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How Criminal Code Drafting Form Can Restrain Prosecutorial and Legislative Excesses: Consolidated Offense Drafting

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HOW CRIMINAL CODE DRAFTING FORM CAN RESTRAIN
PROSECUTORIAL AND LEGISLATIVE EXCESSES:
CONSOLIDATED OFFENSE DRAFTING

Paul H. Robinson,* Matthew G. Kussmaul,** and Muhammad Sarahne***

Abstract

Solving criminal justice problems typically requires the enactment of new rules or the modification of existing ones. But there are some serious problems that can best be solved simply by altering the way in which the existing rules are drafted rather than by altering their content. This is the case with two of the most serious problems in criminal justice today: the problem of overlapping criminal offenses that create excessive prosecutorial charging discretion and the problem of legislative inconsistency and irrationality in grading offenses.

After examining these two problems and demonstrating their serious effects in perverting criminal justice, the essay proposes a particular method of drafting criminal offenses – consolidated offense drafting – and then shows how this drafting approach is the best and perhaps the only effective means of solving the problems. Potential political resistance to the proposal is discussed.

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Solving criminal justice problems typically requires the enactment of new rules or the modification of existing ones. But there are some serious problems that can best be solved simply by altering the way in which the rules are drafted rather than by altering their content. This is the case with two of the most serious problems in criminal justice today: the problem of overlapping criminal offenses that create excessive prosecutorial charging discretion and the problem of legislative inconsistency and irrationality in grading offenses and variations of an offense.

After examining these two problems, this essay proposes a particular method of drafting criminal offenses – consolidated offense drafting – and then demonstrates how this drafting approach is the best and perhaps the only effective means of solving the problems.

I. The Problem of Excessive Prosecutorial Power Created by Overlapping Offenses

It is not uncommon in American criminal codes for a single criminal act to violate several different criminal statutes. Sometimes this makes good sense: a person who commits murder by burning down a house with the victim inside is properly charged and convicted of both murder and arson. The killing and the property destruction by fire are separate and distinct harms, each of which deserves punishment.

Unfortunately, it is commonly the case that American criminal codes contain multiple offenses for a single criminal act where the offenses are simply overlapping prohibitions of the same bit of wrongdoing. For example, each of the different offenses may contain one aggravating factor for the same base harm. An offender who steals a gun from a state museum has committed a single wrong. In grading the seriousness of the theft, we may want to take special account of the fact that the property stolen belongs to the state, the victim of the offense was a museum, a charitable institution, and the item stolen was a firearm, but it hardly makes sense for the law to treat the person as having committed three (or more) separate offenses by allowing the thief to be charged under multiple overlapping statutes: the general theft statute, which probably has different grades based upon the value of the property; a special theft of state property offense; a special theft from museum offense; and a special theft of firearm offense.

A. Examples of Overlapping Offenses

Yet these kinds of overlapping offenses are common in American criminal codes. For example, in Federal law the proliferation of interrelated fraud offenses makes it a regular practice for a defendant accused of participation in a single scheme to be charged with a handful of overlapping offenses. In August 2019 the Department of Justice charged Michael Hild with wire fraud,¹ bank fraud,² securities fraud,³ and conspiracy⁴ to commit all three offenses for orchestrating a scheme to deceive lenders (including a bank) to Live Well Financial,

¹ 18 U.S. Code § 1343 (carrying a maximum sentence of 30 years where, as here, the fraud “affects a financial institution”).

² 18 U.S. Code § 1344 (carrying a maximum sentence of 30 years).

³ See 15 U.S. Code §§ 78j (defining violation by reference to 17 Code of Federal Regulations § 240.10b-5), 78ff(a) (criminal penalties, including maximum sentence of 20 years).

⁴ 18 U.S. Code § 1349.

of which Mr. Hild was CEO, by inflating the value of the company's bond portfolio.⁵ The fact that a bank was affected aggravated Mr. Hild's situation both by allowing a bank fraud charge *and* increasing the maximum sentence of his wire fraud charge.⁶

Indeed, the Department of Justice had even more fraud offenses available that it could have charged: the federal criminal code's general offense for "Frauds and swindles" (which, like wire fraud, would have carried an aggravated maximum sentence of 30 years because the fraud "affects a financial institution");⁷ and a Title 18 "Securities and Commodities Fraud" offense (carrying a maximum sentence of 25 years) that (as to registered securities) is coextensive with the Title 15 offense under which Mr. Hild was charged.⁸

The Model Penal Code, promulgated in 1962 by the American Law Institute, created a modern criminal code format that significantly reduced such overlapping offenses.⁹ And the three-quarters of the states that recodified their criminal codes in the following several decades generally adopted this non-overlapping approach.¹⁰ Unfortunately, as these Model Code jurisdictions created new offenses or added new grading distinctions for an offense, they typically did so not by integrating the refinement into the existing offense structure but rather by creating an entirely new offense. That is, they layered the new offense or new offense grading factor on top of the existing offense structure.¹¹ This unfortunate legislative habit re-created the problem of overlapping offenses in even the modern Model Penal Code-based jurisdictions. And, of course, in non-model Penal Code jurisdictions, there was rarely any effort to avoid the creation of overlapping offenses.

⁵ See *Former CEO of Live Well Financial Charged in \$140 Million Bond Fraud Scheme*, Department of Justice Press Release (Aug. 29, 2019), <https://www.justice.gov/usao-sdny/pr/former-ceo-live-well-financial-charged-140-million-bond-fraud-scheme>; United States v. Michael Hild, Indictment Document, <https://www.justice.gov/usao-sdny/press-release/file/1198561/download>.

⁶ In parallel proceedings, the Securities and Exchange Commission charged Mr. Hild under various civil anti-fraud provisions for the same scheme, seeking a permanent injunction, financial penalties, and an officer and director bar against him. See *SEC Charges Private Lender and CEO with Fraudulent Mismarking Scheme*, Securities and Exchange Commission Press Release (Aug. 29, 2019), <https://www.sec.gov/litigation/litreleases/2019/lr24579.htm>; United States Securities and Exchange Commission v. Live Well Financial, Inc. and others, Complaint Document (Aug. 29, 2019), <https://www.sec.gov/litigation/complaints/2019/comp24579.pdf>.

⁷ 18 U.S. Code § 1341.

⁸ 18 U.S. Code § 1348. Furthermore, if the acts underlying Mr. Hild's wire fraud charge had been his second such act within ten years, those acts would form a "pattern of racketeering activity" opening Mr. Hild up to racketeering charges. See 18 U.S. Code §§ 1962(c) (defining offense), 1961(1)(B) (defining "racketeering activity" to include conduct indictable as wire fraud under 18 U.S. Code § 1343) & (5) (defining "pattern of racketeering activity"), carrying a maximum sentence of 20 years, 18 U.S. Code § 1963. The same conduct may also expose a defendant to punitive enforcement actions by government agencies. For example, where securities fraud is involved, a defendant is usually also exposed to parallel enforcement for the same conduct by the Securities and Exchange Commission—which, although technically engaged in civil enforcement, wields punitive measures such as fines, permanent injunctions, and various types of bars in addition to purely remedial measures such as disgorgement of ill-gotten gains and restitution.

