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The Model Penal Code and the Dilemma of Criminal Law Codification in the United States

Stephen C. Thaman

Wen-Yeu Wang
Editor

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Editor
Wen-Yeu Wang
College of Law
National Taiwan University
Taipei
Taiwan

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Introduction to the Codification Books (two volumes)

Codification is the process of collecting and restating the law of a jurisdiction into a legal code. This process has often involved international dimensions and, as such, has long drawn the attention of comparative jurists. A historic example is the East Asian reception of Western laws, in particular the German Civil Code, in the 19th century. More recently, globalization has increased the relevance of this topic. Examples include the proposed Common European Sales Law and the codification efforts in the legal transition of former Soviet States. Consequently, comparative jurists are now challenged to apply the study of codification on an unprecedented scale. This published work, with its combination of comprehensiveness and depth, is a meaningful contribution to this endeavor.

As a matter of background, this work grew out of the IACL Thematic Conference on the subject of codification held at the National Taiwan University in May 2012. Scholars worldwide, including scholars from the common law and civil law systems, gathered in Taiwan to explore this important topic. Considering the theme of "codification" and its subtheme on East Asia, Taiwan offers a befitting setting for this historic event, for Taiwanese law represents a rare amalgamation of Continental civil law, common law, Confucianism and multicultural legacy.

This work is divided into two volumes. The first volume first provides an overview and explores codification from various theoretical perspectives and their attendant profound implications. It then addresses soft codification efforts, such as the Unidroit Principles of Commercial Contracts and the supranational codification of private law in Europe and its significance for third states.

Codification reform occurs as the ideology and rationales of the law evolve. A dramatic example is the codification of private law in former Soviet states in post-Soviet times, to which this volume next turns. In addition, different fields of law lend themselves differently to codification. This volume then focuses on different fields of law, including administrative procedure, criminal law and human rights law. These field-based studies are heavily informed by national perspectives and experiences, as codification differs in methods and results from across countries and must consider country-specific characteristics.

The second volume is devoted to East Asian Law. It first puts the codification in East Asia in context by exploring the defining characteristics of the East Asian

Chapter 10
The Model Penal Code and the Dilemma of Criminal Law Codification in the United States

The History of Attempts to Codify the Criminal Law in the US: The Antecedents of the Model Penal Code

Stephen C. Thaman

10.1 The Livingston Codes and the Influence of Jeremy Bentham

Edward Livingston was a New York lawyer, who represented New York in the federal Congress, and then moved to Louisiana after the Louisiana Purchase in 1804, where he became one of the greatest codifiers of his time. His four Penal Codes, consisting of Codes of Crimes and Punishments, Procedure, Evidence, and Reform and Prison Discipline were considered to be a monument of Benthamite utilitarian principles which melded the common law with the civil law traditions inherited from Spain and France, which had previously governed Louisiana. Following the French tradition, Livingston wanted the codes to be compehensive and to contain all the law needed to decide cases. Common law crimes would disappear. He distrusted judges: they were to be "mouths of the law" and not lawmakers in the common law tradition.[1] His four criminal codes, completed in 1821, influenced European criminal law reformers in Europe, among them Carl Joseph Mittermaier in Germany, with whom Livingston corresponded.

Livingston even went beyond Bentham, by eliminating capital punishment from his Criminal Code.[2] On the other hand, Livingston introduced at least ten different maximum and ten different minimum punishment gradations, with numerous fractional increments for aggravating circumstances, along with a detailed specification of aggravating and mitigating circumstances, which could be seen as a precursor to the 1984 US Sentencing Guidelines. The judge was also required to pronounce the reasons for his final judgment in criminal cases, and criticism, something virtually unknown to the common law.[3]

(Kadish, 1100–01).
Kadish (1978, 1102–03).
Ibid. 1104.

S. C. Thaman (✉)
School of Law, Saint Louis University, 100 N.Tucker, St. Louis Mo 63101, USA
e-mail: thamansc@slu.edu

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Livingston's radicalism was too much for the slave-holding society of Louisiana at the time and his criminal codes were never enacted into law. His Civil and Commercial Codes did, however, become law. Sir Henry Maine called Livingston, "the first legal genius of modern times."[4]

10.2 The Field Codes: The First Successful Attempt at Criminal Law Codification

Daved Dudley Field, who drafted the first comprehensive New York codes, was also a New York lawyer and Benthamite.[5] Field created not only a Penal Code, but also a civil code, political code and codes of civil and criminal procedure. He was not a radical reformer, like Livingston, but a pragmatist who attempted to manage, in his words, "the lawless science of our law," to "reduce its bulk, clear out the refuse, condense and arrange the residuum, so that the people, and the lawyer and judge as well, may know what they have to practice and obey."[6]

Submitted to the New York legislature in 1865, the Field penal code was not enacted until 1881. It had a remarkable influence on American law, taking root, in Dakota in 1865, California in 1872, and at least six other Western states thereafter.[7]

10.3 The American Law Institute's Model Penal Code

10.3.1 State of Criminal Codes Before the MPC

In the mid-twentieth century, American criminal law consisted, in some jurisdictions, in a collection of unrelated statutes, adopted sporadically over nearly 200 years. The Field codes, where adopted, were augmented by randomly enacted legislation until the new laws made the old codified structure unrecognizable. The resulting stew included archaic and outdated laws, inconsistent treatment of similar acts, wildly disparate penalties, and incomprehensible and unjust prohibitions. The field was objectively ripe for reform.[8]

10.3.2 The Genesis of the Model Penal Code of 1962

The American Law Institute's (ALI) Model Penal Code (MPC) of 1962 was one of the great intellectual accomplishments of American legal scholarship. Unlike the ALI's

[4] Ibid, 1106.

