penalty is, then we can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if

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5. The method of the criminal law, of course, involves something more than the threat (and, on due occasion, the expression) of community condemnation of antisocial conduct. It involves, in addition, the threat (and, on due occasion, the imposition) of unpleasant physical consequences, commonly called punishment. But if Professor Gardner is right, these added consequences take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction. Indeed, the condemnation plus the added consequences may well be considered, compendiously, as constituting the punishment. Otherwise, it would be necessary to think of a convicted criminal as going unpunished if the imposition or execution of his sentence is suspended.

In traditional thought and speech, the ideas of crime and punishment have been inseparable; the consequences of conviction for crime have been described as a matter of course as "punishment." The Constitution of the United States and its amendments, for example, use this word or its verb form in relation to criminal offenses no less than six times. Today, "treatment" has become a fashionable euphemism for the older, ugly word. ***(T)o the extent that it dissociates the treatment of criminals from the social condemnation of their conduct which is implicit in their conviction, there is danger that it will confuse thought and do a disservice.

At least under existing law, there is a vital difference between the situation of a patient who has been committed to a mental hospital and the situation of an inmate of a state penitentiary. The core of the difference is precisely that the patient has not incurred the moral condemnation of his community, whereas the convict has.

**NOTES AND QUESTIONS**

1. Suppose the legislature in your state enacted a law prohibiting left-handed writing, punishable by one year imprisonment. Would Hart say this is a "crime"? What if the legislature passes a law, which it calls a "crime," to drive 66 miles per hour in a 65-miles-per-hour zone, also punishable by imprisonment. Is this a crime because the legislature so characterized it?

2. *Sources of American criminal law: the common law beginning.* The roots of American criminal law are found in English soil. The early colonists brought to this country, and in large part accepted as their own, the judge-made law, i.e., common law, of England. Over time, however, the American common law of crimes diverged in key respects from the English version.

Beginning in the late nineteenth century, many state legislatures asserted authority to enact criminal statutes. At first, they used their power to supplement the common law, but eventually they replaced it by legislation. Today, in every state and in the federal system, legislators, rather than judges,
exercise primary responsibility for defining criminal conduct and for devising the rules of criminal responsibility.

3. **The legislature's role.** Professor Hart, supra, at 412, has explained the legislature's perspective in criminal lawmakers as follows:

A legislature deals with crimes always in advance of their commission ***. It deals with them not by condemnation and punishment, but only by threat of condemnation and punishment, to be imposed always by other agencies. It deals with them always by directions formulated in general terms. The primary parts of the directions have always to be interpreted and applied by the private persons—the potential offenders—to whom they are initially addressed. In the event of a breach or claim of breach, both the primary and the remedial parts must be interpreted and applied by various officials—police, prosecuting attorneys, trial judges and jurors, appellate judges, and probation, prison, and parole authorities—responsible for their enforcement. The attitudes, capacities, and practical conditions of work of these officials often put severe limits upon the ability of the legislature to accomplish what it sets out to accomplish.

If the primary parts of a general direction are to work successfully in any particular instance, otherwise than by fortunate accident, four conditions have always to be satisfied: (1) the primary addressee who is supposed to conform his conduct to the direction must know (a) of its existence, and (b) of its content in relevant respects; (2) he must know about the circumstances of fact which make the abstract terms of the direction applicable in the particular instance; (3) he must be able to comply with it; and (4) he must be willing to do so.

Beyond the matter of efficacy, is it fair to convict a person if one or more of these conditions are not satisfied? Why, or why not?

4. **Limits on legislative lawmaking: the Constitution.** Legislators do not have unlimited lawmaking power. Their actions are subject to federal and state constitutional law. For example, the United States Constitution prohibits ex post facto legislation (Article 1, §§ 9 and 10) and cruel and unusual punishments (Eighth Amendment), and provides that persons may not be deprived of life, liberty or property without due process of law (Fifth and Fourteenth Amendments). The study of the criminal law, therefore, necessarily includes consideration of these and other constitutional provisions.

Constitutional issues raise competing policy concerns. On the one hand, the doctrine of federalism teaches that each state has sovereign authority to promulgate and enforce its own criminal laws; and, pursuant to the doctrine of separation of powers, the legislative branch of government, rather than the judiciary, is now considered the appropriate lawmaking body. Therefore, when a federal court declares that a state statute is unconstitutional, it risks violating principles of federalism and usurping legislative authority. On the
other hand, President (later Chief Justice) William Howard Taft once pointed out that "[c]onstitutions are checks upon the hasty action of the majority. They are self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority." H.R.J. Res. 4, 62nd Cong., 1st Sess., 47 Cong. Rec. 4 (1911). Since legislative bodies typically represent the will of the majority, the judiciary is usually responsible for ensuring that the rights of the minority are respected. Therefore, if courts defer too readily to legislatures, they risk abdicating their responsibility for enforcing the Constitution.

5. **The present-day role of the judiciary.** Modern courts do not simply pass upon the constitutionality of legislation. They also play a vital role in ascertaining guilt in individual cases by interpreting criminal statutes. This role comes into play when a legislature has drafted a statute but its meaning is subject to reasonable dispute. In such circumstances courts have developed a number of "presumptions with which *** [to] approach debatable issues of interpretation." Hart, supra, at 435. As you proceed through this casebook you will become familiar with some of these presumptions.

6. **Model Penal Code.** Until well into the twentieth century, most state "criminal codes" were little more than collections of statutes, enacted by legislators in piecemeal fashion over many decades, defining various crimes and their punishments.

These penal codes left much to be desired. First, not all common law crimes and defenses were codified, which meant that courts had to determine if the legislature intended these gaps or if they were inadvertent. Second, many statutory systems were silent regarding essential penal doctrines, such as accomplice liability. Third, criminal codes typically included overlapping, even conflicting, penal statutes. Fourth, many codes applied internally inconsistent penological principles.

In order to bring coherence to the criminal law, the American Law Institute, an organization composed of eminent judges, lawyers, and law professors, set out in 1952 to develop a model code. A decade later, the Institute adopted and published the Model Penal Code and Commentaries thereto. Key portions of the Code (including some recent amendments) are set out in the appendix to this casebook.

The Model Penal Code has greatly influenced criminal law reform. Some states have adopted major portions of the Code. In other jurisdictions, courts look to it for guidance to fill holes in their own statutory systems. Perhaps most usefully, the Commentaries to the specific provisions of the Model Penal Code have shaped the reform debate in many state legislatures. For a fuller discussion of the status of the criminal law before the adoption of the Model Penal Code, see Sanford H. Kadish, *The Model Penal Code's Historical Antecedents*, 19 Rutgers L.J. 521 (1988). For a critical analysis of modern criminal codes, including an effort to rank them in terms of effectiveness, see Paul H. Robinson, Michael T. Cahill, & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 Nw. U. L. Rev. 1 (2000).
B. CRIMINAL LAW IN A PROCEDURAL CONTEXT: PRE-TRIAL

Criminal law casebooks use judicial opinions, mainly those of appellate courts, as the primary tool for exposing students to the general principles of the criminal law. This process can be misleading. It is easy to think that the commission of a crime inevitably results in a prosecution, culminating in a trial, conviction, and appeal of the conviction by the defendant. In fact, however, trials are the exception rather than the rule. A great deal of the criminal process is barely visible in a criminal law course, although it is the focus of attention in courses relating to criminal procedure.

The criminal process begins, of course, when an alleged crime is reported to the police. Not all crimes are reported. In 2015, according to the National Crime Victimization Survey, only 47% of violent victimizations and 35% of property victimizations were reported to police. U.S. Dep’t of Justice, Bureau of Justice Statistics, Criminal Victimization 2015 (Oct. 2016, NCJ 250180).

The fact that a crime is reported does not ensure that an arrest will be made. The police might not investigate the report with vigor because they doubt (rightly or wrongly) its authenticity. Or, they may give the investigation low priority, because police departments have inadequate resources to investigate every reported offense. Unfortunately, as well, improper factors may affect criminal investigations. For example, the police may work hard to investigate a crime against a prominent individual, and yet do little to find the perpetrator of an offense against a homeless person. Likewise, until relatively recently, some police departments treated domestic violence as more of a “family matter” than a public offense.

Even if the police investigate a crime report thoroughly, insufficient evidence may exist to make an arrest. The United States Constitution prohibits the police from arresting a suspect unless they have probable cause to believe that the individual committed an offense. The concept of “probable cause” is a fluid one, not quantified in percentage terms, but which requires a substantial chance that the suspect committed the offense under investigation.