⁹ Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100(3) J. Crim. L. & Criminology 709, 711-712 (2010) (hereinafter *The Modern Irrationalities*).

¹⁰ *Id.* at 711; Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, U. Louisville L. Rev. 173, 173 (2015) (hereinafter *The Resurrection*).

¹¹ Paul h. Robinson and Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56(4) Hastings L. J. 633, 635-644 (2005) (hereinafter *The Accelerating Degradation*).

The extent of such layered-on additions is enormous, and accelerating.¹² For example, it is not uncommon today for Model Penal Code jurisdictions to have codes that are four, five, or six times longer than their original Model Code-based code.¹³ As the number of new criminal statutes has increased, so too has the problem of overlapping offenses.

For example, Mark Farmer, a 36-year-old convicted felon from Kentucky, was arrested with a defaced sawed-off shotgun in his possession. He was charged¹⁴ with both possession of a defaced firearm (a class A misdemeanor punishable by three months to one year in prison and fines),¹⁵ and possession of a firearm by a convicted felon (a class D felony punishable by one to five years in prison and fines).¹⁶ Had he been arrested with that weapon in his pocket on a school's campus, he could have been prosecuted under two additional offenses: carrying a concealed deadly weapon (a class A misdemeanor),¹⁷ and unlawful possession of a weapon on school property (a class D felony).¹⁸ Nothing in Kentucky's penal code appears to prohibit finding such an offender guilty of all four of these offenses.¹⁹ There are not four separate wrongdoings here but rather a single wrongdoing with four different factors that should each be taken into account to determine its overall seriousness.

Similarly, in Delaware, a person who recklessly inflicts bodily injury upon an elderly person who suffers from a mental or physical disability, by hitting him with a car, may be charged with vehicular assault in the third degree (a class B misdemeanor punishable by up to six months in prison, besides fine and restitution),²⁰ abuse of an adult who is impaired²¹ (a class A misdemeanor punishable by up to one year in prison, in addition to other penalties), and a crime against a vulnerable adult²² (a class G felony, punishable by up to two years in prison). There is nothing in Delaware's criminal code that would seem to prohibit conviction for all three offenses.

In New Jersey, a person who provides an arrestee with a tool to help him escape from a detention facility may be prosecuted for escape implements,²³ permitting or facilitating escape²⁴ (both crimes of the third degree, punishable by three to five years in prison and a fine), and obstructing administration of the law²⁵ (a crime of the fourth degree if the offender obstructs the detection, investigation or prosecution of another, punishable by a maximum 18 months in prison and a fine).

¹² *Id.*

¹³ *Id.* at 635-636. See also Paul H. Robinson, Matthew Kusmaul, Ilya Rudyak, and Criminal Law Research Group, Criminal Law, Report of the Delaware Criminal Law Recodification Project 114-115 and 400-402 (2017), https://scholarship.law.upenn.edu/faculty_scholarship/1746) (hereinafter Delaware Report).

¹⁴ Matthew DeVault, *Rosine Man Faces Defaced Weapon, Drug Related Charges*, 14 News (Jun. 8, 2019), <https://www.14news.com/2019/06/08/rosine-man-faces-defaced-weapon-drug-related-charges/>

¹⁵ KRS 527.050.

¹⁶ KRS 527.040.

¹⁷ KRS 527.020.

¹⁸ KRS 527.070.

¹⁹ KRS 505.020.

²⁰ Del. Code Ann. tit. 11, § 628.

²¹ Del. Code Ann. tit. 31, § 3913.

²² Del. Code Ann. tit. 11, § 1105.

²³ N.J. Stat. Ann. § 2C:29-6.

²⁴ N.J. Stat. Ann. § 2C:29-5.

²⁵ N.J. Stat. Ann. § 2C:29-1.

In Illinois, if a person possesses a motor vehicle, whose value is \$50,000, knowing it has been stolen from a police department in the state, he may be prosecuted for theft²⁶ (a class 1 felony, because the theft is of governmental property that exceeds \$10,000 but not \$100,000, punishable by four to fifteen years in prison and up to \$25,000 fine), unlawful possession of a stolen motor vehicle²⁷ (a class 2 felony, punishable by three to seven years in prison, and up to \$25,000 fine), and aggravated possession of a motor vehicle²⁸ (a class 1 felony). Illinois' criminal code permits prosecution of multiple offenses violated by the same conduct, and does not prevent convictions for all of these offenses.²⁹ It was left to the courts to develop doctrines that might limit conviction for multiple overlapping offenses.³⁰

B. Why Are Overlapping Offenses Problematic?

Such overlapping offenses are problematic for a variety of reasons. First, they undermine the rule of law. While it is properly for the legislature to define what is criminal and the relative seriousness of each offense, multiple overlapping offenses essentially transfer that criminalization and grading authority to the discretion of the prosecutor (and sometimes to the court). The prosecutor is free to pick which of the overlapping offenses she will charge, and thus which offense grade will apply. (Most criminal codes, and essentially all modern codes, have a system of offense grading, such as first-degree felony, second-degree felony, etc., with a maximum authorized sentence attached to each offense grade.³¹) Or, the prosecutor may decide ad hoc to charge any combination of the multiple overlapping offenses.

Second, overlapping offenses create the danger of punishment beyond what is deserved if the prosecutor chooses to prosecute several or all of the available offenses. In the examples above, no one would suggest that punishment proportionate to the seriousness of the offense conduct can be reached by treating each of the overlapping offenses as an independent wrong with the offender punished separately for each of them. What we are left with when a prosecutor takes the multiple-overlapping-offense path is the very messy task of trying to have a sentencing judge disentangle the extent of the overlap.

A few jurisdictions adopted a statutory provision like Model Penal Code section 1.07, which prevents conviction for certain multiple related offenses;³² but even in these minority jurisdictions, the statutory provision will be of limited help to a sentencing judge. Most of its provisions prevent conviction for multiple related offenses different than those creating the

²⁶ 720 ILCS 5/16-1.

²⁷ 625 ILCS 5/4-103(a)(1).

²⁸ 625 ILCS 5/4-103.2(a)(6).

²⁹ 720 ILCS 5/3-3.

³⁰ See, e.g., *People v. Harvey*, 211 Ill.2d 368 (2004), in which the state's Supreme Court reversed the conviction of the defendant of four counts of unlawful possession of stolen motor vehicle, as the possession of the four vehicles constituted one count of aggravated possession.

³¹ See, e.g., 18 Pa. Stat. and Cons. Stat. Ann. § 106, Tex. Penal Code Ann. § 12.21-12.35, or Del. Code Ann. tit. 11, § 4205.

