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### The Accelerating Degradation of American Criminal Codes

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## Articles

# The Accelerating Degradation of American Criminal Codes

PAUL H. ROBINSON\* & MICHAEL T. CAHILL\*\*

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## INTRODUCTION

In the 1960s and early 1970s, states across the country were caught up in a wave of criminal law reform unprecedented in our history. Influenced by the American Law Institute's development of the Model Penal Code, more than two-thirds of the states adopted comprehensive new criminal codes. In all major respects, these new codes were better than any that had previously been in place.<sup>1</sup>

Since that period of turbulent change, there has been little momentum for further development or refinement of American criminal codes. Worse, the changes to criminal codes over the past generation—and there have been numerous changes, as we shall discuss—have undercut, rather than built on, the useful reforms implemented earlier by adopting comprehensive codes. The last thirty years have seen a serious and growing degradation of most criminal codes.

We are not the first to recognize and lament the growing problems with American criminal codes.<sup>2</sup> We have written this Article because we believe our personal experiences with criminal law reform efforts in two states have taught us a few lessons about *why* this trend is occurring and about possible ways to reverse the downward spiral. Part I of this Article documents examples of the trend and describes its harmful effects. In Part II, we discuss the current political processes and incentives driving the degradation of criminal law. The constituencies and influences that drive political decision-making in criminal law frequently operate to impede reform and can even erode past reform. These impediments may reflect unconscious biases inherent in the political process or deliberate efforts to promote the interests of one group over others. Whatever the underlying cause, it has become clear that most legislatures no longer use their criminal law codification power to promote broad and useful change, but have become “offense factories” churning out more and more narrow, unnecessary, and often counterproductive new offenses. Because no elected legislative member can afford to appear “soft on crime,” proposed penalty enhancements and new offenses often sail through the legislature with little public complaint, even though privately legislators recognize they contain serious flaws. Many legislators bemoan the “enormous, almost hydraulic pressure to pass any criminal law bill that is offered, unless you don't care about [keeping] the job.”<sup>3</sup>

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1. For a description of what we mean by “better” in this context, see Michael T. Cahill et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 3–20 (2000).

2. See, e.g., Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997); Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261 (2003); William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

3. Interview by Stephen Haedicke with Dawn Clark Netsch, former Illinois state senator, in Chicago, Ill. (Mar. 18, 2001).

As was true forty years ago, the time is ripe for a new wave of criminal law reform. But the nature of the problem and the possibility of arriving at a solution are significantly different this time around. In the 1950s, the problem was stagnation: many criminal codes were woefully incomplete, leaving many, if not most, substantive criminal law rules to be constructed by the courts. Today, the opposite problem exists: legislative hyperactivity has created too many statutory pronouncements that are unnecessary and often inconsistent. Accordingly, the needed second wave of criminal code reform is not easily cast as an opportunity for legislatures to exert their lawmaking power, as was the first one. The new reforms will entail a call for legislatures to put the brakes on their own excesses, which is perhaps a less palatable idea.

Even so, we believe that it is not only desirable but feasible for states to engage in a far-reaching reevaluation of their practices in enacting criminal law legislation. Indeed, as we discuss in Part III, such a reevaluation has the potential to achieve substantial and lasting changes that would prevent future legislatures from degrading their criminal codes as past legislatures have done.

## I. THE ACCELERATING DEGRADATION OF AMERICAN CRIMINAL CODES

### A. EVIDENCE OF DEGRADATION

Let us briefly give some indication of what we mean when we say that criminal codes have shown a tendency to degrade over time. We are most familiar with two states in particular—Illinois and Kentucky—because we have been involved in their recent major reform projects. For the sake of simplicity and consistency, our examples will draw heavily from just one of those states, Illinois. The problems we identify, however, are by no means unique to Illinois—they are all too typical of the development of American criminal codes over the last thirty years. In fact, both Illinois and Kentucky should be commended for having an unusual level of interest in addressing the problems created by criminal code degradation, as evidenced by their willingness to fund major and comprehensive criminal code rewrite efforts.

The main form of degradation is the proliferation of numerous new offenses that duplicate, but may be inconsistent with, prior existing offenses. For example, four decades of piecemeal modification of the Illinois Criminal Code have led to the addition of hundreds of new offenses, many of which cover the same conduct as previous offenses (and, in some cases, provide for conflicting levels of punishment) or appear in various chapters of the Illinois Statutes instead of in the Criminal Code. One might expect that over time, as more loopholes or omissions in a code are eliminated, there would be a reduced need to alter or expand that code, but historical trends demonstrate that the

*opposite* is true. The process of amending the Illinois Criminal Code—through the addition of new offenses, expansion of existing offenses, and increases in available penalties—has not only continued, but has actually *accelerated* over time.<sup>4</sup> Now forty years old, the Illinois Code underwent nearly twice as many amendments in its second twenty years of existence than in its first twenty years.<sup>5</sup> Looking only at new offenses, over fifty offenses were added in the 1980s<sup>6</sup> (more than the total number of offenses added in the 1960s and 1970s combined!<sup>7</sup>) and over seventy more were added in the 1990s.<sup>8</sup> The rate at which the legislature has increased penalties for existing offenses has also accelerated.<sup>9</sup>

Today, both Illinois and Kentucky also define numerous serious crimes *outside* the Criminal Code. In Illinois, hundreds of misdemeanors and low-grade felonies are scattered throughout the Compiled Statutes, and more than eighty offenses outside the Criminal Code are graded as “Class 3” felonies or higher, corresponding to a sentence of two to five years imprisonment.<sup>10</sup> For example, the Illinois Public Aid Code defines several “public assistance fraud” offenses—graded as high as “Class 1” felonies, with a corresponding sentence of four to fifteen years<sup>11</sup>—that overlap substantially with several Criminal Code offenses such as theft, state benefits fraud, public aid wire fraud, and public aid mail fraud.<sup>12</sup> Similarly, the Illinois Vehicle Code defines several vehicle theft offenses aimed at “chop shops” in the business of receiving stolen vehicles, and grades the offense of organizing an “aggravated vehicle theft conspiracy” as the most serious class of felony (“Class X,” which is the only class above Class 1<sup>13</sup>), although all of the relevant conduct—vehicle theft,

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4. A recent study identifies and analyzes all the changes to the Illinois Criminal Code since 1961, pointing out that the number of new amendments has increased over time. Stephen Haedicke, *Punishing Democracy: A Political History of the Amendments to the Illinois Criminal Code of 1961*, with Recommendations for Change 65 (May 20, 2001) (unpublished manuscript, on file with authors) (“As should be obvious simply from the frequency of amendments during the 1980s and especially the 1990s, this dynamic [of modifying and expanding the code] is accelerating.”).

5. *Id.* at 60 (“The sheer number of amendments to the Criminal Code in the 1980s and 1990s, almost double that of the 1960s and 1970s, reveals that a change had taken place in the General Assembly’s relation to Illinois criminal law.”).

6. *See id.* at 37–40 (identifying and describing each of these new offenses).

7. *See id.* at 17–19, 25–26 (identifying and describing offenses added in 1960s and 1970s).

8. *See id.* at 46–51 (identifying and describing each of these new offenses).

9. *See id.* at 56–60 (identifying enhancements to criminal penalties enacted during the 1990s).

10. *See* 730 ILL. COMP. STAT. 5/5-8-1(a)(6) (1997). The authors would like to thank the staff attorneys of the Illinois Criminal Code Rewrite and Reform Commission, Scott England and T.R. Eppel, for their work on the commentary to the Commission’s proposed Code, which provided many of the examples we discuss in this Article.

11. 730 ILL. COMP. STAT. 5/5-8-1(a)(4).

12. *Compare, e.g.*, 305 ILL. COMP. STAT. 5/8A-1 to -17 (2001) (public assistance fraud), with 720 ILL. COMP. STAT. 5/16-1 (theft), 5/17-6 (state benefits fraud), 5/17-9 (public aid wire fraud), and 5/17-10 (public aid mail fraud).