If a suspect is arrested, the prosecutor must overcome various hurdles before a trial may be held. In many states, the arrestee is entitled to a preliminary hearing within two weeks after arrest, at which proceeding a judge must determine whether the arrest was justified. If the judge determines that probable cause exists to proceed with the prosecution, the prosecutor is permitted in some states to file an “information” in the trial court and to proceed to trial. An “information” is a document that sets out the formal charges against the accused and the basic facts relating to them.
CRIMINAL LAW IN A PROCEDURAL CONTEXT: TRIAL BY JURY

In many states and in the federal system, however, the accused may not be brought to trial unless she is indicted by a grand jury. A grand jury consists of lay members of the community who consider evidence presented to them by a prosecutor, after which they deliberate privately, and determine whether adequate evidence exists to prosecute the accused. If the evidence is sufficient, the grand jury issues an “indictment,” a document similar to an information.

Even if an indictment is issued or an information is filed, a trial might still not be held. First, the accused is entitled to make various pretrial motions which, if successful, sometimes require the dismissal of charges. For example, if evidence to be used by the Government was secured in violation of the Constitution, it may not be introduced at trial. On occasion, suppression of such evidence so weakens the prosecutor’s case that charges must be dismissed.

Far more often, a defendant may plead guilty rather than proceed to trial. Nearly always, a guilty plea is the result of bargaining between the prosecutor and the defendant’s lawyer. Typically, in exchange for a guilty plea, a prosecutor agrees to dismiss certain charges, reduce the severity of a charge, or recommend a more lenient sentence upon conviction. Guilty plea rates vary by jurisdiction, by offense, and by year, but the conviction rate obtained by guilty pleas typically nears or exceeds ninety percent.

Thus, in short, many crimes go unreported, many reported crimes do not result in arrest, and where arrests occur, the great majority of prosecutions are disposed of prior to trial, largely by guilty pleas.

C. CRIMINAL LAW IN A PROCEDURAL CONTEXT: TRIAL BY JURY

The Sixth Amendment to the United States Constitution provides that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” The right to trial by jury applies to prosecutions of all non-petty offenses, i.e., any offense for which the maximum potential punishment exceeds incarceration of six months. Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

In Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), the Supreme Court explained the history and rationale of the right to trial by jury this way:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies
and against judges too responsive to the voice of higher authority.

*** Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

In the federal system and in most states, a jury in a criminal trial is composed of twelve persons, who must reach a unanimous verdict to acquit or to convict. However, juries as small as six in number are constitutionally permissible. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) (jury of six is allowed); Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978) (jury of five is disallowed). Furthermore, state laws permitting non-unanimous verdicts by twelve-person juries are permissible, as long as the vote to convict constitutes a “substantial majority” of the jurors. Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (upholding a 9–3 guilty verdict).

The Sixth Amendment provides that “the accused shall enjoy the right to *** an impartial jury ***.” A juror is no impartial if her state of mind in reference to the issues or parties involved in the case would substantially impair her performance as a juror in accordance with the court’s instructions on the law. In order to discover possible bias prior to trial, the judge and the attorneys examine prospective jurors (“venirepersons”) regarding their attitudes and beliefs. The examination is called “voir dire.” If a venireperson’s responses demonstrate partiality, the juror is excused “for cause.”

The defense and the prosecutor are also entitled to exercise a limited number of “peremptory” challenges, i.e., challenges not based on cause. The primary purpose of peremptory challenges is to allow the parties to exclude persons from the jury whom they believe (often intuitively or as the result of such intangibles as “body language”) are biased, but whose partiality was not adequately proven through voir dire. Although the tradition of peremptory challenges is a venerable one, the Fourteenth Amendment Equal Protection Clause is violated if a prosecutor or defense lawyer exercises such a challenge solely on the basis of the venireperson’s race or gender.

Because the purpose of the jury system is to defend against exercises of arbitrary power by the Government and to make available to defendants the common-sense judgment of the community, the accused is entitled to a jury drawn from a pool of persons constituting a fair cross-section of the community. This right is violated if large groups of people, such as women or members of a racial or religious group, are systematically excluded from the jury pool for illegitimate reasons.
D. PROOF OF GUILT AT TRIAL

1. "PROOF BEYOND A REASONABLE DOUBT"

The Supreme Court ruled in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that in order to provide "concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of our criminal law'"—the Due Process Clause of the United States Constitution requires the prosecutor to persuade the factfinder "beyond a reasonable doubt of every fact necessary to constitute the crime charged." The Winship Court justified the reasonable-doubt standard this way:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.

*** The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

Justice Harlan, who concurred in Winship, conceded that the practical effect of the reasonable-doubt standard is to enhance the risk that factually guilty people will be set free. But, he explained:

In a criminal case, *** we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. *** In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

NOTES AND QUESTIONS

1. Do you agree with Justice Harlan that it is better to let a guilty person go free than to convict an innocent individual? If so, why? What if the guilty person who is freed because of the presumption-of-innocence and reasonable-doubt requirements is a serial murderer or rapist? If you still
believe that Harlan is correct, how far would you take this principle? Do you agree with Blackstone that "it is better that ten guilty persons escape, than that one innocent suffer"? 4 Blackstone, Commentaries on the Laws of England *352 (1765) (emphasis added). How about a hundred? See Jeffrey Reiman & Ernest van den Haag, On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con, 7 Soc. Phil. & Pol'y 226 (Spring 1990).

In this regard, consider the following defense of the heavy burden of proof imposed on the Government by the Constitution, expressed by a jury foreperson to his fellow jurors during deliberations in a New York criminal case:

*** I think that we all understand why [the burden of proof is so great]: to protect citizens from the *** tremendous power of the state.

We understand that power much better after the last four days [cf deliberation]. We discovered that it is, fundamentally, an absolute power, and a frightening one. We discovered that a man in a chair and a robe [the judge] could tell us we couldn’t go home, that we couldn’t talk to our families ***. He could send us to jail.*** We discovered that, in the end, there seemed to be no limit to the power of the state over us, once we fell into its hands.

*** Knowing what we know now, imagine that we had a chance to set up our own state ***. What kind of protections would we try to offer to the citizens? I think *** we would put the heaviest possible burden on the state before we would let it take away a person’s liberty, and we would do that because we’ve learned the secret of government: that the state, any state, is, in the end, like a monster, more powerful than everything else.***

Yesterday, in a moment I will never forget [two jurors] *** reminded us of a transcendent idea: that true justice, final justice, absolute justice, belongs to God; human justice can only be cautious, not perfect. For this reason the burden is so heavy.


Is the standard of proof beyond a reasonable doubt too cautious? Should the law permit, if you will, “conviction without conviction”? One scholar recently suggested the law should have “different classes of convictions, *** such as conviction on guilt beyond a reasonable doubt, conviction on guilt by clear and convincing evidence, or conviction by preponderance of the evidence”; the punishment that flows from these different levels of conviction would be “adjusted to the corresponding conviction category.” Talia Fisher, Conviction

* The judge ordered the jurors sequestered during deliberation, i.e., they were not permitted to go home, and were not permitted to talk to family members without permission and supervision. The jurors learned that if they violated the judge’s orders, they could be held in contempt of court and jailed. In a couple of circumstances, the jurors felt that the judge acted officiously in dealing with jurors’ requests.
Without Conviction, 96 Minn. L. Rev. 833, 836 (2012). For example, conviction beyond a reasonable doubt for murder would carry the most severe punishment (death or life imprisonment), conviction based on a somewhat lesser standard of guilt would carry a sentence less than life imprisonment, and conviction based on mere preponderance of the evidence "would entail only the lowest of possible sanction alternatives (such as a fine)." Id.

2. Defining "beyond a reasonable doubt." How onerous a burden is "proof beyond a reasonable doubt"? The Supreme Court has said that the standard requires a juror's mind be in a "subjective state of near certitude" of guilt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Can "near certitude" be quantified? One Nevada trial judge tried. He distinguished the burden required in a criminal case from those required to arrest a suspect (probable cause) and to obtain a civil judgment (preponderance of the evidence). He told jurors that on a scale of zero to ten, "the standard of probable cause [is] about one, and the burden of persuasion in civil trials [is] at just over five." Reasonable doubt, he said, is about "seven and a half, if you had to put it on a scale." Do you believe a juror is in a "subjective state of near certitude" is she believes the chance a defendant is guilty is 75%?

The Nevada Supreme Court ruled that the judge's explanation was improper, without deciding whether the particular number—seven and a half—was too low. It stated, as have nearly all courts when confronted with the issue, that "[t]he concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify." McCullough v. State, 99 Nev. 72, 657 P.2d 1187 (1983).

3. If "reasonable doubt" is not quantifiable, how should jurors be instructed on the concept? According to some observers, "the meaning of reasonable doubt is self-evident and *** efforts to define it lead only to confusion or even dilution of the state's burden of proof." State v. Portillo, 182 Ariz. 592, 898 P.2d 970 (1995). According to the United States Supreme Court, "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). If a court does choose to define the concept, the Constitution does not require any particular form or words be used, as long as there's no reasonable likelihood that the definition, taken as a whole, would allow a conviction insufficient to meet the constitutional standard.