[5] Ibid, 1132.

[6] Ibid, 1134.

[7] Ibid, 1137–38.

[8] Lynch (2003, 225).

traditional "restatements" of the common law, its authors felt that the substantive penal law in the US was unworthy of being "restated," as Field did in his codes, but required a model statute, which could be adopted, in whole or in part, by the States and the federal Congress.[9]

Another New York lawyer, Herbert Wechsler, a Columbia law professor and veteran of the Nuremberg trials, was its guiding force. To draft the code, he 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.[10]

The MPC combined Livingston's systematic ambition and integrated utilitarian approach with Field's pragmatism and legislative success. Like Livingston's code, the MPC 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.[11]

The MPC authors provided an extensive commentary to its thirteen tentative drafts which filled six-volumes. The body of the work revitalized criminal law scholarship, provided a new starting point for writing in the field and profoundly influenced the direction of criminal law study in American law schools.[12]

10.3.3 MPC as Catalyst for a Wave of Codification

The MPC and its tentative drafts contributed in the next 20 years to major new codifications in 34 states.[13] It also had great influence on the case law in the federal system and in States which enacted none of its provisions. Despite the later turn of modern American penal law towards retribution and severe sentences, and away from the largely liberal positions of the MPC authors, the MPC approach to any given issue is still likely to be persuasive authority, or a starting point for analysis, even where that position is not ultimately adopted.[14]

The best-organized codes all were heavily influence by the MPC. The general organizational scheme is easy to recognize: a distinct "general part," containing principles of liability, justifications, responsibility, and inchoate crimes, followed by a "special part" grouping offenses into categories: crimes against the person, against property, against the family, against public administration, public order and decency, all laid out in decreasing order of seriousness.[15] This can be compared with the federal criminal laws, which, in 1948 were organized alphabetically into Title 18 of the U.S. Code, with no concern for the interests protected by the respective offenses.

[9] Ibid, 220.

[10] Robinson, Dubber (2007, 323).

[11] Ibid, 332.

[12] Kadish (1978, 1140).

[13] Robinson, Dubber (2007, 326).

[14] Lynch (1998, 299).

[15] Robinson et al (2000, 35–36).

10.4 The General Part of the MPC and Its Influence in the Reform of American Criminal Law

10.4.1 Element Analysis and the Limitation of Strict Liability

Prior to the MPC, statutory and case law used a confusing array of terms to describe guilty *mens rea,* some moralistic, such as "wilful," "malicious," "wantonly," "corruptly," and other overly flexible concepts like specific and general intent. The MPC reduced the possible guilty mental states to four—purpose, knowledge, recklessness, and negligence (MPC § 2.02)[16]—and also differentiated the act component of criminal offenses into three objective elements: the nature of the conduct, the attendant circumstances, and the result of the conduct (MPC § 1.13(10)). The innovation of the MPC was to recognize, that different mental states could accompany the different objective act elements, and that each act element had to be accompanied by a guilty *mens rea.* Seven factors thus replaced the common law's simple understanding of *actus reus* and undifferentiated intent or *mens rea.*[17] Another innovation of the MPC, was that where the grade of the offense depends on the mental state with which it was committed—such as homicide—then the level is determined according to the lowest level of mental state accompanying any material element of the crime (MPC § 2.02(10)). This factor is of great importance in relation to how justifications and excuses affect liability under the MPC, discussed in Sect. 2.4.3.3, below.

The MPC's "element analysis" is considered by some to be the most important contribution of the MPC to criminal law theory.[18] If a statute were silent as to the mental state required, then the MPC would require either purpose or recklessness to prove that element (MPC § 2.02(3)). This approach, which tends to restrict criminal liability, was followed by eleven states. Six States, however, including New York, make negligence the default *mens rea.*[19]

If a statute fixes a mental state such as "knowingly" for conviction, but clearly contains more than one objective element (i.e. an act and an attendant circumstance), then the MPC presumes this mental state will apply to each objective element of the offense, unless a "contrary purpose plainly appears." (MPC § 2.02(4)). This comes close to a rejection of "strict liability" public welfare offenses, otherwise accepted in the US common law,[20] unless they constitute "violations" punishable by no more than a fine (MPC 2.05(1)(a)). Although a voluntary act or omission is a *sine qua non* for a crime (MPC § 2.01), the MPC will allow for strict liability as to an "attendant circumstance" only rarely, such as with sexual acts performed against a child under 10 years of age (MPC § 213.1(d)).

[16] All cites from the MPC taken from Dubber (2002).

[17] Dubber (2002, 50–51).

[18] Robinson, Dubber (2007, 335).

[19] Simons (2003, 188); Dubber (2002, 58–59).

[20] See Morissette v. United States, 342 U.S. 246 (1952).