³² See Model Penal Code § 1.07 comment pages 101-136. Similarly, several jurisdictions attempt to address the problem of overlapping offenses by statutorily adopting, in their penal codes, the double jeopardy rule, according to which a defendant may not be convicted of greater and lesser included offenses for the same underlying conduct. See, e.g., Del. Code Ann. tit. 11, § 206 (Delaware), N.J. Stat. Ann. § 2C:1-8 (New Jersey), and Ky. Rev. Stat. Ann. § 505.020 (Kentucky).

problems described above. For example, it prevents conviction for both the substantive offense and an inchoate offense toward that substantive offense,³³ prevents conviction for offenses that require inconsistent findings of fact,³⁴ and prevents conviction for both an offense and a lesser included offense.³⁵ But these multiple-offense limitations do not avoid the problem of overlapping offenses. The troublesome overlap that we discussed here are instances where each of two offenses focus on a different aggravating factor, for example. Neither is a lesser included offense of the other. There distinct offenses but overlapping.

Another reason judicial discretion cannot solve the overlapping offense problem is that judges commonly have only a binary choice. They can prevent conviction for both of the overlapping offenses, but that has the effect of completely ignoring the part of the dismissed offense that is not part of the overlap. For example, where to two offenses each focus on a different aggravating factor, one of the aggravating factors will now be entirely ignored. Alternatively, the judge could allow conviction for both offenses but then have the sentences run concurrently. But again, that completely ignores the non-overlapping part of the offenses. Each aggravating factor ought to provide some kind of additional aggravation of the sentence.³⁶ Or, the judge could have the sentences run consecutively, but that invites excessive punishment by treating the two offenses as if they were entirely separate, ignoring their overlap.³⁷

The larger point here is that any judicial exercise of discretion as a means of solving the problem is just another mode by which the legislative role of determining the proper grading for an offense may be usurped. The legislative role is here being usurped by the judge rather than the prosecutor. It is the legislature that should be making the grading judgment as to what grading factors are more serious or less serious, or whether some factors ought to merge, while other factors ought not.

Third, the use of overlapping offenses creates an inappropriate power for prosecutors to use threats of excessive punishment to extract plea bargains. Charging the offender with four separate offenses that substantially overlap with one another threatens enormous total liability exposure, an exposure far beyond the amount of liability and punishment that the offender deserves. It is the overlapping nature of the offenses that creates the exposure to excessive liability and punishment, yet it is this very threat of excessive punishment the gives the prosecutor the leverage to get a “better” plea.

³³ Model Penal Code § 1.07(1)(b).

³⁴ Model Penal Code § 1.07(1)(c).

³⁵ Model Penal Code § 1.07(1)(a)&(4).

³⁶ A clever judge might try to game the system by giving concurrent sentences but increasing the sentence length of the more serious offense in order to take into account the aggravating factor that is the focus of the other offense (with a concurrent term). But, setting aside the obvious problem of unjustified disparity among judges, it would be difficult to justify such a system as an acceptable solution to the overlap problem.

³⁷ The federal sentencing guidelines provide a mechanism to somewhat reduce the extent of the consecutive versus concurrent problem. The federal guidelines have each offense count for something but increasingly less for each additional offense, with offenses ordered with the most serious first. See US Sentencing Guidelines Manual §5G1.2, <https://guidelines.uscourts.gov/gi/%C2%A75G1.2>. But even if this solution to the consecutive-concurrent problem is adopted, there still remains a problem with overlapping offenses. The additional overlapping offenses will trigger some additional penalty under the federal guidelines approach, when in fact no additional penalty is appropriate because there is no separate harm or wrongdoing in the overlapping offenses.

One might argue that this excessive power simply makes it easier for a prosecutor to get a plea to an offense that best matches her perception of the offender's deserved punishment. But this sort of outsized power disconnects the plea process from the actual facts of the case and ties it more to the peculiarity of the offense overlaps that exist in that area of law. Further, it substitutes the prosecutor's judgment about the seriousness of the offense for the judgment of the legislature (as well as for the judgment of the judge and jury).

Fourth, the use of overlapping offenses and the prosecutorial discretion that necessarily follows inevitably creates disparity in the treatment of similar cases. Different prosecutors can have different judgments about the relative seriousness of different offenses or the deserved punishment of different offenders. The discretion that overlapping offenses give to the prosecutor essentially ensures that there will be disparity in the treatment of similar offenders according to an offender's good or bad luck in the prosecutor they get.

Fifth, a practice of multiple overlapping offenses also undercuts the rule of law by making law so complex and obscure that even those who want to know the law will have difficulty learning it. In a nonoverlapping code, like the Model Penal Code, even a high school student could look at the table of contents and find the particular offense definition that applies to the conduct they have a question about, and that provision will both define the offense and specify the grade of the offense or each distinct suboffense. But in today's codes, it is a nearly impossible task for any nonprofessional to be able to find and reconcile the many overlapping offenses scattered across different places in the criminal code and commonly even outside of the criminal code. And even the professionals can't know the law without the assistance of research and compilation services from companies like Lexis or Westlaw and, often, a significant investment of time.

Finally, this same ignorance of the law problem applies to legislators, sometimes with even more dire results. When proposing new legislation, it would seem essential for a legislator to know what law already exists on the subject. Is the proposed offense conduct already covered? In proposing the offense grade for the new offense, what grade would match the legislative grading judgments of the existing related offenses? A legislator cannot have this critical information without knowing current law, but the current state of American criminal codes, with scattered multiple overlapping offenses, makes it unrealistic that a legislature can obtain this basic information without commissioning a major research project.³⁸ And legislative drafting in ignorance of current law regularly produces inconsistent and irrational offense grading as illustrated in the next Part.

II. The Problem of Legislative Inconsistency and Irrationality in Offense Grading

Most people would agree that, other things being equal, more serious offenses should be punished more severely than less serious offenses.³⁹ Modern criminal codes help legislators follow this principle by creating a system of offense grades, as noted previously. A grading

³⁸ cite some codification literature that discusses and/or illustrates this point – legislators not knowing their own criminal law because their codes are such a mess. [MOVE THIS TO THE TEXT AT THIS POINT?] MK

³⁹ Andrew Von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 *Crime & Justice* 55, 76-77 (1992); Jesper Ryberg, *The Ethics of Proportionate Punishment* (2004); Michael Tonry, *Proportionality Theory in Punishment Philosophy: Fated for the Dustbin of Otiosity?*, in *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* 1, 4-5 (Michael Tonry ed., 2019).

scheme allows legislators to test the accuracy of their relative seriousness judgments by asking, for example: Are all of the offenses categorized as third-degree felonies generally of the same level of seriousness? Are they all less serious than second-degree felonies and more serious than fourth-degree felonies?

Even non-modern codes that do not use an offense grading scheme presumably want consistency and rationality in setting the maximum penalties for offenses, which will put each offense in its appropriate ordinal rank as against all other offenses: offenses with a ten-year maximum sentence ought to be more serious than offenses with a seven-year maximum sentence and less serious than offenses with a thirteen-year maximum sentence.

Judging the relative seriousness of each offense must take account of the relative seriousness of its harm or evil as against that of other offenses; for example: How damaging was the injury? What was the value of the property stolen or destroyed? What was the extent of the risk created? How many people were affected? How important was the governmental function impaired? Offense grading also may take account of culpability factors: assigning a higher offense grade for a higher culpability level in committing the same offense conduct. Most famously, purposeful or knowing killing may be murder, which is graded higher than a reckless killing, which is manslaughter, which is graded higher than a negligent killing, which is negligent homicide.⁴⁰ Offense grading may also take account of a wide variety of other offense characteristics that, in the legislature's view, affect the overall seriousness of the offense—for example: whether the victim is a member of a particularly vulnerable class of persons; whether the offender is of a particular status, such as a public official; whether the offender and victim have a particular relationship, such as parent and child; whether the offense was committed in a particularly heinous or egregious way; whether the offender had committed the offense previously; or whether hatred of a class-characteristic of the victim motivated the offender's action.