13. 730 ILL. COMP. STAT. 5/5-8-1(a)(3) (1997) (providing standard sentence of 6 to 30 years, unless statute defining offense provides otherwise). Of course, the very existence of “Class X” felonies

receiving stolen vehicles, and conspiracy to commit either of those offenses—is covered and graded differently by the Criminal Code.<sup>14</sup> In fact, there are more than two dozen criminal offenses outside the Illinois Criminal Code that are graded as Class 1 and Class 2 felonies.<sup>15</sup>

Even within the criminal code, numerous offenses have been added to do the job that a single well-crafted offense could do better. Dozens of narrow, specific offenses duplicate broader prohibitions against the same general conduct. For example, even though the current Illinois Code already contains a provision covering theft of all things of value, a number of other special provisions have been added to prohibit theft under specific circumstances or involving certain forms of property, such as library theft or delivery-container theft.<sup>16</sup> The legislation was not driven by the existence of any flaw in the existing statute, but rather by

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reflects the trend toward ever-higher penalties. The original Illinois Code of 1961 had Class 1 felonies as the most serious category, but eventually it was thought that a new, more serious class had to be added. See ILL. PUB. ACT 80-1099 § 3 (effective Feb. 1, 1978).

14. Compare, e.g., 625 ILL. COMP. STAT. 5/4-103 to -108 (2002) (Vehicle Code provisions), with 720 ILL. COMP. STAT. 5/16-1(a)(1) (defining offense of theft by taking); 5/16-1(a)(4) (defining offense of receiving stolen property); 5/16-1(b) (grading theft offenses) (2003); cf. 720 ILL. COMP. STAT. 5/16-1(b)(2) (cross-referencing Vehicle Code provisions for purposes of recidivism aggravation for theft).

15. See 5 ILL. COMP. STAT. 175/10-140 (2004) (fraudulent use of signature device; Class 2 felony), 175/15-210 to -215 (fraudulent use or request of electronic signature certificate; Class 2 felony for each), 175/15-220 (fraudulent use of signature device of certification authority; Class 2 felony); 20 ILL. COMP. STAT. 3520/45 (2001) (making false statement or report in document before Department of Commerce; Class 2 felony); 30 ILL. COMP. STAT. 320/4 (2001) (fraudulently using state seal or signature; Class 2 felony); 35 ILL. COMP. STAT. 130/22 to /23 (1996) (counterfeiting or forging cigarette tax stamps, or selling cigarettes or other tobacco products with forged stamps; Class 2 felony for each), 505/15(1) to /15(11) (evading motor fuel sale tax, filing false return or report to Department of Revenue, or selling dyed diesel fuel; Class 2 felony for each); 205 ILL. COMP. STAT. 685/7 (2000) (structuring transaction to evade currency reporting requirements; Class 2 felony); 415 ILL. COMP. STAT. 5/44(b) (2004) (endangering another by disposing hazardous waste; Class 2 felony); 625 ILL. COMP. STAT. 5/11-401(d) (2002) (failing to stop when involved in auto accident involving death; Class 2 felony), 5/11-501 (fourth DUI offense; Class 2 felony), 5/18c-7502 (removal of railroad property resulting in serious bodily injury; Class 2 felony), 45/3A-21 (forging certificate or sticker relating to watercraft; Class 2 felony); 730 ILL. COMP. STAT. 5/3-6-4 (1997) (escaping from correctional institution; Class 2 felony), 5/5-8A-4.1 (failing to comply with home-monitoring program while armed; Class 1 felony); 765 ILL. COMP. STAT. 835/1(b) (2001) (causing \$100,000 in property damage in cemetery; Class 2 felony); 815 ILL. COMP. STAT. 5/14 (1999) (aggravated securities fraud; Class 2 felony), 515/5 (aggravated home repair fraud; Class 2 felony), 705/25 (false or misleading statement in selling franchise; Class 2 felony).

16. Compare 720 ILL. COMP. STAT. 5/16-1 (2003) (general theft offense), with 5/16A-3(a) (retail theft), 5/16B-2(a) (library theft), and 5/16E-3(a)(1) & (4) (delivery-container theft).

Kentucky is similar: in addition to the general offense of theft by deception, Kentucky has several offenses covering particular situations involving deception, such as by false representation on a loan application or the fraudulent use of credit cards. Compare KY. REV. STAT. ANN. § 514.040 (Michie 2003) (defining general offense of theft by deception), with KY. REV. STAT. ANN. § 434.095 (Michie 2003) (obtaining real estate loan by substituting or making false instrument), KY. REV. STAT. ANN. § 434.655 (Michie 2003) (fraudulent use of credit or debit card after reporting it lost, as stolen, or not received), KY. REV. STAT. ANN. § 434.660 (Michie 2003) (furnishing goods or services to user of false credit card with intent to defraud), KY. REV. STAT. ANN. § 434.670 (Michie 2003) (failure to furnish goods, services, etc., represented in writing as furnished), and KY. REV. STAT. ANN. § 516.130 (Michie 2003) (using slugs in coin machine with intent to defraud).

some lobbying group urging a special subchapter regarding theft of a particular kind of property.<sup>17</sup> The same situation applies to property-damage offenses. There, again, the existing general prohibition provides full coverage and a coherent grading system, but is nonetheless supplemented with specialized offenses concerning, for example, damaging library materials, delivery-containers, anhydrous ammonia equipment, government-supported property, and animal facilities.<sup>18</sup>

These duplications are neither unimportant nor harmless. The proliferation of potentially redundant offenses causes several significant problems. First, overstuffed criminal codes make it more difficult for the average citizen to understand what the criminal code commands. Although actual notice of legal prohibitions may be more of an ideal than a practical goal, it is an ideal that should be taken seriously. It is also achievable, especially with the recent advances in plain-language drafting. But rather than promoting the principle of notice, today's criminal law creates an impenetrable network of prohibitions that only a criminal law expert could decipher.

The notice problem is further exacerbated by the increasing level of criminalization. As William Stuntz has put it, we are moving "ever closer to a world in which the law on the books makes everyone a felon."<sup>19</sup> Even attorneys, police officers, and other law enforcement officials cannot grasp all of the prohibitions of modern criminal law. Frequently, these officials have little time to consult legal texts and authorities or conduct significant research before arresting and charging an individual. Yet even if they had all the time in the world, many would not know where to look for all the relevant rules. Because there are often multiple prohibitions against the same type of conduct, most officials would not even know when to *stop* looking for an applicable law. The increasing complexity, inconsistency, and unfamiliarity of most criminal codes increase the likelihood of costly mistakes by both lawyers and trial judges, and the odds of disparate treatment. Any given official can only be expected to become familiar with a digestible set of "pet" offenses—

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17. For example, the offense of "retail theft," *see supra* note 16, which basically covers shoplifting—a form of theft that, like the other examples, was already covered by Illinois' theft provision—was evidently enacted at the urging of the Illinois Retail Merchants Association. Why the new offense was thought to be necessary is not clear, especially since it does not even increase the penalty for most relevant kinds of theft. The only higher penalty available under retail theft, relative to standard-issue theft, is when the theft involves between \$150 and \$300 worth of goods. *Compare* 720 ILL. COMP. STAT. 5/16-1(b) (2003) (penalties for theft), *with* 5/16A-10 (penalties for retail theft). There is no explanation as to why this particular category, and only this category, of retail theft merits an enhanced penalty.

18. *Compare* 720 ILL. COMP. STAT. 5/21-1 (2004) (general property damage offense), *with* 5/16B-2.1 (2003) (damage to library materials), 5/16E-3(a)(3) (defacing delivery-containers), 5/21-1.5 (tampering with or damaging anhydrous ammonia equipment), 5/21-4 (damaging government supported property), *and* 215/4(2) (damaging an animal facility).

19. Stuntz, *supra* note 2, at 511.

but different officials may have different pet offenses, or differing levels of familiarity with the intricacies of the law, making arbitrary treatment more likely.