4. A thought experiment. Pretend you are on a jury in a criminal case. The judge will instruct you on the meaning of "reasonable doubt" in one of the following ways. Which instruction below do you find most helpful as a juror? As a separate thought experiment, which instruction would you prefer if you were the defendant's attorney?

The "Moral Certainty" Instruction

[Reasonable doubt] is not merely possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open
to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850), abrogated by Commonwealth v. Russell, 470 Mass. 464, 23 N.E.3d 867 (2015)).

The "Firmly Convinced" Instruction

The state has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty. (State v. Portillo, 182 Ariz. 592, 898 P.2d 970 (1995), based on Fed. Jud. Ctr., Pattern Criminal Jury Instructions 17–18 (Instruction 21) (1987).)

The "No Waver or Vacillation" Instruction

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers or vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable. (Standard Jury Instructions in Criminal Cases (97–1), 697 So.2d 84 (Fla.1997).)

The "No Real Doubt" Instruction

It is the Government that has the burden of proving a defendant guilty beyond a reasonable doubt. If it fails to do so, you must, under your oath, find the defendant not guilty.

But while the Government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. The law does not require mathematical certainty, because that is generally impossible. What is required is
that the Government’s proof exclude any reasonable doubt concerning the defendant’s guilt.

A reasonable doubt is just precisely what it says. It is a real doubt based upon reason and common sense after a careful and impartial consideration of all of the evidence in the case. Proof beyond a reasonable doubt, stated a little bit differently, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. (United States v. Daniels, 986 F.2d 451, opinion withdrawn and superseded in part on reh’g, 5 F.3d 495 (11th Cir. 1993).)

5. The truth and nothing but the truth? What if a judge tells the members of a jury to be “guided solely by the evidence in the case and the crucial, hard-core question you must ask yourselves . . . is, where do you find the truth? The only triumph in any case, whether it be civil or criminal, is whether or not the truth has triumphed.” United States v. Shamsdeen, 511 F.3d 340 (2d Cir. 2008). If you represented the defendant, would you have a legitimate basis for objecting to this instruction?


The story is told of a Chinese law professor, who listened as a British lawyer explained that Britons were so enlightened that they believed it was better that ninety-nine guilty men go free than that one innocent man be executed. The Chinese professor thought for a second and asked, “Better for whom?”

How would you answer the Chinese professor’s question?

2. ENFORCING THE PRESUMPTION OF INNOCENCE

OWENS v. STATE

Court of Special Appeals of Maryland, 1992.
93 Md.App. 162, 611 A.2d 1048.

Moylan, Judge.

This appeal presents us with a small gem of a problem from the borderland of legal sufficiency. It is one of those few occasions when some frequently invoked but rarely appropriate language is actually pertinent. Ironically, in this case it was not invoked. The language is, “[A] conviction upon circumstantial evidence alone is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence.”

We have here a conviction based upon circumstantial evidence alone. The circumstance is that a suspect was found behind the wheel of an automobile parked on a private driveway at night with the lights on and with the motor running. Although there are many far-fetched and
speculative hypotheses that might be conjured up (but which require no affirmative elimination), there are only two unstrained and likely inferences that could reasonably arise. One is that the vehicle and its driver had arrived at the driveway from somewhere else. The other is that the driver had gotten into and started up the vehicle and was about to depart for somewhere else.

The first hypothesis, combined with the added factor that the likely driver was intoxicated, is consistent with guilt. The second hypothesis, because the law intervened before the forbidden deed could be done, is consistent with innocence. With either inference equally likely, a fact finder could not fairly draw the guilty inference and reject the innocent with the requisite certainty beyond a reasonable doubt. We are called upon, therefore, to examine the circumstantial predicate more closely and to ascertain whether there were any attendant and ancillary circumstances to render less likely, and therefore less reasonable, the hypothesis of innocence. Thereon hangs the decision.

The appellant, Christopher Columbus Owens, Jr., was convicted *** by Judge D. William Simpson, sitting without a jury, of driving while intoxicated. Upon this appeal, he raises the single contention that Judge Simpson was clearly erroneous in finding him guilty because the evidence was not legally sufficient to support such finding.

The evidence, to be sure, was meager. The State’s only witness was Trooper Samuel Cottman, who testified that at approximately 11 P.M. on March 17, 1991, he drove to the area of Sackertown Road in Crisfield in response to a complaint that had been called in about a suspicious vehicle. He spotted a truck matching the description of the “suspicious vehicle.” It was parked in the driveway of a private residence.

The truck’s engine was running and its lights were on. The appellant was asleep in the driver’s seat, with an open can of Budweiser clamped between his legs. Two more empty beer cans were inside the vehicle. As Trooper Cottman awakened him, the appellant appeared confused and did not know where he was. He stumbled out of the vehicle. There was a strong odor of alcohol on his breath. His face was flushed and his eyes were red. When asked to recite the alphabet, the appellant “mumbled through the letters, didn’t state any of the letters clearly and failed to say them in the correct order.” His speech generally was “slurred and very unclear.” *** A check with the Motor Vehicles Administration revealed, moreover, that the appellant had an alcohol restriction on his license. The appellant declined to submit to a blood test for alcohol.

After the brief direct examination of Trooper Cottman (consuming but 3½ pages of transcript), defense counsel asked only two questions, establishing that the driveway was private property and that the vehicle was sitting on that private driveway. The appellant did not take the stand and no defense witnesses were called. The appellant’s argument as to legal
insufficiency is clever. He chooses to fight not over the fact of drunkenness but over the place of drunkenness. He points out that his conviction was under the Transportation Article, which is limited in its coverage to the driving of vehicles on "highways" and does not extend to driving on a "private road or driveway."

We agree with the appellant that he could not properly have been convicted for driving, no matter how intoxicated, back and forth along the short span of a private driveway. The theory of the State's case, however, rests upon the almost Newtonian principle that present stasis on the driveway implies earlier motion on the highway. The appellant was not convicted of drunken driving on the private driveway, but of drunken driving on the public highway before coming to rest on the private driveway.

It is a classic case of circumstantial evidence. From his presence behind the wheel of a vehicle on a private driveway with the lights on and the motor running, it can reasonably be inferred that such individual either 1) had just arrived by way of the public highway or 2) was just about to set forth upon the public highway. The binary nature of the probabilities—that a vehicular odyssey had just concluded or was just about to begin—is strengthened by the lack of evidence of any third reasonable explanation, such as the presence beside him of an inamorata or of a baseball game blaring forth on the car radio. Either he was coming or he was going.

The first inference would render the appellant guilty; the second would not. *** For the State to prevail, there has to be some other factor to enhance the likelihood of the first inference and to diminish the likelihood of the second. We must look for a tiebreaker. ***

In trying to resolve whether the appellant 1) had just been driving or 2) was just about to drive, it would have been helpful to know whether the driveway in which he was found was that of his own residence or that of some other residence. If he were parked in someone else's driveway with the motor still running, it would be more likely that he had just driven there a short time before. If parked in his own driveway at home, on the other hand, the relative strength of the inbound inference over the outbound inference would diminish.

The driveway where the arrest took place was on Sackertown Road. The charging document (which, of course, is not evidence) listed the appellant's address as 112 Cove Second Street. When the appellant was arrested, presumably his driver's license was taken from him. Since one of the charges against the appellant was that of driving in violation of an alcohol restriction on his license, it would have been routine procedure to have offered the license, showing the restriction, into evidence. In terms of our present legal sufficiency exercise, the license would fortuitously have shown the appellant's residence as well. Because of the summary nature of the trial, however, the license was never offered in evidence. For purposes
of the present analysis, therefore, the appellant's home address is not in the case. We must continue to look for a tiebreaker elsewhere.

Three beer cans were in evidence. The presence of a partially consumed can of beer between the appellant's legs and two other empty cans in the back seat would give rise to a reasonable inference that the appellant's drinking spree was on the downslope rather than at an early stage. At least a partial venue of the spree, moreover, would reasonably appear to have been the automobile. One does not typically drink in the house and then carry the empties out to the car. Some significant drinking, it may be inferred, had taken place while the appellant was in the car. The appellant's state of unconsciousness, moreover, enforces that inference. One passes out on the steering wheel after one has been drinking for some time, not as one only begins to drink. It is not a reasonable hypothesis that one would leave the house, get in the car, turn on the lights, turn on the motor, and then, before putting the car in gear and driving off, consume enough alcohol to pass out on the steering wheel. Whatever had been going on (driving and drinking) would seem more likely to have been at a terminal stage than at an incipient one.