Yet, despite the consensus that criminal codes should grade an offense according to its relative seriousness as against all other offenses, the unfortunate truth is that American criminal codes generally do a poor job in this regard. The problems are most common and most serious in those jurisdictions that have failed to adopt a modern offense grading scheme.

A. Non-Modern Code Jurisdictions

A common problem in this regard is assigning different grades to offenses involving similar conduct, for no rational reason. For example, according to the California Penal Code, if an assault is committed against a parking control officer, the offense is punishable by a maximum term of six months in prison.⁴¹ However, if the assault is committed against a highway worker, the maximum punishment would go up to one year in prison.⁴² It is unclear why these two cases should have these relative maximum punishments.

Federal criminal law is a rich source of inconsistencies. While destroying religious property carries a maximum punishment of three years in prison,⁴³ destroying a veterans'

⁴⁰ See, e.g., Model Penal Code article 210.

⁴¹ Cal. Penal Code § 241(b).

⁴² Cal. Penal Code § 241.5.

⁴³ 18 U.S.C. § 247.

memorial statue is punishable by up to ten years in prison.⁴⁴ There seems little justification for the latter to have a maximum sentence more than three times greater than the former.

Grading similar offenses differently is one sort of grading irrationality but the reverse sort of irrationality is also common: grading meaningfully different cases the same. Under California law, for example, the omission of a parent to furnish necessary clothing for her child⁴⁵ has the same maximum punishment as the complete abandonment of the child by the parent.⁴⁶ Both are punishable by a maximum of one year in county jail. Strangely, the maximum fine in the former case is twice that of the latter. Similarly, physically injuring a juror and trying to corruptly influence a juror has the same legislative maximum penalty of ten years under the federal criminal code, because both kinds of conduct are included in the same broadly worded offense.⁴⁷

Grading irrationalities are rampant in non-modern code jurisdictions. Examples provided here are the tip of the iceberg.

B. Modern Code Jurisdictions

Unfortunately, the same kinds of inconsistencies and irrationalities are not uncommon even in modern code jurisdictions, which typically have offense grading schemes. Inconsistent grades are often assigned to offenses of similar seriousness. In Pennsylvania, for example, unauthorized administration of an intoxicant with the intent to rape⁴⁸ is a specific instance of the offense of attempted rape;⁴⁹ yet the former is punishable by up to seven years in prison, while the latter carries a maximum sentence of twenty years – nearly three times the penalty. In Delaware, the offense of sexual extortion is a class E felony (maximum five years in prison),⁵⁰ but is defined so broadly that it encompasses both sexual contact *and* sexual intercourse—the conduct forming the offenses of unlawful sexual contact in the third degree on the one hand, and various degrees of rape on the other.⁵¹ Furthermore, both unlawful sexual contact and rape require the conduct to be “without consent,”⁵² which, in turn, is defined to include the very kinds of threats that comprise the “extortion” in the sexual extortion offense.⁵³ But unlawful sexual contact is graded as a class A misdemeanor, and rape is graded anywhere from a class C felony (maximum fifteen years in prison) to a class A felony (life imprisonment), depending upon the precise circumstances. In other words, a sexual extortion charge is always either disproportionately too serious, or not serious enough, when compared with the

⁴⁴ 18 U.S.C. § 1369.

⁴⁵ Cal. Penal Code § 270.

⁴⁶ Cal. Penal Code § 271.

⁴⁷ 18 U.S.C. § 1503.

⁴⁸ 18 Pa. Cons. Stat. §2714 (2009).

⁴⁹ 18 Pa. Cons. Stat. §§3121(4), 905 (2009).

⁵⁰ 11 Del. Code § 774.

⁵¹ *Compare id.* (“A person is guilty of sexual extortion when the person intentionally compels or induces another person to engage in any sexual act involving *contact, penetration or intercourse*”) (emphasis added) with 11 Del. Code § 767 (“A person is guilty of unlawful sexual contact . . . when the person has sexual contact with another person”) and §§ 770-73 (“A person is guilty of rape . . . when the person: . . . intentionally engages in sexual intercourse with another person”).

⁵² See 11 Del. Code §§ 767, 770(a)(3)a., 771(a)(2)a., 772(a)(1) and (a)(2)a., 773(a)(1) and (a)(2).

⁵³ *Compare* 11 Del. Code § 761(k) (“‘Without consent’ means: (1) The defendant compelled the victim to submit by any act of coercion as defined in §§ 791 and 792 of this title”) and § 791(1)-(8) with § 774(1)-(7).

coextensive alternative offenses. Similarly, escaping from prison in Illinois is graded less seriously than a prisoner's mere possession of a tool that may be used to escape from prison—thereby grading a preparatory step that may not rise to the level of attempt more harshly than the completed offense.⁵⁴

As noted above, grading irrationalities commonly arise when offenses with a single grade are defined so broadly that acts of materially divergent seriousness are improperly punished as though they were the same. This kind of irrationality occurs even in modern codes. The law of theft in Kentucky, for example, sets a single “cut-off” level of \$300 to distinguish between the two grades of the offense, no matter what property is involved⁵⁵ – meaning that theft of \$400 would receive the same grade as theft of \$4,000,000.

Similarly, the offense of committing a second sex offense in Pennsylvania is defined so broadly as to include both a second conviction for raping another by force and a second conviction for displaying obscene materials in public: both courses of conduct carry a *minimum* sentence of 25 years in prison.⁵⁶ In Delaware, the general offense for property damage, “criminal mischief,” has only one felony grade: a Class G felony for \$5,000 or more in resulting damage.⁵⁷ As a result, intentionally destroying the Statue of Liberty (were it located in Delaware) would be subject to the same punishment as theft of \$1,500, issuing a \$1,500 bad check, or causing \$1,501 in property damage by an act of graffiti.⁵⁸

Additionally, many modern codes apply grading factors inconsistently among different offenses, with bizarre results. In Delaware, the age of the offender is taken into account for rape, but not sexual assault.⁵⁹ Under this scheme, a person who sexually assaults a 12-year-old child is treated the same regardless of whether the offender is another 12-year-old, or an adult.⁶⁰ In Pennsylvania, the general offense of theft makes grading distinctions according to the value of the property stolen: under \$50 (3rd degree misdemeanor), \$50 to \$199.99 (2nd degree misdemeanor), \$200 to \$2,000 (1st degree misdemeanor), and \$2,000 or more (3rd degree felony).⁶¹ In contrast, the similar offense of library or museum theft also makes grading distinctions according to the value of the property stolen, but uses different monetary cutoffs and makes fewer distinctions: less than \$150 (summary offense), and \$150 or more (3rd degree misdemeanor).⁶² As a result, stealing property valued at \$40 is punishable with a maximum of one year if stolen from an individual, but is punishable by a maximum of 90 days if stolen from

⁵⁴ 720 ILCS 5/31-6(b) (escape; Class 2 felony); 5/31A-1.1(i) (possession; Class 1 felony).