This ties into a second problem, which is that the criminalization trend effectively destroys the rule of law. The creation of new statutory offenses may seem like an acceptable and even desirable exercise of legislative prerogative, in full accord with the core principles of legality that are central to criminal law. But the modern expansion of criminalization also reflects a shift of practical authority away from the legislature to prosecutors and police, who now have broad discretion over who gets punished and the level of punishment. As Douglas Husak noted, the combination of that broad discretion with the modern trend toward “all-encompassing offenses . . . is destructive of the rule of law.”<sup>20</sup> Arrest, punishment, and the level of punishment are now determined as much by the ad hoc decision-making of individual law enforcement officials as they are by the legal rules.<sup>21</sup>

Third, overlapping offenses introduce considerable difficulties into the interpretation and implementation of a statutory scheme because the relationship between multiple overlapping offenses is often unclear. Specific offenses that duplicate a preexisting general offense call into question the scope of the general offense. According to interpretive canons, such an overlap must be read so that nothing is rendered superfluous—a task that may require courts to distort the meaning of one provision in order to accommodate another. To add prohibitions against narrow and specific forms of conduct in addition to a general prohibition against all such relevant conduct; or to scatter serious crimes throughout the State’s statutory code instead of keeping all relevant offenses within the criminal code where their significance and relationship to one another is clear is not only redundant, but potentially counterproductive and self-contradictory.

Even if offenses do not contradict each other, efforts to use all available offenses at once to obtain multiple punishments only introduce confusion. For example, current Illinois law limits the total aggregate sentence for all consecutive sentences committed as part of a single course of conduct to the sum of the maximum terms for the two most serious offenses.<sup>22</sup> In a recent case interpreting this rule, the Illinois Supreme Court held that the consecutive-sentence provision effectively trumped a separate statutory sentence aggravation, so that the maximum allowed sentence for the defendant’s *five* offenses of conviction was less

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20. Husak, *supra* note 2, at 269.

21. See also William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

22. See 730 ILL. COMP. STAT. 5/5-8-4(c)(2) (1997).



than—in fact, less than half of—the sentence for which he would have been eligible had he committed only *one* of the offenses.<sup>23</sup>

Fourth, in addition to confusing the relationship between offenses in a code's Special Part, many new offenses (or revisions of earlier provisions) ignore or affirmatively undermine rules set out in a code's General Part. One of the profound achievements of the Model Penal Code and its progeny was the development of sophisticated and thorough General Part provisions that define a context and vocabulary, such as the articulation of specific and thoroughly defined culpability terms, that would apply to every defined offense.<sup>24</sup> Yet even that most fundamental advance is often lost in what seems to be a willy-nilly rush to maintain a continuous stream of new offenses.

For example, although Illinois' General Part defines only four basic culpability terms—intentionally, knowingly, recklessly, and negligently<sup>25</sup>—numerous additional Illinois criminal provisions employ other terms that refer to culpability requirements, such as “specific intent,”<sup>26</sup> “having reason to know,”<sup>27</sup> “reasonably should know,”<sup>28</sup> “willfully” (or “wilfully”),<sup>29</sup> “maliciously,”<sup>30</sup> “fraudulently,”<sup>31</sup>

23. See *People v. Pullen*, 733 N.E.2d 1235, 1239 (Ill. 2000). The defendant, Dennis Pullen, pleaded guilty to five counts of burglary, which is typically a Class 2 felony. Normally, Pullen's various prior convictions would have led to sentencing him as a Class X offender under Illinois law. *Id.* at 1236; see 730 ILL. COMP. STAT. 5/5-5-3(c)(8) (requiring that defendant convicted of Class 1 or 2 felony, who has committed two past offenses of Class 2 or higher, “shall be sentenced as a Class X offender”). If Pullen had pleaded guilty to a *single* count of burglary, he would have received a sentence of at least six to thirty years, and would have been eligible for an “extended term” sentence of thirty to sixty years. See 730 ILL. COMP. STAT. 5/5-5-3.2(b)(1) (allowing extended term based on recidivism), 5/5-8-2(a)(2) (allowing extended-term sentence of 30 to 60 years for Class X felony).

Because he was convicted of *multiple* counts, however, the court had to apply Illinois' consecutive-sentence provision. *Pullen*, 733 N.E.2d at 1237; see 730 ILL. COMP. STAT. 5/5-8-4(c)(2). The court interpreted that provision to require that the defendant could receive, at most, twice the extended-term sentence for the underlying, unaggravated Class 2 felony of burglary. *Pullen*, 733 N.E.2d at 1239–40. A Class 2 felony carries an extended-term sentence of seven to fourteen years, see 730 ILL. COMP. STAT. 5/5-8-2(a)(4), so the maximum sentence for Pullen would be fourteen to twenty-eight years, instead of the thirty to sixty years available if the consecutive-sentence rules had not come into play. See *Pullen*, 733 N.E.2d at 1240 (“We recognize that it may seem anomalous for defendant to have been eligible for a longer sentence if sentenced ‘as a Class X offender’ for a single crime than if he were subject to consecutive sentences for multiple crimes . . . . However, we are not at liberty to rewrite the statute in the guise of interpreting it.”).

24. See, e.g., MODEL PENAL CODE § 2.02 (1962).

25. See, e.g., 720 ILL. COMP. STAT. 5/4-4 to -7 (2002).

26. See, e.g., 720 ILL. COMP. STAT. 5/6-3.

27. See, e.g., 20 ILL. COMP. STAT. 1805/94a(b)(1) (2001); 625 ILL. COMP. STAT. 5/18c-7502(a)(iii) (2002); 720 ILL. COMP. STAT. 5/12-11, 5/14-2(a)(2), 690/2.

28. See, e.g., 720 ILL. COMP. STAT. 5/11-20.1(a)(1), 5/12-21(a)(2), 5/20-1.1, 5/24-1.2(a)(2), 5/24.6-20, 5/29B-1 (2004).

29. See 720 ILL. COMP. STAT. 5/12-4.8, 5/12-9(a), 5/12-21.6, 5/16-1.2, 5/16-3(b), 5/16B-2(d), 5/17-15, 5/17-22, 5/17B-10(b), 5/32-10, 5/33C-2, 5/33C-3, 5/33E-16, 130/2, 130/2a, 150/4.1, 660/2; see also, e.g., 15 ILL. COMP. STAT. 520/23 (2001); 30 ILL. COMP. STAT. 230/2b (2001); 35 ILL. COMP. STAT. 5/130 (1996); 35 ILL. COMP. STAT. 130/22, 130/23 (1996); 55 ILL. COMP. STAT. 5/3-11019 (1993); 205 ILL. COMP. STAT. 5/49,

“designedly,”<sup>32</sup> or a combination of the foregoing and others.<sup>33</sup> These terms are generally left undefined.<sup>34</sup>

Finally, multiple overlapping offenses generate inconsistent punishment levels. One might think that these additions and piecemeal amendments are defensible on the ground that they are needed, or at least useful, to specify grade distinctions among meaningfully different offense levels. In practice, however, these overlapping offenses often demonstrate a completely incoherent, if not self-contradictory, grading scheme.

New offenses, or aggravations and enhancements of existing offenses, commonly introduce seriously questionable, and sometimes transparently disproportionate, grading distinctions. Not all offenses can be the worst; yet the trend over time is to enhance the penalties for

620/8-1, 635/4-4, 690/36; 215 ILL. COMP. STAT. 5/1023 (2001); 410 ILL. COMP. STAT. 535/27 (1997); 625 ILL. COMP. STAT. 5/4-103.2(a)(7) (2002).

30. 720 ILL. COMP. STAT. 5/16B-2.1 (2003); *e.g.*, 20 ILL. COMP. STAT. 2305/2(e) (2001).

31. 20 ILL. COMP. STAT. 4020/22 (2001); 35 ILL. COMP. STAT. 130/22, 200/21-306(a)(2); 310 ILL. COMP. STAT. 10/25.04 (2001); 320 ILL. COMP. STAT. 25/9 (2001); 720 ILL. COMP. STAT. 5/16G-15(a), 5/17-13, 5/17-16, 5/33C-1, 5/33C-4 (2003).