Yet another factor would have sufficed, we conclude, to break the tie between whether the appellant had not yet left home or was already abroad upon the town. Without anything further as to its contents being revealed, it was nonetheless in evidence that the thing that had brought Trooper Cottman to the scene was a complaint about a suspicious vehicle. The inference is reasonable that the vehicle had been observed driving in some sort of erratic fashion. Had the appellant simply been sitting, with his motor idling, on the driveway of his own residence, it is not likely that someone from the immediate vicinity would have found suspicious the presence of a familiar neighbor in a familiar car sitting in his own driveway. The call to the police, even without more being shown, inferentially augurs more than that. It does not prove guilt in and of itself. It simply makes one of two alternative inferences less reasonable and its alternative inference thereby more reasonable.

The totality of the circumstances are, in the last analysis, inconsistent with a reasonable hypothesis of innocence. They do not, of course, foreclose the hypothesis but such has never been required. They do make the hypothesis more strained and less likely. By an inverse proportion, the diminishing force of one inference enhances the force of its alternative. It makes the drawing of the inference of guilt more than a mere flip of a coin between guilt and innocence. It makes it rational and therefore within the proper purview of the factfinder. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). We affirm.
NOTES AND QUESTIONS

1. Background information. The offense of DWI ["driving while intoxicated" or "driving while impaired"], which was the charge against Owens, does not require evidence regarding the driver's blood alcohol content (BAC). Instead, the offense can be proven based on the arresting officer's opinion that the driver was intoxicated or otherwise impaired, in view of the driver's apparent lack of mental or physical capacity to operate the vehicle.

2. In Owens, the trial judge served as trier of fact, the role ordinarily reserved for a jury. If you had been a juror hearing this case, would you have voted to convict? Look again at the jury instructions on burden of proof set out in the Note 4 "thought experiment" immediately preceding Owens. Based on any of these instructions (for example, focus on the "Firmly Convinced" instruction), are you convinced of Owens's guilt beyond a reasonable doubt?

3. The role of the trial judge in enforcing the presumption of innocence. In a criminal trial, the prosecutor ordinarily makes an opening statement to the trier of fact, which is typically the jury, in which she outlines the evidence she plans to present at trial. The defense may also make an opening statement at that time, or may wait and give it when it presents its own case.

After opening statements, the prosecutor calls her witnesses. When the State completes its case, the defense may move for directed verdict of acquittal. In doing so, the defense asserts the presumption of innocence and claims the Government failed to overcome the presumption based on the evidence presented in its case-in-chief. A motion for a directed verdict, if granted, will immediately terminate the trial in the defendant's favor.

If the motion is denied, the defense presents its case, after which the prosecutor is permitted to introduce rebuttal testimony. At the conclusion, the defense may again move for a directed verdict of acquittal. If the motion is denied (or is not made), the parties make closing arguments to the jury, after which the judge (upon consultation with the parties) instructs the jury on the principles of law relevant to the case, including the constitutional presumption of innocence.

On what basis does a judge decide to grant a motion for directed verdict and thereby strip the jury of its factfinding role? The following explanation is helpful:

The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the

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*Because a defendant has a constitutional right to trial by jury, which includes the right to have the jury reach the requisite finding of guilt, a trial judge may not constitutionally direct a verdict for conviction, no matter how overwhelming the evidence of guilt. Sullivan v. Louisiana, 506 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 162 (1993).*
existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurors must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.*** Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.


4. The presumption of innocence on appeal. At the conclusion of its opinion, the Court of Special Appeals stated that drawing an inference of guilt in this case involved "more than a flip of a coin between guilt and innocence," and that a finding of guilt was "rational and therefore within the proper purview of the factfinder." How can this be enough to meet the proof-beyond-a-reasonable-doubt standard? Why did the court apply this test? The answer requires keeping in mind the distinction between the standard the factfinder (typically, a jury) must apply and the standard an appellate court must follow after a conviction, if the defendant appeals on the ground that the evidence was insufficient to convict.

An appellate court is not the factfinder in a criminal case. That's the jury's role. The jury is ordinarily in a better position than an appellate court to resolve conflicting factual claims because it sees all of the evidence and, more importantly, is able to evaluate the credibility of the witnesses. Consequently, many jurisdictions provide, in essence, that when jurors are confronted with a record of historical facts that could support conflicting inferences, an appellate court should assume that the jury resolved those factual conflicts in favor of the prosecution. The relevant inquiry, then, is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. See Jackson v. Virginia, cited at the end of Owens. With that
understanding, if you were an appellate court judge and applied this standard in *Owens*, would you have affirmed the conviction?

E. JURY NULLIFICATION

INTRODUCTORY COMMENT

Suppose a prosecutor proves beyond a reasonable doubt every fact necessary to constitute the crime charged, but the jury—the community’s representative—does not want to convict. Perhaps the jurors believe the defendant’s conduct should not constitute a crime, although it does. Or, perhaps the jury feels the police mistreated the defendant and it wants to acquit to send a message signaling its displeasure. Or, perhaps, the jurors simply feel compassion for the accused. In such circumstances, may the jury ignore the facts and the judge’s instructions on the law and acquit the defendant? If it does so, this is called “jury nullification.”

The Fifth Amendment Double Jeopardy Clause (“No person shall * * * be subject for the same offense to be twice put in jeopardy”) bars the Government from reprosecuting a defendant after a jury acquittal. Therefore, ultimately, a jury has the raw power to acquit for any reason whatsoever. *Should* juries nullify the law? Since they have the power to nullify, should they be *told* they have it? These questions are considered in the next case.

**STATE V. RAGLAND**

Supreme Court of New Jersey, 1986.
105 N.J. 189, 519 A.2d 1361.

**WILENTZ, C.J. **

[Defendant Ragland, a previously convicted felon, was prosecuted for various offenses, including armed robbery and possession of a weapon by a convicted felon. At the conclusion of the trial of the latter offense, the judge instructed the jury that if it found that the defendant was in possession of a weapon during the commission of the robbery, “you must find him guilty of the [possession] charge.”

On appeal, the defendant argued that the judge’s use of the word “must” in the instruction conflicted with the jury’s nullification power, which he claimed was an essential attribute of his constitutional right to a jury trial. He also contended that the judge should have informed the jury regarding its power of nullification, as follows:

“You are here as representatives of your community. Accordingly you are entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant, even if the
# APPENDIX

## AMERICAN LAW INSTITUTE

## MODEL PENAL CODE

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(Official Draft, 1962)

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PART I. GENERAL PROVISIONS

Article 1. Preliminary

SECTION 1.01. [Omitted]

SECTION 1.02. PURPOSES; PRINCIPLES OF CONSTRUCTION

(1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;

(b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;

(c) to safeguard conduct that is without fault from condemnation as criminal;

(d) to give fair warning of the nature of the conduct declared to constitute an offense;

(e) to differentiate on reasonable grounds between serious and minor offenses.

(2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:

(a) in decisions affecting the sentencing of individual offenders:

(i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;

(ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i);
The American Model Penal Code: A Brief Overview

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If there can be said to be an "American criminal code," the Model Penal Code is it. Nonetheless, there remains an enormous diversity among the fifty-two American penal codes, including some that have never adopted a modern code format or structure. Yet, even within the minority of states without a modern code, the Model Penal Code has great influence, as courts regularly rely upon it to fashion the law that the state’s criminal code fails to provide. In this essay we provide a brief introduction to this historic document, its origins, and its content.

INTRODUCTION

Within the United States, there are fifty-two American criminal codes, with the federal criminal code overlaying the codes of each of the fifty states and the District of Columbia. Under the U.S. Constitution, the power to impose criminal liability is reserved primarily to the states, with federal authority limited to the prohibition and punishment of offenses specially related to federal interests (including crimes committed on property of exclusive federal jurisdiction such as military bases, crimes against certain federal officers, and crimes that involve conduct in more than one state that is difficult for a single state to effectively prosecute, such as drug
The vast bulk of crimes and essentially all “street” crimes—homicide, rape, robbery, assault, and theft—fall under jurisdiction of one of the fifty state criminal codes or the code of the District of Columbia.

There is much diversity among the fifty-two American criminal codes and, therefore, it is often difficult to state “the” American rule on any point of criminal law. But there also are many similarities among the codes, in large part due to the influence of the American Law Institute’s Model Penal Code. Promulgated in 1962, the code prompted a wave of state code reforms in the 1960s and 1970s, each influenced by the Model Penal Code.

Some of the Model Penal Code provisions have not been widely accepted. For example, while the Model Penal Code generally rejects the common law’s “felony murder” rule, which in its broadest form holds all killings in the course of a felony to be murder, most states have retained the rule. Similarly, a majority of states have rejected the Model Penal Code’s innovation in prescribing the same punishment for inchoate offenses, such as attempt, and consummated offenses.