The rejection of strict liability is also reflected in the fact that, if mistakes of fact or law lead to the negation of the mental state required in relation to an act, attendant circumstance or result, the person is not guilty (MPC § 2.04(1)(a)). The only exception here is for voluntary intoxication, which only can negate the mental states of purpose or knowledge, but will be no defense if a crime may be committed with a reckless or negligent mental state (MPC § 2.08(1,2)).

The four mental states of the MPC clearly reflect diminishing levels of guilt, with inadvertent risk-creation (negligence) being treated as less culpable than knowing risk creation (recklessness). This has been criticized as ignoring an important third possible category—namely, where an actor realizes that she is creating some risk, but concludes (either reasonably or unreasonably) that the risk is insignificant (like the German concept of *Fahrlässigkeit*). Although this is "knowing" risk creation, German theory treat this as being comparable to negligence and therefore meriting a lesser punishment.[21] When an actor gives no thought to a risk, because he erroneously believes his conduct is not punishable, then such ignorance of law might mean that the actor only had a negligent mental state, whereas actors who are diligent enough to ascertain the legal requirements that govern their actions are more likely to be perceived as reckless under the MPC test.[22]

On the whole, the 34 States which reformed their criminal codes under the influence of the MPC, adopted the four MPC mental states and the basics of element analysis. But some of these States either failed to eliminate the old common law terminology, or included it in post-MPC legislation. Thus, while the General Part of the Illinois code follows the MPC approach, numerous provisions in the Special Part employ other generally undefined terms like: "specific intent," "having reason to know," "willfully," "maliciously," "fraudulently," "designedly," or a combination therof.[23]

The situation is even worse in the federal system, where, over the last two centuries, Congress has used at least 78 different terms in Title 18 of the U.S. Code, which is dedicated to criminal law and procedure, to describe the *mens rea* of the various offenses. The confusion is enhanced by the courts who have variously interpreted the most commonly used of the statutory terms–"willfully"-in different contexts to mean "voluntarily," "intentionally," "stubbornly," "with bad purpose," and, in at least one instance, "with studied ignorance."[24]

10.4.2 The MPC Subjectivist Approach Replaces the Objectivist Approach of the Common Law

The general part of the MPC, by eliminating strict liability and insisting on the subjective assessment of guilt, is not radically different from the German theorizing

[21] Simons (2003, 191).

[22] Ibid, 194.

[23] Robinson, Cahill (2005, 640–41).

[24] Gainer (1998, 70–71).

of *Schuld*.[25] Had the authors of the MPC introduced a substantive offense such as the German "complete intoxication"[26] (*Vollrausch*, § 323a StGB), to cover actors who due to voluntary intoxication have obliterated their mental responsibility for the underlying crime, instead of undermining its edifice of "element analysis" with a presumption of reckless guilt of the charged crime when committed in an inebriated state, the consistency of the subjective emphasis on *mens rea* in the General Part would have been nearly complete.

The MPC thus replaced the common law's objectivist approach, which was geared primarily to grading criminal offenses based on the gravity of their harmful results and employed strict liability to assess liability independent of fault. For example, the MPC abolishes strict liability felony murder by introducing a rebuttable presumption of recklessness if a suspect kills while in the course of a serious felony, such as rape, robbery, burglary, arson, kidnapping or escape (MPC § 210.2(1)(b)). It also punishes inchoate crimes—such as attempt or solicitation—based solely on intent, rather than proximity to dangerous results. The MPC also limits the scope of accomplice and conspiratorial liability by requiring that the defendant share the guilty mental state of the person who actually carries out the *actus reus* of the crime (MPC §§ 5.03(1); 2.06(2)(a)), thus rejecting objectivist doctrines which would find a conspirator or accomplice guilty of any crime committed by an accomplice which was "reasonably foreseeable" even though the person did not share that criminal intent.[27]

10.5 The MPC Approach to Justifications and Excuses in Light of Common Law Practice

10.5.1 The MPC Approach

The MPC clearly distinguishes between justifications and excuses. Although there is no chapter discussing "excuses," several standard excuses are listed in Chap. 2, including duress (MPC § 2.09), military orders (MPC § 2.10) and entrapment (MPC § 2.13), and the entirety of Chap. 4 deals with the excuse of insanity (MPC § 4.01) and the procedure for establishing it and treating a person acquitted due to insanity. On the other hand, Chap. 3 of the MPC is dedicated to "principles of justification" and includes detailed explanations of several justifications, the most important of which are "choice of evils" (MPC § 3.02); execution of public duty (MPC § 3.03); self-defense (MPC § 3.04); use of force for the protection of others (MPC § 3.05); use of force for the protection of property (MPC § 3.06); and use of force in law enforcement (MPC § 3.07).

[25] Lynch (2003, 222)

[26] *Vollrausch*, § 323a Strafgesetzbuch, which punishes those who

[27] Cf. Pinkerton v. United States, 328 U.S. 640 (1946).

The MPC also recognizes, as do European codes, that an excuse is peculiar to the actor and does not render an act non-criminal, as will a justification. Accomplices of an excused offense may therefore be found guilty thereof if they are not also personally excused.