⁵⁵ See KRS 514.130.

⁵⁶ 42 Pa. Cons. Stat. § 9718.2 (2009).

⁵⁷ See Del. Code Ann. tit. 11, § 811(b)(1).

⁵⁸ See Del. Code Ann. tit. 11, § 900 (issuing a bad check); Del. Code Ann. tit. 11, § 841(c)(1) (theft); Del. Code Ann. tit. 11, § 812(a)(2) (graffiti and possession of graffiti implements).

⁵⁹ Compare Del. Code Ann. tit. 11, §§ 770–73 with Del. Code Ann. tit. 11, §§ 767–69.

⁶⁰ Compare Del. Code Ann. tit. 11, §§ 771(a)(1) (providing a higher grade of rape where the victim is less than 14 years of age, and the offender is at least 19 years of age), 773(a)(5) (providing an even higher grade of rape where victim is less than 12 years of age, and the offender is at least 18 years of age) with Del. Code Ann. tit. 11, § 769(a)(3) (providing a higher grade of unlawful sexual assault where the victim is less than 13 years of age, regardless of the offender's age). Note also that the relevant age of the victim — less than 12 or less than 13 years of age — varies between the two sets of offenses, but it is not clear that these different distinctions are meaningful, or whether the Delaware General Assembly was even aware of this apparent discrepancy.

⁶¹ 18 Pa. Cons. Stat. §§ 3902, 3903 (2009) (consolidated theft provisions).

⁶² 18 Pa. Cons. Stat. §3921.1 (2009).

a library, and stealing a rare book valued at \$3,000 is punishable by up to seven years if stolen from an individual, but only one year if stolen from a library.

C. What Causes Offense Grading Irrationalities?

One may wonder why such irrationalities and inconsistencies are so common in American criminal codes, especially modern codes built upon an offense-grading scheme. The primary cause lies in the dynamics of American crime politics.

When a state's criminal laws are being codified or recodified in a single project, it is natural at some point in the process to sort all of the offenses into their appropriate grading categories. (Of course, the minority of states without modern criminal codes have probably never undertaken this comparative classification project so it is no surprise to find great irrationality and inconsistency in those jurisdictions.) Thus, when a new criminal code is enacted, the code tends to have well-considered grading judgments among its offenses. The grading problems arise as those jurisdictions add new offenses over time, some criminalizing new conduct and some introducing a new offense that is a variation on an existing offense (for example, creating the special offense of assault of a fireman that provides greater maximum punishment than the general assault offense). Hundreds of new offenses are added with little regard for their relative seriousness to existing offenses.⁶³

Bad offense grading judgments for new offenses occur for several reasons. First, the new legislation is commonly a response to a case in media headlines, or some other triggering event has upset some constituents and motivated lawmakers to show that they are responsive to their constituents' concerns. The newspapers report an incident in which an offender has stolen a car while the driver was in it. Despite the fact that this is already conduct that is criminalized and carries a serious penalty, a new offense – “carjacking” – is enacted.⁶⁴ Unfortunately, this kind of “crime du jour” political dynamic tends to have the natural effect of exaggerating the seriousness of the offense because people are worked up at the moment about that particular conduct. The offense grade that seems appropriate in the heat of the moment stands out a year later as seriously out of line with other related offenses but there is little political incentive to go back and correct the exaggeration. (And, unfortunately, the exaggeration can provide a new baseline for the next crime-du-jour grading judgment.)⁶⁵

A second common source of bad grading judgments is legislative ignorance about existing offense grades of related offenses. That is, even if a legislator sought to be more deliberate and to consider the new offense from a larger perspective that takes account of the offense grades of related existing offenses, it may be difficult if not impossible for the legislator

⁶³ See, e.g., Paul H. Robinson and Criminal Law Research Group, University of Pennsylvania Law School, Report on Offense Grading in Pennsylvania 13 (2009), https://scholarship.law.upenn.edu/faculty_scholarship/295 (2,331 criminal offense-related amendments to the Pennsylvania Crimes Code between 1972 and 2009); Paul h. Robinson *et al.*, Report on Offense Grading In New Jersey 20 (2011), https://scholarship.law.upenn.edu/faculty_scholarship/340 (863 criminal offense-related amendments to the New Jersey Code of Criminal Justice between 1979 and 2011), and Appendix E (charting the number of amendments over time).

⁶⁴ See Federal Anti Car Theft Act of 1992, 102 H.R. 4542 (codified at 18 U.S.C. § 2119). By 2008, nearly half of the states enacted similar carjacking statutes. See National Conference of State Legislators, *Auto Theft & Carjacking State Statutes*, <https://www.ncsl.org/print/cj/FSLautotheftpptchart.pdf>.

⁶⁵ The Modern Irrationalities, *supra* note 12, at 734-73; The Resurrection, *supra* note 13, at 181.

to see the bigger picture, as noted in Part I.⁶⁶ Once the original codification or recodification is muddied with new offenses being layered on top rather than integrated into it, it is a major research task to even find all of the existing related offenses, let alone to get a picture of a coherent grading plan that ties them together.

This may explain why grading irrationalities are getting worse, at an accelerating rate.⁶⁷ The messier the code becomes and the more grading irrationalities accumulate, the more difficult it is for even the conscientious legislator to find a coherent larger grading picture into which he or she can fit the new offense or offense variation.

To summarize, the crime-du-jour dynamic of American crime politics means that many legislators simply don't focus on getting the offense grade correct because their overriding concern is showing their constituents that they are responsive to the apparent problem at hand. If the legislators do focus on grading, their tendency will be to exaggerate it because of the heat of current public concern. But even if they try to grade the new offense to fit the larger grading pattern in existing law for related offenses, it may be difficult to pull that information together. And, if they are successful in collecting this information, they may well discover that grading consistency has already been so compromised that they are left with little or no rational guidance.

III. The Solution: "Consolidated Offense Drafting"

One might assume that the problems of overlapping offenses and inconsistent offense grading are intractable. Their solution seems to demand fundamental structural changes to the allocation of power and discretion on matters relating to criminal justice. How could we realistically eliminate prosecutorial discretion in the charging decision? How could we realistically constrain the legislative desire to be responsive to the crime du jour?

Interestingly, there is a realistic and workable means of reducing these problems without such dramatic – and perhaps unreachable – structural changes. The solution is possible because, rather than trying to limit the power of prosecutors and legislators generally, it aims at the dynamic that creates the problem and seeks to channel the prosecutorial and legislative power rather than to eliminate or reduce it. The solution we propose is to use a particular method of defining offenses, what might be called *consolidated offense drafting*. Once a jurisdiction takes the step of codifying its criminal law in this format, the problems of excessive prosecutorial power from overlapping offenses and irrational and inconsistent offense grading by subsequent legislative amendment should be dramatically reduced.