Nonetheless, the Model Penal Code is the closest thing to being an American criminal code. The federal criminal code is too unsystematic and incomplete in theory and too irrelevant in practice to function as a national code. Where states have not followed the Model Penal Code, the divergences locate points of controversy that often continue today. And the code and its commentaries have been the intellectual focus of much American criminal law scholarship since the code’s promulgation.

I. THE HISTORY OF THE MODEL PENAL CODE

The Model Penal Code was not the first or the most ambitious, but far and away the most successful attempt to codify American criminal law. To appreciate the Model Penal Code’s significance, it must be placed within the
THE AMERICAN MODEL PENAL CODE: A BRIEF OVERVIEW

spotty history of American criminal codification.3 Unlike the development in continental Europe, modern criminal law in the United States did not arrive in the form of criminal codes. Rather than concern themselves with the threat of punishment, American reformers pragmatically proceeded directly to reform the punishment itself. In the new field of corrections, Americans led the way. As a French resident of Philadelphia noted admiringly in 1796, “the attempt at an almost entire abolition of the punishment of death, and the substitution of a system of reason and justice, to that of bonds, ill-treatment, and arbitrary punishment, was never made but in America.” As early as 1776, Thomas Jefferson had drafted a bill for the Virginia legislature that called for punishment based on the theory of prevention outlined by Cesare Beccaria and developed by Jeremy Bentham.5 The final two decades of the eighteenth century brought the establishment of solitary confinement prisons in Philadelphia and then in New York and other states, including Virginia. 1823 saw the opening of the prison in Auburn, New York, to which visitors flocked from around the world, including Alexis de Tocqueville.6

American criminal codes were first compiled by Edward Livingston and later David Dudley Field. Livingston’s elaborate drafts for a federal criminal code and a Louisiana criminal code, completed in 1826, were both the most ambitious and the least successful efforts at criminal law codification in the United States. Livingston’s penal code was Benthamite both in scope and in substance. The penal code was divided into four separate codes comprising all aspects of penal law, from the definition of penal norms in a “Code of Crimes and Punishments,” to the imposition of those norms in a “Code of Procedure” and a “Code of Evidence,” and eventually

to the actual infliction of sanctions in a “Code of Reform and Prison Discipline." Each aspect of the penal law, and each corresponding code, was individually, and as a system, designed to rationalize penal law on the utilitarian principle that Bentham had derived from Cesare Beccaria’s famous treatise On Crimes and Punishments: la massima felicita divisa nel maggior numero.8

David Dudley Field was both far less ambitious, and far more successful, as a criminal codifier. A successful New York lawyer, Field’s codification efforts extended beyond the penal law and reflected pragmatic concerns about the accessibility of law, most importantly to lawyers.9 Field’s codes were designed to simplify legal practice by sparing attorneys the tedium of having to sift through an ever rising mountain of common law opinions. As a result, Field was more concerned with streamlining than he was with systematizing or even reforming New York penal law. Field’s New York Penal Code was submitted to the legislature in 1865, and passed into law in 1881.10 It remained in force until it was replaced by the New York Penal Law of 1967.

That New York Penal Law, like the revised criminal codes of many other states, was based in large part on the American Law Institute’s Model Penal Code, which had been published in 1962. In fact, Herbert Wechsler, the Chief Reporter of the Model Penal Code, served on the legislative commission that drafted the New York code.11

The Model Penal Code combined Livingston’s systematic ambition and integrated utilitarian approach with Field’s pragmatism and legislative success. When the Model Penal Code project was launched in 1951, the vast majority of American criminal codes were in a sorry state. Only Louisiana had undertaken a serious effort to reform its criminal code since

10. 4 New York Field Codes (1850–1865).
the nineteenth century. A typical American criminal code at the time was less a code and more a collection of ad hoc statutory enactments, each enactment triggered by a crime or a crime problem that gained public interest for a time. What passed for a major “reform” in that period was the federal criminal code in 1948 putting the offenses in alphabetical order. Faced with this state of affairs, the American Law Institute’s decision to draft a Model Penal Code was an ambitious undertaking.

The American Law Institute (ALI) is a nongovernmental organization of highly regarded judges, lawyers, and law professors in the United States. The institute typically drafts a “restatement” of an area of law, which articulates and rationalizes the governing rules in American jurisdictions. When published, the ALI “Restatement of the Law” for a particular area often becomes persuasive authority for courts and legislatures and commonly is relied upon by courts in interpreting and applying the law.

When the institute undertook its work on criminal law, however, it judged the existing law too chaotic and irrational to merit “restatement.” What was needed, the institute concluded, was a model code, which states might use to draft new criminal codes.

The institute’s criminal law work was started in 1931, a year after the institute completed a model code of criminal procedure. But the work was stalled during the depression years by lack of adequate funding and later by the events surrounding World War II. It was renewed in 1951 with a grant from a private foundation and proceeded at full speed for more than a decade.

From the beginning, the project bore the imprint of the Chief Reporter, Herbert Wechsler, a law professor at Columbia University who also had participated in the Nuremberg trials of Nazi war criminals. Wechsler assembled a distinguished and remarkably diverse advisory committee of law professors, judges, lawyers, and prison officials, as well as experts from the fields of psychiatry, criminology, and even English literature. In addition, a number of drafting groups tackled various

specific topics, such as the treatment of insane offenders or the death penalty. After much debate within the drafting group and the advisory committee, tentative drafts of parts of the code with detailed commentary were presented to and debated by the entire membership of the institute at its annual meetings. This process of annually considering tentative drafts continued until 1962, when the institute finally approved a complete Proposed Official Draft. The original drafters’ commentaries contained in the various tentative drafts were consolidated, revised, and finally republished along with the 1962 text as a six-volume set in 1985.\textsuperscript{15}

The diversity of its advisory committee indicates the almost Livingstonian scope of the Model Penal Code’s ambition. The Model Penal Code is not merely a criminal code, but rather extends to the law governing the infliction of punishment. In fact, the code refers to itself as a “Penal and Correctional Code” or P.C.C., with its first two parts dedicated to substantive criminal law and the other two parts addressing “treatment and correction” and “organization of correction,” respectively.\textsuperscript{16} No part of the Model Penal Code is explicitly devoted to the remaining aspect of penal law, the law of criminal procedure and evidence. Nonetheless, the code is littered with procedural provisions, including sections that determine the method and propriety of prosecution in particular cases;\textsuperscript{17} address the defendant’s competency to stand trial;\textsuperscript{18} define, assign, and shift the burden of proof;\textsuperscript{19} establish evidentiary presumptions;\textsuperscript{20} and deal with the appointment of expert witnesses.\textsuperscript{21} These provisions complement the ALI’s 1930 Model Code of Criminal Procedure. Ten years after the completion of the Model Penal Code, the ALI also published a Model Code of Pre-Arraignment Procedure.

While the Model Penal Code acknowledged the importance of retributional concerns, it commonly gave prominence to more utilitarian

\begin{itemize}
\item \textsuperscript{15} Model Penal Code (Official Draft and Revised Comments 1985).
\item \textsuperscript{16} Id. § 1.01(1).
\item \textsuperscript{17} Id. §§ 1.07-.11, 2.12.
\item \textsuperscript{18} Id. § 4.04.
\item \textsuperscript{19} Id. §§ 1.12, 2.04(4), 2.08(4), 2.09(1), 2.10, 3.01-.11, 212.4(1), 212.5, 213.6, 221.2(3), 223.1(1), 223.4, 223.9, 230.3, 242.5.
\item \textsuperscript{20} Id. §§ 1.01(4), 1.12(5), 5.03(7), 5.06(2) & (3), 5.07, 210.2(b), 211.2, 212.4, 223.6(2), 223.7(5), 223.8, 224.5, 251.2(4), 251.4.
\item \textsuperscript{21} Id. § 4.05.
\end{itemize}
functions: to deter criminal conduct and, in the event this failed, to
diagnose the correctional and incapacitative needs of each offender. 22
The Model Penal Code in this way laid the foundation for the
Correctional Code. 23 For example, the Model Penal Code prescribes the
same peno-correctional treatment for a person who attempts to commit
an offense as for a person who manages to consummate the offense,
because both undeterred offenders have displayed the same symptom of
dangerousness. 24

Still, it cannot be said that the Model Penal Code systematically worked
out the implications of any particular theory of punishment (or treat­
ment). Adopting an approach that has been characterized as “principled
pragmatism,” 25 the code drafters never lost sight of the code’s ultimate
goal, the reform of American criminal law. Instead of rewriting criminal
law in strict consequentialist terms, the code drafters took care to ground
the code firmly in existing law and frequently sacrificed theoretical con­
sistency for pragmatic expediency. To continue with the example of attempt,
the Model Penal Code carved out an exception for serious offenses, to blunt
the otherwise radical impact of its new principle of equal treatment for
attempted and consummated offenses. 26 Similarly, the code did not con­
demn capital punishment, the one sanction that could not fit into its law
of “treatment and correction.” Instead, it addressed the question in a
bracketed section that imposes many serious restrictions on the imposi­
tion of capital punishment. 27 Ironically, this conflicted provision later
became the foundation for several death penalty statutes and, eventually,
the United States Supreme Court’s effort to place capital punishment on
a constitutional foundation. 28