32. *See* 720 ILL. COMP. STAT. 5/17-17 (2003).

33. *See* 720 ILL. COMP. STAT. 5/17-1(A)(iii) (“wilfully, and with . . . specific intent”), 5/17-18 (“wilfully and designedly”), 5/21-1.1 (“wilfully and maliciously”), 5/32-11 (“wickedly and wilfully”) (2003); 125/2(a) (“[w]ilfully obstructs or interferes with . . . specific intent”); 300/1 (“wilfully and maliciously”); 360/1 (“wilfully and maliciously”); 540/1 (“wilfully, corruptly and falsely”); *see also, e.g.*, 55 ILL. COMP. STAT. 5/3-14043 (1993) (“wilfully, corruptly and falsely”); 105 ILL. COMP. STAT. 10/9(e) (1998) (“wilfully and maliciously”); 210 ILL. COMP. STAT. 85/6.17(i) (“wilfully and wantonly”); 605 ILL. COMP. STAT. 10/28 (1996) (“wilfully, maliciously and forcibly”); 610 ILL. COMP. STAT. 95/1 (1996) (“wilfully and maliciously”); 625 ILL. COMP. STAT. 5/11-503 (2002) (“willful or wanton disregard”).

34. The General Part does explicitly equate “wilfully” with “knowingly” and “wantonly” with “recklessly.” *See* 720 ILL. COMP. STAT. 5/4-5, 5/4-6 (2002). Confusingly, however, these equivalences only apply unless the provision “clearly requires a different meaning,” indicating that even the General Assembly anticipated some misuse of defined terms of art. *Id.* This equivocation as to meaning makes it unclear whether, for example, “wilfully” should be considered to be synonymous with “knowingly” for the numerous current offenses specifying both culpability levels with respect to a single element or set of elements; *cf., e.g.*, 720 ILL. COMP. STAT. 5/12-4.8 (“knowingly and wilfully”), 5/12-9(a) (“knowingly and wilfully”), 5/17B-10(b) (“wilfully facilitates, aids, abets, assists, or knowingly participates in a known violation”), 130/2 (“knowingly or wilfully”), 130/2a (“knowingly or wilfully”) (2003). As the language in those offenses indicates, Illinois offenses frequently use “wilfully” and “wantonly” coupled with other culpability requirements in a way that would render them superfluous or inconsistent if interpreted in as sections 5/4-5 and 5/4-6 direct.

Currently, there are also no pattern jury instructions defining culpability levels other than intent, knowledge, recklessness, and negligence. *See* ILL. PATTERN JURY INSTRUCTIONS (CRIMINAL) 5.01 *et seq.* (4th ed. 2000). The pattern jury instructions, like current 5/4-5 and 5/4-6, contain language equating “knowingly” with “wilfully,” and “recklessly” with “wantonly.” *See id.* 5.01, 5.01B (4th ed. 2000). Current 5/4-5 and 5/4-6 provide, however, that such equivalence does not exist where a statute “clearly requires a different meaning.” 720 ILL. COMP. STAT. 5/4-5, 5/4-6 (2002). It is unclear, therefore, whether “wilfully” should be considered to be synonymous with “knowingly” for the numerous current offenses specifying both culpability levels with respect to a single element or set of elements. *Cf., e.g.*, 720 ILL. COMP. STAT. 5/12-4.8 (“knowingly and wilfully”), 5/12-9(a) (“knowingly and wilfully”), 5/17B-10(b) (“wilfully facilitates, aids, abets, assists, or knowingly participates in a known violation”); 130/2 (“knowingly or wilfully”), 130/2a (“knowingly or wilfully”) (2003).

offenses so that even inherently less serious offenses, such as inchoate endangerment crimes where nobody is harmed, are potentially subject to the same treatment as homicides.

A number of Illinois offenses, for example, contain special grading aggravations based on the presence or use of a weapon. Yet Illinois also defines a variety of general weapons offenses, including an "armed violence" provision that enhances the penalty for any felony committed while armed. The grading of the special offense aggravation often contradicts the punishment provided by the "armed violence" offense. This has led Illinois courts to find on more than one occasion, and despite several legislative acts specifically aimed at correcting the problem, that the existing scheme for punishing offenses committed while armed violates the Illinois Constitution<sup>35</sup> provision requiring "proportionate penalties" for crimes.<sup>36</sup> Similar findings of unconstitutionality have also occurred in other areas where the law employs both general aggravations that apply to all felonies and specific aggravations within specific offenses, both of which are triggered by the

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35. For example, in *People v. Wisslead*, the defendant was charged with unlawful restraint and armed violence based on detaining his wife with a handgun. 446 N.E.2d 512, 512-13 (Ill. 1983). Under the armed violence statute, the defendant could be held liable for a Class X felony for committing unlawful restraint while armed. See 720 ILCS 5/33A-2, 33A-3; *Wisslead*, 446 N.E.2d at 514. Although unlawful restraint is a lesser included offense of aggravated kidnaping (which includes kidnaping while armed), the latter offense would have only subjected the defendant to liability for a Class 1 felony. *Id.* Because the defendant was subject to a greater penalty for the lesser offense of armed violence based upon unlawful restraint, the Illinois Supreme Court ruled the armed violence statute violated the proportional penalties clause (art. I, § 11) of the Illinois Constitution. *Id.* at 515; see also *People v. Christy*, 564 N.E.2d 770, 774 (Ill. 1990) (finding sentence for armed violence based on kidnaping unconstitutionally disproportionate to sentence for identical offense of aggravated kidnaping).

The legislature apparently attempted to correct this problem by creating the offense of aggravated unlawful restraint, which grades use of a deadly weapon during an unlawful restraint as a Class 3 felony. 720 ILL. COMP. STAT. 5/10-3.1 (2002). Despite this change, an offender is still subject to two vastly different penalties for essentially the same conduct: aggravated unlawful restraint is a Class 3 felony under 5/10-3.1, while armed violence predicated on unlawful restraint remains a Class X felony with an enhanced minimum term under 5/33A-2 and 33A-3.

In *People v. Murphy*, the court rejected the defendant's argument that these offenses created disproportionate penalties for the same conduct. 635 N.E.2d 110, 112-13 (Ill. App. Ct. 1994). The court found that the two offenses were not identical, because armed violence required the use of a "dangerous weapon," while aggravated unlawful restraint required the use of a "deadly weapon." See *id.* at 112. Note, however, that current law does not define the term "deadly weapon," so it is impossible to know how it differs from a "dangerous weapon." Moreover, one would intuitively suppose that using a "deadly weapon" would be more serious than using a "dangerous weapon," but the current grading scheme grades it *less* seriously. Even so, the court found the statute unconstitutional due to the continuing grading disparity between aggravated kidnaping and armed violence based on unlawful restraint. *Id.* at 113.

The legislature acted again to correct this disparity by raising the penalties for aggravated kidnaping (based on use of a weapon) to be comparable to armed violence (Class X felony with enhancements). 720 ILL. COMP. STAT. 5/10-2(b) (2002). However, the disparity described above still exists between the grading of aggravated unlawful restraint and armed violence based on unlawful restraint.