The basic principle of consolidated offense drafting is to collect in one offense definition all of the offenses relating to a particular kind of conduct that at present may be scattered across the criminal code and beyond in many different offenses. All offenses relating to theft, for example, including all those carrying different maximum sentences or grading classifications because of special factors – for example, aggravations relating to the particular nature of the property or the status of the victim or the criminal history of the offender – would be brought together into a single theft offense definition. That provision would not only define the basic

⁶⁶ See *supra* text accompanying notes 42.

⁶⁷ The Accelerating Degradation, *supra* note 14, at 644-645.

offense but also provide in its grading subsection the particular forms of the offense that would qualify for each different offense grade.

To illustrate the consolidated-offense-drafting technique, consider proposed formulations for two common offenses, reckless injuring and tampering with public records, that were drafted to “consolidate” a host of existing related and often overlapping offenses.

Reckless Injuring

(a) *Offense Defined.* A person commits an offense if he or she recklessly causes physical injury to another person.

(b) *Grading.*

(1) If the injury caused is serious physical injury, then the offense is:

(A) a Class 5 felony if:

(i) injury is caused by the person’s abuse or neglect of a child less than 14 years of age; or

(ii) the offense results in the unlawful termination of the victim’s pregnancy without the victim’s consent; or

(B) a Class 7 felony in all other cases.

(2) If the injury caused is physical injury, the offense is:

(A) a Class 8 felony if the victim is a child less than:

(i) 4 years of age; or

(ii) 14 years of age whose intellectual or physical capacity discernibly falls outside the normal range of performance and behavior with regard to age, development, and environment; or

(iii) 14 years of age, and physical injury is caused by a deadly weapon or dangerous instrument; or

(B) a Class B misdemeanor in all other cases.

This “consolidated” formulation is drawn from a proposal that two of us used in a project to recodify Delaware criminal law.⁶⁸ The eleven existing Delaware statutes that this formulation consolidates are reproduced in Appendix A. The consolidated formulation is 172 words in length and completely replaces the eleven existing offenses that total 1,485 words.

Tampering with Public Records

(a) *Offense Defined.* A person commits an offense if he or she:

(1) knowingly makes a false entry in, or false alteration of, any writing:

(A) belonging to, or received or kept by, the government for information or record; or

(B) required by law to be kept by others for information of the government; or

(2) knowingly alters, destroys, defaces, removes, or conceals any public record or device.

(b) *Grading.* The offense is:

(1) a Class 3 felony if the person is a public official or employee; or

⁶⁸ Delaware Report, *supra* note 16, at 114-115 and 400-402.

(2) a Class 4 felony in all other cases.

The thirteen existing Illinois statutes that this formulation consolidates are reproduced in Appendix B. The consolidated formulation is 101 words in length, replacing the thirteen existing offenses that total 1,688 words.

This dramatic shortening of code language seen in these two illustrative formulations demonstrates how consolidated offense drafting can make criminal codes simpler, clearer, and more accessible. This promotes the important interests of fair notice, uniformity in application, reduced inconsistency among different statutes, fewer troublesome interpretation issues for appellate courts, and a variety of other legality principle interests.⁶⁹

For our present purposes, however, the most important effects of the consolidated drafting approach is its ability to dramatically reduce or eliminate the problem of excessive prosecutorial discretion created by overlapping offenses and the problem of irrational or inconsistent offense grading. This is the topic of the next two Parts.

One might note that the modern codification format introduced by the Model Penal Code in 1962 similarly attempted to provide a criminal code that minimized overlapping offenses. Yet that drafting approach led nonetheless to the problems that we have today. Why would our proposed consolidated offense drafting do any better?

We think it would do better, and here's why. The Model Penal Code was drafted at a time when the custom was to have an enormous amount of judicial sentencing discretion. The goal of the criminal code at that time was simply to define the elements of the basic offense. Few offenses (such as homicide) had a system of grading distinctions within the offense.

That world of broad judicial sentencing discretion is long gone. The sentencing guidelines movement has done much to constrain, or at least guide, the exercise of judicial sentencing discretion. More importantly for our purposes, legislatures have created a cottage industry of introducing a continuous and growing stream of offense grading distinctions. The result is more ambitious criminal codes that not only define the basic requirements for each offense but also set out a variety of grading distinctions that call for juries rather than judges to set the extent of liability and punishment.

In the old Model Penal Code era, when a legislator wanted to introduce a new grading distinction because of the crime-du-jour dynamic, or for any other reason, it was quite natural to simply create a new offense that set out the new grading distinction. Most offense definitions contained no grading distinctions to which a new distinction could be added.

Under the new approach of consolidated offense drafting, however, most if not all offenses will have a host of grading distinctions already built into the offense formulation. Indeed, under the new approach each offense will have an "Offense Defined" section and a separate "Grading" section. Now when a legislator wants to introduce a new grading distinction, the easy and obvious approach is to add it to the other grading distinctions already included in the offense's "Grading" subsection.

⁶⁹ Delaware Report, *supra* note 16, at 19-43; Paul H. Robinson and Michael T. Cahill, Final Report of the Illinois Criminal Code Rewrite and Reform Commission xx-lx (2003), https://scholarship.law.upenn.edu/faculty_scholarship/291 (hereinafter Illinois Report); Paul H. Robinson and Kentucky Criminal Justice Council staff, Final Report of the Kentucky Penal Code Revision Project xxiii-xxxix (2003) https://scholarship.law.upenn.edu/faculty_scholarship/294 (hereinafter Kentucky Report).

One might conclude that the consolidated offense drafting proposed here has significant advantages in clarity, brevity, accessibility, fair notice, uniformity of application, and other virtues of the legality principle. But how does this form of drafting rein in prosecutorial overcharging and legislative grading irrationality? That is the subject of the following two Parts.

IV. Restraining Prosecutorial Multiple-Offense Excesses

Recall the hypothetical at the beginning of Part I involving the theft of a gun from a state museum where multiple overlapping statutes allow the thief to be charged with violating a variety of offenses: the general theft statute, which probably has different grades based upon the value of the property, a special theft of state property offense, a special theft from a museum offense, and a special theft of a firearm offense. Under the approach of consolidated offense drafting proposed here, no such multiple charges are possible because there is only one theft offense. The special characteristics of state property, museum property, firearm, and the value of the property are all dealt with in the grading subsection of that single theft offense. The grading subsection would make clear what grade of theft is appropriate given this or any other particular combination of grading factors.⁷⁰

Consider this consolidation dynamic at work in a few illustrative cases. Charles Dillard is a convicted felon from Michigan.⁷¹ He was arrested while possessing a nine-millimeter gun inside a vehicle and, as a result, was charged with three overlapping offenses based on that single course of criminal conduct: a felon in possession of a firearm, carrying a concealed weapon, and possessing a firearm during the commission of a felony.⁷² The Michigan Court of Appeals, after employing statutory construction rules to track the legislative intent, concluded that double jeopardy protection was not offended in the case, and held that conviction for all three charges was permissible.⁷³ Under the consolidated offense drafting approach, in contrast, Dillard could be neither charged with nor convicted of three separate offenses. Instead, he would be charged with one offense of firearm possession, whose grade and maximum

⁷⁰ In addition to the distinctions in a “Grading” subsection, a consolidated offense section can also utilize a subsection of “Grade Adjustments” for aggravating factors that, rather than setting a ‘baseline’ for the offense’s grade, act to increase the grade of any version of the offense. This allows one consolidated offense section to take into account multiple aggravating factors at one time, arriving at one grade for a single course of conduct that most closely tracks the seriousness of that individual case. Two of us have used this approach with good results in the Delaware criminal law recodification project mentioned above. See Delaware Report, *supra* note 16, at 95-96 (general grade adjustments), 113 (grade adjustment for assault offense), 120 (grade adjustment for rape and sexual assault), and 129 (extortion as a grade adjustment for theft offenses).