22. The purposes of the code’s various parts are defined in id. § 1.02(1) & (2). See gen­
erally Dubber, supra note 14; Robinson, supra note 2, § 1.2.
24. Model Penal Code § 2.05 cmt. at 293–95 (Official Draft and Revised Comments
1985).
25. Herbert L. Packer, The Model Penal Code and Beyond, 63 Colum. L. Rev. 594
(1963).
27. Id. § 210.6.
II. THE INFLUENCE OF THE MODEL PENAL CODE

As a pragmatic document, the Model Penal Code enjoyed great success in American legislatures. The code’s impact on American criminal law far exceeded that of even the most successful earlier codification project, the Field code. But it was the criminal law portion of the code—the statement of general principles of liability in part I and the definition of specific offenses in part II—that gained historic significance. The sentencing, treatment, and corrections portions, in parts III and IV, saw little acceptance and were soon left behind as American punishment theory and practice moved on to other approaches.

Even before the Model Penal Code was finished, its tentative drafts were used as models for criminal code reform. The two decades following the 1962 promulgation saw a host of state recodifications. New codes were enacted in Illinois, effective in 1962; Minnesota and New Mexico in 1963; New York in 1967; Georgia in 1969; Kansas in 1970; Connecticut in 1971; Colorado and Oregon in 1972; Delaware, Hawaii, New Hampshire, Pennsylvania, and Utah in 1973; Montana, Ohio, and Texas in 1974; Florida, Kentucky, North Dakota, and Virginia in 1975; Arkansas, Maine, and Washington in 1976; South Dakota and Indiana in 1977; Arizona and Iowa in 1978; Missouri, Nebraska, and New Jersey in 1979; Alabama and Alaska in 1980; and Wyoming in 1983. All of these thirty-four enactments were influenced in some part by the Model Penal Code. Draft criminal codes produced in other states, such as California, Massachusetts, Michigan, Oklahoma, Rhode Island, Tennessee, Vermont, and West Virginia, did not pass legislative review and may yet be revived.

Of the states that have not yet adopted a modern criminal code, the federal system is the most unfortunate example. The U.S. Congress has tried on and off to reform the federal criminal code since 1966, when Congress established a code revision commission at the urging of President Johnson. In 1971, the Brown Commission produced a comprehensive and systematic Proposed New Federal Criminal Code. Later code proposals, built upon the Brown Commission model, were introduced as legislative bills. One of these bills even passed the Senate but died

in the House of Representatives. Criminal code reform is always difficult because it touches highly political issues, but the lack of a modern federal criminal code is considered a matter of some embarrassment among criminal law scholars in the United States. The present federal criminal code is not significantly different in form from the alphabetical listing of offenses that was typical of American codes in the 1800s.

The Model Penal Code's influence has not been confined to the reform of state codes. Thousands of court opinions have cited the Model Penal Code as persuasive authority for the interpretation of an existing statute or in the exercise of a court's occasional power to formulate a criminal law doctrine. (As is well known, while American courts have authority to interpret a code's ambiguous provisions, they generally are bound to follow what they know to be the legislative intention, and bound by interpretation decisions of a higher court.)

Even the Model Penal Code's official commentaries have been influential. Many states have little legislative history available for their courts to use in interpreting a state code provision. Where the state code provision was derived from or influenced by a Model Penal Code provision, the Model Penal Code's commentary often is the best available authority on the reasoning behind the provision and its intended effect.

The code's official commentaries also have become an important research source for criminal law scholars. The commentaries generally give a thoughtful and detailed explanation of the reasoning underlying a code provision as well as the scholarly debates concerning it. Also, because the official commentaries were not published until 1980 (Special Part) and 1985 (General Part), the commentary drafters had available to them information on how each of the Model Penal Code provisions fared during the previous two decades of state criminal code reform. The extent of a code provision's reception or rejection by the states often is detailed in the official commentaries.

The code's provisions for sentencing and treatment have not been influential. They reflect a rehabilitative approach that has since passed out

32. Id. pts. III & IV.
of favor. The code has many fewer grading categories than most modern American codes, thereby allowing greater sentencing discretion within each offense grade.\textsuperscript{34} Its sentencing system generally relies upon the exercise of broad discretion by judges to individualize an offender's sentence.

In contrast, current American practice is to limit sentencing discretion.\textsuperscript{35} That change in approach comes in part from a belief that discretion undercuts the virtues of the legality principle: Discretion increases the likelihood of disparate sentences for similar offenders committing similar offenses.\textsuperscript{36} Discretion increases the potential for abuse by a biased decision maker. Discretion undercuts predictability, which is important for both effective deterrence and fair notice. Finally, discretion shifts the criminalization and punishment decisions away from the legislative branch and to the less democratic judicial and executive branches of government.

The code's discretionary sentencing system also is of little current influence in the U.S. because of a change in the underlying theory of liability and punishment.\textsuperscript{37} The code's use of discretion was consistent with its interest in using the criminal justice system to promote rehabilitation and to incapacitate dangerous offenders who could not be rehabilitated. With that purpose, the length of an offender's incarceration logically depended upon how the person changed during his criminal commitment. An actual release date could only be determined when an offender appeared to be ready for release.

The limited ability of the social sciences to rehabilitate and to reliably predict future dangerousness has dampened the interest in broad sentencing discretion. This, along with a growing interest in imposing just punishment, has led to less sentencing discretion and more determinate sentences (that is, sentences not subject to early release on parole).

This change in the underlying penal philosophy affected the legislative success not only of the code's sentencing and treatment provisions but also


\textsuperscript{35} See, for example, the (once) mandatory sentencing guidelines for federal courts, United States Sentencing Guidelines Manual (2005). The future of determinate guideline sentencing in the United States, however, recently has been thrown into doubt. See United States v. Booker, 543 U.S. 220 (2005) (federal sentencing guidelines merely advisory).

\textsuperscript{36} See, e.g., Marvin E. Frankel, Criminal Sentences: Law Without Order (1973).

of some of its liability and grading provisions. For example, few states have followed the code’s abandonment of the common law distinction between the punishment for attempted and consummated offenses. The code’s policy makes good sense if one’s focus is on rehabilitation and incapacitation of the dangerous—an offender may be equally dangerous whether or not his conduct in fact causes the harm intended or risked. On the other hand, if the criminal law is to capture the community’s sense of justice, then the community’s shared intuition that resulting harm does matter cannot be ignored.

The code’s Special Part also has become dated in some areas, such as in its treatment of sexual offenses and drug offenses. American society’s views on many sexual and gender issues have changed since the code was drafted in the 1950s. Modern American codes typically adopt a gender-neutral approach to defining sexual offenses, give greater expression to the concern for victims of sexual offenses, and reflect a greater sensitivity to the history of sexual victimization of women by men. For instance, beginning in the 1980s, states began to reject the marital immunity for rape, which the Model Penal Code had retained from the common law. At the same time, drug offenses now figure among the most serious offenses defined in American criminal codes. In 1962 the Model Penal Code included no drug offenses. In an appendix to the code’s Special Part, the drafters merely remarked that “a State enacting a new Penal Code may insert additional Articles dealing with special topics such as narcotics, alcoholic beverages, gambling and offenses against tax and trade laws.”

III. THE INNOVATIONS OF THE MODEL PENAL CODE

To appreciate the Model Penal Code’s contribution to criminal law codification in the United States, it is important to recall the embryonic state of the subject at the outset of the Model Penal Code project in the early 1950s. The then most recent codification effort was that of the 1948 reform


of the federal criminal code, an alphabetical ordering of federal crimes for which, according to a contemporary observer, "the spadework was done by the hired hands of three commercial law-book publishers, on delegation from a congressional committee desirous of escaping the responsibility of hiring and supervising its own staff."40

As a result, the Model Penal Code drafters had virtually no existing American criminal codes to which to turn, with the possible exception of the recently reformed criminal code of Louisiana. That code, however, could have only limited significance for a Model Penal Code of American criminal law because of the unique history and nature of Louisiana law, which alone among the states was rooted not in uncodified English common law, but in codified European civil law. Much of what the Model Penal Code introduced into the United States has long been common practice in European codes. But while the code's structure generally resembles that of many European codes, the extent to which these foreign codes more directly influenced the Model Penal Code is unclear. The strongest foreign influence on the code came in the person of Glanville Williams, a British criminal law expert on the uncodified English common law.