36. ILL. CONST. art. I, § 11 (2004).

same relevant conduct or fact.<sup>37</sup>

Endangerment offenses provide another example. Like many states, Illinois has a general endangerment offense (in this case, called “reckless conduct”), which grades reckless creation of a risk of serious bodily injury or death as a Class A misdemeanor.<sup>38</sup> But Illinois also has numerous offenses covering specific types of behavior that risk injury or death, often with far more serious penalties.<sup>39</sup> Several offenses that criminalize discharging a firearm in the direction of others are graded from a Class 1 felony to a Class X felony with a minimum imprisonment term of twelve years, depending on the potential victim’s occupation and the type of firearm involved.<sup>40</sup> Although it is certainly more serious than most of the other conduct covered by the current offense of “reckless conduct,” the act of firing a gun in another’s direction, without any explicitly required culpability as to causing bodily harm, *and without the requirement of any actual resulting harm or injury*, is *less* serious than, say, knowingly causing a catastrophe, knowingly killing another under the influence of an extreme disturbance, or recklessly killing another person. Yet those other offenses have similar, or even lower, punishment grades. Illinois law grades knowingly *causing*, not just *risking*, a catastrophe—which requires “serious physical injury to 5 or more

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37. See, e.g., *People v. Graves*, 773 N.E.2d 1243, 1248 (Ill. App. Ct. 2002) (finding penalty for “theft by deception” against victims over 60 years old, which provides for a maximum sentence of 7 years, unconstitutionally disproportionate to penalty for “unauthorized theft,” which allows maximum extended sentence of 14 years for same conduct).

38. 720 ILL. COMP. STAT. 5/12-5 (2002).

39. In addition to the firearm-discharge offenses discussed in the text, current Illinois law contains numerous offenses criminalizing creating a risk of bodily harm by specific means or to certain persons, some of which impose punishments that vary greatly from the general offense. See, e.g., 720 ILL. COMP. STAT. 5/12-2.5 (causing “an object to fall from an overpass in the direction of a moving motor vehicle traveling upon any highway”; Class 2 felony), 5/12-4.5 (tampering with food, drugs, or cosmetics; Class 2 felony), 5/12-4.8 (possessing infected domestic animals; petty offense), 5/12-4.9 (inducing or encouraging a child athlete to ingest a drug designed for quick weight gain or loss; Class A misdemeanor, Class 4 felony for repeat offense), 5/12-5.1 (permitting residential real estate to deteriorate; Class A misdemeanor, Class 4 felony for repeat offense), 5/12-5.5 (“gross carelessness or neglect” in operating a steamboat or other public conveyance; Class 4 felony), 5/12-21.6 (“willfully” permitting a child to be endangered; Class A misdemeanor, Class 3 felony for repeat offense); 120/5, 120/10 (hazing; Class A misdemeanor).

40. 720 ILL. COMP. STAT. 5/24-1.2 (2003) grades knowingly discharging any type of firearm in the direction of a building or vehicle one “reasonably should know to be occupied” as a Class 1 felony, but aggravates the offense to a Class X felony where the offense occurs near a school, and to a Class X felony with a minimum imprisonment term of ten years where the firearm is discharged in the direction of certain categories of person (such as peace officers, emergency medical technicians, and teachers). 720 ILL. COMP. STAT. 5/24-1.2-5 is similar to 5/24-1.2, but only applies to “machine guns” and guns equipped with silencers. 720 ILL. COMP. STAT. 5/24-1.2-5(b) grades discharging such a firearm in the direction of an ordinary person as a Class X felony, and aggravates the offense to a Class X felony with a minimum term of 12 years where the firearm is discharged in the direction of certain persons, as noted above. Finally, 720 ILL. COMP. STAT. 5/24-3.2(b) treats recklessly discharging a firearm known to be loaded with an “armor piercing bullet” as a Class X felony where the bullet strikes another.

persons”—as a Class X felony.<sup>41</sup> Similarly, second-degree murder, which requires knowingly causing another’s death under a sudden and intense passion (what most jurisdictions would call voluntary manslaughter), is a Class 1 felony.<sup>42</sup> Recklessly killing another person is a Class 3 felony.<sup>43</sup> Thus, these “causing-harm” offenses end up with equal or lower grades than the less serious “creating-risk-of-harm” offenses of discharging a firearm in the direction of others.

This trend is both intrinsically harmful, in that it treats less serious crimes more harshly than is appropriate, and subtly harmful, in that it calls into question the moral authority and credibility of the criminal code. It promotes disrespect for the law’s commands rather than increasing the law’s deterrent effect. Such grading anomalies are not only contrary to our intuitions regarding correct punishment, but also likely to be counterproductive on their own utilitarian terms. And of course, there is the absolute cost of the added levels of incarceration required by ever-increasing statutory punishments.

In short, American criminal codes have, since their initial codification, shown a tendency to become bigger and bigger. Bigger, however, is not always better. Indeed, it is sometimes worse, for *ad hoc* expansion reduces consistency and undermines the codes’ comprehensiveness in defining offenses.

#### B. WHAT DRIVES DEGRADATION

The underlying causes of degradation relate to the inherent nature of the legislative process. Many amendments and new offenses are enacted for purely political purposes: politicians propose a specific bill to show concern about some apparently serious issue, or to respond to an especially grim or headlined case (e.g., when an offender received little or no punishment). Even in cases where the problem has little to do with any existing legal rule—for example, a jury refused to convict, or a sentencing judge ignored the seriousness of the offense in exercising sentencing discretion—legislators often feel a need to show that they are trying to do something. Often, the drafters and enactors of a new provision do not know or especially care how it relates to the existing code, so amendments might overlap in content with the code while deviating from its form.

Criminal law proposals, however useless or even ridiculous they may be, typically pass because legislators share a common reluctance to appear “soft on crime.” When a new and unnecessary specific offense, such as “library theft,” is proposed, the issue becomes a referendum on

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41. See 720 ILL. COMP. STAT. 5/20.5-5 (2004).

42. See 720 ILL. COMP. STAT. 5/9-2 (2002).

43. See 720 ILL. COMP. STAT. 5/9-3.

whether legislators care about public libraries, not on whether the proposed legislation will actually do anything to combat the problem of theft or will instead have pernicious ramifications for the application of the criminal code's general theft provision. As a result, the rational legislator is likely to vote in favor of the library-theft bill because there is a clear constituency—library users, and taxpayers generally—that will benefit from its enactment, and no constituency to complain about the new provision's more subtle and diffuse drawbacks.

## II. SURMOUNTING THE OBSTACLES TO MODERN CRIMINAL CODE REFORM

Counteracting criminal code degradation will not occur by merely pointing out the problems associated with the current trend and waiting for the powers-that-be to reverse or eliminate them. Every major player in the criminal reform game is likely to believe—mistakenly, as we explain below—that major reform, even if it seems like a good idea generally, runs counter to that individual player's own interests. Accordingly, the identification of degradation as a problem and the suggestion of broad-based criminal law reform is likely to meet substantial resistance. For this reason, actual reform is extremely unlikely without a concerted effort to overcome that resistance by promoting discussion of reform and developing a compelling model code or process to serve as a template for bringing about that reform.

### A. WHY RELEVANT GROUPS OPPOSE REFORM (AND WHY THEY SHOULDN'T)

Efforts toward criminal law reform regularly run up against predictable hurdles. Every major constituency in the criminal justice process has reasons to oppose recodification. As we shall discuss, each group also has reasons to support such a project, but often those reasons are less obvious to the group. The more obvious grounds for rejecting reform therefore tend to drive participants' views.

#### 1. *Prosecutors and Other Law-Enforcement Authorities*

One reason prosecutors oppose reform is because they tend to be overwhelmed by the day-to-day burdens of dealing with their own caseloads. The process of reform appears to be an overwhelming distraction from the press of daily business. As prosecutors would be forced to learn new provisions in addition to what they already know and are comfortable with, reform appears to add only disruption. More importantly, prosecutors are often concerned that the reform process would reopen hard-fought (and usually victorious) legal and political battles.

A somewhat more sinister explanation for prosecutorial resistance to reform is the notion that the prosecutors actually benefit (or think they do) from the fruits of degradation because a complex code with

hundreds or thousands of overlapping provisions provides them with a great deal of discretionary power and increased leverage to induce plea bargains on their terms. The greater the number of offenses available, the greater their discretion as to what and how many offenses are charged. The greater the number and variety of offenses charged, the greater the opportunity to intimidate defendants into plea bargains favorable to the state.

Yet, prosecutors who deal with the criminal code every day should also see the benefits of reform. A new code with fewer, but more general, offenses can close existing loopholes in coverage and eliminate complexities and ambiguities that introduce unpredictability, all of which can be used by defense counsel to create litigable issues that would not otherwise exist.<sup>44</sup> Additionally, clearer laws are easier to explain to juries, and it is prosecutors, not defense counsel, who lose when legal complexities and peculiarities produce jury confusion and hesitation.