⁷¹ He was previously found guilty of assault with intent to murder. The trial court dismissed the third charge, as prosecuting him for possession of a firearm during the commission of a felony in addition to a felon in possession infringes upon his constitutional protection against double jeopardy. *People v. Dillard*, 246 Mich. App 163, 165 (2001).

⁷² The predicate felony in this case for the felony-firearm charge was in fact the felon in possession of a firearm. The court cited the language of the felony-firearm statute, and remarked that it criminalizes any person who carries a firearm in his possession while committing or attempting to commit a felony except for four exclusive felonies enumerated specifically in the felony-firearm statute. Thus, and “because defendant’s felon in possession charge unquestionably does not constitute one of the explicitly enumerated exceptions to the felony-firearm statute”, the court concluded “that the Legislature clearly intended to permit a defendant charged with felon in possession to be properly charged with an additional felony-firearm count.” ⁷² *Id.* at 166-168.

⁷³ *Id.* at 170-71.

punishment, according to the grading subsection of the offense, depends on the relevant aggravating factors like concealing the firearm, possessing it while committing another felony, and the fact that he is a convicted felon.

Edward McGhee served as a vacant-lots coordinator at project CLEAN. The project was a summer youth employment program, funded by the city of Cleveland. McGhee engaged in a scam that resulted in stealing approximately \$45,000 from the project. He was charged with a host of offenses and, following a bench trial, was convicted of, among other things, grand theft (due to the fact that more than \$5,000 was stolen), as well as the offense of theft in office. In his appeal before the Court of Appeals of Ohio, McGhee challenged his conviction of both offenses on the grounds that they are “allied offenses” of similar import, covering the same conduct. The court vacated the grand theft conviction, explaining that both statutory offenses are allied, and the commission of a theft in office automatically results in the commission of theft, and in this particular case the two offenses stem from the same criminal actions by McGhee, with the same motive and as part of the same plan.⁷⁴

Under the consolidated drafting approach, bringing multiple theft charges against McGhee would not have been an option. Instead, he could be charged with a single theft offense. The amount of money stolen, the fact that he used his office in aid of committing the offense, besides other characteristics of the case, would determine the appropriate theft grade, according to the theft offense’s grading subsection.

The result provided by the appellate court seems a proper one, but appellate case law is not a solution to the problem with multiple overlapping offenses – just as judicial sentencing discretion is not, as discussed previously.⁷⁵ The prosecution still has the improper ability to overcharge and threaten excessive liability in order to gain a “better” plea bargain. It still allows for the possibility that some courts on some occasions will not properly sort out the overlapping liability problem. And, perhaps most importantly, it leaves such criminalization decisions to the courts when they are instead appropriately legislative decisions.

Further, sometimes it is simply not within the reach of appellate court law to properly fix the problem. Recall, for example, the case of the theft of a firearm from a museum, where the offender is convicted of theft, theft of a firearm, and theft from a museum. The appellate court only has the ability to invalidate one or two of the convictions but this does not generate the proper result that a consolidated offense drafting provision could provide. Presumably, according to the value judgments of this particular jurisdiction, both the firearm factor and the museum factor are aggravations. The grading subsection of the theft offense might properly double the aggravation of the theft offense and to aggravating factors present. The appellate case law simply cannot reach this result.⁷⁶

After seizing his computer and finding hundreds of child pornography images and videos on it, Joseph Benoit was indicted in a federal court for two separate offenses: the receipt of child pornography and the possession of child pornography. He was found guilty by a jury.⁷⁷ The Tenth Circuit reversed the district court’s judgment and instructed it to vacate one of the

⁷⁴ State v. McGhee, 37 Ohio App.3d 54 (1987).

⁷⁵ See a similar discussion of judicial sentencing discretion at *supra* text accompanying notes 35-39.

⁷⁶ Note the similarity between these limitations of appellate case law and the limitations of the sentencing judge in the discretionary determination of consecutive versus concurrent sentences, discussed earlier. See *supra* text accompanying notes 35-39.

⁷⁷ He was sentenced to concurrent prison terms of 125 and 120 months, in addition to paying restitution.

convictions as the multiple sentences conflicted with the Double Jeopardy Clause, reasoning that possession of child pornography is a lesser-included offense of receipt of child pornography, as the latter necessarily requires the former, for there is no receiving without possession.⁷⁸ Had the Federal code followed the consolidated offense drafting approach, prosecutors would not have been capable of indicting Benoit for two separate offenses. The receipt and the possession of child pornography would be part of a single consolidated child pornography offense.

Again, the fact that the federal appellate court avoided one aspect of the overlap problem in this case does not solve the problem of multiple overlapping offenses used for leverage in plea bargaining, the possibility that some appellate courts will not fix the overlap problem, the fact that this criminalization decision is properly for the legislature not the courts, and the fact that appellate courts are limited to invalidating one or another offense and have no ability to fashion an appropriate overall liability amount.⁷⁹

V. Avoiding Irrational Legislative Offense Grading

The use of consolidated offense drafting also helps solve the problem of irrational or inconsistent offense grading by the legislature. First, when a criminal code has adopted this drafting approach, legislators contemplating a new offense or adjustment to an existing offense grade will no longer have the difficult task of figuring out what current law provides. Instead of having to find related offenses that may be scattered across the criminal code and beyond, they will find all of the relevant criminal law collected in a single code provision with all of the existing grade levels represented in its grading subsection.

Further, this collection of all existing grading provisions in one subsection will set an obvious continuum of offense seriousness that will be difficult to ignore when assessing the appropriate grade for whatever new variation of the offense the legislature wishes to add. Legislators are no longer free to simply make up an offense grade in isolation. Under consolidated offense drafting, they are forced to make a comparative judgment in setting the grade: where on the continuum of current variations contained in the offense grading subsection does the proposed new variation fall?

Consider several real-world examples. Under federal law, giving or offering a bribe to a public official to influence an official act is punishable by up to fifteen years in prison.⁸⁰ Yet, offenses of bribery in a variety of situation, scattered throughout the federal code, carry different inconsistent punishments. A person who endeavors to obstruct a criminal investigation by means of bribery could be sentenced to maximum of five years in prison.⁸¹ Giving or offering bribery to influence inspectors or other employees of the office of any supervisor of a harbor is punishable by six months to one year in prison.⁸² A person who gives

⁷⁸ *United States v. Benoit*, 713, F.3d 1 (10th Cir. 2013). In fact, the legislative history demonstrates the possession offense was added in 1990 for gap-filling purposes, to enable targeting whoever possessed child pornography without having also received it. Since Congress has not expressed any intent to sanction both offenses separately, and Benoit was convicted of the receipt and possession offenses based on the same conduct, multiple punishments could not stand. *Id.*, at 15.