10.5.2 The Confusion in the Codes

In Paul Robinson's ranking of State codes, the lowest-ranked States have no general justification provisions. In fact, North Carolina is the only state among those with the five worst codes to include any justification defense at all–a provision justifying "use of deadly physical force against an intruder." In contrast, the five highest-ranked codes all contain comprehensive general justification sections similar to those in the MPC.[28]

North Carolina, Michigan, Massachusetts, West Virginia, Rhode Island, Mississippi, and Maryland are among the states that fail to define any excuses or nonexculpatory defenses in their penal codes. Numerous other codes include only a fraction of the commonly recognized excuses and nonexculpatory defenses.[29]

Title 18 of the U.S. Code has no general provisions on jurisdiction, voluntariness, actus reus, mens rea, causation, mistake, entrapment, duress, infancy, justification, self-defense, or inchoate offenses. The only exception is that of the insanity defense, which Congress swiftly enacted after John Hinckley was found not guilty by reason of insanity of the attempted assassination of President Reagan in 1981.[30]

10.5.3 MPC Justifications and Their Reception

When the act is committed in order to avoid a lesser evil (MPC § 3.02(1)) or in self-defense (MPC § 3.04(1)), the MPC differs from the conventional common law approach by placing the focus on the actor's subjective perception of risk and not its reasonableness. As Paul Robinson has said: "By defining 'justified' conduct as conduct that the actor 'believes' is justified, the Code has contaminated its concept of justification, packing both objectively justified conduct and mistaken justification into the single term."[31]

The MPC's innovation, here, is that if the actor is negligent (that is, unreasonable) or reckless in his belief that committing a lesser-evil crime or the use of deadly force is necessary, he will be guilty of a negligent or reckless offense (such as manslaughter) but not an intentional or knowing offense (like murder) (MPC §§ 3.02(2), 3.09(2)).

[28] Robinson et al (2000, 26–27).

[29] Ibid, 40.

[30] Dubber (1999, 80–81).

[31] Robinson (1998, 40–41).

Even those codes which were influenced by the MPC have not, by and large, followed this purely subjective approach to justifications.[32] For instance, New York's Penal Law (§ 35.15) requires that a person be "reasonable" in her belief that she is under attack, in order to resort to self-defense and requires that the actor "actually" choose the lesser evil to be able to plead "choice of evils" (N.Y. Penal Law § 35.05). In Illinois, the belief the act is necessary to avoid a greater evil must be reasonable (Ill. Rev. Stat. 1971, ch. 38, §§ 7–13).

10.5.4 MPC Excuses and Their Reception

The MPC excuse of duress employs a "reasonableness" approach, rather than a strictly subjective one, in relation to the person's ability to withstand the coercion alleged to have induced the commission of the crime. It speaks in terms of force or threat of force which a "person of reasonable firmness in his situation would have been unable to resist." (MPC § 2.09(1)). This formulation was adopted by a large number of the states which were influenced by the MPC in their recodifications. The MPC would also allow a person to plead the excuse of duress in homicide cases, a departure from the common law only followed by a few States.[33]

The MPC's greatest influence, however, came in the modernization of the insanity defense. In 1954, 3 years after work began on the MPC, the federal appellate court for the District of Columbia, in the famous *Durham* case,[34] replaced the common law test[35] with a test designed to reflect advances in the field of psychiatry. Whereas *M'Naghten* focussed exclusively on the defendant's cognitive inability to understand the wrongfulness of his conduct, the MPC provided for the defense when, "as a result of mental disease or defect [the defendant] lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law." (MPC § 4.01(1).

The MPC insanity provisions were adopted in over half of the States and in all but one of the federal circuit courts of appeal. But after the Hinckley acquittal, many States, California included, and the federal system returned to a version of the purely cognitive *M'Naghten* approach. Today, around 30 States now adhere to some form of *M'Naghten* and only 15 still follow the two-pronged MPC approach.[36]

10.5.5 The MPC's Inadequate Treatment of Mistake of Law

According to the MPC, "Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense,

[32] For an exception, see Shannon v. Commonwealth, 767 S.W.2d 548, 550 (Ky. 1988).
[33] Kadish et al (2012, 940).
[34] Durham v. United States, 214 F.2d 862 (D.C.Cir. 1954).
[35] Based on M'Naghten's Case, 10 Cl & F. 200, 8 Eng. Rep. 718 (1843).
[36] Kadish et al (2012, 991).

unless the definition of the offense or the Code so provides."(MPC § 2.02(2)(9)). This is a restatement of the ancient maxim *ignorantia legis non excusat* and no longer makes sense today for three reasons: (1) the increasing complexity of the criminal law and the proliferation of *mala prohibita* offenses related to protection of public health and safety and the smooth functioning of administrative regulatory schemes; (2) the continued existence in the U.S. of unnecessary, duplicative and sometimes antiquated, or even absurd criminal prohibitions; and (3) the persistence of "common law" crimes, either expressly recognized, as in Rhode Island, or where the definition is only to be found in case law.

Although the MPC allows for a few exceptions to the maxim that "ignorance of the law is no excuse," namely, for laws that have not been published, or in cases where a public official or organ misleads a citizen to believe his or her conduct is permitted (MPC § 2.04(3)), these exceptions rarely apply.