The police are likely to share the fears of prosecutors: the potential for chaos with a new, unfamiliar code; the high costs and numerous inconveniences of transitioning to the new code; and the concern about reopening settled legal battles. But the law enforcement community should be excited about reform, especially given the shape reform would likely take today. The current trend is to promote plain-language drafting, which ensures that criminal provisions are clear and comprehensible to non-lawyers.<sup>45</sup> These ideas and concerns were not in vogue in the 1950s and 1960s when the Model Penal Code and its state-code progeny were being developed. Today, however, people are less willing to tolerate legalese and are more likely to demand a criminal code

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44. For example, Illinois courts have allowed defendants to litigate on appeal the extent of force necessary for the robbery offense. *Compare, e.g.,* *People v. Bowel*, 488 N.E.2d 995, 998 (Ill. 1986) (finding defendant took victim's purse by force when he pulled the purse from her arm while holding her hand immobile and turning her body "slightly"), *with* *People v. Patton*, 389 N.E.2d 1174, 1177 (Ill. 1979) (reversing robbery conviction where defendant took victim's purse from her body "without any sensible or material violence to the person," despite the fact that the victim's arm was thrown back "a little bit").

Such problems can arise with respect to General Part provisions as well as specific offense definitions. For example, because of a misreading of Illinois's provision seeking to explain, as the Model Penal Code does using different language, that culpability terms define a hierarchy so that a higher actual level of culpability satisfies a lower required one, the Illinois Supreme Court has reversed convictions where the actual level differs in any way from the required one, as by finding that "recklessness and knowledge are mutually inconsistent culpable mental states." *People v. Fornear*, 680 N.E.2d 1383, 1387 (Ill. 1997) (reversing, as legally inconsistent, convictions for multiple offenses where one required knowledge and another required recklessness) (relying on *People v. Spears*, 493 N.E.2d 1030 (Ill. 1986)).

As noted earlier, overlapping offenses have also led to reversed convictions based on findings of unconstitutionality under the Illinois Constitution's proportionate penalties clause. *See supra* note 35.

45. The Illinois Criminal Code Rewrite and Reform Commission included one member, an English professor, who was specifically designated as the Commission's "plain-language consultant," charged with reviewing proposed provisions for readability.

with provisions that the average layperson or police officer could easily read, understand, and, most importantly, apply in actual situations.

### 2. *Defense Attorneys*

Defense attorneys may share prosecutors' worries about having to learn an entirely new code and effectively starting at square one in gaining familiarity with its statutory provisions. Like prosecutors, they may see life as being too hectic to learn new provisions. Furthermore, established defense attorneys, who often hold positions of leadership in the defense community and are therefore the ones with the authority to dominate or squelch reform efforts, have spent much of their careers learning all "the angles" under the current code in order to acquire the expertise that gives them a market advantage over their younger competitors. While this may not be a conscious calculation on their part, it may still shape their lack of enthusiasm for general code reform.

Even so, the defense bar may ultimately be less opposed to reform than prosecutors, because it will tend to have less to lose, given that the prosecutorial side of the debate would probably have won more past political battles. In fact, defense attorneys should actively embrace reform because they, like prosecutors, would get the benefit of clarity. The lack of complex and overlapping offenses would decrease the potential for prosecutorial manipulation.

One of the special virtues of a broad recodification effort is the opportunity it provides to review the grading system as a whole and consider how all the offenses relate to one another, rather than considering individual offenses in a vacuum. This kind of review enables the parties to focus not only on specific offenses, but also on how to establish a rational, proportionate grading scheme among all offenses. The opportunity to engage in such a broad review of relative offense grading is also likely to benefit the defense (and the taxpayers who ultimately foot the bill for extended prison terms) by reducing the number of new offenses with high penalties that reflect the political heat of the moment.

### 3. *Judges*

Judges, especially appellate judges, have invested both time and careers developing the case law that interprets existing code provisions; these efforts are sometimes seen as being wiped out by the enactment of new statutes. As a result, judges are naturally reluctant to have the legislature exercise its superior law-making authority—for the less the legislature acts, the more power judges have. Any legislative action to close statutory loopholes or to resolve statutory ambiguities only emphasizes the judiciary's relative lack of power.

Yet judges too should see important benefits of reform. A cleaner, less ambiguous code should be easier to administer. Its clear terms



should facilitate plea-bargaining, help parties understand the legal rules, and reduce judges' dockets. Trial courts will be able to interpret or apply statutes more quickly and with a lower risk of reversal. This is especially true with respect to jury instructions, whose clarity or opacity will tend to track that of the underlying code provisions. When codes are unnecessarily complex—or poorly or hastily written, as is often true of the new special offenses that fail to employ the code's general vocabulary—jury instructions are more likely to contain weaknesses that risk reversal on appeal.<sup>46</sup>

Put simply, code reform is not jettisoning decades of judicial thought, but rather building on it. Smart code drafters look closely at the case law to identify the present code's ambiguities and often borrow solutions based on judicial experience and wisdom.

#### 4. Legislators

Legislators also tend to oppose general recodification efforts because no one wants to lose her own pet provisions in the current law. Yet legislators should see a broad reform project as an enormous opportunity, for it gives the legislature the potential to firmly reassert its institutional powers and prerogatives. Statutory interpretations developed through judicial decisions do not necessarily track the original legislative design.<sup>47</sup> Moreover, many legislators, if they understand how

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46. For example, an amendment to the Illinois reckless-homicide offense sought to establish that recklessness "shall be presumed" for persons driving under the influence of alcohol and drugs. *See* 720 ILL. COMP. STAT. 5/9-3(b), 9-3(c) (2002). At least one court has held that this language creates an unconstitutional mandatory presumption. *See* *People v. Pomykala*, 759 N.E.2d 916, 919 (Ill. App. Ct. 2001) ("Here, we find the statute and jury instructions clearly established a mandatory presumption. . . . Such a burden shift to the defendant is always unconstitutional.").

*Cf.* ILL. PATTERN JURY INSTRUCTIONS (CRIMINAL) 13.38A (4th ed. 2000) (refusing to instruct jury as to rule in 720 ILL. COMP. STAT. 5/17-1(B)(d) (2003) enabling use of certain "prima facie evidence," because "[t]he term is a legal one which . . . might be read by a jury as creating a type of presumption that is constitutionally impermissible in criminal cases" (citing *People v. Gray*, 426 N.E.2d 290, 293 (Ill. App. Ct. 1981))).

47. We offer here just two examples of the courts' failure to recognize legislative intent, but there are various others. First, the 1961 Illinois Code intended to abolish any requirement of "malice" for the offense of murder. *See* 720 ILL. COMP. STAT. ANN. 5/9-1, Committee Comments—1961, at 16 (West 2002) ("Section 9-1 is intended . . . to avoid the use of the difficult 'malice' language. . . . The words relating to the mental states of intent and knowledge are used in the sense in which they are defined in Article 4."); *People v. Jeffries*, 646 N.E.2d 587, 594 (Ill. 1995) ("Because the term 'malice aforethought' was not susceptible to clear definition, the legislature eliminated any reference to it in the definition of murder in the new criminal code." (citations omitted)).

Nevertheless, Illinois courts occasionally suggest that malice remains an element of murder. *See, e.g.,* *People v. Stokes*, 689 N.E.2d 625, 630 (Ill. App. Ct. 1997) ("To sustain a charge of attempt to murder, it is sufficient to discharge a weapon in the direction of another individual, either with malice or total disregard for human life."); *People v. Medrano*, 648 N.E.2d 218, 223 (Ill. App. Ct. 1995) ("Murder is the unlawful killing of another person with malice aforethought."); *People v. Jerome*, 564 N.E.2d 221, 225 (Ill. App. Ct. 1990) ("In drafting the murder . . . statute, the legislature intended to retain the common-law concepts of express and implied malice but to replace those terms with the more modern and less ambiguous terms of intent and knowledge respectively."). As one Illinois court

the system works and are honest with themselves, recognize the need for recodification. They know how political pressures work to create perverse incentives. What they might also consider is how the discussion and development of a new code creates new political opportunities. To put the issue in a more cynical political light, legislators ought to see a new code not as simply a loss of old “deals,” but as an opportunity to employ their skills and authority in resolving conflicting interests through the striking of new deals.