⁷⁹ See *supra* text accompanying notes 81-83.

⁸⁰ 18 U.S.C. § 201.

⁸¹ 18 U.S.C. § 1510.

⁸² 33 U.S.C. § 447.

bribery for acting or refraining from acting under title 11, which regulates bankruptcy, may face a maximum of five years in prison.⁸³ These irrational differences in grading bribery presumably exist because the legislators drafting, and voting for, each bit of legislation were unaware of bribery grading in the other bribery offenses. Consolidated offense drafting would quickly and easily highlight the bribery grading in current law which would then in turn help avoid inconsistency in grading new variations.

Consolidated offense drafting, by making clear the effect of grading factors in one offense, can also help avoid adopting a conflicting scheme of grading factors in similar or related offenses. For example, whatever grading scheme is used for the general damage to property offense, one would logically expect it to bear some relation to the grading scheme used in other kinds of damage to property offenses. In Delaware, a person who causes damage to property, whether intentionally or recklessly, is guilty of criminal mischief. The offense is classified as a class G felony if it is committed intentionally and the amount of monetary loss exceeds \$5,000 or if it impairs one of the listed essential services. A damage of more than \$1,000 caused intentionally or recklessly is classified as a class A misdemeanor. Any other criminal mischief is an unclassified misdemeanor.⁸⁴ However, the offense grading of other offenses addressing particular property damage in Delaware's code is highly inconsistent with the grading set forth by the criminal mischief offense. An act of graffiti is a class A misdemeanor, and it becomes a class G felony if the damage to the property exceeds \$1,500,⁸⁵ significantly less than the threshold of class G felony according to the criminal mischief offense. The offense of destruction of computer equipment, which criminalizes causing damage to equipment used in a computer system,⁸⁶ inexplicably adopts a different grading scheme, contingent upon the amount of damage or the value of the property affected: class D felony if it exceeds \$10,000; class E felony if it exceeds \$5,000; class G felony if it exceeds \$1,500; and a class A misdemeanor in any other case.⁸⁷

These grading irrationalities presumably exist because, at the time of grading one property damage offense, the sponsoring legislator was unaware of the grading scheme for the other property damage offenses, or even unaware of the existence of the other property damage offenses. By consolidating all property damage offenses and by collecting all of the existing grading schemes in one place, consolidated offense drafting would help avoid such irrational inconsistencies.

VI. Summary and Conclusion

Many if not most significant criminal justice reforms involve rule changes that may be difficult to enact because of conflicting political interests. The rule change may shift the balance between other competing interests, such as privacy versus law enforcement effectiveness, and on this ground the rule change may be opposed. However, as previous discussions have shown, using the proposed change in drafting technique – consolidated offense drafting – can have a

⁸³ 18 U.S.C. § 152.

⁸⁴ Del. Code Ann. tit. 11, § 811.

⁸⁵ Del. Code Ann. tit. 11, § 812.

⁸⁶ Del. Code Ann. tit. 11, § 936.

⁸⁷ Del. Code Ann. tit. 11, § 939.

dramatic effect in improving the criminal justice process even though it requires no change in the content of the rules.

Because the content of the rules is not being changed, only their statutory form, one might conclude that this kind of solution to the problems highlighted here would be without the political tensions triggered by rule-changing reforms. Unfortunately, the world is not so simple or straightforward. One of us has been involved in quite a few state criminal law recodification projects and in every one of those projects prosecutors resisted the recodification plans,⁸⁸ all of which involved some form of offense consolidation with little change in rule content. Why would prosecutors resist a change in drafting format that does not significantly alter the content of the existing statutes?

The answer, as signaled by the analysis in Part I, is that prosecutors wish to preserve the current chaotic structure of multiple overlapping offenses applicable to a single course of conduct. They much value the outsized discretion that overlapping offenses give them. There is a slight awkwardness in this position, however, because they can hardly stand up publicly to defend what is on its face a disorganized and often impenetrable code. It is not as if any legislature ever sought to create a chaotic system of messy overlapping offenses. The current state of affairs is simply the unfortunate effect of decades of criminal law legislation layering one new offense or offense variation on top of existing ones. No legislature defends this mess as desirable but instead reluctantly lives with it as the unfortunate byproduct of ad hoc legislative activity. When a jurisdiction does undertake a general overhaul of its criminal law, as three-quarters of the states did after the promulgation of the Model Penal Code in 1962, it never perpetuates the kind of messy overlapping offenses system that we have today. Without exception, the jurisdictions adopt new criminal code that have as their major hallmark a structure of non-overlapping offenses, as provided in the Model Code.

No doubt prosecutors in their own mind justify their opposition to non-overlapping recodification on the grounds that it would make their job more difficult, as by giving them less leverage during plea bargaining. And, in their minds, that translates into less justice done and less control of crime. However, this view reflects an unfortunate shortsightedness. As social science research increasingly shows,⁸⁹ the long-term crime-control effectiveness of the system depends upon enhancing its reputation for being just, so as to promote community support and assistance as well as the personal internalization of its norms. A criminal justice system seen as regularly unjust will instead provoke resistance and subversion and will increasingly undermine its ability to control conduct through social influence and internalized norms.

⁸⁸ See, e.g., Alex Vuocolo, *Effort to rewrite Delaware criminal code scrapped*, Delaware Business Times (Jun. 8, 2018), <https://www.delawarebusinesstimes.com/delaware-criminal-code-scrapped/> (“Lawmakers have scrapped an effort to overhaul Delaware’s criminal code amid criticism from the attorney general. . . . Attorney General Matt Denn issued a 30-page document . . . outlining the Department of Justice’s concerns.”); Delaware Report, *supra* note 16, at 11 (“[T]he Attorney General declined the invitation for his attorneys to participate in the process and eventually would not permit them to comment on the Report. As a result of this decision by the Attorney General, no one in the Department of Justice contributed to the Preliminary Report.”); Illinois Report, *supra* note 75, at xii-xiii; Kentucky Report, *supra* note 75, at xx (“[T]he Penal Code Work Group discussed the desire of the prosecutors’ representatives to limit the project to proposing amendments to the existing code. Ultimately a majority of the Work Group concluded that a general rewrite of the code was the best approach to fulfilling the statutory mandate of Penal Code reform. In August 2002, the representatives of the Commonwealth’s Attorneys Association and the County Attorneys Association . . . withdrew from the Work Group itself.”).

⁸⁹ Paul H. Robinson, *Intuitions of Justice and the Utility of Desert* 95-236 (2013).

A system of messy overlapping offenses that shifts criminal liability decisions from a criminal code's unambiguous directives to opaque prosecutorial (and judicial) discretion will undermine the system's moral credibility with the community. While the prosecutor may see short-term ease in prosecution, the long-term cost will be reduced crime-control effectiveness. The better approach is to adopt criminal codes based upon consolidated offense drafting.