The increasing criminalization of conduct formerly governed only by private law and civil regulation has made it increasingly unfair to presume that all persons are aware of the criminal law. Therefore some critics believe that it is perhaps time to seriously consider providing a more general excuse to all defendants who are faultlessly ignorant or mistaken with respect to the criminal law. New Jersey has taken this step.[37] Whereas the doctrine of "mistake of law" has become increasingly sophisticated and crucial to German dogma, the US has stuck with its dogmatic approach, virtually excluding it from ever mitigating or eliminating guilt.[38]

10.5.6 MPC Approach to Inchoate Crimes

In relation to the inchoate crimes of solicitation, attempt and conspiracy, the MPC departs from the common law by providing for the same punishment for inchoate, as for completed crime, except when the target crime is homicide (MPC § 5.05(1)). This was one of the least successful innovations of the code.[39] In tune with the MPC's subjectivist approach, the intent to commit the target crime suffices for attempt liability, if the actor has taken a "substantial step" towards its commission (MPC § 5.01(1)(c)). Under the common law's objectivist approach, attemptors must come in close proximity to achieving the desired result. Under the MPC, a guilty mind would suffice, even if, due to mistake of fact, the actor actually committed a harmless act which could never have resulted in the cosummation of the intended crime (MPC § 5.01(1)(a)).

The Code's authors felt that the primary purpose of punishing attempts was to neutralize dangerous individuals, rather than to deter dangerous acts.[40] The "substantial step" test for attempt is now the prevalent view among the states and the

[37] Simons (2003, 203–04).
[38] Fletcher (1978, 737–44).
[39] Robinson, Dubber (2007, 336).
[40] Dubber (2000, 67–68).

federal courts (through its case law), though some state courts, like Illinois, interpret the "substantial step" to be almost equivalent to the common law "close proximity" test.[41]

George Fletcher asserts, that without a general theory of interests protected by the criminal law, such as one finds in German law, it is impossible to decide whether an act is a completed crime or an inchoate crime.[42] He distinguishes between the objective approach to attempt, which identifies which acts will constitute attempt, and the subjective, where the nature of the acts is relatively unimportant.[43] In German theory, for instance, it is only objectively dangerous acts which threaten to injure legally protected interests that and can suffice for attempt liability.[44]

Three major reforms of conspiracy laws introduced by the MPC have achieved widespread adoption. They are: (1) the limitation of the objectives of a criminal agreement to statutorily defined crimes; (2) the treatment of conspiracy as a unilateral offense, which can be committed with a police informant who only feigns agreement; and (3) the requirement of specific intent to promote or facilitate the commission of the target crime.[45]

10.5.7 Appraisal of the General Part

The General Part of the MPC has been praised for its comprehensive articulation and systematization of a general theory of criminal law, and most critics do not think it requires thoroughgoing reform.[46] Yet some critics feel the General Part is too comprehensive, and dispute whether a code should attempt to precisely define the mental elements of crime or the principles of excuses or justifications (like "choice of evils").[47]

Fletcher also criticizes the MPC for attempting to make rules for causation and for attempting to define what a "voluntary act" is.[48] He feels the MPC authors showed not only "contempt for European thinking about criminal law," but also for historical common law doctrine.[49]

10.5.8 MPC Sentencing Philosophy

The MPC adopted the indeterminate sentencing model based on a rehabilitationist philosophy. Felonies are broken down into three categories, the first of which is

[41] Robinson, Cahill (2005, 648).
[42] Fletcher (1978, 133).
[43] Ibid, 138.
[44] Ibid, 141.
[45] Buscemi (1975, 1188).
[46] Lynch (1998, 349).
[47] Dubber (2000, 75–76); Fletcher (1998, 6).
[48] Ibid, 5–6.
[49] Ibid, 10.

punishable by up to life imprisonment, with the lesser categories carrying a maximum of 10 years and 5 years, respectively (MPC § 6.06)). The sentencing rules of the MPC have fallen out of fashion with the current U.S. emphasis on retributive and incapacitative sentences, rigid sentencing guidelines and long mandatory minimum sentences, which many States adopted after originally following the MPC rehabilitationist model.[50]

Many of the drafters of the MPC opposed capital punishment, but they feared that if it was not included in the code, it would not be taken seriously. So the MPC offered an option of abolition, but included an alternative death penalty sentencing procedure based on structured jury discretion (MPC § 210.6). After the death penalty was revived by the USSC,[51] however, the MPC approach was adopted in most States which continued to use the death penalty.[52]

10.6 The Special Part of the MPC and Its Relative Lack of Influence

10.6.1 Approach to Homicide

The MPC eliminated the two aggravating factors which triggered the possibility of capital punishment in the 1794 Pennsylvania statute, premeditation and felony murder, and settled for a single level of murder, which could be committed either purposely, or recklessly with manifest disregard for human life (MPC § 210.2(1)). In doing so it restated the two types of second degree common law murder—those committed with direct and implied malice aforethought. The MPC authors were convinced that premeditation was not always a sign of aggravation, and that sudden, rash killings could be more aggravated than, say, a premeditated mercy killing. A sizeable number of States, many, like New York and Illinois influenced by the MPC, have only one level of murder, however, most of the States still break murder into two degrees.[53] Ironically, the MPC elimination of first degree murder transformed the equivalent of second degree murder into the predicate for capital punishment in the dozen or so death penalty states with one level of murder.[54]