Making things worse, each of these groups—prosecutors, defense attorneys, judges, and legislators—is highly suspicious of the others. If one group overcomes its initial self-interested reluctance and decides to support general recodification, the other groups often take this as a sign that recodification would help that group at the expense of the others. As a result, the groups that have not decided to support recodification are instinctively inclined to oppose it.

#### B. HOW ENTRENCHED OPPOSITION FRUSTRATES REFORM EFFORTS

When it comes to the existence of entrenched opposition to criminal code reform, we know of what we speak. We have witnessed firsthand, in both Illinois and Kentucky, the tendency of various participants in the criminal justice and political systems to object to the idea of reform itself, even before any specific reforms have been discussed or proposed.

In Illinois, the code reform project had barely gotten off the ground when prosecutors expressed their opposition and were unwilling to devote manpower or resources to assist in the project, even though their participation would have assured them a voice within the decision-making group. Judges were also hostile to the prospect of developing a new code. They were both unwilling to part with their own case law and

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has observed, this reading “diminishes both the clear language of these . . . statutes and the legislative intent in enacting them.” *People v. Newbern*, 579 N.E.2d 583, 595 (Ill. App. Ct. 1991).

Second, the 1961 Illinois Code, like the Model Penal Code, establishes a “substantial step” test as the conduct requirement for an attempt. 720 ILL. COMP. STAT. 5/8-4(a) (2002). However, although the substantial step test’s proper focus is on how far an actor has gone from the *beginning* of the causal chain leading to the offense, Illinois courts have sometimes read the provision as retaining the prior “dangerous proximity” test, which focuses on how close to the *end* of the causal chain he has come. See *People v. Smith*, 593 N.E.2d 533, 537 (Ill. 1992); *People v. Terrell*, 459 N.E.2d 1337, 1341 (Ill. 1984) (quoting *Hyde v. United States*, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting)). For example, in *Smith*, the Illinois Supreme Court reversed a conviction for attempted robbery, finding that the defendant’s acts were not a “substantial step” because it would be “improper to conclude that defendant came within a dangerous proximity to success.” 593 N.E.2d at 537. The Court so held as a matter of law, although whether a defendant has taken a “substantial step” toward committing an offense should normally be a question for the jury. *Id.* Rather than asking whether there was sufficient evidence for the jury to find that the defendant had taken a substantial step *toward* the offense, the Court engaged in an independent inquiry as to how far *away* the defendant was from completing the offense. *Id.* That analysis misreads the statute—and also improperly takes the substantial step determination away from the jury.

uninterested in the prospect of having to make an effort to read and learn new statutes. Because so many people were antagonistic to the entire project, it was nearly impossible to engage in a serious discussion about specific reforms. Furthermore, few were interested in contributing the time or effort needed to participate in a drafting work group, in part because they had already made a political determination that there was enough resistance to block criminal code reform.<sup>48</sup>

In Kentucky, the process worked slightly better, primarily because a suitable preexisting reform infrastructure already existed: the constitutionally-created Criminal Justice Cabinet had created a Criminal Justice Council to perform criminal justice oversight and reform. A small group was established to spearhead the code reform project and to engage in discussions. But even there, the prosecutors withdrew from the drafting effort to signal their opposition to any kind of broad code reform. Ultimately, the project did not get mired down in procedural issues or broad questions about the proper extent of reform and was able to move on to substantive proposals and debate because there was significant interest by other parties, an existing vehicle for the project work, and willing participants interested in the initial drafting and decision-making process. Nevertheless, the likelihood of success remains unclear because of the ongoing opposition of prosecutors and the uncertainties of the legislative process.<sup>49</sup>

### C. HOW TO OVERCOME THE OPPOSITION TO REFORM

We don't claim to have all the answers about how to accomplish reform (neither the new Illinois Code nor the new Kentucky Code is on the books yet) But our experiences have given us some ideas on how to at least mitigate, if not fully eliminate, interested parties' natural disinclination to support broad criminal code reform.

One possibility relates to the structure and process of state-level reform efforts. There are two crucial steps that must be taken immediately at the beginning a state code reform project. First, participants must be given, by someone whose opinion they trust, the sales pitch we set forth above in section II.A., to explain and persuade

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48. In fact, the proposed Illinois Criminal Code hammered out among those groups who were willing to participate—see FINAL REPORT OF THE ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION (STATE OF ILLINOIS 2003) (two volumes), available at <http://www.law.upenn.edu/fac/phrobins/illinois/>—might have succeeded despite the resistance, but for the ensuing political and legal troubles of the then-sitting Governor, George Ryan, who declined to seek re-election. The new administration, in addition to having its own legislative priorities, saw broad criminal code reform as an agenda item of the preceding administration, and therefore something from which to distance itself.

49. As in Illinois, the Governor's seat has changed hands, and the newcomer saw little appeal to a project started by his predecessor. One of the many political realities that hurts criminal code reform is the fact that, because it commonly takes quite long, it is easy for the political landscape to change before the process is complete.

them that their visceral opposition to reform ignores or downplays the benefits such a project may provide for them as a group, not just “criminal law” in the abstract. Second, the reform project must be organized so that each interest group feels it has a voice. Each group should be encouraged to contribute to the development and revision of the proposed new code, so that they will feel they have a personal stake and interest in the code when it is complete.

In short, participants must be convinced that a reform project represents an enormous *opportunity* for them, not a threat. In our experience, most of the actual participants in the reform process initially view their participation, at best, as a chore—merely an added burden on top of the many pressures and stresses imposed by their “real” jobs. The crucial task at the outset of such a project is to make clear to these people that the project has huge potential to improve both the law and their own jobs.

Another possibility, operating outside the political process of individual states, is to pursue a major independent model criminal code reform exercise (such as a second-generation Model Penal Code) that could spur reform in the states.<sup>50</sup> As it did in the 1960s and 1970s, a Model Code from the well-respected American Law Institute (ALI) could help prompt the reform that individual states find difficult to undertake on their own. Few states have the resources or the expertise to do the kind of broad and thoughtful recodification work from scratch that the ALI can do. Furthermore, the promulgation of a Model Penal Code (Second) would provide a useful public acknowledgment that our forty years of experience with the Model Code has revealed its flaws and that, even with regard to its well-drafted provisions, times and perspectives change.<sup>51</sup>

Those states whose codes are based on the Model Penal Code—essentially all modern American criminal codes—cannot easily ignore the fact that their foundational model has itself been redone by its drafters. Indeed, it is likely that thoughtful Model Penal Code (Second) drafters would study and learn much from the common variations on the Model Code’s formulations created by the states that used the Code as their model. This reliance would give a Model Penal Code (Second) even more credibility and influence with the states in promoting subsequent state recodification.

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50. See Paul H. Robinson & Michael T. Cahill, *Model Penal Code Second: Good or Bad Idea? Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169 (2003).

51. We have both written before about the revealed shortcomings of the Model Penal Code. See Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for a Model Penal Code Second*, 1 OHIO ST. J. CRIM. L. 599 (2004); Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 EUFF. CRIM. L. REV. 225 (1997).

### III. STRUCTURING FUTURE CRIMINAL CODE REFORM

Let us assume that individual states pick up the cause of reform, or that the ALI answers our clarion call and develops a Model Penal Code (Second) that states implement. What happens the day after any given state's wonderful new criminal code is enacted and takes effect? The same degradation-promoting forces we have identified above would still exist. How do we avoid, ten or twenty years after enactment of the new code, being in the same unfortunate position we are in today?