A. A Comprehensive General Part

The Model Penal Code drafters created a "General Part" that contains a set of general principles applicable to each of the specific offenses contained in the "Special Part" of the code. The general principles include such matters as general principles for imposing liability, general principles of defense, general inchoate offenses, etc. Such a structure, hardly revolutionary by European standards, provides greater clarity and sophistication while simultaneously simplifying the code. Instead of having to repeat the rules governing complicity, omission liability, culpability requirements, or available defenses, for example, in each offense (or leaving them to the courts to define), the rules can be stated once in detailed form in the General Part, to be referred to in the prosecution of any offense in the Special Part.

The current federal criminal "code" is typical of what existed in the states before the Model Penal Code. It has essentially no General Part. (The term "code" may suggest a document of greater coherence and planning than is present in the current federal "code," so it may be better

to refer simply to “Title 18 of the United States Code”). Title 18’s chapter 1, grandly titled “General Provisions,” includes a less-than-helpful definition of complicity, an insanity defense, and a few definitions. Thus, 99 percent of the General Part remains uncodified in federal law, thereby delegating criminal-law making authority to the federal judiciary.

B. An Analytic Structure

The Model Penal Code, like most successful criminal codes, implicitly provides an analytic structure that gives judges, lawyers, and jurors a decisional process for assessing criminal liability. Its three-part structure might be summarized with these questions:

First, does the actor’s conduct constitute a crime? The code defines the contours of the law’s prohibitions (and, where duties to act are created, the law’s commands). This is the issue most familiar to laypersons and most prominent in older criminal codes. It is the sole subject of the code’s entire Special Part.

Second, even if the actor’s conduct does constitute a crime, are there special reasons why that conduct ought not to be considered wrongful in this instance, under these facts? Article 3 of the Model Penal Code answers this question through the use of justification defenses. These defenses concede the violation of a prohibitory norm, but offer a countervailing justificatory norm that undercuts the propriety of liability on the special facts of the current situation.

Finally, even if the actor’s conduct is a crime and is wrongful (unjustified), should the actor be held blameworthy for it? Is he or she deserving of criminal liability and punishment? This question is answered primarily by the excuse defenses and culpability requirements in articles 2 and 4 of the code. For example, wrongful conduct by an actor who is at the time insane or under duress or involuntarily intoxicated may not be sufficiently blameworthy to merit the condemnation of criminal conviction.

C. Defining Offenses Fully, Using Defined Terms

The Model Penal Code drafters understood that an undefined term invites judicial lawmaking in the same way as an absent or partial provision, and

41. See Dubber, supra note 2, §§ 3, 18; Paul H. Robinson, Structure & Function in Criminal Law pt. II (1997). For a functional analysis of the code’s structure, see id. pt. III.
can as effectively undercut the goals of the legality principle. Every code will inevitably contain ambiguous language that must be interpreted by judges. A drafter's obligation, they believed, is to reserve that delegation of judicial authority to the instances in which it is not reasonably avoidable. Code terms that might reasonably be given different definitions by different readers ought to be defined.

With this view, the Model Penal Code drafters did much to fully define offenses and to define the terms they used in defining offenses; the code explicitly rejects common law offenses and bars judicial creation of offenses. In addition, the code's General Part includes definitions of commonly used terms that will then have the same meaning in every provision of the code. Defined terms also are contained at the beginning of many articles in the Special Part.

Compared to many European criminal codes, the Model Penal Code covers more topics in greater detail. As a result, the code occasionally reads more like a criminal law textbook than a code. Its comprehensiveness and detail reflect the scope and nature of the code's reform ambition. Topics can be left for judicial or scholarly interpretation only in the presence of a highly sophisticated judiciary and academic community. At the time of the code project, the criminal law in the United States met neither of these conditions. The code, after all, was specifically designed to wrest the criminal law out of the hands of the judiciary which, after centuries of common-law making, had left the criminal law an unprincipled mess.


The Model Penal Code drafters' concern for advancing legality interests also showed in their creation of a system for the interpretation of the code's provisions. Such guidance in the exercise of judicial discretion increases the law's predictability and reduces both disparity in application and the potential for abuse of discretion.

The statutory principles of interpretation also are designed to advance the goals for which criminal liability and punishment are imposed. Model Penal Code section 1.02 directs judges to interpret ambiguous provisions

to further the code’s purposes.43 While such a provision has its shortcomings (it gives no guidance on what to do when different purposes conflict, as frequently occurs), it is an important first step toward rationality in code drafting, for it offers a formal statement of what the code is meant to achieve.

E. A System of Offenses

Rather than a collection of offenses, where each offense is an independent creature, often the result of a political campaign prompted by a particular crime or event, the Model Penal Code adopts a system of offenses, in which offenses are designed to work together as a complementary group. Offenses typically avoid both gaps and overlaps in coverage. By considering all offenses together, the legislature can better insure that the penalties associated with each offense properly reflect the relative seriousness of that offense in relation to other offenses.

Part of this systematic approach to creating and defining offenses is to organize offenses conceptually—offenses against the person, offenses against property, etc.—and within each general group to organize offenses into related subcategories.44 Offenses against the person, for example, are organized into four articles: homicide (§ 210); assault, endangerment, and threats (§ 211); kidnapping and related offenses (§ 212); and sexual offenses (§ 213). Such conceptual grouping makes it easier to see, and to avoid, overlaps among offenses and unwarranted grading disparities. It also makes it easier for a code user to find the relevant offense. And, when the relevant offense is found, such grouping insures the user that related offenses are nearby, not hidden in a dark corner elsewhere in the code.

43. The code’s purposes are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes; (c) to safeguard conduct that is without fault from condemnation as criminal; (d) to give fair warning of the nature of the conduct declared to constitute an offense; (e) to differentiate on reasonable grounds between serious and minor offenses.


44. For a comparative discussion of the code’s notion of “individual or public interests” and the concept of Rechtsgut in German criminal law, see Markus D. Dubber, Theories of Crime and Punishment in German Criminal Law, 53 Am. J. Comp. L. 679 (2006).
F. Innovations in Specific Criminal Law Doctrines

In substance, the Model Penal Code is based on the American criminal law at the time it was drafted. For the vast majority of issues in the general and special part of criminal law, this law was judge-made common law. If the code drafters ventured beyond the confines of American criminal law, they consulted English common law jurisprudence, particularly as interpreted by Glanville Williams, whose extended project to rationalize English criminal law coincided with Herbert Wechsler’s attempt to rationalize American criminal law through the Model Penal Code.45

Many of the Model Penal Code’s substantive innovations already were laid out in Wechsler’s monumental 1937 article, “A Rationale of the Law of Homicide.”46 There Wechsler, and his Columbia colleague Jerome Michael, subjected American criminal law to a detailed critique, using the law of homicide as an illustration. The Model Penal Code thus arose from a painstaking critique of positive law, rather than from a systematic theory of criminal liability. Wechsler was no theoretician. As a major figure in the American legal process school, Wechsler saw the problems of substantive criminal law as problems of policy. The criminal law, and therefore the Model Penal Code, was a means to achieve a policy end.47

1. Offense Elements

The Model Penal Code set out to simplify and rationalize the hodgepodge of common law offense definitions in two ways.48 First, it adopted an approach that has been called “element analysis,” which carefully distinguished between the various elements of an offense, including conduct, attendant circumstances, and its result. Second, it recognized and defined only four mental states: purpose, knowledge, recklessness, and negligence. Each objective element of a given offense in the code can have attached to it a different mental state.

47. That end, however, in Wechsler’s opinion, recently had been scientifically settled once and for all in favor of a deterrent-rehabilitative approach. See id. at 732 n.126.
The first innovation was designed to eliminate the common law’s confusion about the so-called mens rea of a given offense. This confusion, the code drafters believed, often resulted from the inability of the common law to distinguish between different elements of an offense, each of which may require a different mental state for conviction.

Standing alone, the differentiation of various offense elements, coupled with the novel requirement that each element, rather than merely each offense, carry a mental state, might have complicated rather than simplified the law. The second innovation addressed this problem by replacing the dozens of mental states that had emerged over the course of the common law with merely four.