Another MPC innovation is the reform of the definition of voluntary manslaughter. Under the common law, an intentional killing could be partially excused and characterized as voluntary manslaughter, if committed under the influence of a sudden heat

[50] Lynch (2003, 228–29).
[51] Gregg v. Georgia, 428 U.S. 153 (1976).
[52] Lynch (2003, 232).
[53] According to my research in 2008 of the 36 jurisdictions which then allowed capital punishment, 23 States and the federal system split murder into two degrees, and 13 only had one degree. Barnes et al (2009, 360–61).
[54] The finding of one of a list of aggravating circumstances would then trigger a possible death penalty. See MPC § 210.6.

of passion caused by witnessing a provocative act. The defense was strictly limited. Mere words conveying a provocative act were as a matter of law insufficient and the types of provocation, which often reflected old-fashioned male-oriented values, were more or less limited to an assault on the actor or a close relative or the discovery of one's spouse engaged in adultery.

MPC § 210.3(1)(b) provided for manslaughter liability in the case of a killing, which would otherwise be murder (i.e. committed purposely), which was committed "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." This broadened the types of factors which could excuse an intentional killing far beyond what was allowed under the common law. This MPC innovation was adopted *en toto* by five states, and in part by another dozen states or so.[55]

As was mentioned above (Sect. 2.4.2), the MPC also eliminated strict-liability felony-murder, but this reform was rejected by nearly all the States.

10.6.2 The MPC's Outmoded Approach to Rape

Nearly all commentators agree, that the MPC's treatment of rape is outmoded and must be changed. The MPC was published before feminism triggered a profound transformation of the law of rape in the U.S. Although the MPC authors took a scientific approach and relied on the famous Kinsey Report in articulating its provisions,[56] they basically re-codified the old Common Law of rape which required that the perpetrator, in addition to having non-consensual intercourse with a woman, not his wife, either threaten the victim with death or great bodily injury, or actually use physical force beyond that needed to consummate the act of sexual intercourse (MPC § 213.1(1)).

In its endeavor to focus on the "objective manifestations of aggression by the actor," and not the actions of the victim, the MPC did eliminate the old common law requirement that the victim "resist to the utmost." The code's authors, however, also wanted to protect the defendant against unfair prosecution. This was a time when rape was still a capital offense in some states, and where the ultimate penalty was virtually reserved for African-American men charged with raping white women.[57]

The MPC rape provisions only applied to male on female violence, but today, nearly all rape statutes in the US are gender neutral.[58] The marital immunity rule, still included in the MPC, has also been narrowed or abolished in nearly all states.[59]

The common law rule mandating that no person be convicted of rape upon the uncorroborated testimony of the alleged victim, was also included in MPC § 213.6(5).

[55] Kadish et al (2012, 456).

[56] Denno (2003, 208).

[57] Ibid, 209.

[58] Ibid, 211.

[59] Ibid, 213.

This was heavily criticized and followed by only a few states. The MPC also made the dubious choice of barring prosecution if a complaint was not made promptly (MPC § 213.6(4)).

10.6.3 The Inadequacy of the Special Part of the MPC

While some think the broadly comprehensive General Part of the MPC looks more like a criminal law textbook than a penal code, its special part fails to cover a wide range of penal norms codified in modern American penal codes. For example, the MPC does not deal with drug offenses, to the prosecution of which American prosecutors, especially in the federal system, dedicate the lion's share of their resources.[60]

A revised Special Part of the MPC would likely contain some of the new crimes introduced into federal law which deal with organized crime, such as the racketeer influenced and corrupt organizations law (RICO), the law punishing large-scale illicit drug rings as "continuing criminal enterprise," and laws punishing money laundering and "continuing financial crimes."[61] The war on terrorism also let to the promulgation of new substantive crimes, one of the most commonly used being that of providing material support to terrorist organizations.[62]

10.6.4 The Sprawling Mess of Modern Codes and the Need for Special Part Reform

The failure of the MPC's Special Part is one reason why U.S. criminal codes are still in such a horrendous state 50 years after its enactment. Many U.S. codes are still characterized by the following grave flaws: (1) the criminalization of harmless conduct; (2) the massive criminalization of violations of administrative regulations; and (3) a plethora of redundant criminal offenses punishing the same conduct.

10.6.5 Criminalization of Harmless Conduct

The worst U.S. codes often criminalize harmless conduct. Some limit punishment of harmless acts only in part of the State. A typical example is Maryland's law against fortune-telling: "in Caroline County, Carroll County, and in Talbot County."[63]

[60] Dubber (1999, 79).

[61] Brickey (1998–1999, 162–63).

[62] Lynch (2003, 236).

[63] Robinson et al (2000, 44–45).