The single most significant reform to counteract the forces of degradation might be to reform the criminal code amendment process. Experience has shown that we cannot count on legislators to avoid the present degradation process. They have a valid interest in showing their care about criminal justice issues that their constituents want them to address. The question is whether we can channel that pro-change energy into something more productive.

In this Part, we offer some suggestions based on our observations in Parts I and II regarding the underlying causes of criminal code degradation.

#### A. INTERNAL CHANGE: REFORMING THE LEGISLATIVE PROCESS FROM WITHIN

First, legislators need to recognize that a criminal code presents unique legislative problems and they need to develop specific institutional expertise regarding criminal law. The typical piece of state legislation has as its audience lawyers or specialists in the affected institutions; criminal law legislation is unusual in that its audience is the average citizen. Effective communication to that audience presents special issues not shared by other areas of the law, as reflected by the fact that the legality principle and its many articulating doctrines have application only to criminal law.<sup>52</sup> Procedures must be developed to ensure that when a legislator adds a new provision, the provision is written in language consistent with, and with an understanding of, the existing criminal code. This may require developing within the legislative drafting process some long-term institutional expertise regarding the underlying principles and structure of the criminal code.

It also may help to add certain provisions to the criminal code. For example, one or more provisions might explicitly signal the code's operational structure in order to provide an educational outline of the code's organization for reference by future reformers.<sup>53</sup> Other provisions

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52. For a discussion of the doctrines and rationales of the legality principle and its unique application to criminal law, see PAUL H. ROBINSON, *CRIMINAL LAW* § 2.2 (1997).

53. See, e.g., KY. PENAL CODE § 501.201 (Proposed Official Draft 2003) (explicitly describing the relation between Code's offenses, defenses, and imputation rules); ILL. CRIM. CODE § 201 (Proposed

might collect and advertise the code's defined terms, in order to promote their use in subsequent amendments.<sup>54</sup>

#### B. SYSTEMIC CHANGE: CREATING A STANDING CRIMINAL LAW COMMISSION

A more radical proposal is to create a standing commission to oversee and review criminal law reform. The commission does not need to involve a full-time obligation, particularly if it is able to retain a small permanent staff of just one or two attorneys. Part-time positions increase the possibility that the commission can attract the most competent people in the state.

A standing commission would provide several advantages. It would ensure that criminal law decisions are made, or at least approved or vetted, by people with expertise whose long-term experience with the code would ensure consistency. The commission could issue "impact statements" that analyze the likely effect of proposed amendments to the code, and could provide specific draft language in proper code form for a requested amendment. An unelected commission of criminal law experts would be superior to the legislature not only in its knowledge and expertise, but also in its freedom from political pressure. If a new proposed offense is completely unnecessary and potentially counterproductive, the commission could say so publicly and provide political cover for legislators who wish to vote it down without drawing the politically lethal criticism of being "soft on crime." Indeed, the prospect of an honest and independent commission of experts publicly pronouncing bad legislation to be foolish might deter such legislation from being proposed in the first place. Legislators would have an incentive to run their proposals by the commission beforehand, and bad proposals could be eliminated quietly before seeing the light of day.

Such a scheme would require politicians to give up some of their current opportunities for political grandstanding but it is not unreasonable to think that they might do this voluntarily. Consider, for example, that the U.S. Congress abrogated a great deal of its own authority over sentencing issues by creating the U.S. Sentencing Commission. Of course, Congress also continues to enact statutory mandatory minimum sentences that undercut the authority of the Sentencing Guidelines.<sup>55</sup> Even so, the Commission's efforts have

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Official Draft 2003) (same).

54. See, e.g., KY. PENAL CODE § 500.107 (Proposed Official Draft 2003) (collecting all defined terms used in Code); ILL. CRIM. CODE § 108 (Proposed Official Draft 2003) (same). The proposed Codes also collect, at the end of each specific Code article, all defined terms used in that article, whether the definition itself appears within the article or elsewhere in the Code. See, e.g., KY. PENAL CODE § 512.1206 (Proposed Official Draft 2003) (collecting all defined terms used in assault article); ILL. CRIM. CODE § 1206 (Proposed Official Draft 2003) (same).

55. The recent battles over the Feeney Amendment suggest that some politicians would like to take back some of the power that was delegated to the Commission by the Sentencing Reform Act of

profoundly changed the preexisting system in an area where Congress had ultimate authority but was willing to restrain its own power to advance the interests of justice.<sup>56</sup>

C. POLITICAL OPPORTUNITY CHANGE: GIVING COMMENTARY THE FORCE OF LAW

A final possibility is for the legislature to simultaneously adopt an official commentary to a new criminal code, perhaps similar in form to the commentary for the Model Penal Code, and give that commentary legal force. This would not only provide the traditional benefits of adopting a code commentary, which are enhanced if the commentary is kept up to date, but it would also create an opportunity for political action short of changing the code. If the legislature wanted to make clear that specific conduct fell within the terms of an existing offense, it could add an illustration to the commentary to this effect instead of creating an entirely new offense with elements that would almost entirely replicate the already-existing offense. For example, theft of a delivery-container,<sup>57</sup> or endangerment by feeding a child athlete a drug designed for quick weight gain or loss,<sup>58</sup> could simply be given as commentary examples of existing offenses, rather than being enacted as new and unnecessary distinct offenses.

Furthermore, individual legislators could show concern for, and could be seen as doing something to address, the criminal problem of the day by passing legislation that amends the official commentary rather than making an unnecessary code change that could harm rather than help the code's operation. This would make it easier to maintain the original code's clarity, consistency, and austerity over time, with fewer new offenses being added, less overlap, and less introduction of confusion and contradiction.

In our work to revise the Kentucky criminal code, a similar proposal met with a good deal of support, somewhat to our surprise. That interest may well be an indication that even legislators understand the

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1984. The original proposal, for example, would have taken away authority to give a downward sentencing departure for reasons other than those enumerated, and would have dramatically scaled back the list of enumerated reasons. See Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 296 & n.2 (2004).

56. Readers should not take this reference to the United States Sentencing Commission as a statement of approval of the Commission's work. One of us is on record as the sole dissenter to the promulgation of the Commission's guidelines. See *Dissenting View of Commissioner Paul H. Robinson to the Promulgation of Sentencing Guidelines by the United States Sentencing Commission*, 52 FED. REG. 18,121 (1987), reprinted in 41 CRIM. L. REP. 3174-85 (1987). We mean to cite approvingly only the example of the Sentencing Reform Act of 1984, which, despite its misguided implementation by the Commission, was an inspired piece of legislation that had, and still has, the potential to bring uniformity and fairness to federal criminal sentencing.

57. See *supra* note 16.

58. See *supra* note 39.

detrimental dynamics of the current crime legislation process and are seeking an alternative. Nor would adoption of an official commentary be such a radical idea: many state codes, including that of Illinois, have supporting commentary, or did when they were first enacted.<sup>59</sup> The proposal here is simply to have that commentary maintained and updated as documents of continuing usefulness rather than left to become out of date and increasingly irrelevant.

Ideally, a state might adopt several of the reforms we suggest above. But our larger point is that because the greatest source of problems in modern American criminal codes is degradation rather than the existence of basic flaws in their structure or an absence of needed coverage, the most valuable contribution a second wave of criminal code reform might make is to develop and propose a variety of structural reforms to avoid criminal code degradation in the future.

#### CONCLUSION

Evidence of the continuing and evidently accelerating degradation of criminal codes, and the serious problems it creates is overwhelming. Reversal of this trend and the prevention of future degradation will require major reforms, but no single magic moment of reform will do the trick. Although a fundamental code revision—the hallmark of the last major wave of criminal law reform—can slow future code degradation, a new code cannot fully protect itself against this problem. Only significant (but feasible) structural changes and ongoing vigilance will provide any chance of keeping American criminal codes from collapsing under their own weight.

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59. See generally 720 ILL. COMP. STAT. ANN. (including original Commentary for 1961 Criminal Code) (West 2000).