This radical change in the law of mens rea, one of the core principles of the common law, drew little criticism from commentators and proved remarkably popular among state legislatures.49 In fact, the Model Penal Code’s definitions of these four mental states may be the code’s most important contribution to American criminal law reform. These definitions strove to simplify not only by radically reducing the number of mental states, but also by reducing (but not eliminating) reliance upon normative judgments. Talk of “malice aforethought” and even “premeditation” were replaced by presumably testable phenomena such as “conscious object” or “knowledge.” In its zeal to clarify the law, the Model Penal Code even excised the words “intent” and “intention” from its terminology, concepts that in spite (or perhaps partly because) of their ambiguity had assumed a central place in the criminal law of the United States, as well as of many other countries.50

On the subject of so-called strict or absolute liability offenses, i.e., offenses whose elements do not all require a culpability state, the Model Penal Code struck a characteristically pragmatic compromise. Instead of eliminating such offenses altogether, it limited their common use to two offense categories, “civil offenses” defined in the criminal code as “violations,” punishable only by fine, forfeiture, or other civil penalty, and “offenses defined by statutes other than the code, insofar as a legislative purpose to impose absolute liability for such offenses or with respect to

any material element thereof plainly appears." The Model Penal Code does not prohibit strict liability in the code's offenses, but does create a presumption against interpreting the absence of a culpability element as strict liability. Instead, a requirement of recklessness is read into an offense that contains no specific culpable state of mind requirement.

In the particular case of felony murder, a serious strict liability offense under the common law whose definition required no mental state with respect to the act of homicide, the Model Penal Code transformed the definitional question into an evidentiary one. Instead of eliminating the requirement of a mental state with respect to the homicidal act, as the common law had done, the code instead established a rebuttable presumption that the perpetrator of an underlying felony in fact had the mental state with respect to the killing that would constitute murder (recklessness manifesting an extreme indifference to the value of human life).

2. Inchoate and Accomplice Liability

The Model Penal Code's abandonment of the common law distinction between inchoate and consummated offenses already has been mentioned. This decision was both the most doctrinaire and the least successful by the code drafters. Punishing inchoate offenses as harshly as consummated ones appears particularly harsh against the background of the wide sweep of inchoate offenses under the code. By defining all inchoate offenses in its General Part, the code cemented the common law's broad approach to preparatory offenses. Every crime, including the pettiest misdemeanor, was criminalized in its inchoate form, whether as an attempt, a solicitation, or as a conspiracy. Still, the Model Penal Code did bar the conviction of, though not the prosecution for, both the inchoate and the consummated form of an offense. The code thereby rejected the most expansive theory of inchoate offenses under the common law, still espoused at the time by federal criminal law, which had permitted separate punishments for the preparation and consummation

52. Id. § 2.02(3).
53. Id. § 210.2(1)(b).
of the same offense. The code also prohibits multiple convictions “of more than one [inchoate] offense . . . for conduct designed to commit or to culminate in the commission of the same crime.”

The Model Penal Code draws a sharp theoretical distinction between inchoate offenses and complicity, which was defined as the attribution of the principal’s criminal conduct to another. The distinction was of less practical significance, however, as the code abandoned not only the distinction between the punishment for preparatory and consummated offenses, but also that between the punishment of principals and accessories. In fact, the code discarded the common law distinctions between first- and second-degree principals, on the one hand, and accessories before and after the fact, on the other, in favor of a single distinction between principal and accomplice, both of whom were then subjected to the same punishment.

Only after an intervention by Judge Learned Hand, one of America’s most prominent judges, did the American Law Institute reject the drafters’ proposal to extend accomplice liability, and therefore full punishment as a principal, to a person who was merely aware of his contribution to the principal’s criminal act. The code instead requires that the accomplice act “with the purpose of promoting or facilitating the commission of the offense.” As a compromise, some states have adopted general facilitation provisions that criminalize aiding another’s criminal conduct knowingly or merely “believing it probable” that one is rendering aid.

3. Justification Defenses

The code for the first time recognized a general defense of necessity, or lesser evils. This defense is available where particular justification defenses, such as self-defense, defense of property, or law enforcement authority,

58. See id. § 2.06.
59. On the common law of complicity, see Francis Bowes Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689 (1930).
are not. The defense applies to conduct the actor believes to be “necessary
to avoid a harm or evil to himself or another,” provided that “the harm or
evil sought to be avoided by such conduct is greater than that sought to
be prevented by the law defining the offense charged.” The broad scope
of this provision is best illustrated by the cases enumerated in the official
code commentary:

Under this section, property may be destroyed to prevent the spread of a
fire. A speed limit may be violated in pursuing a suspected criminal. An
ambulance may pass a traffic light. Mountain climbers lost in a storm may
take refuge in a house or may appropriate provisions. Cargo may be jetti­
sioned or an embargo violated to preserve the vessel. An alien may violate
a curfew in order to reach an air raid shelter. A druggist may dispense a
drug without the requisite prescription to alleviate grave distress in an
emergency.

The lesser evils defense does not affect the actor’s civil liability and is a so­
called affirmative defense. To successfully invoke an affirmative defense,
the defendant must produce supporting evidence before the burden of
proof shifts to the prosecution, which must then disprove the defense
beyond a reasonable doubt. The code frequently relies on this procedural
mechanism to resolve difficult issues of substantive criminal law.

4. Excuse Defenses

The Model Penal Code drafters devoted almost an entire article to the
problem of legal insanity. Except for its final section, which sets the age of
maturity for purposes of criminal liability at sixteen, article 4 deals in
great detail with the full panoply of substantive and procedural issues sur­
rounding the defense of insanity, including such procedural questions as
the defendant’s competency to stand trial, the assignment of the burden of
proof, the requirement of notice that an insanity defense will be offered,
the form of the verdict and judgment, the appointment and selection of

64. Model Penal Code § 1.01 cmt. at 9–10 (Official Draft and Revised Comments 1985).
66. See sections cited supra note 10.
psychiatric experts, the admissibility of statements made during the examination, the form of the psychiatrist’s report, the hearing on the question of insanity or competency, and the commitment following an acquittal on the basis of insanity.

The Model Penal Code’s extensive coverage of mental illness reflects the conflicts surrounding this issue during the decade of the code’s drafting. The advisory committee included several members of the “Group for the Advancement of Psychiatry,” whose members were determined to radically reform the criminal law in the name of the science of psychiatry. In 1954, three years into the code project, the federal appellate court for the District of Columbia, in the famous Durham case,68 replaced the so-called right-wrong test of insanity derived from the 1843 English case of M’Naghten69 with a test designed to reflect advances in the field of psychiatry as well as to soften the perceived harshness of the M’Naghten rule.

Characteristically, the Model Penal Code once again struck a compromise by retaining but softening the M’Naghten test while assigning psychiatric experts a central role in the test’s interpretation and application. The M’Naghten rule in its original formulation required that, “at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” The Model Penal Code extended the defense to an actor who “lacks substantial capacity ... to appreciate the criminality of his conduct.”70 In addition, the Model Penal Code made the defense available even to an actor who did not qualify under this cognitive prong, as long as he lacked “substantial” volitional capacity “to conform his conduct to the requirements of law.”71

The Model Penal Code’s insanity test proved popular in many American jurisdictions, including the District of Columbia after the abandonment of its Durham rule in 1972.72 Following John Hinckley’s acquittal

68. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). The Durham test was deceptively simple: “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” For later complications and the eventual demise of Durham, see United States v. Brawner, 471 F.2d 969 (1972) (en banc).
69. M’Naghten’s Case, 1 C. & K. 130; 4 St. Tr. N.S. 847 (1843).
71. Id. § 4.01.
under the volitional prong of the Model Penal Code's test for his assassination attempt on President Reagan in 1981, however, many states and the federal government restricted the defense of insanity by removing the volitional prong.73

5. Special Part

Most of the Model Penal Code's specific doctrinal innovations appeared in its General Part. The most important innovation in the Special Part was its revision of the law of homicide. The code's homicide article provides the best illustration of its new system of mental states.74 In this article, the code drafters replaced the common law's multitude of homicide offenses with a single offense—"purposely, knowingly, recklessly or negligently caus[ing] the death of another human being"—with three defined grades. Murder, manslaughter, and negligent homicide thus differed primarily in their mental state, the first requiring purpose or knowledge, the second recklessness, and the third negligence.

The code's partial rejection of the felony murder rule already has been discussed. The common law defense of provocation was retained, though not without being transformed into the more general defense of "extreme mental or emotional disturbance."75 The code made no attempt to connect this defense to other more general excuse defenses in its General Part. It therefore survives as a defense available only in homicide cases.

CONCLUSION

For almost half a century, the Model Penal Code has been the dominant force in American criminal code reform and a catalyst for American criminal law scholarship. In general, the Model Penal Code has stood the test of time. While individual provisions of the code, such as its definition of insanity and its grading of inchoate offenses, have been amended for one reason or another, no state has seen fit to undertake a wholesale reform of its criminal code away from the Model Penal Code. Even academic

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75. Id. § 210.3(1)(b).
commentary generally has come to focus on the code, albeit not always agreeing with it. 76

Nonetheless, the code is showing its age as the theory and practice of American criminal law has long since rejected the code's emphasis on deterrence and rehabilitation and as attitudes toward criminalization have shifted. A reform of the model therefore is much needed. When that reform comes, however, there can be little doubt that it will build upon the foundations laid down in the Model Penal Code.