Michigan devotes an entire chapter of its penal code to prohibiting performance of the national anthem with "embellishments of national or other melodies," or "as a part or selection of a medley of any kind."[64]

Florida prohibits unmarried women from parachuting on Sundays, and farting on Thursdays after 6 p.m. It also prohibits married men from kissing their wives' breasts and all men from having sex with porcupines. Alabama prohibits men from spitting in the presence of women and having sexual intercourse with their wives other than in the missionary position. In Tampa Bay, Florida, eating cottage cheese after 6 p.m. on Sundays is prohibited. In Norfolk, Virginia, one cannot spit on seagulls and in the same State in Stafford one cannot beat one's wife on the courthouse steps until 8 p.m. Alaska prohibits pushing elk out of airplanes when in flight. In Baltimore, Maryland, one may not throw hay balls from the first floor of a building or take lions into a theater. In Minnesota, sleeping naked is *verboten*, as is crossing the border with a duck on one's head. And finally, when in Oklahoma, don't grimace at dogs, or fish for whale.[65] Cal. Penal Code § 598 punishes "destroying any bird's nest, except a swallow's nest" in a "public cemetery or burial ground."

10.6.6 *Criminal Punishment for Violations of Administrative Regulations*

Many important federal criminal offenses are not to be found in Title 18 of the U.S. Code, but are buried within administrative regulatory provisions of other titles. Aircraft highjacking is located among provisions dealing with interstate transportation. Major espionage offenses are locate in regulations of atomic energy. Federal narcotics offenses are found in regulatory provisions of titles involving food, drugs and shipping, and in California they are in the Health and Welfare Code. Today, when a congressional committee adopts new administrative regulations, regardless of whether they relate to health and safety, it routinely provides that any deviation from the norms constitutes a federal crime.[66]

Taking into account the numerous, discrete rules and regulations enforceable under such regulatory statutes, there are more than 10,000 federal regulatory requirements or proscriptions carrying criminal sanctions.[67] Criminal offenses in the States are also spread out over penal codes, non-penal codes, administrative rules and regulations, and county, town, and village codes. (Dubber, 1999, 78).[68]

[64] Ibid, 46.

[65] von Rimscha (1999).

[66] Gainer (1998, 72–73).

[67] Ibid, 74.

[68] Dubber (1999, 78).

10.6.7 *Redundant Offenses and Code Sprawl*

Many U.S. criminal codes are not cohesive, well-structured, and self-contained statutory schemes, as a "code" should be. Even in States which adopted the structure of the MPC, subsequent ad hoc legislation has made them dramatically less systematic and internally consistent. Code deterioration is sometimes the result of legislators' ignorance of the code's structure, but more likely stems from the practice of politicians who enact so-called "crimes de jour" in response to a particularly news-grabbing crime.[69] The "crimes de jour" are often duplicative or or inconsistent with the laws that preceded them, and contribute to re-establishing the same hodge-podge which led to work on the MPC in the first place.[70]

Since the Pennsylvania Crimes Code was enacted in 1972, it has been amended at least 797 times, and at least 1,532 new crimes were added to other non-criminal codes and statutes.[71] In the words of Paul Robinson, there has been a "serious and growing degradation of most criminal codes."[72]

The proliferation of potentially redundant offenses make it more difficult for the average citizen to understand what the criminal code commands.[73] The same conduct may be punished by one offense as a felony, and by another as a misdemeanor or higher grade felony.[74] Pennsylvania punishes stealing a rare book valued at $3,000 by up to 7 years if stolen from an individual, but by at most 1 year if stolen from a library. In addition, stealing from an individual is punished with much longer prison terms than stealing the same item from a store.[75]

Title 18 of the U.S. Code contains roughly 5,000 sections, produced over 200 years by different draftsmen, with different conceptions of law, the English language, and common sense, extending from common law offenses such as murder and arson to the transportation of alligator grass across a state line, using the slogan "Give a hoot, don't pollute" without authorization, or pretending to be a 4-H Club member with intent to defraud.[76] A prime illustration of the reality of duplicative and overlapping provisions is the fact that one could, at one time, find 232 separate federal statutes pertaining to theft and fraud, 99 pertaining to forgery and counterfeiting, 215 pertaining to false statements, and 96 pertaining to property destruction.[77]

[69] Robinson et al (2000, 2).

[70] Lynch (2003, 224).

[71] Robinson et al (2010, 737)

[72] Robinson, Cahill (2005, 634).

[73] Ibid, 638.

[74] Robinson et al (2010, 711–12).

[75] Ibid, 726–27.

[76] Gainer (1998, 58, 66–67).

[77] Green (2000, 335).

10.6.8 *"Method in the Madness": Prosecutorial Benefits in "Degraded" Federal Criminal Law and the U.S. Sentencing Guidelines*

A complex code with countless overlapping provisions is a boon to prosecutors in inducing plea bargains. Cases can be overcharged with duplicative offenses and deals achieved by an offer to dismiss redundant charges carrying higher potential punishments.[78] Robinson believes that such a state of affairs undermines the rule of law by shifting *de facto* sentencing authority from the courts to the prosecutor.[79]

The shift to prosecutorial sentencing has also been facilitated by the U.S. Sentencing Guidelines, enacted in 1984, which are administered by an independent body, not the courts, and apply to the unsystematic mish-mash of criminal offenses. They have now trumped Title 18 of the U.S. Code and are the most important penal rules in the federal system.[80]

The Sentencing Guidelines replaced the legislatively defined and alphabetized penal norms of Title 18, and other codes with eighteen offense categories, consisting in certain groups of basic offense conduct. The Guidelines also contain provisions on mens rea, complicity, duress, intoxication, mistake, consent, necessity, and inchoate crimes, all subjects scarcely mentioned in Title 18. They have become a "shadow code" of federal criminal law upon which court practice is now solidly based.[81]

This has resulted in a paradigm shift from the guilt phase of a criminal proceeding to the sentencing phase. Even in the handful of federal cases that still are decided by juries, the decisive findings of fact often occur not at trial, but at sentencing, where the judge may consider evidence which was inadmissible at trial, and decides based on a mere preponderance of evidence, rather than "proof beyond a reasonable doubt," to which jurors are held. Although the judge's power at sentencing has been reduced in the last decade or so by a line of cases that has expanded the jury's right to *establish* sentence-determining factors[82] over 95 % of cases are resolved without a jury through plea bargaining or co-operation agreements. In these cases, the prosecutor controls the parameters of sentencing through his charging policy, and has exclusive power under the Sentencing Guidelines to agree to a sentence below a mandatory minimum.[83]

[78] Robinson, Cahill (2005, 645–46).

[79] Robinson et al (2010, 712).

[80] Dubber (1999, 80).

[81] Ibid, 81–83.

[82] Among the most important being Apprendi v. New Jersey, 530 U.S. 466 (2000) and United States v. Booker, 543 U.S. 220 (2005).

[83] 18 U.S.C. § 3553(e); U.S. Sentencing Guideline 5K1.1.

10.7 The Way Out of the Morass

10.7.1 *A New Model Penal Code?*

Paul Robinson believes that the A.L.I. should produce a revised MPC, as he doubts the capacity of State legislators to actually create a modern code.[84] Lynch believes the structure of the MPC, and the bulk of the General Part could be maintained, but the Special Part should be augmented with model statutes in areas in need of concrete reform, such as sexual assault, narcotics, money laundering, organized crime offenses, etc. The indeterminate sentencing provisions based on rehabilitationism should also be scuttled in favor of more modern approaches.[85]

10.7.2 *Robinson's Idea of Separate Codes of Conduct and Adjudication*

The penal code, as Meir Dan-Cohen has pointed out,[86] is addressed to at least two different audiences. It issues "conduct rules" to the population at large (don't do x), and "decision rules" to judges, lawyers, jurors (if someone does x, punish her with consequence y).[87] Paul Robinson and co-authors have followed this idea and produced separate codes containing these different types of rules. In the code of conduct, language relating to liability and grading is eliminated. The prohibited conduct, however, is succintly and clearly described for all to understand. His draft code of conduct is one-fifteenth the length of the MPC and covers the same material.[88] For example, the crime "injury to a person" provides: "You may not cause bodily injury or death to another person." This substitutes not only for assault offenses but also for murder, manslaughter, negligent homicide, and reckless endangerment. The concepts of complicity or conspiracy would be replaced by the simple prohibition: "You may not agree with, ask, assist, or encourage another to commit a crime." The code of conduct would also eliminate all excuses and nonexculpatory defenses, and include only the objective requirements of justifications.[89] Robbery would not be included, for it would be covered by the separate prohibitions for assault and theft. Other "combined" offenses, such as burglary (trespass and theft) could also be eliminated.[90]

[84] Robinson (1998, 42–43)

[85] Lynch (2003, 229–38).

[86] Meir Dan-Cohen (1984).

[87] Lynch (1998, 326).

[88] Robinson et al (1996, 306).

[89] Ibid, 307.

[90] Ibid, 309–10.

The adjudication code would have the adjudicator (whether judge or jury) answer three questions: (1) Has the defendant violated the rules of conduct?; (2) If so, is the violation sufficiently blameworthy that criminal liability ought to attach? (3) If so, how much liability should be imposed?[91] A verdict of "not guilty" under such a system would be able to distinguish cases where: (1) the actor's conduct *did* not violate the rules of conduct, and (2) those, where the actor's conduct *did* violate the rules of conduct but was excused.[92]

Robinson's radical idea for a bifurcated code has not been warmly received in the literature. Green rejects, for instance, the idea that traditional common law categories such as robbery and burglary should be abandoned, believing they have a value that transcends the sum of their parts, largely as a result of the moral, linguistic, and social meanings that have become attached to such labels.[93]

10.7.3 Concentration of All Criminal Offenses in a Comprehensive Penal Code?

According to Dubber, a modern penal code can no longer define every crime, but he believes the great majority of regulatory offenses in other codes or Titles should be decriminalized, or perhaps included in a Code of Administrative Violations such as exists in Germany and Russia.[94] Gainer believes that serious regulatory offenses should be included in the penal code, and the others either decriminalized or covered in the code by a generic regulatory offense.[95] Such a generic regulatory offense was included in the 1971 Draft Federal Criminal Code, which died in Congress. Green supports this idea,[96] and the Russian Criminal Code of 1996 took a similar approach.[97]

Herbert Wechsler felt that environmental and other regulatory crimes should be contained in administrative codes dealing with the particular subject matter as is done in Germany, for these prohibitions are usually addressed to a relatively narrow group of potential defendants and are often enforced by specialized agencies.[98]

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[91] Ibid, 318.

[92] Ibid, 327.

[93] Green (2000, 305).

[94] Dubber (2000, 86–89).

[95] Gainer (1998, 80).

[96] Green (2000, 334).

[97] Thaman (2010, 416–17).

[98] Green (2000, 333).

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